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January 18, 2019

File No. 6377.022

VIA MAIL

Raul Martinez
Department of Public Works
1441 Schilling Place, 2nd Floor
Salinas, CA 93901

RE: Moss Landing Community Plan traffic baseline for Moss Landing Commercial Park (PLN160401)

Dear Mr. Martinez:

Enclosed, please find the table you requested in your letter December 11, 2018. However, I want to reiterate my previous position that we do not believe that the baseline for this or any future project be evaluated from anything other than a baseline of full capacity, which includes buildings removed and not yet replaced.

I have again included a copy of a recent California Court of Appeals decision in North County Advocates v. City of Carlsbad (2015) 241 Cal App 4th 94. Simply stated, the Court of Appeals found that ***the proper baseline for CEQA and impact analysis was the number of traffic trips per day created when all of the shopping center's stores were "Fully Occupied"***. Applying this rule and analysis to Moss Landing Commercial Park, the County should properly establish the traffic baseline for this location by using the number of traffic trips per day when the Kaiser Refractory was in full operation during the time period ranging from approximately 1950 – 2003, preceding its bankruptcy and purchase of the property by its current owners.

Thank you for your continued efforts on this important planning process. We look forward to this project being deemed complete.

Very truly yours,

MONCRIEF & HART, PC

Paul Hart

Enclosures as above

Dates of Historical and Proposed Uses at Moss Landing Business Park

Historical Use	Approximate Date Historic Use Ended	Proposed Use	Approximate Date Proposed Use Began	Approximate Square Feet
Warehouse	May 2016	Commercial Cannabis Activities	March 2018	186,334
Refractory	Ongoing	Refractory, Research & Development	Ongoing	23,360
Industrial Shop	January 2014	Commercial Cannabis Activities	November 2014 & March 2015	78,236
Industrial Shop	Ongoing	Industrial Shop	Ongoing	14,622
Light Manufacturing	January 2014	Commercial Cannabis Activities	January 2015	11,200
Industrial Offices	Ongoing	Industrial Offices	Ongoing	2,770
Industrial Shops	Ongoing	Commercial Cannabis Activities, Office Space, Maintenance Shops, Industrial Shops	May 2014	19,535
Research and Development	Ongoing	Commercial Cannabis Activities	Future	6,800
Industrial Lab	May 2016	Commercial Cannabis Activities	January 2018	1,630
Storage	Ongoing	Storage	Ongoing	225
				344,712

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"Baseline" Defined 2015

Shepard's® report

Key Case = Uses Old "Historic" Baseline

Cites 4 other cases supporting this proposition

North County Advocates v. City of Carlsbad, 241 Cal. App. 4th 94

Copy Citation

Traffic

Court of Appeal of California, Fourth Appellate District, Division One

September 10, 2015, Opinion Filed

D066485

Presumption that "Full occupancy" of Dept store for Baseline was proper, despite fact that store had been empty since 2006

Reporter
241 Cal. App. 4th 94 * | 193 Cal. Rptr. 3d 360 ** | 2015 Cal. App. LEXIS 691 ***

NORTH COUNTY ADVOCATES, Plaintiff and Appellant, v. CITY OF CARLSBAD, Defendant and Respondent; PLAZA CAMINO REAL, LP, et al., Real Parties in Interest.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Subsequent History: [***1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published October 9, 2015.
Review denied by North County Advocates v. City of Carlsbad, 2016 Cal. LEXIS 404 (Cal., Jan. 13, 2016)

Prior History: APPEAL from a judgment of the Superior Court of San Diego County, No. 37-2013-00061990-CU-WM-NC, Robert P. Dahlquist, Judge.
North Cty. Advocates v. City of Carlsbad, 2015 Cal. App. Unpub. LEXIS 6454 (Cal. App. 4th Dist., Sept. 10, 2015)

Disposition: Affirmed in part, reversed in part with directions.

Core Terms

baseline, conditions, traffic, space, City's, site, costs, occupied, shopping center, agency's, vacant, environmental review, trips, substantial evidence, acre-feet, occupancy, annually, regional, square, trial court, discretionary, groundwater, operations, approvals, contends, impacts, administrative record, mitigation measures, refinery, renovate

Proper b/c

Case Summary

① New owner had Right to restart business and b/c

Overview
HOLDINGS: [1]-Substantial evidence supported a traffic baseline under Cal. Code Regs., tit. 14, § 15125, subd. (a), for a shopping center renovation project that assumed full occupancy of a vacant department store space based on historical occupancy rates; [2]-The final environmental impact report, which extensively discussed traffic impacts and incorporated a study's recommendations, sufficiently identified significant effects and selected an effective mitigation measure under Pub. Resources Code, §§ 21100, subds. (b), (b), 21002, consisting of adaptive-response signals for affected street segments; [3]-The city responded adequately to comments; [4]-The city could recover under Pub. Resources Code, § 21167.6, subds. (a), (b)(2), some of its costs for reviewing and certifying the administrative record, to the extent the challenger prepared it with a total disregard for cost containment.

Outcome
Affirmed in part, reversed in part, and remanded.

② store had been fully occupied for 30 yrs

▾ LexisNexis® Headnotes

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN1 **Environmental & Natural Resources, Environmental Impact Statements**

The California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., embodies the state's policy that the long-term protection of the environment shall be the guiding criterion in public decisions. Pub. Resources Code, § 21001, subd. (d). The environmental impact report (EIR) is the heart of CEQA. Its function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account. The EIR process protects not only the environment but also informed self-government. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements
Environmental Law > Administrative Proceedings & Litigation > Judicial Review
Evidence > Burdens of Proof > Allocation

HN2 **Environmental & Natural Resources, Environmental Impact Statements**

An environmental impact report is presumed adequate; the challenger in a California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., action bears the burden of proving otherwise. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview
View more legal topics

HN3 **Standards of Review, Abuse of Discretion**

In reviewing an agency's compliance with the California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., in the course of its legislative or quasi-legislative actions, the courts' inquiry shall extend only to whether there was a prejudicial abuse of discretion. Such an abuse is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Judicial review of these two types of error differs significantly: While a court determines de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements, the court accords greater deference to the agency's substantive factual conclusions. An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: The appellate court reviews the agency's action, not the trial court's decision. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN4 **Environmental & Natural Resources, Environmental Impact Statements**

To decide whether a given project's environmental effects are likely to be significant, an agency must use some measure of the environment's state absent the project, a measure sometimes referred to as the baseline for environmental analysis. The baseline normally consists of the physical environmental conditions in the vicinity of the project, as they exist at the time environmental analysis is commenced. Cal. Code Regs., tit. 14, § 15125, subd. (a). More like this Headnote

Shepardize - Narrow by this Headnote (1)

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements
Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN5 **Standards of Review, Substantial Evidence**

An agency's decision to deviate from the normal rule for determining a baseline is reviewed for substantial evidence. If substantial evidence supports an agency's determination that an existing conditions impacts analysis would provide little or no relevant information or would be misleading as to the project's true impacts, a reviewing court may not substitute its own judgment on this point for that of the agency. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN6 **Environmental & Natural Resources, Environmental Impact Statements**

The baseline for California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., analysis must be the existing physical conditions in the affected area, that is, the real conditions on the ground, rather than the level of development or activity that could or should have been present according to a plan or regulation. Applying this general rule, a baseline has been found impermissibly hypothetical where it was based on maximum permitted operating conditions that were not the norm. But while public agencies should normally use existing conditions as the baseline, neither CEQA nor the Guidelines for the Implementation of the California Environmental Quality Act, Cal. Code Regs., tit. 14, § 15000 et seq., mandates a uniform, inflexible rule. Agencies may exercise discretion to

accommodate a temporary lull or spike in operations that happens to occur at the time of environmental review. As long as that exercise of discretion is supported by substantial evidence, the courts will not disturb it. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Headnotes/Syllabus

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court rejected challenges to the adequacy of a final environmental impact report (Pub. Resources Code, §§ 21100, subds. (a), (b), 21002) for a shopping center renovation project and awarded the city costs for staff time spent reviewing and certifying the administrative record that the challenger prepared (Pub. Resources Code, § 21167.6, subds. (a), (b)(2)). (Superior Court of San Diego County, No. 37-2013-00061990-CU-WM-NC, Robert P. Dahlquist, Judge.)

