

## Santa Monica Backtracks On Smart Growth Plan

BY JOSH STEPHENS

In 2010, the City of Santa Monica adopted a Land Use and Circulation Element to its General Plan that was hailed as a model of progressive planning. The LUCE foretold a denser but, possibly, less trafficked and more pleasant city and was one of the first such elements to achieve the goals of SB 375. Cities across the state looked to the LUCE as a model. It won “Outstanding Comprehensive Planning Award, Small Jurisdiction” from the California Chapter of the American Planning Association.

The LUCE was designed to generate zero net new car trips in the city by 2025 and to reduce the city’s annual greenhouse gas emissions by nearly 200,000 metric tons

compared to 2010 levels. It also provided a bookend to the 1984 General Plan update. Back then, the city sought to increase its employment base but did not [promote housing accordingly](#).

Five years later, Santa Monica has plenty of jobs – 74,000 in a city of 92,000, with pressures increased with the recent rise of “Silicon Beach” tech firms – but with housing costs and development pressures at all-time highs, a recent City Council vote has taken a step back from the LUCE’s vision. If at least one residents’ group gets its way, a full repudiation of the goals of 2010 may be in the offing.

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**insight**  
WILLIAM  
FULTON

## Should We Deal With California’s Housing Crisis By Building Less Housing?

A couple of weeks ago, the satirical newspaper The Onion reported that the City of [San Francisco was looking to relocate](#) because its current location had become too expensive. Funny though this was, I expected the follow-up story to focus on the economic development incentive

package being put together to keep San Francisco where it is.

Then a week or so later, Gabriel Metcalfe – head of the respected San Francisco urban planning organization SPUR – published a provocative piece in [CityLab](#) blaming the

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## State Awards \$224 Million in Sustainable Transportation Grants

The California State Transportation Agency [announced](#) (pdf) recipients of \$224 million in grant money to support public transportation projects that reduce greenhouse gas emissions. This year's recipients would reduce an estimated 860,000 metric tons of greenhouse gases by taking 180,000 cars off the road, and 93 percent of the projects would benefit disadvantaged communities, according to the CSTA. Among 14 projects, the grant money will be used to improve service on the Los Angeles basin light rail and the Bay Area light rail, expand San Diego trolley service, improve Monterey and Salinas bus service, launch a new Orange county rapid bus route, and improve local transit transfers to and from the Amtrak Pacific Surfliner. Over 90 percent of projects serve disadvantaged communities. In total, the grants support \$720 million in total investments and will, according to estimates, reduce annual carbon emissions by 860,000 metric tons. Grants are funded by the Greenhouse Gas Reduction Fund using proceeds from the state's cap-and-trade auctions. The grant funding is part of the Transit and Intercity Rail Capital Program, implemented by CTC in coordination with the California Department of Transportation and California Air Resources Board.

The grants help reduce greenhouse gas emissions by expanding public transportation ridership and capacity.

## Army Corps Approves L.A. River Plan

The Civil Works Review Board of the U.S. Army Corps of Engineers unanimously approved a plan, over a decade in the making, to restore 719 acres of the Los Angeles River, marking a key victory in the long-anticipated plans to reestablish riparian strand, freshwater marsh, and aquatic habitat while maintaining flood risk management on the river. The Los Angeles River Ecosystem Restoration project proposes restoration measures in and along an 11-mile stretch of the river to reestablish scarce riparian strand, freshwater marsh, and aquatic habitat, while maintaining existing levels of flood risk management. The city and the Corps are expected to share the \$1.3 billion cost, but financial commitments have yet to be worked out. "The vote today validated that the recommended plan is technically feasible, environmentally acceptable, and economically justified," said Los Angeles District Commander Col. Kim Colloton. "Our partnership with the City of Los Angeles is as strong as it was in 1898 when we were working on the breakwater for the Port of Los Angeles, and it has been providing

benefits and functioning well for over 80 years. It's now time to make room for the river." In order for the Corps and the City to begin construction, Congress now must authorize the project under the Water Resources Development Act and appropriate funds for it.

## Brown Pushes Bay-Delta Tunnel Plan; Draws Opposition

The state Department of Water Resources [sharpened](#) plans for the construction of two 30-mile-long tunnels on the Sacramento River, releasing hundreds of pages of documents in its environmental impact statement detailing the project's changes from the original 2006 plan worth \$15 billion. Among changes, the new details show that the plan will eliminate pumping plants on the east bank of the Sacramento River in favor of a gravity-fed system into the tunnels. The details also present a scaled-back version of the plan, with Gov. Jerry Brown only calling for 15,600 acres for habitat restoration of offset the effect of the tunnels — only one-sixth of the amount of the governor's original proposal — and dropping efforts to obtain a 50-year permit for the project, raising anxiety among water agencies that are expecting more reliability in their water deliveries. Opposition to the project arose following the release

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of the documents. Stockton-area farmer Dean Cortopassi is circulating an [initiative](#) that would force public work projects costing over \$2 billion to receive voter approval before issuing revenue bonds, a potential hitch in Brown's plan to avoid a public vote by raising funds from water agencies in exchange for reliable water deliveries. Environmentalists and Delta residents still say that pushing huge volumes of fresh water into the tunnels would greatly decrease drinking water quality for the East Bay and northern San Joaquin Valley and continue to [degrade](#) fish habitats, even though the Brown administration is proposing to restore 30,000 acres of habitat in the Delta.

### Tribes Sue to Block Solar Plant

A group of Native American tribes filed a lawsuit to stop construction of the Blythe Mesa Solar Project in the Mojave Desert, saying that the 3,660-acre project's Environmental Impact Report failed to take into account the project's impact on traditional tribal lands. The suit comes after Riverside County Supervisors approved the project, which covers nearly six square miles of developer land. "The project is located in the ancestral homelands of the Colorado River Indian Tribes' Mohave and Chemehuevi members, in a region rich in cultural resources that have been used since time immemorial," tribal Councilwoman Amanda Barrera told the [Press-Enterprise](#).

### L.A. Identifies 660 Acres for Urban Agriculture

The Cornfield Arroyo Seco Specific Plan -- a plan to develop mixed-use,

modern neighborhoods in a 660-acre sector along the Los Angeles River -- would be a prime location for urban agriculture, according to a study by the Los Angeles River Revitalization Corporation. [KCET](#) describes the CASP area as a "food desert," or an area without access to fresh produce and other food, making the area ripe for community-based agriculture. The LARRC study suggested dividing the neighborhood into nodes for specific agricultural activities, and then working around the infrastructure of the area by implementing creative solutions like renovating areas like the Lincoln Heights Jail into a community hub, aquaponics facility, and brewery/restaurant.

