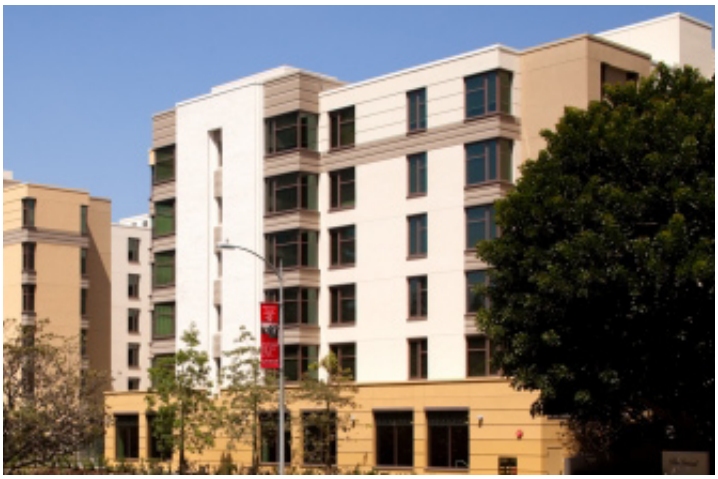
Government • Land Use • Environment • Energy

JMBM Spring 2011

Development Rights

Eldercare Housing Crisis Looming

by Benjamin M. Reznik



Senior Living: Belmont Village of Westwood on Wilshire Blvd.

We are getting older and living longer. The statistics for the growth of the elderly are compelling. In the past few years we have seen several types of new private eldercare facilities, such as independent living and assisted living pop up in the LA area, mostly in more affluent neighborhoods. But make no mistake: neither LA nor the rest of the nation is prepared to properly care for and house the emerging elderly population.

When I speak with people who now must find some level of assisted housing for their elderly parents, their frustration is all too common and similar: there are too few choices and none that are located in their neighborhood. What an interesting concept – siting eldercare facilities "in our neighborhood." This notion is not just for the convenience of the adult child, who wants to remain close enough to the parent for visitation purposes, it is also important for the elder parent, who should not be relegated to living out the rest of his/her life in institutional facilities along major commercial corridors. There must be a way to integrate eldercare housing into residential neighborhoods, including single-family areas.

In 2006, the City of Los Angeles adopted an Eldercare Ordinance (178,063) which tackled this issue head on. It specifically provides for the siting of such facilities in virtually all zones, including single-family zones, through a process that enables a public hearing and the imposition of conditions. One of the biggest issues confronting eldercare facilities in the past has been the amount of parking that should be required. This ordinance modified the parking requirement to more closely reflect the actual parking need, thereby eliminating the need for complicated variance hearings. This ordinance would not have passed but for the tireless work of then Chief Zoning Administrator Robert Janovici, who realized its importance and shepherded it through the legislative process.

Now comes implementation. Will the city approve such facilities if faced with local neighborhood opposition? There have only been a couple of applications utilizing the Eldercare Ordinance so the answer is yet unknown. However, recently the Tarzana Neighborhood Council demonstrated strong leadership on this issue when it voted to recommend approval of an assisted living facility in one of its residential neighborhoods. Many of the Neighborhood Council members pointed out that it is our responsibility as a society to house the elderly in the very same neighborhoods in which they had lived for many years, rather than succumb to the pressure of forcing them to live in commercial areas. In a sense, what the Tarzana neighborhood Council is saying is that while the care of the elderly may be a business, the housing is residential in character.

It will be interesting to see how the City deals with this case as it makes its way through the process. ■

As Chairman of the Firm's GLUEE Department, Ben Reznik's practice emphasizes real estate development entitlements, zoning and environment issues, including frequent appearances before city planning commissions, city councils and other governmental boards and agencies on behalf of real estate development firms and various industries. For more information, contact Ben at 310. 201. 3572 or BMR@jmbm.com

JMBM Proposes Amendments to CEQA

by Sheri L. Bonstelle

JMBM's land use attorneys partnered with the Hollywood Chamber of Commerce, including its developer members, to draft amendments to the California Environmental Quality Act ("CEQA") (Public Resources Code, Division 13, Sections 21000 et al) that will provide developers more certainty and protection from frivolous lawsuits that have threatened Hollywood development in a time of economic turmoil. Hollywood Chamber president, Leron Gubler, stated that thousands of construction and permanent jobs were lost in Hollywood, because CEQA lawsuits against eight key projects delayed the developments for one year to eighteen months. As a

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result, owners decided to put their projects on hold or abandon construction, because either the project lost financing backing or the onset of the recession eliminated the anticipated market. JMBM and the Hollywood Chamber met with State Senator Curren Price in January 2011 to discuss the serious implications of the lawsuits that threaten Hollywood's growth, even when the developer ultimately prevails. Senator Price lauded these amendments as changes that would strengthen CEQA, and agreed to sponsor the bill in the 2011 Senate term.

