



Supplemental Council Agenda Report

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

Prepared by: Christi Hogin, City Attorney

Date prepared: May 22, 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.

DISCUSSION: The staff report dated May 13, 2020, was distributed without the proposed Settlement Agreement and Release. The proposed Settlement Agreement and Release are attached to this supplemental report.

ATTACHMENTS: Proposed Settlement Agreement and Release

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Settlement Agreement”) is made and entered into as of this ____ day of May 2020, by and between Plaintiff Third Point Land Company LLC, a Delaware limited liability company (“Third Point”), and Defendant City of Malibu, a California municipal corporation (“the City”). Third Point and the City are at times hereinafter referred to individually as “Party” and collectively as the “Parties.”

RECITALS

This Settlement Agreement is made with reference to the following facts:

A. 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 on-site wastewater disposal systems (OWDSs) in the Malibu Civic Center Area, as defined in Resolution R4-2009-007 (Basin Plan Amendment).

B. 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.

C. 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, 2015 and discharges from Phase Two systems to cease by November 5, 2019.

D. 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, boundaries and other matters related to the substance of Basin Plan Amendment, which agreement was memorialized in a Memorandum of Understanding (City/Water Boards MOU).

E. Among other things, in the 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.

F. 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 of Malibu, California (the “Property”). The Property is located within the Prohibition Area under the Basin Plan Amendment. However, the City contends that Third Point’s predecessor in interest requested to be excluded from the City/Water Boards MOU. The Parties agree that the Property was not designated into any phase of the City/Water Boards MOU.

G. The Property is the only non-publicly owned property in the Civic Center Area that was not designated.

H. 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.

I. 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.

J. The City has already commenced the planning and design of Phase Two of the wastewater treatment facility and has incurred and will incur certain planning and design and construction costs in this regard.

K. On or about December 5, 2019, Third Point filed a Verified Petition for Writ of Mandate and Complaint for Inverse Condemnation and Violation of Civil Rights Under 42 U.S.C. § 1983 in the County of Los Angeles Superior Court, Case No. 19SMCP00565 (the "Subject Action"). Third Point alleged that (i) the City abused its discretion in denying Third Point's application for inclusion of the Property in Phase Two of the implementation of the City/Water Boards MOU, (ii) the City's actions inversely condemned and caused a taking of Third Point's Property in violation of the California Constitution and the United States Constitution, and (iii) the City's actions resulted in various violations of Third Point's civil rights pursuant to 42 U.S.C. § 1983.

L. In the Subject Action, Third Point challenges the City's denial of its application to have its Property included in the MOU and in Phase Two.

M. The City denies any wrongdoing or liability for Third Point's alleged damages. Nevertheless, separate from the litigation entirely, the City acknowledges that Third Point is in a different situation than other Civic Center Area properties because it is not assigned to any phase and it is within the Prohibition Area of the Basin Plan Amendment.

N. Whether or how Third Point may develop the Property is not the subject of this Settlement Agreement and has not been discussed by the Parties. Although Third Point, through its counsel, has made known its development proposal, the City has not considered it in any way in connection with this Settlement Agreement. The City has not made any representations or commitments regarding Third Point's potential development of the Property and the Parties agree that this Settlement Agreement may not and shall not be construed to convey any development rights.

O. The Property is vacant land, designated Community Commercial in the City's Local Coastal Program and General Plan. The Property abuts Civic Center Way on the south. The southern half of the Property contains a mix of native and non-native vegetation with a portion of

the lower-lying areas on site being designated as wetlands by the U.S. Fish and Wildlife Service National Wetland Inventory (“NWI”) Maps.

P. The Parties have agreed to settle and resolve the Subject Action. By this Settlement Agreement, Third Point and the City desire to fully and finally settle and resolve any and all rights, claims, disputes, causes of action and alleged claims arising out of and set forth in the Subject Action.

NOW, THEREFORE, in consideration of the foregoing recitals and the promises, mutual covenants and warranties set forth herein, and for other good and valuable consideration, the receipt of which are hereby acknowledged, the Parties agree as follows:

1. Third Point’s Obligations.

- a. Reimbursement of costs to date. Within 15 days of the Parties’ execution of this Settlement Agreement, Third Point will cause to be paid to the City a total of \$46,000.00. This amount will consist of payment, in full, for the City’s attorneys’ fees and costs incurred in defending this action and an estimate of additional engineering costs that will be incurred (i) to design a new wastewater collection pipe and recycled water lines on Civic Center Way from Webb Way to the Property, (ii) to calculate the proposed wastewater flows to include 7,194 gpd, and (iii) to evaluate whether any further CEQA review is required. The payment must be wired to the City pursuant to wiring instructions provided by the City
- b. Payment of all additional engineering costs incurred by the City necessary to include the Property in Phase Two. Third Point must pay the City any additional actual engineering costs incurred by the City, beyond the amount identified in Paragraph 1(a), directly attributable to or arising from the Property’s inclusion in Phase Two and connection to the wastewater treatment facility or otherwise necessary to accommodate Third Point’s anticipated 7,194 gallons per day. The City shall justify any such costs with documentation. These costs must be paid by Third Point within 30 days of receipt of request for payment.
- c. Assumption of risk. Third Point acknowledges that this Settlement Agreement only entitles it to be in the same position as all other properties designated to be in Phase Two. Specifically, and without limitation, Third Point understands that whether Phase Two is completed depends on formation of an assessment district (which outcome is out of the City’s control) and that Third Point will be responsible for paying an assessment should the district be formed. Like all properties in Phase Two, Third Point is responsible for the cost of the wastewater lines on its Property and to the point of connection to the City’s wastewater collection pipe. Also, Third Point will be responsible for the capital costs to extend the wastewater collection line and recycled water line from the Property to Webb Way, which costs may be included in the assessment. Should the Phase Two assessment district be formed, the

