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INSIDE

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Bulldozers Roll, Then Halted On Toll Road Project

9th Circuit Ponders Last-Ditch Legal Effort

By William Fulton

The long-running battle between environmentalists and builders of the San Joaquin Hills toll road in Orange County may be almost over.

After clearing away several legal obstacles to grading across Laguna Canyon, the Ninth U.S. Circuit Court of Appeals introduced a new stay just before Christmas and held oral argument in early January on what appears to be the environmentalists' final legal stand. A decision was pending at press time.

The latest stay brought grading to a halt two days after the Orange County Transportation Corridor Agencies started up the bulldozers across the canyon near Laguna Beach. Construction on the rest of the toll road has been under way for some time but the Natural Resources Defense Council and other environmentalists have tied the four-mile Laguna Canyon portion of the road up in court for the last three years.

Continued on page 9

Orange County Bankruptcy Imperils Infrastructure Projects

May Have Impact On Mello Deals Around State

By Morris Newman

The calamitous Chapter 9 bankruptcy of Orange County is playing havoc with the ability of the county's school districts and other public agencies to finance school construction and infrastructure projects. As widely reported, many school districts, sanitation districts, and transit agencies were deeply invested in the fund, which has reported losses of more than $2 billion, or 27% of its value.

Mello-Roos and assessment bonds were not directly affected by the bankruptcy because their payback is based on tax revenues, not proceeds from the investment fund. Yet many school districts and other county agencies "banked" the proceeds of their Mellos in the county fund, and are unlikely to see

Continued on page 10

Senate Splits Local Government Committee in Two

Although the Assembly is still in disarray, many political changes in the state Senate have become clear, and they suggest a somewhat different political direction on planning and development issues.

Perhaps the most significant change in the Senate is that the Local Government Committee, long chaired by Republican Marian Bergeson, has been split in two.

Most planning legislation will now go to a new Senate Housing and Land Use Committee. Though the chair of this committee has not been named yet, the name most frequently mentioned in the Capitol is Sen. Tom Campbell, a Republican from the San Jose area.

Meanwhile, the Senate Local Government Committee will now be chaired by Sen. William Craven, a Republican from Oceanside who is a former San Diego County supervisor. The new Local Government Committee will deal with fiscal and structural issues in local government, including Local Agency Formation Commissions.

And Bergeson, the longtime chair of the previous committee, has left the Legislature to become a county supervisor in Orange County.

Other changes:

- Sen. Tom Hayden, D-Los Angeles, is new chair of the Senate Natural Resources Committee, which handles the Endangered Species Act.
- Sen. Jim Costa, D-Fresno, is new chair of the Senate Agriculture & Water Committee, replacing Sen. Dan McCorquodale, D-Modesto, who was defeated for re-election. The committee handles most water bills.
- Sen. Ralph Dills, D-Gardena, remains chair of the Senate Governmental Operations Committee, which handles the California Environmental Quality Act. ❑

LOCAL PLANNING
William Fulton

Amid Bankruptcy, Orange County Approves Bolsa Chica Project

The long-disputed Bolsa Chica development has been approved by the Orange County Board of Supervisors, but the project still faces many hurdles, including Coastal Commission approval and possible challenge by Huntington Beach, the U.S. Fish & Wildlife Service, and local school districts.

On December 14 — just a week after declaring bankruptcy — the board approved a general plan amendment calling for preservation of 770 acres of the 1,400 acres on the Bolsa Chica site, while allowing 3,300 homes on the rest of it. The plan is dramatically changed from the environmental impact report two years ago, which called for 4,800 homes. Among other things, the new plan has scrapped the idea of extending a street across the marsh.

Given the lower number of houses, the Koll Co., the project's developer, had hoped to reduce the cost of wetlands mitigation to $32 million. However, the county demanded that Koll stick to the $48 million figure and reconfigured the project in other ways, said Koll vice president Lucy Dunn. County officials and Koll are now negotiating a development agreement on the project.

The Bolsa Chica project has been one of the most controversial coastal projects in Orange County in recent years, with a variety of proposals being put forth since 1970, including one for 11,000 homes and another for a marina. Two years ago, Koll stopped trying to process the project through the City of Huntington Beach — which surrounds the oceanfront property — and turned to the county instead.

Many environmental groups remain opposed to it, and several expressed surprise that the project would be approved in the wake of the Orange County bankruptcy. Koll and county officials say the project will be a financial plus to the county in the long run despite a predicted short-term loss to the general fund.

The Bolsa Chica project still must be approved by the California Coastal Commission, and county Planning Director Tom Mathews said that the commission staff is likely to "have some problems" with the project as approved by the county. Also part of the mix are the U.S. Fish & Wildlife Service and the Interior Department, which have been discussing the possibility of buying some or all of the property — if a funding source can be identified.

The Huntington Beach City Council has voted not to sue the county over the project, at least for now. Planning Director Howard Zelefsky said the city's biggest concern at this point is money for service provision, as city police and fire departments would probably serve the area. The general plan amendment includes general language stating that the city should be held harmless for service provision, but final details will be included in the development agreement.

Local school districts might be a more difficult obstacle for Koll. The Huntington Beach elementary and high school districts hired well-known school planning consultant Marshall Krupp and demanded considerable mitigation. However, the county responded by allowing only the state-permitted mitigation fees of $1.72 per square foot and suggesting that the school districts re-open closed schools and change district boundaries to accommodate the Bolsa Chica students. A lawsuit from the school districts is likely.

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Santa Clara County Passes New General Plan

Santa Clara County has approved a new general plan urging the county's 15 cities to work with the county in establishing urban growth boundaries. Approved by the county Board of Supervisors on December 20, the plan comes on the heels of a San Jose city general plan revision that calls for infill development. (See *Town & Gown*, page 3.)

The Santa Clara plan came after a five-year consensus-building project and anticipates countywide growth of about 200,000 people — to about 1.7 million people — in the next 15 years. While the plan does not draw urban growth boundaries on the map, it contains policies encouraging Santa Clara's 15 cities to work with the county to do so. County planner Don Weden said the county is already working with Morgan Hill on an urban growth boundary. He also said the county's plan is consistent with San Jose's growth policy, which discourages development in the Almaden and Coyote valleys south of the city.

L.A. Fails to Obtain Empowerment Zone Status

In a stunning development, the City of Los Angeles apparently will not be selected as one of six urban "empowerment zone" areas by the Clinton Administration. Designation would have provided the city with as much as $375 million in federal funds over the next five years; federal officials said the city and Los Angeles County may receive up to $300 million in other funds as a kind of consolation prize.

The empowerment zone was the Administration's twist on the enterprise zone concept. Large cities were encouraged to apply for empowerment zone designation for areas of up to 20 square miles and 200,000 population. L.A. responded with a gerrymandered zone that included several parts of South-Central as well as part of Pacoima in the San Fernando Valley. City officials widely believed that the whole empowerment zone concept, drawn up in the wake of the 1992 riots, was created especially for Los Angeles.

In late December, city officials said they had not been formally notified that they had lost out and insisted they were still in the running. But the L.A. application ran afoul of the program's complicated requirements. Of the six urban areas, one had to be in an urban area with a population of fewer than 500,000 people, one had to straddle the borders of two states, and the six zones together had to have a cumulative population of 750,000 or less.

