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Gnatcatcher Denied Protection by State

The battle over the California gnatcatcher appears to have created a major rift between environmentalists and Governor Pete Wilson's administration.

At the urging of Wilson Administration officials, the state Fish & Game Commission voted on August 30 not to consider listing the gnatcatcher as an endangered species under the California Endangered Species Act. Attorneys for the Natural Resources Defense Council immediately announced plans to sue the Fish & Game Commission over the action. "The evidence is overwhelming that the species is endangered," said NRDC lawyer Joel Reynolds. Meanwhile, the U.S. Fish & Wildlife Service is scheduled to decide this month whether the gnatcatcher deserves protection under the federal Endangered Species Act.

The gnatcatcher has Wilson in a pickle. The small songbird inhabits the coastal sage scrub in much of Orange, San Diego, and Riverside counties, and apparently only about 2,000 pairs of the bird currently exist. But building industry officials claim that if the state considered listing the bird as endangered, the resulting moratorium on gnatcatcher habitat would shut down construction in all three counties at a cost of up to 100,000 jobs.

Wilson Administration officials had been negotiating with both the building industry and NRDC over a way to protect the gnatcatcher temporarily without actually approving the "consideration for listing" that would trigger the moratorium. *Continued on page 6*

Linkage Fees Upheld By 9th Circuit Court

In a split decision, the Ninth U.S. Circuit Court of Appeals has upheld the constitutionality of Sacramento's "linkage" fees on commercial development to pay for affordable housing. Although the case is sure to be appealed to the U.S. Supreme Court, the Ninth Circuit ruling may motivate more California cities to pursue linkage fees as a means of funding housing programs.

Builders complained that the ruling will increase the financial burden placed on them. "This case throws the door wide open to all kinds of fees and exactions to further general social goals," complained John Groen, a lawyer for the Pacific Legal Foundation, which is representing the Commercial Builders of Northern California in the case. But government agencies were pleased with the outcome. Fearing that an adverse ruling could threaten the legality of all impact fees, some 50 California cities joined together to file an amicus curiae brief in the case.

According to the Los Angeles-based Housing Trust Fund Project, eight cities and one county in California currently impose linkage fees on non-residential developers, ranging from $7.50 per square foot for office developers in Berkeley to 25 cents per square foot for warehouse construction in Sacramento. However, just a few days after the Ninth Circuit ruling, Los Angeles Mayor Tom Bradley announced a broad housing program, including linkage fees as high as $6 per square foot for office buildings. *Continued on page 9*

INSIDE

Fresno Gives Law Firm $560,000 Subsidy to Stay Downtown

The Fresno City Council has approved a complicated arrangement o keep the city's largest law firm within the city's downtown redevelopment area. The city will spend more than a half-million dollars in redevelopment funds — money that is technically set aside for housing purposes — to make the deal happen.

The complex arrangement involves not only the law firm, McCormick, Barstow, Sheppard, Wayte & Carruth, and the City of Fresno Redevelopment Agency, but also the city and county Housing Authorities, which have a combined staff, and a development partnership led by Fresno resident Bud Long. Under the terms of the deal, the Housing Authorities — "induced" by a $560,000 payment from the redevelopment agency — will buy the law firm's existing building in downtown Fresno as an administrative headquarters. Freed from a large mortgage, McCormick, Barstow will move its 63 lawyers and 250 employees sometime next year to Long's Civic Center Square redevelopment project. City officials describe the deal as crucial to a downtown area largely abandoned by major employers, retailers, and even other law firms in recent years.

The key to the deal was finding a way for McCormick, Barstow to obtain enough money to pay off a mortgage that was costing the firm $390,000 a month for its 37,000-square-foot building on Fulton Mall. The law firm was asking about $3.1 million for the building; at the same time, the Housing Authorities were seeking an administrative office somewhere in the $2.5 million range to house their 80-person combined staff.

With the redevelopment agency providing $560,000 in redevelopment housing funds, the Housing Authorities — which may use redevelopment housing money for any purpose — were able to offer $2.97 million for the McCormick, Barstow building, an offer the firm accepted. Dennis Gaab, the city's economic resources director, is the architect of the plan, which he describes as "straightforward."

Because the Civic Center Square building is not yet completed, the law firm has agreed to a sale-leaseback arrangement until 1993, when the new Civic Center Square building will be done. McCormick, Barstow is expected to occupy up to half of the 157,000-square-foot building, which is located within walking distance of Fresno's three courthouses — the county courthouse, the Fifth District Court of Appeal, and the U.S. District Court.

Michael G. Woods, a senior partner in McCormick Barstow, says the deal is still conditional on a number of factors, particularly the timely completion of the new building. Not surprisingly, rival developers are still promising the law firm finished space next spring. "The problem is that Fresno has moved progressively north, and clients and 75% of attorneys live on the other end of town (away from downtown)," Woods said. However, he added, the firm sees a vital downtown as important to Fresno "and we thought staying downtown would contribute to that."

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BRIEFS

Riverside County Fees Go Uncollected...

Riverside County has failed to collect millions of dollars in development fees, according to an extensive investigation by the Riverside Press-Enterprise newspaper. The county has established a blue-ribbon task force to look into the matter and has begun to notify developers who still owe fees.

The Press-Enterprise discovered that in four Murrieta housing tracts, the county collected development fees for only about half the houses constructed; in one 179-home tract, the fee for only one house was collected. For these tracts alone, the county shortfall was more than $4 million.

The newspaper said that the problem was rooted in the "rush" on the county planning and building departments that occurred in 1988, when developers sought to have their projects approved before residents voted on a slow-growth measure. The measure failed.

County officials said the problem was created by a lack of communication between the Planning Department, which processes the housing projects, and the Building Department, which collects the fees.

...And Antelope Valley Has Questions Too

Sixty-one homeowners have filed claims with the City of Palmdale in the Antelope Valley, saying that flooding during the March rains resulted from poor drainage in new city tracts.

The claims, filed by residents in the neighboring community of Quartz Hill, have given rise to new questions about how to finance a comprehensive flood-control system in the area. A 1987 county flood-control plan called for $500 million in projects to be financed by development fees, but as of April the county had collected only $4.7 million. Similarly, Palmdale has a $340 million flood-control plan, also to be paid for by development fees, but only $1.8 million has been collected.

Quartz Hill residents claim they never had flooding problems prior to the rapid development of housing tracts in Palmdale over the last few years. Homeowners throughout the area appear likely to balk at the creation of an assessment district to raise the necessary funds.

Audit Faults L.A. Planning Department

An outside audit of the Los Angeles City Planning Department has criticized the department for weak and "overpoliticized" management, out-of-date technology, centralized decision-making, and a laggardly record on processing projects and environmental review. Zucker Systems of San Diego called for an extensive program to revamp the department, which will have a net cost of $10 million.

The Zucker Systems report called for the following changes:

- Major revision of the general plan and community plans.
- Higher professional standards and a management training program.
- A technological upgrade, including $3.5 million in new computer equipment.
- Better integration of land-use and transportation planning efforts.
- Major decentralization of the department outside of City Hall.
- A reduction in the time required to process EIRs.

Hanford Redevelopment May Go to Ballot

The Kings County city of Hanford has adopted a 40-year, $366-million redevelopment plan. But downtown residents, expressing familiar fears that their homes will be condemned, are gathering signatures to place a referendum on the ballot.

The City Council approved the redevelopment plan by a 3-0 vote, with two members abstaining because of financial conflicts of interest.