### First Phase of Alameda Air Station Conversion Approved

Eighteen years worth of attempts to convert Alameda's former naval air station for civilian use have finally come to fruition, as the City Council there approved the first phase of construction of 800 housing units and 60,000 square feet of commercial space on the site. The development had been held up partly because of the 2008 recession and partly because of Measure A banning construction of apartment buildings in the city, which city officials worked around by increasing the number of affordable housing units on the project. That decision also gained favor with the Navy, which had previously turned down the city of Oakland's proposal to develop the former Oak Knoll Naval Hospital into a luxury golf course because it didn't provide a broad public benefit. Work at the air

base is expected to lay the foundation for the development of nearly 900 acres of bay front property over the next 25 years, Jennifer Ott, the chief operating officer for the city's project at Alameda Point, [told](#) the San Francisco Chronicle.

### Reports Describe Inequitable Impacts of Housing Shortage

A pair of new reports highlight the housing woes that Californians are facing even after the state has recovered from the economic recession of 2009.

The first report, a survey of 80 community-based nonprofits by the [California Reinvestment Coalition](#), found that spiking rents are forcing out long-term tenants throughout the state while 77 percent of nonprofits believe that potential homebuyers almost always lose out to institutional investors -- able to purchase homes in cash and financed by Main Street banks -- when trying to buy a lender-owned property. "As a nonprofit, we had a grant awarded to us through HUD's Neighborhood Stabilization Program," Lori Gay, president and CEO of Neighborhood Housing Services of Los Angeles County said in the report. "We got \$60 million, which has really helped us to compete. But even with all of that cash, we still get outbid by investors -- sometimes before the properties are even placed on the market."

The second report from the ACLU, titled "[A Tale of Two Recoveries: Economic Recoveries for Black and White Homeowners](#)," highlights that, while both black and white families suffered in the economic recession,

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median white household wealth has stopped falling while median black household wealth has continued to drop by an additional 13 percent between 2009 and 2011. The report points to various factors affecting the disparity, including that black families had a larger proportion of their wealth in home equity before the quality, and that black Americans were far more likely to receive costly predatory loans during the subprime boom.

### California Species Considered for Endangered List

The U.S. Fish and Wildlife Service has taken steps to possibly [list](#) four new California species under the Endangered Species Act. A review has determined that there is substantial evidence to warrant in-depth reviews of populations of the Western spadefoot toad of the Central Valley, the Relictual slender salamander in the lower Kern River Canyon, the Kern Canyon slender salamander in the lower Kern River Canyon, and the Foothill yellow-legged frog of the Upper San Gabriel River. Factors prompting the review are habitat losses, inadequacy of regulatory mechanisms, and pollution, among other factors.

### Kern County Releases Environmental Review of 2.8 Million Acres for Oil Drilling

Kern County has [released](#) the draft of a environmental review cataloging 2.8 million acres of oil and gas drilling across the county in an attempt to pave the way for the county itself to issue permits for drilling while charging oil companies for air quality mitigation

measures. The report, which comes at a cost of over \$12 million, calls for the county to charge petroleum producers between \$12,500 and \$23,000 per well. Funds would be dedicated to clean air projects, which, with 2,000 new wells being drilled in Kern every year, could come at a benefit of \$20 million per year. The plan also attempts to serve agricultural interests in the wake of successful legal challenges in 2012 to drilling projects. Farmers accused companies with mineral rights of running roughshod over their fields without adequate compensation. The county plans to address this problem by making it quicker and cheaper for oil companies to drill if they can come to an agreement with surface owners, while subjecting them to several rounds of reviews if they cannot come to an agreement. Environmental groups, meanwhile, have called the plan an attempt to rubber-stamp drilling plans in the county.

### O.C. Mismanaged \$2 Billion in Property in Mello-Roos Districts

A new grand jury [concluded](#) that Orange County's 119 Mello-Roos taxing districts worth more than \$2 billion have been mismanaged and have poor oversight. While the districts were created to surpass the restrictions of Proposition 13 — allowing homebuilders to build needed infrastructure in the area without charging more for homes — the grand jury concluded that there are no mechanisms in place to ensure that the taxes are properly spent, and it recommend that the districts form

an oversight committee to see how the taxes are managed. The report comes in the midst of a surge in home construction in Orange County that's relying on Mello-Roos districts — with Irvine forming a \$384 million district and Santa Margarita Water District authorizing a \$70 million district — to pay for public amenities without tacking the cost onto the price of the homes. Homeowners, however, have increasingly become upset by huge Mello-Roos bills in developments like San Clemente's Talega.

### Los Angeles Metro to Restructure Countywide Bus Service

Los Angeles's Metro is [considering](#) a systemwide restructuring that would speed up and slim down its bus lines, possibly cutting services to some of the least-used routes. The proposal, recommended by a commission convened by Metro, centers around increasing ridership by creating reliably frequent buses that arrive every 15 minutes. The buses also would travel faster, as the plan would increase the amount of passengers allowed on each bus, some stops would be eliminated, and it would cut services to some of the least-used corridors in the system. The draft policy will be taken to the Metro Board of Directors in July 2015.

### S.F. Activists Push for Development Moratorium; Short-Term Rental Restrictions

San Francisco advocacy groups have [filed](#) two separate petitions aimed at pumping the brakes on San Francisco's booming housing development. In one petition,

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volunteers submitted 15,000 signatures to the Department of Elections, effectively putting a housing moratorium in San Francisco’s Mission District on the November ballot. Activists say that the moratorium, which calls for an 18-month stop for demolition and construction in the district, is necessary to preserve housing and industrial spaces and to rethink the rapid development of the historically-Latino neighborhood.

