CALIFORNIA PLANNING & DEVELOPMENT REPORT

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Feds Likely to Curb Wetlands Regulation

The politics of wetlands has gotten thick in Washington in the last few months, and the end result could be a new, narrower definition of wetlands. If a narrow definition is adopted, it will probably mean that a great deal of undeveloped land in California will be freed of federal wetlands regulation.

Angry with an expansive definition of wetlands adopted by the federal government in 1989, business lobbyists in Washington, led by the oil and gas industry, have lined up 160 co-sponsors for a bill, H.R. 1330, that would rank wetlands by value and require that landowners be compensated if restrictive wetlands regulations prevent them from using their land. Hoping to forestall such drastic legislation, the Environmental Protection Agency has proposed narrowing the definition of wetlands — a move that has drawn criticism from some environmental groups and one other federal agency, the U.S. Fish & Wildlife Service. All sides are anxiously waiting to see whether the Bush White House will sign on to the EPA proposal or support H.R. 1330 instead.

The current controversy began two years ago, when four federal agencies that deal with wetlands agreed on a common definition for the first time. Under Section 404 of the federal Clean Water Act, no landowner can dredge or fill a wetland without a permit from the Army Corps of Engineers. The Corps must follow guidelines *Continued on page 8*

San Diego Community Offers I-15 Alternative

A Caltrans plan to complete the final two miles of Interstate 15 through San Diego is being challenged by a community group, which has put forth an ambitious alternative that includes broad community development goals. If it is accepted, the City Heights neighborhood proposal could push the Caltrans construction schedule back by a year or more.

Anxious to begin work, Caltrans has asked the California Transportation Commission to authorize an accelerated construction schedule that would begin next January. "We're ready," says Norm Larsen, the deputy director for design in the San Diego Caltrans office. But the City Heights Community Development Corporation is lobbying for a one-year delay while it seeks local and federal funding for its own redevelopment proposal.

The Caltrans plan calls for covering two blocks of the freeway with park space, with the city footing the bill for one block of cover. But the City Heights neighborhood has proposed covering four blocks of the freeway, permitting the creation of an "urban center" — including a community center, commercial development, and park space — that would link the two major commercial boulevards in the area, University Avenue and El Cajon Boulevard. City Heights leaders say their plan provides the opportunity for turning the highway project "from a negative impact to a positive community asset."

The 2.2-mile segment of I-15 through City Heights, located atop a mesa east of downtown San Diego and Balboa Park, is literally the last section *Continued on page 6*

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Most Takings Rulings Continue to Favor Government Agencies

State and federal appellate courts in California continue to churn out a large number of decisions in cases alleging a "taking" of property by regulation — and the trend appears to favor government agencies over landowners. Since the beginning of June, the appellate courts have issued opinions in seven such cases, and ruled in favor of the landowner only twice. Coincidentally, but perhaps not surprisingly, three of the seven rulings arose from land-use disputes in Lake Tahoe.

In four different cases, state appellate courts:

- In an unpublished case from Fresno, allowed a takings trial to proceed in a dispute over land near an airport in Fresno.
- Reversed a lower-court ruling from Lake Tahoe concluding that the Tahoe Regional Planning Agency's billboard regulations constituted a taking of property
- Ruled that a government agency's decision not to prevent natural geological damage on its own property can't be the basis of an inverse condemnation suit by a neighboring landowner.
- Affirmed, after a rehearing, that an inverse condemnation case from Simi Valley was not ripe for review.

Meanwhile, in three cases, the Ninth Circuit:

- Allowed a mobile-home park owner to proceed with a takings case against the City of Rocklin in federal court because — the Ninth Circuit said — state courts would never give the case a fair hearing.
- Ruled on more taking claims from the Lake Tahoe area, reinstating some while rejecting others.
- Ruled, in another case from Lake Tahoe, that a landowner can't pursue an inverse condemnation case under the Nollan ruling after agreeing to conditions of approval as part of a settlement agreement.

Now that four years have passed since the U.S. Supreme Court issued its three landmark takings cases, a large number of takings cases filed subsequent to those rulings have percolated up to the appellate courts. (The three cases were *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 485 U.S. 304; *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Keystone Bituminous Coal Assn. v. De Benedictis*, 480 U.S. 470.) However, many takings cases get kicked out because of the Supreme Court's difficult threshold for ripeness, and others become stuck on the question of whether a taking may occur if a legitimate governmental interest is involved. (For a detailed discussion of these issues, see *CP&DR*, May 1991.)

Here is a detailed rundown of all the takings cases that have emerged since June:

Ninth Circuit Cases

Mobile Home Rent Control

In a case from Rocklin, the Ninth Circuit ruled that the owner of a mobile-home park could proceed with a federal takings case against the City of Rocklin based on the city's mobile home rent control law, saying the park owner would be unable to get a fair hearing in state

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View Tax in Port Hueneme?

Port Hueneme, a coastal town in Ventura County best known for its Navy base, is considering keeping its beaches clean with a novel funding scheme: an assessment district that taxes nearby property owners who have a view of the ocean.

Port Hueneme's 1,200 beachfront property owners would pay between $66 and $184 a year, depending on what kind of ocean view they have. City officials say the scheme would raise $150,000 of the $425,000 needed annually to keep the beach clean.

Beachfront property owners, many of whom use their condos and houses only on weekends, are understandably angry at the proposal. But city officials defend the idea, saying that beachfront property values were rising higher than property values elsewhere in the city and arguing that those property values would decline if the beach were poorly maintained.

Redevelopment May Be Toxic in Davis

The City of Davis is moving ahead with a plan for a new downtown shopping center even though toxic cleanup of the site may cost close to $2 million.

The city discovered the toxic problems only after purchasing the land through its redevelopment agency. The site is saturated with gasoline from a former service station and Davis is seeking to persuade Atlantic Richfield Co., former operator of a gas station on the site, shoulder the cost of cleanup, estimated at between $500,000 and $1.8 million.

The proposed Crossroads Center would provide about 150,000 square feet of retail space and an adjacent parking garage. But critics are wondering whether the project will ever actually be built, especially since the city and the University of California, Davis, have proposed another retail project just south of downtown. Slow-growth Davis is seeking to shore up its retail base in the face of competition from nearby Sacramento and Woodland.