The Court of Appeal affirmed in part and reversed in part. The court held that substantial evidence supported the city's selection of a traffic baseline (Cal. Code Regs., tit. 14, § 15125, subd. (a)) that assumed full occupancy of a vacant department store space based on historical occupancy rates. The report, which extensively discussed traffic impacts and incorporated a study's recommendations, sufficiently identified significant effects and selected an effective mitigation measure consisting of adaptive response signals for affected street segments. The city responded adequately to comments. The city could recover some of its costs for reviewing and certifying the administrative record, to the extent the challenger prepared it with a total disregard for cost containment. (Opinion by Haller, Acting P. J., with Aaron and Irion, JJ., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1) Pollution and Conservation Laws § 2—California Environmental Quality Act—Environmental Impact Reports—Ensuring Full Understanding of Environmental Consequences.

The California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) embodies the state's policy that the long-term protection of the environment must be the guiding criterion in public decisions (Pub. Resources Code, § 21001, subd. (d)). The environmental impact report (EIR) is the heart of CEQA. Its function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account. The EIR process protects not only the environment but also informed self-government.

CA(2) (2) Pollution and Conservation Laws § 2.3—California Environmental Quality Act—Environmental Impact Reports—Contents and Sufficiency—Burden of Proof.

An environmental impact report is presumed adequate; the challenger in a California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) action bears the burden of proving otherwise.

CA(3) (3) Pollution and Conservation Laws § 2.3—California Environmental Quality Act—Environmental Impact Reports—Contents and Sufficiency—Baseline.

To decide whether a given project's environmental effects are likely to be significant, an agency must use some measure of the environment's state absent the project, a measure sometimes referred to as the baseline for environmental analysis. The baseline normally consists of the physical environmental conditions in the vicinity of the project, as they exist at the time environmental analysis is commenced (Cal. Code Regs., tit. 14, § 15125, subd. (a)).

CA(4) (4) Pollution and Conservation Laws § 2.3—California Environmental Quality Act—Environmental Impact Reports—Contents and Sufficiency—Baseline.

The baseline for California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) analysis must be the existing physical conditions in the affected area, that is, the real conditions on the ground, rather than the level of development or activity that could or should have been present according to a plan or regulation. Applying this general rule, a baseline has been found impermissibly hypothetical where it was based on maximum permitted operating conditions that were not the norm. But while public agencies should normally use existing conditions as the baseline, neither CEQA nor the Guidelines for **[*96]** the Implementation of the California Environmental Quality Act (Cal. Code Regs., tit. 14, § 15000 et seq.) mandates a uniform, inflexible rule. Agencies may exercise discretion to accommodate a temporary lull or spike in operations that happens to occur at the time of environmental review. As long as that exercise of discretion is supported by substantial evidence, the courts will not disturb it.

CA(5) (5) Pollution and Conservation Laws § 2.3—California Environmental Quality Act—Environmental Impact Reports—Contents and Sufficiency—Baseline—Historical Occupancy Rates.

A city's selection of a traffic baseline for a shopping center renovation project that assumed full occupancy of a vacant department store space was not merely hypothetical because it was not based solely on the owner's entitlement to reoccupy the building without discretionary action, but was also based on the actual historical operation of the space at full occupancy for many years. The city's decision to base the traffic baseline in the environmental impact report on historical occupancy rates was further supported by substantial evidence consisting of regional data on such use levels. Therefore, substantial evidence supported the city's exercise of discretion in selecting a traffic baseline that assumed a fully occupied department store building.

[Manaster & Selmi, Cal. Environmental Law & Land Use Practice (2015) ch. 22, § 22.04; Cal. Forms of Pleading and Practice (2015) ch. 418, Pollution and Environmental Matters, § 418.35; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 840 et seq.]

Counsel: DeLano & DeLano, Everett L. DeLano III and M. Dare DeLano for Plaintiff and Appellant.

Celia A. Brewer and Jane Mobaldi for Defendant and Respondent.

Alston & Bird, Edward J. Casey and Andrea S. Warren for Real Parties in Interest.

Judges: Opinion by Haller, Acting P. J., with Aaron and Irion, JJ., concurring.

Opinion by: Haller, Acting P. J.

Opinion

[**361] **HALLER, Acting P. J.**—Real Parties in Interest Plaza Camino Real, LP, and CMF PCR, LLC (collectively, Westfield), proposed to renovate a shopping [*97] center originally built in the City [**362] of Carlsbad (City) over 40 years ago.[1] The City approved Westfield's request to renovate a former Robinsons-May store and other small portions of the shopping center (the project). North County Advocates (Advocates) challenged the City's approval under the California Environmental Quality Act (CEQA; Pub. Resources Code,[2] § 21000 et seq.), arguing the project's environmental impact report (EIR) used an improper baseline in its [***2] traffic analysis because it treated the Robinsons-May store as fully occupied, even though it was vacated in 2006 and had been only periodically occupied since. Advocates also argued the City violated CEQA by failing to consider as a mitigation measure that it require Westfield to make a fair share contribution to the future widening of the El Camino Real bridge over State Route 78 (the bridge) and by failing to respond adequately to public comments regarding traffic mitigation. The trial court rejected Advocates's CEQA challenges and awarded the City costs for staff time spent reviewing and certifying the administrative record Advocates prepared. Advocates appeals the trial court's CEQA and costs determinations.

We affirm the trial court's CEQA determinations. Substantial evidence supports the City's determination of the traffic baseline because it was based on recent historical use and was consistent with Westfield's right to fully occupy the Robinsons-May space without further discretionary approvals. Substantial evidence also [***3] shows the City's consideration of traffic mitigation measures and responses to comments were adequate. However, we conclude the trial court erred by awarding certain subcategories of costs to the City. Accordingly, we reverse the judgment as to three of the four subcategories, and remand for further proceedings in connection with one of them. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Original Project Site

Westfield proposed to renovate a portion of a shopping center located in the City. Originally built in 1969, the project site was developed "as a two- and three-story indoor shopping center with five main anchor department store buildings (i.e., Sears, Macy's, Macy's Men, JC Penney, and the vacant former Robinsons-May) and numerous smaller retail specialty shops." The site contains over 6,400 surface parking spaces as well as several outbuildings within the main mall parking lots and across a street to the south of the main mall. While Westfield owns the developed parcels within the shopping center, the City owns the surface parking lots.

[*98]

Under a "Precise Plan" the City first approved in 1977, Westfield was entitled to renovate the interior of the former Robinsons-May [***4] tenant building and fully occupy it without obtaining any further discretionary approvals from the City.

The Specific Plan and Site Development Plan for the Project

The City approved two entitlements for the project: (1) a "Specific Plan" to facilitate future development at the shopping center area beyond the project and (2) a "Site Development Plan," which allowed for the immediate project. The Specific Plan area included all of the shopping center [**363] buildings and the majority of the shopping center's surface parking areas.

The Site Development Plan allowed for the immediate removal, renovation, and/or redevelopment of portions of the east end of the existing mall structure and associated outbuildings. As described in the "Draft EIR," the Site Development Plan would have allowed for a net increase of approximately 35,000 square feet of gross leasable area. The project initially proposed to build additional retail space west of the Robinsons-May building on three pads built as outparcels within the City-owned surface parking lots to accommodate future restaurant and/or retail space.

The Final Approved Project

Because Westfield and the City were unable to agree on lease terms for development [***5] of the City-owned outparcels, Westfield reduced the scope of the project as described in the Draft EIR and revised the Site Development Plan. The reduced project still included demolition and

factual conclusions.'" [***9] (*Preserve Wild Santee, supra*, 210 Cal.App.4th at p. 275.) "An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: The appellate court reviews the agency's action, not the trial court's decision ... ." (*Vineyard Area Citizens, supra*, 40 Cal.4th at p. 427.)

[*101]

[**365] II. SUBSTANTIAL EVIDENCE SUPPORTS THE CITY'S TRAFFIC BASELINE DETERMINATION

HN4 ***CA(3)*** (3) "To decide whether a given project's environmental effects are likely to be significant, the agency must use some measure of the environment's state absent the project, a measure sometimes referred to as the 'baseline' for environmental analysis." (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 315 [106 Cal. Rptr. 3d 502, 226 P.3d 985] (*Communities for a Better Environment*).) Under the Guidelines for implementation of CEQA (Cal. Code Regs., tit. 14, § 15000 et seq.) (Guidelines), [3] "the baseline 'normally' consists of 'the physical environmental conditions in the vicinity of the project, as they exist at the time ... environmental analysis is commenced ... .'" (*Communities for a Better Environment, supra*, 48 Cal.4th at p. 315, quoting Guidelines, § 15125, subd. (a).) [4]

Advocates contends the EIR's traffic baseline is "incorrect and misleading" because it did not follow the "'normally'" applicable rule of measuring conditions as they actually existed when environmental review began. (Capitalization & boldface omitted.) Advocates contends the City instead "falsely inflated the existing traffic conditions" by "imputing over 5,000 daily trips" to the baseline premised on a fully occupied Robinsons-May building when, in fact, Robinsons-May vacated the space in 2006. Advocates contends [***11] that by falsely inflating the existing traffic conditions, the baseline understates the project's true impact on the environment. ***HN5*** We review for substantial evidence an agency's decision to deviate from the normal rule for determining a baseline. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 457 [160 Cal. Rptr. 3d 1, 304 P.3d 499] (*Smart Rail*) ["If substantial evidence supports an agency's determination that an existing conditions impacts analysis would provide little or no relevant information or would be misleading as to the project's true impacts, a reviewing court may not substitute its own judgment on this point for that of the agency."].)

