CALIFORNIA PLANNING & DEVELOPMENT REPORT

October 1991 | William Fulton, Editor & Publisher | Vol. 6, No. 10

Wilson Won't Tip Hand On Growth Policy

Governor Pete Wilson is expected to unveil his statewide growth management proposal in less than three months. But Richard Sybert, Wilson's chief growth management strategist, is holding his cards close to his vest, revealing little about what the governor is likely to propose.

Wilson is expected to present a growth management strategy during his State of the State speech in January, with a package of proposed legislation to follow. Sybert is on the record as favoring the coordination of policies among state agencies, and the Wilson Administration has publicly endorsed the idea of rethinking how sales-tax revenues are distributed to local governments. But how the governor will choose to attack the question of regional governance — the overriding question in the growth management debate — is anybody's guess at this point.

Four legislative leaders introduced growth management bills this year — including Assembly Speaker Willie Brown — but did not try to push them through the Legislature because they are awaiting Wilson's plan. At the same time, California State University, Sacramento, convened the Growth Management Consensus Project — an attempt to bring together all the "stakeholders" in the growth process in hopes of reaching consensus on basic issues. Though success was limited, those involved say that a dialogue began among interest groups — builders, cities, environmentalists — that *Continued on page 5*

Species Controversies Continue to Abound

Development interests and environmentalists continue to battle throughout the state over endangered species issues. The controversy is putting pressure on the Wilson Administration to make complete its fledgling effort to draw up broad-based conservation plans in areas where rare species live, and may also help shape the debate in Washington next year over reauthorization of the federal Endangered Species Act.

In developments around the state in the last month:

• The U.S. Fish & Wildlife Service has proposed listing the California gnatcatcher as an endangered species — meaning, in all likelihood, that the small songbird will receive full federal protection one year from now. The action came only a week after the California Fish & Game Commission, at the Wilson Administration's urging, denied a petition to consider listing the gnatcatcher as endangered under state law. (*CP&DR*, September 1991.)

• The federal government is overdue on a decision to declare its intention to list as endangered another rare bird, the cactus wren, that lives in the same Southern California "coastal sage scrub" habitat where the gnatcatcher also resides.

• Meanwhile, in Northern California, the Fish & Wildlife Service has become embroiled in another endangered species controversy involving a small fish known as the Delta smelt.

In late September, Fish & Wildlife proposed listing the smelt as a "threatened," rather than an "endangered" species, a move that would not lower the *Continued on page 3*

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Endangered Species Controversies Continue Throughout State

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threshold of protection but would give state water officials more flexibility in meeting the letter of the federal law.

• And President Bush has decided to create a so-called "God Committee" to determine which areas of Northern California and the Pacific Northwest may be logged despite the presence of the spotted owl, a federally listed endangered species. The "God Committee" provision was added to the federal Endangered Species Act as an "escape valve" in situations where economic and environmental interests clash, but it has not been used since the snail-darter episode in the late 1970s.

Gnatcatcher and Wren

The U.S. Fish & Wildlife Service's decision to propose the California gnatcatcher for endangered status seems sure to bring controversy over the small bird. Fish & Wildlife rarely proposes a listing unless the agency is almost certain that a listing is warranted. Since the listing is likely to become official one year from now, the federal action essentially imposes a one-year time limit on the Wilson Administration's experimental attempt to create a "Natural Community Conservation Plan" for the coastal sage scrub habitat where the gnatcatcher — and perhaps as many as 40 other potentially endangered species — live.

Environmentalists are pushing for a listing of the gnatcatcher as endangered, a move that would automatically prohibit any activities — such as new development — that would "take," or kill, any of the birds. Building industry officials are opposing the proposed listing, which they say would virtually shut down construction in vast undeveloped areas of Orange, Riverside, and San Diego counties.

Meanwhile, the Wilson Administration has been trying to draw up a broad-based conservation plan for coastal sage scrub that would seek to protect dozens of rare species that live in the area and could emerge as endangered in the next few years. The concept, according to Resources Undersecretary Michael Mantell, is to save an entire ecosystem and avoid one fight after another over individual species.

In pursuing the broad-based goal, however, the Administration has been forced to choose between the environmentalists, who see listing for the gnatcatcher as a precondition for such negotiations, and the builders, who want the gnatcatcher listing dropped as a precondition for such negotiations. In August, the state Fish & Game Commission — at the request of the Wilson Administration — declined to consider listing the gnatcatcher as endangered under the state Endangered Species Act, an action that would have afforded the bird immediate protection. (*CP&DR*, September 1991.) This move kept the builders at the table in negotiating out the conservation plan but alienated environmentalists. Attorney Joel Reynolds of the Natural Resources Defense Council, which asked for the gnatcatcher listing, says he is willing to continue negotiations over the broad-based conservation plan, but only if the gnatcatcher listing is permitted to proceed.

In the meantime, Mantell continues to negotiate with the builders, as well as the U.S. Fish & Wildlife Service, over the coastal sage scrub habitat. But Fish & Wildlife's proposed regulation to list the gnatcatcher as endangered means, in essence, that the Mantell negotiations have until next fall to bear fruit. At that time — no matter what is happening with the conservation plan — the gnatcatcher will probably be listed as endangered under the federal law, meaning new construction will be shut down. Under federal law, "takes" are sometimes permitted if a conservation plan to protect the species is in place. This strategy allowed development to proceed in Riverside County when the Stephens' kangaroo rat was listed as endangered. But the federal government cannot guarantee prior to the listing of a species that a conservation plan will be accepted.

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BRIEFS

No S.F. Beauty Contest Winner This Year

Angered that past winners haven't built their skyscrapers, the San Francisco Planning Commission has refused to select a winner in this year's "beauty contest" competition for downtown office buildings.

