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[the primary article transcribed is “The Tree in the Windstorm”]

TDRs for Housing Conservation: An Innovative Approach to Encourage Housing, Production, and Rehabilitation

by Michael V. Dyett, AICP

The Bay Area's problems with producing low-income housing and preserving residential hotels (SROs) are not unique, but the pressures for demolition and redevelopment are greater than in other areas. To provide an incentive for rehabilitation, Bay Area counties and cities could establish programs to allow a transfer of unused development rights from residential hotels and other low-income housing to other sites. Why not accord this vulnerable resource the same incentives for conservation that are offered owners of historic properties?

A Transfer of Development Rights (TDR) program in Seattle, Washington, has had a promising start. Seattle's TDR Program was formally announced in September 1984 as part of an overall Downtown Housing Program. It has two components: a between-block, low-income housing TDR program, which is intended to preserve existing occupied low-income housing structures in the downtown; and a within block housing TDR program, which is design to promote development of moderate-income housing in the downtown.

In Seattle those selling development rights must agree to maintain their buildings for low- or moderate-income occupancy, depending on the program, for 20 years. This may be extended for up to 30 years if the City offered some financial assistance. The program enforcement provisions are quite strict, requiring deed covenants recorded with the title to the property. At the end of the 20-year period, the property can be redeveloped within the zoning envelope remaining after the transfer with no restrictions as to use.

The program was originally developed as an alternative to a housing production as an alternative to a housing production program similar to San Francisco’s Office Housing Production Program. That program had been unpopular with developers

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THE TREE IN THE WINDSTORM: Revising California's Planning Law

by Peter M. Detwiler

This is the fourth and final installment on the history, politics and lessons of Assembly Bill 2038l (Cortese). Author Peter Detwiler is senior consultant to the Senate Local Government Committee and formerly was with the Office of Planning and Research.

[callout text: "The American Planning Association has emerged as a legislative player in the game of

making loud use lows... planners, not just land use litigation attorneys and trade association lobbyists, now have legitimacy on land use bills."]

Five Problems in Negotiating

Why did AB 2038 look so different from the Task Force's 1982 May Draft? The Advisory Group and the legislative process created at least **five problems** for the planners who wanted to enact their agenda. The **first** difficulty was the problem of educating lobbyists for development and real estate interests on what the existing planning law really said. During negotiations the planners realized that these lobbyists were not aware of recent court decisions or misunderstood what the courts had said. Water districts representatives, in particular refunded to recognize the Friends of "B" Street decision as the foundation for the public works consistency mandate.

Education was also the **second** problem. Planners and allied conservationists needed schooling in the legislative process. Seen by developers' advocates as obsessively nit-picky and inconsistent, some environmentalists insisted on reopening negotiations on items that had been closed out at previous meetings. Not only did this naïve behavior grate on professional lobbyists, it gave the developers an excuse to reopen arguments that they had lost. As a result, the process often bogged down and political momentum was lost.

The **third** snag was the thorny, but sacrosanct, housing issue. Planners, developers and environmentalists felt repeated frustrations each time that logic suggested a rewrite of the housing element, only to be persistently, rebuffed by advocates of affordable housing. Their representatives rarely engaged in negotiation, preferring to sit watchfully until an issue related to housing turned up. Then these lobbyists would suspect that a conspiracy was underway to deny their clients their recently won gains.

Perhaps there is no best time to start political negotiations, but one of the lest productive times is during the last year of a lame duck governor's term. As a fourth problem, AB 2038 straddled the administration of Governor George Deukmejian. As OPR became further isolated from Brown

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In 1982, its staff members were unclear about their own futures and how fare they could take their negotiations. To their credit they acted professionally, adhering to the five principles developed in the 1981 Symposium and reflected in the May Draft. But developers and real estate interests refused to negotiate on key issues such as a governor's role in setting state planning policies until the November 1982 election results were known.

Once in office, the new leadership in the Deukmejian Administration was disinterested and inexperienced in land use issues. Further, they were suspicious of projects started under Brown. The absence of leadership changed the political chemistry of the second Task Force putting increased pressure on the planners who were less skilled in legislative negotiations. This shortcoming was

demonstrated on June 24, 1983, when Huston T. Carlyle, Jr., Deukmejian's OPR Director, met with Cortese's Advisory Group. In short, neither the Brown nor the Deukmejian administrations understood or supported the planning law revisions.