Bradley Challenges L.A. Planners

Los Angeles Mayor Tom Bradley has declared both "no growth" and "unlimited growth" to be bankrupt ideas and challenged city planners to stop pandering to special interests, whether they are developers or slow-growth groups.

In his first-ever speech to Planning Department employees, Bradley said: "You must be the planning department, not the political department and not the case processing department." He said that planners should resist political pressure from all quarters, even his own office.

He challenged L.A. planners to combat sprawl by encouraging mixed-use development and also by implementing the "centers" concept, the visionary — but never implemented — centerpiece of the city's general plan from the 1970s.

For most of his tenure as mayor, Bradley has been a staunch advocate of growth. In the last two years, however, Deputy Mayor Mark Fabiani and Jane Blumenfeld, Bradley's planning deputy, have encouraged him to speak out more critically about planning issues.

Land Becomes Key Issue for UC Expansion

The availability of donated land is becoming a key issue in the three-county race for the new University of California campus in the Central Valley. Already one county has rejected a developer's strings-attached offer, and other areas may feel similar pressure.

UC has narrowed its search to three broadly defined areas — the Academy section of Fresno County, Table Mountain in Madera County, and Lake Yosemite in Merced County — and hopes to make a decision next winter or spring. The university hopes that at least part of the 2,000 acres needed will be donated.

Merced officials have already lined up the donation of a 2,000-acre site in the Lake Yosemite area. The land is owned by a trust managed by the Merced County Board of Education.

Earlier this summer, Madera County supervisors rejected an offer of 1,000 donated acres by the Rio Mesa Property Owners Association, whose members control a large portion of the Table Mountain site. In return for the donation, the property owners wanted a guarantee that Madera County would rezone 7,300 acres of land for private development. The supervisors rejected the offer by a vote of 3-2.

Light Rail Expansions Planned

Rail expansions are being planned in Sacramento and San Diego that could provide service to many new areas.

In Sacramento, a Regional Transit board has voted to extend the two existing lines, which run north and east out of the city, deep into the suburbs and create a third line to the south in the future. The two extensions may be completed by 1996, and they may extend even farther than current RT plans call for if the communities of Roseville and Folsom provide funding.

In San Diego, the board of governors of Jack Murphy Stadium approved a plan to run a light-rail line past the stadium. Under the plan, an elevated rail line would run through the stadium's parking lots, with a rail stop connected to the stadium by a short pedestrian bridge. Stadium officials said that rail proposal "fits in beautifully with our plans," and the idea even received support from the stadium's parking concessionaire.

Roundup

Hoping to forestall the loss of gasoline stations, San Francisco plans to require that **all gas station conversions be subject to a planning commission hearing**....After negotiations with the City of Los Angeles, **UCLA agrees to limit future expansion** to 139,500 vehicle trips....Federal savings-and-loan officials agree to **assess S&L properties for endangered species and wetlands** with an eye toward preservation....**A wood-frame house in downtown Riverside** has been listed as a National Heritage Landmark, which will commemorate its Japanese-American owners' successful attempt to ward off confiscation during World War II.

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COURT CASES

Most Takings Rulings Continue to Favor Government Agencies

settlement agreement from an earlier lawsuit.

Judge Edward C. Reed Jr., a federal district judge in Nevada, had found that a taking had occurred in the case, *Leroy Land Development Corp. v. Tahoe Regional Planning Agency*, 733 F.Supp. 1399 (D.Nev. 1990). Leroy Land Development Corp. had been working on a condominium project in the Lake Tahoe area, called Bitterbrush, when the federal legislation establishing TRPA was amended in 1980, giving the agency a broader scope of review. Subsequently TRPA required Bitterbrush to prepare an environmental impact report showing compliance with new TRPA regulations. Leroy Land sued, claiming vested rights. (*Leroy Land Dev. Corp. v. Tahoe Regional Planning Agency*, 543 F.Supp. 277 (D.Nev. 1982).)

Later, however, Leroy Land and TRPA reached a settlement agreement. Under the agreement, Leroy Land was permitted to construct 185 of the proposed 203 condominiums. In exchange, the developer agreed to provide a variety of off-site mitigation measures, including the installation of stabilizing devices for a cut slope located on land adjacent to Bitterbrush, the acquisition of land for open space, and the provision of a secondary access to Bitterbrush. Leroy agreed to begin the off-site mitigation measures upon completion of the 50th condominium unit.

Five years later, the U.S. Supreme Court ruled in the Nollan case that conditions of approval must have a direct relationship to the impact of the project in question. Subsequently, Leroy filed a motion in district court claiming that under Nollan the company didn't have to abide by the off-site mitigation requirements. Judge Reed agreed that no direct relationship existed and declared the off-site mitigation measures unconstitutional.

However, a three-judge panel of the Ninth Circuit reversed Reed's decision. "The threshold issue is whether, assuming arguendo that the mitigation provisions would constitute a taking under Nollan if imposed unilaterally by TRPA, they can be viewed as a "taking" when consented to as a part of a settlement agreement," wrote Judge Mary Schroeder for the panel. "We hold that they cannot. The mitigation provisions at issue here were a negotiated condition of Leroy's settlement agreement with TRPA in which benefits and obligations were incurred by both parties. Such a contractual promise which operates to restrict a property owner's use of land cannot result in a 'taking' because the promise is entered into voluntarily."

Schroeder went on to conclude: "To allow Leroy to challenge the settlement agreement five years after its execution, based on a subsequent change in the law, would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind."

The full text of Leroy Land Development Corp. v. Tahoe Regional Planning Agency, No. 90-15364, appeared in the Daily Journal Daily Appellate Report on July 10, beginning on page 8222.

State Court Rulings

Fresno Airport

In an unpublished opinion, the Fifth District Court of Appeal in Fresno has ordered a trial in a case brought by a landowner whose zone change was conditioned on setting aside some land near an airport to minimize accidents.

The case involves 18 acres of land owned by Don Blosser and Jill Robinson, which is adjacent to the Sierra Sky Park airport, a private airport open for public use. The land is zoned for agricultural use. When Blosser and Robinson asked for a rezoning to office/commercial, the city insisted on a condition of approval setting aside eight of the 18 acres as a "clear zone" and "emergency touch down zone" in accordance with recommendations of the Federal Aviation Administration. The eight acres is made up of a 150-foot-wide strip off the end of the runway.