This year's competition drew two entries: a proposed 28-story tower by Bechtel Investments Realty Inc. and a 26-story building by Jaymont Properties. Both buildings are in the 350,000-square-foot range, meaning the city — under the 475,000-per-year limitation imposed by Proposition M in 1986 — would have been able to select only one.

Planning Director Dean Macris recommended approval of the Bechtel building, but planning commissioners complained that neither proposal included a firm commitment to actually construct a building. Meanwhile, Macris criticized past beauty contest winners who are not moving ahead with their projects, but have retained their right to build by excavating their property.

Visalia City Manager Resigns

City Manager Don Duckworth of Visalia has resigned amid heavy criticism over his handling of a downtown redevelopment project.

Earlier this year, the council reprimanded Duckworth for advancing $185,000 to the architect of Visalia's new convention center, rather than $80,000 as the council had approved. Fresno architect Warren Thompson requested the funds immediately after writing a check for the same amount to William Courtney, a developer who was working with the city on a hotel project in the downtown redevelopment area. Courtney used the money to help get financing for the hotel, and Thompson repaid the extra $105,000 to the city five days later. *(CPDR Deals,* July 1991.)

The council called Duckworth's handling of the situation "inappropriate" but not illegal. In a closed session in July, the council asked Duckworth to resign. The resignation was made public in September and was scheduled to take effect October 4.

Audit Finds Problems With S.D. Planning

A management audit by Deputy City Manager Severo Esquivel has found that the San Diego City Planning Department is slow and lacks accountability. "There is a low level of customer satisfaction," concluded Esquivel, who is overseeing the department's operations now that Planning Director Robert Spaulding has resigned.

Esquivel's report found many problems, including a failure to meet minority hiring goals and poor performance among planners. He said the role of City Architect Michael Stepner — a former assistant planning director who lost out to Spaulding for the top planning job in 1987 — is unclear, and also said community planning groups, the planning commission, and the city council duplicate each other's work.

Spaulding departed earlier this year after the city council learned that the city manager had secretly approved a $100,000 payment to settle a sexual harassment claim by former city planner Susan Bray. Spaulding has filed a multimillion-dollar claim against the city over his forced resignation, while Bray has filed a federal lawsuit claiming the city broke a confidentiality agreement on the settlement and therefore violated her civil rights. The city rejected her $2.35 million claim on the confidentiality issue in July.

Legislative Roundup Next Month

The Legislature adjourned in late September, leaving Governor Pete Wilson with 30 days to sign or veto hundreds of bills. *CP&DR* will provide comprehensive coverage of the Legislature's 1991 session — and Wilson's own action — in the November issue.

Rail Transit Update

Rail transit plans continue to be debated all over Southern California. Here are a few samples of what's going on:

• The Anaheim-Las Vegas "bullet train" might need some kind of government subsidy in order to proceed. Bechtel Corp. has told the California-Nevada Super Speed Ground Transportation Commission that it might require loan guarantees or tax-exempt bond funding to build the $5 billion project on schedule. The magnetic-levitation train would travel between Anaheim and Las Vegas in 90 minutes or less.

• Orange County's draft transit plan calls for a 25-mile elevated rail system and additional commuter rail service. A study prepared for the Orange County Transportation Agency calls on the county to add eight new trains and four stations on the existing Amtrak line and build an elevated line between Fullerton and Irvine.

• The cities of El Cajon and Santee have settled their longstanding legal dispute with San Diego's Metropolitan Transit Development Board, allowing a light-rail expansion into the El Cajon-Santee area to proceed. MTDB agreed to build an overpass for the train at a key intersection in El Cajon, so long as the city pays for half the cost.

Tide of Water Commuters May Rise

San Diego and Santa Monica are considering proposals to allow commuters to travel by water, rather than rail or road.

Cruise promoter Ted Gurnee is interested in starting ferry service at Oceanside Harbor in north San Diego County that could connect commuters to downtown San Diego or to Orange County.

In Santa Monica, Associate Planner Paul Foley has proposed the creation of a water taxi route to Redondo Beach and other South Bay cities.

Both ideas received early support from public officials.

Roundup

Lancaster City Councilman William Pursley acknowledged he should not have voted to approve one Kaufman & Broad housing project because he had sold land to K&B in a separate deal....Eight Ventura County cities have **routinely exceeded housing allocations** contained in their growth-control ordinances, according to the Los Angeles Times....Its tax-sharing dispute with Fresno County now settled, the Fresno City Council is working on **a backlog of 30 annexation proposals** that have piled up since 1987.

CALIFORNIA PLANNING & DEVELOPMENT REPORT

is published monthly by

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

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Subscription Price: $179 per year
ISSN No. 0891-382X

Wilson Won't Tip Hand on Growth Management Proposal

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traditionally have not talked to each other much. If both Wilson and Brown indicate they are serious about getting something done, a statewide growth management law could be in place by 1993.

What such a law would contain, however, is hard to predict at this point. Brown's bill calls for the creation of powerful agencies at the regional level — in effect, regional growth "legislatures." But Wilson has resisted such a heavy-handed approach. In last year's gubernatorial campaign he insisted that he opposes "land-use planning from Sacramento," and he has repeatedly called for methods that will allow local governments to work together in solving growth problems.

Under the direction of Sybert, director of the Governor's Office of Planning and Research, Wilson's Growth Management Council — a staff-level working group — has been analyzing the issue since January; 13 hearings around the state were conducted during the summer.

In a recent interview with columnist Bradley Inman, top Wilson aide Loren Kaye predicted the governor would make "bold proposals" in his growth management package.

But Sybert is more circumspect. "We're much more interested in being effective than in being bold," he said. He says that Wilson is naturally inclined toward providing local governments with incentives to work together, rather than imposing harsh requirements on what they must do. "He much favors carrots over sticks," Sybert says.

