



LandWatch
monterey county

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November 28, 2003

Mayor Ila Mettee-McCutchon [Sent By Email and FAX: 831-384-9148]
City of Marina, Marina City Hall
211 Hillcrest Avenue
Marina, CA 93933

RE: Water, CEQA, and Due Process Issues Relating To The Marina Heights Project

Dear Mayor Mettee-McCutchon and Council Members:

As you know, I appeared at your meeting on November 18, 2003, to state a number of very significant objections to your proposed approval of the Marina Heights project. I also appeared in the Council Chambers on November 25, 2003, and was prepared to make additional comments, particularly with respect to the applicability of SB 610 and SB 221. I was not allowed to speak on that date because the Mayor indicated that the public hearing was "closed," and that no public comment would be received. In fact no member of the public was permitted to address the Marina Heights project on November 25th.

This letter is to put into writing my objections, on due process grounds, to the Council's failure to allow the public to comment on significant new information, namely, information relating to the Draft Water Supply Assessment and Written Verification of Supply transmitted to you by the Marina Coast Water District, and the City Attorney's memo relating to that topic. Information not available to the public on November 18th was the subject of an extensive Council discussion on November 25th. This new information has a critically important bearing on the proposed project, and on CEQA review for the project, and the public should have been allowed to address this matter. Since no final decision has yet been made on the proposed Marina Heights project, it is not too late to accept public testimony. I urge the Council, at its next meeting, officially to reconsider your certification of the EIR, and to take public comment prior to voting, again, on this matter. That will allow the public to be heard, as it should have been heard on November 25th. There are substantial reasons, outlined below, for delaying certification of the EIR, for recirculating the Environmental Impact Report, and for allowing further analysis and comment on the water supply issues considered by the Council on November 25th.

In the legal analysis that the City Attorney presented to you on November 25th, he opined that there were at least two courses of action legally available to you. One was simply to certify the EIR without receiving any final Water Supply Assessment and Written Verification of Supply from the Marina Coast Water District. You have a "draft" document in front of you, but not a final determination by the Water District. Several Council Members said that there was "no question" but that there is sufficient water for Marina Heights, and gave this as a reason for supporting certification of the EIR without a final Water Supply Assessment.

LandWatch respectfully disagrees with these Council comments, and with your attorney's analysis. We believe that the "second option" outlined by Mr. Wellington in his memo (and chosen by the Council) is not, in fact, consistent with state law.

Under the provisions of SB 610, effective January 1, 2002, Water Supply Assessments must be furnished to local governments for inclusion in any environmental documentation for certain projects (of which Marina Heights is clearly one). The foundational requirement is in Section 10910 of the Water Code:

10910. (a) Any city or county that determines that a project, as defined in Section 10912, is subject to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) under Section 21080 of the Public Resources Code **shall comply** with this part (emphasis added).

Note that Section 10912 says that the projects included are:

10912. For the purposes of this part, the following terms have the following meanings:

(a) "Project" means any of the following:

(1) A proposed residential development of more than 500 dwelling units....

The Council has (properly) determined that the Marina Heights project is subject to the California Environmental Quality Act, and the development is, without doubt, a residential development of more than 500 dwelling units. The state law does not allow the City to "deduct" the existing 874 homes from the 1,050 dwelling unit project, to avoid complying with the requirements of the Water Code. Thus, the City must comply with the state law requirements enacted in SB 610.

The law requires the preparation of a Water Supply Assessment that complies with the following:

(3) If the projected water demand associated with the proposed project was not accounted for in the most recently adopted urban water management plan, or the public water system has no urban water management plan, the water supply assessment for the project shall include a discussion with regard to whether the public water system's total projected water supplies available during normal, single dry, and multiple dry water years during a 20-year projection will meet the projected water demand associated with the proposed project, in addition to the public water system's existing and planned future uses, including agricultural and manufacturing uses (emphasis added).

