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Inside

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Legislature Passes Bill That Links Water, Planning

Coalition Urges Wilson To Sign Legislation

The Legislature has passed a bill that would integrate land-use planning and water-supply planning for the first time, and a wide-ranging group of lobbyists — including farmers, water agencies, and homebuilders — are urging Gov. Pete Wilson to sign it.

The bill, SB 901 (Costa), would require cities and counties to consult with water agencies on water supply issues before approving large projects, and would also require local governments to make findings about water supply before adopting statements of overriding considerations on such projects under the California Environmental Quality Act.

The bill is a compromise that emerged after months of legislative maneuvering this year. Homebuilders signed on to the bill after realizing that it was likely to pass the Legislature over their opposition. Farm and water interests made several key changes — including limiting its provisions to projects of 500 housing units or more — when Wilson made it clear he would veto the bill if it did not have the homebuilders' support.

After the bill passed, 12 organizations — including several water purveyors, home builders and commercial developers, and the California State Association of Counties — signed a letter urging Wilson to enact the bill. The letter says the state must get past the water-planning issue in order to focus on water development. A companion Costa bill, SB 900, seeks consensus on new water development projects.

The Costa bill was the most significant legislative accomplishment in a year that, not surprisingly, proved otherwise unproductive. Distracted by partisan political bickering in the Assembly, the Legislature sought to address a wide range of significant planning and development issues, including development fees, the California Endangered Species Act, further CEQA reform, *Continued on page 9*

Orange County Restructuring May Affect Land Use

League, Bergeson Propose Reduced Role for County

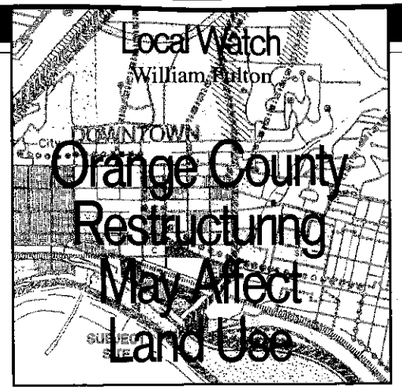
By William Fulton

The Orange County government could lose significant land-use planning authority under at least two proposals for restructuring local government in the wake of last year's bankruptcy. The proposed changes, which would shift more planning power to the county's cities, could reduce the political power of the county's big land developers, such as The Irvine Co., which have traditionally preferred to do business with the county.

Many political experts in Orange County say the land-use planning proposals — from Supervisor Marian Bergeson and the League of California Cities, Orange County Division — are low-priority items that must wait until the county undertakes more basic reform. Others say it is unlikely that the cities have enough clout to wrest control over land use away from the county. Yet last year's bankruptcy has clearly created a political climate conducive to a sweeping re-arrangement of governmental responsibilities.

"I'm not going to hold my breath," said Costa Mesa City Councilwoman Sandra Genis, a professional planner who also serves on the county's Charter Commission. "The bankruptcy created enough movement so inertia may be reduced. But it's creeping in again, and it depends on creating enough political pressure on the Board of Supervisors."

In the wake of last year's bankruptcy, at least 13 different governmental restructuring proposals have come forward. Most propose that the Board of Supervisors be enlarged, that the county treasurer position be converted from an elected to an appointed post, and that the county expand its privatization campaign. In addition, some proposals also call for a wide-ranging consolidation of the county's special districts, *Continued on page 2*



Continued from page 1

including water districts, the Orange County Sanitation District, and the Orange County Transportation Agency.

The Charter Commission is expected to craft a ballot proposal — perhaps for the March ballot — that would convert the county from a general-law county to a charter county, a move that would expand the county's ability to privatize. Beyond basic reforms, however, many commissioners say they are reluctant to move into other wide-ranging areas, such as planning. "I don't think it's a charter issue," said John Erskine, a lawyer and former executive director of the Building Industry Association in Orange County who sits on the commission. "Much of the Charter Commission thinks there's a two-step process. First you create the charter form of government, and then you begin consolidating."

Orange County cities have long been dissatisfied with the land-use policies of the county government. Claiming that the supervisors are too cozy with the large landowners, they say the county approves large development in unincorporated territory to lower standards, then expects the cities to annex and serve the new neighborhoods. In addition, large landowners have occasionally been able to turn to the county to process development applications in unincorporated areas adjacent to cities. The Koll Corp., for example, processed the Bolsa Chica development through the county after failing to win approval for the project from the City of Huntington Beach.

"The prevailing view among the cities is that they do not like the land-use planning and development standards of the county," said Janet Huston, executive director of the Orange County Division of the League of Cities.

The League restructuring proposal calls for the creation of a strong council of governments (COG) that would take control of regional activities, such as flood control, transit, transportation planning, housing, and regional parks. The county government would be reduced to providing state and federally mandated services such as health care and welfare. The cities, meanwhile, would assume greater control over specific land-use proposals in their spheres of influence.

The League's proposal is similar to the restructuring plan put forth last spring by Bergeson, who joined the Orange County Board of Supervisors last year after a lengthy career as chair of the Senate Local Government Committee in Sacramento. Stating that the Board of Supervisors' "days as land barons and full-time governors of the unincorporated area are long gone," Bergeson essentially called for the abolition of conventional county government. In its place, county services would be provided by a large and powerful "Orange Regional Services Organization," which would also assume control of special districts and OCTA. This organization would be governed by a part-time nine member board that would appoint a powerful chief executive.

Most significantly for planning, Bergeson called for incorporation and annexation of remaining county territory — essentially handing land-use planning power to the individual cities.

Both the League proposal and the Bergeson plan would break up the traditional power relationship between the Board of Supervisors and the large land developers which has shaped the growth of Orange County for the past 50 years. Not surprisingly, these proposals are receiving a chilly reception from the development community and a majority of the Board of Supervisors.

"The large landowners prefer the county," said Mike Ruane, director of the county's Environmental Management Agency, the superagency which oversees planning and public works. "They're very concerned about the individual cities."

However, Ruane did say the county will likely pursue the annexation or incorporation of 60 or so county "islands" as a means of streamlining local government in the county. Several of these islands are, in fact, identifiable communities adjacent to existing cities. Such annexations would, of course, mean that the existing cities would have to take responsibility for urban areas they have traditionally chosen not to accept. And some county officials fear the loss of property tax from these areas — a fear that has been stepped up by the cash-flow problems created by the bankruptcy.

Furthermore, Ruane said, the county will also pursue a more orderly transition for annexation or incorporation of new cities as a part of the governmental reform. Since 1988, five new cities have been carved out of new communities in south Orange County developed by big landowners with the county's approval. Many of these cities have incorporated as a response to the county's land-use policies. Ruane said the county would probably step up use of community services districts and municipal advisory committees as a transitional step to cityhood. "I believe very strongly in that," Ruane said.

The bankruptcy/restructuring situation may also have an impact on the county's attempts to create a "metropolitan planning organization" separate from the Southern California Association of Governments. Under the federal Intermodal Surface Transportation Efficiency Act (ISTEA), MPOs play an important role in distributing federal money for transportation planning and for transportation projects.

Many Orange County officials — especially at the Orange County Transportation Authority — have long chafed under SCAG's control, which they say reduces the flow of federal dollars to Orange County. "Why should we have to send our planning projects to them for approval," asked James Ortner, OCTA's director of intergovernmental relations. OCTA asserts that, as a separate MPO, it would receive $1.4 million in federal transportation planning dollars that now flows to SCAG — much of which has been used to finance development of SCAG's Regional Comprehensive Plan.