Additionally, advocates against short-term rentals submitted almost 16,000 signatures supporting a ballot measure that would put more restrictions on the city’s short-term rental market, popularized by websites like Airbnb. The petition, sponsored by ShareBetter SF, would further enhance a measure that the Board of Supervisors adopted in October allowing home sharers to offer their rentals for 90 days a year

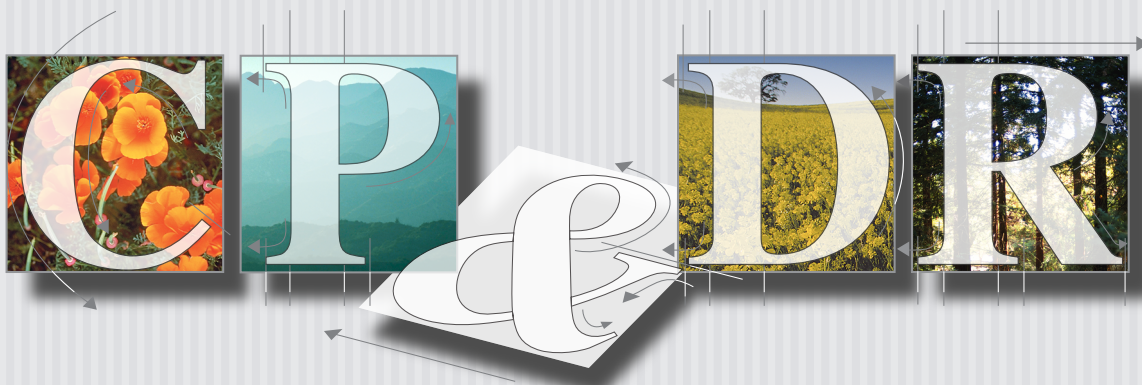
without being present, or 265 days a year if they are. The petition asked the city and county to limit rentals to 75 nights per year, to fine companies like Airbnb and VRBO for listing unregistered units, and to force home sharers to regularly report their rentals.

**Obama Designates Berryessa Snow Mountain National Monument**

President Obama declared the Berryessa Snow Mountain a national monument in an effort to better coordinate management of the area and raise its visibility for additional tourism and economic growth. The 331,000-acre wild land area covering Napa, Mendocino, Lake, Solano and Yolo counties is home to bald eagles, tule elk, and rare plants found nowhere else on Earth. It hosts historic Indian cultural sites from tribes that have inhabited the area for at least 11,000 years. Berryessa had

been under mixed jurisdiction, with the Bureau of Land Management, the Bureau of Reclamation, and the U.S. Forest Service governing various tracts. Officials believe that the new designation will better coordinate management of the area, possibly generating as much as \$26 million in economic activity over five years under the joint management of the U.S. Forest Service and the Bureau of Land Management. “After years of tireless work by countless numbers of people, the Berryessa Snow Mountain region is finally getting the permanent protection it deserves,” U.S. Rep. Mike Thompson, D-St. Helena, and the driving force behind the designation, said in a press release. “This national monument designation will provide a boost to our local economy, enhance recreational opportunities for tens of thousands of people, and protect important wildlife.” ■

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# Stakeholders Urge SGC To Strive For Equity In 2016 AHSC Program

BY JOSH STEPHENS

Stakeholders from around the state – and especially Southern California – are pushing the Strategic Growth Council for more geographical and jurisdictional “equity” in the next round of the Affordable Housing and Sustainable Communities program. The program is likely to increase from \$120 million to \$400 million next year.

At a meeting in Los Angeles on July 20, SGC members and staff were with both kudos and critiques from three dozen or so public officials, activists, and others who offered official verbal comments. (A similar workshop was held the previous week in Sacramento.)

Officials from the Southern California Association of Governments remain wary, especially of AHSC’s jurisdictional caps. Though AHSC does not prescribe regional allocations, this year’s process limited any one jurisdiction (be it a city or county) to a total of \$15 million in grants. That cap may be fine for Truckee (population 16,000), which received an \$8 million grant, but not for Los Angeles or San Francisco, which both maxed out the cap despite having other highly ranked, eligible projects.

“There needs to be a better accounting for regional equity,” said Darin Chidsey, director of Strategy, Policy, and Public Affairs at SCAG. “That’s not just north-south, but that’s looking at urban and suburban communities and creating a program that provides an opportunity for all jurisdictions in our region to be competitive.”

SGC intends to revise the guidelines in August, release a draft in the fall, and vote on a final draft before January 1.

Staff and council members alike pledged their intention to make next year’s selection process as fair and equitable as possible, while remaining faithful to the program’s mandate to directly effect reductions in greenhouse gas emissions.

SGC Chair Ken Alex said, with a hint of frustration, that this requirement likely prevents AHSC funds from going to planning efforts. Rather, funds must go to specific projects and programs that reduce GHG emissions, typically through reducing car trips.

“The overriding purpose of what we’re doing with this grant fund is to reduce greenhouse gas emissions,” said Alex. “We’re doing it in the context of transportation and housing, but...we as a legal matter always need to quantify those emissions reductions.”

While commenters praised SGC’s efforts and acknowledged the challenge of devising a new program in a short time frame, criticisms fell along several distinct themes, the most prominent one being that of geographic and demographic equity. (See sidebar on concerns about and legislative proposals for rural funding.)

SCAG officials reacted with dismay at the relatively small number of projects that were invited to submit full AHSC applications, with a disproportionate share of projects being located in the Bay Area. The SCAG finished strong, though, winning 9 of 28 awards.

Several speakers reminded the council that the region has 50 percent of the state’s population and 66 percent of the state’s disadvantaged communities. Many felt that the region’s 22 percent share of AHSC funding was patently inequitable.

Concerns over the needs of disadvantaged communities arose as well. SCAG representatives emphasized that the SCAG region’s statewide share of disadvantaged communities is even larger — at 66 percent — than its share of the state’s total population is.

One of the program’s chief criteria is that of leverage, with AHSC monies being leveraged at a ratio of about 6 to 1 in the initial round. Some speakers felt that SGC awards should not always be used to supplement existing funds but rather could be some of the first dollars put into a project and therefore act as seed money to attract further funding.

“We certainly understand the need for leveraging,” said Chidsey. “At the same time, some disadvantaged communities are most in need of private capital.”

Some speakers questioned the rigidity of AHSC’s funding criteria and suggested that it was a crude method to be used for communities across such a vast and diverse

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## >>> Stakeholders Urge SGC To Strive For Equity In 2016 AHSC Program

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state. In essence, they implied that projects that look good — or bad — on paper may not appear differently on the ground and in the context of their communities.

This conundrum led some to lobby for what one speaker referred to as “subsidiarity.” They encouraged SGC to look to the recommendations of metropolitan planning organizations, in part to ensure that selected projects were upholding the respective MPOs’ Sustainable Communities Strategies and to acknowledge MPOs’ more intimate knowledge of their local needs.

In his closing statements, Alex tried to address many of these concerns, while pledging that SCG councilmembers and staff were dedicated to incremental improvement. The result will not be perfect, though. “Everybody needs to recognize that it’s not going to come out perfectly,” said Alex. “There are endless balances. Each time we allocate funds in different ways there are winners and losers.” He noted, for instance, that disadvantaged communities in one region are competing against disadvantaged communities in other regions. Wealthy communities are not going to take funds away from poor ones.