CEQA is the foundation for environmental law in California, and its primary objective is to require disclosure of any significant environmental effects of proposed projects and mitigation of these effects to the extent feasible. CEQA also provides strict timelines and expedited litigation schedules for cases involving a challenge to such environmental reviews. However, the law allows for lenient extensions by judges, and the one-year time limit to proceed to hearing is often extended to over two years. In recent years the State legislature considered numerous amendments to CEQA to further expedite the litigation schedule and eliminate frivolous claims to allow more certainty for owners and developers in the process. However, the amendments did not ultimately provide a timely resolution of pending lawsuits.

As a result of CEQA lawsuits, owners decided to put their projects on hold or abandon construction, because either the project lost financing backing or the onset of the recession eliminated the anticipated market.

The amendments suggested by JMBM and the Hollywood Chamber provide three key objectives. First, the proposed language creates a strict schedule for the public agency to complete the administrative record in a timely manner by eliminating lenient extensions of the 60-day limit that often exceed six months. Second, the proposed language reduces the time for a case to proceed to a hearing from one year to nine months, and limits extensions of time periods for tasks prior to the hearing to ensure that this time frame is feasible. Finally, the proposed language allows the real-party-in-interest, who is often the property owner or developer, to participate in the mediation process, and to terminate mediation and proceed to litigation if the mediation is not producing timely results. The existing language allows the local agency or petitioner to continue mediation without results indefinitely. These amendments are currently under consideration by the State Senate in Senate Bill Number 735.■

Sheri Bonstelle is a Partner in the Firm's GLUEE Department. Sheri's practice focuses on land use and construction matters. Sheri is both a lawyer and an architect. For more information, contact Sheri at 310.712.6847 or SBonstelle@jmbm.com

Court Decision Changes CEQA Related Traffic Impact Analyses *by Neill E. Brower*

A recent court decision has already changed the way many public agencies evaluate traffic impacts in analysis reports prepared to satisfy the California Environmental Quality Act ("CEQA"). On December 16, 2010, the Sixth District of the California Court of Appeal issued its decision in *Sunnyvale West Neighborhood Association v. City of Sunnyvale*, invalidating an environmental impact report (EIR) for a major roadway extension project. *Sunnyvale* should be considered as a logical extension of case law regarding the proper baseline for CEQA analysis and the end of the future baseline scenario as the only basis of a traffic impact analysis.

Prior to *Sunnyvale*, an accepted practice for traffic impact analysis involved crafting a future baseline scenario, usually based on the anticipated year of project build-out, and evaluating project impacts based on the difference between future conditions with and without project-related traffic. This approach makes intuitive sense, as under very few circumstances would traffic levels and street configurations plus project traffic represent an accurate picture of the project's ultimate effect on local and regional roadways. The *Sunnyvale* decision even recognized this.

However, CEQA Guidelines require an evaluation of the effects of a project on "the environment." Generally, "the environment" means the physical conditions that exist in an area during publication of the Notice of Preparation (NOP) or, if no NOP is published, the time that environmental review began.

Exceptions to this general rule are uncommon, but can occur when: (1) the physical conditions that existed at the

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L.A. CITY PLANNING DIRECTOR SPEAKS AT JMBM BUSINESS ISSUES FORUM: INSIDE LOOK

Los Angeles City's newly appointed Planning Director, Michael LoGrande, was the guest speaker at a recent "Business Issues Forum" sponsored by the GLUEE group at JMBM. The breakfast meeting was attended by over 70 individuals involved with real estate and general business issues in the city. Below is a summary of Mr. LoGrande's remarks followed by an edited Q&A:

Members of JMBM's GLUEE Department and Michael LoGrande at the Business Issues Forum. From left: Alex DeGood, Kevin McDonnell, Ben Reznik, Michael LoGrande, David Waite, Liz Smagala and Neill Brower.

Having lost 40 percent or more of our Planning Department funding in the past few years, our staff is learning new ways to do more with less. The pressures from a variety of sources including the mayor and the city council continue and the expectations are that somehow we'll figure out how to make it work. Right now I'm in the process of restructuring the entire department, which is challenging because many of our senior staff members took early retirement, leaving us with a cadre of academically well trained but inexperienced individuals in need of on-the-job training.

Among the initiatives we're pursuing is the implementation of a single source in the department who will be responsible for overseeing a project from start to finish. As you know, in the past, there were multiple people involved in the process which led to confusion, frustration and delay. We hope to avoid this with our new streamlined system. Additionally, we've overhauled our over-the-counter approval process to make it more user friendly and expedite the less complex approvals. We're also instituting major project oversight units which will deal with complex projects or those which have regional significance. These teams will include individuals knowledgeable with a host of complicated issues including CEQA. Finally, we're re-creating so-called regional teams which will incorporate planners with in-depth understanding of issues specific to a designated geographic area. We believe this will materially expedite the approval process.