However, there does not appear to be a consensus among the Orange County cities, which control OCTA with the county, that a separate MPO would be preferable. Huston of the League of Cities said many city representatives believe creation of an MPO would not eliminate competition with the rest of the region for transportation dollars, but simply move that competition from Los Angeles to Washington. ❑

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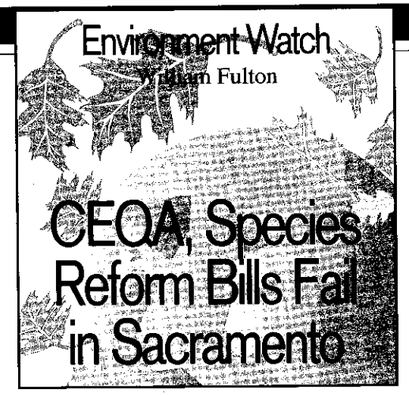
2 County Planning Directors Depart

Two of California's 57 planning directors have recently departed their jobs.

Longtime Sonoma County Planning Director Ken Milam left recently to go into private consulting. Milam had held for almost a decade.

Meanwhile, the El Dorado County Board of Supervisors have replaced Planning Director Tom Parilo with Conrad Montgomery, the community development director of Placerville. El Dorado County, which has been involved in a lengthy general plan process, also voted against reappointing the county counsel. ❑



Homebuilders and property rights advocates have failed for the second year in a row to make substantial revisions to California's Endangered Species Act and the California Environmental Quality Act.

Both state and federal Endangered Species Acts remain explosive political issues. (See item below regarding the new Republican bill in Congress.) But all efforts to change the state law petered out in Sacramento before the session ended in mid-September.

The last surviving bill, at the very end of the session, was SB 1120 (Costa), would have de-criminalized the "inadvertent" or "accidental" take of species "that do not involve a significant conversion of existing wildlife habitat into another land use."

The bill had the strong support of the farmers and some environmentalists but was used as leverage by conservative Republicans in the Assembly, who wanted to include stronger provisions. According to Darryl Young, consultant to the Senate Natural Resources Committee, it was bottled up in the Assembly by Assemblyman Keith Olberg, R-Victorville, the ranking Republican on the Assembly Natural Resources Committee. Young said Olberg sought to amend the bill to include a requirement that landowners be compensated when endangered species diminish the value of their property by 20% or more — a key provision of species reform as proposed by Olberg and other Republicans. When Young's boss, Tom Hayden, and other supporters of the bill could not support the amendment, the bill died.

The fate of the Costa bill is an indication of where the endangered species debate stands in the Legislature these days. A strong contingent of Legislators — led by Olberg and Assemblyman Cruz Bustamante, D-Fresno — are seeking change in the bill on behalf of the homebuilders, farmers, and other groups affected by species listing. However, environmentalists still control enough key positions — including the Natural Resources chairmanships in both Houses — to make consensus difficult to achieve.

Olberg and Bustamante got individual bills out of the Assembly, but Hayden bottled both of them up in his committee. These bills were:

• AB 137 (Olberg), which would have taken listing power out of the hands of the state Fish & Game Commission and given it to the Legislature. The bill also would have required that no environmental impact report need be prepared for the removal of a species from the list and also contained the 20% compensation provisions that Olberg later held out for with the Costa bill.

• AB 350 (Bustamante), which would have left listing authority with the Fish & Game Commission but would have established priorities in the statute for the allocation of state resources for the recovery of the species.

A third bill containing Gov. Pete Wilson's proposed revisions died much earlier in the session in Hayden's committee. SB 131 (Maddy) would have further encouraged habitat conservation planning efforts, which Wilson's conservation aides have pushed hard, but also would have streamlined other aspects of the law in ways that environmentalists found unacceptable.

Despite failure this year, one thing is for sure: As conservative Republicans and property-rights advocates gain more influence in the Legislature, they'll be back next year with similar proposals.

Meanwhile, the Legislature made minor changes to CEQA but stopped far short of the substantial streamlining which the Wilson Administration and the homebuilders said they wanted at the beginning of the year.

The leading CEQA battleground this year was SB 1180 by Sen. Ray Haynes, R-Temecula, which sought to incorporate a variety of CEQA reforms, including many supported by the Wilson Administration. For a time, SB 1180 sought to eliminate the "fair argument" standard for preparation of an environmental impact report — a significant move opposed by environmentalists. However, as finally passed, the bill deals only with environmental review for military base reuse plans.

Also passed was a cleanup bill, AB 1680, by Assemblywoman Doris Allen, R-Cypress, who served as speaker for much of the summer. Among other things, the Allen bill re-set the deadline for filing legal challenges to CEQA actions at 30 days. The time period had been extended to 60 days last year by the accidentally enacted AB 314, one of nine bills that went into effect after Gov. Wilson's veto message failed to reach the Legislature before the statutory deadline.

Endangered Species Bill Introduced In House

The long-awaited attack on the federal Endangered Species Act in the U.S. House of Representatives has begun.

House Natural Resources Chairman Dan Young, R-Alaska, introduced H.R. 2275 after Congress returned from its summer recess in September. Crafted after a series of hearings nationwide by a task force chaired by Rep. Richard Pombo, R-Tracy, the bill attracted more than 75 co-sponsors, including many California Republicans. Two California Democrats also co-sponsored the bill: Rep. Cal Dooley, D-Hanford, and Rep. Gary Condit, D-Ceres.

The bill includes a wide range of proposed changes to the law, including:

• Eliminating the law's prohibition on modification of an endangered or threatened species' habitat.
• Compensating private property owners affected by the law.
• Encouraging more delegation of power to the states.
• Encouraging conservation planning processes.
• Streamlining consultation processes with the U.S. Fish & Wildlife Service.
• Requiring peer review for biological opinions.
• Narrowing the ability of environmental groups to sue under the law, while broadening the ability of individual property owners who have been harmed to sue.
• Eliminating the so-called "God Committee," which can be convened by the Interior Secretary in controversial cases and can take economic issues into account.
• Requiring private landowner consent prior to declaring private property as habitat for an endangered species.

Pombo and Young stated that they were simply attempting to inject "common sense" into the species listing process, but environmentalists said the bill was just an "industry wish list." ❑

Schools Watch
Morris Newman

Urban, Suburban Districts Split Over Construction Funding

This year's legislative session laid bare the growing tension between urban and suburban school districts — or, perhaps more accurately, school districts that can rely on local resources and those that must rely on the state for construction funds.

Increasingly, legislative leaders — such as school facilities guru Leroy Greene, chairman of the Senate Education Committee — are pressuring school districts to come up with more school construction money locally. This trend has led to a growing split between the local haves and the local have-nots. The haves include growing suburban districts which can rely on developer fees or Mello-Roos taxes, as well as some urban districts that can muster a two-thirds vote for a bond issue. The have-nots are the mostly urban districts with big enrollments and little construction activity that have a hard time raising local funds.

A good example of the split occurred this year in the debate over SB 763, Greene's school facilities bill. SB 763 didn't go anywhere, but it contained provisions that seemed to favor the growing suburban districts.