While Alex acknowledged the dissatisfaction of many SCAG representatives, he encouraged SCAG to be proactive in next year’s application process.

**“Everybody needs to recognize that it’s not going to come out perfectly,” said Alex. “There are endless balances. Each time we allocate funds in different ways there are winners and losers.”**

He said, “SCAG needs to recognize that it needs to do some self-evaluation and see if there are ways that it can improve.” He called the 22 percent number “a little artificial” because many SCAG projects did not meet minimal selection criteria in the first place. The responsibility for achieving equity is “on all of us,” he said.

While Alex’s remarks could have been taken as a jab at MPO’s, Chidsey interpreted them optimistically.

“I think at the end of the day what Chair Alex is saying is that we’re all in this together. . . . to really help shape

and make a better Southern California,” said Chidsey. “We couldn’t agree more.”

### Resources and Related CP&DR Articles:

Strategic Growth Council AHSC Program [http://www.sgc.ca.gov/s\\_ahscprogram.php](http://www.sgc.ca.gov/s_ahscprogram.php)

Darin Chidsey, Director of Strategy, Policy, and Public Affairs, SCAG, [chidsey@scag.ca.gov](mailto:chidsey@scag.ca.gov)

[Workshop Presentation Materials](#)

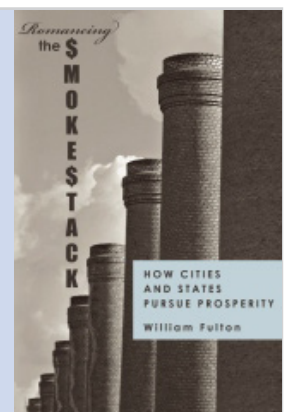
[SCAG Wins In AHSC Grant Funding Recommendations](#)

[Strategic Growth Council Posts AHSC Program Revisions Informally](#)

[Cities Hustle for \\$120 Million in Funding from SGC](#) ■

## Romancing the \$Smoke \$tack How Cities And States Pursue Prosperity

*Bill Fulton’s Book On Economic Development*



# Stakeholders, Legislators Push For Rural Funding From SGC

BY JOSH STEPHENS

While the Los Angeles and Bay Area behemoths battled for big money in the Affordable Housing and Sustainable Communities program, many of the state's rural communities felt left out entirely. The only truly rural award went to a vanpool program based in Hanford. Thus, AHSC will leave not a single lasting mark on the state's rural areas. For now, at least.

At recent workshops sponsored by the Strategic Growth Council (and attended by several council members) in Los Angeles and Sacramento, rural communities pleaded for more attention in next year's funding round, expected to disburse around \$400 million. The program is funded from state cap-and-trade revenues.

While SCG works to address the Bay Area-SCAG divide and other questions of regional equity, it may also have on its hands a rural-urban divide. In some ways, the rural question may prove to be the far thornier one. While SGC staff is now considering how to take these potentially competing interests into account, pending legislation could force their hand.

Assembly Bill x1-6, sponsored by Assemblymembers Roger Hernandez and Eduardo Garcia, would require that 20 percent of AHSC funds be set aside for rural communities. Sponsors chose 20 percent was chosen because it mirrors the rural set-aside in the State Low Income Housing Tax Credit Program.

Per its statute, the AHSC program almost inherently puts rural communities at a disadvantage.

SCG Chair Ken Alex, who said he is "familiar with the tension between rural and urban investments," expressed his hopes that AHSC could support rural communities. But he noted that the program's mandate reduce greenhouse gas emissions makes rural areas inherently less competitive. Whereas AHSC seeks to support urban developments that help commuters take advantage of public and active transit, those are often not viable alternatives in rural areas. Legislation may, therefore, be the only way for rural communities to compete for funds.

"ABx1-6 provides rural areas of the state a level playing field to compete for cap and trade funds while safeguarding the policy goals of the program," said Hernandez in a statement.

The Sustainable Agricultural Lands Conservation Program, a companion to AHSC that also disburses cap-and-trade funds, awards grants to conserve agricultural land threatened by urban development. This year's program included 7 conservation easement projects covering 14,000 acres for a

total of \$4.1 million. The program also included funding to help communities identify at-risk farmland.

SALC seeks to achieve the double-benefit of preserving open space while compelling adjacent urban areas to grow more densely rather than to create emissions-inducing sprawl.

Rural advocates hail that program and say that it too deserves more money.

"I think the climate benefits of making these investments are being underestimated," said Renata Brillinger, executive director of the California Climate and Agriculture Network. "The Department of Conservation and Air Resources Board are primarily considered avoided emissions connected to VMT. We think there's considerably more benefits to be accounted for. We also recognize that the methodology needs to be developed."

Brillinger cited a UC-Davis study suggesting that a built-up urban land accounts for 70 times more greenhouse gas emissions than agricultural land does. She also cited farms' capacity to reduce greenhouse gases via carbon sequestration.

SB 367 sponsored by Sen. Lois Wolk and supported by CalCAN, would set dedicate \$40 million in cap-and-trade funds to SALC for the purpose of purchasing conservation easements and promoting farming practices that reduce greenhouse gas emissions and sequester carbon. The latter program is planned by the SGC, but its development and implementation is a ways off. The bill would speed up its timeline. The bill passed the Assembly Natural Resources Committee prior to the summer recess.

Brillinger noted that funds from programs such as SALC are more important than ever for farmers, since programs like the Williamson Act and the state Farmland Conservancy have been winding down.

Having received input at the two workshops and other meetings, SGC staff are currently working on revised guidelines.

## Contacts & Resources

Renta Brillinger, California Climate & Agriculture Network <http://calclimateag.org/> [renata@calclimateag.org](mailto:renata@calclimateag.org)

District 48 Assm. Roger Hernandez (West Covina), <http://asmdc.org/members/a48/> (916) 319-2048

Senate Bill 367: <https://legiscan.com/CA/bill/SB367/2015>

SCAG Wins In AHSC Grant Funding Recommendations

<http://www.cp-dr.com/node/3751> ■



# legal digest

## Ninth Circuit Punches Hole in HCP Protections

BY WILLIAM FULTON

Punching a hole in the faith local governments and developers in California have placed in habitat conservation plans, the Ninth U.S. Circuit Court of Appeals has ruled that federal wildlife agencies retain the discretion to designate additional land as critical habitat even after an HCP has been approved.