Meanwhile, L.A. officials recently approved an emergency redevelopment zone for earthquake-ravaged areas of the San Fernando Valley, as well as a new zone for the riot-damaged Crenshaw area. In a surprise, however, Councilman Hal Bernson withdrew a plan to create an earthquake redevelopment zone in Northridge, where the earthquake hit hardest. Bernson said he could not deal with the Community Redevelopment Agency, which he said "was more interested in securing their future, their jobs, and their bureaucracy than they are in serving the people of our district." ❑

TOWN AND GOWN
William Fulton

San Jose Passes School Mitigation Plan — Without Schools' Help

Currently in litigation with nine school districts over its general plan, the City of San Jose has approved school impact fees of $2.67 per square foot for single-family homes and $1.93 per square foot for multi-family projects. The figure is far below negotiated agreements in other areas of the state.

The decision would appear to be the latest in a series of positioning moves in a sophisticated minuet between the city and the school districts. Formally known as "presumptive payments," the fees were negotiated between the city and the development community without the participation of the school districts; they will be available only to school districts that file statements of school availability with the city. Meanwhile, the districts are still pursuing a lawsuit they filed in September, which demands that the general plan include a policy that "would condition approval of new development on the availability of adequate school facilities."

The school fee drama has been playing in San Jose since last January, when the City Council suddenly rescinded approval of a new, infill-oriented general plan because of objections from the local school districts. (*CP&DR*, February 1994.) Subsequently the city established a School Impact Task Force, including representatives of local school districts, to work on a school mitigation deal. Among other things, the general plan's emphasis on small-scale infill development made the school mitigation issue more difficult, since school districts are accustomed to obtaining fees and other mitigation from large-scale suburban developers whose houses produce a more predictable number of students.

During negotiations with the city, the school districts provided statistics indicating that the new general plan — which calls for 52,000 new housing units, all of them provided on an infill basis — would probably produce about 32,000 new housing units. However, while the task force was still meeting, the city passed the general plan again with the school mitigation issue pending.

As a result, eight school districts sued the city in September, challenging the general plan's environmental impact report and demanding specific policies in the general plan addressing the school facilities issue.

Though the School Impact Task Force stopped meeting, the city and the Building Industry Association continued to negotiate on the schools issue. The city planning department ran a new set of calculations that concluded the general plan would produce only 20,000 new students — not 32,000. Based on those assumptions, the city and the developers agreed on a formula for school mitigation; city negotiators included Council Member Frank Fiscalini, formerly superintendent of one of the school districts suing the city.

Single-family homes will pay the state-permitted mitigation (currently $1.72 per square foot) plus 55% (currently another 95 cents, bringing the total to $2.67). Multi-family units will pay the $1.72 plus 12% (currently 21 cents, bringing the total to $1.93). The City Council approved the mitigation proposal on November 22. To qualify for the funds, school districts will have to file a school availability statement with the city.

The city's mitigation proposal is likely not the end of the drama, however, because the school districts' lawsuit is still pending. If other situations around the state are any guide, the city's policy will be the starting point for settlement negotiations with the school districts.

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Space-Saver School Approved

The State Allocation Board has finally given the go-ahead for Santa Ana Unified School District's "space-saver" school, the first in the state.

The project is well within the Senate Housing Committee Chairman Leroy Greene's original concept of a "space-saver" school. Santa Ana Unified will buy excess land from the Bristol Marketplace shopping center and construct a three-story intermediate school. But the Santa Ana deal had been criticized for the $2-million-per-acre pricetag for the land. (*CP&DR Town & Gown*, April 1994.)

Nevertheless, the state board — including Green himself — gave the go-ahead at the beginning of December, authorizing $23 million in state funds to buy the land and compensate the property owners for relocation of two major businesses in the center, Home Depot and Montgomery Wards. A compact urban district with a high immigrant population, Santa Ana Unified is one of the fastest-growing districts in the state and also has among the highest property values.

An Allocation Board staff report said that toxic cleanup on the site could be costly and also claimed other sites in Santa Ana could be acquired at a lower price. But the Allocation Board rejected the advice, with Greene, the "godfather" of school housing, saying that the Allocation Board should not second-guess the local school board.

Greene established the space-saver program with a bill he carried in 1988. His goal was to give urban districts more options in providing new school sites. However, few districts have been interested in seeking the funds.

Oxnard School District Can't Sell Land

The Oxnard Unified School District cannot sell 27 acres of lemon orchards left over after construction of a new high school, the Ventura County Board of Supervisors has decided.

The Oxnard district purchased an 80-acre parcel of land for the new high school after Caltrans ordered closure of the old Oxnard High School because it was underneath the flight path of an airport. The district then used 53 acres for the high school, leaving a remnant of 27 acres it hoped to sell back to the original owner for $2.1 million — a pro-rated share of the original purchase price.

However, Ventura County officials were angered that Oxnard Unified did not consult them before building the high school, which was located in a designated greenbelt with 40-acre parcel minimums. (The school district was able to build the high school because of state pre-emption of local zoning and planning regulations.)

The school district then came to the county planning commission, seeking a variance to the 40-acre minimum parcel size in order to split off the 27-acre remnant. However, in October the planning commission denied the request. (*CP&DR Town & Gown*, November 1994.) The district appealed to the county Board of Supervisors — but the board voted 4-0 not to grant the variance. Supervisor Maggie Kildee appeared to speak for the whole board in saying: "This may be one of the most difficult decisions I've had to face because of my love for education and my love for agriculture. But the domino effect has already begun. The domino effect began when the school district bought that piece of property. I think it's important the board not let the second domino fall." ❑

Base Reuse

Morris Newman

Adelanto, San Bernardino County Still Duking It Out

The battle between the City of Adelanto and San Bernardino County for the control of George Air Force Base continues continues — despite the fact that the federal government has long since recognized the the county's chosen vehicle for base conversion, Victor Valley Development Association, as the local lead agency,

In the latest salvo, the county has sued Adelanto for attempting to buy land on the base with redevelopment funds. (Much of the base is within the city's sphere of influence.) County lawyers say the attempt to use redevelopment funds to buy land outside city boundaries is illegal and in violation of Adelanto's original agreement with the county over the use of its redevelopment tax increment, which limits the spending of such money within the city's designated redevelopment area. "We are contending that the Adelanto Redevelopment Agency does not have the jurisdiction to deal with property outside the city and that it's an improper expenditure of redevelopment funds to seek to acquire land at George," said Paul Mordy, deputy county counsel, who is litigating the case.

In a more intriguing cause of action, the county is also arguing that Adelanto's attempt to buy land in George is a rear-guard action designed to disrupt the county's plans to create a redevelopment area at the base. In essence, San Bernardino County claims that the city's efforts to buy the base land is interfering with the county's efforts to establish a redevelopment area of its own at George

One theory holds that the city is trying to stymie the efforts of the county by tying it up in court as long as possible. That theory seems to gain credibility, in the light of Adelanto's fight over where the trial would be heard. Citing a state statute that allows counties to select a "neutral venue" in cases involving county agencies, attorneys for San Bernardino County filed the case in Riverside County. Adelanto objected, saying that the venue change was illegal, because the county did not first obtain the permission of the San Bernardino Superior Court. Adelanto also wanted to try the case in Los Angeles Superior Court, where other George-related cases are being heard.

The Riverside judge sided with Adelanto and sent the case back to San Bernardino. County attorneys filed in San Bernardino Superior Court, while appealing the decision. The appeal went against the county, although the appellate court sent the case to Los Angeles.

San Diego Down On Commercial Airport At Miramar

Many host communities of air bases are keen on converting them into commercial air fields. In San Diego, however, initial enthusiasm to convert the Miramar Naval Air Station may sour in the wake of a report that claims the city would lose money if the base were closed and converted into an international airport.

A $40,000 study sponsored by the Greater San Diego Chamber of Commerce found that operating an international airport at Miramar would deprive the city of about $8 billion in the next 25 years. The study, prepared by Williams-Kuebelbeck, assumes that the base will be selected for closure and that conversion will take five years. Proponents of a new international airport at the site have argued that the existing Lindbergh field is small and antiquated.

