CP&DR

VOL. 27, NO.12 — DECEMBER 30, 2012

CALIFORNIA PLANNING & DEVELOPMENT REPORT

DOF Denies Many Redevelopment Appeals

BY LARRY SOKOLOFF

The holiday season continues to be a cruel time of year for California's redevelopment community. Last year, the state Supreme Court struck a blow on Dec. 29, allowing the state to abolish redevelopment agencies. And this year, on Dec. 18, the state Department of Finance denied funding to many of the 240 of the 400 successor agencies who had appealed earlier rejections.

The latest denial included funding for such high profile projects as site acquisition for a new downtown stadium for the San Diego Chargers football team, and $30 million to be used for a new stadium for the San Francisco 49ers, which is already under construction in Santa Clara.

It's all added up to more pain for California cities who want to continue projects planned before redevelopment ended on Feb. 1. Cities are forced to confront the Department of Finance, which is tasked with taking money out of redevelopment and into other pressing state needs, such as schools.

The Dec. 18 news from the Department of Finance followed appeals by 240 of the state's 400 successor agencies. Finance released its list just before the holidays, bringing little holiday cheer to many. Up and down the state, the news was grim. In Ventura County, the city of Oxnard lost out on a $15.3 million loan for a $40 million affordable housing project, while nearby in Thousand Oaks, the city denied $7.7 million for improvements to its auto mall.

The story is similar throughout the state, although it's not all bad news. San Diego, which had requested $76.6 million in recognized obligation payment schedules to pay redevelopment projects for the first half of 2013, received $30 million, according to UT San Diego, and Escondido, which requested $7.8 million, received $3 million. While Thousand Oaks was denied money for its auto mall upgrades, an appeal for $2.4 million in low-income housing funds was granted by the Department of Finance, according to the Ventura Star.

Modesto, too, had some holiday cheer. The Department of Finance's latest ruling allowed it to pay $3 million in property tax revenue to pay for two downtown parking garages built in the 1980s and 1990s, following that city's appeal.

The newest funding information followed passage of AB 1484, which allowed successor agencies the right to meet and confer, or basically appeal Department of Finance decisions announced earlier.

Out of 400 successor agencies in the state, 240 of them requested meet and confer sessions after DOF ruled on their Recognized Obligation Payment Schedules in mid-October, said H.D. Palmer, a spokesman for the department.

Why have the successor agencies had so much trouble?

"The short answer is, it's based upon the law," said Palmer. "A number of requests have been made that don't comply or comport with the law."

– CONTINUED ON PAGE 7

insight
WILLIAM FULTON

Enviros Poke Hole in SANDAG's SB 375 Effort

Love' em or hate 'em, those litigators at the Center for Biological Diversity are the best in the business. Seems like they always find a way to win.

Take, for example, the Center's recent victory in the Superior Court striking down the Sustainable Communities Strategy adopted by the San Diego Association of Governments. It's an impressive example of the Center's clever legal strategy. If the Center is ultimately successful, it will probably force a significant rejiggering of the San Diego transportation strategy. But SANDAG will probably appeal the case, and it's not at all clear that the cleverness is transferable to any other region in the state. Nevertheless, the case is an object lesson in the use of the California Environmental Quality Act, which in this case overpowered a statutory regime that was silent on the situation.

The key to the Center's win in front of San Diego Superior Court Judge Timothy Taylor was figuring out how to take advantage of the fact that SANDAG had pushed the timeline for the SCS out to 2050 – farther down the road than SB 375 requires. It's an excellent lesson in how to win a lawsuit. The Center filed the lawsuit jointly with the Cleveland National Forest Foundation and the Center for Biological Diversity.

Like other metropolitan planning organizations around the state, SANDAG approved a sustainable communities strategy, or SCS, under SB 375 and tied it to the federally mandate regional transportation plan, or RTP. The state Air Resources Board's target for SANDAG's SCS was 7% by

– CONTINUED ON PAGE 8

inside

LOS ANGELES OFFICIALS have enthusiastically approved a large project to redevelop University Village just north of the University of Southern California campus [ ] .

The Village at USC represents the university's most ambitious foray ever into the surrounding community. Estimated to cost more than $1 billion, the project will involve demolishing the existing University Village shopping center just north of the campus and replacing it with a 2-million-square-foot, six-story mixed-use development [ ] .

The Village will include living quarters for up to 3,000 USC students as well as 350,000 square feet of commercial and retail space. In seeking approval for the project, USC agreed to a wide-ranging set of community contributions, including a $20 million housing trust fund for the neighborhood and a 30% local hiring provision.

Though community activists strongly supported the project, market-oriented commentators such as Adam Meyer of NewGeography.com called the community benefits "exortion." [ ]

In recent years, USC has acquired most of the land on the north and east sides of the campus, ringing the campus with multistory parking garages, student housing, and institutional uses such as the Galen Center basketball arena.

In addition, the university has begun to lease more office space in downtown Los Angeles, two miles to the north, now that the two locations are connected by the Expo Line light rail route.

USC is Los Angeles's largest private employer, representing more than 50,000 jobs.

