CP&DR
CALIFORNIA PLANNING & DEVELOPMENT REPORT
Vol. 10, No. 5 — May 1995

Inside

CP&DR

is published monthly by

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Subscription Price:
$209 per year

ISSN No. 0891-382X

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Republicans Propose Big Changes in Wetlands, Stormwater

Bill Passes Key Committee

By William Fulton

The Republican takeover of Congress continues to have a potentially dramatic effect on environmental policy. A wide-ranging revision of the Clean Water Act has swept through a key House committee and appears headed for the House floor — bringing with it important changes to federal wetlands policy, urban stormwater runoff regulations, and coastal policy.

The bill cleared the House Transportation and Infrastructure Committee by a 42-16 vote in early April — a victory margin that surprised even the committee's Republican leaders. It appears likely to come to the floor of the House for a vote in May.

The bill, H.R. 961, contains numerous provisions, but three are of particular interest to planning and development in California:

• Federal wetlands policy would be revised so that wetlands would be defined as areas subject to 21 consecutive days of surface water, rather than 21 consecutive days of subterranean inundation. Also, wetlands would be divided into three categories, with only the highest-quality wetlands subject to full federal protection.

• The National Pollution Discharge Elimination System, which governs urban stormwater runoff, would be dramatically changed. In particular, local governments and private businesses would no longer need individual permits from the Environmental Protection Agency to discharge stormwater. Stormwater runoff regulations have been a major issue for developers and local governments alike throughout California,

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IRS Proposes Taxing Mello-Roos Bonds

Rule Would Undercut California Infrastructure Finance

By Morris Newman

School districts and local governments alike are flooding the U.S. Internal Revenue Service with protests about the IRS's plans to revoke the tax-exempt status of Mello-Roos bonds and certain assessment bonds — two favored methods of infrastructure finance in California.

The loss of tax-free Mellos and assessment bonds would not leave developers totally without recourse, since general obligation bonds are still available. But taxing them could have a significant impact on infrastructure finance. Mellos were conceived as an alternative to general-obligation bond financing after the passage of Proposition 13. They have been widely used in newly developing areas to finance schools, roads, and other infrastructure. More than $5 billion in Mello bonds have been floated since 1982. Assessment district bonds also saw a comeback after Proposition 13.

"It is astonishing when you think about bonds being used to build schools being taxable. It is counterintuitive," said Patti Sinclair, a bond counsel in Latham & Watkins' L.A. office.

The possible taxation of some Mello-Roos bonds is "a very serious issue for those of us in school facilities, because there are not very many mechanisms to finance school facilities," said Mamie Starr, facilities director of the Lodi Unified School District and chair of Coalition for Adequate School Housing, a statewide organization that lobbies for school construction funds. School districts have floated about $850 million in Mello-Roos bonds.

Mello-Roos taxing districts are typically created by a city, county, or school district in conjunction with a

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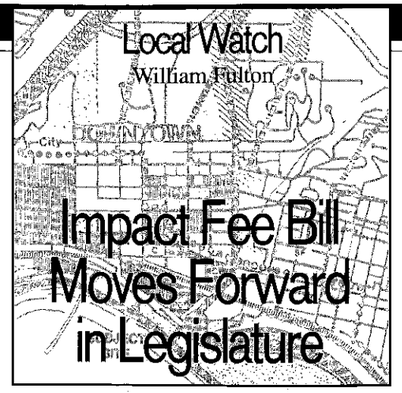


A bill that would restrict school fees and place other limitations on the power of cities and counties to place fees and exactions on new development has passed two key committees in the state Senate.

SB 1066, introduced by Senate Housing and Land Use Chair Tom Campbell, R-Stanford, passed Campbell's own committee in mid-April. Surprisingly, the bill then easily passed the Senate Education Committee, where school lobbyists had expected to make a stand on the bill. It is now scheduled to move on to the Senate Appropriations Committee.

The bill would increase the allowable school fee on new houses from $1.72 to $2.72 per square foot. However, it would also eliminate the so-called *Mira* loophole in the state school facilities law. Under this loophole — named for the court case that established it — the school fee limitation applies to quasi-judicial actions, such as conditional use permits and tentative map approvals, but not to legislative actions, such as general plan amendments and zone changes. The *Mira* loophole has been exploited by many school districts around the state. Many districts have sued or threatened to sue cities and counties on *Mira* grounds and subsequently settled for $4-6 per square foot.

The Campbell bill also has two other significant provisions:

• It would essentially repeal the Court of Appeal's ruling in *Centex Real Estate Corp. v. Vallejo*, 19 Cal.App.4th 1358 (1993), which upheld Vallejo's excise tax on new real estate development. The bill states that an excise tax against new development must be levied on the same basis as other municipal business taxes (for example, gross receipts), or else it will be classified as a fee.

• The bill would also tighten up reporting requirements and restrictions on the use of fee money under AB 1600, the 1987 law that authorizes and governs city and county collection of fees on new development.

Concern about the AB 1600 provisions arises mostly from a recent survey of some Bay Area jurisdictions by the Northern California Building Industry Association. According to the BIA, most local jurisdictions had not compiled annual reports on the use of AB 1600 funds, and many had not kept the funds in segregated accounts, as AB 1600 requires.

Dwight Hansen, a lobbyist for the California BIA, said that his organization supports a number of other changes in the financing of school facilities, including a state bond issue on next year's ballot and a constitutional amendment that would permit passage of local general obligation bonds for schools with a 58% majority vote. A 50% vote proposal was soundly defeated by the state's voters in 1993. The 58% provision is contained this year in SCA 14 and SB 569, carried by Sen. Ken Maddy, R-Fresno.

The easy passage of SB 1066 in the Senate Education Committee was something of a surprise, because the committee's chairman, Democrat Leroy Greene of Sacramento, is considered the legislature's leading advocate of school construction. Most school and local government organizations oppose the bill. The only change in the Education Committee was the linking of its passage to the placement of a school bond on the state ballot in either March or November of 1996.

Water Supply Bills Advance

Meanwhile, legislative committees began a major shakeout in April of bills that would link land-use planning to water supply.

The strongest bill, AB 1005 by Assembly Water Chairman Domenic Cortese, D-San Jose, went down to defeat on April 19 in the Assembly Local Government Committee. The Cortese bill would have required a land-use agency to analyze the impact of new development on water supply when the new development would be annexed to the service area of an existing water purveyor. In particular, the bill would have required the land-use agency to analyze the impact on existing water customers, on future development inside the service area, and on potential development outside the service area. If the land-use agency could not make findings that enough water would be available for all three groups of customers, then the agency would have been required to mitigate the impact or else develop new water supplies itself.

One reason the bill met resistance had to do with the way Cortese responded to critics of a similar proposal last year. Cortese changed his bill to state that its provisions should not be construed as a veto power by water agencies over local land-use decisions. But the bill's analysis by Diane Longshore, consultant to the Assembly Local Government Committee, concluded that other provisions of the bill still constituted a *de facto* veto.

With the Cortese bill gone, attention is now focused on three other bills. SB 901, by Sen. Jim Costa, D-Fresno, is a bill sponsored by the California Farm Bureau Federation that would essentially declare a potential water shortage as a significant environmental impact under the California Environmental Quality Act. This bill is also being promoted by some water purveyors, especially the East Bay Municipal Utility District, which also supported the Cortese bill. SB 901 passed both the Senate Ag and Water Committee and the Senate Housing and Land Use Committee during April. (A recent Superior Court ruling concluded that CEQA analysis of water supply was adequate on a major project that did not have a permanent water supply. See page 7.)

Meanwhile, the California BIA and others opposed to the Cortese and Costa bills are supporting some combination of two other bills: AB 1332, by Assembly Local Government Vice Chair Mike Sweeney, D-Hayward, and AB 584, by Assembly Local Government Chair Richard Rainey, R-Walnut Creek.

The Sweeney bill would require a water assessment on new development and would also link that water assessment to the CEQA process. The Assembly Natural Resources Committee passed Sweeney's bill during April but removed the CEQA component, which will be included in an omnibus CEQA reform bill.