[*102]

The EIR provides the following explanation of how and why the City deviated from the normal rule in selecting the baseline:

"Westfield Carlsbad currently has vacant leasable space beyond the regular amount expected in super regional shopping centers, mainly the 148,159-square foot Robinson's-May building. Since this space is currently vacant, traffic from this space is not included in the traffic counts conducted at the analyzed intersections and street segments. [**366] However, for purposes of determining the Existing Baseline conditions pursuant to CEQA Guidelines Section 15125, trips attributable to that currently unoccupied space were added to the baseline conditions [***12] counted in the project area as noted below.

"Trip generation rates and estimates for the vacant Robinson's-May building were estimated using those identified in the San Diego Association of Government's (SANDAG's) *Brief Guide of Vehicular Traffic Generation Rates for the San Diego Region* (SANDAG 2002) for a 'Super Regional Shopping Center' land use. These estimates are conservative in that they do not account for trip reductions from pass-by trips. Based on the rate, the vacant Robinson's-May building could generate a total of 5,186 daily trips on a typical weekday ... . These modified traffic volumes were added to the existing traffic counts collected in the project area and represent the Existing Baseline conditions for the purposes of this study. [The Transportation Study attached as] Appendix F provides a detailed description of the methodology used to establish the Existing Baseline condition."

The Transportation Study elaborates on the City's determination of the traffic baseline:

"Existing Baseline Conditions—Westfield Plaza Camino Real is an existing super regional shopping [center] which is entitled for 1,151,092 [square feet] of retail commercial space. All of the currently [***13] entitled square footage is completely constructed. However, the nature of a shopping center is that tenants change and the amount of occupied space constantly fluctuates.

"Plaza Camino Real currently has unoccupied leasable space beyond the normal amount, mainly the 148,159 [square foot] Robinsons-May building. Since this space is currently vacant, traffic from this space is not included in the actual traffic counts conducted at the analyzed intersections and street segments. However, for the purposes of determining the Existing Baseline Conditions pursuant to California Environmental Quality Act (CEQA) Guidelines Section 15125, trips attributable to that currently unoccupied space are imputed. A full occupancy assumption is consistent with SANDAG's regional traffic modeling methodology which assumes full occupancy of all entitled square footage. It is also consistent with the City of **[*103]** Carlsbad and City of Oceanside's determination of existing baseline because the currently vacant space could be occupied at anytime without discretionary action. In fact, portions of that space are periodically occupied with temporary uses such as a Halloween store which leases the space in the month of October. For [***14] these reasons, full occupancy of all entitled square footage is assumed in determining the Existing Baseline Conditions."

Using the baseline with the imputed Robinsons-May traffic, the Transportation Study concludes the "Project will not result in a significant impact at any of the analyzed intersections during either peak hour, or any of the analyzed street segments during either peak hour or daily

Document: North County Advocates v. City of Carlsbad, 241 Cal. App. 4th 94 Actions

Advocates contends the California Supreme Court rejected the practice of imputing use levels in *Communities for a* [***367] Better Environment, supra, 48 Cal.4th 310. Respondents counter that ***Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316 [118 Cal. Rptr. 3d 182]** (*Cherry Valley*), a case decided by Division Two of this court, permits an agency to base an existing conditions baseline on recent historical use levels if those levels are permitted to continue. (***Id.* at p. 337**.) We conclude Respondents have the better argument—*Communities for a Better Environment* is distinguishable and *Cherry Valley* is on point and persuasive.

In *Communities for a Better Environment*, the Supreme Court reversed a regional air quality management district's approval of ConocoPhillips's application to modify a petroleum refinery in a way that would increase operation of four boilers that produced steam for refinery operations, but also emitted nitrogen [***15] oxide (a major contributor to smog). (*Communities for a Better Environment, supra*, 48 Cal.4th at p. 317.) The district selected as the project's baseline for nitrogen oxide emissions the amount the boilers would emit if they operated at the maximum level allowed under ConocoPhillips's existing permits, even though ConocoPhillips had never operated them at that level. (***Id.* at pp. 318, 322**.) Using this baseline, the district concluded the project would not have a significant impact on the environment, even though it was undisputed that the as-modified refinery's emissions would exceed the district's "significance threshold." (***Id.* at pp. 317–318**.) The Supreme Court concluded this was error.

reconstruction of the former Robinsons-May store. As revised, the project would result in a net loss of 636 square feet of total gross leasable area in the shopping center.

The project was under construction at the time of the June 2014 hearing on Advocates's petition for writ of mandate and was completed before the 2014 holiday season.

The City's Environmental Review and Project Approvals

The City released the Draft EIR on August 31, 2012, with nine technical reports and studies attached as appendices. Those technical studies included a 194-page (excluding supporting appendices) "Transportation Study." The Draft EIR evaluated three alternatives to the project. With implementation of a number of mitigation measures, the Draft EIR concluded the project would not cause any significant environmental impacts.

[*99]

The City received 10 comment letters on the Draft EIR. The City responded to all of them, and included its responses in the December 2012 final EIR. The City also issued a 37-page "Mitigation Monitoring [***6] and Reporting Program" with the final EIR.

On June 5, 2013, the City's planning commission conducted a public hearing and approved the Site Development Plan and recommended approval to the city council of the Specific Plan for the project.

On July 9, 2013, the city council conducted its public hearing on the project. Two members of the public—including Advocates's counsel—expressed concern about the project; three others expressed support. The city council unanimously approved the project, adopted the Specific Plan, approved the Site Development Plan, and certified the final EIR. On July 10, 2013, the City filed a "Notice of Determination" under CEQA.

Advocates's Petition for Writ of Mandate

On August 7, 2013, Advocates filed a petition for writ of mandate challenging the City's approvals of the project. As relevant here, the petition challenged the City's determination of the baseline for traffic trips, the EIR's mitigation measures for traffic impacts, and the City's response to comment letters concerning those mitigation measures.

The trial court heard the petition on June 6, 2014; issued an order denying the petition on June 24; and entered a final judgment on July 2.

*The Costs Award [***7]*

Westfield filed a memorandum of costs in the amount of $5,490.24, and the City filed one seeking $6,237. Advocates filed [***364] motions to tax costs targeting each. The trial court denied Advocates's motions and awarded costs to Westfield and the City according to their memoranda of costs.

Advocates's Appeal

Advocates timely appealed the judgment upholding the project approvals and awarding the City its costs. Advocates does not challenge the award of costs to Westfield.

DISCUSSION

Advocates contends the trial court erred by rejecting Advocates's challenges to the City's (1) use of an incorrect and misleading baseline in the [*100] EIR's traffic analysis, (2) failure to adequately analyze traffic impacts, and (3) failure to adequately respond to comments it received regarding the EIR. Advocates also contends the trial court erred by awarding the City costs for time its staff spent reviewing and certifying the administrative record that Advocates prepared.

I. GENERAL CEQA PRINCIPLES AND STANDARD OF REVIEW

HN1 CA(1) (1) "CEQA embodies our state's policy that 'the long-term protection of the environment ... shall be the guiding criterion in public decisions.'" (*Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1100 [18 Cal. Rptr. 3d 468]; see § 21001, subd. (d).) The EIR is the "'heart of CEQA.'" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 [253 Cal.Rptr. 426, 764 P.2d 278].) Its "function [***8] is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449 [53 Cal. Rptr. 3d 821, 150 P.3d 709] (*Vineyard Area Citizens*).) "The EIR process protects not only the environment but also informed self-government." (*Laurel Heights, supra*, 47 Cal.3d at p. 392.)

HN2 CA(2) (2) An EIR is presumed adequate; the challenger in a CEQA action bears the burden of proving otherwise. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 275 [148 Cal. Rptr. 3d 310] (*Preserve Wild Santee*).) HN3 "In reviewing an agency's compliance with CEQA in the course of its legislative or quasi-legislative actions, the courts' inquiry 'shall extend only to whether there was a prejudicial abuse of discretion.' [Citation.] Such an abuse is established 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.'" (*Vineyard Area Citizens, supra*, 40 Cal.4th at p. 426, fn. omitted.) "Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' [citation], we accord greater deference to the agency's substantive

CA(4) (4) The Supreme Court approved a line of Court of Appeal decisions that "concluded HN6 the baseline for CEQA analysis must be the 'existing physical conditions in the affected area' [citation], that is, the '"real conditions on the ground"' [citations], rather than the level of development or activity that *could* or *should* have been present according to a plan or regulation." (*Communities for a Better Environment, supra*, 48 Cal.4th at p. 321.) Applying this general rule, the court concluded the district's selected baseline **[*104]** was impermissibly "hypothetical" because it was based on maximum permitted operating conditions that were "not the norm." (*Id.* at p. 322.)