THE OAKLAND A'S BASEBALL TEAM has asked for a five-year extension on their lease at the Oakland Coliseum while they negotiate for a possible move to San Jose.

The A's have played at the Coliseum for more than 40 years but are increasingly discontent with the antiquated stadium, one of the few old multipurpose stadiums still being used. The stadium has its own BART station in south Oakland – it's the transit gateway to the Oakland Airport -- but virtually no new development has occurred in the vicinity.

A new stadium for the A's somewhere in the Bay Area would seem to be a no-brainer. However, the team's fate hinges in part on a combination of other teams and cities.

Oakland is said to be cool to the idea of accommodating the A's because it could complicate their proposed deal with the football Raiders, who have asked the city to demolish the current Coliseum and replace it with a new football stadium by around 2017. Unlike the A's, the Raiders have said they want to stay in Oakland. Nevertheless, Mayor Jean Quan has paid lip service to the idea of keeping both teams in Oakland.

Oakland is said to be cool to the idea of accommodating the A's because it could complicate their proposed deal with the football Raiders,

The A's started negotiating with San Jose after a stadium deal in Fremont fell apart in 2009. But the A's possible move to San Jose is currently being blocked by the San Francisco Giants, who own the minor-league San Jose Giants and are seeking to exercise territorial rights over San Jose. (San Jose is 47 miles from AT&T Park in San Francisco, while the Oakland Coliseum is only 16 miles away)

Without a new stadium, however, the A's have difficulty competing with the world-champion Giants, who play in faux-quaint AT&T Park along the San Francisco Bay just south of Downtown San Francisco. Last year, the Giants averaged 41,000 fans per game (4th in the major leagues), while Oakland averaged 20,000 (27th out of 30).

Excellent coverage of the A's situation with Oakland can be found in this San Jose Mercury News story, which also has links to many other background stories [ ].

A SACRAMENTO JUDGE has greenlighted a 3,500-home subdivision in the North Natomas area, rejecting a challenge by environmentalists who claimed that the project posed health risks and a threat to the Swainson's Hawk habitat [ ].

The lawsuit was the latest chapter in a long debate over whether the Natomas area represents smart growth or unhealthy suburban development. It is located close to existing developed areas en route to the Sacramento airport. However, it is in a low-lying area prone to flooding and does include sensitive habitat.

The Sacramento City Council approved the project, the Greenbriar, in 2008 when it was controlled by prominent Sacramento developer Angelo Tsakopoulos. It was supported by both the local rail transit agency and the local air pollution district. The project is now controlled by Orange County-based Integral Communities. Greenbriar would help fund the light-rail extension to the airport [ ].

The Environmental Council of Sacramento and Friends of the Swainson's Hawk sued, claiming the CEQA analysis regarding the Swainson's Hawk and some public health issues was not adequate. However, Sacramento County Superior Court Judge Timothy Frawley ruled against the environmental agency and in favor of the defendants, the City of Sacramento, and the Sacramento County Local Agency Formation Commission.

