

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

DEPARTMENT SE”H”

(562) 807-7326

December 21, 2009

FAX COVER SHEET

TO: BRIAN GAFFNEY (415) 777-9809
 TATIANA GAUR (310) 305-7985
 GREGG KOVACEVICH (310) 643-8441
 TAMAR STEIN (310) 277-7889

FROM: SOUTHEAST NORWALK DEPARTMENT “H”

RE: RULING ON WRIT OF MANDATE

BS118259 SANTA MONICA BAYKEEPER

vs.

CITY OF MALIBU

Thank You,

Terry Frala
Judicial Assistant

15 pages including the fax cover sheet

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/08/09

DEPT. SEF

HONORABLE THOMAS I. MC KNEW, JR.

JUDGE

T. FRALA

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING

C. LOKUAN

K. SHEPHERD Deputy Sheriff Reporter

9:00 am

BS118259

Plaintiff
Counsel

BRIAN GAFFNEY [X]
TATIANA GAUR [X]

SANTA MONICA BAYKEEPER

Defendant
Counsel

GREGG KOVACEVICH [X]
TAMAR C. STEIN [X]
JAMES R. REPKING [X]

VS

CITY OF MALIBU

'CEQA'

NATURE OF PROCEEDINGS:

- 1 COURT TRIAL CEQA {WRIT OF MANDAMUS}
- 2 MOTION TO DISMISS REAL PARTY IN INTEREST, SCHMITZ AND ASSOCIATES

SCHMITZ & ASSOC. INC.'S "Motion to Dismiss" is GRANTED. CCP section 438(c)(3)(B)(ii). A judgment of dismissal shall be entered in favor of SCHMITZ & ASSOC. INC, CCP section 438(i)(3).

CEQA requires a petitioner to name, as a real party in interest, "any recipient of an approval that is the subject" of the CEQA action. PRC section 21167.6.5(a)(d). It is clear from the nature of the allegations in the petition that SCHMITZ is not the "recipient of an approval" and that it was acting only "on behalf of Malibu La Paz, LLC." Petition and complaint at paragraph 122, 3:26. Moving party denied that it was properly named as a real party in interest. Answer at paragraph 12, 3:4-5. Judicially noticeable documents also reflect that SCHMITZ was acting as Malibu La Paz, LLC's consultant and agent by submitting certain applications "on behalf of Malibu La Paz, LLC." City Resolutions 8-54 (AR 7173 at section 1A), 8-53 (AR 7123 provides for dismissal of the petition if a recipient of an approval is not named as a real party. PRC section 21167.6.5(a)(d); CCP section 389, see County of Imperial v. Superior Court (2007) 152 Cal. App. 4th

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13, 33-34. It does not authorize dismissal of an improperly named party. Therefore, the court on its own motion, grants judgment on the pleadings.

Petitioner has filed a notice of non-opposition; respondent and real party in interest have not opposed the motion.

Moving party is to submit an order.

Moving party SANTA MONICA BAYKEEPER'S petition for writ of mandate is aruge and taken under submission.

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'CEQA'

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RULING ON TRIAL 12/08/09 WRIT OF MANDAMUS;

Petitioner SANTA MONICA BAYKEEPER'S petition for writ of mandate is DENIED. CCP section 1094.5, PRC section 21168.

Real party in interest MALIBU LA PAZ RANCH, LLC's request for judicial notice is GRANTED, EC sections 452, 453.

A challenge to an EIR is reviewed for an abuse of discretion. PRC section 21168.5. "Abuse of discretion 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." Id. An agency fails to proceed "in a manner required by law" when it fails to comply with the informational and procedural requirements of CEQA. Save Our Peninsula Com. v. Bd. of Supervisors (2001) 87 Cal. App. 4th 99, 115. "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App. 4th 645, 670.