But while the Supreme [***16] Court recognized public agencies should "'normally'" use "existing conditions" as the baseline (*Communities for a Better Environment, supra*, 48 Cal.4th at pp. 327, 328), the court also recognized that "[n]either CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule ..." (*Id.* at p. 328). Citing as an example ConocoPhillips's concern that refinery operations "vary greatly with the season, crude oil supplies, market conditions, and other factors" (*Id.* at p. 327), the court explained that agencies may exercise discretion to accommodate a "temporary lull or spike in operations that happens to occur at the time [of] environmental review" (*Id.* at p. 328; see *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125 [104 Cal. Rptr. 2d 326] ["Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods."]). As long as that exercise of discretion is supported by substantial evidence, the courts will not disturb it. (*Communities for a Better Environment, supra*, at p. 328.)

[**368] Applying *Communities for a Better Environment*, the *Cherry Valley* court upheld a city's "quintessentially ... discretionary" baseline determination of a project site's water use levels where the site's historical water use fluctuated. (***Cherry Valley, supra*, 190 Cal.App.4th at p. 337.**) Sunny-Cal operated an egg farm on the site from the 1960's through 2005, when the site transitioned to cattle [***17] ranching and feed crop operations. (***Id.* at pp. 324, 329.**) The record showed the egg farm used an average of 1,340 acre-feet annually of groundwater between 1997 and 2001, but the cattle ranch used only 50 acre-feet annually beginning in 2005. [6] (**190 Cal.App.4th at p. 329.**) In a 2006 revised draft EIR, the city selected as the groundwater use baseline 1,484 acre-feet annually, which was the amount the developer was entitled to extract under a 2004 water-rights adjudication. (***Id.* at pp. 325, 331.**) The petitioners contended the baseline should have been the then-existing 50 acre-feet annually level. (***Id.* at p. 336.**) The Court of Appeal upheld the city's determination.

The court distinguished *Communities for a Better Environment* and other cases cited by the petitioner on the ground that the baseline in each of those cases was hypothetical because it was based on "conditions that were *permissible* pursuant to an existing plan or regulation but that were not being employed or that did not exist 'on the ground' at the time environmental review commenced." (***Cherry Valley, supra*, 190 Cal.App.4th at p. 338**, italics added; see ***Id.* at pp. 339-340**, citing *Woodward Park Homeowners Assn.*, **[*105]** Inc. v. City of Fresno (2007) 150 Cal.App.4th 683, 693, 697 [58 Cal. Rptr. 3d 102] [baseline for 477,000 square-foot office park to be built on vacant lot was apparently based on 694,000 [***18] square-foot maximum allowed under applicable zoning] and *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 357-358 [182 Cal. Rptr. 317] [EIR's for two general plan amendments were deficient because they compared the impacts of the amendments with the existing general plan, which projected populations far larger than ever actually materialized].) By contrast, the *Cherry Valley* court concluded substantial evidence showed the baseline was not hypothetical because it was based not only on Sunny-Cal's *entitlement to extract* 1,484 acre-feet annually of groundwater, but also on Sunny-Cal's recent history of *actually extracting* substantially the same amount. (***Cherry Valley, supra*, 190 Cal.App.4th at p. 340.**) [7]

CA(5) (5) Like *Cherry Valley* and unlike *Communities for a Better Environment*, the City's selection of a traffic baseline that assumed full occupancy of the Robinsons-May space was not merely hypothetical because it was not based *solely* on Westfield's entitlement to reoccupy the Robinsons-May building "at anytime without discretionary action," but was also based on the actual [***19] historical operation of the space at full occupancy for more than 30 years up until 2008. And like the period when Sunny-Cal used less water on its land for cattle ranching and feed crops, the Robinsons-May space was less occupied [**369] from 2007 through 2009 (two retail users occupied part of it from August 2006 through December 2007, and two others occupied part of it from August through November in 2008 and in 2009). [8] We view this fluctuating occupancy—which is "the nature of a shopping center"—as akin to the varying oil refinery operations in *Communities for a Better Environment* that led the Supreme Court to recognize that agencies have discretion **[*106]** "to consider conditions over a range of time periods" to account for a "temporary lull or spike in operations ... ." (*Communities for a Better Environment, supra*, 48 Cal.4th at p. 328.)

The City's decision to base the traffic baseline on historical occupancy rates is further supported by substantial evidence consisting of SANDAG (San Diego Association of Government) data on such use levels.

Therefore, we conclude substantial evidence supports the City's exercise of discretion in selecting a traffic baseline that assumed a fully occupied Robinsons-May building.

III.-V. [*] [NOT CERTIFIED FOR PUBLICATION]

DISPOSITION

The judgment is reversed with [***21] respect to the first, second, and fourth subcategories of the City's costs award. On remand, the superior court is directed to determine how much of the costs in the first subcategory were incurred (1) reviewing the administrative record for completeness or accuracy (for which the City may not recover costs); (2) supplementing the administrative record (for which the City may recover costs); and (3) as a result of a total disregard for cost containment on Advocates's part (for which the City may recover its costs). The judgment is affirmed in all other respects. Real parties in interest are entitled to their costs on appeal; all other parties are to bear their own costs.

Aaron, J., and Irion, J., concurred.

Appellant's petition for review by the Supreme Court was denied January 13, 2016, S230690.

Footnotes

[*] Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III., IV. and V.

[1] We refer to Westfield and the City collectively as Respondents.

[2] All further statutory references are to the Public Resources Code unless otherwise indicated.

[3] The Guidelines are regulations "prescribed by the Secretary for Resources to be followed by all state and local agencies in California in the implementation of" CEQA. (Guidelines, § 15000; see § 21083.) "In interpreting CEQA, we accord the Guidelines great weight except where they are clearly unauthorized [***10] or erroneous." (*Vineyard Area Citizens, supra*, 40 Cal.4th at p. 428, fn. 5.)

[4] Guidelines section 15125, subdivision (a) states: "An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives."

[5] The opinion is silent regarding the site's water use between 2001 and 2005. (***Cherry Valley, supra*, 190 Cal.App.4th at pp. 329–335.**)

[6] The Supreme Court recently cited this aspect of *Cherry Valley* with approval. (See *Smart Rail, supra*, 57 Cal.4th at p. 450 [*Cherry Valley* "applied *Communities for a Better Environment*" to demonstrate that "recent historical use [can] constitute[] a realistic measure of existing conditions."].)

[7] Advocates attempts to distinguish this similarity by arguing that environmental review in *Cherry Valley* began in 2004 when Sunny-Cal was still using the project site as an egg farm and extracting 1,340 acre-feet annually of groundwater, whereas environmental review did not begin here until 2009, when the Robinsons-May space had already been vacant for approximately three years. This argument fails. First, the *Cherry Valley* [***20] court did not state (as Advocates asserts) that Sunny-Cal "had *actually used* that much groundwater 'since February 2004 ... .'" (Italics added.) Instead, the court was referring to the fact that "Sunny-Cal's 1,484 [acre-feet annually] *entitlement* to Beaumont Basin groundwater" existed since 2004. (***Cherry Valley, supra*, 190 Cal.App.4th at p. 338**, italics added.) Similarly, Westfield's right to fully reoccupy the Robinsons-May space "at anytime without discretionary action" existed since 1977. Second, even though Sunny-Cal was using the project site as an egg farm when environmental review began in 2004, the only evidence of Sunny Cal's actual egg-farm-related water use level discussed in the opinion was from 1997 through 2001—a period that ended, as here, three years before environmental review began. (***Id.* at pp. 329–335.**)

[*] See footnote, *ante*, page 94.

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February 12, 2019

File No. 6377.022

VIA HAND DELIVERY

Monterey County Planning Commission

Re: Moss Landing Community Plan – Transportation Issues Workshop 02.13.19

Moss Landing Business Park

Dear Commissioners:

Thank you for your continued work on the draft Moss Landing Community Plan and the opportunity to comment on the proposed plan, on behalf of our client Moss Landing Commercial/Business Park (MLBP).