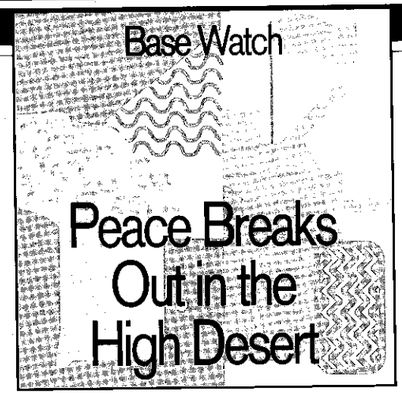
The Rainey bill would require cities and counties to consider water issues in making land-use planning decisions. The bill passed Rainey's committee on April 19.

Update on Housing Element Bills

Meanwhile, several bills that would reform state housing element law are continuing to be considered in the Legislature. Two bills introduced by Assemblyman Jan Goldsmith, R-Poway, have advanced through the Assembly Local Government Committee. Meanwhile, Sen. Tom Campbell has had second thoughts about a housing element bill he introduced.

Goldsmith's AB 1715 establishes a pilot self-certification program on housing elements for jurisdictions within the service area of the San Diego Association of Governments. AB 1731 clarifies that rehabilitation of existing housing, as well as their conversion to affordable status, may be counted toward a jurisdiction's affordable housing goal. This particular question has been an issue in the City of Poway.

Campbell had introduced SB 936, which allowed local governments to apportion housing allocation on a sub-regional basis and established an appeal body to resolve disputes between local governments and regional agencies over how housing allocation would be apportioned. Campbell had scheduled a hearing for April 20 on his bill and a Costa housing element bill, SB 1073, but he called the hearing off at the last minute. The Costa bill would provide a whole host of reforms, including the adoption of joint housing elements by cities and counties, a self-certification process, and a reduction in the data collection required. ❑



Peace, albeit a fragile one, has come to the Middle East, as well as to Northern Ireland. Now the miracle of peace is extending to the High Desert region of San Bernardino County.

The Victor Valley Economic Development Authority of Victorville and Adelanto have agreed to drop a series of lawsuits that the parties have pressed on each other during the past five years, in search of control of the redevelopment of the former George Air Force Base. To settle the matter, Los Angeles Superior Court Judge Diane Wayne dismissed 20 lawsuits.

Under the terms of the settlement, the authority will proceed with development plans for the Southern California International Airport, which fills 2,500 acres of the former Air Force facility. The judge rejected Adelanto's request to be recompensed for the $4 million the town spent in legal fees. The City of Victorville agreed to drop its lawsuit challenging Adelanto's general plan. Adelanto agreed that the base property is not in its sphere of influence. After the settlement, Adelanto Mayor Pro Tem Mary Scarpa, made a classic sour-grapes remark. "The value of the air base has diminished for us over the past few years, especially with three huge advocacy groups seeking property for the homeless."

El Toro Land Swap Killed

An intriguing land-swap deal that would have exchanged sensitive canyonlands for a portion of El Toro Marine Corps Air Station in Orange County has collapsed after a local congressman criticized the deal.

Under the proposed agreement, The Irvine Co. would have gained about 1,100 acres in El Toro (outside the area designated in the general plan for an international airport) where the developer plans to build a large-scale business park. In exchange, Irvine would have donated an unspecified amount of acreage near the Cleveland National Forest to a public agency. The precise dimensions of the preserve were never determined, but had been expected to include the 4,900-acre Fremont Canyon area and three other canyon areas. Securing the lands for the public would have provided the county with an important link in a growing network of habitat preserves in the county known as the Natural Communities Conservation Plan, which is expected to grow to 80,000 acres.

The most notable dissenter, ironically, was the environmental activist who first proposed the swap last July. David Kossack said that the public is not getting enough land in the swap.

Although Babbitt was talking hopefully about the deal in late February, the deal was criticized by U.S. Rep. Dana Rohrabacher, R-Orange County. He described the deal as bad for the public, because the privately owned canyonlands were "worthless," in regard to development, while the publicly owned El Toro lands were potentially very valuable. Rohrabacher's chief of staff, Gary Curran, pointed out that base closure law gives priority to public agencies in need of land, and suggested that Orange County, which has filed for bankruptcy, might be better off taking possession of the land and developing it. Rohrabacher may have also seen political capital in the quashing of plans proposed by Babbitt, a well-known liberal Democrat with a strong environmental record.

On March 17, Babbitt announced that Interior was withdrawing from the proposed deal. "In recent days, however, it has become clear that the consensus we had hoped to gain in support of our land exchange proposal is increasingly elusive," he said in a statement. Irvine Company spokesman Larry Thomas downplayed the swap. "It wasn't our idea in the first place. We were willing to explore it," he said. While Irvine Company was willing to proceed with the swap, he added, "we only wanted to go forward if there was broad consensus. Given the attack by Congressman Rohrabacher, we decided life was too short to go through that."

Winners, Losers in Latest Round

The latest round of base closures and realignments in March has led to the planned demise of two major California facilities — Long Beach Naval Station and the Army Base in Oakland — as well as several small facilities, including the Onizuka Air Station in San Jose and Air Force guard stations in Ontario and North Highlands. Although the state is expected to lose 5,000 jobs from the closures, other parts of the state — particularly the San Diego area — may end up as net beneficiaries of the Pentagon's game of military shuffleboard.

According to one count, the greater San Diego area could gain up to 4,000 jobs and billions of dollars in economic benefits. One clear benefit proposed in the plan is the transferral of the Navy's ship-repair operations, currently being handled at Long Beach Naval Station, which could bring 2,000 new civilian jobs to the area. Another big benefit would be the relocation of the Space and Naval War Command, known as Spawar to the Naval Command, Control and Ocean Surveillance Center in Point Loma. Spawar is a $4 billion agency employing a staff of 1,300 military personnel and civilians. Also benefitting are the Naval Medical Center in San Diego, which gains 102 military personnel, and the Naval Station in the same city, which gains 175 military personnel and 22 civilian jobs.

The 1995 closure and realignment list had other gifts to distribute throughout California. The biggest winner is San Diego's North Island Naval Air Station, which stands to gain 1,529 military personnel and 54 civilian jobs. Riverside's March Air Force Base will gain two National Guard units, with a total 179 military personnel, which will relocate next year from Ontario International Airport. March itself was slated for realignment in 1993; the Pentagon expects to scale back the base's 10,000 active troops to about 5,000 reservists. Now, March officials say they can further benefit from the realignment process, and are challenging a Pentagon proposal to transfer marines from El Toro Marine Air Corps Stations to Miramar Naval Air station in San Diego, which could eventually involve as many as 7,000 military personnel.

One military facility that expected to benefit but didn't, was Lemoore Naval Air Station in Kings County. Located about 35 miles south of Fresno, Lemoore had anticipated growing by 3,180 military personnel and 93 civilian workers. Those people, however, will be sent to three other bases nationwide, according to Pentagon plans. The change of plans would deprive the county of an anticipated 10.9% increase in its employment base, according to Kings County planning director Bill Zumwalt. A local group, Citizens for the Advancement of Lemoore Naval Air Station, headed by former base commander Al Gorthy, is currently meeting to discuss strategies on how to convince the Pentagon to change its mind. ❑

Republican Clean Water Plan Advances

Continued from page 1

with the estimated cost of compliance running into the many billions of dollars.

• Coastal zone management programs would be abolished, and coastal issues would be administered together with stormwater runoff issues in an expanded program dealing with nonpoint source water pollution programs.

The Clean Water Act was first passed in 1972 and is widely regarded as one of the most successful federal environmental programs. Legislators from both parties sought unsuccessfully to obtain reauthorization in the last Congress.

Environmentalists have criticized H.R. 961 as a rollback of federal environmental protections in the clean water area. But the bill's supporters say it will streamline administration of clean water programs and make those programs more responsive to state and local concerns. "It is the height of condescension to say that some fat GS-13 bureaucrat sitting in Washington knows more about coastal management than the city planner of Ventura," said Jack Nelligan, a spokesman for the Transportation Committee.