– CONTINUED ON PAGE 3

CP&DR

William Fulton
Editor and Publisher Emeritus

Josh Stephens
Editor

David Blum
Graphic Design

Susan Klipp
Circulation Manager

Morris Newman, Kenneth Jost
Contributing Editors

Abbott & Kinderman, LLP
Legal Digest

is published semi-monthly by

Solimar Research Group
Post Office Box 24618
Ventura, California 93002

Telephone / Fax: 805.652.0695

Subscription Price: $238 per year

ISSN No. 0891-382X

Visit our website:
WWW.CP-DR.COM

You may e-mail us at:
INFO@CP-DR.COM

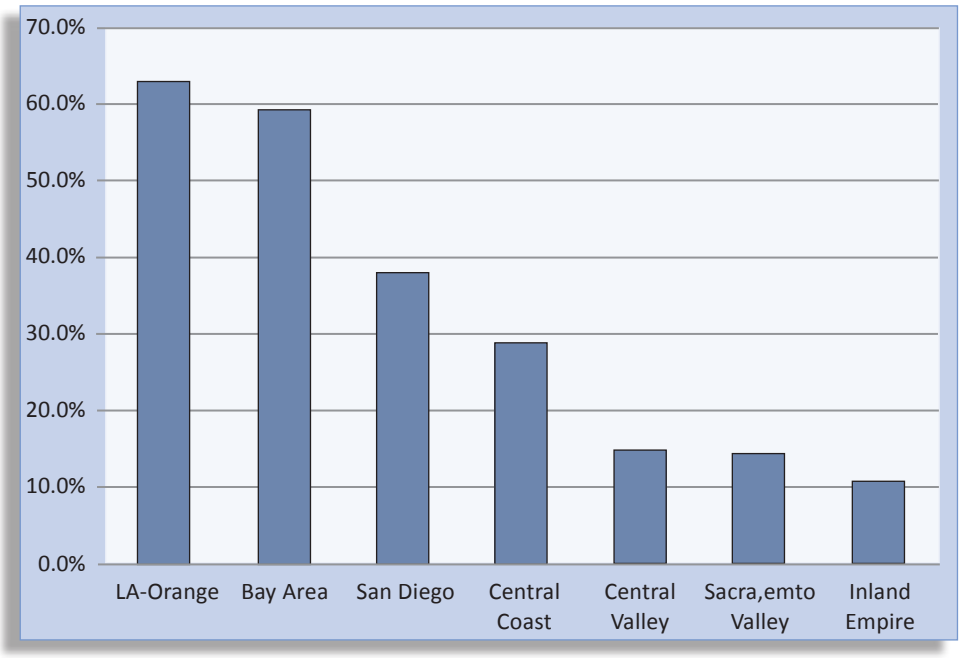
– CONTINUED FROM PAGE 2

APPROXIMATELY ONE-THIRD OF NEW HOUSING UNITS constructed in California's metropolitan counties between 2000 and 2009 were built in infill locations, according to a new report from the Environmental Protection Agency [ ].

The EPA Office of Sustainable Communities found that 386,000 infill units were built in the state's 19 metropolitan counties – 33.5% of the 1.15 million units built overall. This figure did not change between the boom years in the first half of the decade and the bust years in the second half.

The Los Angeles-Orange County metro area (a separate metro area under the Census definition) led the state with 62% infill, followed by 59% in the Bay Area, and 38% in San Diego. The highest percentage in the state was Santa Clara County (again, technically a separate metro according to the Census) with almost 80%.

The lowest figures were 11% in the Inland Empire and 14% in both the San Joaquin Valley and the Sacramento Valley, suggesting that these inland areas continue to serve as the greenfield "escape valves" for crowded coastal metros.



Percent Of Housing in Infill Locations, 2000-2009

California's figure was significantly higher than the national total of 21% and about the same as the 32% total in the Northeast. Unlike those in California, most metros saw an increase in infill construction during the bust.

The EPA defined infill housing as housing constructed in Census block groups that were mostly developed in 2000. The agency used American Community Survey data, land cover analysis, and comparative aerial images in doing the analysis. ■

legal digest

Mobile Home Condo Conversions Subject to Coastal Act and Mello Act

The California Supreme Court ruled Thursday that the conversion of a mobile home park from rental to ownership status is subject to the Coastal Act and also to the Mello Act, which lays down procedures for replacing affordable housing in the coastal zone.

The court's key ruling in *Pacific Palisades Bowl, Mobile Estates, LLC v. City of Los Angeles* is that a mobile home conversion -- which involves a subdivision of property, is a "development" under the Coastal Act even if an immediate change in density or intensity is not contemplated. Relying on Public Resources Code section 30106, the Supreme Court said: "*Any* subdivison under the Subdivision Map ... is, *by definition,* a species of change in the density of intensity of use of land and is a 'development'." The court also noted that while Pacific Palisades Bowl appears to assume that the Coastal Act is intended to alter only increases in density, in fact the law uses the word "change".

The court also rejected Palisades Bowl's argument that the Mello Act does not apply, noting that the law (contained in Gov. Code Section 66590) requires local governments to find replacement housing for low- and moderate-income residents in the coastal zone if they plan to approve projects that will convert or demolish affordable housing.

Palisades Bowl also argued that the Mobilehome Park Resident Ownership Program, which was enacted prior to the Mello Act, should take precedence over the Mello Act. But the court noted that the MPROP program, which is designed to facilitate the purchase of mobile home parks by residents, is a state policy that does not override the Mello Act.

The use of the Subdivision Map Act to convert mobile home parks from rental to ownership is the latest tactic by mobile home park owners to get out from under mobile home rent control ordinances.

Mobile home residents typically own their residences but rent the "pad" on which their residence sits from a mobile home park owner. Over several decades, dozens of cities in California have enacted "mobile home rent control" ordinances limiting the increases on the pad rents. Park owners have argued in court, mostly unsuccessfully, that mobile home rent control constitutes an unlawful transfer of asset value from owners to tenants. In those cases when courts have acknowledged that the value of asset transfer has occurred, they have also concluded that the asset transfer was permissible in the service of a larger public purpose. ■

The Case:
Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles (November 29, 2012, S187243) ___Cal.4th ___.

Almond Farm Loses Acreage Due to Ill-Placed Fence

BY GLEN HANSEN, ABBOTT & KINDERMANN, LLP, SACRAMENTO

It goes without saying that property disputes can be nuts. Sometimes, literally.

In *Martin v. Van Bergen* (2012), the Court of Appeal for the Second Appellate District held that a property owner who unknowingly had raised almond trees up to a common fence located on a neighboring parcel could not raise the doctrine of boundary-by-agreement as a defense to the neighbor's quiet title action, because there was no evidence of an actual agreement to locate the fence as the boundary between the parcels.

In *Martin*, plaintiffs owned a 240-acre parcel of land that contained a residence and vineyard. Defendants owned a contiguous parcel consisting of a residence and an almond orchard. The common boundary between the parcels was approximately 1,300 feet long. A fence ran over plaintiffs' parcel for at least part of that distance parallel to the boundary. The area between the boundary and the fence was planted with almond trees. Defendants' almond orchard thus encroached onto plaintiffs' parcel.