district alone shall determine the assessment paid by the property owners, including Third Point. This Settlement Agreement does not affect any potential assessment.

- d. Refunds. If the assessment district for Phase Two is formed, then within 30 days thereafter, the City shall calculate its actual costs incurred described in Paragraphs 1(a) and 1(b) and shall provide that accounting to Third Point. If those actual costs are less than the amount paid by Third Point pursuant to Paragraph 1(a), then the City shall refund the excess to Third Point along with the accounting. Under no other circumstances shall Third Point be entitled to a refund of the costs paid under Paragraph 1(a) and (b). Should the Phase Two Assessment District fail to be formed Third Point shall not receive a refund of these costs.
- e. No land use entitlements. Third Point further acknowledges that this Settlement Agreement does not confer any land use entitlements. The allocation of 7,194gpd does not constitute a right to development that would generate 7,194gpd.
- f. Dismissal of the Subject Action. Within 5 days of execution of this Settlement Agreement, Third Point must execute and cause to be filed a full and complete dismissal of the Subject Action, with prejudice.

2. The City's Obligations.

- a. Inclusion in Phase Two. The City agrees to include the Property in Phase Two of the planning and design of the Civic Center Wastewater Treatment Facility, 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.

3. Third Point to Bear Its Own Costs and Fees. Third Point shall bear its own attorneys' fees and other costs (including costs of expert witnesses or other consultants) and attorneys' fees and costs incurred (a) in the application for inclusion in Phase Two, (b) for the inclusion in Phase Two, (c) for the preparation, filing, prosecution of the Subject Action and (d) in the preparation, negotiation, and drafting of this Settlement Agreement.

4. Release. In further consideration of this Settlement Agreement and in recognition of the benefits to be derived therefrom, and except as to the rights, duties, and obligations of the Parties as set forth in this Settlement Agreement, Third Point hereby releases, and fully and finally and forever discharges the City, and each of its councilmembers, predecessors, agents, officers, employees, representatives, lawyers, all elected and appointed officials and all persons acting by, through, under, or in concert with the City or any of them, past and present (hereinafter collectively referred to as "Additional Releasees") of and from any and all manner of actions or causes of action, in law or in equity, suits, debts, liens, liabilities, claims, demands,

and damages of any nature whatsoever, known or unknown, fixed or contingent, which Third Point now has against the City as alleged in or arising out of, or which could have been raised in the Subject Action (hereinafter called "Claims").

5. Civil Code section 1542 Release. The Parties, and each of them, intend that this Settlement Agreement shall be a full and final settlement of and bar to any and all Claims and/or causes of action arising between and/or among them. In connection with the releases made herein, the Parties acknowledge that they may hereafter discover facts different from or in addition to the facts which they may know or believe to be true with respect to the Subject Action and/or released Claims, but that they intend to hereby fully and forever settle all disputes between and/or among them. In furtherance of such intention, the release given herein shall be and remain in effect as a full and complete mutual release, notwithstanding discovery of any such different or additional facts. Therefore, the Parties acknowledge that they have been informed of and are familiar with the provisions of Civil Code section 1542, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
THAT THE CREDITOR OR RELEASING PARTY DOES NOT
KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT
THE TIME OF EXECUTING THE RELEASE AND THAT, IF
KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY
AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR
OR RELEASED PARTY.

The Parties hereby waive and relinquish all rights and benefits they have under Civil Code section 1542 to the full extent that they may lawfully waive all such rights and benefits pertaining to the released Claims.

6. Denial of Liability. The Parties agree and mutually acknowledge that this Settlement Agreement is for settlement purposes only. The City has denied, and continues to deny, any wrongdoing in connection with the actions or inactions alleged in the Subject Action. Neither this Settlement Agreement nor any action taken pursuant to this Settlement Agreement shall constitute any admission of any wrongdoing, fault, violation of law, or liability of any kind on the part of the Parties, or any admission by and of the Parties of any claim or allegations made in any action against such party.

7. No Assignment of Claim. The Parties represent and warrant that they have not sold, assigned or transferred, or purported to sell, assign or transfer, and shall not hereafter sell, assign or transfer, any obligations, liabilities, demands, claims, costs, expenses, debts, controversies, damages, rights, actions, or causes of action released pursuant to this Settlement Agreement.