The case is important because local governments and developers in California have relied heavily on the HCPs adopted in the 1990s for certainly in planning future development. The Ninth Circuit ruling reinforces the idea that the HCPs are not iron-clad and wildlife agencies can put protect additional land at their discretion, thus diminishing the certainty HCPs are designed to create. Adopted in 1999, the Western Riverside plan was one of the largest and most comprehensive HCPs.

Ruling in a case involving the Santa Ana sucker, a small fish that lives in the Santa Ana River, the Ninth Circuit upheld the U.S. Fish & Wildlife Service's 2010 decision to add some 1,400 acres (and possibly another 5,000 acres) to the fish's critical habitat pursuant to the federal Endangered Species Act. The court rejected the claim from a variety of local government agencies that the habitat designation was "arbitrary" because the wildlife agency should have waited for implementation of the Western Riverside County Multiple Species Habitat Conservation Plan before designating additional habitat.

Writing for a three-judge panel, Second Circuit Court Judge Barrington Parker – sitting on the panel by assignment – noted that the MSHCP prohibits the Fish & Wildlife Service from designating additional habitat "to the maximum extent allowable after review and comment".

He added: "To the extent Appellants [the local agencies

that sued the Fish & Wildlife Service] believe the MSHCP-IA [Implementation Agreement] creates an enforceable guarantee not to designate critical habitat, they are mistaken.

"Although Appellants raise valid concerns about the permittees' reliance on the FWSs promise not to designate lands 'to the maximum extent allowable,' the FWS may not relinquish its statutory obligation to designate essential critical habitat by contract with third parties," he wrote.

The Ninth Circuit went on to conclude that the designation of additional critical habitat for the sucker did not violate the Fish & Wildlife Service's "No Surprises" rule, which prohibits the Service from imposing additional requirements on a permittee once the permit has been issued. The Ninth Circuit concluded that the 2010 rule did not impose any additional requirements on current permittees and any concern that the local agencies have about violating the "No Surprises" rule is speculative at this point.

The Western Riverside MSHCP was the largest, most controversial, and most significant HCP of its time. It called for preserving about 500,000 acres out of almost 1.3 million acres of land in the area and protected permittees from additional mitigation involving more than 100 potentially endangered species over a 75-year period. [<http://www.cp-dr.com/node/562>] Adopted by local agencies in 1999, the plan was finally approved by the Fish & Wildlife Service in 2004. HCPs were authorized under 1982 amendments to the 1973 Endangered Species Act, but the ability to create iron-clad guarantees against future habitat designations under HCPs was always questionable.

The original critical habitat for the sucker comprised approximately 21,000 acres. Conservation groups subsequently sued seeking more habitat. After a settlement

## >>> Ninth Circuit Punches Hole in HCP Protections

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agreement, the Fish & Wildlife Service adopted a new rule in 2010 designating additional critical habitat for the sucker under the HCP in 2010.

The Fish & Wildlife Service was then sued by a group of local agencies that had participated in the original HCP, including water and floor control districts and the cities of Riverside and San Bernardino. They made three arguments. First, they claimed the Service did not cooperate with the state in resolving water issues that arose from the designation. Second, they argued that the Service acted arbitrarily and capriciously by adding land to the critical habitat designation that had previously been left out. And third, they argued that the Service had violated the National Environmental Policy Act by failing to prepare an environmental impact report prior to the expanded critical habitat designation.

U.S. District Court Judge James Selna ruled in favor of the Fish & Wildlife Service on all counts and the local agencies appealed. The Ninth Circuit affirmed Judge Selna's ruling on all claims.

On the first argument, the local agencies had relied on a policy statement in Section 2(c) of the Endangered Species Act, which states that "it is the policy of Congress" that federal agencies "shall" consult with states on water resources issues arising from the ESA. But the Ninth Circuit called this section "a non-operative statements of policy" that does not create an enforceable procedural step. The court also quoted the Senate Committee report on the HCP amendments in 1982 as saying that no additional procedural steps would be created as a result of the policy statement.

The second argument was most important, because it attempted to bind the Fish & Wildlife Service's ability to designate critical habitat only to those lands identified in the original MSHCP – highlighting a concern that permittees have always had about HCPs.

**The court wrote: "To the extent Appellants believe the MSHCP-IA creates an enforceable guarantee not to designate critical habitat, they are mistaken."**

The Ninth Circuit concluded that, although it was permissible for the courts to review the Service's discretionary action in this case, "the statute cannot be read to say that the FWS is ever obligated to exclude habitat that it has found to be essential. Such a decision is always discretionary and the statute "provides absolutely no standards that constrain the Service's discretion not to exclude" land from the critical habitat designation.

The court also rejected the local agencies' argument that the Service should not have used post-2004 studies in support of the 2010 rule. The court rejected the local agencies' argument that the post-2004 studies were used to show a decline in the species after 2004. Rather, the court concluded, the post-2004 studies were used to further support the 2004 situation.

The NEPA claim was rejected by the court based on *Douglas County v. Babbitt*,

48 F.3d 1495 (9th Cir. 1995), which held that NEPA does not apply to the Endangered Species Act.

The Case: *Bear Valley Mutual Water Co. v. Jewell*, Ninth Circuit No. 12-57297. Issued June 25, 2015.

The Lawyers: This case involved an extraordinarily large number of parties, including intervenors. But the main lawyers were:

For the City of Riverside and several other local agencies: Gregory K. Wilkinson, Best Best & Kreiger, [Gregory.Wilkinson@bbklaw.com](mailto:Gregory.Wilkinson@bbklaw.com).

For the U.S. Fish & Wildlife Service: Andrea Gelatt ([Andrea.Gelatt@usdoj.gov](mailto:Andrea.Gelatt@usdoj.gov)) and Allen M. Brabender ([allen.brabender@usdoj.gov](mailto:allen.brabender@usdoj.gov)), United States Department of Justice, Environment & Natural Resources Division, Washington, D.C.

For Center for Biological Diversity (intervenors): John Buse, Center for Biological Diversity, [jbuse@biologicaldiversity.org](mailto:jbuse@biologicaldiversity.org) ■

# Removal of Conservation Overlay Not Exempt From CEQA

BY WILLIAM FULTON

A decision to remove 200 acres of the Anheuser-Busch-owned Warm Springs Ranch from the Western Riverside County Multiple Species Habitat Plan is not exempt from the California Environmental Quality Act even though the property would be replaced in the plan by 1,000 acres on two other nearby ranches, the Fourth District Court of Appeal has ruled.