Regional Governance

The knottiest political problem any growth management bill is likely to confront is the question of regional governance. Presently, cities and counties are required to follow state guidelines in drawing up myriad local planning documents, but they have little obligation to consider broad regional issues. At the same time, powerful "single-issue" agencies deal with such issues as air quality and transportation on a regional basis, but have little obligation to relate them to land-use issues.

In other states where important growth management laws have been passed, land-use planning and permitting powers have remained in local hands, but the state has taken an active oversight role. For example, in Florida, state officials must review and approve all local general plans, measuring them against a few clearly articulated state policy goals. (State agencies must follow those policy goals as well.)

Many California growth experts have argued that the state is so big that this kind of power — if it exists at all — should reside at the regional level, not in Sacramento. Bills introduced by Brown (AB 3), Assemblyman Sam Farr (AB 76), and Senators Robert Presley (SB 929) and Marian Bergeson (SB 434) all call for some type of regional growth management agency to be created in most metropolitan areas. Depending on the individual bill, these agencies could be either mandatory or voluntary; they might operate on the regional or the sub-regional level

Even most of these legislators, however, acknowledge that public resistance to "another layer of government" is high. And local governments traditionally have resisted any move that would dilute their own power. Sybert says that any solution must deal with "tradeoffs and interrelationships" among different regional issues and different levels of government, but he won't tip his hand about what form of regional governance he — or the governor — is likely to propose.

State Policy

One issue on which Sybert is unequivocal is the need to coordinate the now-disparate policies of dozens of state agencies that oversee areas as diverse — yet related — as land conservation, historic preservation, water management, transportation, and housing. A recent report by the Association for Bay Area Government and the Bay Area Council, for example, found that state housing policies conflict with each other and with state resource conservation goals.

The four legislative proposals all call for coordinated statewide policies to be supervised by a state growth agency — the Brown bill, for example, calls the agency the State Growth Management Commission and the Presley bill calls it the California Conservation and Development Commission.

The Assembly bills call for these new entities to implement current state policies. Presley's bill lays out 11 growth policies, ranging from "conservation of open space" to "development of a stable and diverse economy." Sybert says the Wilson Administration is already trying to resolve policy conflicts among different state departments administratively.

'Fiscalization' of Land Use

Perhaps the most intractable problem in growth management involves economic competition among neighboring jurisdictions and its impact on land use. In particular, communities vie for big sales-tax producers because the state distributes sales tax back to local communities based on where purchases are made, not on where purchasers live. Sales-tax base has long been a cherished prerogative of local government, though in recent years the League of California Cities has indicated a willingness to consider different tax splits on "new money" — meaning, generally, entirely new sources of revenue.

More recently, however, there has been some discussion inside the Wilson Administration about the possibility of creating a different tax split on the growth in sales-tax revenues — that is, permitting communities to retain their current sales-tax revenues but distributing the incremental increase in revenues at least partly on a per-capita basis. Sybert says he sees the possibility of a political consensus around this type of idea, and the Wilson budget message this year indicated support for "explor(ing) the idea of changing the allocation method for growth in sales-tax revenue."

Sprawl

One of the most divisive issues in growth management has been the question of sprawl. Traditionally, planners and environmentalists have favored the concept of "urban growth boundaries" designed to contain development. But the building industry has always opposed this idea — arguing, among other things, that placing some areas out of bounds for development would drive up the price of land (and housing) inside the boundary.

Yet consensus on this issue now appears to be within the realm of possibility. At Sacramento State's recent Growth Management Consensus Project, most participants seemed to agree on the concept of holding some land in reserve, though they did not agree on terminology. And all four growth management bills call for the creation of "urban growth boundaries" or "development boundaries." Even if Wilson endorses the concept of boundaries, however, a major issue will be the respective role of regional and state agencies in drawing those boundaries.

The most interesting similar experience on this issue comes from New Jersey. The state's growth management law, passed in 1986, called for the creation of a state plan that divided all of New Jersey into seven growth "tiers" — in essence, drawing broad development boundaries all over the state.

Recognizing that California, unlike New Jersey, is a vast state, all four legislative proposals would assign authority over development boundaries to regional agencies. But state conservation officials, who already oversee protection of farmland and environmentally sensitive land throughout the state, are reportedly interested in playing a major role in drawing up the boundaries. In fact, some are said to favor a New Jersey-type tiering system based on conservation values. It remains to be seen how well the conservation forces can lobby for this kind of approach, considering Wilson's stated preference for local control.

Endangered Species Controversies Continue In North, South

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A parallel negotiation is currently going on in northern San Diego County, where the City of Carlsbad is leading an attempt to establish a more localized multi-species habitat in coastal sage scrub that would protect the gnatcatcher and many other species. (See accompanying story.)

At the same time, builders and environmentalists are awaiting Fish & Wildlife's impending action on the cactus wren, another rare bird that also lives in the coastal sage scrub. Environmentalists asked for endangered species protection for both the gnatcatcher and the wren at the same time, but Fish & Wildlife missed the September 21 deadline for announcing whether it will consider the wren for listing as endangered. If the wren is proposed for listing, then — as with the gnatcatcher — Fish & Wildlife will have one year to decide whether the bird should be listed as endangered.

Delta Smelt

Even more than the gnatcatcher, the Delta smelt has become embroiled in political controversy that has caused environmentalists to accuse Wilson Administration officials of playing politics with the Endangered Species Act.

The smelt is significant because it lives in the Sacramento Delta, which the state uses as a "transfer" station in moving water from north to south. Protecting the smelt habitat may mean keeping water in the Delta that otherwise would be pumped to farmers in the Central Valley and cities in Southern California.

Federal biologists in California recommended that the agency propose an endangered listing, but higher-ups in the Fish & Wildlife Service changed the recommended to the lesser "threatened" classification. Environmentalists have accused Wilson Administration officials of lobbying for the lesser class of protection, but the administration denies the charge.