The fence that was installed in 1947 had replaced an earlier fence in that same location, without any stated disagreements or uncertainty between the neighboring property owners as to either where the boundary was located or whether the fence was located on the boundary. However, in 2005, three surveys were performed, two of which demonstrated that the orchard encroached onto plaintiffs' parcel, and that the true boundary would result in a loss of 8 to 10 percent of the almond orchard. Defendants' orchard produced approximately 400 pounds of almonds a year, of which only 25 percent are sold commercially; therefore the relocation of the boundary would result in a loss to defendants of a small percentage of the orchard, producing 40 pounds of almonds annually.

The trial court concluded that defendant did not establish the fence as the boundary under the doctrine of boundary by agreement, that defendants would not suffer "substantial loss" if the fence was moved to the true boundary, and that plaintiffs were entitled to quiet title based on the boundary established by the two surveys. The Court of Appeal affirmed, and, in doing so, clarified the doctrine of agreed-upon boundary.

Relying on the Supreme Court's analysis in *Bryant v. Blevins* (1994) 9 Cal.4th 47, the Court of Appeal in *Martin* noted that the agreed-boundary doctrine requires that there be (1) genuine uncertainty as to the true boundary line; (2) an agreement between the coterminous owners fixing the line; and (3) acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change of its position. The doctrine should not be applied where there is no evidence that the neighboring owners entered into an agreement to resolve a boundary dispute and where the true boundary is ascertainable from a legal description contained in an existing deed or survey. Suggestion of acquiescence, embodied in the existence of a fence, without evidence of an agreement to take the fence as a boundary is not sufficient to establish an agreed boundary.

If a survey derived from a deed or other legal document can accurately locate the boundary, the policy favoring certainty in real property title militates against establishing a boundary by agreement. In this case, the defendants' expert conceded that, if asked, he could accurately survey the boundary between the properties. Also, while the neighboring property owners long acquiesced in the location of the fence, "*Bryant* makes clear that such acquiescence is not sufficient to prove an agreed boundary. There must be evidence of an actual agreement." Finally, defendants provided no basis for overturning the trial court's finding that defendants would not suffer substantial loss. ■

The Case:
Martin v. Van Bergen (2nd District, 2012) ___ Cal.App.4th ___, 2012 Cal. App. LEXIS 954

The Attorneys:
Kinman & Curry, Barry Alan Kinman and Marilyn P. Curry, for Defendants and Appellants.

Ogden & Fricks, Roy E. Ogden and Shae A. Luchetta, for Plaintiffs and Respondents.

Federal Courts Dismiss Series of Suits Seeking Relief due to Climate Change

BY GLEN HANSEN, ABBOTT & KINDERMANN, LLP, SACRAMENTO, CA

In 2011, the United States Supreme Court held in *American Electric Power Co. v. Connecticut,* that the Clean Air Act and any Environmental Protection Agency action authorized by that Act displaces any federal common law of interstate nuisance seeking abatement of carbon-dioxide emissions from fossil-fuel fired power plants. In 2012, several federal courts have followed AEP and dismissed lawsuits based on common law claims that sought to address the effects of climate change, either by way of damages or injunctive relief.

American Electric Power v. Connecticut

In *American Electric Power Co. v. Connecticut,* ___ U.S. ___, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011) (*"AEP"*), the Supreme Court held that the Clean Air Act (CAA) and any Environmental Protection Agency action authorized by the CAA displaces any federal common law of interstate nuisance seeking abatement of carbon-dioxide emissions from fossil-fuel fired power plants. Following *AEP,* several federal courts in 2012 rejected lawsuits based on common law claims that sought to remedy climate change, either by way of damages or injunctive relief.

Alec L. v. Jackson

In *Alec L. v. Jackson, slip opinion,* 2012 U.S. Dist. LEXIS 75791 (D.D.C. 2012), the U.S. District Court for the District of Columbia held that the *AEP* decision excluded all federal common law claims that addressed climate change based on the public trust doctrine. In *Alec L.,* several young citizens and non-profit organizations brought an action against several agencies of the Federal Government seeking declaratory and injunctive relief for defendants' alleged failure to reduce greenhouse gas emissions.

The plaintiffs did not allege that the defendants violated any specific federal law or constitutional provision, but instead alleged that defendants have violated their fiduciary duties to preserve and protect the atmosphere as a commonly shared public trust resource under the public trust doctrine. Plaintiffs sought a declaration that the federal agencies "have a duty to reduce global atmospheric carbon dioxide levels to less than 350 parts per million during this century." The District Court granted defendants' motions to dismiss on the ground that plaintiffs failed to raise a federal question under 28 U.S.C. § 1331.

PPL Montana, LLC v. Montana

The court held that plaintiffs' public trust claim is a creature of state law in light of the Supreme Court's statement in *PPL Montana, LLC v. Montana,* 565 U.S ___, 132 S. Ct. 1213, 1235 (2012), that "the public trust doctrine remains a matter of state law" and its "contours . . . do not depend upon the Constitution." The court rejected plaintiffs' arguments that the holding in *AEP* was limited to common law nuisance claims against defendants who were not federal agencies.