Please note that an assessment that concludes that there is water available for the specific project being reviewed is not adequate under state law. The analysis must show that there is adequate water for the proposed project "in addition to ... planned future uses...."

The whole purpose of the required Water Supply Assessment is to make sure water is available not only for a particular project, but for all planned uses. The Council's discussion on November 25th focused on exactly this point, and the Council came to the wrong conclusion. The draft Water Supply Assessment considered on November 25th may well have shown that there was water for Marina Heights, but the question is what about all the other uses? This information

from the Water District was not available, and the Council was required to have that information available, before acting. Furthermore, the public has a statutory and due process right to comment on the analysis, prior to its acceptance by the City. The Council's action on November 25th, without any public comment, constitutes a major failure to follow this very important state law.

Apparently, it is the City's claim that the City properly requested the Water Supply Assessment, and that the Marina Coast Water District failed to carry out its obligations to produce one, in a timely way. A close examination of materials not available to me would need to be carried out, properly to evaluate this claim. However, even if this claim were true, the City cannot simply proceed without a Water Supply Assessment. The Water Code states the following:

If the public water system fails to request an extension of time, or fails to submit the assessment notwithstanding the extension of time granted pursuant to paragraph (2), the city or county may seek a writ of mandamus to compel the governing body of the public water system to comply with the requirements of this part relating to the submission of the water supply assessment.

The City did not do this. Instead, the Council has simply decided to proceed without a final Water Supply Assessment. It needs to reconsider that decision.

While I know that this will be disturbing news to the City Council (and presumably to the project applicant), state law is very clear that:

Water Code Section 10911. ...

(b) The city or county shall include the water supply assessment provided pursuant to Section 10910, and any information provided pursuant to subdivision (a), in any environmental document prepared for the project pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code.

This is not a requirement that can be "waived." The final Water Supply Assessment must be included in the EIR, and that EIR must be recirculated for public comment. The Council's certification of the EIR at its last meeting was improper and illegal. I urge the Council to correct the error, so as not to expose both the City and the applicant to litigation that will almost certainly be successful, in view of the clear requirements of the law.

LandWatch also believes that the City has not properly complied with the requirements of SB 221. A copy of that law is attached to this letter. Unless the Marina Heights project is determined to be "within an urbanized area ... previously developed for urban uses, or where the immediate contiguous properties surrounding the residential project site are, or previously have been, developed for urban uses, or housing projects that are exclusively for very low and low income households" then the provisions of that law apply. In view of the fact that the site is a former Army Base, LandWatch does not believe that the City is excused. However, even if SB 221 were not held to apply, the provisions of SB 610 clearly do.

LandWatch respectfully requests the Marina City Council to do the following:

1. Allow the public to comment on the new information received by the Council relative to the Water Supply Assessment in process for the Marina Heights Project, and not available to the public on November 18, 2003;

2. Reconsider its decision to certify the Final EIR on the Marina Heights project;
- 3.
4. Determine that the provisions of SB 610 apply;
5. Direct that a final Water Supply Assessment be prepared and presented to the City, as required by SB 610;
6. Include the Final Water Supply Assessment in the EIR and recirculate the EIR for public comment, prior to taking final action on the Marina Heights project.

We realize that the City will not like this recommendation, but we hope that the Council will see, based on this letter, and on any testimony that we are allowed to present, that this is exactly what the law requires.

Thank you for taking these comments into consideration, as you further review the Marina Heights project.

Yours truly,

Gary A. Patton, Executive Director
LandWatch Monterey County

cc: City Planning Department
City Attorney
Michael Shaw
Other Interested Persons

SB 221 - Government Code Section 66473.7. (Emphasis added)

(a) For the purposes of this section, the following definitions apply:

(1) "**Subdivision**" means a proposed residential development of more than 500 dwelling units, except that for a public water system that has fewer than 5,000 service connections, subdivision" means any proposed residential development that would account for an increase of 10 percent or more in the number of the public water system's existing service connections.

