CALIFORNIA

PLANNING & DEVELOPMENT
REPORT

November 1989 | William Fulton, Editor & Publisher | Vol. 4, No. 11

State Law Subjects Fees To Greater Scrutiny

A new state law governing development fees apparently hasn't deterred local governments throughout California from imposing such fees. But they are conducting studies designed to show the "nexus"between fees and development, while property-rights lawyers are fighting in court to make such a nexus harder to prove.

Already this year, San Diego and Sacramento have approved housing fees on commercial development, and Los Angeles is in the process of following suit. These so-called "linkage" fees were once considered the exotic province of cities like San Francisco and Santa Monica.

Both the U.S. Supreme Court's 1987 decision in *Nollan v. California Coastal Commission* and the state law AB 1600 require local governments to prove a "nexus," or direct connection, between the need for the fee and the development on which it is imposed. In the case of housing fees, all three cities hired consultants to perform nexus studies. In a case that could lead to the most important decision since *Nollan*, however, the Commercial Builders of Northern California have challenged the validity of the Sacramento fee.

U.S. District Court Judge Edward J. Garcia issued summary judgment in favor of Sacramento, meaning he ruled in favor of the city without even holding a trial. But the case is likely to be appealed with the vigorous assistance of the Pacific Legal Foundation, a pro-property rights law firm based in Sacramento that won the *Nollan* case.

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Locals Lag Behind In Seismic Rehab

The devastating Bay Area earthquake on October 17 has focused new attention on California's 35,000 unreinforced masonry buildings — and on the fact that cities have been slow to implement a state law requiring that they be inventoried and dealt with.

Because of the tragic collapse of a section of the Nimitz Freeway in Oakland, the quake also re-opened the question of whether doubled-decked freeways should be constructed. In Los Angeles, several public officials called for Caltrans to stop construction on an upper tier for the Harbor Freeway, which is slated for use as a transitway.

Except for the freeway collapse, damage to unreinforced buildings caused most of the loss of life in the earthquake. Several people died in the collapse of a masonry office building in the South of Market area of San Francisco, and the collapse of unreinforced buildings in Santa Cruz's downtown shopping district resulted in three deaths. Many of the buildings dated from the 1880s.

Still, some structures experts said they were surprised that so many unreinforced buildings came through the quake undamaged. "On the way into town we've had a great deal of difficulty finding this earthquake," Frederick Krimgold, an architecture professor at Virginia Polytechnic Institute, told the MacNeil-Lehrer Report the day after the quake. Reinforced masonry buildings, as well as modern steel-

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Hurricane Hugo Brings Deluge of Takings Cases

Hurricane Hugo may have died out weeks ago, but its aftermath is likely to have a significant impact on land-use law.

Hugo struck the South Carolina coast only one year after that state passed a strong beachfront management law, which prohibits reconstruction of badly damaged homes on the beach. Even before the hurricane, several angry property owners had filed suit, claiming the law constitutes a "taking" of property under the U.S. Supreme Court's 1987 ruling in the *First English* case in Los Angeles. More lawsuits are expected now that the South Carolina Coastal Council, a state agency, has declared that about 150 homes destroyed by Hugo cannot be rebuilt.

The outcome of this war of lawsuits is hard to predict. In August, a state court judge in Charleston ruled in favor of a property owner and ordered the state to pay him $1.2 million. Then, on October 13, a federal judge in South Carolina laid down a more specific rule. U.S. District Court Judge Falcon Hawkins said a taking occurs only if a beachfront property owner is prohibited from rebuilding elsewhere on the same lot. Appeals are expected in both cases.

In California, the Coastal Commission routinely permits reconstruction of buildings on the same "footprint" after such natural disasters as fires and earthquakes.

In southeastern states, beach erosion has been a major environmental problem, especially on barrier islands. The South Carolina legislature passed the Beachfront Management Act last year as an amendment to its coastal zone management program. The law requires the Coastal Council to establish a "baseline" and prohibits reconstruction of destroyed buildings on the seaward side of the line. The baseline must be located landward of the crest of the primary oceanfront dune by a distance of 20 feet or 40 times the annual erosion rate, whichever is greater.

Last spring, some South Carolina legislators tried to weaken the law but failed. And after the hurricane hit in September, state Sen. Sherry Martschink, a Republican from Charleston, urged Gov. Carroll Campbell to suspend the beachfront law temporarily. However, the Coastal Council moved ahead in identifying structures that could not be rebuilt.

Even before Hugo, however, the Coastal Council was inundated with takings lawsuits. The first court ruling on the beachfront law came in August, when Larry Patterson, a state court judge in Charleston, ordered the state to pay property owner David Lucas $1.2 million in compensation. Though Lucas's two lots, located on the Isle of Palms, are 160 feet deep, they lie seaward of the baseline. The $1.2 million represents fair market value of the property, property tax paid since the law was passed, and simple interest on the mortgage balance. The case is *Lucas v. Coastal Council,* Court of Common Pleas 88-CP-10-66, in Charleston.