According to Cynthia Barry, a spokeswoman at the Fish & Wildlife regional office in Portland, the "threatened" designation does not mean a species receives less protection. The designation simply means that a species, while rare, is not in immediate danger of extinction. (Estimates vary, but there are believed to be somewhere between 250,000 and 600,000 Delta smelt — as compared, for example, with 2,000 pairs of gnatcatchers.) However, because a "threatened" species is theoretically more abundant, then federal wildlife officials and state water officials — who operate the Delta pumps — might have more flexibility in drawing up a conservation plan that would permit some smelt to be "taken." Put bluntly, because the "threatened" status suggests that the smelt is not in danger of immediate extinction, a conservation plan allowing the loss of more smelt might be permitted.

A comprehensive discussion of the state and federal Endangered Species Act was included in CP&DR Special Report: Federal Environmental Laws, June 1990.

The Carlsbad Plan

While the building industry and environmentalists do battle over the California gnatcatcher in Orange County, the City of Carlsbad is quietly leading an innovative effort to protect the rare bird — and dozens of other potentially endangered species — in northern San Diego County.

Carlsbad is working with the Fieldstone Company, a major land developer, on a "pre-listing" conservation plan that treats the gnatcatcher as if it were already on the endangered species list — a plan that, city officials hope, will be readily accepted by state and federal wildlife officials when the gnatcatcher is placed on the list. Carlsbad is also working with developers and neighboring jurisdictions on a multi-species conservation plan that may be used to satisfy environmental concerns when other species that live in the coastal sage scrub come up for consideration under endangered species laws.

According to Carlsbad Planning Director Michael Holzmiller, the city began working on endangered species issues when city officials decided to build a road through undeveloped land that turned out to be gnatcatcher habitat. As sponsor of the road- building project, city officials ran into the same problem that every other developer runs into with a species that may soon be listed as endangered. If they went ahead with construction, they might get stopped in mid-stream if the gnatcatcher were listed — but under state and federal laws they couldn't get advance approval from wildlife officials for a conservation plan. (Both state and federal law allow so-called "habitat conservation plans," which permit developers and government agencies to proceed with projects that "take" endangered species so long as conservation plans are in place.)

Anxious to widen and realign Rancho Santa Fe Road, the city approached the U.S. Fish & Wildlife Service to discuss the possibility of working jointly on a "pre-listing" conservation plan — that is, a habitat conservation plan prepared and implemented in advance.

"They originally said no," Holzmiller says. "They now have changed." Federal officials still won't be able to give advance approval of the plan, but the advance work may allow them to approve it with minimal difficulty at the time the gnatcatcher is listed as endangered — a move that would lessen the disruptive impact of a listing. Preliminary plans call for Fieldstone to set aside up to 800 acres on two different sites to be used as a "mitigation bank" for projects in Carlsbad. The plan is expected to be completed in time for the road-building project to begin next fall — just about the time that the gnatcatcher is likely to be listed as endangered under federal law. (*CP&DR Special Report: Federal Environmental Laws*, June 1990.)

The effort over the gnatcatcher has also led to a broader effort in Carlsbad to create a multi-species habitat. Working with environmentalists, developers, state and federal wildlife officials, and neighboring communities, Carlsbad is currently drawing up an inventory of rare or potentially endangered species in northern San Diego County. Starting next year, the city and its neighbors will examine ways to create — and pay for — a large coastal sage scrub preserve that could fulfill conservation requirements for dozens of potentially endangered species. The final plan for the gnatcatcher is likely to include a mitigation requirement — perhaps a fee on new development that would be used to purchase and protect gnatcatcher habitat. Such an interim solution was reached over the Stephens' kangaroo rat in Riverside County.

COURT CASES

Appellate Court Affirms Decision to Halt Airport Condemnation

An appellate court in Los Angeles has affirmed a judge's decision to halt an eminent domain proceeding against a landowner near the Burbank Airport because of deficiencies in the airport's environmental review.

In *Airport Authority v. Hensler*, the Second District Court of Appeal ruled that the Burbank-Glendale-Pasadena Airport Authority didn't prepare a proper "negative declaration" under the California Environmental Quality Act in connection with the proposed condemnation of a 1.4-acre parcel of land owned by Robert Hensler.

The appellate justices said that the airport's 1985 negative declaration, dealing generally with the expansion of a taxiway, should have been updated four years later when the airport specifically decided to condemn Hensler's property. The decision affirmed the ruling of L.A. Superior Court Judge John Zebrowski to dismiss the eminent domain action against Hensler. Under California law, a defect in environmental review is enough to throw out a condemnation suit.

Hensler's industrial property lies within 750 feet of one of the runways at Burbank Airport. In 1985, the Airport Authority decided to proceed with a new taxiway project alongside the runway near the Hensler parcel, partly to conform with Federal Aviation Administration standards. The agency's initial environmental review found no "significant impact" from the taxiway project and, accordingly, the agency filed a "negative declaration" stating that no further environmental review was required.

In 1989, the agency changed the taxiway project and concluded that part of Hensler's property was required. Hensler resisted the condemnation attempt and filed a cross-complaint alleging CEQA violations.

In his 1990 ruling in Hensler's favor, Judge Zebrowski noted that in seeking to condemn Hensler's property, the Airport Authority relied on the 1985 negative declaration, even though the 1985 taxiway plan apparently did not require the acquisition of Hensler's property.

On appeal, the Airport Authority argued that the acquisition of Hensler's property was always contemplated, and that the only change that occurred between 1985 and 1989 was that the airport's negotiations with Hensler to purchase the land without eminent domain broke down. But the Court of Appeal didn't buy this argument.

"There is certainly no indication in our record that the (airport) commissioners determined that the 1985 negative declaration could or should apply to the project which was the basis of Resolution No. 224 (the resolution to condemn Hensler's property)," wrote Presiding Justice Mildred Lillie for a unanimous three-judge panel. "We can only conclude on our record that the project which was the subject of the 1985 negative declaration was a substantially different project than the one which was the basis of Resolution No. 224."