(2) "Sufficient water supply" means the total water supplies available during normal, single-dry, and multiple-dry years within a 20-year projection that will meet the projected demand associated with the proposed subdivision, in addition to existing and planned future uses, including, but not limited to, agricultural and industrial uses. In determining "sufficient water supply," all of the following factors shall be considered:

(A) The availability of water supplies over a historical record of at least 20 years.

(B) The applicability of an urban water shortage contingency analysis prepared pursuant to Section 10632 of the Water Code that includes actions to be undertaken by the public water system in response to water supply shortages.

(C) The reduction in water supply allocated to a specific water use sector pursuant to a resolution or ordinance adopted, or a contract entered into, by the public water system, as long as that resolution, ordinance, or contract does not conflict with Section 354 of the Water Code.

(D) The amount of water that the water supplier can reasonably rely on receiving from other water supply projects, such as conjunctive use, reclaimed water, water conservation, and water transfer, including programs identified under federal, state, and local water initiatives such as CALFED and Colorado River tentative agreements, to the extent that these water supplies meet the criteria of subdivision (d).'

(3) "Public water system" means the water supplier that is, or may become as a result of servicing the subdivision included in a tentative map pursuant to subdivision (b), a public water system, as defined in Section 10912 of the Water Code, that may supply water for a subdivision.

(b) (1) The legislative body of a city or county or the advisory agency, to the extent that it is authorized by local ordinance to approve, conditionally approve, or disapprove the tentative map, shall include as a condition in any tentative map that includes a subdivision a requirement that a sufficient water supply shall be available. Proof of the availability of a sufficient water supply shall be requested by the subdivision applicant or local agency, at the discretion of the local agency, and **shall be based on written verification from the applicable public water system** within 90 days of a request.

(2) **If the public water system fails to deliver the written verification as required by this section, the local agency or any other interested party may seek a writ of mandamus to compel the public water system to comply.**

(3) If the written verification provided by the applicable public water system indicates that the public water system is unable to provide a sufficient water supply that will meet the projected demand associated with the proposed subdivision, then the local agency may make a finding, after consideration of the written verification by the applicable public water system, that additional water supplies not accounted for by the public water system are, or will be, available prior to completion of the subdivision that will satisfy the requirements of this section. This finding shall be made on the record and supported by substantial evidence.

(4) If the written verification is not provided by the public water system, notwithstanding the local agency or other interested party securing a writ of mandamus to compel compliance with this section, then the local agency may make a finding that sufficient water supplies are, or will be, available prior to completion of the subdivision that will satisfy the requirements of this section. This finding shall be made on the record and supported by substantial evidence.

(c) **The applicable public water system's written verification of its ability or inability to provide a sufficient water supply that will meet the projected demand associated with the proposed subdivision as required by subdivision (b) shall be supported by substantial evidence.** The substantial evidence may include, but is not limited to, any of the following:

(1) The public water system's most recently adopted urban water management plan adopted pursuant to Part 2.6 (commencing with Section 10610) of Division 6 of the Water Code.

(2) A water supply assessment that was completed pursuant to Part 2.10 (commencing with Section 10910) of Division 6 of the Water Code.

(3) Other information relating to the sufficiency of the water supply that contains analytical information that is substantially similar to the assessment required by Section 10635 of the Water Code.

(d) When the written verification pursuant to subdivision (b) relies on projected water supplies that are not currently available to the public water system, to provide a sufficient water supply to the subdivision, the written verification as to those projected water supplies shall be based on all of the following elements, to the extent each is applicable:

(1) Written contracts or other proof of valid rights to the identified water supply that identify the terms and conditions under which the water will be available to serve the proposed subdivision.

(2) Copies of a capital outlay program for financing the delivery of a sufficient water supply that has been adopted by the applicable governing body.

(3) Securing of applicable federal, state, and local permits for construction of necessary infrastructure associated with supplying a sufficient water supply.