The decision to remove the property was the result of a complicated – and in some ways failed -- negotiation between the company, the Western Riverside County Regional Conservation Authority, and Riverside County. Overturning Riverside County Superior Court Judge Daniel Ottolia, the Fourth District ruled that CEQA Exemptions 7 and 8 did not apply to the situation, even though the change would not automatically lead to development of the parcel.

“[W]e conclude the removal of the conservation overlay from the phase 9 property is a ‘project’ under CEQA as a change embodied a fundamental land use decision that has the potential for causing ultimate physical changes in the environment, because land that was protected for conservation purposes will no longer be subject to such protections,” the court wrote.

The background of the case reflects the complicated nature of habitat conservation planning as it emerged in California during the 1990s. Because regulators were reluctant to draw up precise maps of areas to be protected, the Western Riverside MSCP contains a large “criteria area” of 340,000 acres – much larger than the 153,000 acres of privately owned land that the MSHCP says must be preserved to meet the plans goals under the federal and state endangered species acts.

Instead of automatically preserving the “criteria land,” the MSHCP calls for the agency to do apply – and in some cases even “refine” – the criteria when dealing with a specific piece of property. If the property in question is no longer part of the “criteria area” once the criteria are applied, then either the MSHCP must be amended or other property must be acquired to replace the land that would be lost.

Warm Springs Ranch is a 964-acre parcel of land owned by Anheuser-Busch located in unincorporated territory northeast of the City of Murrieta. In 2003, after the MHSCP was adopted, the property was downzoned by Riverside County from 2.5-acre lots to 5-acre lots.

Under the MSHCP, Anheuser Busch was required to prepare a development proposal that would then be assessed under the Habitat Evaluation Negotiation Strategy (HANS) process, which would actually apply the habitat criteria to the development project. In 2007, Riverside County concluded that all but 71 of the 964 acres of the ranch would have to be acquired for conservation.

A variety of negotiations then ensued. The county and Anheuser Busch attempted unsuccessfully to negotiate a land swap. Later, the county sought to obtain a portion of the ranch via eminent domain to widen a road and Anheuser Busch filed a cross-complaint for inverse condemnation. Although the Western Riverside conservation authority was not named as a defendant in the inverse condemnation lawsuit, it became involved because the company alleged that application of MSHCP criteria by the county constituted a taking.

In 2011, the company and the county reached a settlement agreement which called upon the conservation authority to buy the ranch in nine different phases – the last of which, “phase 9,” would be a 200-acre area to be purchased in 2020 for \$11 million.

The purchase and sale agreement for the phase 9 property called upon the conservation authority to complete a “criteria refinement” process that would eliminate the phase 9 property from the conservation plan altogether. If the conservation authority did not buy the land by 2020, then Anheuser Busch would be free to pursue development of the property through normal channels.

In order to remove the conservation overlay from the property, the conservation authority had to either amend the plan or refine it by replacing the lost land with other land that was equivalent or superior in its biological value. The

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conservation authority proposed replacing the phase 9 property with two other properties nearby – known as the Reynolds property and the Peak property – which together totaled more than 1,000 acres of land. These properties had evidence of significant human use but also contained species not present on the phase 9 property.

In removing the conservation overlay from the phase 9 property, the conservation authority concluded both that the decision was not a project under CEQA; and that if it was determined to be so it was exempt under both Class 7 (maintenance or enhancement of a natural resource) and Class 8 (maintenance or enhancement of the environment).

The decision was sued by Anthony Paulek, who spoke during the administrative hearings both on his own behalf and on behalf of Friends of the Northern San Jacinto Valley. Concluding that Paulek had standing, Judge Ottolito ruled that the removal of the conservation overlay was a project but that both the Class 7 and Class 8 exemptions applied.

A three-judge panel of the Fourth District Court of Appeal upheld Ottolito on the standing and “project” rulings, but reversed him on the question of the exemptions.

Writing for the court, Justice Donald Miller said – over and over again in different ways – that removal of the conservation overlay was a land-use decision that opened up the possibility of future development and therefore was the equivalent of a general plan amendment.

Miller acknowledged that the conservation authority may eventually purchase the land, but noted there is no guarantee that this will occur. He also concluded that, while the conservation authority combined the removal of the conservation overlay and the replacement in the plan of that land with the two other ranches, these were actually legally two separate acts.

**“The decision embodies a fundamental land use decision that has the potential for causing ultimate physical changes in the environment because land that was protected by the overlay is no longer protected.”**

“The fact remains,” he wrote, “that the 200 acres of the phase 9 property will no longer be protected by the conservation overlay. The decision, even when it is all combined, embodies a fundamental land use decision that has the potential for causing ultimate physical changes in the environment because land that was protected by the overlay is no longer protected.”

Regarding the Class 7 exemption, Miller wrote that trading the phase 9 property for the other two ranches “is a trade-off: some species may be maintained while others may not be maintained.” Regarding the phase 9 property, he added: “[T]he property may not be ‘prime’ or ideal, but that does not equate with ‘insignificant’ or unneeded. As a result, the evidence does not support the conclusion that there is not a fair argument regarding a significant effect on a natural resources.”

Miller came to a similar conclusion on the Class 8 exemption, noting that the trade-off will mean different geographical boundaries for the habitat preserve and therefore will create a new and different urban edge. “Thus,” he said, “the evidence provides that the loss of the conservation overlay may affect the neighboring conservation area, and the effects may be significant such that there would need to be an attempt to lessen the effects.”

### **The Case:**

Paulek v. Western Riverside County Regional Conservation Authority, NO. E059133

### **The Lawyers:**

For Paulek: Susan Nash, [snash22@earthlink.net](mailto:snash22@earthlink.net)

For Western Riverside County Regional Conservation Authority: Michelle Oullette, Best Best & Krieger, [Michelle.Oullette@bbklaw.com](mailto:Michelle.Oullette@bbklaw.com)

For Anheuser Busch (real party in interest): K. Erik Friess, Allen Matkins, [rfriess@allenmatkins.com](mailto:rfriess@allenmatkins.com) ■

## >>> Santa Monica Backtracks on Smart Growth Plan

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“The LUCE was basically sold to residents as a slow-growth document,” said Armen Melkonians, founder of advocacy group Residocracy, which generally takes slow-growth positions. “The reality is that...it effectuated changed in Santa Monica quite drastically and rapidly.” He likened the LUCE’s proponents to “snake-oil salesmen.”