One of SB 763's many reforms would have been to require local school districts to pay 50% of the cost of school construction projects or devote 30% of its bonding capacity to school construction in order to qualify for state funds. The overall strategy of the bill is to encourage more local funding for school construction, since the state bond fund is almost tapped out. No state school bonds have passed since November of 1992 and this year the Legislature failed to pass Greene's proposed $3 billion bond measure, which would have appeared on the March 1996 ballot.

The 30% requirement was clearly Greene's attempt to light a fire under local districts that have been reluctant to hold bond elections because they believe the two-thirds vote is unattainable.

The bill was supported by many school districts, including Coalition for Adequate School Housing (CASH), an organization dominated by fast-growing school districts. But it was criticized by urban districts — and by the California Building Industry Association — as placing an unfair burden on urban districts whose enrollments are bulging because of overcrowding. "In 1986, we built 314,000 units of housing, and about 200,000 kids came into system," says Dwight Hansen, a lobbyist for the California Building Industry Association.. "This year, we will build 88,500 units, and 140,000 new kids will go to school. These kids are coming, whether we build houses or not."

Urban districts criticized the Greene bill, saying it penalized them for accommodating poorer families that do not buy new houses. "There's no question that (the bill) will place urban districts at a disadvantage," said Mike Vail, senior facilities director for Santa Ana Unified School District in Orange County. "The suburban districts are very powerful, because they can meet the provisions of the bill [through developer fees and Mello-Roos districts] without even having a registered voter bond election." he said. Santa Ana, on the other hand, has a large immigrant population, expanding school enrollment, and a small base of middle-class voters generally opposed to school bonds.

He said Santa Ana Unified will collect $125,000 in fees this year, and has a construction goal of $100 million, because of limited home building, and "we have absolutely no land-owner approved Mello-Roos districts," said Vail. "Yet in this competition for state funds, Santa Ana Unified is supposed to compete with other districts in our own county which have already established Mello Roos districts that can generate $100 million." Vail also expressed concern that the bill provides no "safety net" for districts that can't meet the local requirement. "A number of school districts are going to be left high and dry," he said.

CASH lobbyist Jim Murdoch responds to the criticism by saying that urban school districts that aren't growing do, in fact, get special breaks even under the Greene bill. "If you can't raise money and you are over-bonded, you go to the front of the line." He also argued that SB 763 provided flexibility to school districts that would be unable to drum up enough support for a two-thirds vote to approve general obligation bonds.

Ultimately, the school-finance issue is not simply a fight between suburban and big-city districts, but a pecking match among all school districts for a very small amount of resources, according to Rob Corley, a school-facilities consultant based in Ventura. The state's school finance fund is "fundamentally a bankrupt system," he said. SB 763 promises only "to extend the payments a little bit," he added. "If it doesn't crash and burn this year, it will crash and burn next year." Currently, the state fund is down to $25 million, while more than $5 billion of school projects have filed ready-to-bid applications with the state, and another $5 billion is believed to be in the pipeline. "It's like distributing food in Somalia. You have a few crumbs, and a thousand people are standing in line," Corley said.

Instead of fees, the cure for California's schools lay in shoe leather, according to Corley. School districts must politic their jurisdictions for two-thirds electorate approval of general obligation bonds. Corley observed that many other states have similar two-thirds voter requirements for school bond measures and manage to pass them through vigorous campaigns. Another part of the cure, he added, was to encourage the consolidation of California's many school districts into a smaller number, to achieve a better balance between rich and poor districts.

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CP&DR
LEGAL DIGEST

Initiative OK Under Coastal Act

San Mateo Measure Upheld By Appellate Court

In an important follow-up to the California Supreme Court's *DeVita* ruling, the First District Court of Appeal has ruled that an initiative amending a Local Coastal Plan is not pre-empted by and does not conflict with the state Coastal Act.

The ruling is the latest development in an eight-year-old legal challenge to Measure A in San Mateo County, a coastal protection initiative that passed in November of 1986. The plaintiffs in the case, led by the San Mateo County Coastal Landowners' Association, made a wide range of arguments but focused mostly on the notion that the Coastal Act restricts local voters' ability to amend their coastal plans by initiative.

Writing for a unanimous three-judge panel, Presiding Justice J. Anthony Kline concluded that the *DeVita* case and its predecessor, *Yost v. Thomas*, clearly permit LCP amendment by initiative and, furthermore, that the specific provisions of Measure A do not conflict with the Coastal Act. Quoting *Yost*, 36 Cal.3d 561 (1984), a landmark Coastal Act case, Kline said that the Coastal Act "leaves wide discretion to a local government, not only to determine the contents of its land use plans, but to choose how to implement these plans."

The Coastal Act places land-use planning in California's coastal zone under the control of the Coastal Commission, which must approve the Local Coastal Plans drawn up by cities and counties. In the *Yost* case, which came from Santa Barbara, the California Supreme Court ruled that a local land-use measure is subject to local referendum even when the measure affects land in the coastal zone. However, *Yost* left open the question of whether a general plan can be amended by initiative, whether in the coastal zone or not.

In *DeVita v. County of Napa*, 9 Cal.4th 763 (1995), the state Supreme Court ruled — in a case from outside the coastal zone — that general plans could, in fact, be amended by initiative. That left the question of whether a general plan inside the coastal zone could be amended by initiative — a significant question considering the fact that most land-use questions in the coastal zone are appealable to the state Coastal Commission.

"The land use portion of a county's local coastal program is part of its general plan," Kline wrote. "By definition, the local coastal program amendments at issue here fall squarely within the holding of *DeVita*. Further, *DeVita*'s extensive reliance upon *Yost*, without limiting language, demonstrates that LCP amendments are analogous to general plan amendments as local legislative acts subject to initiative and that local governments have broad discretion to determine the content of their land use plans....

"Taken together," Kline concluded, "*Yost* and *DeVita* leave no doubt that amendments to the LCP, such as Measure A, may be adopted by initiative and are not preempted by the Coastal Act."

The landowners also argued that Measure A conflicted with the Coastal Act because it could only be amended, in most instances, with further voter approval. By contrast, the Coastal Act requires that LCPs be amended with "full consultation of the commission and with full public participation," and charges localities and the commission with providing the public with "maximum opportunities to participate." In particular, the landowners argued that Measure A choked off the normal consultation between a local agency and the Coastal Commission staff regarding amendments.

"Although informal consultations between the local agency's planning staff and the Commission are encouraged," Kline wrote, "it is the local entity that is charged with preparation of an LCP amendment....[T]he commission's role in reviewing a local government's LCP is quasi-judicial — it determines whether the LCP meets the minimum standards of the act." Kline concluded that the preparation of Measure A involved much of the same "normal" public participation and consultation as any other LCP amendment, including public hearings and citizen meetings.

The landowners also made several other arguments, all of which were rejected by the court. The landowners argued, for example, that Measure A conflicted with state housing law because the voter amendment requirement prevents updating of the county's housing element as required by state law. "Measure A did not amend any provision of County's housing element," Kline wrote. "It simply referred to a single existing housing policy of the existing LCP." Indeed, Kline added, "on its face that policy promotes affordable housing by granting a density bonus for such units in rural areas of the coastal zone."

The court also rejected the landowners' claim that Measure A's mitigation policies regarding open space and agricultural land are unconstitutional conditions under *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994). Noting that these policies "are part of a legislatively adopted zoning scheme," Kline wrote: "*Dolan* makes it clear that it does not reach the type of legislative determination classifying entire areas of a county, such as we are here concerned with."