According to the chamber's study, maintaining Miramar as a base and continuing to use Lindbergh as a regional airport would yield $14.9 billion to the regional economy. Miramar, closed as a base and converted to an airfield, would yield only $7 billion. The chamber claimed that the difference equated to 313,000 jobs.

The report apparently contradicts an earlier study released in 1994 by the San Diego International Airport Foundation, a group led by airport booster Doug Manchester. But both reports say that the region will suffer from underuse of Lindbergh. Due both to the local recession and the limitations of the field, Lindbergh yields about $1.2 billion a year to the local economy, while Miramar generates about $800 million annually.

Critics of the Kuebelbeck study claim that it overestimates the economic value of Miramar's new role as a Marine Corps base. The Corps is relocating to Miramar out of its former stations at Tustin and El Toro. The San Diego Association of Governments (SANDAG) has suggested yet another study, to assess the region's air-transport needs.

More Tenants for Norton

Two new tenants have signed leases at the former Norton Air Force Base, accelerating the trend of private businesses locating atthe San Bernardino County base. Inland Valley Development Association, the joint-powers authority overseeing Norton, has received letters of intent to lease from Boney's Farmers Markets and Excelsior Homes, which together will occupy 221,000 square feet at the base. The leases are intended for a 525-acre portion of Norton that the Air Force has not yet officially released to the JPA. Escondido-based Boney's plans to build a 101,000-square-foot food commissary building, while Orange County-based Excelsior wants to use 120,000 square feet in two existing warehouses for the purpose of building modular housing. The two firms could eventually employ up to 700 people.

Separately, the San Manuel Band of Mission Indians plans a 15,000-square-foot medical clinic at the northeast corner of Norton, on a portion of the base earmarked for "incubator" businesses.

Housing Approved at Point Loma

The San Diego City Council in December approved a Navy proposal to set aside part of the Naval Training Center at Point Loma for military housing. The council postponed until February a decision on the amount of land to be dedicated for the housing. The Navy has proposed using 120 acres of the 440-acre base for the $60 million housing project, which would include 500 housing units and a 30-acre park. The base is scheduled for closure in 1999.

Mugu's Loss May Be China Lake's Gain

Nerves grew frayed at Point Mugu Navy base in November, after a press report revealed that the Ventura County naval weapons testing facility was on the 1995 base-closure list. A preliminary Pentagon study leaked by the Los Angeles Times in November recommended the closure of Mugu, to realize savings of $1.7 billion in the next 20 years. Ventura County officials went to Washington in December to fight a rear-guard action against closing the base.

If Mugu closes, the big winner would be the China Lake Naval Air Weapons Station in Kern County, which could gain 2,000 jobs through a consolidation of the Navy's high-tech weapons testing program. If Mugu were to close and test operations were consolidated at China Lake, a total of 1,049 military jobs would be eliminated. ❑

CP&DR
LEGAL DIGEST

Appellate Panel Again Upholds Culver City Fee

Unpublished Ruling Finds Compliance With Supreme Court Ruling in *Dolan*

After reviewing the case in light of the U.S. Supreme Court ruling in *Dolan v. City of Tigard*, the Second District Court of Appeal has once again upheld a Culver City recreation fee as constitutional.

The $280,000 fee — imposed on a landowner who wanted to close a private recreation club and build condominiums on the property — was upheld by Division Five of the Second District in May 1993. (*CP&DR*, July 1993.) After ruling in the *Dolan* case last summer, however, the U.S. Supreme Court remanded the Culver City case to the Second District with orders to review it in light of the *Dolan* decision.

In a lengthy and unpublished ruling filed on December 27, the Second District found that the Culver City fee met the two-pronged test of constitutionality laid out in the *Dolan* decision. The Second District also concluded that the fee does not constitute a special tax under Proposition 13.

The case began in 1988, when landowner Richard Ehrlich closed the Westside Sports Center on Overland Avenue in Culver City and applied to the city to build 30 luxury townhomes on his 2.4-acre parcel of land. At first the city denied Ehrlich's request on the grounds that the construction of townhomes would mean the loss of recreational space to the city. Ehrlich offered to build four unlit tennis courts elsewhere in the city, but the city instead approved the project subject to three fees: a $280,000 recreational mitigation fee, a $30,000 in-lieu park fee, and a $33,200 public art fee. These fees were included in the specific plan approved for the project in 1989.

However, Ehrlich sued and obtained a favorable ruling from L.A. Superior Court Judge John Zebrowski, who said that Ehrlich had no legal obligation to keep his private health club in operation and therefore the city had no right to extract a mitigation fee from him when he closed it down. Zebrowski ruled that the fee was a special tax, calling it "simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer." Zebrowski upheld the arts fee, however.

After the Second District overturned Zebrowski on the recreation fee (*Ehrlich v. City of Culver City*, 15 Cal.App.4th 1737), the U.S. Supreme Court ruled in *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994). In the *Dolan* case, the court expanded on its 1987 ruling in *Nollan v. California Coastal Commission*, 483 U.S. 825, to establish a two-part test for constitutionality of mitigation fees. First, the court stated that the city must be able to deny the request without the denial constituting a taking. Second, the court said that the mitigation fee must substantially further the same governmental goal furthered by the denial and is "roughly proportional" to the impact of the proposed development.

The Second District showed no hesitation in concluding that the Culver City recreation fee met this two-part test. Regarding the first part of the test, the court said that just because Ehrlich does not want to operate a recreation club on the property does not mean his property has been taken. "The mere fact that a particular property owner has not been able to make a profit from a particular recreation facility fails to establish that no community recreational facility could be operated profitably on the property," the court said.

Also, the court noted that Ehrlich had bought the property after the regulations in question had been imposed on the property. "The land-use restrictions on the property coincided with the developer's reasonable investment-backed expectations," the court wrote. "He was not constitutionally entitled to develop the property to its most profitable use."

Regarding the rough proportionality test, the Second District rule that "the imposition of the mitigation fee was directly related to the original denial of the developer's applications for his project and was not a gimmick, subterfuge, or pretext to increase the general funds of the city." The court also rejected Ehrlich's argument that the city was not deprived of recreation facilities because he had already closed his recreation club down. "Of course the city could not require that the developer operate a recreational business on the property. The developer was entitled to go out of business and leave his land vacant or sell it to someone else." Relying on *Terminal Plaza Corp. v. City and County of San Francisco*, the court said: "This restriction is not different than refusing to permit apartments to be converted to condominiums."

The court also rejected Ehrlich's argument that the mitigation fee did not further a governmental purpose because Ehrlich's recreation club was private. "Whether the facilities were provided to the public in the form of a privately owned facility or one which was owned by the public is not significant on the issue of whether the governmental purpose is the same."

Finally, the Second District took Ehrlich to task for even bringing the lawsuit. Recounting the facts in the case, the Second District noted that Ehrlich himself proposed building four tennis courts elsewhere in the city as mitigation, and the city then imposed a $280,000 fee as being roughly comparable in value to providing the tennis courts. "The developer cannot now contend that the form of the condition, which he proposed, is invalid." ❑

■ The Case:
Ehrlich v. City of Culver City, No. B055523 (unpublished, issued December 27, 1994).

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Subdivision Map Act

Council Can't Appeal to Itself On Map Act Action, Court Rules

By Larry Sokoloff

The Thousand Oaks City Council created a conflict of interest by appealing a planning commission decision to itself and then overturning the decision, the California Court of Appeal, Second Appellate District, has ruled.