Furthermore, the court held that all federal common law claims involving climate change were proscribed by *AEP*.

Comer v. Murphy Oil USA

The U.S. District Court for the Southern District of Mississippi in *Comer v. Murphy Oil USA,* 839 F.Supp.2d 849 (S.D.Miss 2012), dismissed a class action lawsuit for public and private nuisance, trespass, and negligence against defendant oil, electric, chemical and coal companies, where the plaintiffs alleged that defendants' activities are among the largest sources of greenhouse gases that cause global warming; and that global warming led to high sea surface temperatures and sea level rise that fueled Hurricane Katrina, which damaged plaintiffs' property. The *Comer* court dismissed the action, among other reasons, because the plaintiffs did not have standing since they "cannot allege that the defendants' particular emissions led to their property damage"; because plaintiffs' claims constitute non-justiciable political questions; because plaintiffs' state common law nuisance claims were preempted by the CAA; and because plaintiffs "cannot possibly" demonstrate that their injuries were proximately caused by the defendants' conduct.

Native Village of Kivalina v. ExxonMobil Corp.

A similar result was reached by the Ninth Circuit Court of Appeals in *Native Village of Kivalina v. ExxonMobil Corp.* There, the Native Village of Kivalina and the City of Kivalina, Alaska (collectively "Kivalina") sought damages under a federal common law claim of public nuisance against multiple oil, energy, and utility companies. Kivalina alleged that massive greenhouse gas emissions emitted by defendants have resulted in global warming, which, in turn, has led to the reduction of sea ice that shielded the Kivalina from powerful coastal storms, which, in turn, have severely eroded the land where the City of Kivalina sits and threatens it with imminent destruction.

The District Court dismissed the action on the grounds that the political question doctrine precluded judicial consideration of Kivalina's claim and that Kivalina lacked standing. The Ninth Circuit affirmed the judgment, but solely on the ground that the Supreme Court in *AEP* held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action: "That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief." Therefore, "the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law."

District Judge Philip M. Pro, who sat on the panel by designation and concurred in the court's judgment, separately addressed his view that Kivalina also lacked standing in the case. In language that is similar to that in *Comer,* above, Judge Pro explained that Kivalina failed to meet the burden of alleging facts showing Kivalina plausibly can trace their injuries to the defendant oil, energy, and utility companies. Judge Pro rejected the idea that "a private party has standing to pick and choose amongst all the greenhouse gas emitters throughout history to hold liable for millions of dollars in damages."

In light of these post-AEP cases, it appears that any federal common law claim for either damages or injunctive relief based on the effects of global warming will not succeed. The federal courts will likely refer all claimants to Congress and the EPA. ■

>>> DOF Denies Many Redevelopment Appeals

– CONTINUED FROM PAGE 1

Many of the disputes are expected to end up in court. The issues in Santa Clara and the 49ers Stadium are headed towards a March 22 legal battle in Sacramento County Superior Court. In Southern California, Los Angeles attorney Murray Kane, whose law firm of Kane, Ballmer & Berkman specializes in redevelopment law, said his firm will be filing litigation this month.

Kane, who declined to disclose his clients, said one issue is "what is an enforceable obligation." He said the DOF is also demanding "payment of affordable housing money already earmarked for projects." In some cases, he said, the department is "threatening not to pay even where enforceable obligations have already been approved."

Kane declined to disclose where the lawsuits would be filed, but added "cities want to be able to pay their bills."

In Santa Clara County, many of the cities have had disputes with the Department of Finance, over redevelopment money, including San Jose, Morgan Hill, Santa Clara and Milpitas, said Kevin Duggan, former city manager of Mountain View.

"This was like a tsunami change for those cities, a huge and dramatic change," he said.

Mountain View is one of the few cities in the county without a redevelopment dispute with the Department of Finance, noted Duggan, who chairs Mountain View's oversight board, which are the boards set up to oversee the successor agencies.

"Mountain View has some of the fewest challenges of redevelopment because we were in the wind down phase, he said, explaining the city's redevelopment agency was already planning to close down before the state ended redevelopment.

But other cities, he noted, have long-term projects at risk, ranging from affordable housing to infrastructure and street renovation.

In another ongoing dispute, the city of Santa Barbara is fighting the state agency over its order to sell downtown parking garages due to how they were financed. City officials traveled to Sacramento in mid-December to make their case.

In Orange County, city officials in 17 cities are being pressured by the Department of Finance to redirect more than $200 million to schools and special districts, according to the Voice of OC website. Santa Ana is said to owe $56 million.

One of the most significant problems caused by the demise of redevelopment may be the uncertainty it creates, according to San Jose City Councilman Sam Liccardo, whose district includes the city's downtown.

"The manner that the Department of Finance is dealing with prior transactions creates a cloud on the title of virtually every parcel transaction by the former redevelopment agency," he said.

