



Council Agenda Report

To: Mayor Farrer and the Honorable Members of the City Council

Prepared by: Christi Hogin, City Attorney

Date prepared: May 13, 2020 Meeting date: May 26, 2020

Subject: Proposed Settlement Agreement and Release in *Third Point Land Company LLC v. City of Malibu* (LACSC Case No. 19SMCP00565)

RECOMMENDED ACTION: 1) Approve the proposed settlement with Plaintiff Third Point Land Company, LLC; and 2) Direct the Mayor to execute on behalf of the City.

FISCAL IMPACT: There is no fiscal impact to the recommended action. The proposed settlement is structured to be cost neutral to the City. Third Point will pay the City \$46,000, which represents the City's attorneys' fees and costs incurred in defending the lawsuit and the estimate for engineering costs in adjusting the current plans to provide wastewater and recycled water lines as part of Phase Two to 23855 Civic Center Way, the property that is the subject of the lawsuit. The engineering costs also include costs for calculating the proposed wastewater flows to include Third Point's 7,194 gallons per day (gpd), and in evaluating whether any further California Environmental Quality Act (CEQA) review is required for the property. Third Point will pay any additional engineering costs necessary to include the Property in Phase Two if they exceed the estimate. The recommended action also saves the City defense costs (which would include attorneys and expert witnesses).

ISSUE BEFORE COUNCIL: Whether to agree to include the Smith parcel in Phase Two of the Civic Center Water Treatment Facility (CCWTF) project at the property owner's sole expense or to defend a lawsuit challenging the property's exclusion. What we know as the "Smith parcel" is the property located at 23855 Civic Center Way and it is the parcel that contains mapped wetlands.

WHAT IS NOT BEFORE THE COUNCIL: The proposed settlement (described below) does NOT confer any land use entitlements. Inclusion in Phase Two gives the property owner the same right as other Phase Two properties to participate in the formation of an assessment district. This does not include any development rights and any development proposals are subject to the requirements of the General Plan, LCP, zoning ordinance, and environmental constraints of the subject property.

BACKGROUND:

Regional Board Prohibited OWDSs in the Civic Center Prohibition Area in 2009-2010

The underlying issues in this case involve a lengthy history between the City and the Regional Water Quality Control Board regarding implementation of the prohibition area preventing on-site wastewater disposal systems ("OWDSs"). On November 5, 2009, over the City's objections, the Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board) adopted Resolution R4-2009-007 approving an amendment to Chapter IV of the Water Quality Control Plan for the Coastal Watersheds of Los Angeles and Ventura Counties (Basin Plan), to prohibit OWDSs in the Malibu Civic Center Area, as defined in Resolution R4-2009-007 (Basin Plan Amendment).

On September 21, 2010, over the City's objections, the State Water Resources Control Board (State Water Board) adopted Resolution No. 2010-0045 approving the Basin Plan Amendment. On December 23, 2010, the Office of Administrative Law approved the regulatory provisions of the Basin Plan Amendment, the final step for the amendment to take effect.

The Basin Plan Amendment prohibits all new OWDSs in the Malibu Civic Center Area (the "Prohibition Area") and prohibits the discharge from existing OWDSs based on a phased schedule that required discharges from Phase One systems to cease by November 5, 2018 and discharges from Phase Two systems to cease by November 5, 2024.

In or about August 2011, the City, on the one hand, and the State Water Board and Los Angeles Water Board, on the other hand, reached agreement on a phased implementation, on boundaries and on other matters related to the substance of Basin Plan Amendment, which agreement was memorialized in a Memorandum of Understanding (City/Water Boards MOU). The City committed to undertake a wastewater treatment plan in the Malibu Civic Center Area in three phases. The properties in the Prohibition Area under the Basin Plan Amendment were generally divided into one of the phases. Pursuant to the City/Water Boards MOU, and its amendments, all properties within Phase Two of the Prohibition Area are to be connected to the wastewater treatment facility by November 5, 2024.

The Smith Property Was Excluded from All Phases

Third Point owns real property consisting of a single lot identified as Los Angeles County Assessor's Parcel No. 4458-021-007, commonly known as 23855 Civic Center Way in the City (the "Property" or, as its long been known locally, the "Smith Property"). The Property is designated Community Commercial in the City's General Plan. The City's assessment engineers estimated that, if built in accordance with the General Plan, the maximum wastewater generation would be an average of 7,194 gpd.

The Property is located within the Prohibition Area under the Basin Plan Amendment, but the Property was not designated into any phase of the City/Water Boards MOU. The Malibu Bay Company owned the parcel at the time that the City/Water Boards MOU was being negotiated and the City staff's recollection is that MBC requested to be excluded from the City/Water Boards MOU, probably because it wanted to avoid the assessment on a property it had no immediate plans to develop. In any case, the Property is the only non-publicly owned property in the Civic Center Area that was not designated in any Phase.

In May 2019, due to considerable demand from various property owners, the City decided to accept applications for property owners to seek inclusion in Phase Two of the wastewater treatment facility which potentially would allow connection to the City wastewater treatment facility by November 5, 2024. This process created an opportunity for the City Council to consider the requests together, rather than respond to the individual requests ad hoc.

At a meeting on September 9, 2019, it was apparent that the applications far exceeded the City's anticipated available capacity (as measured in gallons per day of wastewater produced when properties are developed as permitted in the General Plan). Ultimately, the City denied all applications, including Third Point's application, to have additional property included in Phase Two.

