

LAW OFFICE OF MARC CHYTILO

ENVIRONMENTAL LAW

July 3, 2014

County of Santa Barbara
Board of Supervisors
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101

By hand delivery and by email to
sbcob@co.santa-barbara.ca.us

**RE: Appellant's Letter
Appeal (Case No. 13APL-00000-00029) of the County Planning Commission's Approval
of the Beach Club Project (Case Nos. 12TPM-00000-00006, 11CDH-00000-00006, and
11CDH-00000-00054), First Supervisorial District**

Dear Chair Lavagnino and Members of the Board of Supervisors,

This office represents Appellants Summerland Citizens' Association, Reeve Woolpert and Tom Evans, on behalf of the many groups and individuals affected by the proposed Beach Club Lot Split, Gabion Wall and Grading, and New Single Family Residence Project Project (Case Nos. 12TPM-00000-00006, 11CDH-00000-00006, and 11CDH-00000-00054) ("Project").

On December 4, 2013, the Planning Commission adopted the Revised Final Mitigated Negative Declaration ("MND") and approved the Project based on an erroneous conclusion that the MND constituted sufficient environmental review under and compliance with the California Environmental Quality Act ("CEQA"). However, The MND was adopted and the Project approved by the Planning Commission based on staff's incorrect assertion that the public coastal access trails designated on the Summerland Community Plan ("SCP"), and the associated coastal access policies, were inapplicable. This appeal followed, and Staff has since recognized the error concerning the SCP trail and park designations. The parent lot is identified in the SCP as possessing a coastal access trail, and further, was also designated to be a public park. The Planning Commission action did not consider any of these factors, nor did the MND. Consequently, the MND and Staff Report considered by the Planning Commission lacked any analysis of the Project's consistency with Local Coastal Plan policy, the coastal zoning ordinance and Summerland Community Plan policies concerning public trails and access.

Regrettably, the Staff Report and Revised MND omit an evaluation of the Project's consistency with trail access policies. Project consistency with applicable policies is required by both the Coastal Act and General Plan, but is also an independent CEQA requirement. While the Staff Report contends there is an insufficient nexus to exact a trail, this does not excuse the County from CEQA's requirement that the inconsistency with the coastal zoning ordinance requirement of an offer to dedicate a trail easement must be recognized as a potentially significant impact, triggering an environmental impact report ("EIR"). Appellants ask the Board to deny the Project due to this policy conflict, and if not, that an EIR be prepared to disclose the unavoidable policy conflict.

Additionally, there is substantial evidence supporting a fair argument of a potentially significant impact to visual and recreational resources. As such, the Board may not rely on the MND and must direct the preparation of an EIR if it desires to continue its consideration of the proposed project.

I. The Project Should Be Denied

The Proposed Project seeks to authorize past, unpermitted destruction to biological, cultural and recreational resources and approve a serial lot split that contributes to additional cumulative degradation and impacts to visual, biological and recreational resources and overtly conflicts with applicable Coastal Act, Local Coastal Plan and General Plan policies and the coastal zoning ordinance. As noted below, the findings necessary for approval of this project may not be made based on the record before the Board. As such it is the wrong project for this location, and should be denied due to the various policy conflicts and inability to make the necessary findings.

II. An EIR is Required

In the event the Board elects to not deny the Project at this time, it must direct preparation of an EIR to assess the Project's potentially significant impacts to visual and recreational resources, as well as disclosing the Project's conflicts with various applicable policies and the coastal zoning ordinance.

1. CEQA Sets a Low Bar for Preparation of an EIR

The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259). The statute's purpose is to inform the public and its responsible officials of the environmental and social consequences of their decisions *before* they are made. CEQA documents must be prepared "to protect not only the environment but also informed self-government" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553). For these reasons, CEQA has a low threshold for the preparation of an EIR, and resort to the use of MNDs is reserved for "limited exceptions" (*No Oil Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75).

Under CEQA, a public agency must prepare a complete EIR whenever substantial evidence supports a fair argument that a proposed project 'may have a significant effect on the environment,' even though it may also be presented with other substantial evidence that the project will not have a significant effect. (CEQA Guidelines, §§ 15002, subd. (f)(1), (2), 15063; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111-112). Substantial evidence means 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. When an agency (and Project applicant) elect to rely on a MND, CEQA establishes a

preference for resolving doubts in favor of an EIR as the appropriate form of environmental review. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 617-618).

Here, public comments to the draft MND, and the issues raised by this office on appeal, include “substantial evidence” supporting a fair argument that the Project will have significant effects on visual resources, recreational resources and fails CEQA’s policy and ordinance compliance requirement. Further, the personal observations of area residents on nontechnical subjects may qualify as substantial evidence for a fair argument (*Ocean View Estates Homeowners Assn, Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402). Here, numerous comments by local residents of the proposed Project’s interference with views of the ocean and of historical access to the Ocean across the subject parcel constitute substantial evidence that supports a fair argument that the Project would have significant visual/aesthetic and recreational effects.