I write today to address the following issues:

1. Specific Traffic Issues / Policies being evaluated/considered – including ML -3.3 **and**
2. "Special Treatment Area" vs. "Coastal Heavy Industrial" Zoning Designation for MLBP

I. SPECIFIC TRAFFIC RELATED POLICIES

A. Policy ML – 3.3 - Traffic Generation Reduction Measures

Purpose & Intent: To ensure that all feasible traffic generation reduction measures be implemented to mitigate any [intensified] traffic demands associated with expanded industrial facilities

MLBP Proposed Language: Recommends adopting 2017 Version of language in the left column, with following minor modification:

"…that would generate [significantly increased peak hour] freight and employee traffic…"

1. Overview of Problems with Proposed Staff & Community Changes to ML- 3.3

   a. Use of term "Development" & No Development in "industrial areas" allowed until improvements to Dolan Road & Highway 1 Intersection
   b. Clarify terms "industrial uses" vs. "Any Uses on a Property zoned Industrial" & expansion of Policy to include "Uses"

a. Improper Use of Term "Development"/ Prohibition on Development Until Roadway Improvements -

A recurring linguistic problem in the proposed Policy language of the entire MLCP update is illustrated in ML- 3.3, that is the repeated reference to prohibiting or precluding any or all "Development" unless or until some event occurs.

In almost every Policy in the MLCP, the use of the term "Development" in this way (ie precluding all development), imposes excessive restrictions which are often wholly unintended and wholly unrelated to the goal of the Policy. Use of the term also creates situations where application of the Policy will contradict the state purpose of the Coastal Act itself.

For example:

Here, the obvious goal is to try and minimize any potentially significant traffic impacts associated with expansion of facilities on the industrial properties in Moss Landing.

But, the term "Development" is exceptionally broad. It includes basically any kind of building activity, earth moving, remodeling activity. It also includes new tenants replacing old tenants in existing structures.

Here, the proposed Staff & Community changes to ML 3.3 would state "Development in the industrial areas shall not be allowed until needed improvements are made to the Dolan and Highway 1 Intersection" -

This proposed language/changes in the Staff and Community sections are clearly inappropriate for the following reasons:

First, this language ***would preclude replacing one tenant on the MLBP property with another tenant, even if the change in tenants would result in less traffic*** than was being generated previously.

This is not the intent, nor the purpose of Policy 3.3 – rather it is simply an arbitrary and improper limitation on MLBP's business operations, which does not promote the stated policy or the public interests.

Second, this ***language would literally preclude MLBP from any "development" including non-occupied structures and those that would provide significant public benefit and which do not increase traffic in any way***. For example it could preclude

- building structures for Solar power generation;
- building structures for receipt of transcontinental underwater cable transmission infrastructure
- activities related to removal of waste products left by Kaiser operations
- building, repairing and/or replacing on site wells, rail spurs, existing or pre-existing structures, facilities,

- As written, it would even preclude the building of new roadway improvements (which constitute Development) until such improvements have been made.
- Aquafarm tanks,
- etc

Third, this language ***would prevent any "development" even those types of development and new uses that are specifically prioritized by the Coastal Act, and*** would therefor conflict with the Coastal Act and ***the existing North County Plan***.

- North County Coastal Plan"
  - Section 3.1 - The prime transportation emphasis of the Coastal Act is to preserve highway capacity for coastal access and coastal dependent land uses
  - Section 2.7 – Aquaculture is a preferred use
  - Section 3.1.3 - "Due to the limited capacity of Highway 1, until the time it is expanded, development of coastal dependent industrial; agricultural; commercial; and recreational uses shall be given priority over non-coastal dependent development…"
- Because, as drafted this policy would preclude MLBP from "developing" any uses, including those prioritized by the Coastal Act", but would allow other property owners to continue developing, regardless of whether the uses proposed by the other owners are "priority uses" under the Coastal Act, the proposed policy revisions are inconsistent with both the Coastal Act and existing North County Coastal Land Use Polcies.

Fourth, the proposed language purports to impose upon MLBP the obligation to persuade Caltrans, the County and the Coastal Commission to effectuate alterations and improvements of the public roadway as a precondition of continuing to use the MLBP, and to even engage in activities which do not impact traffic. This is an ***improper imposition of public responsibility for improving and maintaining roadways upon a private landowne***r.

- MLBP has, for years, attempted to work with the County and Caltrans and other agencies to improve transportation, pedestrian access, safety etc along the Highway 1 in Moss Landing. The reality is that Caltrans simply won't do, or allow, anything to be done. The County has been unable to persuade them. MLBP has been unable to persuade them. And Caltrans is unlikely to be persuaded in the near future. But, if the County truly desires for Caltrans to feel pressure to improve traffic and pedestrian conditions and safety, this is not the proper way to effectuate that goal.

Fifth, the proposed policy language is vague. It purports to preclude any "development" until "needed improvements" are made. ***What are "needed improvements"? who decides***?

b. Industrial Uses vs. Any Use on Industrially Zoned Property

As discussed below, there has been widespread support, for many years, for treating MLBP property as a "Special Treatment Area" for zoning purposes. This will allow a wide variety of uses, not solely Heavy Industrial Uses, and will also the property to be used in a less intensive and environmentally impactful way.

"Special treatment Area" designation and current marijuana cultivation Policy in Monterey County, and the coastal zone illustrate that there is a significant distinction between "industrial activities and uses", and "any approved use on an HI zoned parcel". Necessarily, there exist many "non-industrial uses" that exist and are allowed on industrially zoned coastal properties.

As such, it is essential that every Policy in the MLCP update, clearly and specifically indicate distinguish between "industrial use" and/or zoning designation, such that the intended scope and application of the Policy can be clearly understood by County staff, the public and the landowners. This precise issue has placed County Staff and MLBP in disagreement as to intended meaning of other Policies.

Specifically, one sentence in a 150 page+ document states "all new heavy industry shall be coastal dependent". MLBP asserted that this language, if applicable, only applied to new heavy industrial uses. The County Staff asserted that this language applied to any activity on any parcel zoned heavy industrial. At a minimum, it is important that the Policy language specifically state and address your intent in this regard.

Two Solutions:

Solution #1 – In this Policy ML 3.3, and in all other policies, the language of the Policy and the scope of any restrictions as to the use or building or activities conducted on private property, should directly relate and be restricted to only those necessary to promote the purpose and intent of the specific policy.

There are those who are simply opposed to other landowners using their private property for any purpose and who seek to utilize the language of every policy to impose universal prohibitions on any business activity, including on MLBP. Its simply not proper or logical to do so.

Here, the purpose & intent of this Policy is related to traffic. As such, any restrictions on building, uses or activities (imposed on MLBP or others), in this Policy, should be restricted to and related to those necessary to address traffic issues. This Policy should, and must, not restrict or prohibit any activity or use, or development or building that does not adversely impact traffic.

Solution #2 – Policy ML 3.3. The best Policy solution and idea regarding traffic and pedestrian access Policies in the MLCP was presented by Mr. Mark Del Piero, on behalf of the Harbor District, at a recent community meeting.

Mr. Del Piero noted correctly, that Caltrans is the impediment to solving many of the traffic and pedestrian issues in Moss Landing, and Highway 1. ***Mr. Del Piero suggested that the County would be best served to direct its Policy language on these issues directly towards Caltrans, in order to obtain their compliance.*** Mr. Del Piero suggested that the County Policy preclude Caltrans from performing any work or improvement on Highway 1 (or other areas), unless and until it effectuates needed improvements to the Dolan intersection changes and/or Pedestrian access across Highway 1

Rather than randomly imposing the obligation on a private landowner, such a policy would place the burden to solve these problems where it belongs, with Caltrans, the party with the power to actually fix the problems.

Mr. Del Piero noted, that the County could collect development fees to retain from private land owners, which could be used to later fund such improvements, if and when Caltrans ultimately approved the projects. This seems to be a reasonable suggestion.

II. SPECIAL TREATMENT AREA DESIGNATION vs. COASTAL HI ZONING

As you know, for more than a decade, there has been widespread support of designating MLBP as a "Special Treatment Area" for zoning purposes.

The special treatment zoning designation is intended to provide flexibility as to the types of uses allowed on the property, as opposed to mandating only Heavy Industrial types of uses. The intent has always been to allow MLBP to move the property away from the highly intensive and environmentally significant impacts that had, for many decades, been associated with Kaiser Refractories use of the property for large scale seawater intake, mineral extraction, processing, brick production plant and dozens of related peripheral uses.

MLBP believes that the idea of "Special Treatment Area" designation and the transition of this property away from such intensive HI only uses has the support of Monterey County, the California Coastal Commission, Caltrans, members of the Moss Landing local community, environmental interest groups, the Moss Landing Harbor District, and almost every interested group and agency.