The **final** problem had to do with the nature of the Task Force itself. Structured like a house-of-cards, the group operated with every participant holding a veto. The task force approach had worked successfully before on changes to the Subdivision Map Act. But the Map Act issues were far more technical than the basic policy and philosophical questions which begged AB 2038. With multiple views, inexperience and rampant suspicion plaguing the task force, single-issue vetoes became commonplace. Further, the unusual alliance between development interests and local governments shifted the traditional balance of power. The cities' particular dislike of ligation seemed a powerful force. As a result, agreements were impossible on major policy questions and AB 2038 became a collection of compromises on mid-level issues and technical points.

What the New Bill Does

Assemblyman Cortese' successful AB 2038 makes many changes, but they were better understood when viewed as six main groups.

Local General Plans.

The 1965 Law requires every county and city to adopt a general plan with at least nine mandated "elements." Local officials can also adopt other permissive elements and the Law lists ten examples. Assembly Bill 2038 reduces the number of mandated elements from nine to seven by consolidating the current seismic safety element into the safety element and repealing the scenic highway element. AB 2038 also simplifies the requirements for the noise element. In place of the current list of permissive elements. AB 2038 generally authorizes local officials to adopt any other elements it chooses. The bill clarifies local officials' ability to adopt their general plans in any "appropriate or convenient" format.

[callout text: "Because of AB 2038, the Planning and Zoning Law will be able to withstand several more years of political storms."]

Public Notice.

The old Law requires public notice for various land use decisions: the adoption and amendment of general plans, zoning ordinances, variances, use permits and subdivisions.

These notice requirements are separate and not necessarily consistent. Assembly Bill 2038 consolidates these notice provisions into a standard set of requirements. Notice must be mailed at least 10 days before the hearing to the property owner, to significantly affected local agencies, and to property owners within 300 feet. If more than 1,000 property owners must be notified, the city or county can publish a display ad in a local newspaper instead of mailing individual notices. If the city or county mails the notices, it must also publish a legal notice in at least three locations including in the affected area. The city or county must also send a notice to anyone who had asked for it. The notice must explain the hearing and inform recipients of the date, time, place, and other specifics.

Standard of Review.

When a court reviews the adequacy of a city or county's housing element, the statute directs the court to determine whether the plan "reasonably complies" with the Planning and Zoning Law. In reviewing

Mendocino County's inadequate general plan, the court's Camp decision used the standard of "substantial compliance." Assembly Bill 2038 changes this standard from "reasonably" to "substantially" complies. AB 2038 declares the Legislature's intent to codify the standard from the Camp Decision.

Specific Plans.

Cities and counties can adopt specific plans which serve as a bridge between their general plans and individual development proposals. Communities often adopt specific plans to guide projects in areas with special problems, such as older downtowns or large new developments. However, critics say that the current specific plan law is overly complicated and discourages plans' adoption. Assembly Bill 2038 recasts and simplifies the specific plan statute by repealing several outdated and detailed requirements.

Under AB 2038, a specific plan must specify land uses, essential facilities, development and conservation standards, and implementation programs. Once adopted, the specific plan becomes the basis for making land use decisions in that area. The bill continues the current CEQA exemption for housing projects that are consistent with a specific plan for which there already is an EIR.

Obsolete Laws.

In 1957, the Legislature provided for regional planning districts to plan for two or more counties. While many counties conduct common planning efforts through councils of government formed under the Joint Powers Act, none has ever created a regional planning district. In 1978, the Legislature passed the Model Integrated Local Planning Act (MII PA). The Act proposed six pilot projects to encourage local officials to adopt social and economic plans in place of their general plans which focus on physical development. No city or county has ever used the Act. Assembly Bill 2038 repeals the District Planning Law and the Model Integrated Local Planning Act. The bill retains a modified version of MILPA's declaration of legislative policy.

Streamlining.

After nearly 20 years, the Planning and Zoning Law contains many inconsistent, redundant or conflicting features. Assembly Bill 2038 simplifies the

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procedures for adopting general plans. AB 2038 clarifies the ways by which cities and counties must meet or extend the deadlines for adopting their plans. Further, the bill corrects several cross-references in other laws to fit the new numbering system in the recodified Planning and Zoning Law. Among the other laws affected are: California Environmental Quality Act, Subdivision Map Act (including the Quimby Act), Urban Development Incentive Act, California Timberland Productivity Act and the laws affecting sites for community colleges and schools.