The City Council considered a comprehensive zoning code update intended to bring the city’s code in line with the vision of the LUCE. It included three “tiers” of multifamily and mixed use development, affording developers increasing levels of density but requiring increasing levels of public scrutiny. The LUCE establishes two stories or 32 feet as the “base” in Tier 1. Tier 3, approved only through development agreements, requires developers to include community benefits, such as on- or off-site low-income units, in order to earn the right to build up to five stories or 50 feet in height. Tier 3 was designed to apply only to the city’s major boulevards, notably Wilshire, Santa Monica, and Lincoln.

Tier 3 was too much for many of the city’s slow-growth advocates, who clamored for the down-zoning on the grounds that excessive development would infringe on neighborhood character and worsen the city’s notoriously heavy traffic. The City Council voted 4-3 April 15 to eliminate that tier on Santa Monica and Wilshire, the city’s two more important boulevards, as well as some of the other increased density envisioned by the LUCE.

Even with this victory, slow-growth activists may yet gear up for a referendum that could force the city to rewrite the zoning code entirely.

The LUCE was designed to add roughly 4,995 new housing units, well exceeding the 1,694 prescribed by the Regional Housing Needs Allocation, 974 of which are allocated as below market rate. It also envisioned five “activity centers” that would include relatively dense development and clusters of commercial establishments that residents could visit without relying on personal automobiles. Much of the LUCE’s provisions respond to the advent of Phase 2 of the Expo Line light rail, which will

serve three stations in Santa Monica as of next year and provide direct service to downtown Los Angeles.

A separate 5-2 vote eliminated all but one of the five activity centers. Both sets of changes were confirmed, with minor amendments, upon second reading June 23.

The elimination of Tier 3 would not apply to Colorado and Lincoln boulevards, or to downtown Santa Monica, which is governed by its own specific plan, which is currently being revised. 100 percent affordable developments and adaptive reuse projects are exempt as well. Even with much of the LUCE still intact, critics of the down-zoning consider it an egregious retreat from progressive planning, especially in light of pro-infill policies that are being implemented statewide, such as Senate Bill 375.

“There’s the direct effect of the decision, and then there’s the momentum that the decision signifies, said Juan Matute, co-chair of smart growth advocacy group Santa Monica Forward and associate director of the Lewis Center and the Institute for Transportation studies at UCLA. “The concern is that it’s one in a series of capitulations to those who don’t believe in the vision of the land use and circulation element for a progressive, sustainable SM and that this is just one in a series of decisions that will completely dismantle the LUCE’s vision.”

Melkonians, of Residocracy, said that rampant development in Santa Monica over the past five years proves that city government cannot be trusted to manage growth. Melkonians, who is an engineer by trade, said that the LUCE’s relies on faulty growth projections. He contends that many of the 10,000 or so additional residents projected by the LUCE would actually have been induced by new development. In essence, he claims that the LUCE’s projections mistake cause for effect.

“They failed to include any of the growth-inducing impacts of the General Plan update itself,” said Melkonians.

The city’s population has remained relatively static over the past 45 years, having reached 88,000 in 1970.

Critics of the LUCE also contend that, regardless of

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planning trends, conditions have changed over the past five years that make stricter growth controls more necessary. Melkonians said that the LUCE relied on a planned subway extension, known colloquially as the “Subway to the Sea.” That extension will not reach Santa Monica for decades, if ever.

“There’s a lot of support in the community for transit-oriented development,” said Santa Monica Mayor Kevin McKeown, who voted for the down-zoning. “There was, on the other hand, considerable resistance to transit-anticipatory development.”

That resistance was on display several months before the zoning vote when the council, amid fierce lobbying from groups such as Residocracy, voted to rescind an agreement for a major mixed-use project next to the Bergamot Station Expo stop.

(One other change from 2010 involves not demographics but rather a dispute between two luxury hotels just north of downtown Santa Monica. The Huntley Hotel is opposing a proposed expansion of the Miramar that might obstruct the Huntley’s view of the ocean. The Huntley donated \$10,000 to Residocracy. “Voices in the community that were concerned about development became amplified as a result of the Huntley Hotel’s involvement,” said Matute. Melkonians said that donations do not drive the group’s agenda.)

Whatever different methods of analysis reveal, the fact remains that the region faces what many consider a monumental housing crisis. Santa Monica’s high housing costs are often held up as a symbol of that crisis.

“We’ve grown only about a half-a-percent...that’s below the birth rate,” said McKeown. “We’re not even accommodating the kids who are born here.”

Even the slow-growth advocates wanted to make

**A full repudiation of the goals of the 2010 LUCE may be in the offing.**

concessions for subsidized housing—some arguing that affordable housing should be the only type of new housing approved in the city -- supporters of the LUCE counter that, especially in the absence of redevelopment monies, generous amounts of market-rate development will be necessary to create affordable units. Tier 3 projects would have been approved contingent upon development agreements, through

which the city could have compelled developers to include affordable units or set aside funds to promote other types of affordable housing. As well, Tier 2 projects may not be attractive to developers, for whom an extra story could make the difference between profit and loss.

“It will be harder to build four- and five-story housing, which is where the most favorable economics are for residential construction,” said Matute.

Those concerns are overblown, according to Santa Monica Planning Director David Martin. “The result of all of our analysis is that a Tier 2 project is still feasible,” said Martin. “We expect that the four-story mixed-use projects can still be built.”

Overall, Martin insists that the spirit of the LUCE remains intact.

“I think the underlying principles of the LUCE are still sound. I don’t think this undermines it in any way,” said Martin. “It’s not unusual for there to be some adjustments and reductions here and there.”

Though he voted for the down-zoning, Santa Monica Mayor Kevin McKeown said that he supports the vision of the LUCE and does not feel that the city’s progressive spirit has been compromised.

“What we did was to recalibrate that LUCE to accommodate what we see really happening in the next 20 years,” said McKeown. “Our thinking on the zoning code was, I think, an extension of the thinking we put into the

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LUCE. The LUCE was a visionary plan of which we were very proud.”

One major element of the LUCE is the alleviation of the jobs-housing imbalance, symbolized by the nearly static river of cars that travel westbound on Interstate 10 every morning and eastbound evening. Proponents of the LUCE argue that it was designed to reduce traffic by offering housing that would be occupied by workers who currently commute into the city.

“The measures that have been stricken were primarily those that would help the city cope with traffic in the future,” said Matute.

Melkonians rejects that theory, noting that there’s no guarantee that all new Santa Monica residents will also work in the city. 2000 Census data indicates that only 32 percent of the city’s residents worked in Santa Monica, with more workers commuting to Los Angeles than remaining in Santa Monica.

“It’s impossible that over 50 percent of (new residents) will work in Santa Monica,” said Melkonians. “That’s not how Southern California works.”

