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INSIDE

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Property Rights Advocates Make Progress in Congress

Win Key Exemption In Desert Protection Bills

By H. Jane Lehman

In a surprising show of strength, the private property rights movement has made impressive progress in Congress in the past year. In the most significant victory so far, property rights advocates succeeded in inserting a provision in the California Desert Protection Act that prohibits the federal government from using the presence of endangered species to seek lower land prices from private landowners.

The progress parallels impressive victories in court, including the U.S. Supreme Court's recent ruling in *Dolan v. City of Tigard*. Four years after the property rights crusade began to coalesce, its power remains far short of the influence wielded by what the activists consider their chief nemesis, the environmental community. But prospective changes in Congress this November are likely to favor the property rights movement even more.

Peggy Reigle of Cambridge, Md., founder of the Fairness to Landowners Committee, which claims to have 16,000 "mom and pop" members in 50 states, said she is heartened by the changes. "Our message is finally being received....We have instilled a fear in the environmental community and I think we have made a huge, huge impact in four years," Reigle said.

At its core, the property rights coalition is railing against land-use laws, particularly those protecting wetlands and endangered species, that it claims rob property owners of the full use and value of their land, said Robert Meltz, a property law expert at the nonpartisan Congressional Research Service.

"Judging from the decibel level of the debate, the property rights movement is coming on strong," Meltz said.

Property rights advocates made more than 20 different legislative forays this past year before a Congress *Continued on page 10*

Legislative Year Produces Few Strong Results

Growth Management Falls by the Wayside

By Morris Newman

State lawmakers ended the 1994 session with a record of spotty and inconsistent achievement in land-use bills. Despite approval of a number of bills involving the California Environmental Quality Act, military base re-use (discussed on page 4), and the Williamson Act, the past session was most notable for vetoed bills and torpedoed reform efforts, especially in endangered species and housing element reform. While partisan politics and last-minute lobbying helped doom several bills, the real culprit may be a sense of policy burnout and changing political priorities.

Although growth-management and business competitiveness had been high priorities of the Wilson administration in past years, public enthusiasm for these issues appears to be at low tide. Observing that 1994 "did not produce many blockbuster bills," Peter Detwiler, consultant to the Senate Local Government Committee, added that the past year may have signaled "the end of a policy cycle."

The inconsistency of the Wilson administration on land-use issues, even on its own recommended policies, helped dim an already lackluster year. Wilson, who has championed the idea of cooperation among local governments above centralized control, vetoed AB 1877 (Klehs), which would have allowed Alameda County and the cities of Hayward and Pleasanton to coordinate open-space policies; in his veto letter, the governor said the bill "calls for an unwarranted interference" by the state into local matters. Even more remarkably, Wilson vetoed a bill that originated in one of his administration's recommendations: the creation of comprehensive state plan with the State Environmental Goals and Policy Report, which would have included 24 state plans and offered the promise of *Continued on page 9*

LOCAL PLANNING
Elizabeth Schilling

New San Jose Plan Tested by Annexation Proposal

Adopted just three months ago, San Jose's new infill-oriented general plan has already been tested by a hostile annexation attempt and a school district lawsuit.

Under the plan, the state's third-largest city anticipates 58,000 new residential units by 2020. Virtually all of the new units would be built under policies that encourage infill development and discourage additional sprawl in a city that already stretches to 170 square miles. Similar infill growth is projected for empty commercial and industrial properties, according to Kent Edens, a deputy planning director for San Jose. The infill development, along with open-space protection policies, are designed to protect undeveloped areas, especially the Coyote Valley south of San Jose.

The first test came shortly after the plan was approved, when the Santa Clara County Local Agency Formation Commission approved annexation that gave the initial nod for a recreational vehicle park on urban reserve land in the Coyote Valley.

Despite the city's longtime protection policies for the Coyote Valley, a property owner applied to LAFCO for city annexation so he would be allowed to proceed with development plans on the seven-acre site. Surprisingly, just days after the San Jose 2020 General Plan was adopted, LAFCO approved the annexation, contradicting the new document's goals.

The action was called "shocking" by San Jose City Attorney Joan Gallo, who asked LAFCO to reconsider the approval. City staffers say they had repeatedly told the applicant that development of a 130-space RV park was too urban for the southern frontier of the city, but Al Ruffo, an attorney for the applicant, argued the proposal was consistent with general plan policies and was needed by the city.

The week before the item was set for reconsideration, the applicant withdrew his request from LAFCO.

"I think the applicant finally accepted the fact that even if the property was annexed the city would be soured toward his ultimate goal," said Autumn Arias, the LAFCO's executive officer. City development approval would have been required even if annexation were approved by LAFCO.

The city spent four years devising the plan and its 30-member task force took its share of heat in shaping infill policies. The school districts' concerns have been a flashpoint for the last year, and caused a major delay in adoption of the plan. The city originally approved the general plan last December, but complaints about the circulation of its environmental impact report forced the city council to rescind their action (*CP&DR*, February 1994). While the EIR was being recirculated, a School Impact Task Force met twice a month in hopes of reaching a compromise. But little common ground could be found, said Edens, and the city proceeded with readoption of the plan on August. Eight school districts subsequently filed a lawsuit under the California Environmental Quality Act, claiming the infill plan will thrust thousands of new children into their systems without adequate compensation.

While protection of Coyote Valley's 3,000 acres was expected in the new general plan, the council's vote to provide equal protection for 1,000 acres in the South Almaden Valley was seen as a bold move. Neither area is in the city, but both are in San Jose's sphere of influence. Specific plans to develop either valley cannot be considered until a job trigger of 5,000 new jobs and a stable fiscal condition can be proven by the city.

Midway through the revision process it looked like South Almaden Valley would be sacrificed as a means to hold off development pressures elsewhere. San Jose City Councilman Joe Head was pushing for 2,000 new homes there as a way to secure parkland and trails. His idea was adopted by the general plan task force and the planning commission, but an 11th-hour campaign by Mayor Susan Hammer won enough votes to hold the city true to infill policies.

"What the council ultimately did to protect South Almaden was stunning," said Vicky Moore of the Greenbelt Alliance. Moore wanted higher job trigger numbers and more specific commitment to mass transit, but overall she gives the San Jose 2020 plan a 'B' grade.

"It's a good plan," said Moore. "But the reason I don't give it an 'A' is because until the city adopts formal, permanent urban growth boundaries, enforcing the plan depends on having the right number of votes on the council."

Development into these two southern urban reserves looks unlikely in the near future, according to Edens. The plan's initially vague policy of holding off development until the city "declares its fiscal condition stable and predictable in the long term," was given some quantifiable measure by final adoption, he said.

"To show stability the city must be able to predict a balanced budget for five years," said Edens. "If we measure that by 1993 standards, we are a long way from stability."

While Edens and most others are no longer holding their breath for a return of the economic boom days of the '70s and '80s, there are some upward blips in the region's economy. Inventory of vacant commercial and industrial buildings is shrinking rapidly and is one hopeful indicator, he said. Another is the renewed construction by the SONY Corp., which is finally carrying out its approved plan for a large campus in the city.

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Williamson Act Lands Increase

Williamson Act additions exceeded non-renewals during 1992-93 for the first time in four years, according to a new report from the state Department of Conservation.

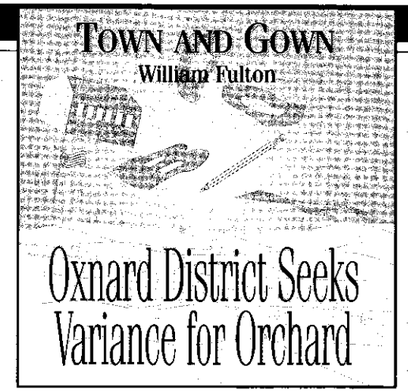
Additions continued a declining trend, dropping to approximately 60,000 acres in '92-93. But non-renewals dropped sharply, from 78,000 to 30,000 acres.