Rather than accept the condition, Blosser and Robinson filed a takings lawsuit against the city, claiming that they should be compensated for this loss of land. According to Chief Deputy City Attorney Don Neufeld, the city allowed some density transfer from the 150-foot-wide strip; permitted very low-intensity uses on the strip; and allowed the developer to count the strip against open-space requirements. Superior Court Judge Stephen Henry ruled in the city's favor, but the Court of Appeal reversed.

In a 28-page unpublished opinion, the appellate court found that "the primary benefit inures to the operators of Sierra Sky Park and those few members of the public who may use the airport" and concluded that "the public at large rather than the individual property owner must bear the cost of restrictions at issue." Clearly angry with the decision, Neufeld said that the purpose of the condition was not to benefit the airport but to "protect people on the now-vacant parcel of property" owned by Blosser and Robinson. He has recommended that the city appeal the decision to the California Supreme Court.

The unpublished opinion in Blosser v. City of Fresno, F013074, was issued by the Fifth District Court of Appeal in Fresno on June 26.

Lake Tahoe Billboards

In yet another case from Lake Tahoe, the Third District Court of Appeal in Sacramento overturned a lower court's ruling that the Tahoe Regional Planning Agency's regulation prohibiting billboards constitutes a "taking" and should be overruled by the federal Highway Beautification Act.

TRPA concluded that three billboards along Highway 50 near Lake Tahoe — one each owned by Bruce King, Edward Stearns, and National Advertising Co. Inc. — constituted "off-premise" signs, which are prohibited under TRPA's sign ordinance. The sign ordinance provides a five-year amortization period for owners of such signs to remove them.

In 1988, after an extensive hearing by a court-appointed referee, El Dorado Superior Court Judge Lloyd Hamilton declared the sign ordinance invalid because (1) it does not conform to the Highway Beautification Act's requirement to compensate owners of billboards within 660 feet of a federal highway, and (2) therefore, it apparently authorizes a taking without compensation.

However, the Third District disagreed. The court concluded that the Highway Beautification Act does not override TRPA's power to remove the signs without compensation. For this reasoning the court relied on the fact that while the Highway Beautification Act is a federal law, TRPA is the creation of another federal law, the Tahoe Regional Planning Compact.

Relying on a Washington Supreme Court case, *Markham Advertising Company v. State (Washington)*, 439 P.2d 248 (1968), Justice Rodney Davis wrote: "The provisions of the HBA, including its just compensation clause, are not mandatory and have been held not to preempt conflicting state statutes." (To underscore that reasoning, the court noted that the Washington case was dismissed by the U.S. Supreme Court for want of a federal question.)

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court "under any circumstances."

The case involves a longstanding dispute between Rocklin, in Placer County, and Sierra Lakes Reserve, the owner of a mobile home park in the city. Rocklin passed a rent control ordinance for mobile homes in 1979, shortly after Sierra Lakes raised rents to cover the cost of capital improvements. Sierra Lakes was forced to roll back the rent increases, but the company continued to make improvements and applied to the city for a rent increase in 1984 to cover the costs. The request was rejected, and subsequently Rocklin passed a revised rent control ordinance limiting rent increases to cover "reasonable" expenditures.

In 1985, Sierra Lakes filed a request for a rent increase under the new law. But according to Sierra Lakes, the city manager refused to accept the application because it did not contain a place of execution, even though, Sierra Lakes claims, the application form contained no space to include the place of execution. Subsequently, Sierra Lakes claims, the city manager refused to permit the company to cure the defect.

The application was finally accepted in the fall of 1985 and a rent increase was took effect in December of 1985.

Nevertheless, Sierra Lakes sued in 1987, alleging that the city's action violated the company's constitutional rights to due process and equal protection. Sierra Lakes also filed a takings claim, arguing that the rent control ordinance's "vacancy control" provision — limiting rent increases when a unit is vacated — constituted a taking of property.

Since the case was never filed in state court, the Ninth Circuit addressed the question of whether Sierra Lakes had exhausted all state judicial remedies, as required under a string of U.S. Supreme Court takings rulings. Writing for a three-judge panel of the Ninth Circuit, Judge Alex Kozinski concluded that because state court opinions have not followed a previous Ninth Circuit ruling on a similar issue, Sierra Estates should be permitted to pursue its case in federal court. Kozinski noted that the Sierra Lakes situation was virtually identical to the facts in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), cert. denied, 485 U.S. 940 (1988). In that case, the Ninth Circuit found a taking claim by a mobile home park owner unripe, but properly stated. However, Kozinski took state appellate courts to task for not following the Hall case's suggestion that takings claims in such cases could be valid if ripe. (The cases cited were *Yee v. City of Escondido*, 224 Cal.App3d 1349 (1990) and *Casella v. City of Morgan Hill*, 91 Daily Journal D.A.R. 5577 (May 10, 1991).)

"We accept (these cases) as being correct statements of California law, there being no contrary authority. Thus, plaintiff does not rely on the mere generalized hostility of state courts to takings claims, but instead on the demonstrated inability to obtain just compensation through an inverse condemnation action under any circumstances."

The Ninth Circuit also ruled that Sierra Lakes should be permitted to proceed with its due process and equal protection claims.

The full text of Sierra Lake Reserve v. City of Rocklin, 89-15371, appeared in the Daily Journal Daily Appellate Report on July 10, beginning on page 8224.

Lake Tahoe Takings Claims

In the latest in a long string of cases arising from the Lake Tahoe regional plan, the Ninth Circuit permitted some takings claims by California property owners to proceed and allowed others to die. In so doing, a three-judge panel of the Ninth Circuit relied on Ninth Circuit ruling last year involving the claims of landowners on the Nevada side, though the new ruling departs from the old ruling in several instances.

As in the earlier case, the California property owners claimed that the Tahoe Regional Planning agency's regulations have prevented them from developing their property. But the property owners fell into a variety of categories depending on the period of time their claim covers. In 1981, TRPA identified environmentally sensitive parcels of land; placed an interim prohibition on their development; and established a system of case-by-case review. This system was made permanent in the 1984 Tahoe regional plan. After a lengthy court challenge, a new Tahoe plan was passed in 1987, and TRPA has argued that the passage of the new plan made most of the claims moot.