"Out of 400 successor agencies in the state, 240 of them requested meet and confer sessions after DOF ruled on their Recognized Obligation Payment Schedules in mid-October."

The disputes aren't surprising to Dan Carrigg, legislative director of the California League of Cities. "The governor has been quite clear that he wants redevelopment to end and the money to go to other programs," he said. "Finance is implementing the objectives of the governor."

Carrigg said the cities view redevelopment as a way to meet other state objectives, such as providing affordable housing and transit-oriented development. With the passage of Proposition 30 and the ascendance of a super majority of Democrats in the state legislature, he noted, that additional money and a change in state laws may help resolve some of the problems.

Liccardo said he expects the next legislature to "find a way forward" on affordable housing programs that were hit by the demise of redevelopment. Despite San Jose's setbacks at the loss of redevelopment, he hinted at the possibility of several new high rise towers being proposed for his city in the new year.

"Clearly there is life after redevelopment," he said. ■

Contacts:
H.D. Palmer, spokesman, California Department of Finance (916) 323-0648
Murray Kane, senior principal, Kane, Ballmer and Berkman (213) 617-0480
Dan Carrigg, legislative director, California League of Cities (916) 658-8200
Kevin Duggan, former Mountain View city manager (650) 903-6309
Sam Liccardo, San Jose city councilman, (408)535-4903

>>> Enviros Poke Hole in SANDAG's SB 375 Effort

– CONTINUED FROM PAGE 1

2020 and 13% by 2035.

SANDAG did an environmental impact report showing that would reduce per-capita greenhouse gas emissions by 14% for 2020. However, critics of the plan claim that after 2020, per-capita emissions will actually increase, resulting in a net decrease in per-capita emissions of 9% by 2050 [ ].

Whether or not that's true, it would appear that SANDAG's strategy was to use 2050 to "wait out" both SB 375 and AB 32. But in court, SANDAG was tripped up by something Gov. Arnold Schwarzenegger did before either of those two laws were passed.

All through the debate on both AB 32 and SB 375, Schwarzenegger kept trumpeting the idea that California would reduce greenhouse gas emissions by 80% by 2050. He said it over and over again, and some news reports claimed that this goal was contained in AB 32.

But AB 32 sets no greenhouse-gas emissions reduction target for 2050. AB 375 doesn't mention 2050, either. And ARB did not set a 2050 target for regions to meet. Presumably, then, SANDAG thought it was "safe" for 2050.

However, the Center for Biological Diversity remembered something everyone else seemed to have forgotten: Executive Order S-03-05.

Schwarzenegger issued Executive Order S-03-05 on June 1, 2005 – the year before AB 32 was passed and three years before he signed SB 375. It prefigured AB 32 almost exactly, stating that "the following greenhouse gas emission reduction targets are hereby established for California: by 2010, reduce GHG emissions to 2000 levels; by 2020, reduce GHG emissions to 1990 levels; *by 2050, reduce GHG emissions to 80 percent below 1990 levels.*"

The key to the Center's win in front of San Diego Superior Court Judge Timothy Taylor was figuring out how to take advantage of the fact that SANDAG had pushed the timeline for the SCS out to 2050 – farther down the road than SB 375 requires.

Since Executive Order S-03-05 has never been rescinded and no subsequent legislation has ever addressed the 2050 question, Judge Taylor bought the Center's argument that Schwarzenegger's edict about 2050 is still in force. And so SANDAG's clever attempt to push the SCS out to 2050 ran into the Executive Order.

In his ruling at the beginning of December, Judge Taylor somewhat amusingly notes that he did not ask for briefings on all the issues that he might have because the court's budget has been cut. But he did hear briefs from the plaintiffs, SANDAG, and the California Attorney General's Office, which joined the environmental groups in challenging the SCS.

The relevant portions of Judge Taylor's ruling are worth reading:

SANDAG argues that the Executive Order does not constitute "plan" for GHG reduction, and no state plan has been adopted to achieve the 2050 goal. The EIR therefore does not find the RTP/SCS's failure to meet the Executive Order's goals to be a significant impact. This position fails to recognize that Executive Order S-3-05 is an official policy of the State of California, established by a gubernatorial order in 2005, and not withdrawn or modified by a subsequent (and predecessor) governor. Quite obviously it was designed to address an environmental objective that is highly relevant under CEQA (climate stabilization).

SANDAG thus cannot simply ignore it. This is particularly true in a setting in which hundreds of thousands of people in the communities served by SANDAG live in low lying areas near the coast, and are thus susceptible to rising sea levels associated with global climate change. The court in Association of Irritated Residents v. State Air Resources Board, 206 Cal. App. 4th 1487, 1492-93 (2012), recognized the importance of the Executive Order in upholding the ARB's Scoping Plan.

The court agrees with petitioners that the failure of the EIR to cogently address the inconsistency between the dramatic increase in overall GHG emissions after 2020 contemplated by the RTP/SCS and the statewide policy of reducing same during the same three decades (2020-2050) constitutes a legally defective failure of the EIR to provide the SANDAG decision makers (and thus the public) with adequate information about the environmental impacts of the SCSIRTP. Moreover, as was pointed out in oral argument, having chosen to develop a plan for 15 years beyond that which was required under law, SANDAG was obligated to discuss impacts beyond the 2020 horizon. The ARB's scoping plan adopts the Executive Order, and SANDAG failed to extend the analysis to 2050.