Orange County leads the state with about 70% of Williamson Act land in non-renewal. Also high on the list — with between 30% and 40% in non-renewal — are Placer, Nevada, Riverside, and San Bernardino counties. Overall, the South Coast region has the highest percentage of Williamson Act land in non-renewal.

However, in the last two years the highest non-renewal rates have occurred in Central Valley and far Northern California counties such as Colusa, Madera, and Tehama, while urban counties such as Contra Costa, Ventura, and Alameda have shown a net loss of non-renewed land.

Under the Williamson Act, property owners are eligible for lower property taxes by entering into 10-year contracts with county governments. "Non-renewal" indicates a decision not to renew the contract after 10 years. ❑

TOWN AND GOWN
William Fulton



Oxnard District Seeks Variance for Orchard

The Oxnard Union High School District is locked in a dispute with Ventura County planners over whether and how to sell a 27-acre lemon grove left over after construction of a new high school. The situation illustrates the volatile relations that can emerge between school districts and local governments when school districts strike deals with landowners and developers that make financial sense but contradict land-use policy.

The Ventura County Planning Commission voted October 27 to deny a school district request for a variance from the county's 40-acre zoning in the mostly agricultural area where the new school is being built. School district officials asked for the variance because of an agreement to sell the 27 acres back to the original owners for $2.1 million. School superintendent William Studt said the district will appeal the decision to the county Board of Supervisors.

The issue began in 1990, when Caltrans declared the existing Oxnard High School a safety hazard because it is located directly under the approach pattern of Oxnard Airport. Moving quickly to obtain $28 million in state funds for school construction, district officials chose a site in an agricultural area east of Oxnard.

Under state guidelines, the school district needed a 50-acre site for the school. However the site chosen sat on an 80-acre parcel. Rather than wait for lot-split approval from reluctant county planners, school officials obtained the parcel by eminent domain for $6.3 million, or approximately $79,000 per acre, and agreed to sell the remainder of the property back to the original owners at the original price once the high school was built.

The high school site is located in a 1,200-acre area that has been the subject of great controversy in recent years. The area is located outside Oxnard's sphere of influence and is zoned for 40-acre agricultural properties by the county. In its plan, Oxnard has designated the area as an agricultural reserve but has not placed it in the official greenbelt that separates Oxnard from Ventura.

The principal property owner in the area, Ag Land Services, has made several attempts to develop the property in recent years. Ag Land offered to donate the site to California State University but wanted permission to build a residential neighborhood in return. The company also has made development proposals to the City of Oxnard for the site, but Oxnard has postponed any development decisions on the area until the year 2000.

When Oxnard High School was declared unsafe, the high school district obtained approval from the State Allocation Board for $28 million in Proposition 152 school bond funds to construct the school. However, the school district had to surrender the old high school site to the state in return, leaving the district with the problem of how to pay for the new school site.

The school district then struck a novel deal with Ag Land Services and a minority property owner, Maland Enterprises. In a friendly condemnation action, the district agreed to a sale price of $6.3 million. The district also agreed to sell back the unused portion of the property — 27 acres — for $2.1 million to Maland Enterprises. Ag Land Services also agreed to reimburse the district for the remainder of the money — $4.2 million — if and when the company obtains development approval for the surrounding area. Superintendent Studt said this last provision is a standard mitigation agreement with developers of new residential areas.

However, the whole arrangement did not sit well with county planners, who feared that construction of the high school — which they could not stop — would induce growth in the agricultural area. Among other things, the deal would create a 27-acre parcel — illegally small under the county's 40-acre zoning for the area. In negotiations, county planners asked for some guarantee that the land would remain in agriculture, such as a Williamson Act contract or a deferral of the sale until the property is annexed to Oxnard.

However, the school district did not pursue any such options. So when the school district asked for a variance from the zoning and a parcel map for the two parcels, the county planning staff recommended denial. In its staff report, the planning department said it could not make the necessary legal findings for the variance, such as a finding that unusual circumstances exist and that the variance would not confer a special privilege on the school district. The staff planners also recommended denial because of their view that the high school would induce growth in the area.

Before the planning commission, school officials argued that the district did meet the variance requirements. Development consultant George Lauterbach, who represented the school district, said the variance should be permitted because several other parcels in the area are also less than 40 acres in size. Further, he asked, "Should the school district be in the agriculture business?"

But critics of the application said the agreement between the school district and the landowner essentially amounted to a sweetheart deal that could open up the agricultural area to urban development. "This variance will be like the camel's nose under the tent," said Jean Harris, a former member of the local elementary school board. Harris said Ag Land Services had gone to both school districts offering the 80 acres of land for free in exchange for support of a development project, but that the elementary district rejected the offer.

For their part, county planning commissioners suggested that the school district establish a magnet agricultural education program on the lemon grove site. In the school district's environmental impact report for the high school, an agricultural program was proposed as a mitigation measure for the loss of farmland. However, the school district established the program at a different high school and has indicated little willingness to move it or start another one.

The planning commissioners also were clearly miffed that the school district had bought the land and built the high school without consulting them. "The high school is already there, and we were not party to that action," said Commissioner Johnie Carlyle Jr. ❑

■ Contacts:
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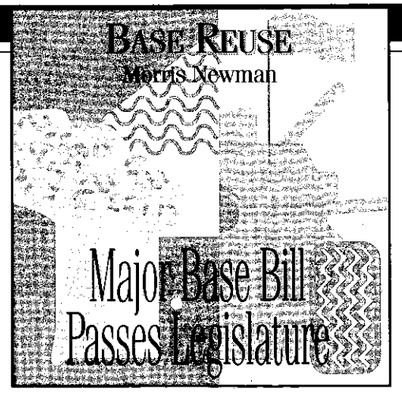
Keith Turner, Ventura County Planning Director, (805) 654-2481.

BASE REUSE
Morris Newman



Major Base Bill Passes Legislature

Amid a lackluster legislative session, a number of significant base re-use bills emerged from state lawmakers in the 1994 legislative season, indicating the continued high priority of re-use efforts among lawmakers.

Perhaps the most important bill was AB 3759 (Gotch), a comprehensive bill which enables local governments to establish base reuse commissions, for the purpose of planning, financing, and managing revitalization projects. According to Randy Pestor, consultant to the Assembly Local Government Committee, who helped draft the bill, the importance of the bill is the creation of a uniform local-government structure for all retired bases. "It's always preferable to have a general act, rather than coming up with a special act in each and every case. It makes it easier for the public to understand, and avoids a lot of disagreement and the need for different interest groups to put together legislation to resolve particular issues," he said.

Ironically, much of the content of the Gotch bill echoes legislation created for a single area: the Fort Ord bills, SB 899 and SB 1600 (both Mello) which create a local government structure for the recently closed base in Monterey County.

Two further bills authorize the creation of redevelopment agencies on former bases. AB 3769 (Weggeland) creates provisions for redevelopment at March Air Force Base in Riverside County, while SB 1035 (Thompson) creates similar provisions for Marc Island Naval Base near Vallejo, while also allowing the local joint-powers authority to use incentives, including credit enhancements and loan interest buy-downs, to lure commercial development and business relocation. The Thompson bill also has the advantage of an 18-month deferral on the requirement to prepare an EIR for the redevelopment project area, which will allow local officials to start marketing efforts to bring new business to Mare Island without being delayed by the EIR process. "Since we didn't have specific users (already lined up), it was an important first step, indicating that Mare Island was serious about attracting new business," said Thompson aide Tom LeFaille.

Advocates of base re-use were also aided in early October by Congress, which approved an amendment to the McKinney Act, removing the priority formerly given to homeless shelter providers to bid on surplus federal lands. The Senate passed the amendment, which was introduced by Sen. Dianne Feinstein, on October 6, with the House approving it the following day, both by unanimous vote. The provision of the McKinney Act had been a particular aggravation to local base-reuse officials, who had complained that homeless providers could ask for all or part of bases, without regard to local planning efforts, which could be delayed for months while federal officials evaluated the requests.