In the case involving the Nevada property owners, the Ninth Circuit rejected the mootness argument, saying that under the temporary takings doctrine, if the plan "effected a taking, even for a short time, plaintiffs are entitled to just compensation for that temporary taking." (That case was *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1404 (1991), originally reported in the September 1990 issue of *CP&DR*.) The court in that case also revived a variety of claims against TRPA that the district court judge had rejected as not ripe for judicial review.

In the current case, a different Ninth Circuit panel also found the temporary takings doctrine to override the mootness argument with regard to some of the California claims. Also, TRPA argued that California's state-financed buyout program of some property owners (first established with the passage of a bond issue in 1982) making the "takings" situation different for California property owners than for Nevada property owners — since the California property owners may have a way to obtain compensation by selling their land to the state. However, the Ninth Circuit rejected this argument, saying "First English altered the legal landscape, changing the focus of this case onto a temporary taking."

However, in the new case, Judge Beezer departed from the earlier case with regard to damage claims under the Tahoe Regional Plan adopted in 1984. In the earlier case, the three-judge panel dismissed such claims as unripe, but no two members of the majority agreed on a rationale for the dismissal. The author of the opinion, Judge Stephen Reinhardt, felt the claims were unripe because the plaintiffs had never sought to amend the 1984 plan; Judge Betty Fletcher agreed that the claims were unripe, but for a different reason.

In the current case, the Ninth Circuit reversed the dismissal of similar claims, agreeing with the reasoning of Judge Alex Kozinski, who dissented in the earlier case and said he thought the claims were ripe. "The lack of a definitive rationale limits the precedential value," Beezer wrote in the current case. "We agree that the ripeness issue must be reached, but hold that ripeness did not require the plaintiffs to ask TRPA to amend the 1984 plan before bringing their claims." For this reason the panel reversed the district court's dismissal of the claims.

The full text of Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, No. 87-2096, appeared in the Daily Journal Daily Appellate Report on July 9, beginning on page 8160.

Conditions of Approval and *Nollan*

In another case from Lake Tahoe, a different panel of the Ninth Circuit reversed a district court's finding that a taking had occurred, saying that a landowner could not bring an action under the Nollan doctrine if the conditions of approval had been agreed to as part of a

COURT CASES

Huge SLAPP Suit Damages Award Upheld by Appellate Court

Opponents of so-called "SLAPP suits" won a big victory in June when an $11.1-million damages verdict — awarded in a so-called "SLAPP-back" suit against J.G. Boswell Co. — was upheld by the Court of Appeal.

At the same time, however, SLAPP opponents suffered a blow when the California Supreme Court decertified two appellate court rulings from Santa Clara County involving successful SLAPP-back suits.

As citizens around the state have become more vocal about the actions of corporations and developers, they have often found themselves the targets of "strategic lawsuits against public participation" — dubbed "SLAPP" suits by two University of Denver professors who have examined hundreds of cases around the country. The suits take all forms, but often they are libel or slander suits against citizen groups or individual citizens. Citizen advocates say the suits, which are brought by the corporations and developed, are intended to stifle public debate. (For more background on SLAPP suits, see CP&DR, November 1990.)

Although the Boswell case is not a land-use case, the size of the damages award has cast a long shadow over SLAPP suits by developers. The case began when Boswell, a large agribusiness firm, sued three Kern County farmers for libel over a newspaper ad they published during the 1982 campaign on the proposed Peripheral Canal. However, the farmers then filed a countersuit alleging malicious prosecution, and won $10.5 million in punitive damages and $600,000 in compensatory damages.

Boswell then filed a wide-ranging appeal, but in an unpublished 73-page opinion the Fifth District Court of Appeal in Fresno upheld the damages award. (The case is *Wegis v. J.G. Boswell Co.*, No. F011230.)

The appellate ruling covered a vast array of issues, but among other things the appellate court found that:

- It was reasonable for the jury to infer from the evidence that Boswell had an ulterior motive in filing the lawsuit — the motive being to discourage campaign contributions to the pro-Peripheral Canal campaign.
- Boswell also engaged in a "willful act in the use of process which is not proper in the usual conduct of the proceeding" by writing letters to 11 newspapers around the state in order to discourage those papers from publishing the advertisement in question.
- The state's system of punitive damages was properly followed in awarding the $10.5 million in punitive damages against Boswell.

Only six days after the Fifth District's ruling, the Supreme Court decertified two important appellate rulings in a series of SLAPP-back suit from Santa Clara County, similar to the Boswell case, in which a developer was ordered to pay $260,000 to the leader of a community group. Both cases arose from a situation in Saratoga, when three homeowner associations circulated brochures in opposition to a development project, alleging in the brochures that the developer had created a conflict-of-interest situation with a former mayor of Fremont. In a virtual replica of the Boswell case, Parnas sued for libel and the community groups — who hired the victorious lawyers from the Boswell case — countersued for malicious prosecution.

In *West Valley Taxpayers and Environment Association v. Parnas Corp.*, 222 Cal.App.3d 627, the Sixth District Court of Appeal reversed a trial judge who had ruled that Parnas, the developer, had probable cause for suing the community group. The appellate court ruled that the probable cause issue should be broad to trial because it involved a factual dispute — that is, whether Parnas really believed that the brochure contained false statements.

In *Monia v. Parnas*, 227 Cal.App.3d 1349, the Sixth District ruled that the jury was properly instructed to determine the reasonableness of Parnas's belief in the truth of the brochure's statements. The jury had found that Parnas did not have a reasonable, good-faith believe in the brochure's contents and awarded community group leader Victor Monia $6,000 in compensatory damages and $200,000 in punitive damages.

On June 20, the Supreme Court decertified both cases on its own initiative, meaning the cases will not be published and may not be cited as precedent.

While these appellate actions were taking place, two other important SLAPP suits came to light around the state:

- In a case pending in the Court of Appeal, a Los Angeles developer sued a Burbank community leader who opposed one of his projects, saying she interfered with a contract agreement. Developer Sherman Whitmore claims that community leader Annette Baecker interfered with his contractual agreement with the Mountains Restoration Trust, which called for Whitmore to restore wetlands in exchange for wetlands lost as part of a housing project.
- In Fresno, Newcity Corp. has sued a group of homeowners who picketed the company over home repairs, saying they spread false accusations about the company. The case also alleges that the picketers interfered with Newcity's business and engaged in a conspiracy.