Second, SANDAG's response has been to "kick the can down the road" and defer to "local jurisdictions." ... This perverts the regional planning function of SANDAG, ignores the purse string control SANDAG has over TransNet funds, and more importantly conflicts with Govt. Code section 65080(b)(2)(B) quoted above. As the AG argues, it is certainly feasible for SANDAG to agree to fund local climate action plans, yet the EIR does not adopt or even adequately discuss this form of mitigation.

And as argued by petitioners in their consolidated reply brief, "encouraging" an optional local plan that "should" incorporate regional policies falls well short of a legally enforceable mitigation commitment with teeth. This is what the CEQA Guidelines require at subsections 15126.4(a)(1)(B), (a)(2) and (c)(5) in a setting in which SANDAG controls the funding for at least some of the projects contemplated by the SCS/RTP. Contrary to SANDAG's assertion , it does have the legal power -- indeed, the obligation - to see to it that TransNet funds are spent in a manner consistent with the law. (Cleveland National Forest Foundation v. SANDAG, San Diego Superior Court Case No. 2011-00101593.)

Of course, you can argue the case the other way, as SANDAG did. We're not talking about a law or a policy or a plan. We're talking about an executive order from the governor – essentially a directive to the executive branch. The state could have included the 80%-by-2050 goal in AB 32 but chose not to. That's a perfectly plausible argument. Except for CEQA.

It's CEQA that gives life to the executive order in this case. If there were no CEQA, it would make it harder to make the argument that the executive order must be followed. You could probably make the argument that the RTP would have to take greenhouse gas emissions into account because it involves state transportation funds. But CEQA is the trump card: The CEQA Guidelines are written by the executive branch, and so everybody's got to use CEQA in order to accomplish what the executive branch wants done. Hence the significance of the executive order.

And that's the real lesson of this case: CEQA is an awfully muscular law, able to push environmental issues far beyond where other laws might take them. We'll see whether the appellate court agrees – or whether the Center for Biological Diversity will find similar openings with other SCSs. ■

Post-Redevelopment Strategies Vary From City to City

Though painful, the unwinding of redevelopment would seem to be a pretty straightforward process for most cities: Designate yourself as the successor agency, negotiate with your oversight committee to keep as much stuff going as possible, and try to keep the state Department of Finance from vetoing the whole situation.

But don't overlook the opportunities being created by a forced reorganization of planning and economic development functions. "The chaotic process of unwinding redevelopment has been painful and difficult," said Paul Silvern of HR&A at a panel recently at the annual conference of the American Planning Association, California Chapter, "But it presents interesting opportunities, especially for planners playing a new role – more connected and better connected to the implementation side, particularly in smaller cities."

Silvern of HR&A spoke of a "continuum" of post-redevelopment strategies, while Kevin Keller of L.A. City Planning – and the current president of APACA – talked about how Los Angeles was moving away from redevelopment to more conventional planning anyway.

Silvern laid out the varied strategies of four cities: Alhambra, Oakland, San Diego, and Los Angeles. Although all except Alhambra are large, the examples could be instructive. He emphasized that the end of tax-increment might actually allow cities and counties to view economic development more broadly again. Among other things, he noted that many cities that are now receiving increased general fund property taxes as a result of the end of redevelopment – a 15% bump on average – are considering setting aside all or some of those funds for redevelopment-type purposes.

The Alhambra Approach

As *CP&DR* reported last spring, Alhambra was the first and most aggressive small city to move on redevelopment – following the longstanding approach of City Manager Julio Fuentes, who was the last president of the California Redevelopment Association before it folded. Within a few days, Alhambra had granted the city and its economic development division all the specific powers of a redevelopment agency except that of tax-increment, including eminent domain for economic development purposes, writing down land, and so forth.

The Oakland Approach

Oakland was especially hard hit by redevelopment because the city had, over time, increasingly used tax-increment funds to pay for positions in general fund departments such as police. The city has used the end of redevelopment as a way of reorganizing a huge number of city functions – consolidating planning and building into one department, and economic and workforce development into another. The city has also created an Office of Neighborhood Investment, which staffs the successor agency.

The San Diego Approach

As *CP&DR* indicated last spring might happen, San Diego has retained its unusual structure of farming out development/redevelopment activities to nonprofit agencies created by the city. Center City Development Corp. was often viewed as a highly successful example of an innovative approach – a nonprofit development entity that contracted with the city to execute redevelopment plans, process permit approvals, and conduct planning. Southeast Development Corp. followed the same model.

CCDC and SEDC have been merged into a new entity called "Civic San Diego," which retains the permitting functions, serves as the successor agency, provides economic development services in the two areas, and operates the downtown parking management district. Though tax-increment is gone, Civic San Diego is funded by a wide variety of revenue sources including the new post-redevelopment administrative fees, permit application fees, and parking revenues.