In addition, Transportation Committee Chair Bud Shuster, R-Pennsylvania, has emphasized that the bill includes a large increase in available federal funds for clean water programs, though he has acknowledged publicly that Congress is unlikely to appropriate the full amount.

Nelligan emphasized the bipartisan nature of the vote in the Transportation Committee. He said that only three of 32 Republicans voted against it, while Democrats split evenly on the vote 13-13. As an example of Democratic support, he pointed to Rep. Walter Tucker, a former mayor of Compton. While drawing opposition from environmentalists, H.R. 961 has received support from key state and local government groups, including the National Governors Association, the National League of Cities, the U.S. Conference of Mayors, and the National Association of Counties.

Nelligan said that the House leadership was buoyed by the lopsided committee vote and may schedule an early House floor vote as a result. As with other environmental issues in the current Congress, environmentalists are counting on Senate Environment Committee Chair John Chafee, R-R.I., to push for a more moderate revision of the Clean Water Act. But Chafee has already disappointed the environmentalists at least once by waffling his support for the Endangered Species Act. (*CP&DR*, April 1995.)

Wetlands

The bill promises to put an end to the volatile debate over federal wetlands definitions. Federal wetlands policy has been in flux for almost a decade, since scientists from four federal agencies first tried to draw up a common definition of a wetland. Wetland definitions became progressively tighter until 1991, when the issue became so political that Vice President Dan Quayle and special White House task force stepped in to resolve matters.

At the time, Quayle was widely ridiculed by scientists for proposing simply that the federal government follow the rule: "When it's wet, it's wet." However, this is essentially the rule proposed in H.R. 961. Previous federal definitions have defined any area with an extended period of subterranean inundation as a wetland. H.R. 961 would state specifically that to qualify as a wetland, a piece of property must be inundated with surface water for 21 consecutive days, and must also show soil types and vegetation characteristic of wetlands.

Just as important as the new definition, however, may be the bill's provisions allowing for the ranking of wetlands into three categories for the purposes of federal regulation.

According to industry lobbyist Robert Zabow, who has advocated such a ranking system for several years, the system would work as follows:

Class A wetlands, which Zabow predicted would cover approximately 15-20% of currently defined wetlands, would be the wetlands of highest value, and they would be regulated under the current system, with the Army Corps of Engineers issuing permits for dredging and filling them. Class B wetlands, which Zabow predicted would cover most wetlands, would be regulated under a "public interest" test that would require a balancing of competing values, rather than regulation for scientific values only. Class C wetlands — the poorest-quality wetlands — would not be regulated at all by the federal government, though Zabow said states could regulate such wetlands if they wanted to.

Regarding property rights and the question of regulatory takings, Zabow said the bill contains identical provisions for landowner compensation contained in the formal property rights bill already passed by the House, which was included as part of the Republicans' Contract With America.

Stormwater Runoff

While wetlands regulation has been the highest-profile planning issue under the Clean Water Act, the stormwater runoff issue has been roiling underneath the surface. 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 industry activities and construction sites into the stormwater system. It also requires a vast array of private activities to obtain stormwater permits from the EPA.

Under H.R. 961, local governments and businesses would no longer require individual stormwater runoff permits — a process that government agencies complained was burdensome and cost $650,000 on average. According to Doug Harrison, general manager of the Fresno Metropolitan Flood Control District, who helped to draft the bill, government agencies would still be required to take steps to improve the quality of stormwater runoff. But specific standards would not be required for 15 years. In the meantime, the federal government would devote $100 million to studying the stormwater problem.

Although the water quality standards would be help in abeyance, local governments would still be required to follow stormwater management plans, and states would be required to adopt stormwater management plans subject to EPA approval.

Environmentalists have characterized H.R. 961's changes to the stormwater program as making stormwater compliance essentially voluntary. But the Republican leadership on the Transportation Committee disputed that characterization.

In L.A. County, the Regional Water Quality Control Board, which has been implementing the regulations, has granted a blanket permit covering the county, all 88 cities in the county, and Caltrans. A similar permit has been issued for Ventura County. However, the Natural Resources Defense Council has sued Caltrans and three cities, and forced settlements with several other cities that call for tighter stormwater programs as well as oversight by NRDC scientists. (*CP&DR Legal Digest*, January 1995.) ❑

■ Contacts:.
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Robert Zabow, National Wetlands Coalition, (202) 298-1920.
Doug Harrison, General Manager Fresno Metropolitan Flood Control District, (209) 456-3292.

CP&DR
LEGAL DIGEST

High Court Skeptical in Species Case

Forest Industry Faces Critics In Sweet Home Oral Argument

By Kenneth Jost

The timber industry took its legal effort to limit the government's power to protect endangered species on privately owned land to the Supreme Court last month, but ran into a buzzsaw of skeptical questions from a majority of the justices.

In the so-called *Sweet Home* case, at least five of the nine justices appeared to reject the industry's argument that the government has stretched the Endangered Species Act too far in interpreting the law to cover uses of private property — such as timber harvesting or urban development — that might adversely affect the habitat of rare fish, birds, or other animals.

"I don't see how to reach your position," Justice Stephen Breyer told the industry lawyer at one point during the animated hour-long argument April 17. Four other justices — John Paul Stevens, Anthony M. Kennedy, David H. Souter, and Ruth Bader Ginsburg — similarly voiced doubts about the industry's argument to varying degrees, and a sixth — Sandra Day O'Connor — seemed somewhat unreceptive to its position.

But Justice Antonin Scalia openly sided with the industry, even to the point of helping attorney John Macleod fashion his arguments in the case. At one point, Scalia called the government's interpretation of the law "just weird."

The case, which drew more than two dozen briefs from industry groups and state governments on one side and environmental organizations on the other, boils down to a dispute over the meaning of one word in the landmark 1973 law aimed at preserving endangered species in the United States.

The act makes it unlawful to "take" an endangered fish or wildlife species and goes on to define "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Under a regulation dating back to 1975 and rewritten in 1981, the U.S. Fish and Wildlife Service has interpreted "harm" to include any "significant habitat modification or degradation" that significantly impairs "essential behavioral patterns, including breeding, feeding, or sheltering."

Separate provisions of the act clearly regulate uses of public lands that affect wildlife habitat — for example, the construction of dams or highways. But the industry contends that the provisions affecting private property were aimed only at deliberate harm to wildlife such as by hunting or fishing. And last year, the federal appeals court in Washington, in a 2-1 decision, agreed and struck down the regulation. (*CP&DR Legal Digest*, April 1995.)

Deputy Solicitor General Edwin S. Kneedler opened his defense of the regulation before the Supreme Court by saying the industry had a "very heavy burden" in seeking to throw out the entire regulation. A few minutes into the argument, however, Kneedler was interrupted by a forceful line of questions from Scalia challenging the regulation as going beyond the statutory language.

"To 'take' an animal applies to hunting," Scalia said. "The word 'harm' — and every other word — is consistent with that old-fashioned definition."

Scalia said the Fish and Wildlife Service had instead given the term a broader interpretation. "You plow your land, you 'take.' Nobody would use it that way."

Later, Chief Justice William H. Rehnquist similarly questioned the statutory basis of the regulation. But when Macleod got his turn to argue, he fielded critical questions from a broad array of justices.

Ginsburg said Macleod was effectively ignoring the word "harm" in the statute. "It's as though the word 'harm' is not there," Ginsburg said. For his part, Souter rejected Macleod's argument that the act only applies to "purposeful" harm to wildlife. "If you know that the destruction of the habitat is going to harm the species, that's enough," Souter said.

Stevens and Breyer also challenged Macleod by suggesting his argument would prevent use of the law in cases where endangered species were clearly being harmed. "I felt there was no way to reach your position without thinking that the person who goes out and kills the koala bear for fun is outside the act too," Breyer said.

The case takes its name from the local chapter of an Oregon citizens group from the community of Sweet Home, but the major plaintiffs are timber industry groups from the Pacific Northwest and the Southeast. The suit, financed by the American Forestry and Paper Products Association, did not involve a specific enforcement action but challenged the regulation on its face.