When Mayor Villaraigosa came into office, he promised to streamline the project approval process. The concept was to whittle down the process from 12 steps to two. Unfortunately, it became impossible to make this work. We're still trying to find ways to create more synergy between city departments and to limit the appeals process among other things. Perhaps our greatest challenge is to revise an antiquated and ineffective city zoning code. This will need to be done expeditiously so as to make sure we're ready for the next development cycle. Also critical to the Los Angeles planning process is the need to revise and update our community plans to incorporate the concepts of smart growth and transportation oriented development (TOD), among other issues. The Hollywood Community Plan has been completed and is out for public comment.

Among the most exciting recent developments has been the on-going expansion of the rail transit system in the Southland. Seventeen new light rail stations are due to be opened in the next year or two. This brings forward the challenge of developing good TOD planning making sure that both open space and streetscapes are carefully considered as development is created around these facilities. We're working closely with the MTA on these and other issues including the possible acquisition of Prop R funds to assist us with our work. Given our budget crunch, we need to be creative in locating alternative revenue sources to assist in our planning process.

Q. Has any thought been given to creating micro planning districts allowing growth of healthcare facilities?
A. We're working with Kaiser on some of these issues, but currently there's no specific plan to deal with the growth of healthcare facilities, although it's a good idea.

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Business Issues Forum *continued from page 3*

Q. What impact will the Governor's plan to eliminate redevelopment agencies have on your department?
A. This would be very challenging for us in the current environment. We need to figure out how to adopt ordinances allowing us to continue LACRA's work if that legislation passes in Sacramento.

Q. You mentioned major project units. What's your definition of a major project?
A. No specific definition has been created; however, the process could function in a situation where a project, though small, could be highly complex or where a major project in one geographic area would be of regional significance.

Q. What are the chances that the city's parking requirements will be relaxed for specific types of projects e.g. senior housing?
A. We're in the process of looking at the parking issue specifically in the case of TODs where the Federal authorities require that on-site parking be reduced. ■

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Court Decision *continued from page 2*

time of NOP publication somehow did not represent a normal or typical state; (2) the project involves an expansion of an existing use, such as a mine, with varying levels of operation over time; (3) the project involves a slight change to a previously approved project for which the lead agency had already certified an EIR or other CEQA document; or (4) illegal development has occurred in past, and the lead agency wishes to capture and disclose the impacts of that development in addition to the project. In each case, the document must clearly and explicitly state the reasons for deviating from the general rule, explain the basis for the selection of the baseline used and how that baseline was derived, and provide substantial evidence to support these decisions. Even where an alternative baseline is justified and reasonable, the failure to clearly explain the process for selecting and crafting that baseline can be fatal.

In *Sunnyvale*, the EIR analyzed the traffic, air quality, and noise impacts of the project against the City's projected 2020 General Plan build-out, rather than against conditions that actually existed at the project site. The EIR explained the 2020 baseline by stating that the City anticipated completing the project at that time. However, no indication existed that the City could actually complete the project by 2020, or even that the City could complete the project at all. In fact, communications among City staff indicated that no foreseeable funding for the project existed. Consequently, the court ruled that the use of a future baseline was not justified, and that even if it had been, the City failed to support its choice of baseline with substantial evidence in the record.

In each case, the document must clearly and explicitly state the reasons for deviating from the general rule, explain the basis for the selection of the baseline used and how that baseline was derived, and provide substantial evidence to support these decisions.

The lessons? Absent a clear and compelling reason to do otherwise, developers should ensure the lead agency publishes an NOP and pegs the analysis—all of the analysis—to that date. Also, a redeveloper who will use trip credits from the preceding use should carefully consider issuing an NOP while the existing use remains in operation.

In most cases, the traffic impact analysis for a typical development project should compare existing traffic conditions to existing conditions plus project traffic. A second analysis that adds other related projects' traffic to the existing conditions and project traffic likely remains necessary to evaluate cumulative traffic impacts. Finally, mitigate the most severe impact of the two analyses for each significantly impacted intersection.

Where conditions that exist at publication of the NOP do not represent typical or normal circumstances at a project site or its surroundings, or are likely to change rapidly between the NOP and the time the lead agency would actually consider the project, the developer and lead agency must ensure that the analysis clearly and explicitly sets forth the decision-making process for adopting an alternative baseline. ■

Neill Brower is an associate in the Firm's GLUEE Department. Neill represents clients in environmental and land use issues, including permitting and regulatory compliance under CEQA, NEPA, CERCLA, RCRA, the Clean Water Act, and the California Fish and Game Code. For more information, contact Neill at 310.712.6833 or NBrower@jmbm.com