The court must uphold a decision if there is substantial evidence in the record to support the

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agency's decision. PRC section 21168; Laurel Heights Improvement Ass'n v. Regents of the Univ. of California (1988) 47 Cal. 3d 376, 392. Substantial evidence is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Id., 14 CCR section 15384(a). Petitioner bears the burden of presenting credible evidence that the agency's findings and conclusions are not supported by "substantial evidence." Jacobson v. County of Los Angeles (1977) 69 Cal. App. 3d 374, 388. As discussed below, petitioners have not met that burden.

PROJECT DESCRIPTION

15.2 undeveloped acres located within the Malibu Creek flood plain and about 1/4 mile from the Pacific Ocean. The "project" actually consist of two office and retail projects: a .20 FAR (Floor Area Ratio) project under a Design and Development Agreement which would also dedicate 2.3 acre parcel for municipal use (the proposed project) and a .15 FAR project (the preferred alternative). The City determined that a single EIR could be prepared and the process for approvals could proceed simultaneously. Although both projects were approved only one of them will be built. The .15 project is consistent with the Local Coastal Plan and will not require Coastal Commission approval. The .20 project will require Coastal Commission approval. The two projects are

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essentially the same except for the dedication of a portion for municipal use and the increased square footage.

The Project area is near Malibu Creek and Malibu Lagoon, two water bodies identified as impaired or threatened by the Water Quality Control Board. It is also in an area of relatively shallow ground water that is prone to flooding. Water quality impacts are a concern and this challenge focused on the EIR's analysis of cumulative impacts, particularly with respect to hydrology and water quality, the improper deferral of mitigation measures and the claim that the City's findings were inadequate.

Although the project changed slightly during the review process, the changes were occasioned by comments from the public or conditions imposed by the responsible agencies. The description fully describes all integral components, ensuring all impacts were adequately analyzed. It is clear that the smaller "preferred alternative" (.15 FAR) project would utilize the same wastewater treatment system as the larger proposed (.20) project. 11621-11787.

RECIRCULATION

The City determined that recirculation was not required because the Wastewater Treatment System will further reduce environmental impacts when compared to the septic system that was originally proposed. 4692-

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4693, 7237, 7337. The decision was based on independent analysis, expert hydrological and water quality studies and conformance with Environmental Health Division review. 733, 734, 11619-11787. That a single city staff member may have thought the recirculation was appropriate does not change the fact that there was substantial evidence in the administrative record to support the decision not to recirculate. 870-871. CEQA guidelines require recirculation if a significant change in the project that would deprive the public of an opportunity to comment upon a substantial adverse impact on the environment. 14 CCR section 15088.5 Incorporation of the zero net discharge wastewater treatment system, decreases instead of "increases the severity of an environmental impact." Cf 14 CCR section 15088.5(a)(2). It also represents a feasible project alternative that would "clearly lessen the significant environmental impacts of the project" that was adopted, rather than declined by the projects proponents. Cf 14 CCR section 15088.5(a)(3). While materially different then the septic system previously proposed it does not represent a significant change that would necessitate recirculation. If petitioner's interpretation of recirculation requirements were the law, every improvement to a project in response to comments would require another round of environmental review subjecting a project to endless review. The City's decision not to recirculate is presumed to be correct and petitioner has failed to meet its burden on this issue. Western Placer Citizens for an

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'CEQA'

NATURE OF PROCEEDINGS:

Agricultural and Rural Environment v. County of Placer
(2006) 144 Cal. App. 4th 890, 903.

IMPACT ANALYSIS

In determining the adequacy of the environmental analysis, the court does not "pass on the correctness of the report's environmental conclusions, but only on its sufficiency as an informative document." Laurel Heights Improvement Ass'n v. Regents of University of California (1988) 47 Cal. 3d 376, 392.

The EIR determined that the project will not change the currents of nearby creeks because stormwater will be contained on site ensuring that flow rates are "at or below the flow rates that currently exist on site." 9772. The EIR concluded that the "impacts from drainage and flooding will be reduced to less than significant levels." Id. The project's extensive drainage system was designed to accommodate stormwater flows. 9769-9772. The water quality management plan analyzed both water quality control measures and storm water drainage capacity and incorporates mitigation maintenance measures. 2683-2693, 2851, 7267-7268.