In his comments, Breyer questioned the industry's strategy. He told Macleod "Your clients and others who are worried about extreme interpretations ought to challenge it on a case-by-case basis. But what I can't see is throwing the whole thing out the window."

The Supreme Court case attracted strong interest from outside groups, both nationally and in California, most of them on the side of the timber industry. The Association of California Water Agencies filed a brief saying that the Fish and Wildlife Service had used the broad interpretation of the act to require controlled use of water in the Sacramento-San Joaquin Delta without considering the economic impact of the changes. The state attorney general's office filed a brief, joined by three other states, saying that enforcement of the regulation "costs the states millions of dollars in foregone economic development and tax revenue."

After the court session, one of the timber industry lawyers voiced satisfaction with the argument despite the critical questioning. "The questioning from the bench was split down the middle in the case," said Steven Quarles, a partner with Macleod in the Washington firm of Crowell & Moring. "But I think the questions helped because they allowed us to make our position."

But John Kostyack, a lawyer with the National Wildlife Federation who helped write a brief supporting the broad interpretation of the act, said he was "heartened" by the justices' questions. "Apart from the rigid conservatives — Rehnquist, Scalia, and presumably [Justice Clarence] Thomas — all of the other justices asked questions that really put the industry lawyer in a box."

Both lawyers added that the issue may ultimately reach Congress, which is due to consider reauthorizing the Endangered Species Act later this year. "Whatever this court decides," Quarles said, "we have not heard the last of this issue." ❑

■ The Case:
Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 94-859.
For Bruce Babbitt, Secretary of the Interior: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice,

Washington, D.C. 20530, (202) 514-2217.
For Sweet Home Chapter of Communities for a Great Oregon et al.: John A. Macleod, Crowell & Moring, 1001 Pennsylvania Ave., N.W.Washington, D.C. 20004-2595, (202) 624-2500.

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ENDANGERED SPECIES

Species Act Covers Future Harm to Spotted Owl

The prospect of future harm to endangered or threatened species is enough to form the basis for litigation under the federal Endangered Species Act, the Ninth U.S. Circuit Court of Appeals has ruled. In making the ruling, the Ninth Circuit specifically rejected the lumber industry's contention that a species must already be harmed for litigation to proceed.

The case involves yet another situation from the Northwest affected by the listing of the Northern Spotted Owl as endangered under the federal law. In 1991, the federal Bureau of Land Management authorized construction of a road across its land in Lane County, Oregon, so that Rosboro Lumber Co. could gain access to its own land, where it planned to clearcut approximately 40 acres of timber. However, BLM's environmental assessment indicated that the road might disrupt the nesting sight of a pair of spotted owls. Under federal law, such disruption cannot occur without a so-called "incidental take permit" from the U.S. Fish & Wildlife Service.

In the summer of 1992, Rosboro built the road without consulting with the Service. Subsequently, the Forest Conservation Council sued Rosboro seeking an injunction from the clearcut. But U.S. District Court Judge Michael Hogan in Oregon ruled that because the Forest Conservation Council alleged only a future injury to the birds, and did not allege that the activity would threaten the extinction of the owl, the council's suit was premature.

On appeal, a three-judge panel of the Ninth Circuit overturned Judge Hogan's decision. Reviewing the statutory language, the court ruled that future injury is included as a basis for legal action and a 1981 decision by the Interior Secretary to narrow the definition of the word "harm" did not change this interpretation. "Nowhere does the redefinition of 'harm' or its explanatory commentary require historic injury to protected wildlife," the court wrote.

Regarding the statutory purpose of the Endangered Species Act, the court noted that it becomes more difficult to preserve endangered species if they are further injured after they become endangered. "FCC aptly argues," the court wrote, "that forcing it to wait until after harm has been inflicted would render their claims moot before they become ripe."

Rosboro had also argued that Ninth Circuit case law led to the conclusion that future injury could not form the basis of legal action, relying especially on *Pacific Northwest Generating Cooperative v. Brown*, 25 F.3d 1443 (1994), and *Pyramid Lake Paiute Tribe v. U.S. Department of the Navy*, 898 F.2d 1410 (1990). The court ruled that both these cases did not apply to the situation at hand; neither case dealt directly with the question of future versus present injury, according to the court. "In contrast to the cases cited by Rosboro, FCC has proffered sufficient evidence to show that Rosboro's logging activity is reasonably certain to harm the Swartz Creek owl pair and that such harm is imminent."

Judge Hogan had also ruled that habitat modifications that merely retard species recovery — instead of leading to extinction — are not outlawed by the Endangered Species Act. The Ninth Circuit said it would likely come to the opposite conclusion but ruled that because sufficient evidence existed that actual injury would occur, the appellate judges did not have to reach this question. ❑

- The Case:
  Forest Conservation Council v. Rosboro Lumber Co., No. 94-35070, 95 Daily Journal D.A.R. 3759 (March 27, 1995).
- The Lawyers:
  For Forest Conservation Council: Gary K. Kahn, Reeves & Kahn, Portland, (503) 777-5473.
  For Rosboro Lumber Co.: Steven P. Quarles, Crowell & Moring, Washington, D.C., (202) 624-2500.

GENERAL PLANS

Menlo Park Project Is Consistent With City's General Plan

By Larry Sokoloff

In a case involving the status of private open space, the First District Court of Appeal in San Francisco has upheld the approval of a residential development by the city of Menlo Park previously zoned for such a use.

A three-judge panel of Division Four ruled unanimously that two environmental groups had failed to show that approval of a 145-home project was inconsistent with the city's general plan or that the environmental impact report was inadequate. The opinion was unpublished.

The developer, Oak Leaf Associates, proposed to build homes on 46 acres that is part of an 88-acre parcel that is the site of St. Patrick's Seminary. The seminary is located on 23 acres of the site. The remaining 65 acres is designated as open space. It is fenced off, but the open space is used by walkers, joggers and bicyclists.

Earlier plans to build a care facility and 728 residential units on 69 acres of the land were defeated by Menlo Park voters in 1987. In the same election, voters said in an advisory measure that they didn't want single-family homes built on the property, but also said in another measure that they did not favor buying the property for open space.

The City Council approved the Oak Leaf project in 1992. The development includes a 1.8-acre public park. The city also entered into an agreement with the seminary for an open space and conservation easement to keep 16 acres of the site as open space for 15 years. The city has an option to purchase the open-space land if sale or development is proposed.

Two groups, SPACE and the St. Patrick's Preservation Committee, sued, seeking a writ of mandate and injunctive relief. San Mateo County Superior Court Judge Thomas McGinn Smith denied relief.

In an appeal, the two groups argued that the project was inconsistent with the open space element of the city's general plan, and attacked the adequacy of the EIR in dealing with impacts on open space, wildlife, vegetation, and traffic. The appellants also claimed the EIR did not adequately address alternatives to the project.

The unpublished opinion by Presiding Justice Carl Anderson said that the environmental groups were "adamant that the easement is an 11th hour move to avoid a general plan conflict. " The environmental groups also claimed the agreement for the easement is illusory because the Seminary can terminate the easement at will if a lawsuit is filed.

But the court disagreed, saying the city's findings on the easement were supported by substantial evidence, and that the easement had not been withdrawn even though a lawsuit had been filed.

The appellants charged that the EIR failed to adequately address the loss of open space. But the court said there was substantial evidence for the city's finding that the impact on open space was not significant or adverse.

The court disagreed with SPPC that the city erred in evaluating the significance of the loss of open space at the site with other open space lands in Menlo Park. There are 228 acres of developed parkland in the city and policies in place to preserve about 7,500 acres of baylands as open space.

"To meaningfully analyze the impact of loss of open space to an urban community one must first know what the total package looks like," the court said. "'Loss' implies a diminution in quantity that relates to the whole body. The area, for purposes of our analysis, is Menlo Park, not the Seminary Site."

The area to be developed consists of fields, savannah areas and dense woodlands.

The court said one reason the loss of open space is an insignificant impact is because the development will contain a public park, low density residences, extensive landscaping, and because existing trees will be preserved.