Sonoma B&B Violated Zoning Ordinance, Appellate Court Rules

An appellate court has affirmed a lower court ruling that a Sonoma County bed-and-breakfast inn was operating in violation of the county zoning ordinance.

The case involved a 17-acre parcel of land in Glen Ellen owned by the family of Robert Rex. The Rexes had purchased the land in 1982 intending to start a winery.

Apparently on the advice of an unidentified member of the planning department, the Rexes began renting overnight rooms to B&B guests, even though B&Bs were not permitted in the agricultural zone where they were located. Later an enforcement officer warned the Rexes that B&Bs were not permitted, but forestalled punishment until after the passage of a new countywide B&B ordinance. The new ordinance permitted B&Bs in agricultural zones with a use permit, but the Rexes never even applied for a use permit. Instead, they apparently tried to operate the B&B under a zoning provision allowing them to rent three rooms in their primary residence to boarders. In 1986, the county Board of Supervisors ordered them to halt the practice.

On appeal, the Rexes claimed that the county should be stopped from shutting them down under the legal doctrine of equitable estoppel. However, the court rejected this argument, saying that the Rexes were aware that the inn was not a permitted use without a use permit. The Rexes also argued their B&B was a legal nonconforming use under the provision permitting boarders, but the court ruled that overnight guests were not the same as boarders. Finally, the Rexes claimed they had a vested right to operate the inn because they relied on information from the county. But the court said that "the Rexes' purported reliance upon statements of an unnamed County planning department employee over the telephone or statements made by an unnamed County planner at a meeting" did not constitute a vested right.

The full text of County of Sonoma v. Robert Rex, A049006, appeared in the Daily Journal Daily Appellate Report on July 8, beginning on page 8038.

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"In addition," Davis wrote for the three-judge panel, "we conclude that Congress necessarily created a narrow exception to the HBA within the limited geographical area of the Tahoe Basin when it approved the Compact in 1980." Among other things, the court noted that neither the Federal Highway Administration nor the Secretary of Transportation has ever taken any action to enforce the HBA in Lake Tahoe.

The Third District also concluded that the TRPA sign ordinance does not authorize takings, as the trial court claimed. "Under established California law, an ordinance prohibiting existing billboards may be enforced as a constitutionally valid exercise of the state's police power which does not require compensation if a reasonable amortization period for discontinuance of the use is provided." The court further noted that in First English, the Supreme Court dealt solely with the remedy for takings and "did not discuss or reject the concept of amortization."

The full text of Tahoe Regional Planning Agency v. King, No. C005345, appeared in the Daily Journal Daily Appellate Report on July 8, beginning on page 8077.

Government Ownership of Land

In another takings case, the First District Court of Appeal in San Francisco ruled that a government agency can't be sued on takings grounds simply because it owns geologically unstable land that threatens a neighboring property owner and chooses not to take action.

The case was brought by Mary Wildensten, a landowner whose property lies adjacent to Wildcat Canyon Regional Park in Contra Costa County. A nearby steep slope within the park is given to landslides, the possibility of which threatens the Wildensten property. After Wildensten's repeated requests to the East Bay Regional Park District to make engineering improvements were ignored, she sued.

In considering the case, the First District said that "to state a cause for inverse condemnation (i.e., taking), the plaintiff must allege the defendant substantially participated in the planning, approval, construction, or operation of a public project or improvement which proximately caused injury to plaintiff's property."

But, Justice John E. Benson wrote for the unanimous three-judge panel, "all the District has done is purchased undeveloped land containing natural landslides and left it undeveloped....The District's mere ownership and `management' of this undeveloped property could not be the proximate cause of any physical injury to Wildensten's property. Such passive ownership of raw land cannot be considered a government taking."

The full text of Wildensten v. East Bay Regional Park District, No. A048056, appeared in the Daily Journal Daily Appellate Report on July 8, beginning on page 8053.

Simi Valley Development

Earlier this year, the Second District Court of Appeal panel in Ventura declared a landowner's taking claim as unripe because, in the case of a proposed development near Simi Valley, the landowner didn't seek annexation to the city and didn't seek a variance from the county.(*CP&DR*, May 1991.)

The panel subsequently granted a request for rehearing based on the argument of the landowner, Long Beach Equities, that the unpublished opinion contained many factual errors. Now the court has re-issued the ruling (and ordered it published), correcting some factual errors. However, the panel did not alter its conclusion that Long Beach Equities' taking claim was unripe.

The full text of Long Beach Equities v. County of Ventura, B045047, appeared in the Daily Journal Daily Appellate Report on July 9, beginning on page 8130.

San Diego Neighborhood Challenges Caltrans on I-15 Construction

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of the north-south highway yet to be constructed. Caltrans's construction of a depressed eight-lane highway, first planned in 1970, is expected to take six years and cost close to $150 million. As Caltrans has acquired right-of-way and the spectre of the freeway has loomed, the neighborhood has deteriorated.

The City Heights alternative began to take shape after the election of John Hartley as District 3 councilman in 1989. Hartley had worked with City Heights community leaders on the 1988 ballot initiative that created council districts in San Diego for the first time. At Hartley's insistence, the city gave the City Heights Community Development Corp. $145,000 in block grant funds to hire a consulting team and draw up an alternative plan. "We have been saying this should be done for 10 years," said Jim Bleisner, chairman of the City Heights CDC committee working on the project.

The resulting plan calls for more than 10 acres of new park and 300,000 square feet of new development, most of it for public facilities. A complex at University Avenue would include a library, a community center, a post office, and a light-rail station. A second complex at El Cajon Boulevard would be oriented around a proposed community college. The cost of these facilities is estimated at more than $50 million.

To make the plan work, neighborhood leaders must force Caltrans to slow down the construction schedule and also find major sources of funding — both difficult tasks.

For funding, City Heights is banking on the creation of a redevelopment project area, which is likely to occur by the end of the year. But the project area will have little tax-increment money at the beginning and therefore — like many other new redevelopment areas — will have to borrow start-up money from the city treasury. Neighborhood leaders are also hopeful that the area's freshman Republican congressman, Randy "Duke" Cunningham, will be able to secure $25 million federal Highway Demonstration Grant for the project.