The impact on groundwater was also analyzed. 11673-11674, 1440-1625, 11716, 11746, 10058. The EIR then concluded that the "Zero Net Discharge System" will not result in a significant rise in groundwater levels across the site including the areas adjacent to the subterranean parking structures." 9862-9863.

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Petitioner argues that the EIR does not discuss the effect on the direction and flow of the ground water, an issue that was not specifically raised during the review process and therefore cannot be raised now. Even though the effect on flow and direction of ground was not discussed in the EIR, the oversight is not prejudicial. Obviously, if the project does not impact the mounding of groundwater on the site, it cannot effect the flow of subsurface water. 9862-9863. Furthermore, the EIR analyzed the project's impact on groundwater quality. Noting that the system will "meet the Title 22 standards for disinfected tertiary treatment," and that any discharge would need to comply with Waste Discharge Requirements (WDR) imposed by the Regional Water Quality Control Board, the EIR concluded that even the discharge of "off spec" wastewater would result in less than significant impacts to groundwater quality. 9774-9778. Compliance with applicable laws or regulations is adequate mitigation in this situation. See Leonoff v. Monterey County Bd. of Supervisors (1990) 222 Cal. App. 3d 1337, 1355.

Petitioner has not shown that the issue of flooding impacts on people was raised at the administrative level. Nevertheless, the court finds that this human impact analysis is implicit in the analysis of the impacts of flooding on structures. 9768-9769, see Sequoyah Hills Homeowners Ass'n v. City of Oakland (1993) 23 Cal. App. 4th 704, 716. If the project is designed to withstand adverse impacts to its

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structures, common sense dictates that the measures will also protect the persons using those structures.

The impacts on wildlife by the proposed manmade wetlands was adequately analyzed. Recognizing that the project site is not within an Environmentally Sensitive Area or other protected area, the EIR then concluded that the Manmade Wetlands area will create a beneficial impact to wildlife. 9774, 9781, 10018. The EIR analyzed the natural processes that would occur in the wetlands and, as a result, concluded that with annual and long term maintenance programs in place the habitat value of the wetlands could be optimized. 7268, 9774.

CUMULATIVE IMPACTS

With respect to cumulative impacts, agencies are not required to "provide evidence supporting every fact" contained in the EIR. See Association of Irrigated Residents v. County of Madera (2003) 107 Cal. App. 4th 1383, 1403. An EIR's cumulative impacts analysis "need not include all information available on a subject." Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners (1993) 18 Cal.App. 4th 729, 748. Past projects were considered as part of the baseline conditions of the project. 9638, 9655-9656. Petitioner claims that the cumulative projects list omitted two related projects, the Malibu Legacy Park and the Malibu Lumber Yard. The City responded to those comments during the review period by explaining that those projects were proposed after the City issued

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the Notice of Preparation (NOP) for the La Paz Project. The CEQA Guidelines require analysis of the conditions that "exist at the time the Notice of Preparation is published." 14 CCR section 15125. The NOP provides an appropriate cutoff date for future projects required to be in the analysis. San Franciscans for Reasonable Growth v. City and County of San Francisco (1984) 151 Cal. App. 3d 61, 71-77. These projects need not be included in the analysis, nevertheless, the EIR recognized that wastewater discharge generated by related projects would be required to meet the Wastewater Discharge Requirements toward attaining both state and federal water quality standards in the Civic Center Area. (9778-9779, 9862-9863. Futhermore, a cumulative analysis of past projects is adequate where, as here, it was included in the baseline conditions and environmental settings portion of the EIR. City of Long Beach v. LAUSD (2009) 176 Cal. App. 4th 889, 910-911.

Contrary to petitioner's claims the EIR did not use an improper "ratio" approach. The EIR did find that certain cumulative impacts were significant and that the project's contribution was significant, but concluded that projects contribution could be mitigated to less than significant level through compliance with applicable state and federal. The EIR considered the incremental to the cumulative cumulative effect, not merely its proportional share of an already adversely effected environmental condition, when determining that the project's impact

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would be rendered less than cumulatively considerable. 9778-9779. Relying on the facts that existing and future projects would be required to comply with water quality control plans, the EIR reasonably determined that the project as mitigated, would have a less than significant impact.