SPACE argued that the EIR should have considered the cumulative impacts on urban open space. But the court said that under Public Resources Code Section 21177, subdivision. (a), the matter should have been raised at the administrative level, and was not. ❑

- The Case:
  SPACE and St. Patricks' Preservation Committee v. City of Menlo Park, Nos. A063091 and AO63362 (January 10, 1995).
- The Lawyers:
  For SPACE: Mark Weinberger, Shute, Mihaly & Weinberger, (415) 552-7272.
  For St. Patricks Preservation Committee: Mark A Massara, (415), 665-7008.
  For Menlo Park: Steven R. Meyers, Rick W. Jarvis, Meyers, Nave, Riback, Silver & Wilson, (510) 351-4300.

CEQA

Water Analysis Was Sufficient On Stanislaus County Project

The Stanislaus County Board of Supervisors adequately analyzed water supply issues on the controversial Diablo Grande resort project even though the project does not have a permanent supply of water, a Superior Court judge has ruled.

Envisioned as a high-end resort project, Diablo Grande is expected to consist of some 5,000 housing units, a resort hotel and conference center, several golf courses, and other resort amenities on a 30,000-acre site in the mountains of Stanislaus County west of Interstate 5. The project was approved by the county in 1993 even though no permanent source of imported water was available.

Instead, the project's developers purchased land on the valley floor with water rights, which they planned to use on the resort projects. After complaints by the local farm bureau, which feared that the project would siphon off groundwater from local agriculture the county agreed to permit construction of "Mini-Phase I," which included the resort but no houses, so long as the developers found a permanent source of water within five years. (*CP&DR Local Planning*, May 1994.) This situation was one of several around the state which led the California Farm Bureau Federation and other groups to seek legislation linking water supply and land-use planning decisions. (See page 2.)

Subsequently, the county was sued by a coalition of environmental groups led by the Stanislaus Natural Heritage Project. The environmentalists sued on a variety of grounds, including the cancellation of Williamson Act contracts, failure to mitigate for loss of kit fox habitat under the Endangered Species Act, and inconsistency with the county's general plan. However, environmentalists' major argument was that the county did not adequate analyze the issue of permanent water supply in the environmental impact report.

The county and the developers argued that it was not feasible to incur the expense of securing and storing a long-term water supply before it was needed, especially since the developer did not yet know whether the county would approve the Diablo Grande Specific Plan.

Superior Court Judge David Vander Wall ruled in favor of the county. In general, Vander Wall concluded, "the primary water issue presented by this case is whether the impacts of a long-term water supply (including source, delivery, and storage) for the project (including Mini-Phase I) should be examined now or later." Further, Vander Wall said, since the county deferred the action until later in this case, the county did have sufficient information to make the decision.

"This court finds substantial evidence in the record to support Respondent's [county's] position," he wrote. "While Respondent did not know the identity of the long-term water supply, it did have information regarding various alternatives for source, delivery, and supply, and it knew the reasons Real Party [Diablo Grande] was requesting deferral of this issue," he wrote. "The Court finds tiering is appropriate for the long-term water supply issues of Mini-Phase I as well as Phase I and the rest of the Plan."

Vander Wall characterized the environmentalists' arguments as "a direct attack on the very concept of tiered EIRs" as well as an attack on the county's economic strategic plan, which called for development west of I-5. "Local governments have discretion in determining the timing of environmental studies," he wrote. "This decision will be respected in the absence of manifest abuse."

Vander Wall also ruled in favor of the county on all other issues as well. On the Williamson Act issue, the judge found cancellation legal because it was in conformance with the economic strategic plan and because no prime farmland was involved. ❑

- The Case:
  Stanislaus Natural Heritage Project v. County of Stanislaus, Stanislaus County Superior Court No. 301417.
- The Lawyers:
  For Stanislaus Natural Heritage Project: Susan Brandt-Hawley, (707) 938-3908.
  For Stanislaus County: E. Vernon Seeley, Assistant County Counsel, (209) 525-6376.
  For Diablo Grande Limited Partnership (Real Party in Interest): Steven R. Meyers and Rick W. Jarvis, Meyers, Nave, Riback, Silver & Wilson, (510) 351-4300.

TAKINGS

BCDC Order on Marin Property Does Not Constitute Taking

In the third appellate ruling to come out of the same situation in Marin County, the First District Court of Appeal has reiterated that the Bay Conservation and Development Commission has jurisdiction over five acres of marshland and ruled that BCDC's cease-and-desist order did not create an unconstitutional taking of property. In so doing, the First District declined to use the doctrine of temporary taking to compensate the property owner in a case where development of the property was held up by litigation.

BCDC regulates development activity along the Bay by issuing fill permits. Under the 1965 legislation that established the agency, BCDC has permitting authority over all territory within 100 feet of the bay's shoreline, as well as all areas subject to "tidal action." (Government Code §66610.) BCDC has interpreted this last provision to mean its jurisdiction extends to any land that has been inundated by tides since the 1965 legislation passed.

This broad interpretation has led to a long-running dispute over BCDC jurisdiction between the agency and Jack Krystal, principal partner of Littoral Development Co., which owns a 2.5-acre parcel of land in

Sausalito. The regulatory battle began in 1976, when Littoral filled and fenced the landward two-thirds of the property for use as a parking lot without first obtaining a fill permit. Subsequently, Littoral sought a BCDC permit but was denied.

In early 1994, the Court of Appeal ruled that the bayward one-third of the parcel is marshland subject to the jurisdiction of BCDC, while the landward two-thirds of the parcel constitutes uplands outside BCDC's control. *Littoral Development Corp. v. San Francisco Bay Conservation and Development Commission*, 24 Cal.App.4th 1050 (1994), or *Littoral I*. (*CP&DR*, June 1994.) As a result, BCDC vacated the cease-and-desist order. In an unpublished ruling in late 1994, the First District ruled against Marin County's efforts to order the abatement of all uses of Littoral's property. *Littoral Development Co. v. County of Marin*, No. A064513 (Nov. 23, 1994), or *Littoral II*.

In the new ruling, known as *Littoral III*, Littoral continued to argue that BCDC had no jurisdiction over the bayward third of the property, that the cease-and-desist order constituted a taking of Littoral's property, and that Littoral was entitled to attorneys fees. The court ruled in favor of Littoral on all three points.

BCDC has control over all marshlands along the bay that lie no higher than five feet above mean sea level. Littoral contended that the bayward third of its property does not meet the statutory definition of marshland under BCDC's control, and in any event the statutory definition of marshland is too vague.

The appellate court ruled that under the doctrines of *res judicata* and collateral estoppel this question cannot be addressed again, since it was resolved in the previous case. (The California Supreme Court declined to hear the case after it was decided by the First District.) Beyond that, however, the First District also ruled against Littoral on the merits of the company's arguments.

Among other things, the court found that the definition of marshland in the Government Code is not vague or overly broad. "Unlike many other statutory definitions which limit development of 'wetlands' or other arguably vague and ill-defined areas, thus resulting in some potential for bureaucratic overreaching, the term 'marshland' as used in §66610 has a relatively precise definition." The court also refuted the statements of Littoral's principal that the property is not a "real marsh" by stating that even if the property "does not have outstanding scenic value," the land is still marshland under the statutory definition.

Littoral also claimed the parcel was not marshland because it had subsided below the five-foot level since 1965 and because it is near an island of fill that is more than five feet above sea level. The court rejected these arguments. "The delineation of BCDC's jurisdiction over marshland and other types of bayfront property is a matter which may be addressed by the Legislature in the future, but we must deal with the statutory definitions as they currently exist," the court wrote.

The court also found that BCDC did not create a regulatory taking merely because the cease-and-desist order and subsequent litigation led to delay. "While we recognize that, on very different facts, a transient and impermanent interference in real property use due to egregious bureaucratic overreaching may arguably constitute a compensable temporary taking, BCDC's actions here were facially valid and supported by a plausible though erroneous legal argument which the trial court accepted," the court wrote. "We decline to hold that such a taking occurred here or occurs every time a land-use agency makes an erroneous decision which is ultimately overturned in part on appeal." ❑

■ The Case:
Littoral Development Corp. v. San Francisco Bay Conservation and Development Commission, No. A064842, 95 Daily Journal D.A.R. 3451 (March 21, 1995).