The full text of Burbank-Glendale-Pasadena Airport Authority v. Hensler, No. B051639, appeared in the Daily Journal Daily Appellate Report on August 23, beginning on page 10280.

Revised Billboard Ruling Still Favors TRPA

A Sacramento appellate panel has issued a revised ruling reaffirming the Tahoe Regional Planning Agency's right to regulate billboards in the Lake Tahoe area. The new decision, issued after a rehearing in the case, specifically states that TRPA's powers may not be overridden by California's Outdoor Advertising Act.

In the first ruling in *TRPA v. King*, C005345, the appellate court concluded that federal Highway Beautification Act did not restrict the TRPA's authority to regulate billboards. The court overruled El Dorado Superior Court Judge Lloyd Hamilton, who had ruled that TRPA's billboard regulation — requiring removal after a five-year amortization period — constituted a taking of property without compensation. Hamilton had said the TRPA sign ordinance should have followed the requirements of the Highway Beautification Act, which requires compensation for owners of billboards near a federal highway. (*CP&DR*, August 1991.)

At the rehearing before the Court of Appeal, billboard owners argued that the California Outdoor Advertising Act (Business and Professional Code Sections 5200 et seq.), which also requires compensation for billboard owners, could be used independent of the Highway Beautification Act to strike down the TRPA sign ordinance. The court ruled that the state law is merely an implementing vehicle of the federal law and therefore cannot be used against the TRPA sign ordinance.

The revised ruling in TRPA v. King, C005345, appeared in the Daily Journal Daily Appellate Report on September 10, beginning on page 10986.

Permit Streamlining Action May Be Appealed

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According to Rivera, the 1987 legislative revisions allow an applicant to move have a permit "deemed approved" in one of two ways. The applicant may ask the city to schedule a public hearing, or — if the city refuses — the applicant may give the public notice required by law, as Mosher Trust attempted to do in the Green Dragon Colony case. The question, Rivera said, has been: What is the applicant giving notice of? Is the applicant giving notice of a public hearing — which the city has refused to schedule? Or is the applicant simply given notice of its intent to assume that the project is "deemed approved" — in which case there is no public hearing at all?

"This case gives the answer," Rivera said. "It's the latter." Notice is required, but no hearing, according to the justices in this case. "This is the first document ever written to deal with this question," she said.

Meanwhile, the remains of the Green Dragon Colony still stand in La Jolla, awaiting the outcome of the legal maneuvering. Asserting its right to initiate an appeal, the Coastal Commission heard the case on July 13 — three days after the initial demolition — and approved the demolition permit subject to an array of conditions. These conditions include incorporating the building materials and the original building patterns into any new development project. The Mosher Trust asked for — but failed to obtain — a postponement of the July 13 hearing and no Trust representatives attended the meeting.

The full text of Ciani v. San Diego Trust and Savings, D015057, appeared in the Daily Journal Daily Appellate Report on September 17, beginning on page 11309.

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COURT CASES

Permit Streamlining Action May Be Appealed, Court of Appeal Rules

In an important case involving the Permit Streamlining Act, the Court of Appeal in San Diego has ruled that some permits "deemed approved" under the law may be appealed to the Coastal Commission. The case also clarified some other controversial due process issues involved in the law, but did little to clear up the question of what will actually happen to the Green Dragon Colony in La Jolla — or what is left of it after it was partially demolished in July.

The Colony is a group of small structures in La Jolla's old "village center" that date from the early part of the 1900s. The Permit Streamlining Act was invoked by the Colony's owner — the family trust of retired architect Robert Mosher — after the City of San Diego failed to act on the Mosher Trust's request for a demolition permit within one year — the deadline under the law. After negotiations, the city agreed to issue a demolition permit on July 10 and demolition proceeded immediately. Local preservationists sought to block the demolition with a court order, but they did not obtain a restraining order until the following day. By that time the buildings had already been partially demolished — or, according to the Trust's lawyer, "99 and 44/100% demolished."

Under the Permit Streamlining Act, if the law's time limits are not followed, a development project may be automatically "deemed approved," so long as the applicant issues two sets of notices prior to the expiration of the time period. The Mosher Trust filed these notices with the City of San Diego. The Trust did not, however, file the second notice with the Coastal Commission, which ordinarily would have appeal power over a demolition in the coastal zone. This oversight provided the basis of the lawsuit brought by preservationists and the Coastal Commission to stop further demolition of the Green Dragon Colony.

Since its passage in 1977, the Permit Streamlining Act's concept of an "automatic approval" of a development project has raised due process questions. In *Palmer v. City of Ojai*, 178 Cal.App.3d 280 (1986), the Court of Appeal rejected Ojai's argument that automatic approval violated due process rights of nearby property owners because they would not have the right to receive notice and attend a hearing on the action. In 1987, the Legislature amended the law so that the "deemed approved" provision of the law applies only if the required public notice is given. The applicant was given the option of giving the required notice himself.

More recently, in *Selinger v. City Council,* 216 Cal.App.3d 259, an appellate panel ruled --- in contradiction to *Palmer* — that the Permit Streamlining Act prior to its 1987 amendments does, in fact, violate the due process rights of neighboring property owners.

The ruling in the Green Dragon Colony case clarified two important wrinkles in the due process question with regard to the Permit Streamlining Act. First, the Court of Appeal firmly ruled that an application "deemed approved" under the law is subject to appeal to the Coastal Commission if it is in the coastal zone. The court noted that Section 65922 of the law specifies that its provisions shall not apply to "administrative appeals within a state or local agency or to a state or local agency."