Complainace with Total Maximum Daily Load (TMDL) program is mandatory. The EIR concluded "the wastewater discharge generated by the related projects, as well as the proposed project would... be required to meet the TMDL standards set forth in the WDR, which is considered a vehicle for moving towards attainment of federal and state water quality standards in the Civic Center Area." (9778-9779, 9862-9863. Petitioner argues that the reliance on TMDL compliance improperly defers the cumulative impact analysis. This specific issue was never raised during the review process before the City and cannot be considered now. In any case, the CEQA Guidelines acknowledge "with some projects, the only feasible mitigation for cumulative impacts may involve the adoption of ordinances or regulations rather than impositions of conditions on a project by project basis." 14 CCR section 15130(c).

DEFERRED MITIGATION

The soil leaching managment plan is not deferred mitigation conditioned approval on the development of a plan with specific performance standards. 7269, 9777-9778, 10094, 11676. The referenced

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water quality standards mandates testing prior to discharge, describes maximum contaminant levels, acceptable pH levels and other restrictions. Request for judicial notice Exhibit 1 (LARWQCB's Order N. 93-010). The final system design, after Los Angeles Regional Water Quality Control Board (LARWQCB)'s approval "shall be engineered to meet effluent limits specified in the WDRs, taking in to account the USEPA." 9780, 10077. A condition requiring compliance with environmental regulations is a common and reasonable mitigating measure. Leonoff v. County of Monterey (1990) 222 Cal. App. 3d 1337, 1355, see also Sundstrom v. County of Mendocino (1988) 202 Cal. App. 3d 296, 308.

ADEQUACY OF FINDINGS

Under CEQA, the City is required to make written findings regarding a project's significant impacts on the environment PRC section 21081. The findings are entitled to a presumption of correctness. City of Poway v. City of San Diego (1984) 155 Cal. App. 3d 1037, 1043. The court must resolve any doubt "in favor of the findings and decision." El Dorado Union High School Dist. v. City of Placerville (1983) 144 Cal. App. 3d 123, 130. With respect to hydrology and water quality issues, the City found the mitigation measures would sufficiently mitigate the projects impacts. 7340-7342. These findings are supported by the analysis in the EIR. 9768-9778, 9769, 9772, 9773. The City also made findings with respect to other environmental impacts such as air quality, geology

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and soils, public utilities and environmental hazards. 7239-7247, 7339-7348. The City determined that these impacts could be mitigated. 7366, 7369, 7344-7346, 7377-7389, 7346-7347 and 7391. CEQA does not require that the City make a separate finding for each subimpact. Agency findings "need not be stated with the formality required in judicial proceedings." Topanga Ass'n for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 517 fn16. If the basis for a finding is found in the EIR and the agency's findings incorporate the EIR's discussion, detailed explanations are not required for each impact. Mira Mar Mobile Community v. City of Oceanside (2004) 119 Cal. App. 4th 477, 479. The City incorporated the analysis contained in the EIR into its findings. 7338.

It is presumed that the municipal entities complied with the law, and petitioners bear the burden of proving otherwise. Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners (1993) 18 Cal. App. 4th 729, 740. Any alleged failure to comply must also be shown to be prejudicial, i.e., the alleged error or omission is of such magnitude as to "preclude informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." Id. at 748, PRC section 21005. Petitioners have not established that there was any prejudicial abuse of discretion. Accordingly, the respondent's decision should be upheld. The petition is denied.

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Respondent is to prepare an order and judgment denying petition.

Respondent is to arrange with the court's judicial assistant to retrieve the lodged certified administrative records and to maintain and preserve them until 60 days following final determination of the action, including any appeals.

A copy of this minute order is faxed this to:

BRIAN GAFFNEY (415) 777-9809
TATIANA GAUR (310) 305-7985
GREGG KOVACEVICH (310) 643-8441
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