The unanimous ruling by the three-judge panel said that the "cumulative actions" of the council resulted in a violation of a developer's substantive and due process rights. The council acted when it reviewed the city planning commission's 1992 approval of a controversial 47-acre residential and commercial project in the Newbury Park section of the city.

The ruling, which the city plans to appeal, nullifies the city's decision to reject the controversial project.

The developers, the court said in an opinion by Justice Steven Stone, "should not be subjected to the blatant disregard of their due process rights. The council simply submitted to the roar of the crowd."

Justice Stone said that under the city's own code and under the Subdivision Map Act (Gov't Code §66452.5(d)), only an interested person adversely affected by a planning commission decision may appeal. The council did not make this showing.

"By appealing the decision to itself, the Council evidenced at least the appearance of a conflict of interest," the opinion said.

The opinion is the first by a California appellate court to indicate a city council must maintain its neutrality in such proceedings.

R. David DiJulio, the attorney for the developers, members of the Nedjatollah Cohan family, called the court's decision "very significant."

"Many cities practice the same technique" of appealing planning commission decisions to themselves," he said. "This has outlawed that practice."

Four city attorneys concerned about the implications of the decision have already contacted Thousand Oaks City Attorney Mark Sellers.

Sellers said that elected officials clearly have a duty to appeal planning commission decisions. "That's what they're elected for, to oversee subordinate bodies," he said. "I don't think a council hearing can be structured to the same degree of sterility or formality as a trial court or appellate court."

The disputed parcel was purchased by Nedjatollah Cohan in 1977. Cohan, an Iranian immigrant, has been trying to develop the property for the past 15 years.

"Thousand Oaks has basically confiscated their property," said DiJulio, who estimated that the Cohans had spent $2 million in their efforts to develop the property.

His clients, said DiJulio, "have actually told me that they would have fared better under the Ayatollah than the Thousand Oaks City Council."

The planning commission approved a subdivision map and development conditions in June 1992 along with 500 conditions. Many of the conditions were related to wetlands in the middle of the property and to flood control issues, Sellers said.

The project, which abuts a residential neighborhood, has become open space for local residents.

The council conducted a noticed public hearing on the appeal on July 28, 1992. Approximately 200 residents attended the hearing in opposition to the project. At the end of the six-hour hearing, the council denied the Cohans' project and a permit to remove oak trees on the land.

In its decision, the Court of Appeal overturned an earlier ruling by Ventura County Superior Court Judge Melinda Johnson, which found that any errors by the council regarding the appeal to itself were harmless.

The Cohan family claimed in their writ of mandate lawsuit that due process was ignored and their civil rights were violated by the council's appeal of the planning commission decision. Their suit also charged inverse condemnation and violations of the Brown Act. DiJulio said he will now ask the trial court for damages on the civil rights violations.

The Court of Appeal said that it was a cumulative effect of the City Council's actions that violated the Cohans' substantive and procedural due process rights. The court did find that requiring Nedjatollah Cohan to rebut three hours of comments in 10 to 15 minutes at the appeal hearing was wrong.

As respondents, the Cohans should have responded to the allegations, the court said.

"Instead, the burden was placed on the Cohans to convince the Council of the correctness of the planning commission's decision," the court said. "This stands due process on its head."

Sellers argued that *Reed v. Coastal Zone Conservation Commission*, 55 Cal. App. 3d 889 (1975) contradicts the ruling. In that case, a California court said that a ten-minute appeal to the California Coastal Commission was sufficient.

In addition to the appeal, another court battle may be brewing over the property because the city has not issued a permit to remove oak trees on the property. Under a municipal ordinance, a permit is required to remove more than four oak trees on a property. DiJulio, however, said that there are only three oak trees on the site. ❑

■ The Case:
Cohan v. City of Thousand Oaks, California Court of Appeal, Second Appellate District, Division Six, No. B077680, 94 Daily Journal D.A.R. 16709, November 28, 1994.

■ The Lawyers:
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ENVIRONMENTAL LAW

Judge Orders Caltrans to Undertake Major Stormwater Runoff Cleanup

In a major ruling, a federal judge in Los Angeles has ordered Caltrans to take wide-ranging steps to clean up the vast stormwater runoff system that the agency operates in L.A. County. The ruling comes on the heels of a legal settlement in which three key cities in the county also agreed to increase their stormwater runoff efforts — a move environmentalists say is designed to help create model stormwater runoff programs for cities throughout Southern California.

Though Caltrans has said little about the case in public, a Caltrans spokesman said the agency would comply with the ruling rather than appeal it. The spokesman said Caltrans did submit a stormwater plan to the Regional Water Quality Control Board on December 7, as required under a stormwater permit, and that plan would be used as the basis for Caltrans action.

In the Caltrans case, U.S. District Court Judge Edward Rafeedie gave Caltrans four months — until mid-March 1995 — to clean out 10,000 drain inlets, catch basins, and pump houses believed to be the biggest contributors to pollution in L.A.'s stormwater runoff. The agency must clean up another 10,000 facilities within seven months and a third group of 10,000 within 10 months. In addition, Caltrans has four months to develop a stormwater plan.

In the previous settlements, the three cities had also agreed to draw up stormwater plans. In addition, Hermosa Beach agreed to contribute $7,500 toward the Santa Monica Bay Restoration Project educational fund, while Beverly Hills agreed to spend over a half-million dollars on a whole series of actions, including the purchase and operation of video cameras to inspect city storm drains and trace illegal dumping. El Segundo agreed to rebuild two stormwater pump stations at a cost of more than $750,000.

Both the Caltrans ruling and the settlement with the cities came in lawsuits filed by the Natural Resources Defense Council under the federal Clean Water Act. These legal actions appear to be the most significant developments so far in the effort to improve the water quality in urban stormwater runoff in Southern California. The runoff system — once described by an engineer as "a series of chutes to the sea" — is the main contributor to water pollution in Santa Monica Bay. Gail Ruderman Feuer, a lawyer with the NRDC, said her organization sued Caltrans because it believes the agency to be the largest single source of polluted stormwater in the county.

The stormwater regulation effort could have a significant effect on cities and development policies throughout the region. The city stormwater plans are likely to include a variety of restrictions on new development, especially during the construction stage, when the level of sediment and other pollutants in the runoff is high. "What's going to happen is that they are going to get better control over new development and redevelopment," Feuer said. The cities are also likely to impose regulations on local businesses that contribute to runoff.

The stormwater regulation effort kicked into high gear in 1992, when the Environmental Protection Agency adopted a new set of regulations called the National Pollution Discharge Elimination System, or NPDES. The NPDES regulations require all municipalities of more than 100,000 population to obtain permits for separate stormwater systems and for discharge from industrial activities and construction sites into the stormwater system.

An innovative approach was taken in Los Angeles County, where the Regional Water Quality Control Board — the state agency implementing these regulations — allowed 88 municipalities, the county government, and Caltrans to have all of their activities covered under a single permit. The regional board recently approved a similar permit for Ventura County. Industrial discharges are covered under a separate permit for the entire state.

NRDC's Los Angeles office became involved when NRDC lawyers and scientists reviewed the first 20 or so cities that filed their plans with the regional water board. "The level of compliance was not high among any cities," she said. NRDC contacted several cities the organization concluded had weak plans and some — including Culver City and Westlake Village — voluntarily agreed to help pay for an NRDC scientist to help them draw up plans, she said.

However, NRDC sued Caltrans and the three cities in separate actions, claiming that they had not complied with the county-wide permit covering the municipalities and the transportation agency. All three cities settled out of court last fall. However, the case against Caltrans proceeded to trial in the courtroom of U.S. District Court Judge Edward Rafeedie. On December 14, Rafeedie issued his final ruling, which included the following requirements:

1. Caltrans will develop a new stormwater plan within 120 days that includes an extensive discussion of the "best management practices" to be used in improving the water quality of its runoff, as well as a schedule for implementing those practices.