A. Concern That Current Community Plan Language Will Not Effectuate Goal/Intent

Unfortunately, MLBP is concerned that the Moss Landing Community Plan ("Plan") language which is intended to effectuate the Special Treatment Area Designation will not effectuate its intended purpose unless it is modified.

Specifically, as drafted the Plan states that the Special Treatment Area Designation is structured as an "overlay", being placed on top of a continuing "Coastal HI" zoning designation for the MLBP property.

> Presently, the North County Land Use Plan repeatedly refers to Kaiser Refractories in the Heavy Industry definitions and makes no mention of Moss Landing Commercial Park in the Special Treatment Area section. Similarly, Figure ML-6: Land Use Diagram of the August 2017 draft of the Moss Landing Community Plan, shows Moss Landing Commercial Park as "Coastal Heavy Industry".

The problem with this structure, ie. having a "Special Treatment Area" overlay, but retaining a Coastal HI zoning designation is that Section 1.5 of the Moss Landing Community Plan states,

> "To the degree that policies in any one of the documents – the Moss Landing Community Plan, the North County Land Use Plan, and the 1982 Monterey County General Plan – conflict, the more restrictive policy applies."

Various other rules of interpretation and construction in the Monterey County Code and other laws and regulations would also support this proposition.

As such, as currently structured, even though MLBP, the County, the Coastal Commission and other interest groups might reach consensus and support certain uses within the MLBP "Special Treatment Area", legally any uses not authorized by the Coastal HI designation would likely be prohibited. This is clearly not what is intended. Rather, the entire purpose of the Special Treatment designation is to provide greater flexibility in use of the property.

To effectuate this goal, the structure of implementing the Special Treatment designation in the Plan should be modified.

B. <u>How To Solve This Issue via Modified Language / Provisions</u>

There are several possible ways to resolve this issue.

The easiest and most simplistic method would be to simply remove the "Coastal HI" zoning designation and instead simply zone the MLBP as only a "Special Treatment Area".

Alternatively, the "Plan" could include additional language to be included within the "Coastal HI" provisions and perhaps also within the North County Plan language and the related implementing ordinances which explains that the MLBP "Special Treatment Area" overlay/designation takes priority over the more general Coastal HI regulations, such that the uses authorized as part of the Special Treatment Area would override any conflict with the Coastal HI zoning restrictions.

Undoubtedly, there are also other potential drafting solutions, and MLBP is amenable to any method the County and/or Coastal Commission prefer.

But, something must be done. In all honesty, it is rare to have consensus among a property owner and all of the above groups. Where, as here, it exists, its worth the effort to make sure that the language and structure of the implementing ordinances effectuate the common goal.

III. CONCLUSION

Thank you for the opportunity to comment on these important changes.

MLBP appreciates your careful consideration of these issues and is more than willing to assist and work with staff to effectuate any changes in language that will effectuate your purpose and intention, if you desire to simply provide us with guidance, rather than attempting to craft new language.

Yours Truly,

Moncrief & Hart, P.C.

Paul Hart, Esq.

Attorneys for MLBP

CASTROVILLE COMMUNITY
SERVICES DISTRICT

MEMORANDUM

HEARING SUBMITTAL
PROJECT NO./AGENDA NO: PZ20190005 #3
DATE RECEIVED: 2-11-19
SUBMITTED BY/VIA: Public Counter
DISTRIBUTION TO/DATE: PC / 2-11-19
DATE OF HEARING: 2-13-19

To: CCSD Board of Directors

From: Eric Tynan, General Manager

Date: June 8, 2015

Re: 1984 Moss Landing Sewer Allocation Plan

BACKGROUND

The Moss Landing Sewer Allocation Plan (MLSAP) was created in 1984 when a bond was passed and a sewer system installed to alleviate pollution from septic systems in Moss Landing. The Bond was financed by a USDA loan to be paid back with user fees.

The MLSAP plan was based on the total capacity of 105,000gpd available at the Castroville treatment plant in 1984, which is documented in a County memo dated October 1, 1984. The capacity flow was split among 5 service areas: #1 Struve Road, #2 North Harbor, #3 The Island, #4 Potrero Road and #5 Downtown.

In the November 6, 1984 report to the Board of Supervisors it is noted that, "The allocation plan will be subject to further review as new uses are brought into the area" and "The current allocation plan is based on estimates of flow, revisions to the plan may be necessary and desirable based on actual flows." There is no evidence that any follow up review of the MLSAP based on actual flow data of the entire system had ever been done until the Castroville CSD initiated its study on August 2013.

THE PROBLEM

The MLSAP is based on the 105,000 gpd capacity of the former Castroville treatment plant. The Castroville treatment plant has been gone for decades as it was replaced by the MRWPCA regional pump station (RPS) which has a capacity of 2,700,000 gpd. The Castroville pump station in turn receives flow from the Moss Landing RPS which has a capacity of 309,000 gpd. While the MLSAP is based on a capacity of 105,000 gpd from a treatment plant that has long since been replaced, the actual system capacity of the Moss Landing sewer system is the 309,000 gpd limit of the Moss Landing RPS. Currently, the Moss Landing sewer system averages about 79,000 gpd.

The problem is that the MLSAP as it now stands is not working. Of the 5 service areas, #1 (Struve Road) is at 88% of its allocation, # 2(North Harbor) is only using 10% of its allocation but has significant expansion plans for a restaurant, #3 (The Island) is exceeding its allocation, and has significant expansion plans and ample capacity, #4 (Potrero Road) is using about 31% of its allocation with no plans of using the rest and #5(Downtown) is using about 90% of its allocation. Clearly the facts show that there is a need for change

In short, the MLSAP is seriously out of date, not being followed, and in fact if it were followed would needlessly restrict access to unallocated capacity needed by residences and businesses in the Moss Landing community.

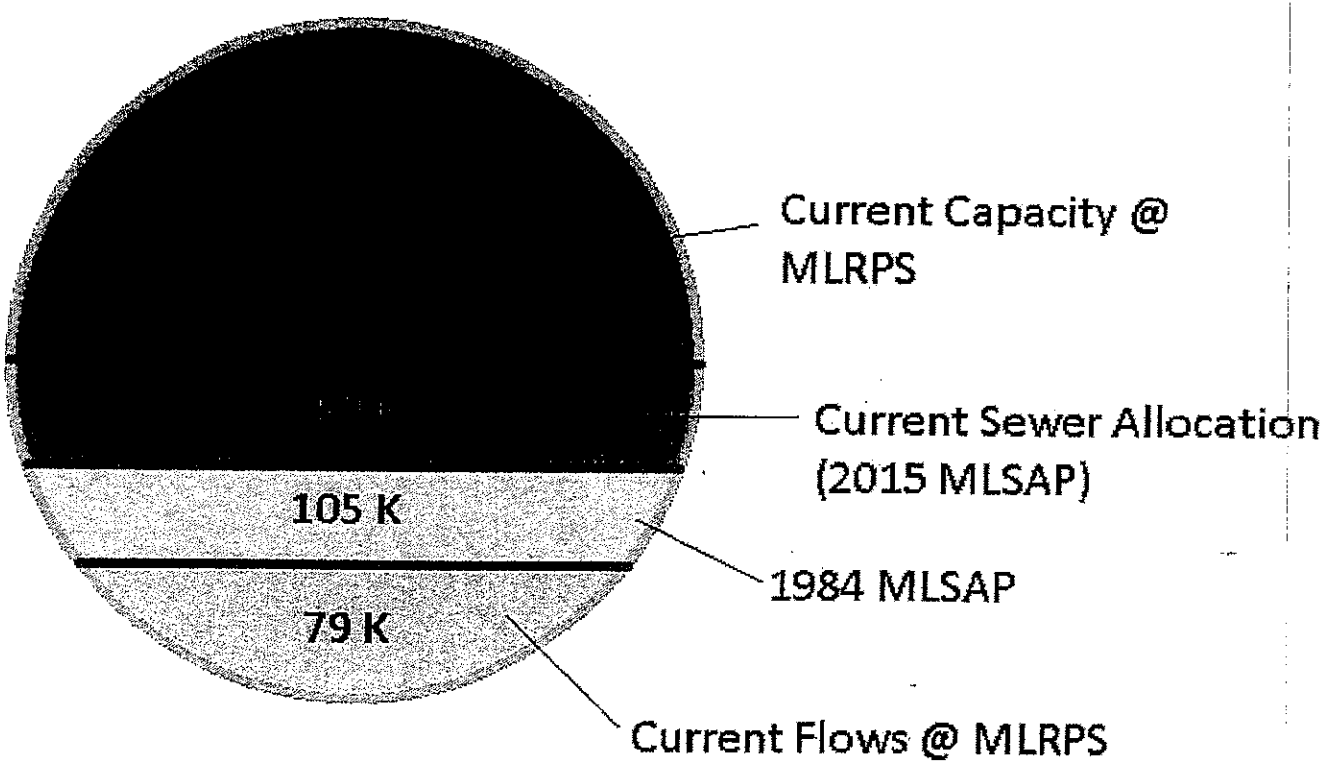
THE SOLUTION

The solution to the problem could be solved by increasing the MLSAP to 140,000 gpd. This is well below the actual system capacity of 309,000 gpd while leaving the rest in reserve and eliminating the MLSAP service areas altogether while making the allocations "at large" in the District so they can be used where they are needed.