The Mosher Trust argued that because the "deemed approved" date was in April, the required 10-day appeal period had long passed before the Coastal Commission sued. The appellate court agreed that this argument was persuasive except for one thing: The Trust never notified the Coastal Commission of its intent to invoke the Permit Streamlining Act. Mosher Trust lawyer Franne M. Ficara says that, in her reading of the law, the Coastal Commission should have received notice from the City of San Diego — but the court put the onus on the landowner.

The court's ruling means that the Permit Streamlining Act is constrained by the Coastal Act and, perhaps, by other state administrative laws. "The take-home message is: Look around and see if there are any other regulatory schemes that apply, and if it does, you've got to take account of that," said Maria Rivera of McCutchen Doyle in Walnut Creek, who has done considerable research on the Permit Streamlining Act.

The second due-process "wrinkle"is even more subtle.

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Hawthorne Developers Fail in Attempt to Stop Redevelopment Project

In the latest round in a longstanding legal dispute, two Hawthorne developers have lost in their attempt to have the environmental impact report on a Hawthorne redevelopment project declared inadequate.

Howard Mann and Eugene Rosenfeld tried to argue that the alternatives analysis in the EIR for a redevelopment project being built by Cloverleaf South Bay Ltd. was legally deficient because it did not include Mann and Rosenfeld's own failed proposal for the same site as an alternative.

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Mann and Rosenfeld's main lawsuit against the city — seeking to compel Hawthorne to drop Cloverleaf and proceed with them as developers — is scheduled for trial in October. Meanwhile, in order to assemble the property for Cloverleaf, the city initiated a condemnation proceeding against Mann and Rosenfeld, who own part of the needed acreage. To combat the condemnation lawsuit, Mann and Rosenfeld filed the environmental suit, claiming the city's EIR was inadequate.

In their lawsuit, Mann and Rosenfeld argued that the city's alternatives analysis was inadequate because it did not include their project, or the project proposed by Watt, as alternatives, nor did it explain why these projects had not been pursued by the city. Superior Court Judge David P. Yaffe ruled in favor of the city, and a three-judge panel of the Court of Appeal affirmed. Writing for the court, Justice Jack E. Goertzen said that the four alternatives discussed in the EIR were legally sufficient, and noted that these alternatives were similar in scope to the Mann/Rosenfeld and Watt proposals. Goertzen also rejected the developers' argument that the EIR should have explained why Cloverleaf had received financial incentives that they had not. "We are in accord with the court's conclusion that this type of economic/business negotiation information is not what CEQA (the California Environmental Quality Act) requires," the judge wrote.

The full text of Mann v. Community Redevelopment Agency of the City of Hawthorne, B051750, appeared in the Daily Journal Daily Appellate Report on September 3, beginning on page 10663.

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COURT CASES

Permit Streamlining Action May Be Appealed, Court of Appeal Rules

In an important case involving the Permit Streamlining Act, the Court of Appeal in San Diego has ruled that some permits "deemed approved" under the law may be appealed to the Coastal Commission. The case also clarified some other controversial due process issues involved in the law, but did little to clear up the question of what will actually happen to the Green Dragon Colony in La Jolla — or what is left of it after it was partially demolished in July.

The Colony is a group of small structures in La Jolla's old "village center" that date from the early part of the 1900s. The Permit Streamlining Act was invoked by the Colony's owner — the family trust of retired architect Robert Mosher — after the City of San Diego failed to act on the Mosher Trust's request for a demolition permit within one year — the deadline under the law. After negotiations, the city agreed to issue a demolition permit on July 10 and demolition proceeded immediately. Local preservationists sought to block the demolition with a court order, but they did not obtain a restraining order until the following day. By that time the buildings had already been partially demolished — or, according to the Trust's lawyer, "99 and 44/100% demolished."

Under the Permit Streamlining Act, if the law's time limits are not followed, a development project may be automatically "deemed approved," so long as the applicant issues two sets of notices prior to the expiration of the time period. The Mosher Trust filed these notices with the City of San Diego. The Trust did not, however, file the second notice with the Coastal Commission, which ordinarily would have appeal power over a demolition in the coastal zone. This oversight provided the basis of the lawsuit brought by preservationists and the Coastal Commission to stop further demolition of the Green Dragon Colony.

Since its passage in 1977, the Permit Streamlining Act's concept of an "automatic approval" of a development project has raised due process questions. In *Palmer v. City of Ojai*, 178 Cal.App.3d 280 (1986), the Court of Appeal rejected Ojai's argument that automatic approval violated due process rights of nearby property owners because they would not have the right to receive notice and attend a hearing on the action. In 1987, the Legislature amended the law so that the "deemed approved" provision of the law applies only if the required public notice is given. The applicant was given the option of giving the required notice himself.

More recently, in *Selinger v. City Council,* 216 Cal.App.3d 259, an appellate panel ruled — in contradiction to *Palmer* — that the Permit Streamlining Act prior to its 1987 amendments does, in fact, violate the due process rights of neighboring property owners.

The ruling in the Green Dragon Colony case clarified two important wrinkles in the due process question with regard to the Permit Streamlining Act. First, the Court of Appeal firmly ruled that an application "deemed approved" under the law is subject to appeal to the Coastal Commission if it is in the coastal zone. The court noted that Section 65922 of the law specifies that its provisions shall not apply to "administrative appeals within a state or local agency or to a state or local agency."

The Mosher Trust argued that because the "deemed approved" date was in April, the required 10-day appeal period had long passed before the Coastal Commission sued. The appellate court agreed that this argument was persuasive except for one thing: The Trust never notified the Coastal Commission of its intent to invoke the Permit Streamlining Act. Mosher Trust lawyer Franne M. Ficara says that, in her reading of the law, the Coastal Commission should have received notice from the City of San Diego — but the court put the onus on the landowner.

The court's ruling means that the Permit Streamlining Act is constrained by the Coastal Act and, perhaps, by other state administrative laws. "The take-home message is: Look around and see if there are any other regulatory schemes that apply, and if it does, you've got to take account of that," said Maria Rivera of McCutchen Doyle in Walnut Creek, who has done considerable research on the Permit Streamlining Act.