Kline also rejected several other arguments, including:

• The claim that the agricultural and open space exactions are conservation easements as contemplated under state law and therefore may not be used as a condition of granting subdivision approval under Civil Code §815.3(b). Kline found that the county had authority under other areas of law.

• The claim that the trial court erred in granting of summary judgment for the county on charges that the Coastal Commission failed to comply with the California Environmental Quality Act in certifying Measure A. The Resources Agency has ruled that commission review of LCPs is the functional equivalent of CEQA review. The landowners' argument dealt with a technical issue of judicial notice, which Kline rejected.

• The claim that Measure A violated the single-subject rule for initiatives because some provisions dealt with offshore drilling and onshore refineries. "The policies addressing regulation of off-shore drilling and on-shore oil facilities address land use no less than any of the other policies of Measure A," Kline wrote.

• The claim that Measure A's adoption of a pre-existing density credits mechanism, based on water consumption patterns, was arbitrary. The appellate court said the claim was a back-door challenge to the Coastal Commission's certification of Measure A, seeking to review certification through a traditional mandamus proceeding rather than an administrative mandamus proceeding. ❑

■ The Case:
San Mateo County Coastal Landowners Association v. County of San Mateo, No. A059553, 95 Daily Journal D.A.R. 12558 (September 20, 1995).

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SLAPP

Two Rulings Broaden Power Of Anti-SLAPP Legislation

Two new appellate court rulings have strengthened the scope and power of state's anti-SLAPP law.

So-called "Strategic Lawsuits Against Public Participation," or SLAPP suits, attempt to muzzle opponents of development projects by launching retaliatory lawsuits against them. (*CP&DR*, November 1990.) The anti-SLAPP law, contained in Code of Civil Procedure §425.16, was enacted in 1992 after being vetoed by Gov. Pete Wilson the year before. The law permits the defendant in an alleged SLAPP suit to file a motion to strike the cause of action at the beginning of of the case. The law permits the motion in defense of any person who has exercise rights of free speech or petition "in connection with a public issue."

In both recent cases — *Ludwig v. Superior Court* and *Lafayette Morehouse v. Chronicle Publishing Co.* — the Court of Appeal affirmed the ability of defendants to file motions to strike. The cases, however, were very different.

The *Ludwig* case arose out of competition between Barstow and the Victor Valley over the proposed development of an outlet mall. Developer Glen Ludwig hoped to build such a mall in either Adelanto or Hesperia in the Victor Valley. Meanwhile, Barstow was also pursuing a deal for a discount mall with a different developer, Tanger Properties.

Allegedly at Ludwig's instigation, various individuals in Barstow criticized the mall deal at public hearings, and two of these individuals then sued Barstow over the environmental review process. Barstow settled both cases — agreeing in one case to recirculate the negative declaration, and agreeing in the other case to update the master environmental assessment and create an "environmental advocacy fund."

Subsequently, Barstow sued Ludwig, alleging that the developer had interfered with contractual relations and with prospective economic advantage, and also charging unfair competition. Ludwig then filed a motion to strike the causes of action under the anti-SLAPP law. Riverside County Superior Court Judge Richard Van Frank denied the motion "apparently," the appellate court observed, "because the litigation promised good sport." (Judge Van Frank had observed that he hated to deny two "so righteous" groups of people the opportunity to a trial because juries "so enjoy determining which side that's so righteous is really correct.")

On appeal, the Fourth District reversed. Initially, the court concluded that Ludwig's use of the anti-SLAPP law was valid on its face because the Barstow mall was clearly a matter of public interest. The court also rejected several specific arguments that Barstow made.

Most significantly, the court rejected Barstow's argument that Ludwig is not covered by the anti-SLAPP law because his actions were "non-communicative" in nature — an apparent reference to the fact that he did not personally speak out against the mall project. "We are at a loss to imagine how Ludwig accomplished the recruiting and encouragement [of the other opponents] without communication," the court wrote.

Once the court found that Ludwig fell under the anti-SLAPP law, however, he was not automatically in the clear. The court also had to determine whether there was a "probability" that the claim against him would be successful. Barstow argued, of course, that the probability of success against Ludwig was high. To reach the opposite conclusion, the appellate court used the fact that Barstow settled the two cases brought by Ludwig's confederates.

Among other things, Barstow argued that the two lawsuits were baseless and in fact formed the basis of a case of malicious prosecution. Barstow claimed the cases were settled in order to minimize their usefulness as a nuisance against the city. But the court did not buy this argument. Barstow could not settle the cases and also claim they were baseless. "There is no legal way for a defendant who elects to settle a suit rather than going to trial to demonstrate that the dismissal resulting from the settlement constituted a favorable termination on the merits."

The second case involved a libel suit filed against the San Francisco Chronicle by More University, the controversial Contra Costa County institution that advocates alternative lifestyles. In 1992, people living on the More University property permitted many homeless people to pitch tents on the property, creating complaints from neighbors. Contra Costa County subsequently concluded that these activities violated the zoning ordinance and permits were needed. When More University refused to obtain such permits, the county sued. Then More sued the county in federal court, claiming constitutional violations. (*CP&DR Legal Digest*, March 1993.)

Meanwhile, the Chronicle published an extensive series on the More University situation, alleging, among other things, that the university's leaders had been involved in LSD prosecution and that the institution advocated free love. More filed a libel suit against the Chronicle, and the Chronicle responded by filing a motion to strike under the anti-SLAPP law.

The Court of Appeal ruled in favor of the Chronicle. In a significant ruling for the news media, the court ruled that the anti-SLAPP law may be used by the news organizations as protection against libel suits. Among other things, More contended that the media should not be permitted to use the anti-SLAPP law because the news media's freedom to public material is already covered by the First Amendment — a right that is tempered by libel law. The court ruled otherwise, saying that news reporting must be considered free speech under the law and noting that the news media lobbied heavily for the law's passage.

The appellate court also rejected several narrow arguments challenging the constitutionality of the anti-SLAPP law.

More argued that the law violated substantive due process because it was not rationally related to a legitimate legislative goal. But the court found that the law was aimed at the legitimate goal of deciding SLAPP suits expeditiously, given the "disturbing increase" in their number.

More also argued that the statute deprives More of a jury trial by permitting the judge to strike the causes of action at the beginning of the case. The court rejected this argument too, saying that granting the motion to strike requires "a prima facie case."

More also argued that the law denies due process by arbitrarily curtailing discovery. The court ruled that the trial court "must liberally exercise its discretion by authorizing reasonable and specified discovery timely petitioned for by a plaintiff in a case such as this," and that if this provision is properly construed, no constitutional violation occurs.

After going through all those arguments, the appellate court then upheld the trial court's decision to grant the motion to strike, claiming that More could not prove a "probability" that it would prove its libel charges against the Chronicle. For example, More claimed it was libeled when the Chronicle characterized it as a "sensuality school." Yet, the appellate court noted, More offers an advanced degree in "sensuality." ❑

■ The Case:
Ludwig v. Superior Court (City of Barstow), No. E015539, 95 Daily Journal D.A.R. 10117 (July 31, 1995).

■ The Lawyers:
For Ludwig: Brian J. Simpson, Cummings & Kemp, (909) 889-3565.
For City of Barstow: Dorn G. Bishop, Latham & Watkins, (619) 236-1234.