■ The Lawyers:
For Littoral Development: Terry Thomas, Bowers, Thomas & Associates, (415) 383-8399.
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LOCAL PLANNING

Property Owners Have No Claim Against City in Driveway Case

A property owner who sued the City of Newport Beach over the city's denial of a small development project has no claim against the city, the Fourth District Court of Appeal has ruled.

Paul and Doreen Burchett had sought to overturn Superior Court Judge Randell L. Wilkinson's ruling that sustained the city's demurrer without leave to amend and granted the city's motion to quash service of the litigation to certain city department heads. Judge Wilkinson's ruling essentially left the Burchetts with no case in their attempt to win $8.7 million in damages from the city. But the appellate court declined to overturn the ruling.

The Burchetts had originally approached the city with a request to retain a non-conforming driveway in connection with their attempt to raze a duplex and replace it with two condominiums. The property contained a driveway from the street, although it is also accessible from an alley in the back. Current city regulations prohibit street driveways on property adjacent to alleys.

The Burchetts wrote a letter to the city about the use of the existing driveway, but did not include any plans and did not allude to the driveway regulation. An assistant planner wrote a note at the bottom of the letter that the letter's information was "correct." However, the Burchetts' proposal violated the driveway policy, and their request for an encroachment permit was denied by the Public Works Department and the City Council.

The Burchetts filed a complaint in April 1992 for damages against the city, the city council members, and the city's department heads. But when the complaints were not served by September, the court ordered the Burchetts to serve them by October 15. The city and the retired city manager were served, but after the city's lawyer responded that service was improper, no further attempt to serve was made. A motion to quash service to the other defendants and dismiss the case was granted in March of 1992 after the Burchetts did not answer the motion. At the same time, a demurrer without leave to amend filed by the city and the former city manager was granted, and that portion of the case was dismissed as well.

On appeal, the Burchetts blamed the lack of service on the marshal. But the Court of Appeal did not buy this argument, noting that the Burchetts themselves agreed that a substitute service at City Hall would have been an adequate substitute for personal service.

Regarding the claim against the two parties that were served, the Court of Appeal apparently had no problem sustaining the demurrer without leave to amend. The Burchetts had claimed that a written agreement between them and the city had been breached, basing this claim on the assistant planner's notation. "The assistant planner," the court noted, "was not the person to contact." The city charter provides that only the city council can enter into a contract.

After rejecting other claims related to breach of fiduciary duty and the U.S. Civil Rights Act, court concluded: "Here, there was not even a suggestion of the potential viability of any new cause of action, either below or on appeal. The demurrer was properly sustained without leave to amend." ❑

■ The Case:
Paul J. Burchett v. City of Newport Beach.
The Lawyers:
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For Newport Beach: M. Katherine Jenson, Rutan & Tucker, (714) 641-5100.

IRS Proposes Taxing Mello-Roos Bonds

Continued from page 1

developer of raw land. A vote is required to levy the taxes. But if the area in question has fewer than 12 registered voters, then the vote occurs only among property owners — meaning the developer and the local government can, in essence, create the district on their own. The taxes are then levied on property owners in the area (including subsequent home buyers) on top of the regular property tax. Local governments then bond against this revenue stream in order to pay for infrastructure that benefits the new development.

For school districts, Starr said, "Mello-Roos has been a good mechanism from two standpoints. You can get voter approval for the bonds, and Mello-Roos gives the school district a little more flexibility than the standard general-obligation bond route. Districts have the flexibility to adjust the boundaries." If growth occurs in a given area, local voters can deal with Mello-Roos taxes in a localized way.

While opinions vary, taxable Mello-Roos bonds would carry interest rates 2-3% higher than current tax-exempt rates, making them less attractive to investors and far costlier for communities to pay debt service. The net result — if, in fact, taxable Mellos would be marketable — would be to reduce the actual amount of bond money available for the construction of infrastructure facilities.

The proposed regulations hold that "private activity bonds" are taxable, and define such bonds as those in which 5% or $5 million (whichever is less) of the bond proceeds are lent to "nongovernmental persons or entities." The code provides an exception for "tax assessment loans" which are loans that public agencies undertake and impose taxes to pay off. So-called tax assessment loans would not be taxable if the assessments or taxes were to pay for essential government functions. But "the proposed regs draft those exceptions so narrowly, that you end up having requirements that don't work in California," said Sinclair.

Among the proposed IRS regulations on tax-free Mello-Roos and assessment bonds:

• Developers would not be able to use the proceeds of tax-free Mello-Roos or assessment bonds to build infrastructure, if the construction of that infrastructure is a "primary unconditional legal obligation" of their development agreements, regardless of whether the projects have a public purpose.

Example: A developer obtains a development agreement from a city on the condition that she builds a sewer line. Because construction of the sewer was a condition the developer had to fulfill to build her project, the bond proceeds were employed in a "private business use," and, as such, would be taxable under IRS rules.

Since this scenario, in fact, describes how Mello-Roos bonds are most often used in California, this proposed rule is "the most troublesome" of all the proposals, according to a report by Orrick, Herrington & Sutcliffe.

A loophole would exist to avoid this rule. Tax-exempt Mellos could be used if the issuer (i.e. the local government or school district) and the developer believe that the development project will be sold within three years of the time the bonds were issued. But many developers who use Mellos are homebuilders who build big master-planned subdivisions that take many years, sometimes decades, to build out. In such cases, this loophole would be of little value.

• Mello-Roos taxes would have to be levied proportionally to benefit — an important change from current law. When drafted, the Mello law deliberately avoided levying taxes by value (which would make it a property tax) or by benefit (the method typically used in assessment districts). Instead, Mello taxes are levied on any "reasonable basis." Under the proposed regulation, Mellos not levied according to benefit would be taxable.

• Both Mello-Roos taxes and special assessments would have to be levied on all properties that benefit from the taxes in order to be tax-exempt. Currently, many Mello-Roos districts omit certain properties from taxation.

• Mello-Roos taxes cannot be levied in a way that makes any distinctions among different kinds of property for tax purposes. Currently, many Mellos have different tax rates for housing and businesses. Some observers believe that imposing a uniform tax creates methodological problems, because the regulation seems to be asking for the Mello-Roos tax to be levied in an "ad valorem" manner — that is, based on the underlying value of the property. But this method of taxation is outlawed by Prop. 13 — which is why the Mello law was drafted differently.

"What's troublesome about these regs is that there are enormous parts of California that have been built in the wake of Prop 13, using assessment financing," said Latham's Sinclair. "There are whole sections of Southern California where this is extremely common. It is very disconcerting to see a technique that has been broadly used, almost as a technique of last resort, be taken off the table — especially when you are talking about school construction."

One observer who does not think the sky is falling is attorney Clayton H. Parker of Tustin-based Parker, Covert & Chidester. In a letter to Jim Murdoch, chief lobbyist for the Coalition for Adequate School Housing, Parker says that the effect of the proposed regs on California school districts has "been both overstated and misstated." He claims that the "typical" Mello-Roos district formed by school districts to pay for school construction would not be affected by the proposed regs.

Instead, those rules would "prohibit, as has happened, some of the Mello-Roos districts, whether formed by a school district or by a city, in which improvements being financed include in-tract improvements required by a city or county and possibly some off-site improvements, as well as financing a school or schools." In other words, Parker holds that schools-only Mellos are safe because the projects being financed have a governmental purpose, which are exempted under the proposed regs, and that only Mellos that finance both schools and other infrastructure appear in danger of taxation.

The IRS has requested public comment on the proposed regs. Carol Lew of Stradling, Yocca said she was very busy in April drafting responses for her municipal and school-district clients for a May 1 deadline on written comments. The comment period will end on June 8, although that deadline may be extended. ❑

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Developers May Have To Emphasize 'Soft' Infrastructure

By Rob Corley and William Fulton

Changing demographics will require developers of master-planned communities to give as much importance to"soft" infrastructure, such as child-care opportunities and neighborhood "feeling," as to "hard" infrastructure such as roads and sewers.