2. The Project is Inconsistent with Applicable Policy and Zoning Ordinance Requirements

The Project must conform to all applicable Comprehensive Plan, Community Plan, and Zoning Ordinance requirements in order to be lawfully approved (Cal. Gov. Code § 66473 .5; County Code§ 21-18.1; CZO § 35-169.5.1). Significantly and additionally, CEQA characterizes any Project that conflicts with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the Project (including General Plan, Local Coastal Plan and coastal zoning ordinance) that was adopted for the purpose of avoiding or mitigating an environmental effect as causing a potentially significant impact. CEQA Guidelines, Appendix G, X.b., Land Use.

A. *Visual Resource Policy Inconsistencies*

CLUP Policy 4-3. *In areas designated as rural on the land use plan maps, the height, scale, and design of structures shall be compatible with the character of the surrounding natural environment, except where technical requirements dictate otherwise. Structures shall be subordinate in appearance to natural landforms; shall be designed to follow the natural contours of the landscape; and shall be sited so as not to intrude into the skyline as seen from public viewing places.*

The MND recognizes that the structures will be visible from the same location where public blue water views are available. MND at p. 10. Given the height of the structures, they have the potential to, and as a practical matter are certain to intrude into the skyline when viewed from Padaro Lane, a public viewing place. The MND and the policy consistency analysis do not discuss this as a Project impact or as a policy inconsistency.

Coastal Act Policy 30251. *The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas to minimize the alteration of natural*

land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

The LCP adopts California Coastal Act provisions by reference. As noted below in the visual resources CEQA impact discussion, views across this parcel existed until the myoporum hedges were installed and allowed to block views of the ocean from Padaro Lane. The intervening hedges have degraded the visual environment and compliance with California Coastal Act § 30251 requires restoration and enhancement of public visual resources.

B. *Parks, Recreational and Trail Policy Inconsistencies*

As noted infra, the MND fails to disclose and analyze the Project's inconsistency with as many as three applicable policies as follows:

Coastal Zoning Ordinance Section 35-63. Coastal Trails. Easements for trails shown on the Santa Barbara County Comprehensive Plan Parks, Recreation and Trails (non-motorized) maps, shall be required as a condition of project approval for that portion of the trail crossing the lot upon which the project is proposed.

Coastal Zoning Ordinance § 35-63 plainly mandates a trail easement as a requirement for all trails shown on PRT maps. Staff acknowledged the existence of a PRT-mapped trail crossing the Project lot (Board of Supervisor's Agenda Letter for July 8, 2014 Hearing to Consider the Appeal (Case No. 13APL-00000-00029 at pg. 5). Therefore, the failure to "require as a condition of project approval" a public trail easement creates an incontrovertible inconsistency between the project and the ordinance.

Coastal Land Use Plan Policy 7-25. Easements for trails shall be required as a condition of project approval for that portion of the trail crossing the parcel upon which the project is proposed.

The failure to require an easement also creates an inconsistency between the Project and Coastal Land Use Plan Policy 7-25.

Summerland Community Plan Policy PRT-S-2. In compliance with applicable legal requirements, all opportunities for public recreational trails within those general corridors adopted by the Board of Supervisors as part of the Parks, Recreation and Trails (PRT) maps of the County Comprehensive Plan (and this Community Plan) shall be protected, preserved and provided for during and upon the approval of any development, subdivision and/or permit requiring any discretionary review or approval.

The Project's consistency with these policies, and the attendant CEQA compliance issues, are a central issue in this appeal. Staff attempts to respond on page 5 of the Staff Report, however the

response fails to consider or analyze the project's consistency, but instead focusses principally on the issue of exaction and the County's authority to exact such a trail dedication. While appellant believes the Project's cumulative impacts to the recreational experience do supply facts that could justify exaction of a public trail easement across the subject parcel, we direct the Board to Staff's omission of the CEQA-mandated policy consistency analysis. Regardless of whether grounds for an exaction exist, the first question must be whether there is a policy inconsistency. If there is, the MND is not appropriate and an EIR must be prepared. Not coincidentally, the EIR is the vehicle through which the County can assess and articulate how the Project impacts the totality of the Project's impacts to the recreational experience and thereby find the facts requisite to establishing the nexus and proportionality of a trail easement condition.