The second due-process "wrinkle"is even more subtle.

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Hawthorne Developers Fail in Attempt to Stop Redevelopment Project

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COURT CASES

Appellate Court Affirms Decision to Halt Airport Condemnation

An appellate court in Los Angeles has affirmed a judge's decision to halt an eminent domain proceeding against a landowner near the Burbank Airport because of deficiencies in the airport's environmental review.

In *Airport Authority v. Hensler*, the Second District Court of Appeal ruled that the Burbank-Glendale-Pasadena Airport Authority didn't prepare a proper "negative declaration" under the California Environmental Quality Act in connection with the proposed condemnation of a 1.4-acre parcel of land owned by Robert Hensler.

The appellate justices said that the airport's 1985 negative declaration, dealing generally with the expansion of a taxiway, should have been updated four years later when the airport specifically decided to condemn Hensler's property. The decision affirmed the ruling of L.A. Superior Court Judge John Zebrowski to dismiss the eminent domain action against Hensler. Under California law, a defect in environmental review is enough to throw out a condemnation suit.

Hensler's industrial property lies within 750 feet of one of the runways at Burbank Airport. In 1985, the Airport Authority decided to proceed with a new taxiway project alongside the runway near the Hensler parcel, partly to conform with Federal Aviation Administration standards. The agency's initial environmental review found no "significant impact" from the taxiway project and, accordingly, the agency filed a "negative declaration" stating that no further environmental review was required.

In 1989, the agency changed the taxiway project and concluded that part of Hensler's property was required. Hensler resisted the condemnation attempt and filed a cross-complaint alleging CEQA violations.

In his 1990 ruling in Hensler's favor, Judge Zebrowski noted that in seeking to condemn Hensler's property, the Airport Authority relied on the 1985 negative declaration, even though the 1985 taxiway plan apparently did not require the acquisition of Hensler's property.

On appeal, the Airport Authority argued that the acquisition of Hensler's property was always contemplated, and that the only change that occurred between 1985 and 1989 was that the airport's negotiations with Hensler to purchase the land without eminent domain broke down. But the Court of Appeal didn't buy this argument.

"There is certainly no indication in our record that the (airport) commissioners determined that the 1985 negative declaration could or should apply to the project which was the basis of Resolution No. 224 (the resolution to condemn Hensler's property)," wrote Presiding Justice Mildred Lillie for a unanimous three-judge panel. "We can only conclude on our record that the project which was the subject of the 1985 negative declaration was a substantially different project than the one which was the basis of Resolution No. 224."

The full text of Burbank-Glendale-Pasadena Airport Authority v. Hensler, No. B051639, appeared in the Daily Journal Daily Appellate Report on August 23, beginning on page 10280.

Revised Billboard Ruling Still Favors TRPA

A Sacramento appellate panel has issued a revised ruling reaffirming the Tahoe Regional Planning Agency's right to regulate billboards in the Lake Tahoe area. The new decision, issued after a rehearing in the case, specifically states that TRPA's powers may not be overridden by California's Outdoor Advertising Act.

In the first ruling in *TRPA v. King*, C005345, the appellate court concluded that federal Highway Beautification Act did not restrict the TRPA's authority to regulate billboards. The court overruled El Dorado Superior Court Judge Lloyd Hamilton, who had ruled that TRPA's billboard regulation — requiring removal after a five-year amortization period — constituted a taking of property without compensation. Hamilton had said the TRPA sign ordinance should have followed the requirements of the Highway Beautification Act, which requires compensation for owners of billboards near a federal highway. (*CP&DR*, August 1991.)

At the rehearing before the Court of Appeal, billboard owners argued that the California Outdoor Advertising Act (Business and Professional Code Sections 5200 et seq.), which also requires compensation for billboard owners, could be used independent of the Highway Beautification Act to strike down the TRPA sign ordinance. The court ruled that the state law is merely an implementing vehicle of the federal law and therefore cannot be used against the TRPA sign ordinance.

The revised ruling in TRPA v. King, C005345, appeared in the Daily Journal Daily Appellate Report on September 10, beginning on page 10986.

Permit Streamlining Action May Be Appealed

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According to Rivera, the 1987 legislative revisions allow an applicant to move have a permit "deemed approved" in one of two ways. The applicant may ask the city to schedule a public hearing, or — if the city refuses — the applicant may give the public notice required by law, as Mosher Trust attempted to do in the Green Dragon Colony case. The question, Rivera said, has been: What is the applicant giving notice of? Is the applicant giving notice of a public hearing — which the city has refused to schedule? Or is the applicant simply given notice of its intent to assume that the project is "deemed approved" — in which case there is no public hearing at all?

"This case gives the answer," Rivera said. "It's the latter." Notice is required, but no hearing, according to the justices in this case. "This is the first document ever written to deal with this question," she said.

Meanwhile, the remains of the Green Dragon Colony still stand in La Jolla, awaiting the outcome of the legal maneuvering. Asserting its right to initiate an appeal, the Coastal Commission heard the case on July 13 — three days after the initial demolition — and approved the demolition permit subject to an array of conditions. These conditions include incorporating the building materials and the original building patterns into any new development project. The Mosher Trust asked for — but failed to obtain — a postponement of the July 13 hearing and no Trust representatives attended the meeting.

The full text of Ciani v. San Diego Trust and Savings, D015057, appeared in the Daily Journal Daily Appellate Report on September 17, beginning on page 11309.

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DEALS

Redevelopment Workouts Put Bakersfield to the Test

The skyline of downtown Bakersfield is a postcard image of commercial real estate in the 1990s. A few blocks away from City Hall, a 293-room hotel stands half-finished, its gray skeleton an unintended monument to the savings-and-loan crisis. Nearby is a 92,000-square-foot office building that is completely empty — and will stay that way for a while. Now owned by the lender, the building is a victim of the overbuilt, undervalued office market. Both projects, as it turns out, lie within in a redevelopment area, and the city has a stake in both. For Bakersfield's Central District Development Agency, it's workout time.

