CP&DR

VOL. 30, NO. 6 — JUNE 2015 CALIFORNIA PLANNING & DEVELOPMENT REPORT

North, South Score Equally In AHSC Recommendations

BY JOSH STEPHENS

For the moment, equilibrium has been more or less restored in rivalry between Northern California and Southern California — at least as far as urban planning goes.

Recommended awards have been announced in the competition for $120 million in planning assistance monies from the Affordable Housing and Sustainable Communities grant program, the state's largest funding program for planning. Of the 28 projects selected, 11 are from the Bay Area and 10 are from Southern California. That's a big shift from the semifinal count, when the 54 finalists included twice as many from the Bay Area as from Southern California.

The Strategic Growth Council is scheduled to act on the staff recommendations on June 30.

Put simply, 10 of the 12 semifinalists from the Southern California Association of Governments region were selected, compared to only 11 of 21 from the Bay Area's Metropolitan Transportation Commission. SCAG officials had complained mightily about the semifinal counts..

Program officials estimate that the projects will create over 2,000 affordable housing units near "high-quality" transit. By discouraging the use of personal

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insight
WILLIAM FULTON

No Way Builders Were Going To Win San Jose Case

Last week's landmark ruling by the California Supreme Court upholding San Jose's inclusionary housing ordinance was rightly hailed as a huge victory for affordable housing advocates. But the truth is that the ruling shouldn't be viewed as a surprise. It was a very difficult case for the building industry to win – at least the way the industry's lawyers has set the case up.

And along the way, Chief Justice Tani Cantil-Sakauye plowed some very powerful ground. She hoisted Supreme Court Justice Antonin Scalia on his own

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inside

Suit Alleges NEPA Violations across Vast Public Lands in S. California

Two environmental groups have sued the U.S. Bureau of Land Management and the Secretary of the Interior for opening up 400,000 acres of public land in Southern California for fracking, which they claim violates the National Environmental Policy Act. The groups, The Center for Biological Diversity and Los Padres Forestwatch, claim that the federal government's environmental report erroneously analyzed impacts to air quality by assuming that only 40 new wells will be drilled each year, though the plan estimates that 4,000 wells will be drilled in the plan's lifetime. Environmentalists say that fracking, which involves high-pressure injection of water and chemicals into shale rock to fracture the formations and extract oil and gas, pollutes groundwater and can cause earthquakes. California's oil producers are increasingly turning to fracturing to extract oil, with Kern County containing 2,361 fracked wells in 2014 and Ventura County containing 456 of them, according to the lawsuit.

Schiff Pushes for Expansion of Wild Lands in L.A. County

More than four decades after a graduate student proposed adding a "green belt" of wildlife habitats, parks, and recreational areas in a rim circling the San Fernando Valley, Rep. Adam Schiff is pushing to add as much land as possible "Rim of the Valley Corridor" to the Santa Monica Mountains National Recreation Area in the Los Angeles area. Backed by a broad coalition including the National Park Service, the designation would protect of the 1,000-square-mile area from future development and preserve puma and bobcat habitats, along with forests and fossil beds. "For us, it's a complete and utter enhancement," Las Virgenes Homeowners Federation president Kim Lamorie told the LA Times. "Our [residents] are always competing to get the National Park Service … to purchase land in and around our homeowners associations and rural villages.... Property values go up when you're surrounded by open space."

Senators Push Ballot Measure to Reform Prop. 13

Senators Holly Mitchell (D-Los Angeles) and Loni Hancock (D-Oakland) have introduced legislation to launch a ballot measure to amend Proposition 13. If passed by two-thirds of the Senate, the measure could go on the 2016 ballot. It would create a "split-roll" property tax to allow for regular reassessments of commercial and industrial property, starting with the 2018-19 fiscal year. By removing commercial properties from Prop. 13 limitations, it is estimated that the measure could raise $9 billon in taxes. Prop. 13 limitations would still apply to residential properties. The legislation, a gut-and-amend of SCA 5, would not require the governor's signature. A recent poll by the Public Policy Institute of California found that 59 percent of Democrats support a split roll while only 36 percent of Republicans do; independents were evenly split.

Lawsuit Over Sacramento Arena Dismissed

Without further comment the California Supreme Court dismissed a lawsuit led by retired state Department of Transportation director Adriana Gianturco Saltonstall alleging that the $477 million Sacramento Kings downtown arena project violated CEQA and would cause massive traffic and air pollution problems in the city. Officials breathed a sigh of relief at the decision, as they assumed that the case could delay the stadium's scheduled opening date of October 2016. The Third District Court of Appeal sided with the city. [https://www.cp-dr.com/node/3698] The dismissal leaves only one hurdle for the construction of the new arena which has been fast-tracked through CEQA by AB-900. Three Sacramentans are suing the city for contributing a $255 million subsidy to the project, most of which will come about by borrowing against its downtown parking operations.

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CP&DR

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is published semi-monthly by

Solimar Research Group
Post Office Box 24618
Ventura, California 93002

Fax: 805.652.0695

Subscription Price: $238 per year

ISSN No. 0891-382X

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S.F. Takes Partial Control of Treasure Island

In the first phase of a landmark redevelopment deal many years in the making, the U.S. Navy transferred nearly 300 acres of its old Treasure Island/Yerba Buena Island naval base to the City of San Francisco to redevelop the campus into 8,000 homes in exchange for $55 million to the Navy. The city has approved plans to build 2,000 affordable units, along with 300 acres of parks and open space on the campus, and will create a new ferry service to become a cornerstone of the island's transportation program. "It's taken almost two decades to get to this point, and we're eager to transform this former naval base into a vibrant community with more housing, jobs and economic opportunities for our residents," Mayor Ed Lee announced.

High Speed Rail Identifies Properties for Eminent Domain; Faces Opposition in L.A.

The California High-Speed Rail Authority has listed over 200 properties in the Central Valley for possible eminent domain proceedings to accommodate construction of the first two segments of its network. The State Public Works Board, made up of the heads of the state's Transportation, General Services, and Finance departments, recently voted to adopt 23 resolutions declaring a public need and authorizing the acquisition of properties in Fresno, Madera, Kings, and Tulare Counties. Since December 2013, the Public Works Board has adopted 230 such resolutions covering more than 625 acres of land in the four counties in anticipation of the $68 billion project planned to be fully operational by 2028. Now a Superior Court judge will decide if the agency is entitled to the property, and, if the judge rules in the train's favor, a trail will determine the fair market value due to the owner. Also, in a settlement with the city of Bakersfield over the environmental impact of the train, the rail authority will cut eight miles of track from the first construction of a 130-mile section through the Central Valley and will review its proposed route through the city.

Meanwhile, local elected officials and homeowners groups in suburban Santa Clarita as well as blue-collar San Fernando, Pacoima, and other communities are demanding the state abandon a proposed route that would use above-ground tracks and tunnels through the mountains between Palmdale and San Fernando, instead insisting that only underground routes should be considered. They expressed their concerns at a recent meeting of the HSR board. San Fernando officials said that the proposed train would cut their city in half with 20-foot-high walls and could displace dozens of businesses and a police station at a cost of $1.3 million per year and 850 jobs.

L.A. Mayor Garcetti Launches National 'Climate Action Agenda'

Los Angeles Mayor Eric Garcetti announced that the Mayors National Climate Action Agenda, an organization he co-founded with Mayor Michael Nutter of Philadelphia and Mayor Annise Parker of Houston, has called on President Obama to fight for the strongest possible climate agreement at the upcoming 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21) in Paris. The nationwide coalition of mayors also announced that 27 mayors from across the country have signed on to support the President and the U.S. delegation in Paris in pushing for strong action on climate change. Other California members of the organization include the mayors of Berkeley, Oakland, San Francisco, San Jose, and Santa Monica.

Sacramento Voters Reject Streetcar Plan

Advocates for a new streetcar line in downtown Sacramento suffered defeat when a small group of voters in the surrounding neighborhood rejected plans to create a $30 million streetcar tax district to help finance the project. Property owners had formerly expressed enthusiasm for the project, with sixty-eight percent approving the idea to finance the $150 million plan. But with both renters and owners opining in the most recent vote, that number skewed to 52 percent voting no. Advocates have stated that they will not give up the quest to build the 3.3-mile system, though they have no Plan B to grab the necessary funding for the project. The city of West Sacramento has already agreed to put in $25 million, and the federal government has agreed to finance half the project, though that money could disappear if local officials can't nail down the other $75 million.

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San Diego Loses Ground in Effort to Keep Chargers

Possibly undermining months of work to create a viable proposal for a new pro football stadium in San Diego, the San Diego Chargers issued a statement that a Dec. 15 public vote on a new stadium would be impossible because the city won't be able to craft a legally defensible Environmental Impact Report within that time. "The various options that we have explored with the city's experts all lead to the same result: Significant time-consuming litigation founded on multiple legal challenges, followed by a high risk of eventual defeat in the courts," Chargers' special counsel Mark Fabiani said in a statement. The timing of the vote is important because the NFL could move a team to Los Angeles by 2016, and city officials have emphasized that they could indeed meet the Dec. 15 deadline, but that the Chargers have been unwilling to play ball. "It appears the Chargers have pulled the plug on San Diego even though the city and county have gone out of their way to try and accommodate the team," Mayor Kevin Faulconer's Task Force spokesman Tony Manolatos told the Union-Tribune. "Instead of working collaboratively on a solution, the Chargers have thrown up one road block after another in San Diego while working aggressively on stadium plans in Carson."