[callout text: "Recognized as an innovator, California's commitment to planning remains firmly intact with the passage of AB 2038."]

So What Really Happened?

What are the results from five years of trying to solve planners' problems? More than just AB 2038 and the other related bills, the less tangible result promises a bigger role for planners in Sacramento. The American Planning Association has emerged as a legislative player in the game of making land use laws. Through the Cortese bill, APA has educated planning professionals about the legislative process and has taught lobbyists what the planning statutes really say. Both types of schooling will pay off in the future as more legislatively sophisticated planners will be available to work on other bills. Similarly, developer and real estate advocates have learned a lot more about how the planning statutes fit together. The immediate product is political credibility in Sacramento for APA. Perhaps the most important currency in circulation in the Capitol is a reputation for reliability. Planners, not land use litigation attorneys and trade association lobbyists, now have legitimacy on land use bills. AB 2038 has earned this for APA.

Planners succeeded on AB 2038 because they learned to apply what they do daily to the legislative process in Sacramento. Because much of successful land use regulation requires compromising conflicting but equally valid goals, planners should be especially qualified to negotiate legislation. There is little harm in conceding minor points in Sacramento if the concessions lead to achieving or protecting the overall principle. The labyrinth that was the Advisory Group taught APA's California leadership how to apply their land use negotiating skills to legislative issues. Finally, the substance of planning was advanced. Recognized as an innovator, California's commitment to planning remains firmly intact with the passage of AB 2038. The calls for less planning were turned aside. The planning process has been pruned of unnecessary formalities, leaving a trimmer statute of capable of withstanding criticism. This unburdened law may not lead to more land use litigation, but that was never the planners' goal in AB 2038. The goal of restoring vigor to the state's laws on local planning was met. The format has changed, but the content remains intact.

The Agenda Left Undone

Compared to the five principles articulated by the 1981 Symposium, AB 2038 falls short. Although the bill eliminated much of the 1965 Law's complexity and gave local officials' maximum flexibility over organizing planning agencies, AB 2038 did not respond to three other principles. Planners were not able to have the Legislature articulate issues of state concern. The question of intergovernmental coordination was left undone. And the related issue of how to resolve planning conflicts fell out during negotiations. These three remaining points comprise planners' future agenda.

Of the 18 key features the first Task Force identified in its May Draft, only eight will be law on January 1, 1985. The rest serve as an outline for future bills or cause for serious rethinking. Resistance to a strong or even clearer role for state agencies was the main reason that most of these items failed. Local elected officials and developers' representatives feared that a strong state presence in planning would change the customary ways of making land use decisions at the local level. A clear statemen of statewide policy, an organized state planning effort that included line agencies, and stronger links between planning and budgeting all fell by the political wayside.

Nevertheless, the planning profession has invested five yeas in deflecting reactionary attacks, identifying statutory flaws and building political credibility. Concerned professionals need only to return to the Symposium's working papers and the May Draft to find their agenda for future action.

The Tree In The Windstorm

The best analogy to explain the five-year effort that culminated in AB 2038 is a tree in a windstorm. A sapling, as it grows, resists the wind's damage by bending with the storm. It branches out, gathers girth and in time spreads a crown that makes it vulnerable to storm damage. The wind's force on dead limbs and tangled branches can knock down the entire tree. Wise husbandry calls for selective pruning, keeping the important limbs and removing excessive and unproductive growth. The pruned tree can then withstand even the most ferocious winter storm.

The Planning and Zoning Law is like this tree. In its early years of growth, it bent to local political demands. But as the Legislature added new general plan requirements and consistency mandates, its very size made it cumbersome and politically vulnerable. The reactions of 1979 to a strong state role in enforcement nearly toppled the statute. Planners recognized this danger and studied the law to find what was worth saving and what could be pruned. The repeal of obsolete articles like the Model Integrated Local Planning Act and the District Planning Law, trimmed the statute's bulk. Retaining the consistency requirements and holding on to the basic mandates for local planning kept the most productive features of California's progressive laws. Because of AB 2038, the Planning and Zoning Law will be able to withstand several more years of political storms.