"It's an important piece of legislation that we worked very hard to get through. We were really the spearhead of the effort to secure passage," said Ben Williams, deputy director of the Office of Planning and Research and former executive officer of the Governor's Task Force on Base Closures. Williams added that he did not view the amendment as hostile to the interests of homeless service providers, and that the Governor's office had conferred with representatives of homeless agencies. "They wanted to be involved in the planning process anyhow, and this (amendment) will bring them into the process."

The California Military Base Reuse Task Force, chaired by San Diego Mayor Susan Golding, had recommended the changes.

Three Bases Shut Down

As expected, three military bases formally shut down in late September, including the 219-year-old Presidio in San Francisco, the 77-year-old Fort Ord and the 53-year-old Long Beach Naval Station.

Hunters Point Gets Shipbuilding

In an indication that the City of San Francisco's plans to maximize the economic value of closed military bases in the city, an Oregon-based ship-dismantling firm signed a five-year lease with the U.S. Navy for Dry Dock 4 of Hunters Point Naval Shipyard. Astoria Metal, a unit of Portland-based HC Inc., is leasing 25 acres, together with several office buildings and warehouses, for $240,000 a year.

In June, the Navy agreed to transfer 80 acres of the 520-acre base to the City of San Francisco, which does not include any ocean frontage. The dry dock is the largest on the West Coast.

Regional Park Opens at Mather

Sacramento County opened the 1,440-acre Mather Regional Park on a portion of the former Mather Air Force Base. Officials plan to develop an amphitheater, horse stables, campgrounds and playing fields for soccer and softball in the next two decades. The park adjoins the 29-acre Mather Sports Complex, with an existing gym and other athletic facilities. Initial work on the park is being funded by a $2 million grant from the Corporation of National and Community Service, Defense Conversion Assistance Program. The Sacramento Local Conservation Corps plans to use the money to hire inner-city youth to do initial work on the park.

Norton Gets Favorable Financing

The joint powers authority responsible for the conversion of Norton Air Force Base struck an agreement in September with the Pentagon that allows local authorities to defer payments for 15 years on the purchase of 575 acres. Under the terms of the deal, the Inland Valley Development Agency receives the land at no initial cost, and will begin to pay off the $52 million purchase by diverting 40% of lease payments from private companies that rent buildings on the base during the next 10 years. Local officials praised the plan allowing business development to take place with a minimal economic burden on local government. IVDA plans to start leasing buildings on the site within the next three months.

On a different part of the base, the IVDA recently signed a lease with the San Bernardino Police Department, which will use a building on the base as a temporary headquarters during construction of a new facility in the city's Downtown area.

Packard Bell Gets Tax Breaks at Army Depot

In September, the Legislature approved tax breaks for Packard Bell to build a computer-assembly plant at the former Army Depot in the City of Sacramento, where the company is expected to provide 3,000 jobs. City officials are also contemplating a state prison, a Navy/Marine Corps Reserve Training Center, and U.S. Army Reserve and unit of the California National Guard at the 485-acre depot. Already on site is a food distributor for the homeless, California Emergency Foodlink. ❑

CP&DR
LEGAL DIGEST

Encinitas Housing Element Upheld

Appellate Court Confirms Validity of Growth Management Plan

By Larry Sokoloff

An appellate court has upheld Encinitas's housing element and other zoning restrictions, affirming a lower court ruling.

A three-judge panel of the Court of Appeal, Fourth Appellate District, Division One unanimously ruled that the city's housing element is in substantial compliance with state laws regulating such documents. The court also ruled that the city's general plan is not inconsistent and that the city has not violated Government Code §65913 and §65913.1, which it referred to as the "least-cost" zoning law.

Encinitas was incorporated in 1986 when five smaller communities in San Diego County decided to join together. It contains beach communities as well as more rural, agricultural inland areas. The California department of Housing and Community Development has never approved a housing element for the city, though it has reviewed drafts of the element. In recent years, HCD, as well as various legal aid groups, have made major efforts to force local jurisdictions to produce a housing element that is in compliance with state law (See *CP&DR*, August 1994).

Attorney Joel Kuperberg, who represented the city in the case, said the Court of Appeal ruling is more important to the jurisdiction than HCD's decisions. HCD spokesman John Frith said the court used a different standard of review than HCD does. Here, the court based its standard of review on an earlier decision in *Buena Vista Gardens Apartments Association v. City of San Diego* (1985), 175 Cal. App. 3d 289, 297, 298, which looked at whether the local adopting agency had acted "arbitrarily, capriciously, or without evidentiary basis." Frith said HCD's responsibility as defined by the Legislature is to look at the feasibility of the plan.

HCD believes that it "has a role to look more deeply, to look at the merits," Frith said.

An attorney for the low-income residents who sued the city said he plans to appeal the decision. Jonathan Lehrer-Graiwer said he believes the ruling conflicts with the recent decision by another Fourth Appellate District panel in *Building Industry Association v. Oceanside*, No. D016581, 94 Daily Journal DAR 11413, August 18, 1994.

In the *BIA* decision, the court said that state planning and housing law pre-empts a city's ability to restrict housing. Lehrer-Graiwer said that Encinitas, like Oceanside, has a growth control program that restricts development to a level below that required to meet regional housing needs. However, Kuperberg said the Encinitas ordinance contains an exception for affordable housing. One of the judges who was on the three-judge panel in the Encinitas case, Justice Gilbert Nares, also was on the panel that decided the Oceanside case.

The Encinitas case was an appeal of ruling from San Diego County Superior Court, where three separate judges found in 1990 that Encinitas's housing element was in substantial compliance with state law. In its September 30 opinion, the appellate court upheld the judgment and orders of the lower court.

The three-judge panel examined challenges to portions of the housing element, including its inventory of land suitable for residential development, provisions for housing farmworkers and homeless persons, and identification of adequate sites for low and moderate income housing. It repeatedly found that the provisions were in substantial compliance with §65583 of the state Government Code.

The court also upheld other parts of the lower court rulings. The appellate panel said that the city's general plan is not inconsistent because its land use element contains such items as the growth management plan.

The court dismissed appellants' arguments that the city's zoning ordinance and its land use element violated §65913 and §65913.1, which Lehrer-Graiwer and the justices referred to as the "least-cost" zoning law. The law permits setbacks and other development standards but requires such standards to "contribute significantly to the economic feasibility of producing housing at the lowest possible cost given economic and environmental factors..." Lehrer-Graiwer had argued that height limits, parking restrictions on multifamily housing, and the growth management program violated this provision by rendering "least-cost" housing economically infeasible. Affirming the lower court, the Court of Appeal disagreed, noting that the law also permits consideration of such factors as environmental damage and adequate public facilities. "The city struck a balance in adopting the general plan that is fully consistent with economic and environmental factors and the public health and safety," the court said.

Mike Rawson, of the Legal Aid Society of Alameda County, is director of the Housing Element Enforcement Project, which seeks to get local jurisdictions to bring their housing elements into compliance with state law.

Rawson said that since the case is so fact specific to issues in Encinitas, the opinion will probably not be useful in other jurisdictions.

Kuperberg indicated the case had not broken new ground in housing element issues.

"Most of the housing element discussion confirms, but doesn't significantly expand on housing element cases in the past ten years," he said. ❑

- The Case:
  Hernandez v. City of Encinitas, California Court of Appeal, Fourth Appellate District, Division One, No. D016586, 94 Daily Journal D.A.R. 13831.
- The Lawyers:
  For appellants: Jonathan Lehrer-Graiwer, (213) 936-8111.
  For respondents: Joel Kuperberg, Rutan & Tucker, (714) 641-5100.