Orange County Accused of Mismanaging $1.7B Worth of Property

An Orange County Grand Jury issued a report lambasting county officials for failing to keep adequate records of over $1.7 billion in unused or underutilized property that it must manage. The jury found that there are 2,300 real estate properties that must be managed by the county, but that the county has only partially complete or updated databases of its real estate holdings, and that the information is not consistent. "With the potential for future real estate decisions being based on unavailable or inaccurate data that could lead to less-than-desirable stewardship of (the) county's tax dollars, the grand jury believes that comprehensive and compatible real estate data information is necessary," the grand jury wrote in its report.

S.F. Giants Revise Housing Plan Amid Opposition

The San Francisco Giants have revised their plans for a massive mixed-use project next to AT&T Park to include an unprecedented amount of affordable housing, garnering the endorsement of all 11 supervisors and prompting Supervisor Jane Kim to withdraw her threat to draw up a countermeasure lowering allowed building heights and require half of all residential units to be designated affordable. Kim's opposition had drawn scorn from fellow supervisors who had worked on the deal with the Giants. The new proposal for the 28-acre project built on land controlled by the Port of San Francisco will include 40 percent of its 1,500 apartments priced to various levels of affordability, with 12 percent available for people making $32,000 to $39,000, 21 percent for people making $64,200 to $85,000 and 7 percent for people making $108,000.■

CEQA Bills Stall, GHG Bill Moves Forward

BY MATTHEW HOSE

With the year's legislative session in full gear, attempts to reform – or end-run – the California Environmental Quality Act don't seem to be doing so well. But Sen. Fran Pavley's effort to codify an 80% greenhouse gas reduction target by 2050 – which would moot some major legal challenges – appears to be sailing through.

Legislation items are listed, by category and in numerical order, according to bill number, bill name, sponsor, description, and status as of press time. This list will be updated periodically to reflect new developments.

Bills had to have been passed out of their house of origin by June 5. Policy committees must consider bills by July 17.

Planning & Zoning

AB-744 (Chau) Planning and zoning: density bonuses

This bill would prevent cities or counties from imposing a required vehicle parking ratio greater than 0.5 spaces per bedroom on developments that include a maximum percentage of affordable units and that are located within a half-mile of an easily accessibly transit stop.

Passed Assembly; in Senate awaiting assignment

AB-1478 (Maienschein) Land Use Planning

Makes nonsubstantive changes to a land-use law granting a maximum two-year extension for a city to adopt a general plan if it meets one of six conditions

Pending Referral in Assembly

SB-379 (Jackson) Land use: General Plan: Safety Element

This bill would require cities and counties to include in the next revision to their local hazard mitigation plans a new safety assessment identifying the risks that climate change poses to the local area.

Passed Senate; in Assembly

Transportation & Infrastructure

ACA 4 (Frazier) Local government transportation projects: Special Taxes: Voter Approval

This bill would lower the voter threshold requirements for special taxes by a local government for the purpose of providing funding for transportation projects from 2/3rds approval to 55 percent approval.

In Assembly Committee on Revenue and Taxation

AB 338 (Hernandez) Los Angeles County Metropolitan Transportation Authority: Transactions and Use Tax

This bill would authorize the Los Angeles Metropolitan Authority to impose a new transportations transactions and use tax of 0.5% for 30 years if it adopts an expenditure plan and gets voter approval. This would tack on funding to a 0.5% tax that MTA is already authorized to use.

Passed Assembly, in Senate Committee on Transportation and Housing

AB 360 (Melendez) Airports: Evaluation

This bill, originally intended to transfer control of the Ontario International Airport from control of the City of Los Angeles to a new Ontario International Airport Authority, was amended to strike that provision, and now will simply allow the California Transportation Commission to take five extra days to complete review for the possibility of creating new airports.

In Assembly Committee on Transportation

AB 518 (Frazier) Department of Transportation

This bill would delete a requirement that the Department of Transportation compile information and report to the legislature on specific projects in which the department allows local agencies to transfer their own funds for the right to develop transportation projects if they are included in the state transportation improvement program.

In Assembly Committee on Transportation

AB 1098 (Bloom) Transportation: Congestion Management

Revises congestion management programs to delete the level of service standard in managing traffic and replace it with performance measures including vehicle miles traveled, air emissions, and multi-modal infrastructure. Requires agencies implementing roadway capacity expansions to conduct an analysis of the potential for

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induced vehicle travel on those particular roadways

In Assembly Committee on Transportation

SB 508 (Beall) Transportation funds: Transit operators: Pedestrian safety

This bill would revise the Transportation Development Act to apply less-stringent farebox ratio requirements for transit operators to receive funds from a 1/4% sales tax. It also would authorize spending 5% of local funds for pedestrian safety education programs.

P*assed Senate; In Assembly Committee on Transportation*

SB 16 (Beall) Transportation Funding

This bill would create a Road Maintenance and Rehabilitation Account within the State Transportation Fund to address deferred maintenance on state highways by imposing a $0.10 per gallon increase in gasoline taxes, a $35 increase in annual vehicle registration fees, and a $100 vehicle registration fee for zero-emission vehicles. It would also allocate $0.02 of a $0.12 increase in diesel fuel excise taxes to the Trade Corridors Improvement Fund and would increase vehicle license fees to 1% over five years from 0.65%. Last, it would require the Department of Transportation to present a plan to increase department efficiency by up to 30% over the 3 years following April 1, 2016.

In Senate, on third reading

SB 64 (Liu) California Transportation Plan

Amends California Transportation Plan updates to be completed every five years, emphasizing that the California Transportation Commission will prepare action-oriented and pragmatic recommendations for transportation improvements.

Passed Senate, in Assembly Committee on Transportation

SB 491 Transportation: Omnibus Bill

This bill would implement various transportation reforms, including: requiring every commercial vehicle be equipped with a speedometer, imposing tighter requirements for towing, and allowing commercial drivers to inspect their cargo before operation, among other reforms.

Passed Senate; In Assembly Committee on Transportation

SB 767 (DeLeón) Los Angeles County Metropolitan Transportation Authority: Transactions and Use Tax

This bill would authorize the Los Angeles Metropolitan Transportation Authority to impose a 0.5% "transportation transactions and use tax" pending voter approval and exempts MTA from the standard limit of 2% on those taxes.

Passed Senate, in Assembly

AB 755 (Ridley-Thomas) Sales and Tse Taxes: Exemption: Small Businesses: Los Angeles County transit projects

This bill would temporarily exempt certain small businesses in Los Angeles from paying taxes on sold goods if they can prove that they have suffered financially because of construction of the Crenshaw/LAX Transit Corridor Light Rail Line, the Regional Connector Transit Corridor Light Rail Line, or the Westside Subway Extension Light Rail Line.

In Assembly Committee on Revenue and Taxation

Housing

AB 35 (Chiu / Atkins): Income taxes: Credits: Low-Income Housing: Allocation Increase.

AB 35 would expand the state's Low-Income Housing Tax Credit by $300 million annually. Expansion of the state tax credit will have two positive effects: Developers will not only have access to more funding for building developments where the rents remain affordable, but they will also be able to leverage additional federal funds (a total of $600 million annually). Developers acquire and sell the tax credits, which provides revenue that they cobble together with other funding sources to build developments where rents are kept affordable. This bill would increase the state's Low Income Housing Tax Credit by $300 million to build and rehabilitate affordable housing.

Passed Assembly; Pending Referral in Senate

AB 90 (Chau): Federal Housing Trust Fund

Another piece of this year's housing-affordability bill package, Assemblymember Ed Chau's AB 90 creates a

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framework for how California will spend funds received from the National Housing Trust Fund, which (with the recent lift of the suspension that prevented funding of the trust fund) are expected to begin flowing to California in 2016.

Passed Assembly; Pending Referral in Senate

AB 1220 (Harper): Transient Occupancy Taxes: Residential Short-Term Rentals Units

This bill would prohibit cities, counties, or a city and county from levying a transient occupancy tax (TOT) on residential short-term rental units, including single family homes, apartments, condos or other residential real estate in which the public pays for accommodations for less than 90 days.

In Assembly Committee on Local Government

AB 668 (Gomez): Property Taxation: Assessment: Affordable Housing

Requires county assessor to assess for taxation contracts with non-profit companies if they have received a welfare exemption for properties intended to be sold to low-income families and if the contract restricts the use of the land for 30 years to owner-occupied housing available at an affordable cost

Passed Assembly; In Senate Committee on Transportation and Housing

AB 1335 (Atkins): Building Homes and Jobs Act

Would generate up to $700 million per year for affordable rental or ownership housing, supportive housing, emergency shelters, transitional housing and other housing needs via a $75 recordation fee on real estate transactions. This fee would not apply to home sales.

In Assembly

Environment, Climate Change, CEQA

AB 33 (Quirk): California Global Warming Solutions Act of 2006: Climate Change Advisory Council

This bill would create the Energy Integration Advisory Council to make recommendations of the various strategies necessary for the energy grid to integrate specified annual targets as part of the California Renewables Portfolio Standard Program.

Passed Assembly; in Senate pending assignment

AB 300 (Alejo): Safe Water and Wildlife Protection Act of 2015

The Safe Water and Wildlife Protection Act of 2016 would require the State Water Resources Control Board to establish and coordinate the Algal Bloom Task Force to review the risks and negative impacts of toxic algal blooms and microcystin pollution and then use bond funds from the Water Quality, Supply, and Infrastructure Improvement Act of 2014 to prevent blooms of those toxins in the state.

Passed Assembly; In Senate Committee on Natural Resources and Water

AB 323 (Olsen): California Environmental Quality Act: Exemption: Roadway Improvement

AB 323 would extend the sunset date for current law that exempts city roadway improvement projects from California Environmental Quality Act requirements if the project is within the existing right-of-way, improves safety and is within a jurisdiction with a population of less than 100,000 people.