In mid-October, Judge Hawkins ruled simultaneously on three cases from Hilton Head Island. In two cases he ruled that a taking had not occurred because, even with the restrictions on the beach, property owners still had room to build on their lots. landward of the baseline. (*Esposito v. Coastal Council*, 88-2055-1, and *Feuer v. Coastal Council*, 88-3073-1, both filed in the Beaufort Division of U.S. District Court in South Carolina.) In the third case, *Chavous v. Coastal Council*, 89-0216-1, Hawkins found that a taking had occurred. Hawkins still must determine damages.

Though most South Carolina coastal residents are still digging out from the hurricane, land-use lawyers expect many more takings claims will be filed against the Coastal Council as a result of Hugo's destruction.

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Cities Lag Behind in Implementing Seismic Law

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supported structures, performed admirably in the quake.

The state's unreinforced masonry building law requires local governments to inventory such buildings and establish "earthquake hazard mitigation programs" by next January 1. According to a report by the California Seismic Safety Commission, however, only 8% of local governments had mitigation programs in place as of June 30. A third of all local governments in California had not even begun to inventory their buildings.

"First, there are no teeth in the law," said one Los Angeles-area urban planning researcher who has investigated the law's implementation. "And second, to cities it's a touchy political issue. It's often perceived as a tool for the city to justify things it would like to do anyway — like forcing redevelopment down the throats of property owners."

Dealing with unreinforced masonry buildings poses two difficult problems for local governments. The first is money. Retrofitting such buildings can cost anywhere from $5 to $20 per square foot. That kind of expense could spell economic disaster for many of the small businesses and residential landlords who own these buildings. In downtown Ventura, for example, property owners are resisting city proposals to reinforce their buildings, claiming that such a requirement may put many downtown merchants out of business.

One possible source of funds is Proposition 77, the $150 million housing bond issue which sets aside a substantial portion of its funds for seismic rehabilitation. So far, however, the state Department of Housing and Community Development has not released any of this money to local governments or property owners.

The second problem for local governments is relocation of the people who live in such buildings. Throughout California, unreinforced masonry buildings provide a large supply of cheap housing for poor people. Low-income housing advocates have sometimes resisted retrofitting efforts, saying the cost would drive poor tenants out of the buildings and leave them homeless.

In Los Angeles, the city is about halfway through a program requiring retrofitting of about 8,000 unreinforced buildings. But an estimated 100,000 people still live in these buildings, most of them immigrant families. City Planning Director Kenneth Topping said the retrofit program was stepped up after the Mexico City earthquake in 1985. But, he added, "The retrofit program has bumped into the problem of the homeless. The (seismic) ordinance has been put on hold in some instances."

The Seismic Safety Commission estimates that there are about 35,000 unreinforced masonry buildings in California's seismic hazard zones, housing about 1 million people. Only a few local governments had seismic rehab programs prior to the passage of the state law in 1986 — though because Los Angeles was one of them, these programs accounted for close to 9,000 buildings.

As of June 30, 8% of the local governments have established mitigation programs, while another 7% have completed the inventory but haven't established programs. About 34% have inventories in progress and 15% surveyed their communities and found no unreinforced masonry buildings. Some 35% of all communities, representing almost 12,000 buildings, have made no known progress, according to the Seismic Safety Commission.

"Status of California's Unreinforced Masonry Building Law," a report dated June 1989, is available from the Seismic Safety Commission in Sacramento, (916) 322-4917.

BRIEFS

Bolsa Chica Deal Finalized

Environmentalists and the Signal Landmark Co. have reached final agreement to drop the longstanding litigation over the Bolsa Chica wetlands in Huntington Beach.

The settlement agreement encompasses the terms of a deal reached in June over how to develop the property. Signal will be able to build up to 5,700 homes on 412 acres, with 1,105 acres set aside for wetlands. Plans for a marina navigable from the ocean have been dropped.

Amigos de Bolsa Chica had first filed a lawsuit in 1979. Agreement came after Orange County Supervisor Harriett Weider formed the Bolsa Chica Planning Coalition, made up of all interested parties, and urged them to negotiate together.

Meanwhile, the city of Huntington Beach hopes to replicate the Bolsa Chica success by forming another planning coalition to deal with preservation of 232 acres of wetlands between Beach Boulevard and the mouth of the Santa Ana River.

High Court Won't Take Marin County Case

The U.S. Supreme Court has decided not to hear a takings case from Marin County involving a property owner who could not get his land re-zoned.

Robert Barancik purchased some 560 acres of farmland zoned for one unit per 60 acres by the county. After being denied a rezoning that would have permitted him to build 24 homes (one unit per 24 acres), Barancik filed suit in federal court, claiming his property had been taken because of the zoning.

But he lost the case all the way down the line. Earlier this year, the Ninth U.S. Circuit Court of Appeals found that no taking had occurred. (872 F.2d 834). The Supreme Court then chose not to hear the case, Docket No. 89-318.