2. Caltrans will file a copy of the stormwater plan with Judge Rafeedie's court.

3. Caltrans will clear 10,000 drain inlets, catch basins, and pump houses in the L.A. Caltrans district within 120 days; another 10,000 within 210 days; and another 10,000 within 300 days.

A significant component of the Caltrans ruling is NRDC's role in overseeing the agency's implementation of Rafeedie's ruling. Caltrans agreed to pay for NRDC to hire an expert to consult with the agency, and the NRDC expert will also have access to all of Caltrans' facilities. ❑

■ The Case:
NRDC v. van Loben Sels, U.S. District Court, Central District, No. 93-6073.

■ Contacts:
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TAXATION

Pre-'88 Mello-Roos Bonds Don't Have Lien Problem

Reversing a Superior Court judge's ruling, the Second District Court of Appeal has ruled that pre-1988 Mello-Roos bonds do, in fact, have priority over private lenders, even though their liens were not formally recorded.

In an unpublished ruling, Division Six of the Second District relied on Revenue and Taxation Code §2187, which states: "Every tax on real property is a lien against the property assessed."

Mello-Roos taxes are "special" taxes within the meaning of Proposition 13, meaning they cannot be based on *ad valorem* property value. But the court that the Mello-Roos tax in question — a tax on property involved in a failed real estate development in Oxnard — is, in fact, a tax on real property because it is apportioned on the basis of square footage and not on the basis of benefit. Thus, the court concluded: "We hold that special taxes levied in this case are on real property within the meaning of Revenue and Taxation Code §2187 and thus are a lien on parcels of real property within the district, including the subject one."

The ruling dissipates a cloud that had gathered over some $1 billion in pre-1988 Mello-Roos bonds whose liens were never formally recorded under law.

The Oxnard case involved the city's attempt to foreclose on property once designated for a regional shopping center after the developer defaulted on $14 million in Mello-Roos bonds. However, the Bank of A. Levy, which had loaned the developer $1.6 million, sought to block Oxnard's foreclosure, claiming that the bank's own loan had priority over the city's Mello taxes.

Last February, Ventura County Superior Court Judge John Hunter ruled in favor of the bank, saying that because Mello liens were not formally recorded prior to 1988, Mello-Roos bonds from that period do not have priority over private lenders. (*CP&DR*, April 1994.) In overturning Judge Hunter, the Second District found that under the Revenue and Taxation Code a lien was created under operation of law.

Bank of A. Levy argued that while the Mello law (specifically Government Code §53340 and §53356.1) gave Oxnard statutory power to levy and collection special taxes, it did not grant a lien until January 1, 1989; when amendments to the Mello law specifically stated that Mello liens should be recorded the same as assessment liens. (The provision was part of a package of amendments designed to improve consumer disclosure of Mello requirements.) The Court of Appeal concluded that the 1989 amendment (contained in Government Code §53328.5) "simply permitted the city to direct the imposition of a separate lien for these special taxes."

"The Bank may not use these remedial statutes as a sword to invalidate this properly established special tax lien. The Bank knew that the instant property was in a Mello-Roos district. It knew about the tax levy and the bonds before it issued the instant loan, and it required that part of the loan proceeds be used to pay the 1988/89 special taxes....The trial court's order would be a windfall to the bank and it is at variance with the Legislature's expressly stated goal of liberally construing the Act to effectuate its purposes." ❑

■ The Case:
City of Oxnard v. Superior Court, No. B081684 (unpublished; issued November 22, 1994).

■ The Lawyers:
For City of Oxnard: Diane B. Galfas, Cox Castle & Nicholson, (310) 284-2279.
For Bank of A. Levy: Steven Ray Garcia, Peterson & Ross, (213) 625-3500.
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SLAPP SUITS

Consultants' Suit Is Subject To State SLAPP Law

A scientist's negative comments about the work of a consulting firm are protected from libel and slander litigation under the state's "SLAPP suit" law, the Fourth District Court of Appeal has ruled. The case is the first test of the law, which was passed in 1992.

In *Dixon v. Superior Court*, the Fourth District found that the scientist, Kenneth

Dixon, made his allegedly slanderous comments about Scientific Resource Surveys Inc., during the public review period of a proceeding under the California Environmental Quality Act, meaning they are protected under the SLAPP suit law. The court also rejected constitutional challenges to the SLAPP suit law, Code of Civil Procedure §425.16.

The term "SLAPP" suit — the acronym stands for "strategic lawsuits against public participation" — is often used by citizen activists to refer to punitive lawsuits filed by developers and others to discourage citizen activism. (For background, see *CP&DR*, November 1990.) The law permits a special motion to strike a cause of action that is found by the court to be a SLAPP suit.

The case involves a longstanding dispute over a 22-acre property on the campus of the California State University, Long Beach, which some believe to be part of an ancient Native American village known as Puvunga. In 1992, Cal State Long Beach — seeking to build a strip retail center on the property — undertook an initial study. The lead consultant, Envicom, recommended a negative declaration on the project under CEQA. SRS had conducted archaeological work for Envicom on the project.

In March of 1993, Dixon, an anthropology professor who had been instrumental in getting the Puvunga site placed on the National Register of Historic Places, wrote three letters to Cal State Long Beach's vice president complaining about the quality of SRS's work. Among other things, Dixon wrote that SRS's work had been "highly flawed and biased" and the firm had refused to correct errors allegedly found by Dixon. Dixon's comments were written after the negative declaration had been filed.

SRS responded by filing a libel and slander lawsuit against Dixon seeking $570,000 in damages. Dixon filed a motion to strike the lawsuit under the SLAPP suit law. SRS responded that Dixon's remarks were not protected because they had not been made as part of the CEQA process. Orange County Superior Court Judge Frederick P. Horn agreed with SRS and denied Dixon's motion to strike. However, the Court of Appeal reversed Horn's decision.

The appellate court ruled that Envicom's recommendation that a negative declaration be issued "did not end the public review process; on the contrary, it initiated it." Thus, the court ruled, Dixon's comments were made "in connection" with the CEQA proceedings, as required by the law.

SRS also contended the Envicom had not relied on the SRS work in making its recommendation. But the appellate court concluded that SRS had been so intimately involved in the project — conducting archaeological work as far back as 1980 — "it strains credulity for SRS to argue it was not involved in the CEQA proceedings."

SRS also argued that, by presenting the allegedly libelous material, it had established a probability of prevailing at trial, thus meeting the legal test required for Dixon's motion to strike to be denied. But the court concluded that because Dixon had responded to a matter of public concern, "SRS could not, as a matter of law, have established a probability of prevailing at trial because even if it proved Dixon acted with malice, his statements are still entitled to absolute immunity."

The appellate court also dismissed SRS's arguments that the statute was unconstitutional by (1) requiring a plaintiff to establish probability of success without discovery, and (2) depriving SRS of a trial by jury by requiring the court to weigh the evidence in ruling on the motion to strike. Both arguments were derived from SRS's contention that Dixon was waging a vendetta against the firm. On the first, the court said Dixon's motive, as might be uncovered by discovery, is irrelevant; on the second, the court said there was no question of fact to be found. ❑

■ The Case:
Dixon v. Superior Court, No. G015646, 94 Daily Journal D.A.R. 16878.

■ The lawyers:
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HOUSING ELEMENTS

Homeless Advocates Win Round In Case Against City of San Diego

By Larry Sokoloff

In a decision believed to be the first to tie housing for the homeless to a city's housing element, a judge has suspended subdivision map approvals by the City of San Diego until it addresses the failure of its housing element to provide housing for homeless persons.