The Los Angeles Approach

For decades, the mayor-controlled Community Redevelopment Agency ran the show, while a variety of other agencies did bits and pieces of economic development and the city council largely sat on the sidelines. That's part of the reason the council, in dramatic fashion, rejected the idea of the city serving as a successor agency.

While the governor-appointed board of the successor agency winds down redevelopment, the city is looking at consolidating all other functions into some kind of central economic development office or division. Meanwhile, the Department of City Planning had already begun to take over some functions downtown, where redevelopment project areas were scheduled to expire beginning in 2013 anyway. Keller said the city has already adopted new design guidelines for downtown and expanded its transfer of development rights ordinance (known in Los Angeles as TFAR, for Transfer fo Floor Area Ratio). "We were already taking on 'Bringing Back Broadway'," he said, and noted that the city is looking to other new sources of funding such as business improvement districts and planning funds from Measure R, which are funneled through L.A. Metro.

– WILLIAM FULTON | DECEMBER 30, 2012

Lesson From Elsewhere: Using Public Land To Make Redevelopment Work

With the demise of redevelopment in California, one idea put forth -- by me, among others -- is using publicly owned land as equity in a real estate deal as a way of subsidizing it. If you can't "write down" private land (selling it to a developer for less than your bought it), maybe you should look at real estate assets your city – or some other public agency – already owns.

Recently, while attending the annual conference of the National Capital chapter of the American Planning Association, I ran across an interesting example from the D.C. metropolitan area that – at least in some ways – illustrates the point: the combined deal to redevelopment two public housing projects in Alexandria, Virginia.

Having successfully redeveloped public housing projects to mixed-income projects under the federally funded HOPE VI program, the Alexandria Redevelopment and Housing Authority decided to try to do the same thing once the federal program wound down. In particular, ARHA wanted to redevelop the Glebe Park housing project near Ronald Reagan National Airport into a mixed-income project. There was only one problem: Glebe Park had a $5 million mortgage on it, held by the U.S. Department of Housing and Urban Development.

So ARHA issued a request for proposals to developers that basically said, 'Hey, let us know if you think it's possible to use some other ARHA landholding to help make this deal work.'

"How do you do it with no money and no land value?" says Bryan Allen (A.J.) Jackson of EYA, a prominent mixed-income developer in the D.C. area that responded to the RFP. The answer was to find another piece of property, also ripe for redevelopment, that does have value.

That property was the James Bland Homes, another public housing project farther south in Alexandria. The James Bland property is located in an historically African-American neighborhood, which means it's on the wrong side of Highway 1 -- west of the road and therefore separated from the beautiful, historic Old Town area and the Potomac River. (It's named for our nation's most famous African-American minstrel.)

James Bland Homes

Nowadays, however, the James Bland property is in the right place, because it's in between the Braddock Road Metro stop and Old Town. No matter the history of the neighborhood, ARHA is now sitting on a valuable piece of property.

The details of the deal are complicated, but they basically boil down to this: The Glebe Park mixed-income project penciled out with a $5 million loss – the $5 million owed to HUD. The James Bland mixed-income project -- now called Old Town Commons -- penciled out with a $5 million profit – largely due to a much higher density (almost 50 units per acre as opposed to 23 for the old public housing project) and a strong condo and townhome market in the neighborhood. So ARHA worked with EYA to redevelop both sites and use the profits from one to subsidize the other. Public housing units from the two locations were replaced on a one-to-one basis at either James Bland, Glebe Park, or in scattered locations around Alexandria.

Old Town Commons

As tends to be the case with affordable housing projects, it wasn't easy. ARHA, EYA, and the City of Alexandria all had to provide patient capital. It took several years to get the deal done. Also in order to maximize the value of the market-rate units, EYA had to provide some lofts that added to the height (they were set back from the other four floors) and, in some cases, had to segregate the market-rate and subsidized units into separate buildings. (This was also necessary to execute the low-income housing tax credit part of the deal, because EYA actually sold the subsidized units on a fee-simple basis to the tax credit investors.)

You can criticize the Glebe Park/James Bland deal from a lot of perspectives. For Glebe Park, the James Bland surplus was just another layer of financing in a typical affordable housing deal -- making it even more complicated. Maybe ARHA could have made more money by just selling the James Bland property, and, although the new public housing is undoubtedly nicer than the old, the additional density means more height and much less onsite open space.

Still, ARHA accomplished its goal: To use the asset value of its own real estate to make public redevelopment goals work.

Not every city or public agency in California is fortunate enough to have a piece of land like James Bland -- historically low-value but suddenly in the right location. Indeed, California cities have gone to great lengths in the last year to assert that their former redevelopment agencies have hardly any properties that are worth anything. (That's partly because some of them transferred all valuable assets back to the city or some other entity in 2011.) But the James Bland/Glebe Park story does illustrate the fact that it's worthwhile for cities and other public agencies in California to dig through their real estate portfolios to see what they've really got.

– WILLIAM FULTON | DECEMBER 30, 2012 ■