City Heights may have a tougher time slowing down the Caltrans construction schedule, however. The first phase of the project was originally included in the California Transportation Commission's 1992-93 spending plan, but Caltrans has asked that the funds be moved into the current fiscal year. And while Assemblyman Mike Gotch, D-San Diego, who represents the area, supports the City Heights proposal, Bleisner acknowledges that "we don't have any negotiating clout with Caltrans."

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Federal Government Likely to Place Limits on Wetlands Regulation

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drafted by the EPA, while Fish & Wildlife reviews all 404 permit applications and the Soil Conservation Service administers federal laws that prohibit certain farm subsidies from going to farmers who destroy wetlands. Though some state agencies, such as the Coastal Commission, regulate wetlands independently, most local governments simply yield to the Corps on wetlands issues.

The 1989 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* laid out three specific criteria for a wetland:

(1) the presence of so-called "hydric" soils — meaning mucky or peat-based soil that thrives in wet areas.

(2) the presence of plants found on the federal list of plant species that thrive in wet areas. The list included plants that were also sometimes found in dry areas.

(3) the presence of water within 18 inches of the surface of the ground for at least seven consecutive days during the year. However, under the 1989 definition, wetlands investigators did not have to actually find the water; if the soil and the plants were present, the water was assumed also to be present for the minimum of seven days.

This expansive definition was certainly in keeping with the promise of President Bush, then newly elected, to enact a "no net loss" policy on wetlands. However, it also led to widespread complaint all across the country. Under this definition, 80% of the fast-growing Hampton Roads area in Virginia was classified as wetland, and lawns in West Houston were termed wetlands because they could grow Bermuda grass. In California, the seven-day rule proved especially important because the state's seasonal precipitation means that many areas serve as wetlands for only part of the year.

Given the expansive definition of wetlands, governmental agencies became cautious in permitting them to be disturbed, and tales soon began to circulate among developers and business leaders about such situations as drainage ditches being categorized as wetlands. "This has been the biggest land-use program in the country," says Robert Szabo, lobbyist for the National Wetlands Coalition, an organization made up of regulated industries.

With the Clean Water Act up for reauthorization in 1992, business interests began lobbying for changes in the Section 404 program. And only two years after Bush was applauded for his "no net loss" policy, a backlash against wetland regulation began in Congress.

Led by oil and gas companies, whose operations in Louisiana and East Texas were profoundly affected by the expansive definition of wetlands, the business community formed the National Wetlands Coalition to fight for more leeway in the law. (Many municipalities belong to this group, including the City of Los Angeles — which runs into wetlands issues as the "developer" of the Port of Los Angeles — but the Building Industry Association of Southern California does not.) These business lobbyists are supporting a proposal introduced as H.R. 1330, by Rep. Jimmy Hayes, D-Louisiana, and S. 1463, by Sen. John Breaux, D-Louisiana. Among other things, the Hayes/Breaux bill would:

- Reduce the EPA's role in wetlands protection.
- Narrow the definition of wetlands, so that 21 days of inundation with surface water would be required for a piece of property to qualify as a wetland.
- Establish a ranking system to determine the value of wetlands and provide different levels of protection depending on the value — a system opposed by environmentalists.
- Require that the federal government pay compensation to owners of "high value" wetlands.

Though congressional hearings have yet to be held on the the Hayes bill, it has so far won the support of more than 160 co-sponsors in the House of Representatives. Meanwhile, environmentalists are laying their chips on H.R. 251, introduced by Rep. Charles Bennett, D-Fla., which would establish an official "no net loss" policy, expand the activities subject to Army Corps permits, strengthen the role of the EPA, and require the Corps to give greater deference to other federal agencies such as Fish & Wildlife.

Apparently hoping to counteract the Hayes bill, EPA Administrator William Reilly embarked on a campaign this spring to resolve the wetlands controversy administratively by changing the federal delineation manual. But in so doing, he set off a new round a political machinations surrounding the definition of a wetland.

In mid-May, Reilly produced a proposed new definition of wetlands, agreed to by the Soil Conservation Service and the Army Corps of Engineers. The new definition would require saturation with water for 14 consecutive days per year rather than seven, and would also require confirmation of the water's presence. In addition, the definition of wetlands plant species would be narrowed somewhat and at least half of the species on site must be wetlands species. "We're only interested in saving genuine wetlands," said Reilly, who released the proposal while it was still pending at the White House.

Predictably, environmentalists opposed the definition. In addition, however, William Sipple, EPA's chief wetlands scientist, resigned from the task force working on the delineation manual, saying it was not scientifically justified. And the Fish & Wildlife Service refused to sign onto the proposal, raising the same scientific concerns as Sipple.

But the Hayes bill continued to pick up supporters, and in mid-July Reilly took another step away from the old definition in hopes of containing the damage. Testifying before the Senate Environment and Public Works subcommittee on environmental protection, he said he now supports a requirement that water be present on the surface of the site — rather than below the ground — for 10 to 20 days in order for the land to be declared a wetland. The new proposal was considered a surprise because the White House still has not signed off on the proposed changes.

Press reports suggest that Reilly is fighting the White House as much as he is fighting Congress. The *Washington Post* later reported that White House officials had instructed Reilly not to release the latest revisions or criticize the Hayes bill in his subcommittee testimony. Despite the instructions, Reilly did both. According to the *Post*, the White House task force on wetlands is headed by Teresa Gorman, a special assistant to the president who is known for her sympathy to the concerns of industry on wetlands issues. It is Gorman's task force, not Reilly, who will ultimately recommend to President Bush how he should proceed on the wetlands issue.

If the new wetlands definition is accepted, the impact on California could be considerable, according to both a BIA lawyer and a wetlands expert at the state Department of Fish & Game.

"In the Southeast, wetlands tend to be wet," says Bart Doyle, general counsel to the Southern California Building Industry Association. "Most of the time, one, two, three weeks isn't going to make any difference. But the relatively short duration test clearly has an impact in arid areas."

Both Doyle and Fish & Game's Bob Radovich said that the revised manual could diminish protection for vernal pools, ponds, and other small, isolated wetlands away from the coast. Radovich noted that while the Coastal Act protects wetlands along the coast, "there's no state protection outside the coastal zone," and therefore wetlands in the state's interior are subject only to federal regulation.

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Kemp Commission Blames Regulation for High Cost of Housing

Using California as a leading example, a presidential commission has blamed high home prices on excessive land-use and environmental regulations. The commission even titled its report "Not In My Back Yard" because, as its report states, practically every witness who testified before the commission used the term "NIMBY."