That's the word from master-planned community developers, who gathered in Las Vegas early in April for a special seminar on the topic sponsored by the Urban Land Institute. Though the seminar was national in scope, many of the speakers — and many of the master-planned communities they used as examples — came from California. According to ULI statistics, four of the 10 leading master-planned communities in the United States are located in Southern California, and two more are being built in Las Vegas by California-based developers. Aliso Viejo in Orange County was No. 1 nationwide in units sold for the year 1991.

Both demographers and developers at the conference said that increasingly, two-income homebuyers are placing higher priority on neighborhood amenities that relieve the hassles of working parents, such as child care, after-school activities, neighborhood gatherings, and a safe environment for children to live and play. Because local governments can no longer afford to pay for all these services, land developers may consider forming partnerships with private, public, and non-profit organizations to provide them.

"Accepting and dealing with social engineering as a business discipline will likely tax the comfort zone of many developers," said V.R. "Pete" Halter, a real estate consultant from Atlanta. "These are not simply land planning issues. They are social issues."

Some community amenities have long been accepted as marketable by developers, especially developers of master-planned communities. But such developers have traditionally limited their focus. Convenient elementary schools are frequently viewed as a drawing card for families. Proximity to golf courses and open space also have proven appeal. But the Las Vegas speakers said developers must also further in helping to form the infrastructure for neighborhood social networks as the "latchkey" phenomenon grows for time-stressed, two-income families with children. Among the components of this infrastructure are:

- Safety patrols.
- Child-care opportunities.
- After-school recreation programs for school-age children.
- Community centers, especially for children and teenagers who might otherwise "hang out" at the local convenience store.
- Churches.
- Better street maintenance.

Many of these ideas are not new. But the ULI speakers said they must be pursued through innovative partnerships with government agencies, with a focus on the ongoing operation of social programs, not just provision of "hard" infrastructure. And sometimes they have been ignored. In master-planned communities in south Orange County, for example, churches have had a hard time finding sites and have sometimes faced neighborhood opposition.

Mark Fine, president of Ridder Park Associates, which is developing a master-planned community in the Antelope Valley section of northern Los Angeles County, encouraged developers to work together with city governments to create a combination of "hard" and "soft" infrastructure. While developing the Green Valley master-planned community in Las Vegas, Fine said, he worked with the local government to place recreation staff members in the Green Valley community center to encourage and coordinate recreation programs. He said that in general both developers and local governments will gain more in the way of community services if they work together, rather than in an adversarial fashion.

Similarly, two leading developers — Fritz Grupe of Stockton-based Grupe Communities and Jim Motta of Florida-based Arvida Corp. — said developers must get more deeply involved in schools than simply building them or providing money. In one Grupe development, for example, the community association has a full-time teacher on staff, working on standards for students from that subdivision. (The teacher is on loan to a local middle school.) "Builders need to get involved in schools, because meeting needs of your buyers will generate sales," Motta said.

But the emphasis on "soft" infrastructure should not be construed as an endorsement of "neo-traditional" planning, which emphasizes pedestrian orientation, transit, and a close mixture of residential uses with shopping and job centers. According to a study by San Francisco-based American LIVES Inc., a market research firm, amenities such as pedestrian orientation and accessible town centers are not as important as more traditional suburban amenities such as cul-de-sacs, traffic control, open space, and schools. However, these amenities scored higher than golf courses and distinctive entrances to their subdivisions.

One of the big questions is the institutional structure by which developers will be able to provide "soft" infrastructure. Local governments will likely not be able to provide personnel and operations for all community services, even if they are housed in buildings and other pieces of "hard" infrastructure built by the developer. Many speakers predicted that homeowner associations will play a broader, different role — essentially serving as a surrogate municipal government in providing the soft infrastructure.

However, according to one speaker, homeowner associations cannot perform this function if they continue to serve primarily as the local "cop," enforcing homeowner association rules. "Homeowner associations must stop being rulemakers and enforcers," said Wayne Hyatt, an Atlanta lawyer specializing in real estate and condominium law. "Too many rules empower 'condo commandos' who end up harassing neighbors." Instead, Hyatt said, homeowner associations must serve as mediators in homeowner disputes and take on a broader range of duties in governing the community.

The Las Vegas speakers also said today's real estate financing deals have forced developers — even those who build master-planned communities — to operate under a shorter time horizon. Seeking to reduce their own risk after taking a real estate bath over the last five years, banks and other lenders are giving shorter financing guarantees. Only a few of the 200-plus members of the Las Vegas audience said they had obtained development financing of 10 years or more.

This trend means developers must figure out how to make each project successful (planning, building, and selling) in a three-to-five-year time frame — the typical cycle of a good real estate development market. But lengthy local government approval processes, especially in California, can make such time frames impossible to meet.

In addition, developers face a more subtle problem when they must match up short-term financing with long-term infrastructure requirements. Developers may have to meet a three-to-five-year financial time frame, but local government exactions — and the demands of the marketplace — require schools, community centers, and other pieces of infrastructure that typically require a 20- to 30-year financial time frame. So local government assistance — especially infrastructure financing techniques such as Mello-Roos bonds — will continue to be important to developers of master-planned communities. ❑

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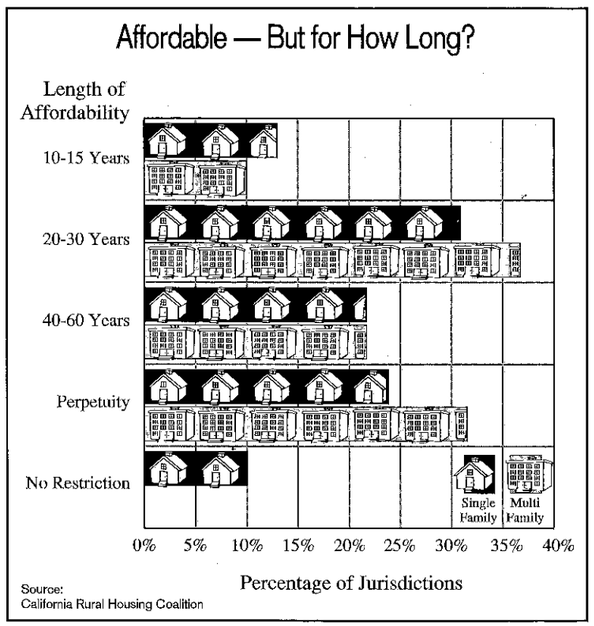
NUMBERS

Stephen Svete

How Inclusive Are Inclusionary Housing Programs?

In the world of housing policy, the presence — or absence — of an inclusionary program is commonly used as a measure of the jurisdiction's commitment to addressing affordable housing. But a recent report on inclusionary programs in the state suggests that such conclusions about a jurisdiction's housing policy may be simplistic. Inclusionary programs, the report says, are applied inconsistently, contain loopholes that undermine larger goals, and just plain miss the most housing-needy segments of the population.

An inclusionary program is broadly defined as a mandatory requirement — or a voluntary goal — to reserve a specified percentage of housing units in new residential developments for lower-income households. It's worth noting that there's considerable philosophical disagreement about inclusionary programs; planners and social activists generally favor them, while free-marketeers often believe they drive up the cost of housing for everybody. But the California Coalition for Rural Housing's new report, entitled "Creating Affordable Communities: Inclusionary Housing Programs in California," suggests that there's a lot more to the question of inclusionary housing than just ideology.



Perhaps it's not surprising that programs are spread thinly around the state; they're in place in only 12% of cities and 17% of counties. And there is no clear geographic pattern to the programs, though four of the 10 counties with programs are coastal and 64% of the cities with inclusionary housing are either in the Bay Area or Southern California metropolitan areas.

But there are a number of indicators that suggest the inclusionary programs aren't really working. These include the following:

- 39% of the jurisdictions have no monitoring programs in place to track production and affordability of inclusionary units after initial approval.
- 34% are voluntary, not mandatory.
- Only 17% of the programs require that inclusionary single-family units remain affordable permanently.
- 61% of the programs allow fees to be paid in lieu of actual construction of affordable units. Though such provisions allow more flexibility for developers and local governments, one wonders if the program isn't simply being used as a payoff tool.