Hanford has historically maintained a strong and handsome downtown area, but city officials say they fear that Wal-Mart and other businesses will draw retailing away from the area. More than 100 residents attended the final public hearing on the issue, and city officials promised not to condemn residential property as part of the plan.

"We're not out to get their homes," Mayor Simon Lakritz told the Fresno Bee. "We want to pave streets and install curbs and gutters. We want to make sure downtown Hanford continues to be a nice place."

Burma...Shave...Territory

San Francisco officials are balking at the largest public art project ever proposed for the city — a $500,000 "word sculpture" in front of the Moscone Center with four 36-foot-high steel arches that spell out "THIS...IS A...NICE...NEIGHBORHOOD." At night, the phrase would appear in Chinese in yellow neon and in Spanish in red neon.

The San Francisco Arts Commission has already given a startup fee to three Los Angeles artists who came up with the concept. But the arts commissioners would like the artists to come up with a different phrase. So far, the artists have refused, citing artistic integrity, and additional city approvals — including an environmental impact report — may be required as a result.

The artists say they came up with the idea because the phrase was repeated again and again during meetings with local politicians. To change the wording, one artist said, would be "like dissecting the 'Mona Lisa' because somebody didn't like her eyes."

San Francisco Examiner readers have proposed several alternative phrases, including "EARTHQUAKE PROOF," "SPARE CHANGE," and "LOS ANGELES, 430 MILES."

Roundup

The L.A. City Council has held up **part of the lucrative retirement payout** to former redevelopment director John Tuite....The City of Madera **buys the local train station**, hoping to attract Amtrak service....Most residents of the new City of Lake Forest (formerly El Toro) **discover they can't use the lake they named the town after**, which is owned by the private development of Lake Forest....Sacramento considers adopting **a "no net loss" housing policy** regarding zone changes within the city limits....Greenbelt Alliance announces plans to **endorse Bay Area housing projects** that met its "compact housing development" guidelines.

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New Federal Wetlands Definition and Policy Appear to Favor Industry

The Bush Administration has finally released a proposed new regulation that would narrow the definition of wetlands, and followed up that announcement with a broad wetlands policy that would include vast federal purchases of sensitive wetland areas.

The president's announcements appear to be a big victory for business forces, especially the oil and gas industry and agricultural lobbyists, which have been agitating for changes in federal wetlands policy. Environmental groups vowed to continue fighting for a stricter definition but appear to be losing ground.

The impact on California is unclear. The narrower definition might mean that some areas in California which are wet on a seasonal basis would no longer be considered wetlands. On the other hand, vernal pools, which are common in the Central Valley and may not qualify as wetlands under the new definition, are specifically categorized as an exception under the proposed regulations. This exception means vernal pools will be considered wetlands even if they would not qualify under the federal definition.

The proposed new federal regulation says that land will be considered wetlands if it has standing water on it for 15 consecutive days during the growing season or if the soil is saturated at the surface for 21 days. Under a definition adopted in 1989, property was considered a wetland if water was present within 18 inches of the surface for seven consecutive days. According to new reports, the final compromise was fashioned within the White House by Vice President Dan Quayle. (See accompanying story.)

In addition, the proposed regulation would require the confirmed presence of water, hydric soil, and wetlands vegetation. Under the 1989 definition, if hydrologists found the vegetation and the soil, the water was assumed to also be present. (The proposed new regulation was published in the Federal Register on August 14, beginning on page 40445.)

A separate wetlands program announced by the White House a week later contains several other provisions. First, federal officials would rank of wetlands by value. Second, wetlands would be provided with different levels of protection depending on their value, with the most valuable wetlands (perhaps 1 million acres) to be purchased by the federal government and the least valuable wetlands being opened for development. Finally, the Bush plan called for quicker governmental decisions on individual wetlands issues and an amendment to the Clean Water Act to prohibit the draining or dredging of wetlands.

With the exception of the last item, the Bush proposals would appear to be a complete capitulation to the National Wetlands Coalition, a business group led by the oil and gas industry that has been leading the charge in Congress to loosen up wetlands regulations.

The current controversy began in 1989, when four federal agencies that deal with wetlands — the Army Corps of Engineers, the Environmental Protection Agency, the Fish & Wildlife Service, and the Soil Conservation Service — agreed on a common wetlands definition for the first time. But the definition was expansive, especially the rule including any land that has water within 18 inches of the surface for only seven days per year. Soon the definition came under fire, as business leaders claimed it included 80% of the Virginia Beach, Virginia, metropolitan area, as well as suburban lawns in Houston. The oil and gas industry was particularly hard hit because the definition appeared to include millions of acres of land in oil-rich Louisiana and East Texas.

Business lobbyists have been pressing Congress to pass H.R. 1330, by Rep. Jimmie Hayes, D-Louisiana, and S. 1463, by Sen. John Breaux, D-Louisiana, which contained virtually the same provisions as the Bush policy announced in August. The bill was bitterly opposed by environmentalists but with little success, and EPA Administrator William Reilly fought a rear-guard action against it, partly because it would have curtailed his agency's role in wetlands regulation. However, the bill signed up more than 160 co-sponsors in the House alone.

More background information on the federal debate over wetlands appeared in the August issue of CP&DR.

The Inside Story on Wetlands: How Dan Quayle Crafted the New Policy

Arguing for strong wetlands protection at a recent White House meeting, Environmental Protection Agency chief William K. Reilly quoted a 1988 pledge by President Bush to protect ecologically fragile areas — "no matter how small."

From across the table came a return from Office of Management and Budget Director Richard G. Darman. Bush, he noted, "didn't say that. He read what was given to him in a speech."

Darman's demurrer, relayed by observers at the meeting, may have been wrapped in jest. But it gave a flavor of the manner in which the administration decided to relax the criteria for wetlands protection, a move that could open millions of acres to development, from Alaskan tundra to shrubby swamps in the Florida Everglades — as well as large tracts of land that rarely get wet.

The struggle over who should control environmental policy — the experts throughout government or the political and economic advisers to the president — is as old as this administration. But many federal wetlands experts complain that even for a White House whose top officials routinely get involved in the smallest domestic policy spats, the resolution of this issue reached new heights of political intervention.

What, from their standpoint, was supposed to be a scientific review of the swamps, marshes, and bogs considered worthy of safeguarding ended up essentially rezoning thousands of acres for development. And what they planned to be a collaborative drafting effort by environmental specialists in four federal agencies was taken over by officials in the White House who have little direct knowledge of the issue. Indeed, they had to be given a special wetlands glossary at the decisive meeting.

A White House aide defended the process by saying that previous wetlands protection had gone too far in blocking development and denying landowners their rights to develop their land. He said its implications for private property and the environment were too important to be left to bureaucrats.

"Ultimately politicians make the decisions in Washington," the official said. "That's how the system works."

"Wetlands" is a catchall term applied to a wide variety of ecosystems ranging from prairie potholes that flood seasonally and become waterfowl breeding grounds to tidal salt marshes bordering estuaries such as the Chesapeake Bay. Wetlands are among the most diverse of wildlife habitats, but in the White House meeting, one characteristic was measured — how wet they were.

Vice President Quayle, wading into the complex debate over the extent to which soil must be soaked to qualify as a wetland, reportedly suggested a simple criterion: "When it's wet, it's wet."