Concluding that excessive regulation adds 20-35% to the price of a home, the Advisory Commission on Regulatory Barriers to Affordable Housing — the so-called "Kemp Commission" — made a series of sweeping recommendations to President Bush, including:

- Attaching strings to federal housing aid, so only those communities engaging in "barrier-removal strategies" will receive funds.
- Providing streamlined federal regulations to states which take action to increase the supply of affordable housing.
- Instituting a "Housing Impact Analysis" requirement for all federal actions.
- Reforming wetlands regulations and the federal Endangered Species Act.
- Increasing the federal government's role in bringing lawsuits challenging barriers to affordable housing.
- Reforming federal mortgage requirements to encourage more investment in inner-city areas.
- Increasing the state's role in "responsibility and oversight for the regulatory decisionmaking processes of their constituent localities."

"If even half the recommendations in this report were implemented, we would have three to five million families who would be able to afford decent housing now, who cannot afford it," said the commission's chairman, former New Jersey Governor Thomas Kean.

The environmental proposals received considerable publicity because the commission report was released in the midst of the heated congressional battle over wetlands regulations. (See main story.) The Kemp Commission was highly critical of federal wetlands regulation, and cited a situation from Juneau, Alaska, where a six-unit homeless shelter proposed by the St. Vincent de Paul Society was halted because neighboring land purchased for a parking lot was located on a wetland and the Army Corps of Engineers refused to issue a permit. (The parking lot for the homeless shelter was required under city codes.)

The commission's recommendations parallel the proposals contained in H.R. 1330, introduced by Rep. Jimmy Hayes, D-Louisiana — including a recommendation that wetlands be ranked by value and that landowners be compensated for wetlands protection. The commission also recommended that the federal government encourage more states to assume control of wetlands regulations. Under the Clean Water Act, the Army Corps of Engineers can turn its permitting program over to the states, but so far this has occurred only in the state of Michigan.

The wetlands proposal has apparently caused friction between Jack Kemp, the secretary of the Department of Housing and Urban Development, and William Reilly, administrator of the Environmental Protection Agency and a leading advocate of wetlands protection. Testifying before a Senate subcommittee just two days after the Kemp Commission report was released, Reilly evoked laughter by saying: "We hear that wetlands regulations are preventing the construction of housing for poor people in, uh, swamps."

California was singled out for criticism in the report because of its widespread growth control ordinances and also because of the way the Endangered Species Act has been used to shut down development in certain parts of the state. Two Californians served as members of the commission: Greenlaw "Fritz" Grupe Jr., CEO of the Grupe Co., a Stockton development company, and Thomas Cook, a housing specialist from San Francisco who was recently named to a high-ranking position in the state Department of Housing and Community Development by Gov. Pete Wilson. A large number of Californians testified at a commission hearing in San Francisco last September.

The commission was especially critical of municipal-level growth control in California. Noting that a recent study identified more than 900 local growth-control ordinances in California, the Kemp Commission concluded: "All growth-limiting policies adopted by one community simply displace the same amount of growth to other communities. ... They do not solve any problems associated with or caused by growth, but simply move them around within the metropolitan area."

With regard to the Endangered Species Act, the Kemp Commission singled out the well-known case of the Stephens' kangaroo rat in Riverside County, whose habitat caused a halt in development of starter homes and, eventually, the imposition of a $1,950-per-acre fee on new development. (For more information on this situation, see *CP&DR Special Report: Federal Environmental Laws*, June 1990.) "For years to come," the commission stated, "people buying new homes in Riverside County will be paying for the Stephens' kangaroo rat's preserves." (Biologists will no doubt be amused to learn that the commission misspelled the rat's name as "Stevens" in the report.)

Growth control and environmental regulation were not skewered as severely, however, as the familiar problems of restrictive zoning and subdivision controls in the suburbs, including "gold-plated" standards. The commission also criticized exactions and fees, saying that when they are negotiated, rather than fixed, "local inconsistencies and inequities can arise." Although this section of the commission report was titled "Inequitable Fees on Development," the commission came down hard on any kind of fee — even those that are not inequitable — because "newer residents are pitted against older ones in the struggle over who pays for infrastructure, and some potential new residents are simply priced out of the housing market."

Although land-use controls are a jealously guarded prerogative of local governments throughout the country, the Kemp Commission made a series of detailed recommendations regarding a bigger state role in the field. Despite the fact that the commission singled out California for criticism, however, many of the recommendations on an enlarged state role would borrow from California, including making housing elements subject to state review, imposing standards on impact fees, and having time guidelines similar to California's Permit Streamlining Act.

It remains to be seen whether the federal government will accept the commission's challenge of getting involved in legal challenges to excessive regulation at the local level. The commission's report suggested that HUD and the Justice Department "undertake a joint program to identify cases of excessive or exclusionary regulations in which a favorable resolution would have a significant impact upon removal of regulatory barriers." This program may include technical assistance to other parties bringing local lawsuits or — when important constitutional issues are at stake — the federal government could initiate the lawsuits itself.

The commission's recommendations on inner-city reform called for tougher enforcement of anti-discrimination policies of HUD, the Federal Housing Administration, and Freddie Mac and Fannie Mae, the federally chartered secondary mortgage companies. In particular, proposed federal reforms include the following:

- The policy of the secondary mortgage market companies should include "a firm, unequivocal commitment to end all forms of discrimination."
- As regulator of Fannie Mae and Freddie Mac, HUD should aggressively pursue a policy of requiring investment in low- and moderate-income housing and central-city areas.
- The secondary market companies should expand into new types of products that serve the affordable housing market.
- The Community Reinvestment Act and the Home Mortgage Disclosure Act should be vigorously enforced.

"Not In My Back Yard": Removing Barriers to Affordable Housing was issued on behalf of the Advisory Commission on Regulatory Barriers to Affordable Housing by the U.S. Department of Housing & Urban Development, Office of the Assistant Secretary for Policy Development and Research, Washington, D.C. 20410.

DEALS

Nobody Plays the Redevelopment Game Better Than Price Club

"Don't blame them. It's the parents' fault," people often say of children who act poorly. Logic holds that the parents have rewarded the kids' bad behavior; otherwise, why would children act that way? In a similar vein, if you think that Price Club is overbearing in its dealings with local governments, you might take a look at California's redevelopment and taxation laws. These oddball codes have given smart operators like Price Club every reason to bully cities around.

