

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

**DEPARTMENT SE"TH"**

(562) 807-7326

December 22, 2009

**FAX COVER SHEET**

TO: BRIAN GAFFNEY (415) 777-9809  
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FROM: SOUTHEAST NORWALK DEPARTMENT "H"

RE: RULING ON WRIT OF MANDATE

BS120033 SANTA MONICA BAYKEEPER

vs.

CITY OF MALIBU

Thank You,

Terry Frala  
Judicial Assistant

9 pages including the fax cover sheet

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/22/09

DEPT. SE H

HONORABLE THOMAS I. MC KNEW, JR.

JUDGE

T. FRALA DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING

NONE

NONE

Deputy Sheriff Reporter

10:30 am

BS120033

Plaintiff  
Counsel

NO APPEARANCES

SANTA MONICA BAYKEEPER

VS

Defendant  
Counsel

NO APPEARANCES

CITY OF MALIBU

'CEQA'

**NATURE OF PROCEEDINGS:**

RULING ON TRIAL 12/14/09 WRIT OF MANDAMUS;

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

Petitioner SANTA MONICA BAYKEEPER's motion to augment the record is DENIED. CCP section 1094.5(e). The court finds the Malibu Lumberyard MND was mentioned only once, in passing, in discussing the history of neighboring projects. 5674. It was not "relied" on by the EIR being challenged. PRC section 21167.6(e)(10). There is no evidence that it was before the decision makers, or that petitioner could have presented it to the decision makers at the time the City was considering the project. Therefore, the motion is denied.

Petitioner SANTA MONICA BAYKEEPER's request for judicial notice is DENIED. EC sections 452, 453. The only evidence that is relevant is that which was before the agency at the time it made its decision. Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 574 fn4. Extra-record evidence is barred.

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**NATURE OF PROCEEDINGS:**

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. When an agency fails to comply with the mandatory procedures, the decision must be set aside. Sierra Club v. State Bd. of Forestry (1994) 7 Cal. 4th 1215, 1236. However, the petitioner is not challenging the City's failure to follow procedures, rather it attacks the EIR as lacking required information. Petition at paragraph 3.

"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. "In determining the prejudicial effect of the failure to disclose, a court must resolve any factual issues in favor of the lead agency, if supported by substantial evidence." Barthelemy v. Chino Basin Muni. Water Dist. (1995) 38 Cal. App. 4th 1609, 1620. The purpose of an EIR is "to inform the public and its responsible officials of the environmental

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**NATURE OF PROCEEDINGS:**

consequences of their decisions before they are made." Laurel Heights Improvement Ass'n v. Regents of the Univ. of California (1993) 6 Cal. 4th 1112, 1123. In determining the adequacy of the environmental analysis, the court does not "pass on 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.

**PROJECT DESCRIPTION**

Malibu Legacy Park is planned to occupy approximately 15 undeveloped acres located within Malibu's Civic Center Area. The project is located at the terminus of the Malibu Creek watershed where Malibu Creek drains into Malibu Lagoon. The project, designed by a team of experts, has three elements; 1) a stormwater detention, treatment and re-use element; 2) a habitat restoration element; and 3) a passive park element. 1565-1590, 8176-8179, 8182-8191. A fourth element, a wastewater treatment plant, was eliminated from the revised final EIR.

The stormwater element includes an eight acre foot detention pond which, in combination with the City's existing stormwater treatment facility located across the street, will allow the City to capture and treat virtually all of the stormwater flows that pass through the Civic Center Area. The habitat restoration element will involve the reintroduction of several different types of habitats allowing

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native plants and wildlife to thrive while providing an opportunity for the beneficial use of treated wastewater from a nearby shopping center. The public park will utilize treated wastewater, which is currently disposed subsurface on a portion of the property, for irrigation of the park and habitat areas.

The City initially hoped that the project site could be used for a centralized sewage treatment plant. However, site specific analysis revealed that the property is simply not suitable for a wastewater treatment facility. 8209-8210, 6196. The property is not large enough to accommodate a treatment wetland. 5694-5695, 8210.

CONSTRUCTION PHASE IMPACTS.

Geosyntec, one of the consulting firms on the project, did an extensive analysis of the hydrology and water quality impacts of the project. 8193-8196. The EIR mentions that construction "could" have a significant impact on the environment. 5899. As further explained in the EIR, the potential construction phase erosion, sedimentation and hazardous materials impacts depend on those variables listed and apply to any project site anywhere. 5899. Rather than speculate on what might happen, the EIR addresses the real issue of what will be done to avoid any significant impacts regardless of what those variables will be. 5899-5892. A General Construction Permit must be obtained under the NPDES program. Best Management Practices

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(BMPs) will be incorporated into the project under both the General Construction Permit and the Stormwater Pollution Prevention Plan (SWPPP) and detailed mitigation measures were developed to ensure that potential hydrological impacts will be reduced to less than significant. 6295, 5899-5903. A SWPPP and the implementing BMPs are necessarily dynamic: the runoff control measures in place are constantly evaluated and adjusted as the project site evolves. See 8206-8207 (commenting on normal practice). Prophecy is not required in an EIR and there is nothing to be gained by pointless speculation. Laurel Heights Improvement Ass'n v. Regents of University of California (1988) 47 Cal. 3d 376, 398.

While the EIR focuses on the mitigation, it does not forego the analysis completely, as petitioner suggests. A discussion of soils and erosion is located in the geologic section. 5827, 5829, 5830, 5833, 5839, 5840. The studies considered several factors including soil erosion, extent of grading, precipitation, topography and proximity to drainage channels. 5618, 5691, 5904. Extensive modeling of actual storm events over the course of 57 years provided accurate analysis which was explained at the public hearing by expert Ken Susilo. 8193-8196.

The grading and trenching will be above groundwater level. 8207. Even if temporarily exposed, the mitigation measures will reduce the impacts to less

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than significant. 5902-5903. The grading has been completed. Petitioner did not seek temporary restraint or a preliminary injunction to prevent any perceived threat of adverse impact from grading activities.

**DISCHARGE OF TREATED WASTEWATER**

The project does not include the subsurface discharge of treated wastewater form a neighboring development. That project was approved, without a challenge, more than 2 years prior to this project. The project does include the beneficial reuse of the treated effluent from Malibu Lumber. 5614, 5969-5697. In fact, the project anticipates a shift away from subsurface disposal to re-use for irrigation of the park and habitat areas. The net effect of the park project will be to reduce the amount of discharge to groundwater. 1576-1590.

**CUMULATIVE GROUNDWATER IMPACTS**

As discussed above, the Legacy Park project will not discharge anything to the groundwater. 6187-6201. The incremental contribution is zero and obviously less than "cumulatively considerable." 14 CCR section 15064(h)(1). Therefore, there is no requirement or reason to analyze cumulative effects.

"The ultimate decision of whether to approve a project. . . is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information. . . required by CEQA." Santiago County Water Dist. v. County of Orange (1981) 118 Cal.

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App. 3d 818, 829. "The level of specificity of an EIR is determined by the nature of the project and the 'rule of reason' rather than any semantic label accorded to the EIR." Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency (2000) 82 Cal. App. 4th 511, 533. Absolute perfection is not required. Concerned Citizens of South Central L.A. v. LAUSD (1994) 24 Cal. App. 4th 826, 839. It is presumed that the municipal entities complied with the law, and the 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. Petitioner has not established that there was any prejudicial abuse of discretion. Accordingly, the respondent's decision should be upheld. The petition is denied.

Respondent is to prepare an order and judgment denying the 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.

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A copy of this minute order is faxed this date to:

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