In any event, inclusionary affordable programs have taken a hit during the real estate recession. If a policy relies on the market to produce affordable housing, then the volume produced is subject to the same ups-and-downs as the private real estate market. With housing development down for four years running, affordable units linked to inclusionary programs aren't going anywhere. And this phenomenon is more or less permanent in jurisdictions that are fully built out.

The report raises some serious questions about the dilemma of tackling housing as a social policy within the context of a private market commodity. For example, most inclusionary programs seem to be aimed at home ownership — entirely precluding the lowest-income segments of the population. Shoshana Zatz, the report's principal author, concedes that the question of why subsidies for "moderate-income" households (income of 80-120% of the local median) are needed at all is a valid one. "There is certainly a debate whether limited housing resources should be used to achieve home ownership for middle-income groups rather than focusing on the very-low groups." The question becomes more urgent, perhaps, when falling home prices and low interest rates make private-market units much more affordable.

The report does credit 23,295 affordable units to inclusionary programs since the 1970s. But how much difference have these programs really made? Only 20% of the surveyed jurisdictions declared their programs successful. Many blamed the slowdown in the development business, underscoring the fundamental flaw in market-based provision of affordable housing.

In any case, the Rural Housing Project makes a series of obvious recommendations: improve monitoring and tracking of inclusionary units, make the programs mandatory, create an income level below "very low" (which currently covers up to 50% of median income), and target truly poor consumers more consistently. All well and good. But what of the other 87% of California jurisdictions — the ones that don't have inclusionary programs? The political will for them to adopt new programs — let alone the idea of getting the other 13% to tighten programs already in existence — may be as hard to find as a Democratic congressman who will stand up to Newt Gingrich. ❑

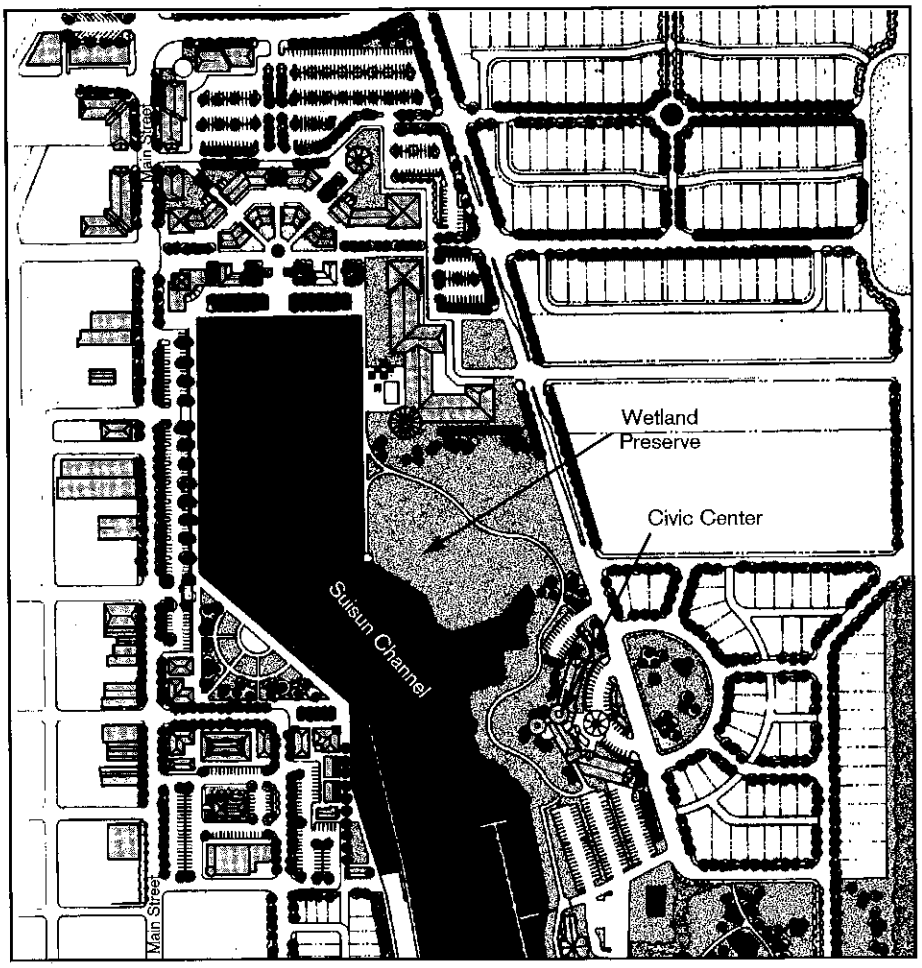
Places

Morris Newman

Making a New Suisun City

Five years ago, Suisun City was a town looking to be reinvented. Today, with the help of an aggressive public policy and an elegant master plan, this city of 24,000 people in Solano County appears to have accomplished a minor miracle in redevelopment, as well as a redefinition of its civic purpose. From the point of view of physical planning, what is most interesting is the useful role played by the New Urbanism (formerly known as Neo-traditionalism) to help a town change from an industrial backwater to a desirable bedroom community by the water.

Located on the northern edge of Grizzly Bay, a waterway that communicates with San Francisco Bay, Suisun City was the place where goods from the Bay Area floated in and were trucked to towns and military bases. Suisun City began going to seed in the 1960s, however, shortly after Caltrans built I-80, which bypassed the city entirely. One newspaper report ranked Suisun City as the least desirable city in the Bay Area.



Source: ROMA Design Group

Suisun City's $70 million redevelopment project involved a number of different goals, including redefining the town's purpose and its economic base, cleaning up the in-town neighborhoods, encouraging new development, and developing a tax base. The political part of the solution was spearheaded by the town's energetic redevelopment director, Camran Jojoomy. The physical planning solution came from ROMA Design Group of San Francisco.

Suisun City is a "plum" project for urban designers. The city has handsome old commercial buildings and houses as a foundation. And the city had ample open land to allow the designers a reasonably free hand in devising solutions. In the downtown area, the goals were to remove the industrial blight, such as oil tanks on Main Street and a sewage plant only a stone's throw from City Hall. The transformation on Main Street was particularly remarkable: the city removed the eastern half the street, which Jojoomy described as mostly refinery-related structures and other industrial blight. Main Street got a clear view of the water of the Suisun Channel, a 300-foot-wide body of water that is downtown's chief landscape amenity. With this simple but powerful gesture, Main Street in Suisun City became that coveted rarity: an important thoroughfare with buildings on one side and open space on the other, like upper Fifth Avenue in Manhattan, where it borders Central Park, or Michigan Avenue in Chicago.

Across the water is Suisun City's Civic Center, where some offending industrial buildings nearby, including the sewage plant, have been demolished, so that City Hall now stands with a backdrop of wetlands. The waterway, which cuts through the center of the city, is both the blessing and the curse of the plan. Downtown's commercial district and its civic center are divided by the wide channel, which has no bridges in the immediate area. A combined center might have been better, but the designers had no choice; City Hall and Main Street already existed on opposite sides of the channel, so those conditions had to remain. Immediately north, the city capitalized on the potential beauty of the channel by dredging and extending the waterway, and building a 150-slip marina at the channel's northern edge.

Housing is another major concern of the master plan. In the depressed Crescent district, the city bought up a group of fourplexes that had been crime magnets, and bulldozed them. And in the city's undeveloped residential areas, Jojoomy and city officials helped frame a stringent set of design guidelines that require homebuilders to provide frame houses that would be quasi-Victorian in style, with wooden siding, gambrel roofs, and even some gingerbread. I am uneasy with design guidelines in general, and with guidelines that ask for ersatz historical styles in particular, although I also acknowledge that the houses built to date are good-looking.

In general, ROMA's plan is notable for its ingenuity in integrating the old city grid into the new urban fabric, without being intimidated by history, using some bold gestures where needed. It's a little unsettling to see John Steinbeck replaced by Andres Duany, and an industrial small town becoming a bedroom for Edge City. But that's my quarrel with history, not ROMA or Suisun City. Otherwise, Suisun City seems destined to become a reference point for cities seeking to reinvent themselves in post-industrial California. ❑