ENDANGERED SPECIES

Appeal Court Sends Gnatcatcher Back to Fish and Game Commission

By William Fulton

An appellate court has ordered the California Fish & Game Commission to reconsider its 1991 decision not to make the California gnatcatcher a candidate for endangered status. In the process, the court established a new standard for the commission in determining whether species should be designated as candidate species.

Rejecting proposals by all sides, the Third District Court of Appeal concluded that the commission should grant candidate status if there is "a substantial possibility that listing could occur" — a threshold higher than environmentalists sought but lower than the building industry suggested. Though lawyers involved in the case differed about the meaning of this standard, an appeal is unlikely and the case appears headed back to the Fish & Game Commission for reconsideration. The case is the first significant land-oriented appellate ruling ever issued under the California Endangered Species Act.

The gnatcatcher case began in 1991, when the Fish & Game Commission declined to grant candidate status to the gnatcatcher. The commission did so at the request of the Wilson Administration, which was seeking to encourage landowners to participate in the Natural Communities Conservation Planning program. (*CP&DR*, September 1991.) Candidate status is especially important under the California endangered species law. Under the state law — unlike federal law — a candidate species is fully protected for 12 months as if it were already listed as endangered. Fish & Game Code §2074.2 states that a species should be granted candidate status when the petition "provides sufficient information to indicate that the petitioned action may be warranted." The commission then makes a new determination as to whether a candidate species should actually be listed.

The Natural Resources Defense Council, which had petitioned to list the gnatcatcher, sued the Fish & Game Commission, claiming the commission should have used a lower, "fair argument" threshold for candidate status. The Building Industry Association and the Orange County Transportation Corridor Agencies, which have been actively involved in other gnatcatcher litigation, intervened in the case.

Sacramento County Superior Court Judge William Ridgeway rejected the NRDC's argument and imposed a standard requiring that candidate status be granted when the petition presents "substantial evidence indicating a need for a listing." The Fish & Game Commission, the BIA, and the TCAs appealed.

On appeal, NRDC again argued that a fair argument standard should be applied. According to NRDC lawyer Joel Reynolds, the group's argument was that under the two-step process contemplated in the law — candidacy and then listing — the threshold for candidacy should be low and the threshold for listing should be high. Before the appellate court, the NRDC essentially argued that a petition for candidacy should be judged by the same standard used in cases under the California Environmental Quality Act.

However, the court rejected this argument. "The determination of whether a species is a candidate under the California Endangered Species Act contemplated a more formal, public, evidentiary, and fact-finding process than does the determination of whether to prepare an environmental impact report under CEQA," wrote Acting Presiding Justice Rodney Davis for the unanimous three-judge panel.

The Fish & Game Commission, the BIA, and the TCAs proposed a much higher standard: That a species should be granted candidate status only if it is "reasonable probably that an endangered (or threatened) listing will occur." But the appellate court found fault with this proposal as well. First, the court found fault with "the standard's fundamental premise — that a determination favoring candidacy operates to preclude, during the candidate study process, all potential habitat development and land use." In particular, the court cited Fish & Game Code §2084, which permits landowners to take species under certain conditions specified by the Fish & Game Commission — the legal basis for habitat conservation plans during candidacy.

In addition, the court also found that such a high standard for candidacy "is at odds with the two-step listing process set forth in CESA and the Department's role in that process." In particular, the two-step process calls for one year of intense scientific analysis by the Department of Fish & Game after candidacy is granted — indicating that listing itself should be subject to a much tougher threshold than candidacy.

"In sum," Justice Davis wrote, "the 'reasonably possibility' standard of the CEQA/EIR process sets too low a threshold for the 'may be warranted' provision in §2074.2 And the standard of 'reasonably probable that a listing will occur' sets too high a mark. But these two standards are helpful in delineating a spectrum of meaning and point to a standard located between them."

As a compromise, Justice Davis and the rest of the panel created a new standard: "substantial possibility that a listing could occur."

NRDC's Reynolds said he counted the Third District's ruling as a victory because it achieved his group's main goal — to retain "the sharp contrast between the two steps," with a much lower threshold at the candidacy stage than at the listing stage.

Yet Robert Thornton, lead counsel for the TCAs, also said he was relatively pleased with the outcome. "Clearly it went better than what we had at the trial level, which amounted to the fair argument standard in sheep's clothing." He also noted that the court took great pains to point out this standard would apply only to the Fish & Game Commission's quasi-judicial deliberations and not to judicial review. He also said the language about §2084 was potentially important although it is dicta because it would prevent environmentalists from blocking all land-use changes when a species has candidacy status.

In any event, neither side expressed interest in appealing — a marked change from most litigation surrounding the gnatcatcher and the related construction of the San Joaquin Hills Transportation Corridor. With Reynolds and Thornton on opposite sides, NRDC and the TCAs have been engaged in seemingly endless litigation in both state and federal court on a variety of issues. ❑

- The Case:
  NRDC v. California Fish & Game Commission, No. CO14827, 94 Daily Journal D.a.R. 13821 (October 4, 1994).
- The Lawyers:
  For NRDC: Joel Reynolds, NRDC, (213) 893-6500
  For Fish & Game Commission: Walter Wunderlich, Senior Assistant Attorney General, (916) 324-5361.
  For Building Industry Association of Southern California: Richard Jacobs, Howard Rice Nemerovski Canady Robertson & Falk, (415) 434-1600.
  For Orange County Transportation Corridor Agencies: Robert Thornton, (714) 833-7800.

CEQA

Judge's Adverse Ruling May Kill Eagle Mountain Landfill

By Larry Sokoloff

A ruling by a Superior Court judge against a gigantic Riverside County landfill proposal — and the passage of a federal law creating Joshua Tree National Park — has set a chain of events in motion which could mark the end of the waste disposal project.

The decision, issued by San Diego County Superior Court Judge Judith McConnell on September 1, ordered a new environmental impact report on the Eagle Mountain landfill project, which is proposed for abandoned iron ore mining pits located 1 1/2 miles south of the boundary of Joshua Tree National Monument. The landfill would be the nation's largest if it is built.

Since McConnell's ruling, passage of the federal California Desert Protection Act by Congress has upgraded Joshua Tree to a National Park, raising further doubts that such a project will be approved. And Browning Ferris Industries, which owned 60% of the stock in the corporation that proposed the landfill, has backed out.

Meanwhile, the Riverside County Board of Supervisors is studying whether it can vote to kill the project. And attorneys for a hydroelectric facility competing for some of the same land as the landfill recently won a court battle against landfill proponents.

The developers of the proposed landfill, Mine Reclamation Corporation, have appealed McConnell's ruling and vow that they will continue with the project. MRC's largest shareholder is Itel Corporation, which manufactures shipping containers. Other shareholders include private disposal haulers, according to Kay Hazen, MRC's spokeswoman.

According to court documents, the landfill would take up 2,262 acres of a 4,654-acre site. The landfill could accept up to 20,000 tons of trash daily for at least 115 years.

Hazen said a sophisticated liner system to prevent groundwater contamination is planned, with 12 layers of protection on the bottom of the landfill and seven layers on the side. She said the Colorado River Regional Water Quality Control Board approved the liner system after lengthy study and hearings.

Ninety percent of the trash would be shipped to the site by rail from Los Angeles County and other counties in Southern California. The site is located 10 miles from the town of Desert Center at former mines once used by Kaiser Steel Corporation. Desert Center is about 50 miles east of Palm Springs.

Kaiser Steel went bankrupt in the mid-1980s, leaving its approximately 7,000 retirees without health benefits. The site of the mines is one of the assets of Kaiser Steel Resources, the successor corporation, and is being leased to MRC for the project. Kaiser retirees are supporting the project, hoping that it will lead to the return of their benefits, Hazen said.

Part of the land for the landfill is now owned by the U.S. Bureau of Land Management. Kaiser proposed to acquire the land in exchange for other land it owns. That action was stayed by the U.S. Department of Interior's Board of Land Appeals.