San Diego County Superior Court Judge Wayne L. Peterson granted a writ of mandate on December 23 and ordered the city to amend its housing element to identify and provide housing for homeless persons. The order included a sanction that suspended subdivision map approvals in the city until a hearing in January.

The case was filed after the city refused to reopen Municipal Gym in Balboa Park, which housed up to 700 homeless persons on cold winter nights last winter. Attorney Tim Cohelan, who represented the homeless plaintiffs, said the city had not given a reason why the shelter has not been reopened, despite an unusually cold month in November. No public opposition to reopening the shelter had surfaced, he said.

Under Government Code §65755, Judge Peterson also could have suspended the city's authority to issue building permits and zone changes. In making his decision to suspend only subdivision map approvals, he asked the city to provide information in January on which subdivisions will be affected. Deputy City Attorney Anita Noone said in court that the judge's action would force the city to lay off up to 150 employees.

Peterson had issued a tentative ruling on December 16, when he ordered the city to bring the housing element into compliance within 120 days. He said he found a nexus between the city's failure to adopt a valid housing claims of the homeless plaintiffs because Government Code §65583(c)(1) requires identification of potential sites to house the homeless.

The judge rejected the city's request for a dismissal under Government Code §65009(c)(1), "since that section governs actions taken by a legislative body but does not address a legislative body's failure to act."

But Chief Deputy City Attorney Leslie Girard said the judge ruled against the city because he found the city's housing element needed to be reviewed and revised, and not for failure to provide housing for homeless persons. Girard said the city council will review the draft revisions of the housing element in mid-January, making the case moot. He also indicated that "provision of temporary shelters for the homeless may be arranged by that time."

The ruling in the Hoffmaster case is the latest in a series of rulings against cities and counties around the state on housing element grounds. In recent months, poverty lawyers have successfully scored housing element victories in several parts of the state — most notably Yuba County, where a judge held up a 5,000-acre specific plan because of housing element deficiencies. (*CP&DR Legal Digest*, October 1994.) ❑

■ The case:
Hoffmaster v. City of San Diego, San Diego County Superior Court No. 682920.

■ The Lawyers:
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For San Diego: Anita Noone, Deputy City Attorney, (619) 533-5800.

Bulldozers Roll, Then Stop, on Final Portion of San Joaquin Hills Road

Continued from page 1

However, there is some question as to whether the TCAs — a joint-powers authority consisting of Orange County and several cities in the county — will have the funds available to complete the road. Some $311 million in funds earmarked for construction of the San Joaquin is included in the infamous Orange County investment pool that led the county to declare bankruptcy on December 6. The multibillion-dollar pool lost 27% of its value before the bankruptcy was declared. (See accompanying story.)

The San Joaquin Hills Transportation Corridor is an 18-mile toll road connecting Newport Beach with south Orange County. It is one of three toll roads being built by the TCAs with a combination of development fees, anticipated toll revenues, and other funds. After lengthy litigation, the TCAs had commenced construction on all except the 4.5-mile stretch through Laguna Canyon, where environmentalists from Laguna Greenbelt and other organizations had held a series of protests.

Led by the NRDC, the environmentalists also filed lawsuits in state and federal court challenging the road's environmental documentation. Coincidentally, NRDC also petitioned both state and federal governments to list the California gnatcatcher as endangered — a move that threatened to hold up many building projects in Southern California, including the toll road. In 1993, the Interior Department listed the gnatcatcher as a threatened species but issued a separate biological opinion giving the toll road the green light. Subsequently the NRDC sued to challenge that opinion as well. In retaliation, the TCAs and the Building Industry Association sued to challenge the listing of the gnatcatcher.

In the lawsuit challenging the federal environmental impact statement on the San Joaquin, U.S. District Court Judge Linda McLaughlin issued a preliminary injunction in 1993 prohibiting the TCAs from grading across Laguna Canyon. McLaughlin later granted summary judgment for the TCAs and other defendants, but the Ninth Circuit enjoined construction in Laguna Canyon pending appeal.

In early December, a three-judge panel of the Ninth Circuit ruled in favor of the road-builders and against the environmentalists in the federal EIS case. (*Laguna Greenbelt Inc. v. U.S. Department of Transportation*, No. 94-55757.) The Ninth Circuit's injunction was expected to remain in place until the ruling became final on January 23. While NRDC asked for a rehearing, the TCAs asked that the injunction be lifted as soon as possible. The Ninth Circuit denied the rehearing and lifted the injunction on December 20. The TCA bulldozers immediately began grading Laguna Canyon, and a few protesters were arrested.

The NRDC, Laguna Greenbelt, and other environmental groups then sought an injunction against further grading in its other lawsuit, the one that challenges the biological opinion stating the construction of the road would not harm the gnatcatcher. But in a ruling on December 21, Judge McLaughlin refused to issue an injunction, saying NRDC had not shown "probable success on the merits" of the case. Subsequently the Ninth Circuit declined to overturn McLaughlin's ruling. NRDC appealed to the Ninth Circuit, which asked for briefs and agreed to hear oral arguments on January 5.

The Laguna Greenbelt lawsuit argued that the federal EIS was flawed in several respects. The lawsuit also claimed that the Federal Highway Administration should have prepared a supplemental EIS after the October 1993 fires in the Laguna Canyon region (which affected the gnatcatcher count), and that the FHA violated the federal Transportation Act by using parkland in the Laguna Canyon area for the toll road.

Of these arguments, the last was probably the strongest. Laguna Greenbelt argued that the EIS did not comply with §4(f) of the U.S. Transportation Act (49 U.S.C. §303(c)), which limits the ability of the Federal Highway Administration to locate roads along existing parkland. Laguna Greenbelt argued that the EIS violated this provision because the toll road would infringe on a 1.7-acre parcel of the UC Irvine Ecological Reserve and 23 other parkland properties.

However, the Ninth Circuit struck down all of Laguna's arguments. Regarding the UCI reserve land, the Ninth Circuit noted that the TCA had commented on the land's designation and the University stated it was strongly committed to the road. Of 10 park properties that Judge McLaughlin had specifically analyzed, the Ninth Circuit found that nine had been acquired since a 1979 Orange County environmental impact report had established a route alignment, and the toll road's route was identified in planning documents for the 10th. Of 13 other park properties, which Judge McLaughlin did not analyze individually, the Ninth Circuit found Laguna could not raise challenges regarding eight of them. Of the remaining five, the Ninth Circuit said the impact on four were minimal and accepted the EIS's conclusion that there was no feasible alternative for the fifth. (Many of these were bicycle trails.)

Regarding the argument that a supplemental EIS should have been prepared after the Laguna Canyon fire in October 1993, the Ninth Circuit concluded that the Federal Highway Administration "took the requisite hard look at environmental consequences after the fire" and "the decision not to prepare an SEIS was not arbitrary and capricious and we will not set it aside."

The environmentalists had a laundry-list of complaints about the EIS itself, all of which the Ninth Circuit rejected.

For example, Laguna Greenbelt claimed that the EIS should have included more than the three alternatives that were examined. But the Ninth Circuit noted that the EIS's discussion of six categories of alternatives that were evaluated in earlier environmental documents or in the course of the joint EIS/EIR, but were rejected as infeasible or unable to meet the project's environmental goals. "Thus," the Ninth Circuit said, "the EIS discusses in detail all the alternatives that were feasible and briefly discusses the reasons others were eliminated. This is all NEPA requires — there is no minimum number of alternatives that must be discussed."