■ The Case:
Lafayette Morehouse Inc. v. Chronicle Publishing Co., 95 Daily Journal D.A.R. 10818 (August 14, 1995)

■ The Lawyers:
For Lafayette Morehouse Inc.: Richard W. Hyland, (415) 283-7163.
For San Francisco Chronicle: James M. Wagstaff, Cooper White & Cooper, (415) 433-1900.

CEQA

EIR Should Have Been Done For Santa Clara CUP

The City of Santa Clara should have prepared an environmental impact report before approving a church, school, and day-care facility in an industrial area containing several businesses that use and store toxic materials, the Sixth District Court of Appeal has ruled.

The Santa Clara City Council approved a conditional use permit for the Muslim Community Association in late 1993 — an action that overturned the Planning Commission, which had denied the entire project. The staff had recommended approval of the church but not the other facilities. The council's action adopted the staff's mitigation measures, but these measures only applied to the church and not the other facilities.

Thus, the court ruled that despite the mitigated negative declaration, substantial evidence remained on the record supporting a fair argument that the Muslim project might have significant environmental impacts — the legal threshold for preparation of an EIR.

"Clearly, none of [the] conditions directly, specifically, and adequately addressed the serious environmental concerns of the fire department, such as the exposure of the building occupants to hazardous materials, the impairment of the city's ability to deliver emergency service, or the significant additional burdens that would be imposed on neighboring industrial facilities," wrote Justice Eugene M. Premo for a three-judge panel of the Sixth District.

The lawsuit was brought by LSI Logic Corporation, a neighboring business potentially affected by the decision, and other businesses in the area that handle hazardous waste.

The Muslim Community Center first asked for a CUP on the church, school, and day-care center in 1993. While the proposal was still pending, a hazardous materials administrator for the fire department noted that the hazardous materials are frequently handled and used in the area. Under state law, businesses within 1,000 feet of a proposed school must prepare a "risk management and prevention program," which can cost tens of thousands of dollars.

In denying the entire project — including the church — the Planning Commission noted that approval of the CUP for the school might require several businesses in the vicinity to prepare such plans. The commission found that the project would have an adverse environmental impact and advised the Muslims to find a different location.

Based on this evidence and testimony of the Fire Department at the Planning Commission hearing, the court found that substantial evidence exists in the record to support a fair argument of significant environmental impact.

On appeal, the City Council overturned the Planning Commission's ruling on a 4-3 vote, approving not just the church but the school and the day-care facility as well. However, the mitigation measures contained in the mitigated negative declaration — which had been prepared by the Planning Department staff — applied only to approval of the church, not the school and day-care facility. The court thus found that the substantial evidence was not diminished by the passage of the mitigated negative declaration.

The court declined to reach the question of whether the city violated the zoning ordinance in approving the CUP. ❑

■ The Case:
LSI Logic Corp. v. City of Santa Clara, No. H012427, 95 Daily Journal D.A.R. 12669 (September 22, 1995).

■ The Lawyers:
For LSI Logic: John W. Elliott, Reed, Elliott, Creech & Roth, (408) 993-9911.
For City of Santa Clara: Michael R. Downey, City Attorney, (408) 984-3232.
For Muslim Community Association (Real Party In Interest): Stephen C. Gerrish, Thoits, Love, Hershberger & McLean, (415) 327-4200.

ENDANGERED SPECIES

Pre-Existing Agreement Prevents Fish & Wildlife

The federal Bureau of Land Management does not have the discretion to undertake an endangered species consultation with the U.S. Fish & Wildlife Service under a right-of-way agreement that pre-dates the federal Endangered Species Act, the Ninth U.S. Circuit Court of Appeals has ruled in a split decision.

The ruling emerged from an attempt by Seneca Sawmill Corp. to construct an 800-foot logging road across BLM land in Oregon. Sawmill's right to build such a road traces back to a 1962 agreement between BLM and a predecessor company, Woolley Logging Co.

The environmental assessment determined that the road may affect spotted owl habitat. However, the Interior Department's regional solicitor determined that, under the 1962 agreement, BLM did not have the discretion to influence the design of the road construction and therefore a consultation with the Fish & Wildlife Service under Section 7 of the Endangered Species Act would serve "little purpose."

Subsequently, BLM issued a FONSI, or finding of no significant impact, for the road project. Seneca began constructing the road in the fall of 1991, but prior to completion the Sierra Club sued BLM, seeking a temporary restraining order to halt the project. Seneca intervened in the case and agreed to a preliminary injunction.

In the lawsuit, Sierra Club claimed BLM should have consulted with the Fish & Wildlife Service, and also that BLM prepared an inadequate environmental assessment and should have prepared an environmental impact statement under the National Environmental Policy Act.

U.S. District Court Judge Malcolm F. Marsh issued summary judgment in favor of the BLM on the NEPA claim and in favor of the Sierra Club on the endangered species claim. The judge concluded that BLM should have consulted with the Fish & Wildlife Service to determine whether Seneca was required to obtain a 10(a) ("incidental take") permit to build the road. Judge Marsh enjoined further construction of the road and all sides appealed.

Writing for the split majority, Judge Stephen S. Trott said: "[W]e hold that Congress did not intend for Section 7 to apply to an agreement finalized before passage of the ESA where the federal agency currently lacks the discretion to influence the private activity for the benefit of the protected species."

In reaching this conclusion, Trott rejected the Sierra Club's argument that the Endangered Species Act "implicitly abrogates pre-existing agreements such as the one at issue here." While acknowledging that Congress does have such power, Trott concluded that Congress chose not to exercise it in this case. He relied on the famous "snail darter" case (*TVA v. Hill*, 437 U.S. 153 (1978)), in which the Supreme Court concluded that Congress did not mean for Section 7 to be applied

retroactively but only prospectively.

Trott also ruled against the Sierra Club on the NEPA claim, saying the Endangered Species portion of the ruling "dictates the resolution of the NEPA claim." "If anything," Trott said, "case law is more forceful in excusing nondiscretionary agency action or agency 'action' from the operation of NEPA." He rejected an analogy with the 10th Circuit case *Sierra Club v. Hodel*, 848 F.2d 1068 (1988) because the Endangered Species Act does not confer statutory authority on the BLM to regulate land for the benefit of the species.

Judge Harry Pregerson dissented, saying that the BLM actually retained some discretion to control Seneca's construction project for the benefit of the spotted owl. "The BLM had the right under the contract to review the location of the proposed road and object if it concluded that the planned road was not the most direct and reasonable route," he wrote. "Moreover, under the stipulation, the BLM could halt the project if it believed that Seneca's construction would be likely to violate Section 9 of the ESA or any other environmental law. The authority to review the project pursuant to the contract or stop it until the conditions of the environmental stipulation are met plainly constitutes 'discretion,' albeit limited." ❑

■ The Case:
Sierra Club v. Babbitt, Nos. 93-34582 and 93-35509, 95 Daily Journal D.A.R. 12451 (September 5, 1995).

■ The Lawyers:
For Sierra Club: William H. Sherlock, Ashland Oregon.
For Interior Department: Peter A. Appel, U.S. Department of Justice, Washington, D.C.
For Seneca Sawmill Co.: Mark C. Rutzick, Portland, Oregon.

CC&R'S

Violation of CC&R May Be Recorded With Deed

A Los Angeles homeowners association may record a notice of violation of covenants, conditions, and restrictions (CC&Rs) with the county recorder, even though such actions are sometimes taken because they are cheaper than suing the homeowner in question, the Second District Court of Appeal has ruled. Along the way, however, the court seriously questioned the wisdom of the practice and narrowed its ruling only to the situation at hand.