Riverside Mall Deal Hampered by Lawsuits

Riverside city officials and the Donahue-Schriber development company are struggling to make a deal to expand Tyler Mall in the western part of the city.

Several Riverside residents have challenged the $100 million expansion of Tyler Mall in court. But Donahue-Schriber has charged that the lawsuit is being bankrolled by T&S Development, which is planning a regional mall elsewhere in Riverside and has opposed the Tyler expansion.

The California Supreme Court recently declined to review a lower court decision stating that the residents must divulge who is paying the legal bills. Settlement talks are ongoing.

Meanwhile, the city has agreed to earmark about a third of the increased sales-tax revenue from the mall for public improvements associated with the mall. For example, $21 million — a quarter of the $92 million expected over 25 years — would be dedicated to debt services on three parking garages.

Citizens Protest Freeway Expansion

Caltrans is planning to finally finish the Long Beach Freeway — but South Pasadena residents and preservations are rallying to oppose it.

Hundreds of local residents marched in opposition to the freeway in early October, including city officials and high-school cheerleaders. They were accompanied by officials of the National Trust for Historic Preservation, which has designated South Pasadena as one of 11 endangered historic places nationwide.

According to critics, the completion of the project could destroy 1,500 houses, including more than 50 historic residences, and 7,000 trees.

Irvine Co. to Remove Last Land From Agriculture

The Irvine Co. has chosen not to renew Williamson Act contracts on some 19,000 acres of farmland in Orange County, meaning the land will be available for development by the year 2000.

The property is the last of almost 50,000 acres the company placed in the farmland preservation program some 20 years ago. About 7,000 acres of the land is already earmarked for parks or other public open space. Company officials predicted they would eventually seek to develop about 6,000 acres of land.

Under the Williamson Act, landowners pay low taxes on farmland in return for a promise to keep the land in agriculture. Over the course of a 10-year "non-renewal" period, taxes gradually rise until the property is assessed at market value.

No Commercial Development of Pan Pacific

The site of the Pan Pacific Auditorium in Los Angeles will not be used for commercial development, which had been contemplated prior to a fire that gutted the historic structure in May.

Prior to the fire, Los Angeles County, which administers the site for the state, had sought development proposals in hopes of raising enough money to restore the 54-year-old auditorium.

Now that the fire has robbed the Pan Pacific of its architectural integrity, however, the state Parks and Recreation Department decided to prohibit commercial development, ordering instead that the land "be dedicated to the general public's use and enjoyment."

Roundup

Gov. George Deukmejian names his chief deputy legislative secretary, **Maureen Higgins, as director of housing and community development**....The L.A. Community Redevelopment Agency **requires downtown developers to replace low/mod housing units** razed for redevelopment projects....Palo Alto imposes **restrictions on "monster houses"** in an attempt to over-development of residential neighborhoods....Bedford Properties sells **7,200 acres of rugged and environmentally sensitive land near Rancho California** to two other homebuilders at a reduced price....Mission Viejo city officials ask **the Mission Viejo Co. to donate land** for a new civic center.

CALIFORNIA PLANNING & DEVELOPMENT REPORT

is published monthly by
Torf Fulton Associates
1275 Sunnycrest Avenue
Ventura, California 93003
(805) 642-7838

Subscription price: $179 per year

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ISSN No. 0891-382X

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SPECIAL REPORT: FEES AND EXACTIONS

Development Agreements Now in Widespread Use Throughout State

As local governments find themselves more constrained than ever in using development fees, more and more of them are turning to development agreements as a means of obtaining funds and public facilities from developers.

More than 500 development agreements are in place today in California. And no wonder: The state's development agreement law gives local governments and developers the opportunity to strike a bargain that would be difficult for either side to obtain any other way.

Local governments are able to acquire more concessions than they could legally obtain through the "nexus" requirement of the *Nollan v. California Coastal Commission* court case. In return, they are able to offer developers virtual immunity from future slow-growth challenges — a feature developers regard as vital in planning for the huge, multi-phase projects that have become so common in California.

Along the way, however, development agreements have begun to present three problems, which will probably grow as the years ago by. First, their constitutionality is open to question and so far no appellate court in California has ruled on the issue. Second, the negotiations between city and developer may unfairly lock out citizen groups — or, indeed, constitute an attempt to circumvent their efforts. And third, re-negotiation may be necessary in many cases, but both developers and local officials are often afraid to try it for fear that they will lose more than they gain.

The California development agreement law grew out of the state Supreme Court's ruling in *Avco Community Builders v. Coastal Commission*, 17 Cal.3d 785 (1976). In that case, the court ruled that Avco did not have a vested right to build even though it had spent more than $2 million grading a subdivision site in Orange County. Only a building permit plus a "substantial" expenditure of funds secured a vested right.

Builders tried to overturn this ruling in the state legislature but local governments resisted. Then lobbyists for both sides hit on the development agreement idea — in essence, a contract that would secure vested rights for the developer and provide cities and counties, hard hit by Proposition 13, with a secure source of capital funds. The law passed in 1979.