The Project violates the above-described policies which were designed for the purpose of avoiding or mitigating environmental effects. It is well established that CEQA mandates this as a basis for requiring the preparation of an EIR. *The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 930; CEQA Guidelines, App. G, § IX (b). The trigger for CEQA's environmental review process is preempted by the takings doctrine – whether the County could actually exact the trail easement is a separate question. The first question in the analysis is whether there is a policy conflict by adopting a Project that does not include a trail easement when the applicable policies and ordinances clearly require such a project to include such an easement.

Staff's analysis is notably silent on that point. Staff admits the Planning Commission's analysis and the initial MND was predicated on the belief that Figure 15 of the SCP, locating a public coastal trail on this parcel, simply did not apply. The Planning Commission Staff Report contains a policy consistency analysis, but since staff didn't recognize the application of the SCP PRT map, coastal zoning ordinance 35-63 (which expressly requires easements for all trails identified on PRT maps), the Project's facial inconsistency with the coastal zoning ordinance provisions adopted for the clear purpose of avoiding or mitigating environmental effects was overlooked.

Without a specific response to the question of policy consistency between the Project and applicable policies, the MND is fatally flawed. Further, public and decision makers and the public are left without the information necessary to intelligently comment on and make decisions regarding the Project. Further, without the required findings of consistency, the Project cannot be lawfully approved.

3. There is a Fair Argument Of Potential Impact To Existing And Historical Recreational Use

The Staff Report acknowledges there are several sources of evidence demonstrating public use of the SCP Trail referenced in Figure 15. Fifteen declarations of public use have been submitted, but staff incorrectly asserts these only reflect public use that occurred 15 or more years ago. A visual inspection of the site shows a well worn trail through the gap between the metal gates that are now in place. The County's trail studies, and the SCP itself implicitly acknowledges this use. This is substantial evidence that supports a fair argument of a potentially significant impact from the

construction of a large residence housing a privacy-minded prominent family adjacent to the public trail, which will have the effect of chilling the public's use of the trail. Enhanced security measures and presence is expected, which may physically exclude members of the public seeking to use the trail. It is entirely reasonable to predict that approval and construction of the proposed project will adversely affect public use of the trail that has been used historically through and along the project site.

There is authority reflecting the need for a Project to ensure continued public use in areas with historical use to avoid a potentially significant impact. In *Citizens' Committee to Save Our Village v City of Claremont* (1995) 37 Cal. App. 4th 1157, an MND was accepted based on the express inclusion, in the Project Description, of continued public access in accordance with historical use evidence. In *Citizens*, the Project Description was crafted to specifically preserve a continued right of public access, thus avoiding the potentially significant impact and thus the need to prepare an EIR. ("The project has been designed to preserve the ability of the public to diagonally cross through the site . . . [, and] the center of the site will remain open for public use." *Id.*, 37 Cal. App. 4th at 1164.) Here, the situation is quite different. As discussed above, the County has acknowledged the public's recreational use of the project site by mapping the Toro Canyon Creek trail on the SCP PRT maps (Figure 15); and the County received numerous declarations attesting to the existence and historical public use of the trail. This constitutes substantial evidence supporting a fair argument of a potentially significant impact, and thus necessitates preparation of an EIR.

Staff suggests that the Loon Point Access provides sufficient access to the beach in this area. This is not the case – tidal conditions foreclose dry lateral beach access for a majority of each day. The Toro Creek beach is practically accessible only from a trail through the subject property – its access is eliminated by the tide under most times and conditions. With sea level rise, access will be further restricted.

The relevant question in the context of CEQA review is whether substantial evidence supporting a fair argument of a potentially significant impact to recreational uses is present in the record. There is such evidence, and consequently, an EIR is required.

4. Fair Argument Of Potentially Significant Impact To Visual Resources

“‘Significant effect on the environment’ means a substantial, or potentially substantial, adverse change in the environment.” Public Resources Code § 21068. Under CEQA, there is a “rebuttable presumption [that] any substantial, negative aesthetic effect is to be considered a significant environmental impact for CEQA purposes.” *Quail Botanical*, 29 Cal.App.4th at 1604. Further “it is inherent in the meaning of the word ‘aesthetic’ that any substantial, negative effect of a project on view and other features of beauty could constitute a ‘significant’ environmental impact under CEQA.” *Quail Botanical*, 29 Cal.App.4th at 1604. Impacts to private as well as public views may be significant under CEQA. *Ocean View Estates Homeowners Ass’n Inc. v. Montecito Water District* (2004) 116 Cal. App. 4th 396, 402.