"This was worse than the Reagan years in the amount of second-guessing and political involvement," one seasoned environmental official said. "Once the agencies achieve compromise, you assume you'll have the support of the principals. When the whole thing is reopened, the system goes awry."

Continued on page 5

How Dan Quayle Crafted the New Wetlands Policy

Continued from page 4

Wetlands protection is the most recent flashpoint in an administration sharply divided over environmental policy. But unlike past disputes over broad policy questions, the wetlands issue centered on narrow, technical judgments such as the plant species that are characteristic of wetland habitats and the number of days soil must remain saturated at various depths to constitute a wetland that deserves protection against development.

At issue was a manual drafted by scientists in 1989 to set forth the factors that distinguish a wetland. The 100-page listing of criteria is used by the Army Corps of Engineers, which controls permits to fill in wetlands and decides whether projects threaten "unacceptable" environmental harm. Its decisions are subject to EPA veto.

The manual did little to curb development — 95% of permit applications were approved last year. But industry complained nonetheless of unreasonable controls, which, for example, restricted development on cropland that had been tilled for generations.

Large sections of the Eastern Shore of Maryland and the state of Louisiana were technically off-limits to development under a strict reading of the manual.

The controversy, fueled by members of Congress who picked up the cudgels for angry landowners, sent the panel of government scientists who wrote the document back to work.

Reilly assumed leadership of the interagency effort that included the EPA, the Corps, and the departments of Interior and Agriculture. He sought to establish what he called more defensible criteria and was willing to let go of marginal areas to concentrate on the most ecologically valuable wetlands.

It was not a popular cause. When Reilly forged a consensus to broaden soil saturation criteria, one scientist quit the panel in disgust and another asked to "disassociate" itself from his work.

The real fight began when Reilly took his consensus to the White House. Technically, the Office of Management and Budget is required to sign off on all regulations. But the wetlands review was so high on industry's list of concerns that the President's Council on Competitiveness entered the fray. The council, set up to ease regulatory burdens on industry, is chaired by Quayle and run by his staff.

Although the council is supposed to serve as an appeals board for agencies unhappy with OMB decisions, its staff participated at every stage of the wetlands debate.

On July 1, the interagency group reached agreement with OMB on manual revisions. But the next day, officials said, they were informed by a vice presidential staff member that the terms were unacceptable.

A White House official said that the agreement had been tentative and that objections by other interested parties, including the Council of Economic Advisers and the departments of Energy and Housing and Urban Development, kept the accord from becoming final.

A week later, Reilly attempted to deal directly with Quayle. Anxious to draft a proposal for public comment and unveil it at a Senate hearing on wetlands the next day, officials said, Reilly called Quayle the night before and offered a compromise.

The 1989 manual had conferred protections on wetlands saturated for at least seven consecutive days as deep as 18 inches below the surface. The interagency group raised the threshold, saying it wasn't a wetland unless it was saturated 14 straight

days at the surface. Some administration officials wanted the criterion to be 30 days.

Reilly got Quayle's approval to propose 15 straight days and to ask for public comment on a range of 10 to 20 days, officials said. But Allan B. Hubbard, the competitiveness council's executive director, called back and told Reilly that Quayle had misspoken.

Another call by Reilly to Quayle just after midnight July 10 resulted in another compromise: a request for comment on the 10-20 day range and dropping the 15-day proposal. The EPA staff worked through that night to draft a proposal for the hearing the next morning.

But on his way to the Senate, Reilly received a call on his car phone from Hubbard, who directed him not to release the document, official said.

That impasse set the stage for the competitiveness council meeting July 29. In attendance were the six council members or their representatives — Darman, the secretaries of commerce and treasury, the attorney general, the White House chief of staff, and the chairman of the Council of Economic Advisers.

Also attending were officials from the interagency group. But although representatives of those agencies had earlier supported Reilly's compromise, they changed their minds in the more political atmosphere and none of them spoke in favor of Reilly's appeal for a 15-day saturation rule.

Interior Secretary Manuel Lujan Jr. told colleagues privately that he had come under pressure from the White House to break away. "I'm a politician, not a scientist," he said at the meeting, according to observers.

A knowledgeable official said that Quayle's staff had contacted council participants earlier in the search for a consensus, but that no one was pressured.

Lujan's spokesman said the secretary could not be reached for comment.

Darman, who is known as a critic of environmental policy, told the council that the dispute came down to deciding whether land that is dry for 344 or 350 days a year should be classified as wetlands.

"Boston was built on a wetlands," Darman reportedly said.

Quayle then interjected what he called a "supertest" for wetlands. If it is covered by water 80% of the time, it could be considered a wetland, he suggested.

"How about if we say when it's wet, it's wet?" Quayle suggested.

Darman then reportedly shot back: "Okay, Dan, and when it's dry, it's dry."

One observer said that Quayle was "thinking out loud," searching for a common-sense approach to defining wetlands that would be easily understood and universally applicable.

Wetlands experts said Quayle's formula was more appropriate for classifying ponds or streams.

Although Reilly was outnumbered, the meeting ended without resolution.

Later in the day, Quayle offered him another compromise: 15 days of standing water and 21 days of saturation at the surface.

Hoping to bring public pressure to bear once the proposal gets out, Reilly accepted the formula. The new criteria were published in the Federal Register on August 14, starting a 60-day review period.

Reilly declined to comment on the deliberations.

Michael Weisskopf

Michael Weisskopf is a staff reporter for The Washington Post.

COURT CASES

Appellate Court Upholds L.A. County EIR Preparation Policy

A split Court of Appeal panel has ruled that environmental impact reports may be prepared by consultants hired directly by developers. But the court argued forcefully that public agencies must exercise independent judgment in reviewing the EIRs, and a bill moving through the legislature would require local governments to make formal findings that independent judgment had been used.

Meanwhile, the state Fair Political Practices Commission has clarified earlier opinions by saying that planning consultants may work directly for developers without creating a conflict of interest under state law.

The First District court's ruling in *Friends of La Vina v. County of Los Angeles* overturns the decision of L.A. Superior Court Judge John Zebrowski, who declared that developer-prepared EIRs set up a "stark and irreconcilable conflict of interest." (*CP&DR*, September 1990.)

Writing for a two-justice majority, Justice Morio L. Fukuto called Zebrowski's interpretation "erroneous as a legal matter." Fukuto concluded that the California Environmental Quality Act, the CEQA Guidelines, and case law "consistently teach that an agency may comply with CEQA by adopting EIR materials drafted by the applicant's consultant, so long as the agency independently reviews, evaluates, and exercises judgment over that documentation and the issues it raises and addresses." Fukuto dismissed Zebrowski's conflict-of-interest concern by saying that CEQA is not meant to address such matters.

However, Justice Donald N. Gates wrote a sharp dissent that defended Zebrowski's reasoning, saying that an EIR consultant who works directly for a developer has a "patent" conflict of interest. He said that L.A. County's system of preparing EIRs had contributed to the public's "disillusionment and understandable cynicism" about government.

Despite the Court of Appeal's ruling, more and more local governments around the state appear to be moving away from L.A. County's system, hiring their own EIR consultants instead of allowing developers to do it. But developer-prepared EIRs are allowed in many of the state's largest jurisdictions, including the cities of Los Angeles and San Francisco, and the La Vina ruling could force these jurisdictions to undertake more rigorous review.

"I don't think it's a very good system, generally, for the consultant to be doing work directly for the applicant," said Ronald Bass, a CEQA expert with Jones & Stokes Associates in Sacramento. "But there are jurisdictions where it works well, as in San Francisco. Even though the applicant selects the consultant, all the consultant's work is given to the agency. They control the whole process."