MRC and Kaiser lost a court battle before the District of Columbia Circuit Court of Appeals in August against Eagle Crest Energy Corporation, which seeks to use the landfill site for a hydroelectric project. The suit clears the way for Eagle Crest to continue seeking a permit from the Federal Energy Resources Commission. FERC has the power to reserve BLM's land for the project, thus thwarting the Kaiser/BLM land swap.

The Eagle Crest project would generate electricity by releasing water from an upper reservoir through a turbine generator to a lower reservoir. MRC spokeswoman Hazen claimed that Eagle Crest has not secured the water for the project, while an Eagle Crest attorney said groundwater would be used.

In a statement of decision issued in the superior court case, Judge McConnell criticized the way the EIR treated the hydroelectric project.

The original EIR called the hydroelectric project speculative and remote, and did not evaluate it as a cumulative impact.

McConnell also said that the county's failure to disclose its opposition to the hydroelectric project in the EIR violates CEQA and demonstrated bad faith.

The superior court case was heard in San Diego County, because Riverside County is one of the defendants in the case.

In making her ruling, McConnell issued a writ of mandate ordering a new EIR that would look at numerous impacts of the project. Those impacts include the growth of a town to house landfill employees, the land swap with Kaiser and BLM, the possibility that earthquakes would break the liners at the landfill, and the effect the project would have on desert tortoises, which are listed as a threatened species. ❑

- The Cases:
  Eagle Mountain v. Riverside County Board of Supervisors, No. 662906, and National Parks and Conservation Association v. County of Riverside, No. 662907
- The Lawyers:
  For National Parks and Conservation Association: Joel S. Moskowitz, Gibson Dunn & Crutcher, (213) 229-7273.
  For Mine Reclamation Corporation and Riverside County: Martin Nethery, Best Best & Krieger, (619) 325-7264.
  For Eagle Crest Energy Corporation: Jose Allen, Skadden, Arps, Slate, Meagher & Flom, (415) 984-6400.

Subdivision Map Act

Quimby Act Pre-empts Tax On New Development

Roseville's residential construction tax — in place since 1972 to pay for parks in the city — violates the Quimby Act, the state law that governs exactions and land dedication for parkland, the Third District Court of Appeal said.

Roseville's tax was not a traditional park fee in that it was not imposed as a condition of approval on a tentative subdivision map. Instead, it was imposed at the building permit stage and relied on Roseville's home rule powers rather than the Quimby Act for its legal authority. But the Third District concluded that the Quimby Act pre-empted the tax anyway.

Roseville passed the tax in 1972 after specifically rejecting a proposal to require land dedications for parks under the Subdivision Map Act, as called for by the Quimby Act. The city then adopted the residential tax to pay for new public facilities, specifically stating that the tax was being adopted under the city's power to levy taxes, not the police power.

The appellate court considered three issues in determining the case. First, is there an actual conflict between the Quimby Act (Gov't Code §66477) and Roseville's tax? Second, is the exaction an issue of statewide concern? And third, is the Quimby Act reasonably related and narrowly tailored to address matters of statewide concern?

On the first question, the justices distinguished the *Roseville* case from two somewhat similar cases involving municipal tax ordinances that survived challenges under the Map Act, *The Pines v. City of Santa Monica*, 290 Cal.3d 656 (1981) and *Centex Real Estate Corp. v. City of Vallejo*, 19 Cal.App.4th 1358 (1993). The *Centex* case in particular bore a strong relationship to the *Roseville* case because Vallejo had imposed an excise tax on development as a means of evading the restrictions contained in AB 1600, the state law governing imposition of development fees. Both taxes were upheld by the courts.

The Roseville situation was different, however, because it was not a general tax, according to the appellate court. "Here ... the exaction was not imposed to generate revenue for the general fund but to finance the parks needed to service future residents."

On the second question, the court wrote strongly that the Roseville park tax involved an issue of statewide concern. Writing for the unanimous three-justice panel, Justice Vance W. Ray stated: "In a highly mobile society, seldom do residents restrict their enjoyment of parks to those located within a designated subdivision....City boundaries mean little to Californians in search of, and drawn to, the piece of land designated 'a park'."

Having reached those answers, the court then examined the question of whether the Quimby Act was reasonably related and narrowly tailored to address extraterritorial concerns. By requiring a nexus between development and impact, the court concluded that this tailoring had in fact occurred — and the court went on to say that the Roseville tax does not meet the Quimby Act's requirements.

"The statute does not provide developers immunity from any and all taxes imposed by a charter city." However, the court went on, "§66477 does not provide a blanket exemption from taxation. Since, however, the city's residential construction tax blatantly conflicts with §66477's mechanism for assessing developers their proportionate share of the costs of parks, a matter of statewide concern, it is pre-empted by the statutory scheme." ❑

- The Case:
  Auburn Manor Housing Corp. v. City of Roseville, No. C014252, 94 Daily Journal D.A.R. 14693 (October 20, 1994).
- The Lawyers:
  For Auburn Manor: James K. Norman, Norman & Eames, (916) 885-8336.
  For Roseville: Steve Bruckman, Deputy City Attorney, (916) 774-5325.

Summary of Significant Bills in 1994 Legislature

Signed by the Governor

Base Reuse

AB 3755 (Honeycutt): Requires a single local base reuse entity to be recognized in accordance with certain provisions. Chapter 1261, Statutes of 1994.

AB 3759 (Gotch): Permits local governments to establish military base reuse commissions to plan and finance revitalization projects for closed bases; modeled after SB 899 (Mello), which established procedures for Fort Ord. Chapter 1165, Statutes of 1994.

AB 3769 (Weggeland): Creates special provisions for redeveloping March AFB. Chapter 1170, Statutes of 1994.

SB 899 (Mello): Created Fort Ord Reuse Authority. Combined with SB 1600 (Mello). Chapter 64, Statutes of 1994.

CEQA

AB 3373 (Bustamante): Exempts farmworker housing from CEQA under certain circumstances. Chapter 1058, Statutes of 1994.

SB 749 (Thompson): Revises definition of project and exempts some low-income housing projects of 45 units or less. Urgency measure; took effect immediately. Chapter 1230, Statutes of 1994.

Endangered Species

AB 2874 (Snyder): Would specify that a surface mining operator would not be liable for criminal prosecution for taking endangered species if certain conditions are met. This was the only endangered species bill passed. Chapter 1148, Statutes of 1994.

Housing

AB 51 (Costa): Would permit a city or county to transfer up to 15% of the region's affordable housing units ,but not more than 500 units, to a contiguous city or county. This bill was the remains of a more comprehensive attempt to revise the housing element law. Chapter 1230, Statutes of 1994.

AB 3134 (McDonald): Allows HCD to prepare guidelines for combined housing element/CHAS document. Chapter 191, Statutes of 1994.

AB 3198 (Hauser): Gives local governments more control over regulation of second units. Chapter 580, Statutes of 1994.

Infrastructure

AB 1495 (Peace): Creates the California Infrastructure Bank to finance a wide range of state and local public works projects. Chapter 94, Statutes of 1994.

SB 101 (Bergeson): Creates the California Infrastructure Bank to finance a wide range of state and local public works projects. Chapter 749, Statutes of 1994.

SB 881 (Killea): Would permit use of enterprise zone bonds to be used as incentives for economic development. Chapter 913, Statutes of 1994.

LAFCO

SB 1397 (Johnston): Authorizes the creation of a Mountain House Community Services District subject to the approval of the San Joaquin LAFCO. Chapter 1201, Statutes of 1994.

Land Use Planning

AB 1873 (Moore): Exempts film ordinances from other land-use regulations unless the ordinance states otherwise and makes film permits valid in any area unless zoning expressly prohibits filming. Chapter 687, Statutes of 1994.

AB 2831 (Mountjoy): Restores the requirement for airport land use plans, including special provisions for specific counties, which had previously been suspended by the Legislature. Chapter 644, Statutes of 1994.