Passed Assembly; In Senate Committee on Environmental Quality

SB 389 (Berryhill): Environmental Quality: The Sustainable Environmental Protection Act

Reduces the risk of CEQA litigation against projects that comply with high-density, multi-modal land use plans but that could have substantial effects on traffic, as long as the lead agency or developer provides an annual report showing compliance with mitigation measures as dictated by sustainable land-use plans

Failed passage in Senate Committee on Environmental Quality; reconsideration granted

AB 498 (Levine): Wildlife Conservation: Wildlife Corridors

This bill would provide credits to applicants who invest

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in "mitigation banks," defined as wetland areas denoted for conservation, in order to protect habitat connectivity for fish and wildlife, and it also makes it impermissible for an agency to deny a permit to a project applicant who does not take voluntary steps to protect a wildlife corridor.

Passed Assembly; in Senate Com. on N.R. & W.

AB 641 (Mayes): Expedites and Reduces Cost for Housing Projects.

Streamlines and reduces regulatory burdens for the approval and construction of housing developments by providing an expedited review process under the California Environmental Quality Act.

Failed in Assembly

AB 747 (Eggman): An act to amend Section 65962 of the Government Code, relating to land use. Sacramento-San Joaquin Valley.

This bill would prohibit a city or county within the Sacramento-San Joaquin Valley from approving a discretionary permit or entitlement that would result in the construction of a new building or construction that would result in an increase in allowed occupancy for an existing building for a project that is located within a flood hazard zone unless the city or county finds that the construction meets the criteria referenced above.

Passed Assembly; In Senate Committee on Natural Resources and Water

AB 1398 (Wilk): Environmental Quality: The Sustainable Environmental Protection Act

Reduces the risk of CEQA litigation against projects that comply with high-density, multi-modal land use plans but that could have substantial effects on traffic, as long as the lead agency or developer provides an annual report showing compliance with mitigation measures as dictated by sustainable land-use plans

Failed

AB 1482 (Gordon): Climate Adaptation

This bill would require coordination between the Natural Resources Agency and the Strategic Growth Council to address climate change by establishing policy guidelines and guidance at the state level to ensure that state investments consider climate change impacts and promote the use of natural systems when developing infrastructure.

Passed Assembly; In Senate Committee on Natural Resources and Water

AB 1068 (Allen): California Environmental Quality Act: Priority Projects

This bill would allow each member of the state legislature to nominate one project within his or her respective district as a priority project, allowing CEQA streamlining and prohibiting court injunctions unless the court makes specific findings against the project.

In Assembly Committee on Natural Resources

AB 1030 (Ridley-Thomas): California Global Warming Solutions Act of 2006: Greenhouse Gas Reduction Fund

This bill would give priority to greenhouse gas-reducing projects that foster creation of Green jobs and that include partnerships with training entities with a proven track record of placing disadvantaged workers in career-track jobs.

Passed Assembly; In Senate Committee on Environmental Quality

AB 1205 (Gomez): The California River Revitalization and Greenway Development Act of 2015

This bill would require the Natural Resources Agency to establish a grant program for developers who build on or near riparian corridors and who assist the state in implementing the California Global Warming Solutions Act of 2006 by rehabilitating the lands adjacent to rivers. The bill would create the CalRIVER Fund in the State Treasury to prioritize funding for projects that provide the greatest level of benefits to the Global Warming Act.

Passed Assembly, in Senate Com. on RLS. for assignment

SB 32 (Pavley): California Global Warming Solutions Act of 2006: Emissions Limit

SB 32 would require the state Air Resources Board to approve a statewide greenhouse gas emission limit

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(equivalent to 80 percent below the 1990 level) to be achieved by 2050. The bill would authorize the state board to adopt interim greenhouse gas emissions level targets to be achieved by 2030 and 2040.

Passed Senate; Pending referral in Assembly

SB 471 (Pavley): Water, energy, and reduction of greenhouse gas emissions: planning.(2015-2016)

This bill would include improved water treatment methods within investments that are eligible for funding from the Greenhouse Gas Reduction Fund.

Passed Senate; In Assembly

Economic Development/Redevelopment

AB 974 (Bloom): Redevelopment dissolution: Housing projects: Bond Proceeds

This bill would authorize a successor housing entity to designate the use of, and commit, proceeds from indebtedness that was issued for affordable housing purposes prior to June 28, 2011, and would require the proceeds from bonds issued between January 1, 2011, and June 28, 2011, to be used only for projects meeting certain requirements established in this bill for projects, to be funded by successor agencies generally, from proceeds of bonds issued during the same period.

Passed Assembly, in Senate Committee on Transportation and Housing

SB 608 (Liu): Community Revitalization Authority

This bill allows the creation of new entities called Community Revitalization Investment Authorities. These new authorities would be allowed to invest property-tax increments of consenting local agencies (not including schools) and other available funding in order to improve conditions of blighted areas and encourage economic development.

Referred to Coms. on GOV. & F. and T. & H.

Miscellaneous

AB 3 (Williams): Isla Vista Community Services District

Create a community services district as a means of self-governance for Isla Vista

Passed Assembly; Awaiting Referral in Senate

AB 52 (Gray; D-Merced): Disability Access Litigation Reform

Seeks to improve access for disabled customers and limit frivolous litigation against businesses for construction-related accessibility claims by providing an opportunity for the businesses to timely resolve any potential violations.

In Assembly Judiciary Committee

AB 54 (Olsen; R-Modesto): Disability Access Litigation Reform

Seeks to improve access for disabled patrons without harming businesses through frivolous lawsuits by providing businesses with a 60-day right to correct the violation for a claim based upon a constructed related accessibility standard that was changed or modified in the prior three years.

In Assembly Committee on Revenue and Taxation

AB 201 (Brough): California Public Records Act

Would allow local governments to create local restrictions related to where a registered sex offender can live or be present.

Passed Assembly; In Senate Judiciary Committee

AB 278 (Hernandez): District-based municipal elections

This measure would require that a city, with a population of 100,000 or more, switch to a by-district election system.

Passed Assembly; Pending Referral in Senate

SB 302

This bill approved a $24 million appropriation from the state's general fund to transfer to a private investor group who sued the state for killing a deal wherein the group purchased state buildings for $2.3 billion and agreed to lease them back to the state for at least $56 million in rent each year.

Signed by Governor ■

legal digest

Did Supreme Court Over-Reach In Sign Case?

BY MARTHA BRIDEGAM

Cities' ability to control their streets' aesthetics may be affected by a June 18 U.S. Supreme Court ruling on content-based regulation of signage, but perhaps not as drastically as they had feared.

In *Reed v. Town of Gilbert,* a six-justice majority of the high court applied strict scrutiny to a local "sign code" that restricted "temporary directional signs" based on their content. However, as the American Planning Association noted, a partly overlapping group of six justices joined in more cautious concurrences that sought to moderate the effects of the main ruling. And even the majority opinion offered reassurance that "our decision today will not prevent governments from enacting effective sign laws."

The case concerned a church that held services at varying borrowed locations in the town of Gilbert, Arizona. The church would post signs early each Saturday pointing out the site of the next Sunday service. Town officials regulated these signs under a special legal category for "temporary directional signs" specific to events of religious or nonprofit groups. The category limited the size and frequency of such signs and allowed them to be posted for only 12 hours before each event and one hour after it.

The church was cited for leaving signs in place longer than the allowed time. The case before the high court followed from a complaint by its pastor that "temporary directional" signs were regulated more severely than signs with other messages, such as expressions of support for local electoral candidates.

All nine of the justices agreed the ordinance should be struck down, though only six justices joined directly in the majority opinion. Previously the federal District Court for Arizona and the Ninth Circuit had sided with the town.

Justice Clarence Thomas, writing for the majority, held the Gilbert municipal "sign code" was content-based, hence invoked a strict scrutiny level of review, where it regulated signs differently according to their purposes — including purposes defined as temporary, political (in the sense of electoral campaigns) or "ideological".

Relying closely on the 1989 case of *Ward v. Rock Against Racism*, 491 U. S. 781, he wrote that the code did not survive strict scrutiny in that the choice to distinguish among signs by subject matter was not narrowly tailored to serve a compelling state interest. He described the town's arguments as naming only two governmental interests: "preserving the Town's aesthetic appeal and traffic safety," and wrote that, presuming those to be compelling governmental interests, "the Code's distinctions fail as hopelessly underinclusive."

Justice Elena Kagan, who in her concurrence treated the majority opinion as a dangerous overreaction, agreed that the town had made a weak case: "the Town of Gilbert's defense of its sign ordinance — most notably, the law's distinctions between directional signs and others — does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."

The Ninth Circuit in 2013 had upheld the "sign code," finding that the choice to regulate church signs in the "temporary" category did not reflect disagreement with the ideas expressed. But Thomas' majority opinion said that approach "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face."

He wrote that the "political", "ideological" and "temporary directional" sign categorization "depends entirely on the

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communicative content of the sign." And: "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." The Court had received an amicus brief arguing this point from the attorneys general for ten states, led by West Virginia.

Even the majority opinion offered reassurance that "our decision today will not prevent governments from enacting effective sign laws."

Thomas wrote that an official attempt to block "public discussion of an entire topic" would also be improper. The choice to treat messages for political candidates favorably, and "ideological" messages even more favorably, he wrote, was "a paradigmatic example of content-based discrimination."