Such a process may soon be encouraged by state law. Under AB 1642, introduced by Assembly Natural Resources Chairman Byron Sher, CEQA would be amended to clearly require the "lead agency" in the CEQA process to make a finding in certifying an EIR that independent judgment was used in reviewing the document. Advocates of the bill say it will simply codify the procedures now permitted in the *CEQA Guidelines*.

The La Vina case began when two developers, Cantell-Anderson Inc. and Southwest Diversified Inc., sought to construct an apartment complex in Altadena. After three years of discussion, the county reduced the density of the project from 360 units to 274 units and approved the project. Friends of La Vina, an ad hoc citizens group, then sued, challenging the validity of the EIR on various grounds.

Relying on a series of appellate cases ending with *City of Poway v. City of San Diego*, 155 Cal.App.3d 1037 (1984), the majority concluded that "the `preparation' requirements of CEQA and the Guidelines turn not on some artificial litmus test of who wrote the words, but rather upon whether the agency sufficiently exercised independent judgment over the environmental analysis and exposition that constitute the EIR."

As for the conflict-of-interest issue, the majority ruled that Zebrowski had "assumed an unwarranted role....Except where the law clearly provides rules for identification and rectification of what might be termed conflicts of interest, that is a legislative not a judicial function."

The La Vina case may not be the last word on the question of developer-prepared EIRs. A similar case is currently pending before a different panel of the First District Court of Appeal in Los Angeles. In that case, which involves the Paramount Ranch property in Agoura Hills, Superior Court Judge David Yaffe ruled that L.A. County's system of developer-prepared EIRs is acceptable. (The case is going forward even though the owners and developers of the property have run into a series of financial problems. Most recently, the Santa Monica Mountains Conservancy purchased the developer's loan notes, hoping to obtain control of the property.)

At the same time, the FPPC has proposed regulations clarifying the EIR consultants' conflicts of interest under the state Fair Political Practices Law (Government Code Section 87100.)

The full text of Friends of La Vina v. County of Los Angeles appeared in the Daily Journal Daily Appellate Report on August 7, beginning on page 9519.

Angels' Suit Against Ex-City Manager Thrown Out

In a case brought in an apparent attempt to obtain attorneys' fees, an Orange County appellate court has concluded that the California Angels can't sue a former Anaheim city manager for fraud.

Golden West Baseball Co. v. William O. Talley is the latest chapter in a long-running dispute between the Angels and Anaheim over the deal Anaheim made to lure the Los Angeles Rams football team to Anaheim Stadium in 1980. As part of that deal, the city granted the Rams and an associated development partnership permission to build office buildings in the Anaheim Stadium parking lot. The Angels sued, claiming their agreement with the city prohibited construction of buildings on the lot. In 1989, an Orange County judge issued an order permitting some construction, but not as much as the Rams wanted.

As part of the same dispute, the Angels sued Talley, the longtime Anaheim city manager who now holds the same position in Dana Point. The Angels claimed that Talley misrepresented to the Rams that the Angels did not have a prior interest in the parking lot, and sued for damages of more than $1 million — the amount of attorneys' fees incurred in the dispute. Talley argued that he had done nothing wrong and, in any event, was protected from liability because at all times he was acting in his capacity as city manager.

The appellate court agreed with Talley and found no triable issues of fact. The court also admonished the Angels for attempting to use the Talley lawsuit as a means of recouping several million dollars in legal fees.

Still pending is Talley's countersuit against the Angels, which alleges that team executives engineered his dismissal as city manager in 1987.

The full text of Golden West Baseball Co. v. William O. Talley appeared in the Daily Journal Daily Appellate Report on August 2, beginning on page 9335.

State Fish & Game Board Denies Protection to Gnatcatcher

Continued from page 1

The purpose of the negotiation, according to Resources Undersecretary Michael Mantell, was to buy time to complete Wilson's new "Natural Community Conservation Plan" for coastal sage shrub — a plan to protect the entire ecosystem before the gnatcatcher and dozens of other species become endangered.

In an interview, Mantell said he fears that a consideration of listing for the gnatcatcher would have led to a narrow, single-species debate. "Unless we come up with a collaborative planning process, we're going to be stuck with a one-species-after-another debate," he said. (For details on Wilson's NCCP proposal, see accompanying story.) He also warned that if the gnatcatcher were under considering for listing, "The Fish & Game Commission would become the regional land-use planning agency for all of Southern California for a period of time."

Building industry sources confirmed that a "no" vote by the Fish & Game Commission was their price to stay at the table in negotiating the NCCP, which requires the participation of large landowners such as The Irvine Co. and the Santa Margarita Co. "Otherwise we'd have cowboys plowing up their land every night," one source said. But the NRDC's price to drop the Fish & Game petition — which the Wilson Administration was not willing to pay — was a moratorium on all development that would have "taken," or killed, any gnatcatchers in the interim. Reynolds called the NCCP a "useful and interesting process," but added: "It doesn't exist today, so it doesn't do the gnatcatcher any good."

Without the NRDC on board, Mantell went before the Fish & Game Commission and asked that the organization's petition to consider the gnatcatcher for listing be denied. He called a listing "premature" and promised that the Resources Agency would establish "milestones" for the NCCP process, which — if not met — would trigger reconsideration of the gnatcatcher. His request was greeted with laughs and catcalls by a mostly pro-gnatcatcher crowd of 300 people in the Long Beach City Council chambers. Nevertheless, the commission voted 3-1 to turn NRDC's petition down. The only dissenting vote came from Wilson's only appointee on the board, land developer Frank D. Boren. The other three members of the board are holdovers from the Deukmejian Administration.

Biologists and developers have been expecting a showdown over the gnatcatcher for years — ever since the controversy over the Stephens' kangaroo rat halted development in Riverside County. (See CP&DR Special Report: Federal Environmental Laws, June 1990.) The current battle arose in the context of NRDC's legal challenge to the San Joaquin Hills Transportation Corridor, one of three proposed tollways in Orange County. Both the NRDC, which recently opened a Los Angeles office, and the U.S. Fish & Wildlife Service expressed concern over the impact of the tollway on the gnatcatcher and on Bell's vireos, which is already on the federal endangered list. (*CP&DR*, June 1991.)

Though U.S. Fish & Wildlife was already considering the possibility of listing the gnatcatcher as endangered, NRDC petitioned the state Fish & Game Commission to consider listing as well, for an important practical reason: The state Endangered Species Act offers protecting during the one-year consideration period, while the federal law does not.

The building industry immediately mobilized against the NRDC's petition, saying that because of the gnatcatcher's vast range (some 250,000 acres), a consideration of listing would virtually shut down the building industry in the fastest-growing parts of Southern California. There were widespread reports of developers moving quickly to grade undeveloped land before the Fish & Game Commission acted, so that no gnatcatchers would be found on their land. Under the state law, the Fish & Game Commission is not permitted to consider the economic consequences of any action involving potentially endangered species.

At a boisterous hearing in Newport Beach on August 1, the Fish & Game Commission heard three hours of public testimony, including a Michael Brandman Associates report commissioned by the building industry which concluded that more than 100 square miles of gnatcatcher habitat was protected by public and/or park ownership — enough to ensure the species' survival. Brandman's Lee Jones was denounced as a "liar" by the pro-gnatcatcher crowd.