AB 3152 (Bates): Enacts Transit Village Development Planning Act with incentives for higher-density, mixed-use development near rail stations. Chapter 780, Statutes of 1994.

AB 3523 (V. Brown): Extends deadline for Vallejo and Solano County to adopt White Slough Specific Area Plan to 1996. Follow-up to bill requiring plan to resolve issues among local government, BCDC, and Caltrans. Chapter 528, Statutes of 1994.

SB 517 (Bergeson): Promotes mediation in land-use, CEQA, LAFCO, and redevelopment lawsuits. Chapter 300, Statutes of 1994.

SB 2112 (Bergeson): Prohibits local agencies from enforcing requirements related to rebuilding non-conforming multi-family dwellings after disasters under certain circumstances. Chapter 743, Statutes of 1994.

Redevelopment

AB 978 (Hauser): Revises and sunsets the standard law for redeveloping communities after disasters. Died in Senate Appropriations Committee.

AB 3750 (Friedman): Creates special provisions for redevelopment in Malibu after 1993 wildfires. Vetoed.

SB 732 (Bergeson): Cleanup bill for AB 1290. Chapter 936, Statutes of 1994.

SB 1035 (Thompson): Creates special provisions for redeveloping Mare Island Naval Base. Chapter 1168, Statutes of 1994.

School Facilities

AB 3747 (Quackenbush): Permits a school district with a Mello Roos District to form a school facilities improvement district under certain circumstances. Chapter 1105, Statutes of 1994.

SB 1461 (Craven): Allows a school district to waive school facilities fees for senior citizens and low-income residents who have moved from mobile home park spaces in one school district to another. Chapter 983, Statutes of 1994.

Subdivision Map Act

AB 1414 (Gotch): Contains six minor changes to Subdivision Map Act recommended by Assembly's Subdivision Map Act advisory group. Chapter 458, Statutes of 1994.

AB 3353 (Gotch): Requires certificate of compliance to include more information. Chapter 655, Statutes of 1994.

SB 243 (Lewis): Prohibits a local agency from disapproving an application in order to comply with time limits unless there are other reasons for the disapproval. Chapter 977, Statutes of 1994.

Transportation

AB 1958 (Katz): Establishes priorities for allocation of funds under State Transportation Improvement Program. Chapter 1012, Statutes of 1994.

AB 1963 (Katz): Implements recommendations on how to better coordinate congestion management planning and air quality planning. Chapter 1146, Statutes of 1994.

SB 1742 (Kopp): Establishes procedures for BART's extension to the San Francisco International Airport. Chapter 988, Statutes of 1994.

Williamson Act

SB 1534 (Johnston): Increases the information that public agencies must produce before placing public works on Williamson Act contracted land. Chapter 1158, Statutes of 1994.

SB 2663 (Sher): Requires land use on Williamson Act contracted lands to conform to statutory principles Chapter 1251, Statutes of 1994. ❑

Slow Year Yields Little Significant Legislation

Continued from page 1

coordinated planning in the state. But Wilson vetoed AB 230 (Gotch), which would have cost about $800,000 to implement, as too costly. "We were kind of surprised by the veto, because the comprehensive state plan is a viable tool for economic development, and has helped states like New Jersey save hundreds of millions of dollars," said Randy Pestor, consultant to the Assembly Local Government Committee.

Bills creating Wilson's long-promised state infrastructure bank were hamstrung by inconsistencies of other kinds. The governor signed AB 1495 (Peace), which created the bank, as well as SB 101 (Bergeson), a "clean up" bill, although the bill to issue a $200 million general obligation bond to fund the bank, AB 638 (Brown), died in committee.

A notable casualty of the '94 session was a package of reform bills to the Endangered Species Act, described as the most significant attempt ever to ease California's endangered species conflicts. The effort involved long and reportedly productive negotiations among environmentalists, developers, utilities, oil companies and farmers. AB 3052 (Bustamante, Hart and McCorquodale) would have tightened the scientific standards for listing species on the threatened-or-endangered list, including requirements for Fish & Game to adopt guidelines for a scientific peer review process. SB 1621 (McCorquodale and Hart) would have clarified the conditions under which Fish and Game could issue permits for the "take" (i.e. killing or harming) of listed species. SB 1549 (McCorquodale, Maddy, Mello and Wyman) would have decriminalized accidental killings of listed species.

At a point where the various parties thought they had a consensus, a timber-industry lawyer reportedly objected to the requirement in SB 1621 about the requirements of companies which accidentally kill listed species to actively mitigate and "conserve" species, rather than merely paying fines. Then representatives of the timber industry and the California Building Industry Association objected to the conditions under which Fish & Game could issue "take" permits, and the last-minute objections killed the bills. John McCall, the lobbyist for the Audubon Society, who participated in the negotiations, said the policy and language at issue mirrored that of the federal Environmental Species Act, and speculated that the timber industry did not want to see California set a precedent in the area of species mitigation at a time when those industries are having an "all-out war" against the federal statute.

The only endangered-species legislation to pass was AB 2874 (Snyder), which decriminalized unintended "takes" of listed species by surfacing mining operators, and SB 1756 (Kelley), which instructs Fish and Game to set up regulations regarding the taking of birds or other animals by specified methods.

Another notable collapse in long-anticipated legislation was housing element reform. Again, a process of negotiations among interest groups — in this case, affordable housing advocates, building industry officials and local governments tried to create a "self-certification" standard for cities, and thus defuse the growing tension over housing-element conformance between the Housing and Community Development Department and local government. SB 1839 (Bergeson), which would have allowed self-certification as well as revised rules for the allocation of "fair-share" housing, died in the Assembly Housing and Community Development Department. Wilson signed AB 51 (Costa), which liberalizes housing policy by allowing jurisdictions to transfer their affordable housing requirements to other cities, as well as allowing counties to transfer housing credits among each other.

Redevelopment reform was furthered by SB 732 (Bergeson) a clean-up bill for last year's redevelopment reform law, AB 1290. Less fortunate was AB 978 (Hauser), which was an attempt to update the 30-year Disaster Project Law in the Health and Safety Code, §34000 et al. The Hauser bill would have required municipalities to address the activities of disaster-related redevelopment agencies strictly to damage. Ironically, the bill was shot down by the state Finance Department, which claimed the bill would make it too easy for local governments to create redevelopment districts, although the bill's authors had the opposite intent.

In a further irony, AB 3750 (Friedman), which had attempted to create a disaster-related district in Malibu in the wake of the hillside fires last fall, was vetoed by the governor. Two bills bolstered the Williamson Act, the state's agricultural preserve law. The more significant was AB 2663 (Sher), which requires all uses on protected land to avoid conflict with ag operations, and to avoid removing land out of ag or open-space use.

CEQA reform was also underwhelming, although Paul Thayer, consultant to the Senate Natural Resources Committee, defended the modest scale of this past year's CEQA bills, saying that the most important CEQA reforms, such as the Master EIR, had already been enacted in 1993. AB 314 (Sher and Allen) contains a hard deadline for filing judicial challenges to CEQA compliance; Wilson actually intended to veto this bill, which nonetheless became law after an aide mislaid the veto letter. SB 749 (Thompson) narrowed the definition of "project" under CEQA to operations that have direct physical impacts, or foreseeable impacts, heading off a recent trend of CEQA-related litigation against policies and regulations.

Dying in committee were two CEQA reform bills which attempted to limit the scope of CEQA lawsuits and the people who could bring them, AB 3250 and AB 3251 (Haynes).

New land-use bills included SB 517 (Bergeson), which promotes mediation for most of the state's major land-use laws, including the Subdivision Map Act, redevelopment and CEQA. The governor vetoed AB 231 (Gotch) which called for including routes for bicycles and pedestrian paths in the circulation elements of general plans, claiming the bill would apply to "only a few" communities.