Alternately, the Harbor District could to limit itself to the North Harbor's current allocation of 10,100 gpd while the rest of the Moss Landing system is free to use the additional capacity as long as it conforms to the Moss Landing Community plan and California Coastal Commission guidelines.

CURRENT UPDATE ON CASTROVILLE CSD OPERATIONS OF THE MOSS LANDING SYSTEM

- The Moss Landing sewer system has not had a spill or any violations since CCSD took over operation and maintenance in 2011.
- The 7 illegal cross connections with the storm drain on Struve Road have been eliminated.
- The three dangerously degraded manholes on Highway 1 have been replaced.
- The Bond financing for the installation of the sewer system was paid off by CCSD with an interest free loan, immediately saving the Moss Landing community $65,505 in interest.
- The initial draft CIP 5 year plan for the Moss Landing system shows significant savings, this in spite of capital improvements necessary due to years of deferred maintenance. It is anticipated that if this continues, in a few years the Moss Landing systems customer's sewer user fees could be reduced.
- A state of the art command and control system has been installed at all the sewer lift stations allowing for real time monitoring, trending and remote control of the system , thus reducing overall operation & maintenance while allowing for an immediate response to emergency situations.


Current Capacity @ MLRPS
Current Sewer Allocation (2015 MLSAP)
105 K
1984 MLSAP
79 K
Current Flows @ MLRPS

(c) The priority uses of Moss Landing Beach, Salinas River Beach and the Moss Landing Harbor district pump-out are given priority allocations.

(d) The full capacity available for development of coastal-dependent industrial uses on Moss Landing Island is provided.

(e) The balance of the capacity in the system is essentially pooled by service area to allow for new or expanded uses consistent with the Moss Landing Community Plan of the North County Land Use Plan.

3) The implementing ordinance will require a use permit for new uses in the district area. Through the review and decision-making process allocations will in effect be made by grant of the use permit. The availability of sewer capacity and impact of a project on that capacity will be an integral part of the decision-making process.

4) The allocation plan will be subject to further review as new uses are brought into the area and specific sewage flow information is gathered. The current allocation plan is based on estimates of flow. Revisions to the plan may be necessary and desirable based on the actual flow data that may be available over the first several months of operation.

Dale Ellis

DALE ELLIS
Zoning Administrator
11/1/84

DE/mlk

Attachments: Allocation Plan, Background Report, Draft Ordinance

cc: Clerk to Board (15), Jose Ramos-County Counsel, Applicant, File, Director of Public Works

2

Eric Tynan

From: Brian O'Neill [Brian.O'Neill@coastal.ca.gov]
Sent: Tuesday, August 23, 2016 10:45 AM
To: Eric Tynan
Subject: RE: Moss Landing Sewer Allocation Plan
Attachments: 3-84-1 Castroville County Sanitation District (CCSD) adopted report - Rick Hyman.pdf

Hello Eric,

I was able to dig up what I think is one of the original permits. I've attached the report to this e-mail.

To me, it looks like the allocation plan (or any updates to it) would not need explicit Coastal Commission approval. Instead, it looks as though the permit only lays out the parameters for what the allocation plan must prioritize, leaving the actual allocation plan up to the applicant (CCSD). This gives CCSD flexibility, while also giving CCC authority to ensure that coastal dependent uses are prioritized if any issues were to arise.

The condition language (condition 7) is found on page 43 of 55 in the PDF. The annexation of new service areas would require CCC approval (condition 4), but it does not appear that the allocation plan needs our approval. Hopefully that makes sense. Let me know if you would like to discuss further.

~Brian

From: Eric Tynan [mailto:eric@castrovillecsd.org]
Sent: Friday, July 29, 2016 11:24 AM
To: Brian O'Neill
Subject: FW: Moss Landing Sewer Allocation Plan

Hi Brian,
I just got it
Here is the info on the Moss Landing proposed Sewer Allocation Plan.
I'll be sending a few more documents to help clarify the issue'
Much appreciated!

ET

J. Eric Tynan
General Manager
Castroville Community Services District
11499 Geil Street
Castroville CA. 95012
Office: 831.633.2560
Cell: 831.235.0155
Fax 831.633.3103

3

Novo, Mike x5192

From: Dan Carl [dcarl@coastal.ca.gov]

Sent: Monday, September 08, 2008 4:53 PM

To: Linda G. McIntyre

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Subject: RE: Moss Landing Planning

Hello All,

We just briefly wanted to respond to the questions posed to Coastal Commission staff in Linda's email below in response to Melanie's email. I apologize for the delay, and thank you for your patience in awaiting our response. We agree that the infrastructure questions must be addressed in this planning process, and also agree that public service capacities will affect what can be accomplished in the future as part of the to be developed updated community plan. Although such capacities are limiting factors, in some ways, and perhaps this is to what Linda refers, such capacities themselves are not necessarily the bottom defining line if a community plan vision comes together that appropriately provides and accounts for Coastal Act priority uses and resource protection as well. In other words, our understanding regarding public service capacities and what is appropriate in that respect, including relieving capacity problems, should be driven by what capacities are necessary to reach the Coastal Act consistent and preferred vision, and not necessarily by a rote reliance on a lack of one capacity or another compared to existing uses. That is not to say that service capacities don't matter. We believe that they certainly do, and what can be accomplished overall will certainly be tied to the adequacy of public services, whether part of the plan includes reducing demand and/or expansion of certain capacities.

In any case, though, we agree that updating our assumptions and understandings about existing public service capacities is a good start, and we agree that collecting some of the type of information that Melanie outlined in her email is a good first step. We need to also understand what the current plan says. Specifically, with respect to sewer, the Moss Landing County Sanitation District Allocation Plan (1980) describes the sewer allocation and capacity for Moss Landing (existing demand, allocation for vacant parcels, and expected allocated capacities for new or expanded uses for a total allocation of 105,000 gallons per day). This allocation was expected to cover all future LCP-prescribed development of Moss Landing. An apparent problem with the allocation now exists because the system is at capacity and Moss Landing is not fully built out, and it is not clear if this is because the original numbers were wrong, because there are possible system malfunctions, things were not sized correctly, if users are using more than they are allocated, something lese, combination of all, etc.. We need to have current flow information, and if the system is truly maxed out and it is not just a malfunction or sizing problem, we need to revisit the allocation plan in conjunction with expected future development.

In general, and in response specifically to Linda's question, we are not opposed to increasing sewer capacity per se as part of the updated community plan process so long as such capacity is allocated to Coastal Act consistent and preferred priority uses within the area, and provided all other coastal resource impacts can be avoided. We believe consideration of such potential capacity modifications to be inherent to, and important for, this planning process in which we are all engaged as it is a critical part of the visioning process, and helps to inform what is possible and at what cost. In that effort, there is obviously a need to reexamine the priority uses outlined in the current community plan, and I think we can all agree that this is a primary objective of this planning process. In the Monterey County LCP Periodic Review in 2003 (http://www.coastal.ca.gov/recap3/Draft-FindingsChapter2.pdf, page 69), we evaluated the development of Moss Landing since LCP adoption and made observations about current and future land uses and trends. I think it would be helpful for the group to look at this to assist with discussions of priority uses and potential future development.

I hope this response proves helpful, and we look forward to helping to develop an updated community plan vision appropriate for Moss Landing's unique circumstances. In that respect, I apologize that we have been unable to attend the last few community plan meetings, and will most likely continue to have limited involvement in these meetings and this planning process as a result of increasingly constrained staff resources. That said, we will continue to do our best to provide input at critical junctures, and will do our best to attend meetings as much as we can. Thank you all for your continued understanding.

Dan

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seconded by David Pecci to approve the proposal for the Audit Services Agreement for 2014-2016. The motion carried by the following vote:

AYES:	5	Directors:	Lewis, Stefani, McCready Pecci and Gugale
NOES:	0	Directors:	None
ABSENT/NOT PARTICIPATING:	0	Directors:	None

The Board returned to Unfinished Business, Item one and followed the order of the agenda.