No question about it, Price Club is a hardball player. An affluent company, the self-styled "original cash-and-carry membership store" pushes hard to make cities subsidize its land costs and other infrastructure. Financially creative, the retailer often demands and receives a sizeable rebate of sales tax. Restlessly expansionary, it encourages neighboring cities to vie for its franchises and compete in offering it incentives. And even if a city already has a Price Club inside its borders, the price of keeping it is often high. More than a few cities have had to provide a larger site and a new package of subsidies in order to keep Price Club from skipping town.

But Price Club's tough tactics are just a logical and canny response to the quirks in California law. One quirk is the state's way of distributing sales tax revenue, which flows back to the local jurisdiction where the sales transaction took place, rather than on a per-capita basis. Another quirk is the way redevelopment permits local governments to use property tax-increment financing to bring in companies, like Price Club, that throw off a lot of sales tax. In short, state law encourages cities to compete with each other to try and "steal" Price Club away.

This situation is old news in a lot of ways; auto dealerships, the Walt Disney Co., and Nordstrom have also proven savvy at dangling themselves like prizes in front of salivating city officials. But Price Club is different because of its size, its relentless expansion, and the way it has built the redevelopment game into the basic economics of its business. With 30 stores already in the state, Price Club is seeking access to every major market in California, cutting deals and pulling strings throughout the state. The chain even has a slick brochure for cities that talks the language of redevelopment and tax revenue. In this way, Price Club is become a statewide force in shaping public policy.

Price Club's wish list seems to be more or less the same throughout California. The retailer wants sites of at least 10 acres, to allow for ample parking. The chain rarely wants to spend more than $5 a square foot in land, even in areas where market rate is two or three times that amount, and often asks for "rebates" of up to 50% of the local sales tax revenues it generates. And, Price Club officials "almost always get what they want," says Roger Anderman, assistant city manager in Fremont. (Price Co. president Robert Price hadn't gotten back to us at press time.)

Price Club, in turn, can offer some extraordinary bait to small cities. The stores, which can be up to 200,000 square feet in size, can gross between $100 million and $120 million annually. Since at least 65% of those sales are taxable, Price Club's own brochure boasts that cities can expect to yield from $650,000 to $780,000 annually. (Cities receive 1 cent back from the state for every $1 in retail sales within their borders.) Some city managers hint that their local stores do even better. Otis Ginoza, an Inglewood city planner, declines to specify the revenues Price Club generates for his city but observes the chain "puts out the sales tax of a lot of major malls." For many cities, that means Price Club is the biggest sales-tax performer in town. And because Price Club has so far been a "sure thing" — unlike hotels, auto dealerships, and malls, which are always a risk, every single Price Club will generate the promised revenue — cities are willing to play along with the retailer's gruff tactics.

Land write-downs and subsidies are typical elements in Price Club's art of the deal. In Inglewood, Price Club bought a 20-acre site in a redevelopment area in 1986 for about $8.7 million — about $10 per square foot — which was about twice the amount the retailer wanted to pay. Because the city lacked the cash to write down the price of the land at purchase time, Inglewood agreed to repay to Price Club 50% of its land costs. In a deal that has Price Club playing the part of banker for its own land write-down, Inglewood agreed to repay the retailer half its land costs with a 15-year note, plus 8% interest, to be paid out of property tax increment funds. In Santee, where Price Club is also located in a redevelopment area, the retailer balked at paying the full $3.39 million purchase price for a 14-acre site — that's about $5.50 per square foot — so the city chipped in roughly half that amount and reimbursed itself through tax increment.

Once a Price Club is already in place, the subsidies don't end, however; the chain is not above letting itself be "stolen away" by rival cities who offer a more attractive package than the existing host. In Cerritos, where Price Club had an existing franchise in a redevelopment area, the retailer wanted more parking and asked the city to build a $4 million parking structure. The city countered with a request for minimum annual revenue, which officials would not reveal publicly. Price Club decided against Cerritos and moved a mile away across city lines to neighboring Norwalk, which could offer more surface parking. Meanwhile, back in Cerritos, Price Club leased its former site to another successful chain, Home Depot.

Another example of Price Club's ability to pit communities against one another occurred in 1987 in the Orange County cities of Fountain Valley and Santa Ana. Price Club, which had an existing franchise in a Santa Ana redevelopment area, again sought more parking and room to expand. In the end, the retailer moved one mile east on the same street — across city lines — to a redevelopment area in Fountain Valley. There, Price Club paid $15 million for a 30-acre site, a hefty $11 per square foot. On the extra land, the entrepreneurial chain has built accommodations for Carl's Junior, Soup Plantation, and other tenants.

But Fountain Valley paid a heavy price in the form of sales-tax rebates. Under the deal, the city is obliged to pay back 50% of sales tax, with a ceiling of $750,000 annually plus interest, until reaching a total $8 million; again, the city pays back Price Club on a sliding scale based on the amount of sales tax the retailer generates. To protect itself from Price Club's notorious wanderlust, Fountain Valley stipulated that if the principal and interest were not paid back in 20 years — that is, if Price Club skips town and fails to throw off any further tax revenue for the city — the deal is off. In this case, Price Club agreed.

Even though cities are willing to put up with Price Club's elaborate deals, the question recurs whether the act of playing up to the biggest generator of tax revenue is the purpose of redevelopment. Price Club can justify itself in economic development results; outlets employ up to 250 people per outlet, far more than many industrial plants of comparable size. Christopher Lyman, Chula Vista's finance director, says Price Club can further aid economic development by attracting other businesses to particular redevelopment areas.

So what's the beef? Simply that by taking advantage of the way California's tax and redevelopment system works, Price Club has turned economic development on its head. Instead of cities using incentives to lure companies into depressed market areas where those companies wouldn't otherwise locate, Price Club stakes out a market area and then plays all the cities in that market area off against each other. We don't begrudge either cities or the retail chain for wanting to make a living, but fat subsidies to billion-dollar corporations like Price Club phenomenon reveals just how much cities are really thinking about money when they talk redevelopment. Cities may be inviting abuse if they forget the goals of redevelopment in their search for cash.

Morris Newman