Though used rarely at first, DAs became commonplace in the mid-'80s. According to a 1986 study by the University of California, Berkeley, 30% of California's cities and 37% of the state's counties have used DAs. The size of mixed-use projects incorporating DAs varied from 54,000 square feet in Santa Monica to 6 million square feet in Irvine.

The typical DA continues to involve an exchange of building guarantees for capital funds. But increasingly cities and counties are using these agreements to deal with tricky problems involved with timing and sequencing, to lock in assurance that a particular mix of development will occur, and to bring together small developers in order to fund large public improvements.

Timing and sequencing have become crucial, for example, in a pending development agreement on the Mission Bay project in San Francisco. The city and Santa Fe Pacific Realty have agreed on the general terms of the 300-acre development project near downtown. However, they are still negotiating the sequencing of various elements of the projects. Specifically, the city wants commitments that toxic cleanup and construction of affordable housing will move along as quickly as construction of retail and office projects. When these terms are negotiated, they will be included in the DA.

Many of the provisions on timing, sequencing, and even capital improvements could be obtained through other regulatory agreements, especially specific plans. (In fact, specific plans and development agreements are often processed together.) While regulatory tools may be fine for planners, however, they are not enough for developers. In California's highly charged slow-growth environment, it is the prospect of guaranteed permission to build that brings them to the bargaining table.

In recent years, development agreements have been most popular in rapidly growing counties such as Orange and Riverside, where large developers own huge tracts of land on which they are planning subdivisions of as many as 10,000 houses. These DAs have truly represented the institutionalization of development fees — with counties extracting far more in fees and/or infrastructure than they would have obtained under traditional processes.

In Orange County, for example, development agreements have been the cornerstone of the Foothill Circulation Phasing Program. Large landowners such as the Irvine Co., Mission Viejo Co., and Rancho Santa Margarita Co. have plans to build some 60,000 units in the area. But traditional sources of funds were inadequate to pay for the arterial roads required by the new developments. So 19 Orange County developers agreed to provide $235 million in exchange for a vested right to build their projects. The vast majority of the funds came from bond issues. The DAs — guaranteeing that the houses will be built — were vital in marketing the Orange County bonds on Wall Street.

Similarly, in Riverside County, developers have agreed to pay more than $4,300 per unit in fees as part of DA deals. Riverside's typical development fees run about $2,700 per unit, which are used for capital improvements. According to County Supervisor Kay Ceniceros, the additional $1,600 will be used to maintain public facilities built with the rest of the fee money.

Citizen Participation

The nature of the Orange and Riverside county DAs, however, raises one of the most serious questions about the development agreement process: whether it can be used to circumvent public participation in a development project. In both counties, slow-growthers placed growth-control initiatives on the ballot in 1988, causing the Board of Supervisors to rush through DAs prior to the election. The result was quick approval — and vested rights — for all 60,000 units in Orange County and about 100,000 units in Riverside County.

Many of these projects had already received all other governmental approvals and, in some cases, were partially built. Nevertheless, the projects protected by DAs are immune from any future growth measure or change in council membership.

Local politicians defend these approvals as thoughtful. In fact, they say, some represented an improvement, because they were able to make additional demands on the projects already approved. "I think every one of them came out a better project than had been previously approved," says Ceniceros. "That could have been done independent of the development agreement, but the development agreement was what brought the developer in."

Still, slow-growthers felt betrayed by the DAs — especially after both initiatives failed. In Orange County, all the DAs were challenged in court, but slow-growthers, strapped for funds, have settled virtually all of the cases. And Richard Cowart, a former Berkeley planning professor who headed up the 1986 study, says these situations simply point up the potential for abuse. "It sounds to me like the decisionmakers at the local level are cutting a deal that can't be undone by the citizens in an election, either amending the plan or throwing the bums out," he said.

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SPECIAL REPORT: FEES AND EXACTIONS

State Law Forces Cities, Counties to Justify Fees

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AB 1600 and Trends in Development Fees

AB 1600, enacted in 1987 but effective only last January, places all local governments — including school districts — on a much shorter leash in imposing development fees. Under the law's provisions (Government Code sections 66000-66003), a local government must establish a nexus between the fee (or other exaction) and the development that must pay for it. In addition, this fee revenue must be held in a trust fund and the agency must draw up a plan to spend it. The money must be spent or committed in five years; if not, the local agency must make findings each year as to why the money is still needed.

AB 1600 does not appear to have dampened local governments' appetite for development fees. In fact, such fees still appear to be going up. A June survey by the San Diego Construction Industry Federation found that, for an average house, development fees in San Diego County ranged from $3,000 (National City) to almost $24,000 (Escondido). A similar survey in Riverside County, conducted last year by the Building Industry Association, found that fees for the average home ranged from less than $6,000 in Blythe to almost $13,000 in unincorporated county territory. And these fees do not include the cost of land and other facilities that cities and counties sometimes also require from developers. For example, according to the CIF survey, these dedications increase the cost of fees in Carlsbad from $13,000 to about $23,000 per unit.