(4) Any necessary regulatory approvals that are required in order to be able to convey or deliver a sufficient water supply to the subdivision.

(e) If there is no public water system, the local agency shall make a written finding of sufficient water supply based on the evidentiary requirements of subdivisions (c) and (d) and identify the mechanism for providing water to the subdivision.

(f) In making any findings or determinations under this section, a local agency, or designated advisory agency, may work in conjunction with the project applicant and the public water system to secure water supplies sufficient to satisfy the demands of the proposed subdivision. If the local agency secures water supplies pursuant to this subdivision, which supplies are acceptable to and approved by the governing body of the public water system as suitable for delivery to customers, it shall work in conjunction with the public water system to implement a plan to deliver that water supply to satisfy the long-term demands of the proposed subdivision.

(g) The written verification prepared under this section shall also include a description, to the extent that data is reasonably available based on published records maintained by federal and state agencies, and public records of local agencies, of the reasonably foreseeable impacts of the proposed subdivision on the availability of water resources for agricultural and industrial uses within the public water system's service area that are not currently receiving water from the public water system but are utilizing the same sources of water. To the extent that those reasonably foreseeable impacts have previously been evaluated in a document prepared pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) or the National Environmental Policy Act (Public Law 91-190) for the proposed subdivision, the public water system may utilize that information in preparing the written verification.

(h) Where a water supply for a proposed subdivision includes groundwater, the public water system serving the proposed subdivision shall evaluate, based on substantial evidence, the extent to which it or the landowner has the right to extract the additional groundwater needed to supply the proposed subdivision. Nothing in this subdivision is intended to modify state law with regard to groundwater rights.

(i) **This section shall not apply to any residential project proposed for a site that is within an urbanized area and has been previously developed for urban uses, or where the immediate contiguous properties surrounding the residential project site are, or previously have been, developed for urban uses, or housing projects that are exclusively for very low and low-income households.**

(j) The determinations made pursuant to this section shall be consistent with the obligation of a public water system to grant a priority for the provision of available and future water resources or services to proposed housing developments that help meet the city's or county's share of the regional housing needs for lower income households, pursuant to Section 65589.7.

(k) The County of San Diego shall be deemed to comply with this section if the Office of Planning and Research determines that all of the following conditions have been met:

(1) A regional growth management strategy that provides for a comprehensive regional strategy and a coordinated economic development and growth management program has been developed pursuant to Proposition C as approved by the voters of the County of San Diego in November 1988, which required the development of a regional growth management plan and directed the establishment of a regional planning and growth management review board.

(2) Each public water system, as defined in Section 10912 of the Water Code, within the County of San Diego has adopted an urban water management plan pursuant to Part 2.6 (commencing with Section 10610) of the Water Code.

(3) The approval or conditional approval of tentative maps for subdivisions, as defined in this section, by the County of San Diego and the cities within the county requires written communications to be made by the public water system to the city or county, in a format and with content that is substantially similar to the requirements contained in this section, with regard to the availability of a sufficient water supply, or the reliance on projected water supplies to provide a sufficient water supply, for a proposed subdivision.

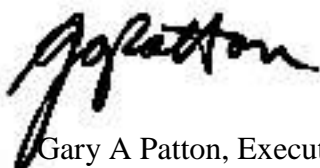
(l) Nothing in this section shall preclude the legislative body of a city or county, or the designated advisory agency, at the request of the applicant, from making the determinations required in this section earlier than required pursuant to subdivision (a).

(m) Nothing in this section shall be construed to create a right or entitlement to water service or any specific level of water service.

(n) Nothing in this section is intended to change existing law concerning a public water system's obligation to provide water service to its existing customers or to any potential future customers.

(o) Any action challenging the sufficiency of the public water system's written verification of a sufficient water supply shall be governed by Section 66499.37.

Very truly yours,



Gary A Patton, Executive Director