However this debate plays out in Santa Monica, it may foretell more challenges to the provision of housing and achievement of smart growth goals throughout the region. A recent report from the Legislative Analysts’ Office emphasizes the need for coastal cities to allow more housing — as much as 100,000 more units annually than are currently expected to be build statewide. At the same time, the LAO acknowledged the challenges of developing in cities like Santa Monica.

**Though he voted for the down-zoning, Mayor McKweon said that he supports the vision of the LUCE and does not feel that the city’s progressive spirit has been compromised.**

“Local residents are often resistant to new housing development and they’ll use their local communities’ land use authority to delay or block new housing development,” said Brian Uhler, senior fiscal and policy analyst with the LAO, in a video released with Tuesday’s report. “We see that this type of resistance is particularly heightened in California’s coastal communities.”

Matute said that achieving these housing goals, and promoting infill development, is going to require planners around the state to become more politically savvy and more convincing in their outreach efforts.

“The state, the regional, and the local plans in focusing on infill development are looking at putting a growing share of new growth in California...into existing communities,” said Matute. “It requires an expanded level of community negotiation skills.”

### Contacts and Resources

Santa Monica 2010 Land Use and Circulation Element <http://www.smgov.net/Departments/PCD/Plans/2010-Land-Use-and-Circulation-Element/>

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## >>> Should We Deal With California's Housing Crisis By Building Less Housing?

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city's affordability crisis on progressive politics – especially progressive politics of the no-growth kind. Progressive San Francisco, he argued, “had a fatal, Shakespearean flaw that would prove to be its undoing: It decided early on to be against new buildings. It decided that new development, with the exemption of publicly subsidized affordable housing, was not welcome.”

All up and down California – especially in the expensive coastal enclaves around San Francisco and Los Angeles – community activists have been lately decrying how the rising cost of housing is making it impossible for normal people with normal incomes to live in these towns. Yet, as Metcalf points out, most of the time these same community activists are arguing that the trend toward high housing cost must be countered with ... less housing construction. Or at least less market-rate housing construction.

Perhaps the best example in Southern California is the recent “growth politics” melt-down in Santa Monica, which led the city council to rescind approval of a major [development project](#) near the Bergamot Station Expo Line station even though it contained a major housing component.

It's no surprise when NIMBYs fight against new development projects because they want to preserve their community's “character” – which usually means low-rise development and, they hope, a tolerable amount of traffic. But now a new generation of people – not quite NIMBYs, but not quite *not* NIMBYs – are arguing that you shouldn't build more housing because housing is already really expensive. What gives?

What gives is this is what happens when supply and demand get intertwined in peculiar ways, as is happening up and down California today – and, indeed, as is occurring in desirable locations across the country and throughout the world.

The traditional economist's assessment of the current situation would be pretty straightforward: Housing prices are going up because demand is outstripping supply. So if

you create more supply, prices will come down (or at least stabilize) and the market will approach equilibrium. This is Gabriel Metcalfe's argument: Like the rest of California, San Francisco's been underbuilding for decades, and now that the city's population is going up, this undersupply is beginning to show up in the market.

This, in turns, leads to the typical argument of the building industry or Joel Kotkin, which is that overregulation in California – especially the California Environmental Quality Act – has suppressed supply and screwed up the market.

All of this is true as far as it goes, but it doesn't explain why people who are concerned about the high price of housing are against the construction of more housing. That's happening because the interplay between supply and demand is more nuanced than traditional economics would suggest, and because the interplay between the market and politics isn't always rational.

The problem is that under some market conditions, more supply doesn't lead to market equilibrium because it actually creates its own demand. You can see this wherever the world's uber-rich decide to buy houses – New York, London, or, most relevant to this discussion, Santa Barbara.

Santa Barbara has housing prices that are not supported by the underlying dynamics of the local economy, for one very simple reason: The uber-rich from around the world drive up home prices by paying premium prices, often for houses they don't actually occupy very often. This throws the supply-demand equation out of whack; if you build more houses, the result might just be more uber-rich folks from out of town showing up to buy them, and that doesn't help ordinary folks. In fact, for a while the debate in Santa Barbara centered around encouraging construction of *certain types of housing that uber-rich wouldn't want to buy*, such as small rental apartments on busy streets. But given the revival of urban living, I wouldn't even bet on that strategy working. Look at what's happened to Charleston, which has rapidly become a second-home haven for people from New York.

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## >>> Should We Deal With California's Housing Crisis By Building Less Housing?

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And once the uber-rich throw the supply-demand equation out of whack, there's a ripple effect. When I was in elected office in Ventura, we faced this very problem: A two-earner couple making \$200,000 a year, having been driven out of Santa Barbara by the uber-rich, would show up in Ventura, and their jaws would drop at the prices. A hillside home with an ocean view for only \$900,000? A three-bedroom track home for only \$500,000? These folks would drive our prices up, thus driving our local folks out of town. An increased supply of housing in Ventura just meant an increased demand from Santa Barbara commuters, which didn't really solve the problem.

Something similar is going on today in San Francisco and Santa Monica. These places are hotbeds for cool jobs. The folks taking the cool jobs may not be uber-rich, but they have tons more money than everybody else, and so they drive prices out of sight. Build more market-rate housing, and you'll just accelerate the cycle – more smart kids will show up wanting to work for tech start-ups, and that means you'll have more tech start-ups, and pretty soon demand will rise faster than supply – in large part *because* you increased the supply. To a local community activist, it feels like a no-win.

The solution isn't easy – or, at least, it isn't simple. Yes, you need to build way more new housing than we've done

**This is what happens when supply and demand get intertwined in peculiar ways**

in California. But that housing needs to come in more types, forms, and even tenures than we have seen in a long time. Yes, some needs to be market-rate – but we need to recognize that this will be snapped up by highly successful folks and won't necessarily bring about market equilibrium. Yes, some needs to be subsidized – but we need to recognize that we will never built enough affordable housing and so therefore to some extent we are creating housing for lucky lottery

winners.

Maybe most important, we need to build – and, more important, be politically accepting of – a wide variety of housing types. Apartments of all sizes. Duplexes and triplexes. Micro-units. Even boarding houses, which will allow urban singles to live more cheaply and comfortably than they do now.

The growth control policies in coastal California began when everybody lived in a single-family house and most NIMBYs (and even environmentalists) believed that less was better. The solution today is not simply to restrict supply to preserve a neighborhood's character because these will strangle our cities – and our emerging middle-class. Nor is it to let the private market loose, because this will turn the cities over to the uber-rich. The solution is both-and. We have to do everything we can. ■