Furthermore, the state's largest cities are quickly latching onto the idea of linkage fees, through which commercial developers provide money for housing on the theory that the new commercial projects draw people to the area and therefore create more demand for housing. A $5-per-square-foot housing fee has been in place in San Francisco for several years. Now Sacramento, San Diego, and Los Angeles are following suit.

The Sacramento fee schedule is in place. It imposes fees ranging from 25 cents per square foot on industrial property to 95 cents per square foot for office buildings. The city is expected to reap about $1.75 million per year from the fees, which will be used for low-income housing projects. (The money will not be used to assist moderate-income projects.) Sacramento County is considering a similar fee.

In San Diego, the city housing commission has approved a fee schedule ranging up to $2 per square foot on commercial projects. The fee is part of a larger funding package including business license fees, utility taxes, and hotel taxes that will reap some $54 million a year for housing. The San Diego City Council will consider the proposed fee in December. And in Los Angeles, an office-housing linkage fee of $2.50 per square foot and up is under consideration.

Occasionally, state laws authorizing such fees inadvertantly encourage that they be imposed or raised. In 1986, the state legislature passed the cap on school fees partly so the fees wouldn't get too high. (The fee cap was part of a larger school construction finance package.) But once the legislature specifically authorized school districts to levy such fees, virtually every school district in the state — whether growing or not — imposed them.

And park fees are often driven up by the provisions of the Quimby Act, which require that fees be tied to the cost of the parkland to be acquired. In June, for example, the city of Oceanside hiked its park fee from $740 to $3,200 per dwelling unit — over the objections of the building industry — because land prices had risen so much since the last increase in the early '80s. "Six or seven years of inflation and rising property values went unaccounted for," said Douglas Williford, a senior planner with the city.

Occasionally, cities have taken steps to halt the rise of fees — usually in response to urgent pleas from builders. Last spring, for example, the members of the Long Beach City Council took a second look at the $3,500-per-house park fee they were about to approve and did something surprising: They reduced it by more than $800.

In order to cut the fee, the council decided to work with the local school district in converting under-used school playgrounds into part-time city parks. By gaining more parkland that way, the city wouldn't need so much money to buy property for new parks. "The thing that really pumps up the fee is acquiring land that is already developed in the city," said Planning Director Bob Paternoster.

But, generally speaking, cities have instead hired economic consultants to help them justify the fees. For example, when an Orange County judge ruled that the Newport-Mesa School District had improperly imposed $1.50-per-square-foot fees on an area where enrollment was not growing, the fees were refunded to certain developers. The reaction among other school districts, however, was to not to eliminate questionable fees but to hire more economic consultants to justify them. "In the initial rush-rush, some districts may not have appropriately drawn the relationships between the need for the fee and the impact of the development," said John Mockler, a Sacramento lobbyist for the Coalition for Adequate School Housing.

The Sacramento Case

While cities are hiring economic consultants to help them justify new development fees, builders and property-rights activists are going to court to knock them down.

Specifically, the Commercial Builders of Northern California and the Pacific Legal Foundation have gone to federal court in Sacramento, where they had tried to overturn Sacramento's new housing linkage fee.

Commercial Builders claimed that the nexus study did not prove a strong enough connection. Pacific Legal Foundation, a pro-property rights law firm in Sacramento, filed as amicus curiae.

U.S. District Court Judge Edward Garcia in Sacramento issued summary judgement in favor of the city, meaning he believed a trial on the facts was not necessary.

At least from PLF's point of view, the Sacramento case provides an opportunity to push beyond the *Nollan* case and further circumscribe the government's ability to impose conditions on development. "Judge Garcia and the city seem to believe that if you can establish any kind of linkage, that is sufficient," said PLF lawyer John Quillan. "We think *Nollan* requires more."

However, Quillan admitted that the biggest flaw in the builders' case in Sacramento is the lack of a plaintiff who had been monetarily damaged by the development fees. But the search for such a plaintiff is ongoing. According to the Sacramento Planning Department, the builders have asked for copies of all building permit applications, hoping to find a better plaintiff.

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San Luis Obispo County Fails to Extend Growth Cap

Unable to muster the necessary votes to extend it, the San Luis Obispo County Board of Supervisors has permitted an emergency growth cap to expire. The move has left the county with some 1,700 building permits to process — and set the stage for a slow-growth initiative scheduled for the June 1990 ballot.

The shift in policy came at a 14-hour meeting on October 6, when Supervisor Harry Ovitt, who represents the Atascadero-Paso Robles area, refused to provide the fourth vote required to extend the ordinance. The measure would have limited the county to 826 building permits per year in unincorporated areas, about two-thirds of a typical year's volume.

The fight over a county growth cap goes back some 18 months, when a slow-growth group called the Fair Share Growth Management Committee asked the supervisors to adopt a growth-control ordinance or place it on the ballot. Instead, the supervisors chose to appoint a blue-ribbon task force of developers, environmentalists, and others to hash out the issue.