December 2019 Third Point Sues the City

On December 5, 2019, Third Point sued the City seeking a writ of mandate alleging the City abused its discretion in denying its application for inclusion of the Property in Phase Two. Third Point further alleged that the City inversely condemned the Property and that the City's actions resulted in various violations of Third Point's civil rights.

Third Point's petition challenges the City's determination, on September 9, 2019, to deny its application for inclusion in Phase Two of the CCWTF, and for inclusion in the MOU. The petition alleges that the Property would not require a general plan amendment, zone change, or variance for Third Point's plan to build its proposed commercial project consisting of mixed use with retail/office/restaurant on a portion of the site. The petition alleges its proposed project is expected to generate a wastewater flow of 7,601 gallons per day, but that under the status quo, the Property may not be developed for any purpose because the Property is within the Prohibition Area but is not included in any phase of the MOU. The petition further alleges that the denial of Third Point's application for inclusion in Phase Two rendered the Property undevelopable, and that 10,000 gpd of excess capacity exists in the planned sewer system, which is enough to accommodate Third Point's anticipated flow from its project.

Obviously, the City disagrees with Third Point and is prepared to mount a defense. But to what end? The lawsuit is not over development rights; whether and what development is allowed on any parcel in the City is governed by the City's LCP and

local land use laws. The issue here is exclusively the ability to participate with the other Phase Two property owners in forming and being part of an assessment district. The likelihood of prevailing in the lawsuit must be tempered with the practical reality that even complete victory is expensive and does not reap any significant benefit to the City.

The fact that distinguishes this property from all other properties whose owners would like to be part of Phase Two is that the Smith parcel is not included in any phase, even though it is nearly smack in the middle of the Prohibition Area and flanked by both Phase One and Phase Two properties. Including the Property in Phase Two does not disadvantage the City nor is it necessarily unfair to other properties wanting that opportunity because this Property is uniquely situation. No precedent is set by including the Property in Phase Two.

Note that, when it applied to the City to be included in Phase Two last September, Third Point requested a flow of 7,601/gpd, based on it anticipated development. In this agreement, the maximum flow is set at 7,194/gpd — the amount the Property would have been allocated using the General Plan guideline used by the City's assessment engineers to allocate capacity.

Settlement Proposal

i. Third Point's Obligations

Third Point would reimburse the City its costs to date, totaling \$46,000, including both the City's attorneys' fees and costs in defending the action to date (\$16,000), and also an estimate of additional engineering costs (\$30,000) that will be incurred in connection with (i) designing a new wastewater collection pipe and recycled water lines on Civic Center Way from Webb Way to the Property, (ii) calculating the proposed wastewater flows to include the 7,194 gpd, and (iii) to evaluate whether any further CEQA review is required for the Property. Third Point also would pay the City "all additional engineering costs incurred by the City necessary to include the Property in Phase Two", which includes those costs that are "directly attributable to or arising from the Property's inclusion in Phase Two and connection to the wastewater treatment facility." The City must justify such additional costs with documentation.

Third Point expressly acknowledges in the agreement that it is only entitled through the settlement to be in the same position as all other properties designated to be in Phase Two. Third Point further agreed that it assumes the risk of formation of the assessment district, and acknowledges that the assessment district's formation, which is necessary to facilitate the completion of Phase Two, is out of the City's control. Third Point further agreed that it is responsible for the cost of wastewater lines on its Property, and to the point of connection to the City's wastewater collection pipe, like all properties in Phase Two. In addition, Third Point acknowledged that the assessment district shall alone determine the assessment paid by property owners, including Third Point, and that assessment is not affected by the Settlement Agreement.

Further, if the assessment district is formed Third Point will be refunded the excess difference, if any, between its \$30,000 payment and the City's actual additional engineering costs as set forth by and contemplated in the settlement. If the assessment district is not formed, Third Point agreed that it "shall not receive a refund of these costs." Thus, the settlement agreement appropriately allocates this risk to Third Point.

With respect to future entitlements for Third Point's proposed project on the Property, Third Point acknowledges in the agreement that the settlement "does not confer any land use entitlements", and that the "allocation of 7,194 gpd does not constitute a right to development that would generate 7,194 gpd." Further, the parties recited in the agreement that, "[w]hether or how Third Point may develop the Property is not the subject of this Settlement Agreement and has not been discussed by the Parties."

Finally, Third Point will dismiss its lawsuit upon execution of the agreement, and will file a complete dismissal of its lawsuit, with prejudice within 5 days of execution of the Settlement Agreement.

ii. The City's Obligations

In exchange for Third Point's promises of performance, under the settlement the City would include the Property in Phase Two of the planning and design of the CCWTF, subject to the limitation of a maximum of 7,194 gallons per day, which amount reflects the City's calculation of anticipated wastewater generated if developed consistent with the City's General Plan. The City further agrees to include the Property in the assessment district that will determine whether to fund the construction of Phase Two.

Conclusion

If approved, the settlement will remove the expense of defense and the risk of uncertainty if the case goes forwards in litigation. This settlement does not entitle Third Point to any specific right to develop the Property as it proposes. Any proposed project by Third Point will be required to proceed through the City's permitting process. The proposed settlement merely places Third Point in the same position as other Phase Two private property owners within the Prohibition Area and Third Point has agreed to pay the City's costs associated with doing so and fully reimburse the City for its attorneys fees.

TO BE PROVIDED UNDER SEPARATE COVER WHEN AVAILABLE:
Settlement Agreement and Release