In the area of transportation, achievement was again mixed. The most notable bill was AB 1958 (Katz), which essentially suspended highway construction for the next several years by allowing Caltrans to speed up the awarding of contracts on earthquake retrofit work on the state's highways and bridges. The bill banned the Transportation Commission from reprogramming the State Transportation Improvement Program — essentially the state's highway and rail construction plan — until 1996.

AB 1963 (Katz) codifies the recommendations of the Statewide Steering Committee to better coordinate planning on air-quality and congestion-management issues. The governor signed AB 2831 (Mountjoy), which reinstates the mandate to establish airport land-use commissions. Perhaps the most forward looking transportation bill was AB 3152 (Bates), which enacts the Transit Village Development Planning Act, by authorizing local governments to provide incentives, including increased density, for mixed-use development near transit. ❑

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Dan Silver, Endangered Habitats League, (213) 654-1456.

Paul Thayer, consultant, Senate Natural Resources Committee, (916) 445-9367.

Randy Pestor, consultant, Assembly Local Government Committee (916) 445-6034.

Property Rights Advocates Make Progress in Congress

Continued on page 10

that, several commentators have observed, was loath to approve much of anything during the six months leading up to its October 8 adjournment.

The property rights movement did, however, succeed where many other interest groups did not in eking out a legislative win at the last moment. When a Republican filibuster fell apart over the California Desert Protection Act, the measure squeaked through in the last few hours of the session, taking with it an amendment including property owner protections.

The measure authorizes the government to acquire 700,000 acres of private land through eminent domain to complete a 6.4 million-acre preserve. The property rights amendment prohibits federal negotiators from using the presence of the desert tortoise and other endangered and threatened species to offer cut-rate prices for the land.

The unexpected success of the amendment was due largely, Reigle said, to "Interior Department arrogance in telling Congress they could buy this land on the cheap because of the desert tortoise."

Property rights strategists are also credited by supporters and detractors alike with helping kill legislation to re-authorize the Clean Water Act, elevate the status of the Environmental Protection Agency to cabinet level and to instigate a nationwide survey of plant and animal species on public and private land.

The Clean Water Act contained a provision directing the Environmental Protection Agency and the Army Corps of Engineers from taking private property for a public purpose without just compensation.

Had the bill survived, it might have been combined with comprehensive wetlands legislation that included a number of provisions applauded by the property rights community. Those provisions would have reduced efforts to protect all but the most ecologically critical wetlands and offered compensation for fair market value without regard to Clean Water Act use restrictions.

Endangered Species Act-related measures introduced by friends of the property rights movements include one establishing compensation for landowners when a government action under the species law ends the economically viable use of the property with an arbitration mechanism. Another specified that an endangered species action that reduces fair market value by 25% or more qualifies as a regulatory taking and is therefore compensable.

The stalemates reached between the environmental and property rights factions on several coming issues before this most recent Congress may well turn out differently during the next go-around, said Stephen Driesler, chief lobbyist for the National Association of Realtors. He is predicting the November elections will increase the numbers of Republicans in the House and Senate. "I think the tide is shifting."

Reigle can hardly wait. "I think we will see a much more property rights-friendly Congress, i.e., conservative Congress when it convenes January 3," she said.

The adversaries in the environmental movement are taking the property rights challenge more seriously, as well, said Darrell Knuffke, a Denver-based regional director for the Wilderness Society.

"As someone who follows politics, I am in awe of their success," Knuffke said.

Knuffke is particularly wary of free-standing legislation that would codify private property rights such as the measure introduced by Rep. W.J. "Billy" Tauzin, D-La.

Robert Bannister, chief lobbyist for the National Association of Home Builders, called the Tauzin bill a "fairly sweeping stand-alone piece of legislation that is a rallying point for those of us concerned about property rights."

The bill instructs the federal government to minimize the impact of environmental programs on property rights and to obtain written owner consent before entering private land to collect information on the property. It also gives property owners a way of appealing permit denials and other government decisions in lieu of going to federal court.

The Tauzin proposal further requires landowner compensation when government regulation devalues property by 50% or more of its fair market value or economically viable use.

"Through a single cross-cutting statute they are winning what they have lost on an individual issue by issue basis," Knüffke said. "The American public is overwhelmingly supportive of reasonable regulation to protect the environment and public health and safety," which he contends the private property proposals undermine.

When the property rights adherents are not seeking direct relief from the laws, they are suing for monetary compensation from the public treasury commensurate with the drop in property value or limitation on its use brought on by government regulation.

Consequently, the property rights movement also is cheering a number of decisions handed down recently by the courts, including Supreme Court decision in the *Dolan* case and a federal appeals court ruling in the *Loveladies Harbor* dispute. (*CP&DR*, July and August 1994.)

Knuffke contends that the decisions that defer to property owners bolster the environmental viewpoint. "The cases confirm what we have been arguing: that the right to habitat and the right to use property are more than adequately protected," he said.

The environmental lobby also maintains that the expansion of private property rights amounts to little more than a money grab. The property movement, National Wildlife Federation attorney Glenn Sugameli said, is but a cover for monied interests intent on a "radical reinterpretation" of property rights.

"Property rights do not include the right to squeeze every dollar of profit out of every square inch of property, only the right to a reasonable return," Sugameli said.

The movement, Meltz said, consists of three flanks that often operate independently of one another. They are small property owners wrapped up in land battles, extractive industries such as building, mining, logging and farming and conservatives seeking to limit the sphere of government influence as a matter of principle. ❑

H. Jane Lehman is a real estate journalist based in Washington, D.C.

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Darrell Knuffke, regional director, Wilderness Society, (303) 650-5815.
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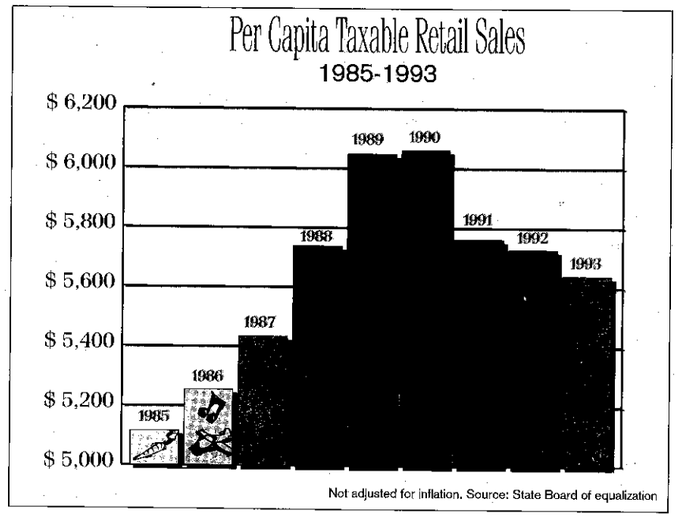
NUMBERS

Stephen Svete

Sales Tax Headed Back Up — For Now

By all estimates, it appears that retail sales in the state may be recovering from a steady four-year slide.

On the face of it, this is heartening news — another welcome sign that the recession is rounding the corner in California. But the reversal will largely benefit those localities which have succeeded in landing large retail developments, resurrecting concerns about the equity of a tax system that relies on the volatile and spatially skewed retail economy.



Per-capita retail transactions fell by 7% unadjusted dollars between 1990 and 1993, from $6,060 to $5,639. In 1991, the first full year of the recession, retail expenditures plunged by over $5 billion dollars in California — a direct loss to local government of over $50 million in that year alone. So the current estimated sales figures coming in from the counties are encouraging.

For example, July 1994 statistical estimates from six urban Southern California counties show that five are expecting increases in taxable sales compared to a year ago. Orange County expects an increase of nearly 8%. Only San Diego expects a continued slide in sales, proving that the border metropolis is the one most tenaciously gripped by the recession.