Earlier this year, the task force recommended a series of long-range planning studies to determine the future course of the county's growth. While the studies were being done, however, the task force recommended the 826-unit annual cap on residential growth — a figure that would limit the county to an annual population increase of about 2 1/2%.

On August 23, county supervisors approved the growth-control ordinance on an urgency basis by a 4-1 vote. Only Ovitt voted against it.

Debate over the ordinance led to a rush on the planning department, which received 1,781 requests for residential building permits between July 1 and August 23. However, the supervisors made July 1 the cutoff point, meaning builders who filed after July 1 would be subject to the growth restriction.

Subsequently, however, board chair Jim Johnson removed himself from voting on the issue because of a conflict of interest. He is a partner in a parcel of land that may be developed as a residential project.

When the initial urgency ordinance was set to expire on October 6, four votes were needed to extend it for another year. But with Johnson disqualified from voting, only three supervisors favored the extension. That set up the climactic meeting on October 6, during which Ovitt refused to change his vote despite repeated pleas from his colleagues on the board.

Now, the ordinance is no longer in effect and the county planning department must wade through the flood of permit applications received last summer. At the same time, however, the Fair Play committee gathered enough signatures to qualify its growth-control initiative for the ballot next June.

The blue-ribbon task force urged the county to work with cities in the county to establish a regional planning authority. The City of San Luis Obispo has had a cap on residential permits for several years and many critics charge that this ordinance has led to residential sprawl in unincorporated areas.

The task force also suggested that the county re-examine the issue of antiquated subdivisions, prepare an infrastructure element for the county's general plan, and complete an agricultural element that is long overdue.

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Sacramento Investors Purchase Los Alamitos Property

The controversial Los Alamitos racetrack property in Cypress, which has been the subject of two initiatives and several lawsuits, has been purchased by four Sacramento investors, including two prominent real estate developers.

And the new owners appear to have a better chance of developing the property than their predecessor, Hollywood Park Realty Enterprises Inc. The Sacramento group has promised to reopen the Los Alamitos golf course, which Hollywood Park closed in 1987. And the quartet has indicated it will prepare a dramatically scaled-down development plan for the rest of the property. Saddled with a huge debt load, Hollywood Park sought approval of a 2.6-million-square-foot development — but ran into nothing but trouble.

The Sacramento group paid $71 million to purchase the property from Hollywood Park — far less than the $95 million SDC Development of Newport Beach was prepared to pay if Hollywood Park had obtained development approvals from the city. But Hollywood Park was almost $100 million in debt on the property and a dissident stockholder, who was threatening to stage a takeover attempt, was pressuring Hollywood Park to sell at any price.

The four Sacramentans involved in the purchase are Christo Bardis and Lloyd Arnold, veteran race-track operators, and developers Buzz Oates and Frank Ramos. Oates is perhaps the most prominent industrial developer in the Sacramento area, specializing in low-cost warehouse and factory buildings in the Sacramento suburbs. Ramos recently won approval to build a large mixed-use project in notoriously slow-growth Davis after negotiating with both the city and Yolo County for several years. (*CP&DR*, September 1989.)

Hollywood Park purchased the Los Alamitos property in 1984 for $58 million, financing the purchase with a loan from Wells Fargo Bank. The company soon began working on development plans, but ran into political resistance from Cypress citizens.

Hollywood Park never planned to close the racetrack. But citizens were angered by the closure of the golf course and by the scale of the proposed development — 2.6 million square feet of buildings on 168 acres surrounding the track. According to City Manager Darrell Essex, many citizens were also concerned about the fact that falling attendance at Los Alamitos meant a steep drop in the city's parimutuel tax revenue — from a high near $800,000 to a yearly take of around $500,000 today.

In a 1987 initiative aimed specifically at Los Alamitos, Cypress voters agreed that any future rezoning of a property designed for "public space" use should go on the ballot. Subsequently the city council approved the Hollywood Park project and put it on the ballot — but last February Cypress votes shot it down by a two-to-one ratio. (*CP&DR*, March 1989.)

Meanwhile, Hollywood Park had to keep borrowing more money from Wells Fargo to pay the interest on the original loan, and the debt load climbed to $98 million. When SDC pulled out of its $95-million deal with Hollywood Park after the vote last February, the company was force to consider selling the property at a cheaper price.

But Hollywood Park is not done with Cypress. The company has filed a lawsuit against the city in federal court, charging that its property was "taken" because the rezoning was not granted. Hollywood Park's lawyer, Robert Forgnone, said the taking amounts to at least $24 million — the difference between the property's price in the SDC deal and the eventual sale price in the Sacramento deal.

Forgnone said Hollywood Park will press the lawsuit against the city even though it has now sold the land. Hollywood Park had also sued the city in hopes of overturning the 1987 initiative, but Forgnone said that suit will likely be taken over by the new owners.