8. Integrated Agreement. This Settlement Agreement is the final and entire agreement between the Parties concerning the subject matter of this Settlement Agreement. All agreements of the Parties with respect to the subject matter hereof are in writing and supersede all prior written and oral agreements and understandings of the Parties. This Settlement Agreement cannot be modified except by a written document signed by the Parties. None of the

Parties are relying upon any other negotiations, discussions or agreements in connection with the subject matter of this Settlement Agreement. This is a fully integrated agreement.

9. Warranty of Authorization. Any person executing this Settlement Agreement on behalf of any Party does hereby represents and warrant to the other Parties that he or she has the authority to execute this Settlement Agreement on behalf of, and to fully bind, such Party.

10. Independent Representation by Counsel. The Parties represent and declare that in executing this Settlement Agreement, they have relied solely upon their own judgment, belief and knowledge, and the advice and recommendations of their own independently-selected counsel, concerning the nature, extent and duration of their rights and claims hereunder, and that, except as provided herein, they have not been influenced to any extent whatsoever in executing this Settlement Agreement, by any representations, statements or omission pertaining to any of the matters herein contained by any party or by any persons representing any party.

11. Governing Law. This Settlement Agreement shall in all respects be interpreted, enforced and governed by and under the laws of the State of California applicable to instruments, persons and transactions having legal contacts and relations solely within the State of California.

12. Severability. If any portion of this Settlement Agreement is declared by a court of competent jurisdiction to be invalid or unenforceable, such a portion shall be deemed severed from this Settlement Agreement, and the remaining portions shall remain in full force and effect as though such invalid or unenforceable provisions or portions had not been a part of this Settlement Agreement.

13. Construction. The language of this Settlement Agreement shall be construed as a whole according to its fair meaning, and not strictly for or against any of the Parties.

14. Headings. The headings of this Settlement Agreement are for convenience and ease of reference only and shall not be used to construe, expand, or limit the terms of this Settlement Agreement.

15. Execution in Counterparts. This Settlement Agreement may be executed in counterparts by the Parties, by either an original signature or signature transmitted by facsimile transmission, email or other similar process, and shall become effective and binding upon the Parties at such time as all of the signatories hereto have signed the original or a counterpart original of this Agreement. All counterparts so executed shall constitute one Settlement Agreement, binding upon all of the Parties hereto, notwithstanding that all of the Parties are not signatory to the original or the same counterpart.

16. Survivability of Covenants. All representations and agreements set forth in this Settlement Agreement shall be deemed continuing and shall survive the execution date of this Settlement Agreement.

17. No Construction Against Drafter. Each of the Parties agrees that each has participated in arriving at the final language of this Settlement Agreement and, therefore, this Settlement Agreement shall not be construed against any Party as the drafter.

18. Covenant to Take Further Actions Necessary. The Parties hereby agree to execute such other documents and to take such other action as may be reasonably necessary to further the purpose of this Settlement Agreement, with the Parties to bear their own costs and attorneys' fees for these additional actions.

19. No Third-Party Beneficiaries. Except for the rights of beneficiaries pursuant to the releases provided, there are no third-party beneficiaries to this Settlement Agreement and nothing herein shall confer any enforceable rights on non-signatory persons or entities.

20. Effective Date. This Settlement Agreement shall be effective as of the date of its complete execution by the last signing party.

21. Final and binding. This Settlement Agreement is intended to be final, binding on and benefiting each of the Parties and any agents, officers, employees, or successors-in-interest, including any future owner(s) of the Property, and is further intended to be effective as a full and final accord and satisfaction between them regardless of any claims of fraud, misrepresentation, concealment of fact, mistake of fact or law, or any other circumstances whatsoever. Each of the Parties relies upon the finality of this Settlement Agreement as a material factor inducing that Party's execution of this Settlement Agreement.

EACH OF THE UNDERSIGNED HEREBY DECLARES THAT
THE TERMS OF THIS SETTLEMENT AGREEMENT AND
GENERAL RELEASE HAVE BEEN COMPLETELY READ
AND ARE FULLY UNDERSTOOD, AND BY EXECUTION
HEREOF VOLUNTARILY ACCEPTS THE TERMS WITH THE
INTENT TO BE LEGALLY BOUND THEREBY.

Dated: May ___, 2020

THIRD POINT LAND COMPANY LLC,
a Delaware limited liability company

Dated: May ___, 2020

CITY OF MALIBU

By: _____
KAREN FARRER
MAYOR

APPROVED AS TO FORM:

Dated: May ___, 2020

GAINES & STACEY LLP

By: _____
LISA A. WEINBERG, ESQ.
Attorneys for Plaintiff
THIRD POINT LAND COMPANY LLC.

Dated: May ___, 2020

BEST BEST & KRIEGER LLP

By: _____
CHRISTI HOGIN, City Attorney
Attorneys for DEFENDANT
CITY OF MALIBU