Thomas rejected the Ninth Circuit's reasoning that the sign code was content-neutral because it distinguished only by type of speaker and type of event. He wrote that the code did not distinguish by type of speaker, nor solely by event, but rather by purpose of communication. Further, if it did distinguish by speaker, he argued that would be a restriction with a potential to control content, so "characterizing a distinction as speaker based is only the beginning -- not the end -- of the inquiry."

The majority ruling noted that it did not limit many types of criteria for regulating signs, such as "size, building materials, lighting, moving parts and portability." Citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789 (1984), it suggested that a town "may go a long way toward" prohibiting all signs on public property "in an evenhanded, content-neutral manner" and that rules narrowly tailored to specific safety issues "well might survive strict scrutiny".

Justices Samuel Alito, Anthony Kennedy and Sonia Sotomayor, all of whom joined the majority opinion, also joined in a concurrence by Alito that restated emphatic free speech principles but listed "some rules that would not be content based" on signage. Alito's list suggested rules for signs might be based on size, location (e.g. freestanding or "attached to buildings), lighting, changing electronic messages, public versus private property, commercial versus residential property, location on or off "premises" (presumably of a business), or "total number of signs allowed per mile of roadway."

Alito even suggested that "rules imposing time restrictions on signs advertising a one-time event" might be acceptable. (Kagan, in her concurrence, called out that suggestion's content-based nature, and its similarity to the rule that started the fuss in the first place.)

An *Atlantic* analysis by Garrett Epps in January 2015 had suggested the U.S. government's administrative branch, which filed an amicus brief on the city's side, was "clearly worried" that an overbroad ruling "might gut the Highway Beautification Act of 1965." The 1965 law distinguishes among kinds of signs to reduce clutter.

Epps' article singled out as "unfortunate" Justice Kennedy's prior opinion in *Sorrell v. IMS Health, Inc.*, which barred the state of Vermont from prohibiting pharmaceutical companies' use of physicians' drug prescription data for marketing purposes. He suggested "Kennedy's foggy version of 'content' will — very soon — take us to a place where government can't regulate advertising at all."

In fact the June 18 majority opinion cited sparingly to *Sorrell* but did agree with its logic in finding it impermissible to ban entire topics of discussion.

Justice Stephen Breyer took a dig at Sorrell in a solo concurrence arguing that "content discrimination... cannot and should not always trigger strict scrutiny." He wrote that "regulatory programs almost always require content discrimination," so that requiring strict scrutiny in every

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>>> Did Supreme Court Over-Reach In Sign Case?

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case would "write a recipe for judicial management of ordinary government regulatory activity."

More generally, he suggested that more lenient scrutiny of "commercial speech" regulation would not address the issue because "I have great concern that many justifiable instances of 'content-based' regulation are noncommercial."

Where he cited *Sorrell* directly was in criticizing the court for applying strict scrutiny even "where the less stringent 'commercial speech' standard was appropriate." At the same time he warned against "watering down" the strictness of "strict scrutiny" itself.

Breyer proposed that analysis for content-based discrimination should be only a "rule of thumb" to supplement a more basic balancing of "harm to First Amendment interests" and "relevant regulatory objectives."

Breyer proposed that analysis for content-based discrimination should be only a "rule of thumb" to supplement a more basic balancing of "harm to First Amendment interests" and "relevant regulatory objectives."

Kagan, Breyer, and Justice Ruth Bader Ginsburg -- the three who did not join the majority opinion -- together signed Kagan's concurrence. Kagan argued that many reasonable limits and exemptions regarding signs, such as laws about warning of hidden driveways or noting historical markers, might be in jeopardy under the majority opinion. In her view the majority had announced an overbroad principle to strike down an ordinance whose flimsy rationales could have been defeated with less grandiose arguments.

She warned "that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and reign themselves to the resulting clutter." She argued many restrictions could be tailored toward certain types of signs while remaining neutral — for example, rules on lighting home address numbers. Kagan looked to cases including Taxpayers for *Vincent and City of Ladue v. Gilleo*, 512 U. S. 43 (1994) for a milder view of scrutiny for local sign regulations.

Kagan wrote that the majority did not need to respond in terms of strict scrutiny to arrive at its ruling. By imposing too strict a standard, she wrote, the court might make it the courts' business to "determine that a town has a compelling interest in informing passersby where George Washington slept" or that it is sufficiently necessary to post signs warning of hidden driveways -- all this at the expense of "democratically enacted local laws" that would not necessarily endanger the First Amendment.

The *New York Times'* coverage noted that Kagan was the author five years ago of a law review article expanding on similar issues.

The American Planning Association (APA), which had joined in an amicus brief by municipal governmental organizations, reacted to the June 18 ruling with mixed feelings. Its press release attributed a statement to its executive director, James Drinan, expressing relief that six of the nine justices "continue to believe that certain kinds of distinctions... may continue to be regulated locally under today's decision". He appeared to be referring to the signers of the Alito and Kagan concurrences.

But the statement quoted APA President Carol Rhea as saying "Today's ruling casts uncertainty over necessary codes."

The case is Reed et al. v. Town of Gilbert, Arizona et al., No. 13-502, decided June 18, 2015

Briefs are on the American Bar Association here. ■

EIR Need Not Find Compliance With Every Plan Policy, Court Rules

BY WILLIAM FULTON

In reviewing a project's consistency as part of an environmental review, a city need not comply with every single general plan policy so long as it concludes that most general plan policies are being followed, the Fourth District Court of Appeal has ruled.

In a case involving a proposed bridge and parking garage in Balboa Park, the appellate court also overruled a trial judge's ruling that the City of San Diego violated its own municipal code by concluding that there would be "no reasonable beneficial use" of the famed Plaza de Panama if the bridge project were not built.

The case involves a proposal to remove automobiles from the Plaza de Panama in order to avoid conflicts between pedestrians and automobiles. The proposal would include construction of a new bridge, the Centennial Bridge, that would connect the historic Cabrillo Bridge to a new underground parking garage south of the Plaza.

The relevance of the court ruling isn't clear, however. In 2013, then-Mayor Bob Filner simply closed the Plaza to traffic, so currently cars do not traverse the Plaza even though the bridge has not been built. Mayor Kevin Faulconer, who supports the new bridge, said the city staff would review the ruling to see whether the bridge project should go forward anyway. [http://www.utsandiego.com/news/2015/may/28/balboa-ruling-bypass-soho/]

After the City Council approved the bridge project in 2012, Save Our Heritage Organization (SOHO), a prominent historic preservation group in San Diego, filed suit against the city on a wide variety of grounds.

Most significantly from a local perspective, SOHO argued that the city had violated Municipal Code Section 126.0504, which requires – at least in situations where there are impacts on historic resources -- that the city find that there can be "no reasonable beneficial use" of the property in question unless the project is constructed.

The city acknowledged that the new bridge would have a significant visual impact on the historic resource of Cabrillo Bridge. However, it found that there could be "no reasonable beneficial use" of the property without the new bridge because conflicts between pedestrians and vehicles in the Plaza de Panama would continue.

Superior Court Judge Timothy Taylor ruled in favor of SOHO, saying there was no substantial evidence for the ruling. But the appellate court disagreed.

Writing for a unanimous three-judge panel, Justice Alex McDonald said the city had demonstrated that "denial of the Project would mean traffic congestion and conflicts between pedestrians and vehicles would continue to burden the users of the (Plaza de Panama) Complex, and denial of the Project would prevent City from recapturing those areas currently being claimed and used by vehicles as thoroughfares and parking lots and reclaiming those lands for parklands and pedestrian spaces."

More important from a statewide perspective was SOHO's challenge to the city's conclusion – again under the municipal code – that substantial evidence exists to support the conclusion that the project would not adversely affect the city's land use plans.

The EIR documented in detail a wide range of land use plans and policies calling for improvements to pedestrian use of the Plaza and a decrease in pedestrian-vehicular conflicts, including the city general plan, the Balboa Park master plan, and the Central Mesa precise plan. The EIR also documented many aspects of the proposed project that promoted those goals.

However, as McDonald put it, "SOHO appears to assert that, as long as a project opponent can identify any stated goal or policy within an applicable land use plan that would be adversely affected by a project, the decision-maker is precluded from finding approval of a project would not adversely affect the applicable land use plans even if the decision maker finds, based on substantial evidence, the proposed project would be consistent with vast majority of the goals and policies of the applicable land use plans."

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As Judge Taylor had, the trial court, the appellate court rejected this reasoning. In fact, he said, case law stands contrary to this proposition.

Justice McDonald quoted at length from Sequoyah Hills Homeowners Assn. v. City of Oakland (1993) 23 Cal.App.4th 704, in which the First District wrote: "It is beyond cavil that no project could completely satisfy every policy stated in the [general plan], and that state law does not impose such a requirement A general plan must try to accommodate a wide range of competing interests—including those of developers, neighboring homeowners, prospective homebuyers, environmentalists, current and prospective business owners, jobseekers, taxpayers, and providers and recipients of all types of city-provided services—and to present a clear and comprehensive set of principles to guide development decisions. Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be 'in harmony' with the policies stated in the plan. It is, emphatically, not the role of the courts to micromanage these development decisions.