The case involved Pacific Palisades property owner Stuart Hackel, who remodeled his home in 1991 and apparently violated the bylaws of the California Riviera Homeowners Association by violating a 10-foot setback rule. The homeowners association then recorded a "Notice of Violation of Restrictions" with the county recorder. Hackel then sued, arguing, among other things, that a notice of violation is not a recordable document.

In late 1993, the Second District ruled that a notice of violation is, in fact, a recordable document, but subsequently the California Supreme Court ordered the Second District to re-examine the case of light of *Nahrstedt v. Lakeside Village Condominium Association*, 8 Cal.4th 361 (1994). The Second District concluded that the California Riviera association is not subject to the Davis-Stirling Common Interest Subdivision Act of 1985, which was the subject of the *Nahrstedt* case, but otherwise concluded that *Nahrsted* reinforced the earlier ruling in the Riviera case.

First, the court concluded that a notice of violation is, in fact, a recordable document as a matter of law.

"From a policy point of view, we are troubled by the concept of a homeowners' association having an abstract right to file a notice of violation of CC&R's," the court wrote. Such action "shifts to the homeowner the burden of initiating legal action and carrying the laboring oar in determining the validity and applicability of the CC&Rs," the court wrote. Also, the court said, "without accompanying legal action by the homeowners' association, a notice of violation purports to do nothing more than place a cloud on the homeowner's title in the hopes that the homeowner will comply with the association's demands so that the cloud can be removed without the expense and bother of a lawsuit."

The court concluded that there is "no basis upon which to stretch existing law to include a homeowners' association's notice of violation of CC&R's as a document that may be recorded as a matter of law."

However, in the specific case of the California Riviera association, the court found that the notice of violation provision is part of the agreement that home buyers buy into when they purchase their property. "Regardless of whether one might think it is more fair for a homeowners' association, rather than an individual homeowner, to initiate an action over alleged violations of CC&R's, the notice of violation procedure in this case is part of the agreement that binds a transferee of land within California Riviera's boundaries." ❑

■ The Case:
California Riviera Homeowners Association v. Superior Court, No. BC070392, 95 Daily Journal D.A.R. 11816 (September 1, 1995).

■ The Lawyers:
For California Riviera Homeowners Association: Kevin P. Kane, Kane & O'Brien, (310) 575-1199.
For Stuart Hackel (Real Party In Interest): Ronald M. Katzman, (818) 501-3501.

Legislature Passes Bill to Link Water and Planning

Continued from page 1

and reform of state housing element law.

Except for water, the environmental issues resulted in a stalemate. And while the major housing element bill — also sponsored by influential Democrat Jim Costa of Fresno — did not move forward, less ambitious housing reform bills passed the Legislature and are now sitting on the governor's desk. (See roundup, page 10.) The major development fee bill also stalled in the last week of the session.

The water legislation, SB 901, is a pathbreaking bill that resulted from a two-year effort by water agencies and farmers that local governments examine water issues when making local land-use decisions.

Randele Kanous, lobbyist for the East Bay Municipal Utility District and a major force in getting the bill through, said to his knowledge it is the first such bill passed anywhere in the West. With the support of urban Democrats and agricultural Republicans, Kanous said, "We felt we had the support of the legislature to move over the objections of the opposition." Among the most powerful pieces of evidence in the case for the bill was Kanous's ever-growing list of large "new town" projects under consideration by local authorities around the state, mostly in the Central Valley.

Kanous said the active support of the California Farm Bureau Federation was critical in broadening support for the bill in the Legislature. "Ag views itself as the probable source of water to serve these sprawling developments," Kanous added. "This year, ag went from being an interested party to being a primary sponsor."

Though Wilson threatened a veto all year, the California Building Industry Association and the California Business Properties Association began working on a compromise as early as June. "I thought all along that they could get it out of the Legislature," said Richard Lyon, lobbyist for CBIA. "The combination of Republicans from agricultural districts and Jim Costa's stature with the Democrats was just too much."

The bill now sitting on Wilson's desk reflects a compromise crafted by two political factions with some leverage over the process. As currently written, the bill incorporates water supply issues into the land-use planning process mostly through CEQA and applies to projects only of 500 units or more.

As part of environmental review, the city or county must solicit information about water supply from the local water purveyor. This information must be incorporated into its environmental documents — not simply as comments to an environmental impact report, but as part of the actual document.

If approval of the project involves passage of a statement of overriding consideration, the city or county must make a finding that the new project will not cause a reduction in water supply to existing water users, even during a severe drought.

Thus, the final bill dilutes the water agencies' power somewhat and applies only to large projects. But it still achieves the objective of formally linking water supply issues and land-use planning for the first time.

> *"The big change this year was the involvement of Sen. Jim Costa, an influential Democrat from Fresno, and the agricultural lobby."*

The water-planning bill originally emerged from a bitter dispute between the East Bay Municipal Utility District and the Contra Costa County Board of Supervisors over the proposed 11,000-home development in Dougherty Valley in the eastern part of the county. The county approved the project, most of which was located inside East Bay MUD's service district, but a pro-environment majority on East Bay MUD refused to guarantee service and the county then sued the district. (*CP&DR*, June 1994.) Subsequently, the Building Industry Association backed a successful slate of candidates for the East Bay MUD board, wresting control away from the environmentalists.

Meanwhile, Assembly Water Committee Chairman Dominic Cortese, D-San Jose, carried a bill sponsored by East Bay MUD that would have given water purveyors virtual veto power over local development projects. That bill failed in 1994. This year, Cortese returned with a similar bill. Also throwing in minor bills were the two Assembly members from the East Bay MUD area, Assembly Local Government Chair Richard Rainey, R-Walnut Creek, and the committee's vice chair, Assemblyman Mike Sweeney, D-Hayward.

The big change this year, however, was the involvement of Costa, an influential Democrat from Fresno, and the agricultural lobby. The farmers' concern about water supply issues stepped up this year, in part because of the way the Stanislaus County Board of Supervisors approved the controversial Diablo Grande project.

As approved in 1993, the high-end, 30,000-acre resort project — located in the foothills west of Interstate 5 — did not have a permanent source of water. The project was consistent with Stanislaus County's general goal of locating development in the foothills to keep it off of agricultural land on the valley floor. However, because the western foothills are so dry, the developers obtained a source of water buy purchasing land — and water rights — on the valley floor east of the freeway.

The supervisors voted to permit the first phase to go forward on the condition that the developers find a permanent source of water within five years. But the local farm bureau expressed concern that the project would wreak havoc with the groundwater supply on which Stanislaus County farmers rely. "After five years," said Jan Ennengay of the Stanislaus County Farm Bureau, "they could establish a proscriptive right and suck the basin dry." (*CP&DR*, May 1994.)

The Costa bill emerged as the compromise vehicle because the Cortese bill, AB 1005, proved unacceptable to the builders and to local government. Responding to a criticism of last year's bill, Cortese inserted a provision in AB 1005 specifically stating that it should not be interpreted as giving water agencies veto power over development projects. In their analysis of the bill, however, Rainey's committee staffers stated it still amounted to a water-agency veto, and the bill went down to defeat in his committee. (*CP&DR*, May 1995). ❑

■ Contacts:
Randele Kanouse, East Bay MUD, (916) 443-6948.
Richard Lyon, California Building Industry Association, (916) 443-7933.
Mary Ann Warmerdam, California Farm Bureau Federation, (916) 446-4647.