Wilson's Broader Policy

While environmentalists have been pushing for quick protection for the California gnatcatcher, Wilson Administration officials have been pushing instead for broader acceptance of its idea to create a "Natural Community Conservation Plan" for coastal scrub sage — habitat for the gnatcatcher and dozens of other potentially threatened species.

In theory, the NCCP idea is supposed to overcome two of the most obvious shortcomings of both the federal and state Endangered Species Acts — the fact that they focus on individual species instead of whole ecosystems, and the fact that they can't step in to offer legal protection until it's almost too late. These problems came to light with particular sharpness during the controversy in Riverside County over the Stephens' kangaroo rat. Having expended tremendous time and effort to establish a plan for preserving the K-rat, Riverside County officials are now trying to establish a huge "multi-species habitat" that would protect species before they qualify for endangered or threatened status. (See CP&DR Special Report: Federal Environmental Laws, June 1990.)

Under a strategy drawn up by Resources Undersecretary Michael Mantell, NCCPs would be used, in effect, as a means of producing multi-species wildlife habitats in areas with many species that might otherwise become endangered. Legislation authorizing NCCPs has been working its way through the legislature in the form of AB 2172 (Kelly). But in the case of coastal sage shrub, the effort has not yet won over environmentalists, who say that it does not have enough protections in place now to help the gnatcatcher. The NCCP idea has also lost credibility among environmentalists because of its support from Orange County developers such as the Irvine Co.

The NCCP process would begin by coordinating the efforts of several parties, including private landowners and the U.S. Fish & Wildlife Service, which administers the federal Endangered Species Act. The Resources Agency, parent agency to the state Department of Fish & Game, would then select a "Scientific Review Panel" to provide scientific advice. Both regional and sub-regional plans would then be drawn up, and in the interim government agencies would negotiate temporary agreements with important landowners. Eventually the state Department of Fish & Game would designate "significant natural areas" whose disruption would trigger various environmental review processes. Some land may also be bought or donated by developers, as in the K-rat solution. Implementation of NCCPs would be left mostly to local governments.

In the case of coastal sage scrub, the Resources Agency began the NCCP process last spring by selecting a five-member Scientific Review Panel. Mantell has promised that the Department of Fish & Game would soon designate coastal sage scrub as a "significant natural area," triggering stricter scrutiny under the California Environmental Quality Act.

COURT CASES

Ninth Circuit Upholds Linkage Fees in Case From Sacramento

Continued from page 1

(See accompanying story.) Several Silicon Valley cities are also considering linkage fees, and Cupertino has already negotiated ad-hoc linkage payments on two new projects, one with a shopping center developer and the other with Apple Computer.

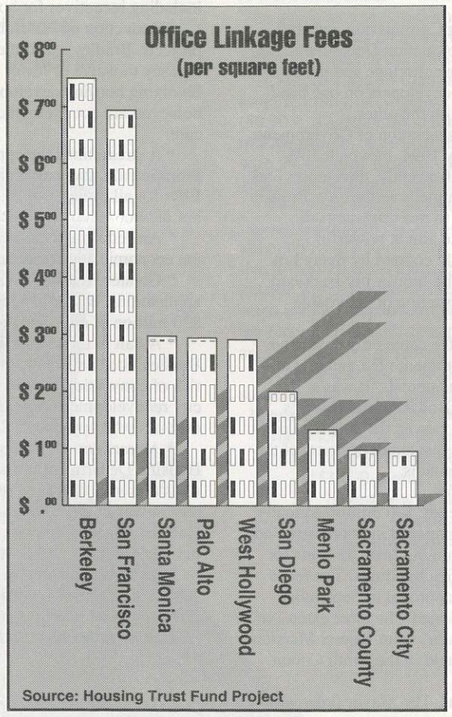
The Sacramento case, Commercial Builders of Northern California v. City of Sacramento, is considered the first important legal test of developer fees and exactions since the U.S. Supreme Court's ruling four years ago in *Nollan v. California Coastal Commission*, 483 U.S. 825. The court ruled in Nollan that conditions of development must have a direct relationship — or "nexus" — to the development project itself. Since Nollan, local governments seeking to impose fees on new projects have often hired economic consultants to conduct "nexus" studies establishing the relationship between project and fee.

In the Sacramento case, the Pacific Legal Foundation, representing the builders, is seeking a refinement of the Nollan
ruling that will establish strict standards for establishing a "nexus." "We're saying you've got to draw the line," PLF lawyer Groen said.

However, the Ninth Circuit did not draw the line where PLF and the builders wanted. Rejecting the builders' claim that the linkage fee constituted a "taking" of property by regulation, a majority of the three-judge panel that heard the case concluded the fee system "cannot be said to work an unconstitutional taking. It was enacted after careful study....It assesses only a small portion of a conservative estimate of the cost of such housing. The burden assessed against the developers thus bears a rational relationship to public cost closely associated with such development."

However, in a fiery dissent, Judge Robert Beezer called the fee system "a transparent attempt to force commercial developers to underwrite social policy." He added: "Although Sacramento attempts to justify the ordinance as an exercise of its police power, the city actually is exercising its taxing power — free of the encumbrances generally thought to limit the exercise of that power."

The city approved the fee system in 1989, estimating that it would raise approximately $3.6 million per year, or 9% of the annual cost of the city's affordable housing program. The fees range from 95 cents per square foot for office buildings down to 25 cents per square foot for warehouses. A central issue in the case was the adequacy of the nexus study prepared by Keyser-Marston Associates, which was use to justify the fee. The builders' own planning consultant, David Wade, argued that new commercial development is but one of many factors affecting the need for affordable housing in Sacramento. In fact, Wade said, low-income workers are drawn to Sacramento not only by new jobs but also by the availability of existing affordable housing.



The Ninth Circuit majority was not persuaded by the Wade study, however. "*Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question," the majority wrote. "Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld....We find that the nexus between the fee provision here at issue, designed to further the city's legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster."

In his dissent, Beezer pointed out that even the Keyser-Marston study states that it "does not make the case that building construction is responsible for growth" and said he fears that"we can be expected next to uphold exactions imposed on developers to subsidize small business retailers, child-care programs, food services, and health-care delivery systems."

The builders have asked for a rehearing before a larger Ninth Circuit panel. But PLF is clearly eager to get the Sacramento case before the U.S. Supreme Court. Representing a Ventura County homeowner, PLF won the *Nollan* case on a shaky 5-4 vote. But two of the dissenters in the *Nollan* case, Justices William Brennan and Thurgood Marshall, have since retired.

In the meantime, however, the split Ninth Circuit decision gives more legal support to the linkage fees in place — and those now being considered by cities around the state. "I think our advice has to be that you've got to assume that *Nollan* says what it says, and do your nexus work, and if you do it well enough it'll pass muster," said Alletta Belin, who represented Sacramento before the Ninth Circuit. "Otherwise any agency contemplating impact fees would have to wait five years for the U.S. Supreme Court to rule on the case."

During this interim period, housing linkage fees are expected to affect not only builders, but also companies seeking to expand their facilities or build new plants.While the builders continue to fight the fees, other companies, concerned with attracting and retaining employees, may be less reluctant to embrace housing requirements.

This divergence of views may become most dramatic in the Silicon Valley, where several of the state's largest computer companies want to expand their operations in cities not always receptive to development.