The Case:

Save Our Heritage Organization v. City of San Diego, No. D063992 [http://www.courts.ca.gov/opinions/documents/D063992.PDF]

The Lawyers:

For Save Our Heritage Organization (plaintiff and appellant): Susan Brandt-Hawley, susanbh@preservationlawyers.com

For Plaza de Panama Committee (real party in interest and appellant): G. Scott Williams, Seltzer Caplan McMahon Vitek, swilliam@scmv.com

For the City of San Diego (defendants and respondents): Jana Mickova Will, Deputy City Attorney, jwill@sandiego.gov ■

>>> North, South Score Equally in AHSC Recommendations

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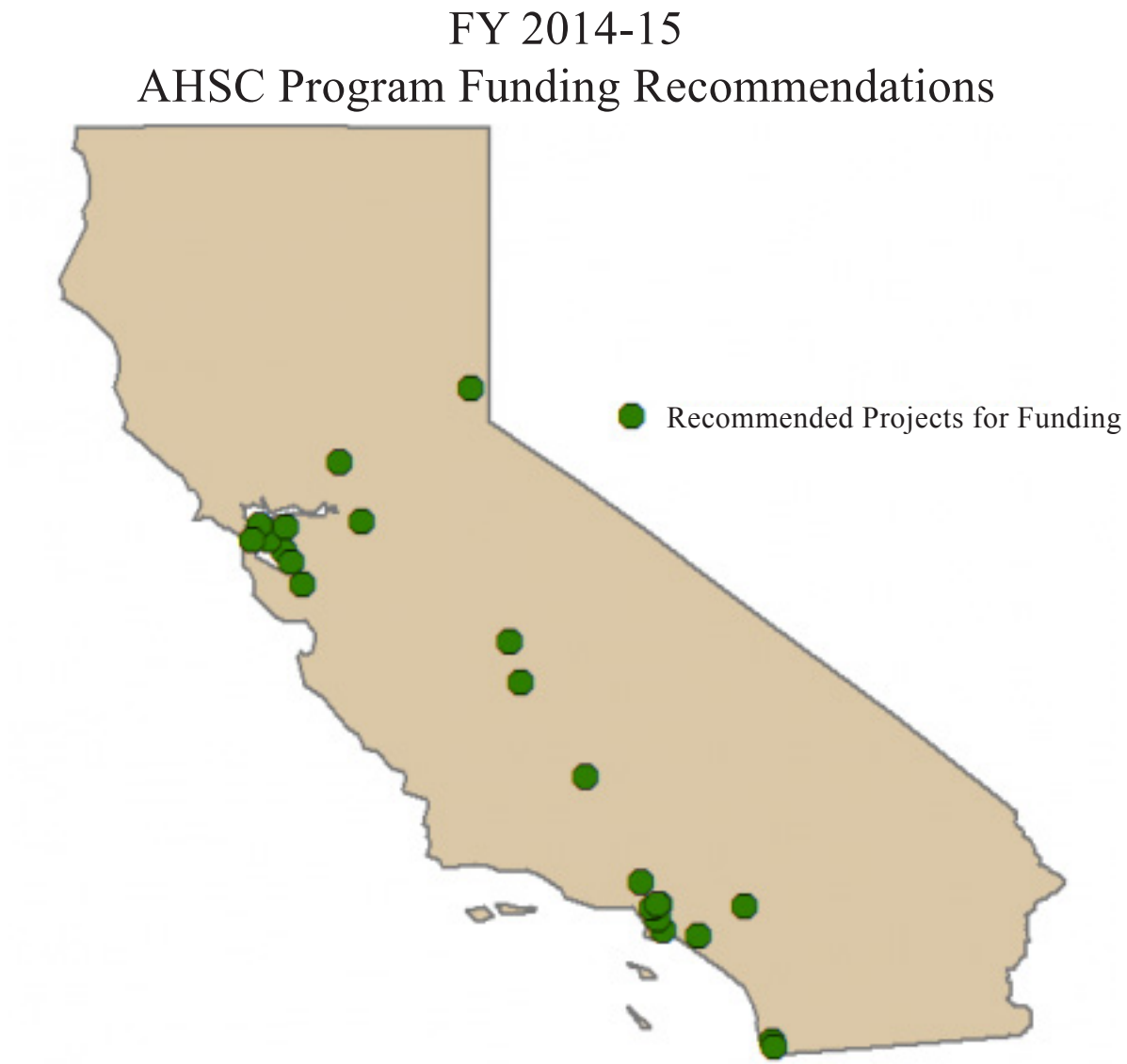

automobiles, the projects will save 81 million gallons of gasoline annually and prevent emission of three-quarters of a million metric tons of greenhouse gas emissions.

Program officials say that the geographic parity that emerged was coincidental. Projects were evaluated according to a strict set of criteria, with projects scored and ranked according to the percentage of criteria that they fulfilled. The top project, Sylmar Court Apartments in Los Angeles, fulfilled 97.632 percent of the selection criteria. The final project to make the cut, Riviera Family Apartments in Walnut Creek, scored 63.776 percent. Several high-scoring applicants were disqualified because they exceeded jurisdictional caps. All told, $130 million in projects in the SCAG and MTC regions were not recommended for funding.

"This has been a purely competitive program from start to finish," said SGC Executive Director Mike McCoy in a conference call. "We are most concerned with reducing the greatest amount of greenhouse gases we can per state invested dollar. The programs in Southern California did

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>>> North, South Score Equally in AHSC Recommendations

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extremely well in that category...part of it was exceedingly good leverage in their top performers."

Beyond the big two regions, the San Diego Association of Governments region had two projects. No other MPO had more than one.

Fifty percent of the award criteria centered on projects' ability to curb greenhouse gas emissions. Project readiness and ability to achieve other related policy goals constituted the remaining half. The only geographic constraints were "jurisdictional caps," which sought to prevent any one jurisdiction from receiving too many projects. These caps put three qualified projects out of the running. McCoy said that program staff are likely to evaluate the efficacy of these caps for the next round of funding.

Program officials say that the geographic parity that emerged was coincidental

The AHSC program strove to award at least 50 percent of funding to disadvantaged communities, and 50 percent had to go to housing. It blew past those goals, with 21 of the 28 winners located in disadvantaged communities. Likewise, 26 of 28 winners include affordable housing components. The majority of grant recipients are private or nonprofit housing developers.

"Recommended projects meet and exceed those co-benefits as well as the other benchmarks that we were required to do," said California Housing and Community Development Director Susan Riggs in the conference call.

AHSC projects had to qualify in one of two categories: transit oriented developments or integrated connectivity projects, the latter being suburban and rural projects that are connected to transit but without the frequency of service that urban projects would have. Winners were evenly split among TOD's and ICP's.

Recommended grants range from $1 million to $10 million. In San Francisco, the Tenderloin Neighborhood Development Corporation's Eddy & Taylor Family housing was tapped for the largest award.

Projects in the SANDAG region received only two awards, but both are sizable: $9.2 million for Westside Infill Transit Oriented Development in National City and $7 million for the South Bay Bus Rapid Transit (BRT) Project. Also in the top four is Truckee Railyard Downtown Corridor Improvements Project, with $8 million.

Leveraging of other funding sources was one of the program's key selection criteria. McCoy said that, overall, the project awards are leveraged at a 6:1 ratio. The total value of the 28 projects is over $700 million.

The SGC board will consider these recommendations at its June 30 meeting. SGC staff is already preparing for next year's funding round, in which over $400 million could be available. Workshops will take place July 14 in Sacramento and July 20 in Los Angeles.

Program officials say that this year's applicants bode well for next year. McCoy said that 105 of the original 147 concept applicants met the program's basic criteria. He encourages many of those projects to re-apply next year.

On the conference call, Riggs of HCD admitted that this year's program was "a really quick turnaround," from last July when the program was launched. She said that, with more time, projects will be better equipped to prepare applicants and to deliberately incorporate program criteria into their development plans.

"We don't think of them as losers," said Riggs. "We think of them as potential future winners." ■

Resources:

AHSC Project Recommendations (pdf)

Descriptions of Recommended Projects (pdf)

Map of Recommended Projects (pdf)

insight WILLIAM FULTON

>>> No Way Builders Were Going to Win San Jose Case

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petard by quoting his opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), to support her conclusion. And she basically invalidated a key portion of *Building Industry Assn. of Central California v. City of Patterson* (2009) 171 Cal.App.4th 886, which struck down Patterson's inclusionary ordinance. [http://www.cp-dr.com/node/2290]

Chief Justice Tani Cantil-Sakauye concluded that the San Jose's inclusionary housing ordinance is not an exaction imposed on housing developers but rather a land-use restriction no different than a zoning ordinance – or, for that matter, rent control.

Ruling for a unanimous court, Chief Justice Tani Cantil-Sakauye concluded that the San Jose's inclusionary housing ordinance is not an exaction imposed on housing developers but rather a land-use restriction no different than a zoning ordinance – or, for that matter, rent control. "This condition does not require the developer to dedicate any portion of its property to the public or to pay any money to the public. Instead, like many other land use regulations, this condition simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale," she wrote.

Homebuilders have always argued that inclusionary housing ordinances – which require them to sell some of their units at a below-market price – is unfair to them because they are required to carry the burden for addressing the broad-ranging social problem of affordable housing. Why, their argument goes, should they be required to provide affordable housing just because they are in the housing business?

The conventional answer might well have been unconstitutional in the San Jose case – that every high-end home they build means one less affordable home, and therefore homebuilders must mitigate the impact of their actions. Cleverly, however, this was not how the San Jose ordinance was crafted. Instead, the ordinance acknowledged that affordable housing is a wide-ranging problem, not one created by housing developers. And that, ironically, is what allowed Cantil-Sakauye to find the ordinance constitutional.