Other Significant Planning and Development Legislation

Here is a summary of legislative action in other important areas of law relating to planning and development this year. A summary of legislative action on environmental issues is contained in the Environment Watch column on page 3.

Housing Elements

For the second year in a row, key lobbying groups were unable to reach an agreement on how to reform the process by which the state housing element law is implemented by local governments, regional councils of governments, and the state Department of Housing & Community Development.

However, two smaller housing element bills did pass which may form the basis for future reform.

The chief vehicle for housing element reform had been Sen. Jim Costa's SB 1073, which would have permitted local governments to "self-certify" their housing elements, rather than requiring review by HCD. After a contentious battle between local governments and housing advocates, however, Costa decided in June to hold the bill until next year.

Meanwhile, Sen. Tom Campbell's housing element reform bill, SB 936, did pass the Legislature and is awaiting Gov. Pete Wilson's signature. Campbell's bill gives local governments somewhat more flexibility in negotiating their "fair share" housing numbers with COGs and HCD. Among other things, the bill:

- Requires that HCD and COGs must hold hearings on the fair-share numbers and give the proposed numbers to local governments 120 days before the hearing.
- Establishes a process by which local governments may appeal the fair-share numbers to either a mediator or an administrative law judge.
- Permits local governments to count certain types of rehabs and other non-new construction as low/mod housing units.
- Extends the deadline for updating housing elements by one year for each region.
- Permits subregions to combine and reallocate fair-share numbers according to criteria established by HCD and COGs.

The Legislature also passed AB 1715, by Assemblyman Jan Goldsmith, R-Poway. This bill establishes a pilot self-certification program for local governments in the San Diego region, to be administered by the San Diego Association of Governments.

■ Contact:
Howard Yee, Senate Housing and Land Use Committee, (916) 445-8740.

Development Fees

Another initiative by Sen. Campbell fell short when his development fee reform bill, SB 1066, failed passage in the Assembly at the end of the session.

When he was appointed chairman of Senate Housing and Land Use early this year, Campbell stated that development fees, along with housing elements and the homeless, would be his highest priorities. SB 1066 contained a variety of reforms to tighten up the imposition and use of development fees, including a prohibition on the use of development excise taxes and stricter reporting requirements on development fees.

The most controversial section of the bill dealt with school fees. Originally, SB 1066 called for an increase in the state school fee limit from $1.72 to $2.72 per square foot. In exchange, the bill repealed the so-called *Mira* loophole, which permits school districts to collect mitigation higher than the state limit on legislative actions, such as general plan amendments and zone changes.

As amended, the bill dropped the cap on school fees for most projects but imposed a 28-cent-per-square-foot cap for affordable housing projects.

Campbell sought to have the bill reconsidered so that it would not be classified as "failed passage" and therefore would be available in the next legislative session. He also held an interim hearing on development fees in Riverside County in late September.

However, Campbell recently announced his candidacy for the congressional seat being vacated by Rep. Norman Mineta, a Democrat from the San Jose area. He is given a good chance of winning the special election in December or January and therefore may not return as committee chair.

■ Contact:
Howard Yee, Senate Housing and Land Use Committee, (916) 445-8740.

Permit Streamlining Act

A small but significant bill to change timelines and close a loophole in the Permit Streamlining Act got stuck in the Senate Appropriations Committee because of a minor dispute over what the new time frame contained in the law should be.

Under current law, a negative declaration under the California Environmental Quality Act must be completed within 105 days, while a development project must be approved or disapproved within three months after a negative declaration is certified. However, there is currently no time limit for actually certifying the negative declaration.

AB 1930 (Sweeney) would have lengthened the time to prepare a neg dec to 180 days, but would have required that the document be approved in that time. The bill would have reduced the time period for action on a project after the neg dec is approved from three months to 45 days.

In addition, the bill would have eliminated the 45-day deadline for negotiating a contract for neg decs (but not environmental impact reports) and raised the standard required to extend the negotiation period for EIR contracts.

The bill got stuck in Senate Appropriations largely because of opposition from the Wilson Administration. In a letter to legislators, Lee Grissom, director of the Governor's Office of Planning & Research, said he wanted a 50-day period for approval or denial of projects to be consistent with the Subdivision Map Act.

He also recommended that the 45-day contract period begin after the close of the 30-day comment period on notices of preparation, rather than 45 days after the NOP itself. Even with those changes, Grissom did not promise to support the bill but only to stand neutral.

Randy Pestor, an aide to Assemblyman Sweeney, said Sweeney would probably bring the bill back next after crafting a compromise this fall.

■ Contact:
Randy Pestor, Assemblyman Mike Sweeney's Office, (915) 445-8160.

Subdivision Map Act

Major revision of the Subdivision Map Act once again eluded the Legislature.

One major bill, AB 771 (Aguiar), would have given tentative maps a life of five years, rather than two or three, but would have reduced the longest possible life of a map (with extensions) from 13 years to 10. However, this bill got stuck in the Senate Housing and Land Use Committee, largely because the League of California Cities and CSAC sought language to ensure that these provisions did not apply to vesting tentative maps.

Another major reform bill, SB 1799 (Valerie Brown) also saw little action in this Legislative session.

However, the Legislature did pass the so-called "environmental subdivision" bill, AB 1287 (Cortese), which permits the use of parcel maps to subdivide property for the purposes of environmental mitigation. The bill is on the governor's desk.

■ Contact:
Randy Pestor, Assemblyman Mike Sweeney's Office, (916) 445-8160.

NUMBERS

Stephen Svete

Debt Down, Economy Up?

Uncertainty and fear surrounding the wisdom of investing in "California paper" have combined to deliver a one-two punch to the state's bond market. The result could be a slower-than-otherwise recovery to the state's economy — if traditional economic roles of public and private sector are still intact.

According to the California Debt Advisory Commission, combined state and local debt issuance decreased by 48% during the first six months of 1995 as compared to 1994. The figure for state bonding alone was 65%. The drop certainly reflects the decline in "refundings" — the bond-traders' term for refinancing debt with more favorable interest rates. But new debt also dropped markedly. So the contraction in bond financing clearly runs deeper than influence from the money markets.

Traditionally, bond activity is an indicator of large-scale investment in infrastructure and public works projects, which theoretically would be followed by private venture activity. And as leading indicators — especially job-growth data — continue to suggest that California's lengthy slump is finally on the mend, the state's big-time investors ought to begin hearing sweet music. But public finance managers apparently are not dancing to the tune.

There are lots of good reasons for this. On the demand side, there is a perceived or actual drop in demand for California issues compared to other municipals. The now much-dreaded annual state budget wrangle and the incumbent bad press that occurs each summer has contributed to a steady drop in the ratings of California's munies. Over the last three years, the state's once sterling debt rating has dropped from triple-A to double A, to double A minus, to single A. This obviously affects the attractiveness of California paper compared to that of other public issues.

In addition to the state's fiscal image, local governments in California — especially counties — have received their own share of bad publicity when it comes to fiscal health. The Orange County crisis and the emerging financial problems of Los Angeles County have also led to a perceived or real chill in demand. According to Steve Juarez, chief lobbyist for Los Angeles County and former executive director for CDAC, "The overall health of local issues is not what it used to be."