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COURT CASES

L.A. County Policy on Nudist Camps Declared Unconstitutional

In a split decision, a Court of Appeal panel has declared that Los Angeles County's zoning ordinance discriminates against nudist camps and is therefore unconstitutional. However, the court declined to overturn the county's 1985 decision not to grant a Topanga Canyon nudist camp's request to continue operating as a non-conforming use.

The dispute between the county and the Elysium Institute has a long history dating back to 1971, when the county zoning ordinance was amended to prohibit nudist camps in the A-1 zone, an agricultural designation used in areas that border on developed communities. Under the 1971 change, nudist camps were permitted only in the A-2 zone — typically used to designate more remote agricultural areas — and the Elysium Institute became a legal non-conforming use, a designation valid for five years.

In 1976, Elysium requested a five-year extension, which was denied by the county. The nudist camp sued in 1980, and after a court order, the county reconsidered the request to extend the non-conforming use. The Board of Supervisors denied the application in 1985 and Elysium sued again.

The Elysium lawsuit challenged the zoning ordinance as unconstitutional and also claimed that the ordinance created a taking of Elysium's property without compensation. Superior Court Judge Norman R. Dowds ruled in favor of the county, and the nudist colony appealed the case. The appeal included a broad array of constitutional issues, including an argument that freedom of expression was being violated, as well as a claim that the evidence did not support Judge Dowds' ruling.

In the Court of Appeal, a two-justice majority quickly rejected the concept of nudity as expression, but went on to find that the zoning ordinance's treatment of nudist camps violates the equal protection clauses of the state and federal constitution. Writing the court's opinion, Justice Mildred L. Lillie noted that while the 1971 amendments forced nudist camps to locate only in A-2 zones, similar establishments, such as recreational clubs, are permitted to remain in A-1 zones if they obtain a conditional use permit. "The distinction between nudist camps and recreational clubs bears no rational relationship to a conceivable legitimate purpose," Lillie wrote.

However, the majority did not go on to overturn the county's decision to deny Elysium an extension of the camp's status as a non-conforming use. In so doing, the justices determined that the county had "in essence deemed Elysium to be a use permitted in zone A-1 subject to a conditional use permit" and "county denied such a permit." The majority also rejected Elysium's challenge to the county's standards for conditional use permits.

In dissent, Justice Earl Johnson Jr. criticized the majority's decision on the issue of the conditional use permit as speculative. "(W)hat we have here is speculation on top of speculation on top of speculation. It is mere speculation that Elysium would have been required to apply for a CUP if it had been considered a permitted use. If a CUP could have and would have been required, it is mere speculation the county would have denied Elysium that CUP. Furthermore, it is mere speculation the county's decisions to require and to deny a CUP would have withstood a challenge based on discriminatory treatment of a constitutionally protected activity involving freedom of association.

"The proper disposition of this case," Johnson wrote, "is to reverse and allow Elysium to be considered as a permitted use in Zone A-1 with whatever consequences that might have in the future under the conditional use permit process."

The full text of Elysium Institute Inc. v. County of Los Angeles, No. B031797, appeared in the Daily Journal Daily Appellate Report on July 23, beginning on page 8743.

Marin Acted Properly in Permitting Chabad Synagogue, Court Rules

Marin County properly granted a conditional use permit to an orthodox Jewish synagogue seeking to operate in a residential neighborhood, the First District Court of Appeal has ruled.

Marin County Superior Court Judge William Stephens had overturned the county's approval of the CUP, saying, among other things, that the Board of Supervisors had given Chabad of North Bay preferential treatment under the county zoning ordinance. The appellate court acknowledged that County Counsel Douglas J. Maloney had advised the supervisors that the burden of proof in this case belonged to the county and not to Chabad. But the justices concluded that the supervisors would have approved the CUP anyway.

The case, which the appellate court said had "occasioned intense emotion and advocacy," began when Chabad purchased a large single-family home in the Lucas Valley residential neighborhood near San Rafael. Under the Marin County zoning ordinance, religious institutions are permitted in single-family residential zones if they obtain a CUP, which Chabad applied for.

Chabad's request generated substantial neighborhood opposition. More than 600 Lucas Valley residents signed a petition asking the county to deny the CUP. Nevertheless, in 1989 the Board of Supervisors approved the application, imposing strict conditions on the number of people permitted to attend various Chabad functions. Because the congregation is required by orthodox Jewish law not to drive on the sabbath — and because some 60 on-street parking spaces were available — Chabad received an exemption from the county's requirement for 21 off-street parking spaces.

The Lucas Valley Homeowners Association sued, and Judge Stephens overturned the county's action, concluding that (1) Chabad cannot be given preferential treatment; (2) the board's findings were not supported by the evidence; (3) the permit conditions restricted Chabad's religious freedom; (4) the board abused its discretion in granting Chabad an exception to the parking requirements; and (5) the board should have required an environmental impact report.

The appellate court reversed on all counts. The court agreed that religious institutions may not receive preferential treatment on land-use issues. The county counsel had advised that Chabad could not be denied the use permit solely because of a lack of off-street parking, since permit conditions prohibiting Chabad would be suspect under the First Amendment.

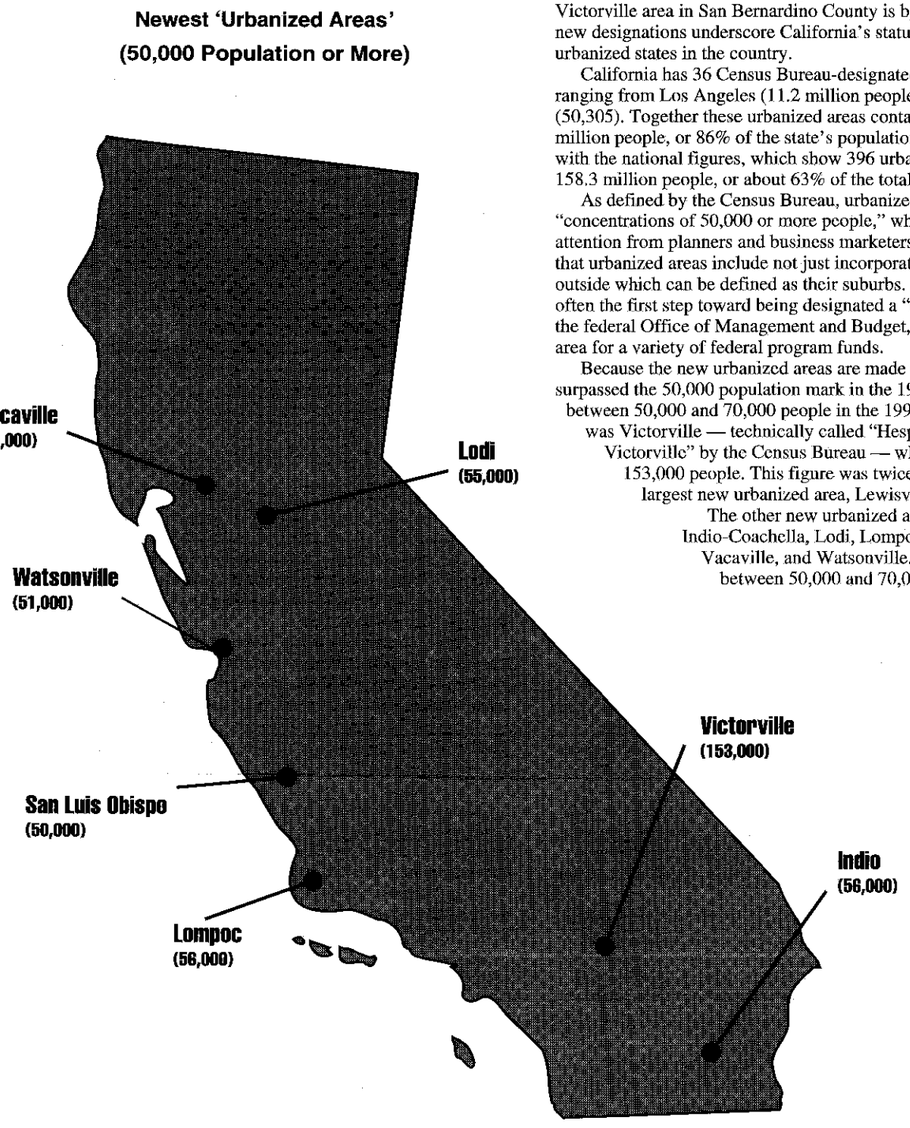
"From our review of the entire record, we cannot say it is more probable than not that the supervisors who approved the permit did so under compulsion of the county counsel's legal advice," wrote Justice Carl W. Anderson for a three-justice panel. "However, assuming for purposes of argument that all the supervisors heeded this advice, we still must ask whether it is more likely than not that the Board would have denied the permit had it adhered to `normal' procedures....We think not. This is because, based on our evidentiary review ... we find there was overwhelming evidence that the project, approved, would not be a detriment to the community or have a significant environmental impact on Lucas Valley."