San Jose passed the inclusionary ordinance in 2010 as part of the city's response to the regional housing needs assessment, which concluded that 60% of the city's housing had to be affordable in order to meet the goals of the state Housing Element law. The ordinance called on housing developers to make 15% of their units available for sale at affordable prices, though it also permitted developers to pay a fee or build the units off-site as well. The trial court ruled in favor of the homebuilders but the Sixth District Court of Appeal reversed, ruling in favor of the city. [http://www.cp-dr.com/node/3382]

The homebuilders' basic argument was that the inclusionary ordinance is an exaction – that is, mitigation for the impact of building market-rate housing – and therefore should be measured against the legal standard for unconstitutional takings laid out in a line of cases that began with *Nollan*. In essence, the argument was that San Jose should have had to prove that the 15% inclusionary housing requirement was "roughly proportional" to the impact on housing affordability created by the construction of any given development project. Furthermore, the homebuilders did not make a constitutional argument as applied to any individual case. Rather, they argued that the ordinance was unconstitutional on its face because of the takings issue.

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insight WILLIAM FULTON

>>> No Way Builders Were Going to Win San Jose Case

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But the Supreme Court rejected this argument. Instead, the court agreed with the city and the appellate court that the ordinance is simply a land-use restriction – similar to a price control mechanism such as rent control – and therefore the standard of review is simply "whether the ordinance bears a real and substantial relationship to a legitimate public interest".

The court devoted considerable time to the *Patterson* case, in which the appellate court struck down the city's methodology for devising an inclusionary housing fee.

Again and again in the course of a ruling stretching to more than 50 pages, Cantil-Sakauye came back to the argument that inclusionary housing is just another land-use restriction. She said that a restriction on the price of some units is no different than a restriction on the use of land – commercial rather than residential or a ban an adult businesses – nor a limitation on height or setback. In particular, she noted, inclusionary housing is no different than a system of price controls such as rent control, which has been upheld constitutionally on repeated occasions.

In referring to the *Nollen* case, the chief justice made a big deal out of quoting Scalia as saying "*where the actual conveyance of property* is made a condition for the lifting of a land-use restriction, since in that context there is heightened risk that the [government's] purpose is avoidance of the compensation requirement, rather than the stated police-power objective" upon which the condition is ostensibly based.

She pointed out that a conveyance of property was *not* required to comply with the inclusionary ordinance. By the same token, she took the air out of another – seemingly contradictory – builders' argument: that simply because paying a fee was an option, therefore the inclusionary housing ordinance must be an exaction.

The court devoted considerable time to the *Patterson* case, in which the appellate court struck down the city's methodology for devising an inclusionary housing fee. Although the court did not touch most of the case, Cantil-Sakueye did "disapprove" one particular aspect of the case on which the builders attempted to rely. ■

New Clean Water "WOTUS" Rule Covers Vernal Pools

BY MARTHA BRIDEGAM

The federal government issued its long-awaited "Waters of the United States," or WOTUS, definition in late May, extending federal authority to California's vernal pools and other naturally forming pockets of water. However, the new rule does not regulate groundwater nor many subsurface flows and states it will maintain existing provisions for stormwater systems and some ditches.

However, business and Congressional opposition to the rule remains fierce. The Association of California Water Agencies expressed disappointment with the rule, saying "ACWA remains concerned that the final rule is too broad and our requests that water conveyance systems and water infrastructure adjacent to 'navigable waters' be excluded from the proposed rule was not met."

Developers and local officials as well as agricultural and industrial businesses had sought to limit the "Waters of the United States" definition for fear it might impose Clean Water Act permitting processes on construction and water management proposals that had hitherto required only local approvals. The rule does make concessions to concerns from business, real estate and rural local governments that existing drainage systems and permit exemptions might be disrupted. California voices were very much included in this pattern, and many California local governments expressed anxiety about their stormwater discharge permits.

As the "WOTUS" abbreviation suggests, the rule has been strongly identified with the Obama Administration by its opponents; the White House backed the rule with a supportive statement from the President. It cross-posted a position paper from the EPA, which prefers to call it the "Clean Water Rule."

But it's debatable whether the new final rule expands federal authority or merely restores some of the scope intended by Congress before the question of the Clean Water Act's application to smaller waters was muddied by ambiguous Supreme Court rulings and the EPA's interim attempts to apply them practically.

The rule itself states it defines a narrower "scope of jurisdiction" than "under the existing regulation."

As anticipated, it applies federal Clean Water Act regulation to many small and intermittent water sources, such as marshes, small streams, California's vernal pools and the Eastern peat bogs known as pocosins. At the same time it emphasizes waters' status as tributaries to larger flows. It requires a tributary to have a "bed, bank and ordinary high water mark" and protects other waters through the logic of "significant nexus" to navigable waters. It says it "does not add any additional permitting requirements on agriculture".

Clean water advocates from arid regions may be disappointed by a logic that views the nature of headwaters in terms of tributaries rather than groundwater. It states it "does not regulate shallow subsurface connections nor any type of groundwater, erosional features, or land use."

The most favorable news for public officials and real estate developers may be a statement in the EPA's announcement summary that ditches are only covered if they could carry pollution downstream and that the rule "maintains the status of waters within Municipal Separate Storm Sewer Systems." The rule's preamble says it does not change exemptions from existing federal stormwater permitting requirements.

As noted in an early commentary from the Allen Matkins law firm, the new rule limits itself to new jurisdictional determinations, locking in most existing decisions on Clean Water Act applicability.

The EPA's opening assurances suggest the new final rule may not do much to change the terms of §402 National Pollutant Discharge Elimination System (NPDES) permit for runoff or wastewater, but it might well broaden the applicability of §404 permit requirements for "discharge of dredged or fill material" into "waters" that can include wetlands and ditches. Other potentially affected areas include state and federal water quality standards and the coordination between them, oil spill prevention programs, pesticide permits and Total Maximum Daily Load (TMDL) standards for specified pollutants in waterways. (Quantities

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>>> New Clean Water "WOTUS" Rule Covers Vernal Pools

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of trash in urban waterways are increasingly regulated under TMDL standards in California.)

The full 297-page rule, in pre-publication form, is available on the conspiciously user-friendly Web page that the EPA has devoted to the "Waters Of" rulemaking process.

Bitter National Publicity Campaign

In recounting California's bad bygone days, Carey McWilliams relates a story that the land baron Henry Miller used to take title to public acres by claiming they fell under laws for distribution of "swamp and overflow lands" -- and would bolster those claims by having himself dragged over the land in a boat by teams of horses. Lately agribusiness, industry and real estate groups, and a fair percentage of Congress as well, have accused the EPA of claiming public jurisdiction over private lands by nearly similar standards.

For a year and more, large-scale agricultural and industrial business groups, especially the American Farm Bureau Federation, have framed the "Waters Of" rule as a leading current menace in their campaigns against federal regulatory authority in general and the EPA in particular. By some accounts more than a million public comments were filed on the rulemaking.

The EPA has responded by promoting the rule publicly to an extent that has drawn criticism in light of federal lobbying rules. The competing Twitter hashtags #ditchtherule and #ditchthemyth call up separate large clouds of commentary with predictably different moods. Similarly, the EPA page mirrors the Farm Bureau's "Ditch The Rule" Web site.

The National Resources Defense Council (NRDC) was prominent among environmental groups treating the rulemaking process as an occasion to broaden EPA jurisdiction. Environmental advocates' comments on the rule were often phrased in somewhat muted and technical language and often spoke in terms of public health rather than stewardship of natural habitats. This was presumably to avoid offering targets to right-wing indignation. Initial NRDC reaction to the May 27 announcement took the form of a blog post by president Rhea Suh. Reflecting the sense of an ongoing campaign rather than a victory, it was captioned, "Americans Need the Clean Water Rule to Keep Our Drinking Water Safe".

The rule does make concessions to concerns from business, real estate and rural local governments that existing drainage systems and permit exemptions might be disrupted.

The Farm Bureau's initial reaction to the final rule said "we find little comfort in the agency's assurances that our concerns have been addressed in any meaningful way," attacked the EPA's "aggressive advocacy campaign," and said that in reviewing the rule "we are looking in particular" at the rules on ephemeral waters.

Difficult Legal History

The two main court cases in the "Waters Of" interpretive tangle -- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (known as SWANCC) and *Rapanos v. U.S.*, 547 U.S. 715 (2006) -- both involved choices to fill in wetlands that had formed at distances from the "navigable waters" that are at the core of Clean Water Act jurisdiction.

The *SWANCC* ruling held the EPA could not stop plans to dump municipal garbage in a former gravel pit despite the EPA's argument that ponds in the pit had become a habitat for federally protected migratory birds. The much-debated split decision in *Rapanos* concerned a property owner's unilateral act of filling in a wetland that was miles from any

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"navigable" water.

Rules derived from *SWANCC* and *Rapanos*, however, have not been limited to such stark changes in landscapes. For example, the National Association of Counties warned in a briefing on the issue last year that §404 permits have been required for maintenance of ditches, including ditches managed by county governments.

As noted in an early commentary from the Allen Matkins law firm, the new rule limits itself to new jurisdictional determinations, locking in most existing decisions on Clean Water Act applicability.

In the text of the new rule, the EPA and Corps read *Rapanos* as showing agreement among the Justices that the Clean Water Act applies beyond "navigable waters." They grant importance to a rule stated by Justice Anthony Kennedy in a concurrence that added the tiebreaking fifth vote to an opinion otherwise stated more conservatively by Justice Antonin Scalia writing for four justices. Kennedy's much-debated rule would apply the Clean Water Act to peripheral waters or wetlands that have a "significant nexus" with navigable or potentially navigable waters. The EPA and Corps apply this "significant nexus" principle in stating distinctions under the rule.