3. Resolution No. 13-9, Acting as the Board of Directors of the Castroville CSD, adopt a Resolution in support of an application to the Local Agency Formation Commission of Monterey County to consolidate the Moss Landing County Sanitation District with the Castroville CSD – General Manager Eric Tynan informed the Board as discussed under Unfinished Business, item three, this resolution will mirror the County's resolution so there are no discrepancies and approval of this resolutions will get the LAFCO process going. District Legal Counsel Lloyd Lowrey stated that it is appropriate for the board to know and it should be noted in the minutes that there are no new services being planned and under the California Environmental Quality Act (CEQA), if you are not increasing the level of service or type of service and all you have happening is a reorganization in a way that the government is providing the service, it's not the type of environmental action that requires an environmental impact report or negative deck report. The reorganization is not a project and it is that which enables the Board to make the findings based on the General Manager's recommendation that this action is not a project and exempt from CEQA. After some discussion, a motion is made by Ron Stefani and seconded by David Pecci to approve Resolution No. 13-9, Acting as the Board of Directors of the Castroville CSD, adopt a Resolution in support of an application to the Local Agency Formation Commission of Monterey County to consolidate the Moss Landing County Sanitation District with the Castroville CSD. The motion carried by the following vote:

AYES:	5	Directors:	Lewis, Stefani, McCready Pecci and Gugale
NOES:	0	Directors:	None
ABSENT/NOT PARTICIPATING:	0	Directors:	None

4. Adopt Resolution No. 13-10, A Resolution Fixing the Employer's Contribution Under the Public Employees' Medical and Hospital Care Act – After some discussion, a motion is made by Ron Stefani and seconded by David Pecci for the Board to adopted Resolution No. 13-10, A Resolution Fixing the Employer's Contribution Under the Public Employees' Medical and Hospital Care Act. The District will submit the minimum employer contribution required to CalPERS. The District still plans to continue to supplement and pay 100% of monthly health benefits for employees and qualified dependents directly to CalPERS. The motion carried by the following vote:

AYES:	5	Directors:	Lewis, Stefani, McCready Pecci and Gugale
NOES:	0	Directors:	None
ABSENT/NOT PARTICIPATING:	0	Directors:	None

5. Amend and clarify Section 10 Employee Benefits, 10.0 Medical and 10.1 Retiree Health Benefits of the CCSD Employee Handbook by establishing new policies for active and retiree health benefits for those hired before January 1, 2013 and those hired on or after January 1, 2013 – After some discussion, a motion was made by David Lewis and seconded by Cornelia Gugale for the Board to amend Section 10 Employee Benefits, 10.0 Medical and 10.1 Retiree Health Benefits of the CCSD Employee Handbook by establishing two tiers. Tier one: If the employee is hired before January 1, 2013, the employee shall be at least fifty (50(years of age upon retirement and have a total of 20 years of continuous service with the District in order to be eligible for 100% retirement health benefits (medical only) for retired employees and qualified dependent. For the retired employee who meets the requirements in tier one, the District will pay the minimum employer contributions for health care to CalPERS, and supplement the difference of the monthly premium for the retired employee and qualified dependent directly to the retiree. Tier two: If the employee is hired on or after January 1, 2013, the employee shall be at least fifty-two (52) years of age upon retirement and will only receive the minimum employer contributions for health benefits (medical only) upon retirement with CalPERS, regardless of the years of service. The motion carried by

Whereas; While the 1984 MLSAP is based on a capacity of 105,000 gpd from a treatment plant that has long since been replaced, the actual system capacity of the Moss Landing sewer system is the 309,000 gpd limit of the Moss Landing RPS.

Whereas; Currently, the Moss Landing sewer system averages 79,000 gpd.

Whereas; The MLSAP as it now stands is not working. Of the 5 service areas, #1 (Struve Road) is at 88% of its allocation, # 2(North Harbor) is only using 10% of its allocation but has significant expansion plans for a restaurant, #3 (The Island) is exceeding its allocation, and has significant expansion plans and ample capacity, #4 (Potrero Road) is using about 31% of its allocation with no plans of using the rest and #5(Downtown) is using about 90% of its allocation.

Whereas; Clearly the facts show that there is a need for change

Whereas; The MLSAP is seriously out of date, not being followed, and in fact if it were followed would needlessly restrict access to unallocated capacity needed by residences and businesses in the Moss Landing community.

NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors of the Castroville Community Services District does hereby accept the 2015 Moss Landing Sewer Allocation as prepared by District Staff.

The Castroville Community Services District Board as the official representative and legal authority responsible for the Moss Landing sewer system finds that the amended MLSAP is:

Zone	Current allocation (gpd)	%	New allocation (gpd)	Diff (gpd)
Area #1 -Struve Rd	34,250	88%	34,250	none
Area #2 - North Harbor	10,100	10%	10,100	none
Area #3 -The Island	14,000	100%	30,000	+16,000
Area #4 The Heights	13,000	31%	13,000	none
Area #5 Downtown	33,650	90%	52,650	+19,000
Totals	105,000	80%	140,000	35,000

Under the 1984 allocation the vacant lots owned by the Harbor District and/or other entities on the Island and downtown areas could not be developed, but under the 2015 MLSAP they can.

- There are 32 vacant lots that are entitled to 250 gpd
  #1 Struve Rd has 6 vacant lots
  #2 North Harbor has 3 vacant lots
  #3 Moss Landing Island has 16 vacant lots
  #4 The Heights has 1 vacant lot
  #5 Downtown has 6 vacant lots
  The total allocation for these lots 32 x 250 gpd=8000 gpd

CURRENT UPDATE ON CASTROVILLE CSD OPERATION OF THE MOSS LANDING SEWER SYSTEM

- The Moss Landing sewer system has not had a spill or any violations since CCSD took over operation and maintenance in 2011.
- The 7 illegal cross connections with the storm drain on Struve Road have been eliminated.
- The three dangerously degraded manholes on Highway 1 have been replaced.
- CCSD has applied for $2.8 million in grant funding to replace the degraded sewer facilities such as the force main under the Hwy 1 bridge over the Elkhorn Slough, all four motor control centers and relocating Lift Stations in the roadway on Sandholt and Potrero Roads.
- The Bond financing for the installation of the sewer system was paid off by CCSD with an interest free loan, immediately saving the Moss Landing community $65,505 in interest.
- The initial draft CIP 5 year plan for the Moss Landing system shows over $70,000 in savings in the 1st year, this in spite of capital improvements necessary due to years of deferred maintenance.
- A state of the art command and control system has been installed at all the sewer lift stations allowing for real time monitoring, trending and remote control of the system, thus reducing overall operation & maintenance while allowing for an immediate response to emergency situations.

RECEIVED NOV 1984 MONTEREY COUNTY

REPORT TO MONTEREY COUNTY BOARD OF SUPERVISORS

SUBJECT	MOSS LANDING SANITATION DISTRICT SEWER ALLOCATION PLAN DISTRICT NO. 1
DEPARTMENT	PLANNING

BOARD MEETING DATE: NOV. 6, 1984 11:30 A.M.
AGENDA NUMBER: #

	INITIAL	NOTE	ACTI
Public Works Director			
Assistant P.W. Director			
Supervising Civil Engineer			
Administration			
Design & Construction			
Maintenance			
Property Development			
Special Services			
Traffic & Program			
Litter Investigator			
Road Damage Inv. & Safety			

RECOMMENDATION

It is recommended that the Board of Supervisors sitting as the Board of Directors of the Moss Landing County Sanitation District

1) Approve the sewage allocation plan for the Moss Landing County Sanitation District

2) Adopt an amendment to Ordinance No. 1 of the Moss Landing County Sanitation District to enable the allocation program to be administered and

3) Authorize the allocation plan and ordinance to be submitted to the California Coastal Commission for their approval.

FILE COPY
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SUMMARY

The construction of the facilities for the Moss Landing County Sanitation District required approval from the State Coastal Commission. In granting the permit the Coastal Commission required the allocation plan to be prepared by the County and approved by the Coastal Commission. Prior to your October 16th hearing you were sent allocation plan, background report and an implementing ordinance. Copies of these materials are attached to this report.

DISCUSSION

1) The Board needs to approve an allocation plan and implementing ordinance to allow submittal of the plan to the State Coastal Commission. Until the State Coastal Commission approves the plan allocation of sewer capacity for new uses in the district cannot be allowed. Without an allocation of sewer, new development cannot take place in the Moss Landing area.

2) The allocation plan provides for the following:

(a) All existing uses in the district will receive capacity to dispose of their current waste

(b) Each vacant parcel in the district is allocated 250 gallons per day flow. This capacity is equal to that of a single family dwelling.

1 = 6
2 = 3
3 = 16
4 = 1
5 = 6
} Total vacant 32 = 8,000 GPD = 240 K/m