"Workout" is the process of rethinking and restructuring a real estate project that has not lived up to expectations. Workouts aren't necessarily bad news; most redevelopment agencies have ridden out at least one problem project to a satisfactory conclusion. But the problem is that politics and business don't always mix. In Bakersfield, the redevelopment agency's hands may be tied by city officials who do not want to spend any more money on real estate albatrosses. Yet without spending money, the redevelopment experts can't cut the deals that will make projects work. During this kind of stalemate, troubled projects fall in between the cracks — or just go nowhere at all.

Like so many other mid-sized cities, Bakersfield was using redevelopment in the 1980s in a attempt to reverse the trends of suburbanization, urban sprawl and economic atomization. The city's effort involved economic revitalization in the form of "Class A" office buildings and new hotel rooms downtown. In the mid-1980s, both ideas seemed supportable; as a county seat, sub-capital of the oil industry, and emerging regional hub, Bakersfield could show a demand for both office space and hotel rooms. The goal of the city, then, was be to provide modern projects in the downtown area and bring some of the economic vitality of suburbia back to "Main Street" — or, in this case, the vicinity of Chester and Truxtun.

The seven-story City Center office building, however, was sucker-punched twice — first by the troubles in the oil industry, and then by the real estate bust.

Over on California Avenue in the suburban southwest, a half-dozen oil "majors" and their satellites were the big customers for office space — and the likely tenants for City Center downtown. They sparked a mini-boom of office construction in the mid and late '80's. With the sagging of oil prices, however, the majors cut back on their space needs; several buildings either went into foreclosure or restructuring. Developers slashed office rents to less than $1 per square foot per month.

Those rents undercut the $1.45 level that Peter Mosesian, the Bakersfield-based developer of City Center, needed to get from tenants to pay off his bank loans. By the time City Center opened in 1989, most tenants looking for space in Bakersfield had been soaked up by the office buildings along "Gasoline Alley" on California Street, and they were paying rents too low to be considered by Mosesian or his lender, an affiliate of U.S. Bancorp.

The city decided to sidestep any further involvement in the office building and chose not to exercise an option for partial ownership. "We would have incurred the obligation to repay the construction loan. We would have to arrange for permanent financing. It was more trouble than it was worth," says Jake Wager, economic development director. Last year, U.S. Bancorp took over the building. Instead of hiring leasing agents and ordering them to "do whatever it takes" to fill up the building, the bank seems more interested in selling off the building "as is."

The city would clearly benefit from tenants in the empty office building, but it's not a total loss. The current owner continues to pay $80,000 annually to the redevelopment agency in tax increment. The big question is whether U.S. Bancorp — or whoever owns the building at the time — will be able to handle an $856,000 note from the city (the cost of a parking lot sold to the developer, plus interest) in 1997.

The office building seems like a success, however, compared to the Clarion Hotel project. The city did take possession of the hotel project, and it's a headache from any viewpoint. A group led by Denver-based Aircoa, sunk a little more than $4 million into the project; the city owns the land, for which it paid $2.5 million in various costs, including relocation. The completed hotel was to have been worth up to $25 million, and was expected to provide the city $550,000 annually in sales tax, bed tax and property-tax increment. But when the project was still under construction, the lender, Mercury Savings & Loan, went under. It didn't help, either, that the city had failed to obtain a performance bond from the developer. Rather than let the Resolution Trust Corp. take possession of the downtown hotel, the redevelopment agency exercised its right to foreclose and began looking for a buyer on the private market.

It is hard to tell, however, whether the city is in a stronger position than before by seizing the half-finished hostelry. If there is a textbook example of a project not to get involved in, this would be it. Developers are traditionally wary of taking over half-finished projects because they are stuck with the original plans whether they like them or not. Bakersfield chose Hallmark Ventures of Santa Rosa to finish the project, but the developer allowed its exclusive right to negotiate lapse in June. Neither the city nor the developer is commenting on the exactly why the two sides failed to come to terms, but a strong possibility is that the city offered little or nothing in the way of additional subsidies.

Wager says his hands are not tied in this way, adding that that the city might be willing to sell its leasehold interest in the land to a developer who would take the project off their hands. "Everything is on the table. We would look at any serious proposal," he said. Among the items on the table are the improvements, the land, and tax rebates. But even at a bargain basement price of $6 million or so, few developers are willing to take on such a project without a lot of featherbedding from the city in the form of subsidies, tax rebates and the like. Politically, the hotel project is viewed locally as a boondoggle; there is a question whether the city has the political will to pump enough money into the gray skeleton to make it dance.

Probably the best way to turn the hotel into a viable property is pump money into it — either by completing the project itself and hiring an experienced hotel operator to get the project off the ground, or by offering dazzling incentives and friendly financing to a developer who's willing to defy conventional wisdom and take on an uphill challenge. But the latter course is the kind of idea that can ruin political careers in a fiscally conservative place like Bakersfield. Because the city's redevelopment funds have been depleted by troubled or failed projects, any new cash infusion would have to come from the city's general fund — meaning other services would have to be cut.

The Bakersfield experience seems to suggest that redevelopment agencies are not well equipped to handle workouts of half-built hotels and see-through office buildings. If they become property owners of troubled projects, the politically liability may be too great. If they leave matters to the public sector, sometimes nothing at all will happen. For the time being, "we are going to take a deep breath and wait for the market to recover," says Bakersfield's Wager. At this point, the whole redevelopment agency should consider going on a zen retreat and learn the "wisdom of non-doing." Maybe then the see-through office building and the half-built hotel won't look so bad after all.

Morris Newman