Opposition in Congress

Bills are pending in Congress to block the rule from taking effect -- and those are only the latest of several efforts at legislative overruling. An initial attempt to stop the EPA and Corps rulemaking trajectory passed last year's House as H.R. 5078. That bill died with the session but the "Cromnibus" year-end budget bill forced the EPA to withdraw a March 2014 "interpretive rule" from the "Waters Of" proposal that would have addressed farm conservation activities.

The bills moving to block EPA over the past several weeks are H.R. 1732 and S. 1140. (*Politico* has detailed coverage of recent reactions and maneuvers in Congress and anticipated lawsuits.)

The leading bill on the matter in Congress, H.R. 1732, passed the House on May 12. It would specifically invalidate the new rule and would require the EPA and Corps to start the rulemaking over in mandatory detailed consultation with state and local officials and "stakeholders".

S.B. 1140 was a recent subject of hearings before the Senate Environment and Public Works Committee's Subcommittee on Water and Wildlife. It would invalidate any interpretive rule on the "Waters Of" question to the extent it failed to comply with new rules for consultation with state and local officials and restrictions on content including avoidance of "intrusive Federal oversight".

Sen. John Barrasso, R-Wyoming, said in introducing H.R. 1140 last month, "What the administration is proposing now simply makes no sense. Under ... the new rule they are proposing, isolated ponds could be regulated as waters of the United States. This is the kind of pond that might form in a low-lying piece of land with no connection to a river or a stream. It could be in someone's back yard."

But at the hearing, which was dominated by supporters of H.R. 1140, Prof. Patrick Parenteau of Vermont Law School protested that the bill was "based on bad science, bad law, and bad policy," particularly in assumptions that some water bodies could be "isolated" or that a stream could be fairly defined as a "natural channel" considering the existence of structures such as the lower Los Angeles River. ■

Valencia Water Company's Status Becomes a Newhall Ranch Football

BY MARTHA BRIDEGAM

The longtime battle over Newhall Ranch has moved to a new venue – in this case, the legal status of the private water company likely to serve the development project, which is currently not regulated by any entity.

The Valencia Water Company supplies water day by day to some 31,000 existing hookups serving about 120,000 people in the Santa Clarita Valley of Los Angeles County. But legally the Valencia Water Company (VWC) has been in an odd state of existence for a little over a year. It is a private company wholly purchased by a public entity, the Castaic Lake Water Agency (CLWA). Uniquely, it is not regulated by the California Public Utilities Commission (CPUC) but continues to operate as a private entity -- lately with a county court's approval.

At present, VWC may be California's only active water company that is neither public, nor mutual, nor regulated as a private entity by the California Public Utilities Commission (CPUC). The company still answers to the State Water Resources Control Board for the quality of its drinking water. Otherwise, opinions differ whether VWC is public or private, what rules apply to its continued operation, and even by what right it operates at all.

Yet Valencia Water is still facing a stiff challenge from local environmentalists – many of whom have spent decade challenging the Newhall Ranch project -- the proposed development by the Newhall Land and Farming Company that, per current plans, would build nearly 20,000 new residential units in the Santa Clarita Valley of Los Angeles County. VWC is envisioned as the water provider for the Newhall Ranch project. VWC was once a subsidiary of Newhall Land and its general manager formerly served in a similar capacity for the development company.

Santa Clarita Organization for Planning and the Environment, the longtime environmental group in the area commonly known as SCOPE, recenty filed a CPUC complaint alleging "apparent prejudicial preference to former parent company promised by a regulated utility prior in purchase contract to transfer of ownership." It said the CPUC had previously required VWC to file a new Water Management Plan before supplying water to the Newhall Ranch and to serve old and new customers fairly -- and yet Article VI of the agreement promised actions that would help protect water supplies for the development.

Dan Masnada, VWC's general manager, described SCOPE and its ally Friends of the Santa Clara River as "trying to dictate land use planning in northern L.A. County" by "trying to keep us from augmenting our water supplies." But from the environmental groups' perspectivethe Newhall Ranch proposal is merely the biggest demand placed on the Valley's resources, which are already stretched thin. SCOPE president Lynne Plambeck wrote that she was "frankly tired of being accused of trying to stop growth every time we demand good planning that is common practice in many other parts of the state or any time we demand that laws be followed as is required of most people and most developers."Plambeck confirmed the Newhall Ranch situation is a significant reason why SCOPE members want the Valencia Water Company to be directly accountable to an outside balancing power -- either the PUC or local ratepayers.

The legal fronts on which the Newhall Ranch battle is being fought seem endless. As recounted in *CP&DR*'s January coverage, one case in the multipart Newhall Ranch litigation is awaiting an oral argument date before the California Supreme Court, significantly on greenhouse gas reduction rules under AB 32. As also reported in January, SCOPE and other groups are separately challenging plan's Landmark Village and Mission Village phases, and have sued over federal agencies' environmental resource reviews.

On April 21, 2015, the Second District Court of Appeal, Fifth Division, issued an unpublished ruling that upheld the Landmark Village environmental impact report (EIR). Plambeck said the petitioners were deciding which aspects of the ruling to appeal. She said it raised emissions issues similar to those before the state Supreme Court.

Focus on the water company fight

This spring, however, the VWC dispute seems the most active front in the Santa Clarita Valley land-use war.

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>>> Valencia Water Company's Status Becomes a Newhall Ranch Football

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A former subsidiary of the Newhall Land and Farming Company, VWC was purchased in 2012 by the Castaic Lake Water Agency (CLWA) in a settlement of an eminent domain action. In February 2014, the California Public Utilities Commission (CPUC) ruled that this cordial $73 million settlement -- which it termed a "consensual condemnation" -- meant VWC was no longer a "private corporation" eligible for CPUC regulation. The ruling canceled VWC's certificate of public convenience and necessity.

The legal fronts on which the Newhall Ranch battle is being fought seem endless.

Last year after the CPUC decision, a statement from the Newhall County Water District, where Plambeck is one of five board members, called the resulting lack of either CPUC regulation or a public board of directors "taxation without representation." On March 10, 2015, however, Judge Robert H. O'Brien of the Los Angeles Superior Court agreed with them, ruling that the purchase was legal and that VWC continued to exist as a private entity distinct from CLWA.

Further proceedings are inevitable. Although last year's CPUC ruling is already in effect, the CPUC case is awaiting a Commission decision whether to grant Newhall Land's request for rehearing. Plambeck said SCOPE would appeal the March Superior Court decision. A parallel court challenge to the VWC purchase is still pending by NCWD.

Plambeck argued there was no legal provision available for a private entity to sell water without being regulated by the CPUC. She said water sellers can be municipal agencies, mutual water districts, county waterworks, state-established agencies like CLWA, or CPUC-regulated private entities -- but VWC is now none of those. She wrote, "Their action is illegal. They are operating illegally. There is no structure in California law to permit them to operate they are operating. They are cowboy outlaws."

But Ed Casey of Alston & Bird, an attorney for VWC, said, "Every private water company has the authority to sell water in the state of California. Simply because it's not subject to the PUC's regulatory requirements doesn't mean it doesn't have the legal right to sell water and if somebody wants to show me a legal argument to the contrary I would like to hear it."

In the Superior Court lawsuit leading to the March ruling, SCOPE had argued CLWA's purchase of VWC was improper in part because, as a legislatively created wholesaler of water from the State Water Project (SWP), CLWA lacked authority to sell water at retail except within boundaries specified by its authorizing legislation.

The boundaries in question were defined in AB 134 of the 2001-02 session, which was a legislative response to a similar dispute following CLWA's 1999 purchase and absorption of the Santa Clarita Water Company (now CLWA's Santa Clarita Water Division).

AB 134 was approved amid litigation, brought by Plambeck among others, over the propriety of the 1999 purchase, principally in *Klajic v. Castaic Lake Water Agency* (2001) 90 Cal. App. 4th 987 (*Klajic I*) and *Klajic v. Castaic Lake Water Agency* (2004) 121 Cal. App. 4th 5. (*Klajic II*).

In the recent March decision, Judge O'Brien found CLWA's purchase of VWC was not blocked by Article XVI, § 17 of the California Constitution, which allows public entities to acquire stock of "any mutual water company or corporation" in order to supply water. Since the Santa Clarita Water Company was a mutual water company, he found *Klajic I* didn't settle whether the words "...or corporation" included VWC. On that issue, he flatly contradicted the CPUC. The Commission's 2014 decision, drawing on legislative history, had found § 17 gave permission only for public entities to purchase not-for-profit mutual water companies. But O'Brien wrote that the CPUC reasoning was not binding -- and instead he held as a matter of statutory construction that the VWC purchase

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was allowed.

Further, O'Brien held there was no barrier to CLWA's ownership of VWC under § 12944.7 of the state Water Code, which provides that if an agency is restricted by its authorizing legislation to wholesale distribution of water -- and CLWA is under that restriction in the VWC service area -- then the only way it can sell water at retail is under a written contract with a CPUC-regulated water corporation providing retail service to the area in question.

Plambeck argued there was no legal provision available for a private entity to sell water without being regulated by the CPUC.

O'Brien agreed with CLWA that it was not acting through VWC, only owning it. The five directors on Valencia's board consist of Masnada, CLWA's administrative services manager, the retail manager of the Santa Clarita water division, and VWC's general manager and vice president. But O'Brien found the operations were not sufficiently merged to justify SCOPE's "alter ego" allegations.

Water is, however, conveyed from CLWA to VWC. Masnada wrote that CLWA received 33,875 acre feet (AF) of imported water in 2014, consisting of 451 AF of currently contracted SWP water, "7,746 AF of SWP 'carryover' from prior years and most if not all of the roughly 14,000 AF extracted from our banking programs." (CLWA owns water banking rights in two storage districts in Kern County.) Of that he wrote that 7,668 AF were delivered to VWC. Meanwhile he wrote that VWC pumped 21,428 AF of groundwater and recycled about 500 AF.