Laguna also claimed the EIS should have considered a broader range of alternatives, including a smaller, four-lane road and another alternative that would have included some operational characteristics of the toll road but might have included engineering options to minimize the environmental impact. But the Ninth Circuit rejected this argument too, saying the environmentalist suggestions "are not reasonable or obvious." As an example, the court pointed to the environmentalist suggestion that the median in the toll road be made smaller, thus limiting encroachment on parkland. "The size of the median was chosen to accommodate rail transit," the court wrote. "Because of rail's positive environmental attributes, it would not be reasonable to eliminate availability of the median for potential rail transit. Moreover, Laguna's contention that this would save parkland is speculative at best."

The Ninth Circuit's ruling in Laguna Greenbelt v. U.S. Department of Transportation, No. 94-55757, was published as 94 Daily Journal D.A.R. 17038, (December 5, 1994).

Judge McLaughlin's decision not to enjoin construction based on the biological opinion was issued in the case NRDC v. U.S. Department of the Interior, No. 93-999. ❑

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Many Infrastructure Projects Will Be Stopped or Delayed

Continued from page 1

the money soon, if ever. Many public agencies are hoping that the liquidation sale of the bonds in the county fund will make up for most of the losses, although other observers are far more pessimistic. Similarly, the Orange County Transportation Corridor Agencies, a group of three joint-powers authorities building three toll roads in Orange County, had more than $300 million in bond proceeds to construct the San Joaquin Hills Transportation Corridor tied up in the investment pool. Other transportation and sanitation agencies had similar problems.

Meanwhile, the ability of local agencies in Orange County to issue new Mellos in the near future will likely be affected by the county bankruptcy. "School districts may find they can only build two-thirds of the schools they could have before," said Dean Misczynski, director of the California Research Bureau and a drafter of the Mello-Roos legislation.

Some school districts, such as Saddleback Valley Unified, are hoping that the county's upcoming liquidation sale of its remaining bonds will yield at least 90 cents on the dollar. But this view may be too optimistic. In mid-December, the county sold off the most attractive portion of the fund — bonds with a face value of $1.4 billion — for $1.27 billion, but netted only about $600 million from the sale, because about $800 million went to previously undisclosed claims from county lenders, according to *The Wall Street Journal*. The county soon plans to sell the remaining $5.25 billion; these are the infamous "derivative" bonds whose plunging value precipitated the county's bankruptcy, and some Wall Street observers predict that the sale price will be far lower.

The collapse of the Orange County fund may have a wide effect on the ability of local agencies to raise new Mello-Roos bonds, according to public finance experts in Sacramento. Misczynski pointed out that much confusion still remains in exactly what monies are locked up in the failed fund. "The most spectacular case would be if there has been a relatively recent bond issue on a development deal and a third of the money is no longer there, and yet the developer is still paying the tax," he said. "If such a case arises, developers could find themselves unable to build sufficient roads or schools for their projects. Taxpayers with two-thirds of a school or developers with two-thirds of a project will be outraged and will sue."

Misczynski also voiced concern that the pool of investors in California muni bonds may dry up. (In fact, *The Wall Street Journal* reported that investors have withdrawn more than $1 billion from funds based on California munis since the Orange County bankruptcy, although the trend has slowed in recent weeks.)

Steve Juarez, director of California Debt Advisory Commission, is confident that Orange County agencies can still issue Mellos, because "the underlying security" (i.e. property taxes) "is supportive of the debt service payments." He acknowledged, however, that agencies and underwriters must contend with what he called "the psychological factor," or market taint attaching to any bond issued in Orange County. "Clearly, we're concerned with the overall impact on the market. We understand that people are going to take a second look at any entity in the county, and whether that (taint) spills over to other California agencies should be of some concern," he said.

Larry Rolapp, managing partner of Fields, Rolapp & Associates, which has served as financial adviser on many of the county's Mellos, predicted that in the short term, "the county situation will have a negative impact on the rates that local government will have to pay to access the credit markets, on land-secured financing," such as Mello Roos and assessment bonds. In the long term, he added, "the fundamental strengths and attributes of each land-secured district will dictate the borrowing costs."

School Districts

Many of the school districts deposited some or all of their Mello-Roos proceeds in the county fund. Peter Hartman, superintendent of the Saddleback Valley Unified School District, claimed such deposits were made routinely by many of the county's school districts, who used the fund as a sort of "bank."

"We took the construction portion of the Mello and transferred it to the county treasurer to be in its (bond) pool. We used it as a 'checking account,' out of which we could expend," Hartman said. Here are some of the consequences of this practice:

- Capistrano Unified School district has about $12 million in the county fund; the city had "banked" its Mello Roos proceeds and state school-construction money in the fund. "It will cause us to reevaluate our position with our building program and cause us not to move projects forward," said David A. Doomey, facilities director.
- Laguna Beach Unified School District has no Mello-Roos money in the county fund, but is still forced to delay construction of a $2.3 million plan for the Thurston Middle School, which had been destroyed in last year's brushfires.
- Newport-Mesa Unified School District must delay construction on $4.6 million of new projects, including a new administration building for the district. "Construction funds for those projects are on deposit with the county. We wired them (the money) the day before this thing blew up," said Mike Fine, director of fiscal services. The money originated in certificates of participation.
- Saddleback Valley Unified School District must delay the completion of a major high school, which needs up to $15 million. Superintendent Hartman said that it was not inconceivable that the district could issue new bonds, "because we have some bonding capacity."

Highways

The Orange County bankruptcy may also have a chilling effect on the county's ambitious program of freeway and toll-road construction. A $650 million private toll road that was to be built along the Santa Ana River has been delayed, as has the sale of a $94 million freeway-widening project on Interstate 5.

The $1.1-billion San Joaquin Hills toll road is moving forward, even though $311 million of the toll-road construction money is locked up in the county fund. The project is 40% complete. Lisa Telles, spokesperson for the Transportation Corridor Agencies, said the agency will seek other sources of funds but was not specific. Telles said the agencies plan to proceed with plans for a $1.4 billion bond issue for the Eastern toll road this spring.

Sanitation Districts

Capital projects are also in limbo for the participating agencies of the Orange County Sanitation Districts, which is administered by a single agency and together handles 90% of county's sanitation services. The districts went into technical default on $26 million of taxable commercial paper, not because the districts failed to make debt service, but because the commercial paper reverted in ownership back to Lehman Brothers, the original underwriter, after investors exercised their "put" options. ❑

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NUMBERS

Stephen Svete

Construction Activity Is Finally Coming Back

If year-end estimates hold, 1994 will prove to be the year that the construction industry in California reversed its five-year slide. But the rebound is modest and uneven across building sectors. Furthermore, preliminary forecasts confirm what we observed last year: that the construction industry will continue to follow — rather than lead — the overall economy out of a blistering recession.

The Construction Industry Research Board, an industry-supported think tank that compiles building statistics, predicts a 4.8% growth in construction dollars for 1994 compared with 1993. (The current forecast includes 10 months of actual statistics and two months of estimates.) That's a healthy change from 1993's annual drop of 5.8% — the fifth straight year construction activity had gone down. The rebound appears to be lagging two years behind the gross state product. According to UCLA's Business Forecasting Project, the gross state product started going up in 1992.