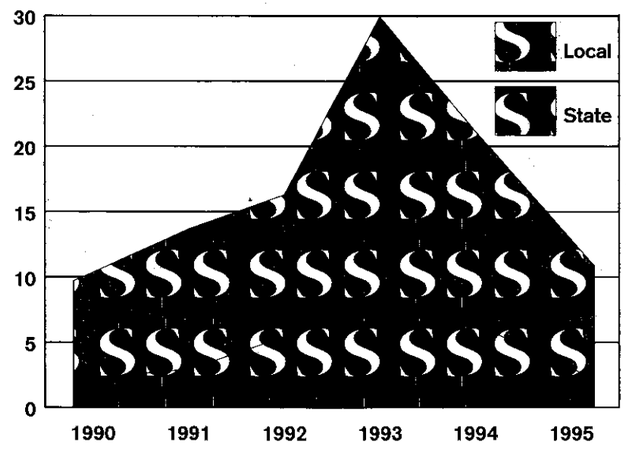
As with any commodity, the same factors that affect demand relate directly to supply. So it is certainly understandable that the state's elected officials and public finance managers are currently more interested in getting their houses in order than financing massive new projects through bonds. And that is exactly what appears to be happening. So even though we remain in a period of very low interest rates, agencies remain conservative with taking on new debt. And because interest rates have been relatively low for at least three years, most of the money-management steps have really been taken. According to Peter Schaafsma, current executive director of CDAC, "most of the refi's were done in 1993." So debt issuance is at its lowest in five years. (The only anomaly last year was a big jump in refunding of multi-family housing projects apparently dating back to pre-tax reform days in 1985.)

Of course, this is actually good news, depending on one's philosophy about investment. There is no question that public agency fiscal health is widely regarded as a top priority. And in these financial times, the drop in public debt issuance is comfortable news to most taxpayers — and their elected officials. But the bond data remains tough to reconcile with other economic indicators. And the cycles ought not be that divergent from one another.

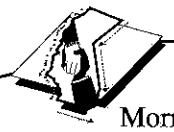
One bond seller from a San Francisco brokerage house suggests that bonds are supposed to act as a leading indicator. If that's true, perhaps we're seeing a shift in the role the government sector will play in economic growth. And if change in the private sector over the last few years is any harbinger of pending restructuring to government, look for downsizing and belt-tightening before the faint tune of a rebound can be heard. ❑

California Public Debt Issuance

in Billions



Source: California Debt Advisory Commission



DEALS
Morris Newman

The One-Dollar Stadium

It's hard to find things that cost only a dollar these days. Even a cup of coffee at Starbucks is $1.10. After an extensive search, I was able to find some ice cream at 7-11, including such second-tier items as the Fudge Bomb and the Eskimo Pie, that individually cost less than a dollar. A bagel with cream cheese at Winchell's Donuts is 99 cents.

But a group of Los Angeles developers have found something else that can be had for a dollar: the annual ground lease on 100 acres of land in Sacramento, complete with a giant hole in the ground where earlier developers have tried to build a sports stadium. (In fairness, the lease runs five years, so the cost is really five dollars.) The opportunity cost to the new lessee is an obligation to maintain a 30-acre parking lot on the site, and to tend the weeds on the remaining 70 acres. At the same time, the developers — Rob Maguire, Jim Thomas, Rick Gilchrist, and Ned Fox, all partners in Maguire Thomas Partners, one of California's biggest developers — will explore the possibility of completing the stadium, under a new set of assumptions.

> *"As originally conceived, the unfinished ballpark was arguably the most ill-conceived commercial project in Sacramento history."*

The unfinished ballpark, once known as Arco Stadium, is arguably the most ill-conceived commercial project in Sacramento history. The stadium, at least in its original conception, was the brainchild of Gregg Lukenbill, a wunderkind developer of the 1980s who had a lifelong ambition to bring professional sports to his home town. (The stadium also served Lukenbill's real estate ambitions, because he used the stadium and the neighboring Arco Arena as the gambit to convince the Sacramento City Council to open the North Natomas area of Sacramento for development.) Located between downtown Sacramento and the city's airport, North Natomas is a flood plain that appears to be the next major growth center of the city as soon as flood mitigation measures are in place.

Lukenbill's timing was as bad as his ambition was overscaled, however. Thinking big, he conceived of a 50,000 seat baseball stadium with a budget of $130 million. After an initial $30 million contribution from Arco, Lukenbill successfully completed the Arco Arena and purchased the Sacramento Kings basketball franchise as its starring attraction. But the young developer failed to locate any further financing for his baseball field of dreams. At one point, in 1990, Lukenbill was quixotic enough to announce that he would bankroll the project out of his own pocket. At that point, however, the real estate recession made it difficult to pull much money out of Lukenbill's office buildings and hotel projects, which were having their own financial problems. By 1991, Lukenbill was forced to sell out his entire interest in sports teams and stadia.

Lukenbill's successors — a partnership made up of developer Buzz Oates, sports team owner Fred Anderson and businessman Bill Cummings — did not fare much better in attracting money for the stadium. Conventional lenders rarely underwrite the construction costs of sports stadiums, so stadium developers are often obliged to raise money by selling season tickets, or even vouchers for such tickets, at exorbitant prices. With no pro baseball team on hand to inflame the hearts of Sacramento residents, the second partnership found itself with little to do.

In a very odd turn of events, the developers have asked the City of Sacramento for permission to donate 100 acres of their 300-acre holdings to the city. The choice seems irrational, unless one is familiar with 1986 tax code, which allows real estate owners and other investors to deduct the losses from unprofitable projects from the income generated by profitable ones, as long as the projects are of the same kind, i.e. real estate. Oates is one of Sacramento's most active developers of industrial real estate, and he himself has told reporters that the land contribution has tax benefits. The city is currently tying up a deal to take over the land and expects to take title by the end of the year.

At the same time, the city is in negotiations with the four L.A. developers, who acquired the Sacramento Kings and the Arco Arena in 1992. City officials say they want to see the stadium completed without a financial contribution from the city, and it is clear that the $1 lease offer to the L.A. Four is intended to be the city's chief form of assistance. Developer Gilchrist, however, hinted that he and his partners would like further assistance.

Gilchrist's plans for the unfinished stadium are intriguingly down to earth. Instead of a gargantuan stadium for a professional sports team, Gilchrist hinted that he and his partners were leaning toward a smaller stadium of 10,000 or so seats, suitable for minor league baseball. Such a project could cost $10-$15 million, or about a tenth of what Lukenbill had projected for his baseball palace. In fact, minor-league baseball in California is in an expansion mode, and Sacramento is a desirable market. And the stadium could be designed and built in a form allowing future expansion in the event that a pro team ever stepped up to the plate in Sacramento. (This is the strategy recently used by Buffalo, now a wildly successful Triple-A town bucking for a big-league team.)

Since I strongly oppose public subsidies for sports stadiums, I guess I can't recommend that Sacramento put money into the new scheme of the L.A. Four. But the attractiveness of the new proposal, if Gilchrist and his partners make good on it, is that it is achievable in the current sports-market conditions of Sacramento, while remaining open to future possibilities. Even with its lowered expectations, of course, the new partnership has much to accomplish before even minor-league baseball can come to Sacramento. It must sign a team and raise the capital to build the stadium from many small investors.

For the moment, I feel swayed by Gilchrist's salesmanship. But in the deal to lease 100 acres of land for a dollar, it will be a long time before anyone can tell who got the better end of the deal. ❑