The appellate court also ruled that the county did not abuse its discretion in making a parking exception, and that an environmental impact report was not needed.

The full text of Lucas Valley Homeowners Association v. Chabad of North Bay, A049762, appeared in the Daily Journal Daily Appellate Report on August 16, beginning on page 10005.

BY THE NUMBERS

Victorville Leads California's Seven New 'Urbanized Areas'



Source: U.S. Census Bureau

The U.S. Census Bureau has designated 33 new "urbanized" areas in the United States — including seven in California — and the Victorville area in San Bernardino County is by far the largest. The new designations underscore California's status as one of the most urbanized states in the country.

California has 36 Census Bureau-designated urbanized areas, ranging from Los Angeles (11.2 million people) to San Luis Obispo (50,305). Together these urbanized areas contain approximately 25.4 million people, or 86% of the state's population. This contrasts sharply with the national figures, which show 396 urbanized areas containing 158.3 million people, or about 63% of the total population.

As defined by the Census Bureau, urbanized areas are "concentrations of 50,000 or more people," which often receive extra attention from planners and business marketers. This definition means that urbanized areas include not just incorporated cities, but the areas outside which can be defined as their suburbs. An urbanized area is often the first step toward being designated a "metropolitan area" by the federal Office of Management and Budget, which may qualify an area for a variety of federal program funds.

Because the new urbanized areas are made up of locations which surpassed the 50,000 population mark in the 1980s, most of them had between 50,000 and 70,000 people in the 1990 Census. The exception was Victorville — technically called "Hesperia-Apple Valley-Victorville" by the Census Bureau — which has a population of 153,000 people. This figure was twice as much as the next-largest new urbanized area, Lewisville, Texas.

The other new urbanized areas in California area Indio-Coachella, Lodi, Lompoc, San Luis Obispo, Vacaville, and Watsonville. All have populations between 50,000 and 70,000.

COURT CASES

Linkage Fees Highlight Bradley's New Housing Policy for L.A.

Furthering a newfound activism on planning issues, Los Angeles Mayor Tom Bradley has offered an eight-point program has offered highlighted by a new housing linkage fee.

Addressing the city's Affordable Housing Commission and staff members of the Housing Preservation and Production Department, the mayor declared that L.A. an imminent housing shortage and portrayed himself as steering a middle course between developers on one hand and the city's substantial slow-growth lobby on the other.

Statistics from the Southern California Association of Governments show the city needs 130,000 housing units by 1994, of which 70% would require either incentives or subsidies. Currently, developers and public agencies produce only 15,000 units annually in the city. Bradley said L.A. must double its current production to meet the demand.

In his remarks, the mayor appeared to take aim at powerful neighborhood groups, a constituency currently courted by many Los Angeles politicians. The city "cannot allow the 'not-in-my-backyard' forces to create artificial barriers to the construction of affordable housing."

The announcement of a housing-linkage fee came only days after the Ninth Circuit decision upholding the Sacramento fee, but mayor's housing coordinator said the timing was coincidental. "It was a harmonic convergence," said a wry Michael Bodaken, the mayor's housing coordinator. Bodaken added that he viewed the appellate court decision as "supportive" but that the mid-August announcement of the Mayor's planning strategy had been set for months.

Bradley's eight-point housing plan calls for:

* A housing linkage fee, intended to generate $30 million annually. A sliding-scale assessment, similar to those imposed in Sacramento and San Diego, would tax commercial projects ranging from 65 cents for low-end industrial to $6 a square foot for office buildings. The fee is expected to go before City Council for final approval in September.

According to Bodaken, the city commissioned "the most extensive" feasibility study of a linkage fee yet undertaken" from Keyser Marston Associates whose Sacramento study was upheld in the Ninth Circuit case.

* Concentration of housing at rail stations. The Mayor ordered the Affordable Housing Commission to collaborate with the Los Angeles County Transportation Commission on a comprehensive land-use plan, including incentives for housing production at transit centers.

* Reduction of "air rights" fees on downtown Los Angeles housing projects. Bradley asked the Los Angeles Community Redevelopment Agency to waive or lower a $35-a-square-foot fee on density transfers involving housing developments in the CBD. Commercial projects, however, are not exempted from the fee, which funds housing and day care.

* A streamlined the approval process for housing developments. Significantly, the mayor called for re-examining the policy of requiring EIRs for all projects of 35 units and above,
but did not specify a new threshold number.

* An "education campaign" aimed at residents to persuade them of the economic and social value of affordable housing.

* Greater Housing Department capacity to process a housing applications. Bradley ordered the agency to "expedite" applications for $20 million of city funds for housing.

* A halt to the conversion of affordable units to market-rate rents. Bradley cited expectations that 10,000 federally subsidized units are at risk of conversion to market-rate units. The mayor said he wants the city redevelopment and housing agencies to negotiate with the federal officials who approve such conversions.

* A crackdown down on slumlords. The mayor instructed the Housing Department to start a program to rehabilitate "thousands" of units currently managed by slumlords. Local investors would avail themselves of city and federal funding to purchase rundown buildings. Half the funds are to come from expected federal housing monies, and the other half from either the city or conventional lenders.

Bradley's announcement followed a speech to the planning staff in July in which he urged planners not to cave in to either pro- or slow-growth special interests. (*CP&DR Briefs*, August 1991.)

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Morris Newman

Supreme Court 'De-Publishes' Cucamonga School Fee Case

The California Supreme Court has "de-published" an important school fee case from Rancho Cucamonga — meaning that the high court has completely declined to get involved in the raging legal battle over school fees.

In *Lincoln Property Co. v. Cucamonga School District*, 229 Cal.App.3d 394, the Court of Appeal in San Bernardino upheld a school district's ability to rely only on its police power — not on the 1986 School Facilities Act — to impose fees on new development.

But the Supreme Court declined to hear the case and decertified it as well — meaning the case will not be included in official case reporters and cannot be cited as precedent. Earlier this year, the Supreme Court also declined two other important school fee cases, *Murrieta Valley Unified School District v. County of Riverside*, 228 Cal.App.3d 1212, and *William S. Hart Union High School District v. Regional Planning Commission*, 226 Cal.App.3d 1612.