But even if the early data points to spending trends returning to normal, the retailing industry is as volatile as ever. In the four years since we last took shopping for granted, department stores have grown increasingly stagnant, catalog and TV-direct sales continue to grow, and the traditional discounters have suffered from an onslaught of competition (factory outlets, department store outlets, off-price stores, catalog outlets, and specialty outlets). These changes are already affecting urban and suburban landscapes throughout the state.

Malls are experiencing high rates of vacancy — including, in prominent cases, empty 100,000+-square-foot anchor-store space. Meanwhile, the outlet mall prototype has gone thematic, and has moved from rural/vacation travel corridors directly into the suburbs — resulting in aggressive competition with the traditional malls and their already vulnerable anchors.

And there's a new kid on the block: the super-regional outlet mall. Pursuing this latest of retail trends will draw local government planners into an increasingly sticky economic development tradeoff: quick cash versus long-term economic development.

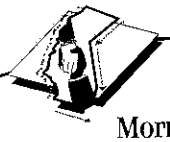
The first super-regional outlet opened in September in the Bay Area edge city of Milpitas, and illustrates the dilemma nicely. At 1.3 million square feet of off-price space, the Great Mall of the Bay Area dwarfs any outlet center yet built in the state. Its 222 stores are expected to generate $4 million in sales taxes to Milpitas' coffers, a 50% increase. Half of the take will pay for new roads and law enforcement.

Located on the site of a former Ford plant — and developed, in part, by Ford itself — the Great Mall is supplying a growing demand for discounted goods. The Urban Land Institute reports that U.S. consumers spent 43% of their 1992 retail dollar at discounters, and that number is expected to grow to 50% this year.

The Great Mall also comes with jobs — about 4,000 of them. These jobs may offset those lost when the Ford Motor Company closed its plant eleven years ago. The plant produced 5 million cars between 1955 and 1983; when it closed, 2,000 people were laid off. But the net result is a labor economy fundamentally altered on the Milpitas site: gone are the auto factory workers who earn around $37,000 per year, replaced with retail clerks and cashiers who may gross about $11,000.

In many ways, the Great Mall stands as a symbol of a new California economy of low-skilled and low paid jobs — and the retail marketplace that this new economy supports. But the debate over the wisdom of retailing as an economic development strategy may be academic in today's public finance environment. For instance, a bill introduced in the last session designed to redistribute sales taxes by population never made it out of the Assembly committee, killed in part by cities desperate to hold onto the revenue source they have come to know and love.

After all, local governments have their own survival to think about, and sales taxes are one revenue source with no strings attached. And with retail sales on the rise again, what's there to worry about? Apparently nothing — at least until the next recession. ❑



DEALS

Morris Newman

RTC's 'Ordinary' Deal in San Bernardino County

Nothing out of the ordinary here: San Bernardino Associated Governments (SANBAG) buys 760 acres of residential land near Rancho Cucamonga. Citing the high environmental value of the Oak Summit housing development, the local council of governments agreed in September to pay the Resolution Trust Corporation an undisclosed price (the property was assessed at about $7 million) for the erstwhile home building site. Most of the people involved in the transaction, in fact, describe the deal as routine. "This case was nothing out of the ordinary," says SANBAG executive director Gary Moon.

Maybe we're just seeing things, but we think that something much more complex was afoot. Consider the following facts:

The land was owned by RTC, the federal agency charged with disposing of property from failed development projects bankrolled by failed savings and loans. But the Landmark Land Co., the original developer of Oak Summit, had pushed hard, and in obvious haste, to increase the homebuilding entitlements on the land from 435 houses to 620. Further, in an apparent race with the deadline for the federal land auction, Landmark officials pressured the San Bernardino Board of Supervisors for quick approval of the higher density. And even after the property entered escrow in late September, the developers have kept their options open until the end of the year — just in case an opportunity opens up.

> *"Landmark may have been pursuing its own agenda the Oak Summit Project."*

Landmark, which is technically an asset of the RTC because it was a subsidiary of the failed Oak Tree Savings and Loan of New Orleans, has attempted to drive up the price of the property with the RTC's approval. While the RTC is notorious for selling property and buildings at big discounts, "it's by no means unusual for us to allow efforts to increase the value of projects, if (they) will enhance the amount of money we can recover, because that's why we're here," said an RTC spokeswoman in Washington, D.C.

But what is disturbing about Landmark's continuing role in the Oak Summit project is that the homebuilder may have been pursuing its own agenda in trying to hold out for a profitable sale to a homebuilder, and that its efforts to win higher densities for the property was an attempt to end run the effort of public agencies to buy the land. Under the Coastal Barrier Improvement Act, public agencies have priority to make bids on federally owned land during the first 180 days after the federal government first announces a land sale; after that period, public agencies lose their priority, and the property can go to the highest bidder. RTC first announced the Oak Summit sale in April 1993, and received one inquiry, which it declined to name.

Situated at the southern edge of the Angeles National Forest, the Oak Summit site contains a number of listed and candidate endangered species. Landmark obtained entitlements to the land in 1989, but went bankrupt in 1991, Shortly thereafter, Oak Tree was declared insolvent by federal regulators, largely due to nonperforming loans made to Landmark.

The RTC scheduled a sealed-bid sale of Oak Summit in September. With the encouragement of RTC, representatives of Landmark rushed through a proposed amendment to Oak Summit's development agreement, proposing a total of 660 homes and a golf course. On July 28, Landmark proposed the higher densities to the San Bernardino County Planning Commission, which sent the proposal back to staff, observing that the developers' work was incomplete and lacked even a map showing the locations of either the new housing or the golf course.

The developers appealed the decision to the county supervisors, where they had an apparent ally in Jon D. Mikels, chairman of the board of supervisors, whose district includes Oak Summit. (Mikels, who could not be reached for this story, has reportedly said he believes the property has no ecological value; Landmark and its officials reportedly contributed $2,000 to his 1990 election fund.)

On September 6, the supervisors upheld the decision of the planning commission to send the plan back to staff, with Mikels commenting that it would be important to approve the plan before the RTC sale to improve the property's value for taxpayers. They scheduled further votes on the project on a fast-track schedule of September 28 and October 18, causing concern that the RTC would delay its auction in hopes of a higher price. At Landmark's behest, RTC spent $250,000 of taxpayer money in lobbying for the project's approval.

Meanwhile, public agencies, including SANBAG and the U.S. Fish & Wildlife Service, were queuing up for the sealed-bid sale on September 13. The agencies hit upon an inspired idea: purchasing the land as a sort of "mitigation bank" for the Foothill Freeway extension that Caltrans plans to build immediately south of Oak Summit. RTC approved SANBAG's bid.

Moon says SANBAG is seeking a public agency or private institution to be the conservator of the land. Anne Dennis of the San Gorgonio Chapter of the Sierra Club says she is "cautiously optimistic" about the purchase but unhappy with RTC. If public agencies were poised to buy the land, she argues, why should the federal government try to add value to the land, in the ostensible purpose of aiding taxpayers, at the expense of the same taxpayers? Replies an RTC spokeswoman: "People think of government as all being in one pot. It's not." That kind of attitude explains how a bankrupt private developer can create a bidding war among public agencies.

Perhaps I should be satisfied with a happy ending, but many things remain confusing. Why was Landmark so aggressive about adding value to Oak Summit? (Landmark officials refused to comment, referring all questions to the RTC spokeswoman, who said she was unaware of any special compensation to Landmark for driving up the price.) Frankly, my guess is that Landmark was trying to make the property attractive to a homebuilder, perhaps in the hope of being hired as a consultant or partner on its own project; that may explain why Landmark officials reportedly threatened an Interior Department official with a lawsuit if he testified that the Oak Summit site had ecological value (again, RTC seems to know nothing about this.) It would not have been the first time that a private developer used the flat-footed RTC as a poltergeist for its own purposes. So maybe Moon is right: the Oak Summit deal isn't out of the ordinary after all. ❑