Since VWC occupies the "sweet spot of the aquifer," Masnada said Valencia has been trying to pump more than its share of groundwater to spare the other Santa Clarita Valley retailers, since some wells are going dry at the upward east end of the valley. He wrote that VWC expected to withdraw less water from storage in the current year, when SWP customers have been offered a 20% allocation, and likely would not need stored water at SWP allocations above 25%.

What's public now?

Adding to the uncertainty, earlier this year VWC conducted a ratemaking proceeding in the style of a Proposition 218 local governmental process, but continued to assert its private status, both in the board's approval resolution and in a separate response to a SCOPE member's public records request.

Casey saw no contradiction: "If there is no alter ego relationship, the identity of the entity that owns Valencia Water Company is irrelevant, which means that Valencia Water Co is not a public agency within the meaning of either Prop 218 or the Public Record Act."

Casey said "Valencia Water Company is subject to the same rules any private entity would be subject to," in that a private corporation must turn over records for reasons such as litigation or subpoenas "but there is no other so-called public disclosure requirement." He said, "We comply with the self-same procedures. If some people like to have more, that's their policy position. But at this point in time there is no legal requirement to do so."

But Casey and Masnada each said VWC voluntarily conducted a public meeting on the ratemaking with opportunities for public comments. Masnada wrote that fewer than 40 protests were filed, so "VWC customers appear to be satisfied with the service they are receiving and, more to the point, don't have the so-called concerns that SCOPE has in regards to acquisition of VWC by CLWA."

Plambeck contended the ratemaking process was improper.

But Casey said, "We decided to follow the PUC process because it was *a* process and we had been under that process for years and we thought it better to continue that process until some entity, whether it's the court or the PUC, told us that it did not have jurisdiction over us." He

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said "I don't think it's fair ... to criticize Valencia for what it did, when we tried to promote transparency and receive direct customer input to the board."

Are profits OK?

The ratemaking procedure surprised Danilo Sanchez, program manager of the water branch at the Office of Ratepayer Advocates (ORA) at the CPUC. Making clear he spoke only for ORA, not for the utilities regulator itself, he said, "They can't be for-profit and not under the Commission's jurisdiction." He said that would be an "unregulated monopoly."

Adding to the uncertainty, earlier this year VWC conducted a ratemaking proceeding in the style of a Proposition 218 local governmental process, but continued to assert its private status

In reading through VWC's posted rate-setting document, he said the water rates were comparatively cheap at lower billing tiers but he was surprised to see projected "returns on equity". He asked, "If they are part of a public agency, should they be for-profit?" Reading through the document, he said, "I've never seen anything like this before."

Regarding the concern Sanchez raised about profits, Casey offered "the same exact response" regarding the irrelevance of the identity of VWC's owner in the absence of an alter ego relationship.

Sanchez further said in his view the tariff sheets listing water prices would have become invalid 30 days after last year's decision ended CPUC jurisdiction.

Future public status?

Masnada treated the separation of the entities as temporary, saying, "Until the litigation is resolved, the utility will continue to operate as a separate corporate entity." Regarding VWC, he said "We would dearly love to take it public." But he suggested SCOPE was "waving the red flag of AB 134" against allowing it to become public. Dunn put it more strongly: "They are trying to stop the public from getting public ownership of a private water company." Dunn said nobody had heard "a rational reason for why somebody would do that, other than that they just want to sue."

From SCOPE's side Plambeck favored a standalone public status for VWC: "It would be wonderful if the (VWC) ratepayers owned their own company and could hold elections." But she opposed its incorporation with CLWA, saying it would create a less accountable "vertical monopoly" between CLWA, as a water wholesaler, and VWC, as a water retailer. She said a public agency is supposed to safeguard the resources and the long-term sustainability of the community, and "what they are doing is directing water to special interests, not protecting the community."

Legislative suspicions

A side dispute developed this spring when SCOPE questioned whether CLWA could be seeking legislative ratification of its hope to run VWC directly, as happened with AB 134. This year's AB 727 by Assemblymember Scott Wilk, D-Santa Clarita, provides for adjustments to CLWA's enabling legislation. SCOPE especially questioned whether the old AB 134 boundaries that limit retail housing might be expanded by a phrase authorizing activities in groundwater basins "both within and outside the boundaries of the agency." But Masnada wrote that "The intent of that language had nothing to do with administration of VWC's groundwater resources on a retail (or any other) basis," writing that it had to do with recharging aquifers with recycled and imported water. The bill has been held over until next year. ■

Papacy Comes Down to Earth on Climate Change

It turns out that two of the world's biggest proponents of smart growth are Catholic. One of them is California Governor Jerry Brown, who once studied to be a Jesuit priest and, more recently, has promoted earthly initiatives like high-speed rail, the adoption of vehicle miles traveled metrics, and the most ambitious greenhouse gas reduction goals in the western hemisphere.

The other is the Pope.

Today the Vatican released Pope Francis' long-awaited encyclical concerning the environment. Drafted a month ago, the encyclical is essentially the Vatican's version of a white paper. It is meant to influence pretty much everyone who falls under Catholicism's sway, but it's bound to gain fans among secular policymakers.

Note to Pope Francis: Don Shoup is retiring from UCLA. Maybe his next gig can be as Vatican advisor – Pontiff of Parking? Bishop of Bicycling?

While the world may have expected airy proclamations about preserving God's creation and such, the Pope has recommendations for revitalizing Sodom and Gomorrah just as he does for preserving Eden. Parts of the encyclical read like Jane Jacobs, starting with the chapter heading, "Ecology of Daily Life." The Pope observes and recommends:

- In our rooms, our homes, our workplaces and neighbourhoods, we use our environment as a way of expressing our identity. We make every effort to adapt to our environment, but when it is disorderly, chaotic or saturated with noise and ugliness, such overstimulation makes it difficult to find ourselves integrated and happy.
- The feeling of asphyxiation brought on by densely populated residential areas is countered if close and warm relationships develop, if communities are created, if the limitations of the environment are compensated for in the interior of each person who feels held within a network of solidarity and belonging. In this way, any place can turn from being a hell on earth into the setting for a dignified life.
- This experience of a communitarian salvation often generates creative ideas for the improvement of a building or a neighbourhood
- Those who design buildings, neighbourhoods, public spaces and cities, ought to draw on the various disciplines which help us to understand people's thought processes, symbolic language and ways of acting....people's quality of life, their adaptation to the environment, encounter and mutual assistance. Here too, we see how important it is that urban planning always take into consideration the views of those who will live in these areas.
- There is also a need to protect those common areas, visual landmarks and urban landscapes which increase our sense of belonging, of rootedness, of "feeling at home" within a city which includes us and brings us together.
- Creativity should be shown in integrating rundown neighbourhoods into a welcoming city
- Many cars, used by one or more people, circulate in cities, causing traffic congestion, raising the level of pollution, and consuming enormous quantities of non-renewable energy. This makes it necessary to build more roads and parking areas which spoil the urban landscape.

(Note to Pope Francis: Don Shoup is retiring from UCLA. Maybe his next gig can be as Vatican advisor – Pontiff of Parking? Bishop of Bicycling?)

These statements are both obvious and breathtaking. They are obvious because they echo the goals that many planners have been pursuing for years. They are breathtaking for their eloquence and, even if for agnostics, for the enormity of the source from which they emanate. They also emphasize social justice more deeply than even the most environmentally conscious planners ever do. And, really, who ever thought a pope would call out *urban planning* by name? If Pope Francis is ever to be canonized, he has his first miracle.

Pope Francis himself is, of course, a city guy. He's from

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Buenos Aires, a city full of delights and troubles. And, really, the Papacy itself is urban. Angels and Demons would have been much less interesting, if not less grating, had it not been set in the extraordinary warren of history and humanity that is central Rome. Modern Rome is what it is in part because of the presence of the Vatican.

In fact, no one has used the world's urban network as cannily as the Catholic Church has. The hierarchy of cathedrals, churches, cardinals, and bishops mirrors the world's network of cities. The Church anticipated Saskia Sassen's theories on global cities by a few hundred years. It only stands to reason that the Pope would appreciate the power, and problems, of cities.

The Catholic Church has done a few amazing things for cities. Catholic cathedrals are some of humanity's most exhilarating works. The plazas in front of them are some of the world's great public spaces. (Subjugation of much of the "public" in many of those places, including in mission-era California, is another matter.) It's about time the Church gave the world something a little less imperialistic.

This is of course a surprising announcement for a historically conservative institution (to say the least), and it's naturally infuriating for members of the religious right, who now find themselves disavowing the figure who is, supposedly, God's messenger on earth. Unfortunately, this encyclical will probably just reinforce existing attitudes.

Progressives will hail it, and ignorant, self-serving climate deniers will reject it. Maybe, though, there are folks on the margins – those who are extraordinarily devout or who were extraordinarily ambivalent – and perhaps in out of the way places, including those in the developing world, who will be moved.

For everyone else it's a welcome, and even obvious, policy. That includes Gov. Brown, former Gov. Schwarzenegger, and the countless other supporters who have put California's environmental policies. Imperfect and incomplete as those policies may be (the Pope is not a fan of cap-and-trade), they put California at the forefront of this essential crusade. Having quit the seminary, Gov. Brown may have missed his chance to become Pope. But he's clearly a good Catholic.

May we all be so devoted to the salvation of our state and our world.

– JOSH STEPHENS | JUNE 18, 2015 ■