The school fee issue has become contentious because of the apparent breakdown of the system of financing school facilities laid out in the 1986 law. Under a compromise-struck at the time, school districts were authorized to impose development fees, but those fees were limited to about $1.50 per square foot for residential projects and 25 cents per square foot for non-residential projects. In exchange for this limitation, the state was to provide the rest of the money necessary for school construction.

However, state funds for school construction lagged far behind need, and school districts began suing cities and counties in an effort to force them to extract more school construction funds from developers. Despite the fee limit contained in the School Facilities Act, the Court of Appeal ruled in Murrieta Valley that counties were not prohibited from dealing with school crowding issues in the development approval process. As a result, local governments and school districts have been preparing higher fee schedules than the '86 law allows.

The Lincoln case, which arose prior to the passage of the '86 law, was important because it ruled that a school district did not have to rely on School Facilities Act for legal authority to impose fees on developers. The court said school districts had been granted such authority by Article IX, Section 14, of the California Constitution, enacted by initiative in 1972, which permitted school board to carry out any school-related activity not prohibited by law.

Lincoln Property Co. v. Cucamonga School District was originally reported in the June 1991 issue of CP&DR. The school fee issue was also covered extensively in the May and July issues.

DEALS

Chino Hills: The Best-Laid Plan Runs Into Problems

The specific plan for Chino Hills, an unincorporated community in San Bernardino County, drew wide attention in the early 1980s as a progressive and innovative example of community planning. A virtual new town, Chino Hills was praised at the time as a sophisticated and thoughtful attempt to coordinate physical development and the financing of infrastructure from the start.

But the best-laid plan has led to some pretty typical results. The paradigmatic suburb has encountered a number of paradigmatic difficulties: cost overruns, traffic snarls, slow-growth sentiment and resultant downzoning, and an unpredictable housing market. Unrealistically low development fees led to problems in paying off bonds, and, later, to a fee structure that makes newcomers pay more than their share. And eager to keep their tax money at home, Chino Hills residents will vote in November on incorporation. In short, the experience of Chino Hills offers some sobering insights into the way land-use planning and infrastructure finance interrelate in the real world, where the best-laid plans must contend with the vagaries of the marketplace, cost overruns, and incendiary land-use politics.

Chino Hills is an 18,000-acre area of rolling hills and oak trees in the "panhandle" area of western San Bernardino County, not far from Chino and Pomona. "It's a delightful place," says Ken Topping, former San Bernardino County planning director and one of the forces behind the creation of the Chino Hills Specific Plan. Foreseeing eventual development, Topping and other officials decided in 1978 the county should act as a sort of "master developer" of the area. After consulting with about 100 local property owners, the county put together a coordinated plan for both infrastructure and financing. The plan called for about 40,000 housing units (including 21,000 apartments) yet still provided for suburban amenities, such as plentiful open space, protection for environmentally sensitive areas, and protections for a nearby dairy preserve.

More important, county officials and their consultants devised an intricate web of funding sources to provide up to $500 million in infrastructure, including assessment districts, developer fees, infrastructure fees, and Mello-Roos bonds. The financial plan also offered inventive touches. Developers were encouraged to build infrastructure themselves, with construction costs credited against developer fees; those who build more than they owe in fees were to be reimbursed quickly. In addition, the bonds from three assessment districts would be paid off not by taxes on the homeowners but by up-front development fees, paid before the homeowners ever even arrived. "Never before has there been a direct relationship between developer fees and retirement of debt," says bond consultant Norman McPhail, who helped underwrite the Chino Hills bonds while employed at Miller Schroeder of Solano Beach.

Despite the elegance of the plan, it ran into problems almost from the beginning. The developer fee/assessment district scheme did not work out as anticipated. The first of Chino Hills' three assessment districts had a hard time servicing its debt. A weak housing market in the mid-'80s meant development fees didn't roll in as quickly as the plan projected, and even when the fees did arrived, they turned out to be too low to cover the true cost of infrastructure.

The bonds were restructured and refinanced, but that still didn't solve the problem of runaway infrastructure costs. The only way to cover those costs was to jack up development fees dramatically — from $4,200 in 1986 to $13,700 currently, with another increase to $18,000 due soon. Those fees are now among the highest in San Bernardino County. Although it is unlikely that anybody wanted it that way, this means the new fee structure makes newcomers pay the lion's share for infrastructure used by all.

Getting the infrastructure in place proved to be a problem as well, and this did not sit well with the arriving homeowners, who quickly developed a slow-growth attitude. A major arterial highway called Grand Avenue was not forthcoming, meaning that the two-lane Carbon Canyon Road remained the principal access road to the area up until this year. "Unfortunately, most of the (residential) development is to the east of Chino Hills, while the job market is to the west in Orange County and Los Angeles, so obviously the traffic all funnels through here," says Karen Bristow, a Chino Hills resident and former San Bernardino County planning commissioner.

The discontent in Chino Hills helped to elect Larry Walker, the slow-growth mayor of Chino, to the San Bernardino County Board of Supervisors in 1986. Walked railed against the project's cost, timing, and density — "that is," he says now, "just about everything." He pushed to get construction of Grand Avenue moving, but concentrated most of his venom on the 21,000 apartments, which he says would have created an overly density community in an area "that is largely committed to moderate and low densities."

Bolstered by the traffic complaints of the Chino Hills residents, Walker pushed for — and got — a successful (if naive) downzoning in the area last year. Total housing units were cut by 35%, from 40,000 to 25,000. And the downzoning resulted in a radical redistribution of unit types, so that the single-family/apartment split went from 52/48 to 72/25. (In fact, the number of single-family units actually increased under the downzoning.)

Walker remains deeply dissatisfied with the plan and says the county would have been better off all along without it. "They corrected the errors, insofar as you can undo a mistake that has already been done," he says. As for the residents, they're still unhappy too — a factor which may play a role in the November incorporation election. "The community thought reducing density would cure traffic," says Bristow. "Of course, it didn't."

A lot of the criticism is just so much pull-up-the-gangplanks rhetoric on the part of Walker and his Chino Hills constituents. But a lot of it is justified. McPhail, now a private bond consultant, acknowledges that the original financial scheme deliberately kept development fees low in order to foster growth. "Keep in mind had the fees been higher, or had the property owners thought they would have to pay big (assessments) for 20 years, the project probably would not have gotten half the response it did," he says. "Even though some fundamental assumptions proved to be not very workable, had all those elements not come together, the project would have been delayed for years and would not have been ready to enjoy the full impact of the housing boom in the late 1980s."

To put it more bluntly, Chino Hills boomed because it was a bargain for builders, because the "numbers" were too good to be true. If the numbers had been more realistic, perhaps the builders won't have come — but neither would Chino Hills have been visited by infrastructure problems, financial woes, and the resulting slow-growth rhetoric.

So what is the report card on the Chino Hills specific plan? Probably very high marks for the ingenious coordination of bonded debt and fees — an experiment that bears repetition and refinement. Low marks for cost estimation and for the slow pace of putting in the roads. The rest of the story, however, just shows how much there is about planning that's beyond the control of planners: housing booms and busts, the political reaction to regional transit problems, slow-growth panaceas for those same problems — and letting in just enough newcomers to pay your bills.

Morris Newman