The SCP notes the importance of public views to the Ocean, and directs an action to develop an ordinance to address the heights of hedges and fences that block views. (See SCP Action VIS-S-3.3). Public comment to the MND and to the PC have identified and articulated the impact that the proposed development of this and adjacent parcels has, is and will have on views of the ocean. The MND acknowledges this evidence but downplays it with the latest revision that describes, for the first time, public views of the ocean as “filtered” or “substantially filtered” views, made through the applicant’s hedge. MND at 9-10. Although CEQA specifies that a proposed project’s site is “normally” the baseline for environmental review, here the applicant has altered the site to block views, then seeks to employ the modified conditions to prevent the recognition of the Project Structures’ interference views of the ocean. The MND does acknowledge that the structures will be visible through the hedge (thus admitting the structures would be visible without the hedge), but contends “filtered blue water views” would be maintained, common sense dictates that these views of the house will be eliminated to protect the privacy of any famous residents of the structures, and the public’s “filtered blue water views” would similarly be eliminated.

Thus, the MND errs in setting an improper baseline and thus downplaying the Project’s impacts to views, and by ignoring comment and testimony that the Project will further interfere with these views. Finally, the MND ignores the concern that the partially visible hedge will be allowed to grow to block all views of the house and the ocean – a clear significant Project impact.

III. Findings Are Not and Cannot Be Made

The County’s findings are inadequate. Findings are necessary to define the logical route the decisionmakers follow between the evidence and the final action. *Topanga Ass’n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 514 (there “is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.”). In this case, a number of essential findings are flawed or absent, and as such, approval of the project as recommended by staff would constitute error.

1. Coastal Zoning Ordinance § 35-63

As noted above, the coastal zoning ordinance consistency analysis is silent as to Coastal Zoning Ordinance Section 35-63, which clearly requires imposition of a coastal trail easement that accords with the PRT maps, now recognized as including the trails plotted on figure 15 to the 1992 SCP. The Board’s proposed findings (para. 2.4.1) are silent as to either the applicability of or the Project’s consistency with CZO § 35-63 and the SCP. The Board’s Findings merely reference Sections 6.2 and 6.3 of the Planning Commission Staff Report, but of course, the Planning Commission Staff Report and action was erroneously based on the belief that the SCP figure 15 did not apply. Despite Staff’s post-appeal recognition that trails delineated on Figure 15 of the SCP applied to the Project, the findings rely exclusively on the pre-appeal, Planning Commission Policy

Consistency analysis. The proposed Findings are clearly erroneous and without evidentiary foundation.

2. CEQA Findings

As noted above, there is substantial evidence supporting a fair argument of a potentially significant impact to visual, recreational and land use resources. Consequently, the Board cannot make the findings to adopt and allow use of a MND.

3. Open Space Action Plan Consistency

The County has not made the mandatory findings pertaining to its Open Space Element and the Open Space Action Plan. Specifically, Government Code § 65564 establishes that “Every local open-space plan shall contain an action program consisting of specific programs which the legislative body intends to pursue in implementing its open-space plan. Government Code § 65566 provides that “Any action by a county or city by which open-space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open-space plan.” Government Code § 65567 dictates that “No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.”

These provisions establish that the County has an on-going duty to maintain its open space element, to adopt and implement a unified open space action program, and to ensure that actions affecting open space lands are consistent. The Project is located on lands designated for Park use, and for which a public coastal access trail is sited. The Open Space Element recites: “The importance of these types of open spaces [Parks and Recreation, Recreation Trails, and Scenic Highway Corridors] to Santa Barbara County can hardly be overstated.” At page 15. Regrettably, the Staff Report and analysis has ignored this factor, as reflected by the absence of a finding of the consistency of the proposed disposition of the proposed trail corridor and park with the Open Space Action Plan and Open Space Element of the General Plan. Since the Project involves a subdivision map, a finding of Open Space Plan consistency is mandatory and its absence disallows the Board from taking the recommended action.

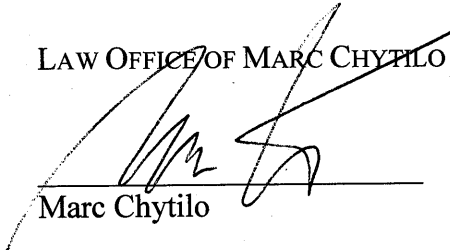
4. Government Code § 66478 Findings of Access to Toto Creek Bank and the Pacific Ocean Are Omitted

Government Code § 66478.4 disallows approval of a tentative map fronting on a public waterway or stream that does not provide reasonable public access by fee or easement from a public highway to that portion of the bank of the river or stream bordering or lying within the proposed subdivision. Government Code § 66478.6 requires such access to be expressly designated on the tentative map. There is no such access provided, and no findings concerning the County and subdivider’s compliance with these provisions.

For the foregoing reasons, we respectfully request that the Board grant our appeal, and deny the Project. In the alternative, the Board must direct staff to prepare an EIR examining the Project's impacts to visual resources, recreational resources, and land use conflicts.

Respectfully submitted,

LAW OFFICE OF MARC CHYTILO



Marc Chytilo