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SPECIAL REPORT: FEES AND EXACTIONS

Development Agreements Now in Widespread Use Throughout State

Continued from page 5

Some jurisdictions have specifically refused to bargain away this kind of power. The city of San Diego, for example, won't approve a DA if it permits protection from either a future growth-control ordinance or a future increase in development fees. Yet developers in San Diego have sought DAs anyway. "Even though it says they can be knocked out by an initiative, it gives them a little more comfort," said City Architect Michael Stepner. The DA also gives the developers incentive to get their infrastructure into the ground, since the city's requirements could rise in the future.

Renegotiation

Now that the development agreement law has been in place for a decade, a second-generation problem has cropped up: re-negotiation. The law's drafters didn't really contemplate re-negotiation, though they did specify that DA amendments should go through the same notice-and-public-hearing process as the original agreement.

But re-negotiation, which is common in long-term private real estate contracts, seems inevitable in the case of 15- to 30-year development agreements as well. For developers, market and financial circumstances change; for cities and counties, the political climate may change, as might the cost of public facilities required to service the project. And, recognizing a DA's vested rights as "currency" of a sort, many developers sell the projects before they are built — bringing in new owners who may want to change things around.

In Santa Monica, pieces of a large mixed-use project called Colorado Place have been sold three times since the original development agreement was reached in 1981, and some substantial re-negotiation has taken place. For example, Southmark Pacific Co., which bought the project from Welton Becket in 1985, sought to increase the height of a proposed hotel in the second phase of the project, move a 3.5-acre park offsite, and give the city cash instead of building affordable housing. After considerable negotiation, Southmark acquired an adjacent parcel of land for the hotel, agreed to retain the park, and obtained preliminary approvals for Phase III. (Southmark subsequently sold the project to Maguire Thomas Partners, which in turn sold the as-yet-unbuilt Phase III to Lowe Enterprises.)

Peggy Curran, Santa Monica's director of community development, said re-negotiation doesn't really put all the cards back on the table; the process is self-confining, especially if political opposition to development is strong. "You don't see developers coming in and saying, 'I need more square footage'," she said. "You get them coming in on the margins, modifications of small provisions that were ill thought-out to begin with."

In an innovative approach to re-negotiation, Santa Monica now builds a review process for amendments into each development agreement. Curran can sign off on small changes herself; larger changes go to the planning commission; and major amendments must go through to the city council. "Sometimes a little change is logical and acceptable," she said, "but who wants to go through the amendment process?"

Constitutionality

As DA-backed projects change hands and renegotiation occurs, the likelihood of litigation increases as well. And while this possibility may sound scary to cities entering into DAs, in the long run it may help clean up the biggest cloud handing over the whole development agreement law: the question of constitutionality.

Since the law's passage in 1979, land-use lawyers in California have worried that a development agreement, because it binds future city councils to the agreement, could be construed as an unconstitutional contracting away of a city's police power. Because developers are so highly motivated to make DAs work, however, few have bothered to sue. Even though more than 500 DAs have been negotiated, only a few cases have been filed. According to land-use law expert Daniel J. Curtin, only three cases have been decided by trial judges and two others have been dismissed. No appellate court in California has ruled on the constitutionality issue — and no significant case is working its way up through the court system. So the constitutional issue remains an open question.

Land-use lawyers in California agree that as time goes by, a good test case is likely to emerge, because new developers who take over projects may read the wording of the original agreements differently. Lawyers have been trying to make DAs "bulletproof" by including a variety of escape clauses that could be used in emergency. "In Orange County, we attempted to carve out a health and safety exception," said Deborah Rosenthal, a Newport Beach lawyer who represented the county in its DA negotiations. "The clause said, in essence, that the DA will stay in place unless there is a compelling public necessity for it to change." The "compelling public necessity" most frequently cited by land-use experts in California is the discovery of some new environmental hazard that wasn't contemplated when the DA was signed.

Because of such provisions, the development agreement law may be able to withstand a tough legal challenge — particularly now that the California Supreme Court, dominated by Deukmejian appointees, tends to decide cases on narrower grounds. Said Cowart, who is also a lawyer: "I've predicted that a California court probably would not throw out the statute in toto, but would narrowly construe any particular development agreement." Thus, if an important new environmental issue came along, the courts might be able to rule a particular DA in question without throwing out the whole law.

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NATIONAL BRIEFS

CEQA Heads for Nation's Capital

An environmental review law, similar to the California Environmental Quality Act, is likely to take effect in the District of Columbia next year.

The law has already been passed by the D.C. city council but must undergo congressional scrutiny before it becomes effective. It requires environmental impact statements for any project that costs $1 million — the cost of a house in many of Washington's affluent neighborhoods — or poses an environmental or safety threat. However, projects in downtown Washington are exempt on the ground that they are already sufficiently regulated.

DEALS

Sunterra: Indian Wells Will Get What It Wants After All

The story of the gigantic Sunterra resort project in Indian Wells is a good example of a local government that has tried to exploit its redevelopment powers for economic gain and gotten beat up in the process.