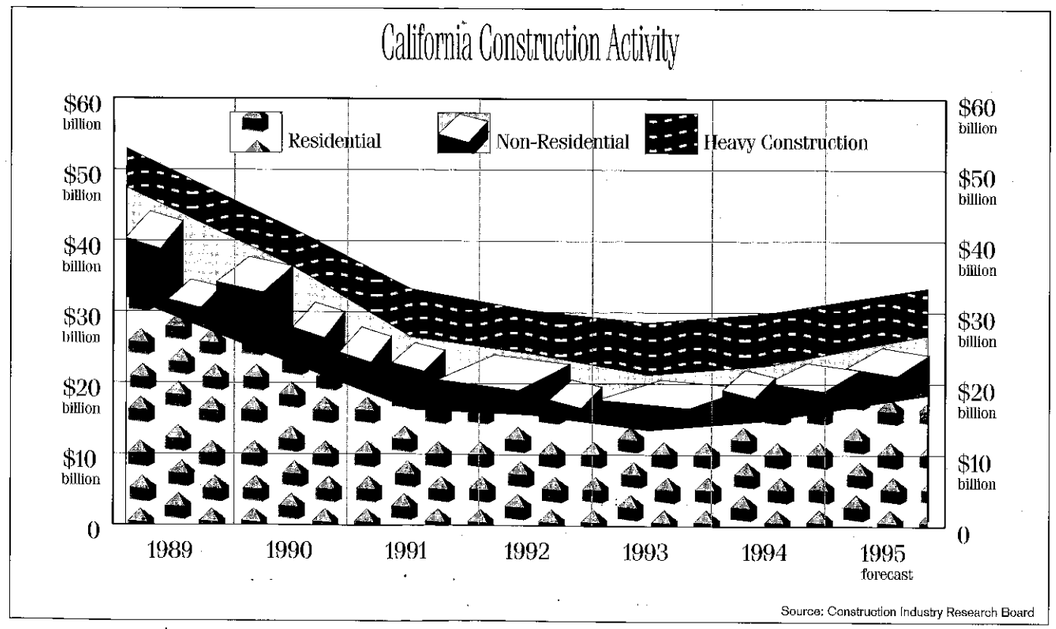
Expanded construction in housing paved the way for the increase in overall construction spending in '94. But a small increase in office and retail activity, which the CIRB had predicted, failed to materialize. Meanwhile, heavy construction, including large public works projects as well as heavy industrial facilities, ended up surpassing all forecasts. The $7.3 billion breaks an all-time record in adjusted dollars and remains the only sector that performed better than CIRB predicted at the beginning of the year.

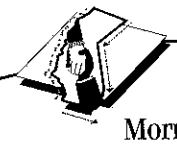
Residential construction is expected to rise 10.4% for the year, but the overall total — $14.9 billion — is the second-lowest total in 13 years. Non-residential construction actually declined for the sixth straight year, though the plunge has stabilized. This reflects absorption of office and retail space constructed during the orgy of overbuilding during the 1980s. The industrial portion of non-residential was a bright performer, growing 25% to $630 million. But CIRB's Ben Bartolotto points out that while this expansion is dramatic, it's still just a small fraction of the $2 billion that represented the typical figure in the 1980s.

The increase in heavy construction is perhaps the easiest to figure. Last January's Northridge earthquake precipitated three significant freeway repair projects in Los Angeles County and accelerated Caltrans's seismic retrofit program statewide.

So will building finally rebound this year? After all, developers around the state have adopted the saying "Stay Alive Till '95" for the past couple of years. Though the rebound will continue, a boom isn't likely. Housing is expected to come back strongest, owing to pent-up demand related to low unemployment and moderate interest rates. Still, the $15.5 billion predicted for '95 won't come close to the $19.2 billion spent in 1990, the first year of the great slide.

So even though it's not as big as forecasts predicted, the construction industry appears to be back in business — and the trend will continue in 1995. ❑





DEALS

Morris Newman

Waterford Runs Into Anti-NIMBY Law

First there was "The Undead." Then there was the Uncola. Finally, we have the Undeal: an affordable housing project that the local city government has done everything to resist.

An "undeal" is a peculiarity for this column, which usually examines the cooperative efforts between government and private developers. The case of the City of Waterford and its attempts to halt an affordable housing project within its boundaries has earned a place on this page as a textbook example of a deal that a city has gone to extraordinary lengths to thwart, even if the city is likely to lose in the end. Besides being a good shaggy-dog story, the Waterford case is a sobering example of the roadblocks that still exist in the affordable housing arena, and how cities can still block projects through expensive and time-consuming tactics of delay, litigation and sheer neglect. And the case has also been a severe test of California's "anti-NIMBY" statute, which was crafted by lawmakers to break through the very kinds of anti-housing roadblocks such as those erected by Waterford.

> *"Does the law have enough teeth to drag cities like Waterford into affordable housing by the scruff of the neck?"*

The story began in 1991, when Rio Linda-based developer Don Kavanagh proposed building 60 units of family-oriented affordable units in Waterford, a working-class city of 6,000 people with a rural character and a large-working class population about 30 miles east of Modesto. Although the project conformed to existing zoning, the city council refused to approve the project after 18 months of negotiations between the developer and city staff. Specifically, the council denied the project on the grounds of health and safety issues, including potential traffic problems posed by the project. (Even though the city's housing element indicates a significant need for affordable housing, "the city feels it has a sufficient amount of affordable housing now," said city administrator Les Crist in a recent interview. In fact, lawyer Pat Sabelhaus contends the city has actually only one bona-fide low-income housing project, and that existing housing for working-class people is often dilapidated. After the city spurned a conditional use permit for the project, Sabelhaus filed suit on behalf of the developer in August 1992 in Stanislaus County Superior Court challenging the right of the city to deny the permit, and lost. Soon after, the developer appealed the case to the Fifth District Appellate Court in Fresno.

In August 1993, the appellate justices ordered the city to reconsider the conditional use permit. Attorneys for the city argued that the project was no longer in conformance with local zoning, because the city had changed the zoning since the date that the developer applied for the CUP. The appellate court, in its opinion, said that the application must be viewed in light of the zoning that was in place when the developer applied for the CUP.

At that point, developer Kavanagh reopened negotiations with the city's planning staff and city attorney regarding which conditions to attach to the property; the developer also offered to give the city an acre of his land as a public park. Nearly six months after the appellate court decision, in February 1994, the city council scheduled a hearing to reconsider the project. When the item came up on the calendar, however, the council quickly kicked the project back to the planning commission for further study, with little discussion: "We considered that to be a waste of time and effort, and not in compliance with the order of the appellate court, so we immediately reappealed," Sabelhaus said.

Sabelhaus quickly filed suit again in Superior Court. "Our position is a clear-cut case. The local jurisdiction has acted in bad faith," he said, pointing out that both the city's general plan and housing element indicate the need for more housing. In the same filing, Sabelhaus also demanded that the city pay his legal fees. Sabelhaus said he regarded the case as a test of the state's anti-nimby statute, AB 2011 (Gov't Code. §65589.5), which essentially forbids local governments from denying housing projects that conform to local zoning, with certain exceptions.

In its second appearance in Superior Court, the city offered an ingenious defense: the city should not be obliged to approve the housing project, because the anti-NIMBY statute allows cities to exempt projects in "planning areas" that already have an excessive number of such units; the city argued that its recently created redevelopment areas did, in fact, have an overabundance of low-income units. Sabelhaus countered that no such planning areas existed in 1991, when the developer first applied for a building permit, and hence the city should not qualify for the exemption. Kavanagh appealed once again to the Fifth District. Nearly a year later, in December 1994, with a newly elected majority on the Waterford City Council, the developer and the city have entered settlement negotiations.

The question arises whether the anti-NIMBY statute has enough teeth to drag cities like Waterford into affordable housing by the scruff of the neck. Waterford, or at least its former city council, is in a state of denial regarding the need for affordable housing. But Sabelhaus is also probably right that even in a worst-case scenario, the ongoing burden of litigation will persuade this stubbornest of NIMBYO cities to relent and to reconsider approval of such units. At that point, the barren Undeal will blossom into new housing, even if the effort is, well, unwelcome. ❑