By approving the billion-dollar project, the tiny Coachella Valley city has become a leading target for all sorts of land-use attacks, including referenda, Sacramento lobbying, and lots of litigation. Indian Wells has gotten hammered from all sides — including attacks by neighboring communities, poverty lawyers, the Marriott Corp., and its own residents.

It seems unlikely that tiny Indian Wells (population 2,600) anticipated the furor that approval of the Sunterra project would touch off. After all, civic leaders had quietly built an affluent desert community and golf-oriented resort without much interference from the outside in the past.

For the city, the financial rewards of Sunterra, which will be developed by Sunrise Co. and a Japanese financial backer, promised to be great. Because Sunterra overlaps with the 440-acre Roadrunner Redevelopment Area (consisting of vacant land), Indian Wells stands to gain more than $13 million a year in tax-increment revenue by the mid-1990s.

According to City Manager Rod Wood, the city already has a tax-increment flow of $6 million a year, of which $1 million is earmarked for affordable housing. But setting this money aside is not the same as spending it. According to state figures, Indian Wells has a redevelopment housing trust fund of nearly $3 million — or about $1,140 per capita, by far the highest in the state. (The statewide average is $5.93 per capita.) And therein lies part of the problem.

Indian Wells has shown so little interest in providing affordable housing that the city has become legally vulnerable. That fact, combined with fear of economic competition on the part of neighboring communities in the Palm Springs area, has led to a remarkable legal assault on the Sunterra project:

- The Western Center on Law and Poverty sued, claiming that neither Sunterra nor Indian Wells had made any provision for affordable housing even though the project would create thousands of low-paying hotel jobs.
- The city of Palm Springs sued Indian Wells over supposedly inadequate traffic mitigation measures associated with the project.
- The city of Palm Desert and Rancho Mirage together brought suit against Indian Wells, charging that the amended general plan of the latter city provides inadequate traffic mitigation.
- In a separate suit, Palm Desert sued Indian Wells for having a general plan in violation of the California Environmental Quality Act.
- In a case indirectly related to Sunterra, a group of disgruntled property owners also sued the city, saying the general plan didn't provide for affordable housing.

Determined to move forward with the project, Indian Wells settled the lawsuits one by one. The city mollified Western Center by agreeing to finance 600 units of low-income housing with redevelopment funds — so long as those units could be built outside city limits. A ferocious lobbying effort by Marriott Corp., which owns a resort in Palm Desert, led Gov. George Deukmejian to veto a bill needed to permit out-of-town construction. The city is now looking for ways to provide 150 units inside city limits.

Indian Wells settled the Palm Springs case by promising $3.4 million for to the Palm Springs Regional Airport and another $100,000 in unspecified costs to the Palm Springs. (That decision is being appealed by a third party, a property owners' group called the Friends of Indian Wells, which wants to be included in the settlement.) Rancho Mirage settled for $90,000 of traffic improvements in that suit; a decision on Palm Desert's claims are still pending. A judge ruled against Palm Desert on the CEQA challenge.

The trickiest case has been the legal challenge of the Committee for Responsible Planning, which filed a suit challenging the general plan. The committee was comprised of disgruntled property owners whose land along a commercial strip had been inexplicably rezoned to residential use. Though they didn't challenge the Sunterra project directly, their consultant did claim its size would "foreclose future land-use options." Riverside County Superior Court Judge Noah Ned Jamin faulted the city on its housing provisions, saying he found "a complete absence of discussion of provision of moderate- or low-income housing" in the general plan. The Court of Appeal later upheld his decision.

In the view of Indian Wells, the arguments about traffic mitigation, proper use of redevelopment, and affordable housing are really just smoke screens for the real issue: the intense competition for resort dollars among the cities in the Palm Springs area. The number of resort rooms in the Coachella Valley has quadrupled in the past five years, and the completion of Sunterra could double that number again. "The competition among cities to achieve economic expansion is fierce and is causing a great deal of problems," said Wood.

As a result of all these lawsuits, Indian Wells will have to surrender some concessions in order to make the Sunterra project happen. Some redevelopment money will go to affordable housing and traffic mitigation elsewhere in the Coachella Valley. The city will have to accommodate a few residences in the "affordable" range. Sunterra won't include a 400,000-square-foot conference center, which has been dropped to mollify local residents. And the original 1992 completion date has been pushed back.

But the Sunterra project *will* happen, and that's the point. Indian Wells has been publicly ridiculed, lobbied, and sued to death. It has become the epitome of selfish and snobby localism. But in the end, the city will get what it wants: a lot of tax-producing, prestige-enhancing resort development with only a little responsibility for the side effects.

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Morris Newman

Sunterra At A Glance

Description: Four hotels with a total of 4,500 rooms (Hilton, Sheraton, Loews, and a fourth to be named later) and two golf courses. Plans for a large conference center have been dropped.
Location: Indian Wells, Riverside County
Developers: Sunrise Co, and West MEC Inc., a subsidiary of Mitsubishi Estate Co.
Size: 640 acres.
Cost: $1.3 billion.
City Involvement: No subsidy. Estimated $13.6 million in annual tax-increment revenues through redevelopment.