

Letter of
Barg Coffin Lewis & Trapp, LLP
Dated May 27, 2021

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By Contra Costa County
Department of Conservation and Development

May 27, 2021

Via E-Mail (john.kopchik@dcd.cccounty.us)

John Kopchik, Director
Contra Costa County Department of Conservation and Development
30 Muir Road
Martinez, CA 94553

**Re: Tassajara Parks Project, Unincorporated Contra Costa County
June 9, 2021 County Planning Commission Meeting**

Dear Mr. Kopchik:

On behalf of East Bay Municipal Utility District (EBMUD or the District), we are writing to advise the County of significant new information that has come to light since EBMUD's September 29, 2020 comment letters regarding the referenced project, which we understand is to be taken up at the June 9, 2021 County Planning Commission Meeting.

On April 27, 2021, EBMUD's Board adopted a Resolution Declaring a Stage 1 Drought. The Resolution concerned the impact of the current drought on EBMUD's source of water, the Mokelumne River watershed. It provided:

- dry conditions currently prevail throughout much of California, including within the Mokelumne River basin and the East Bay;
- 2021 has thus far been the second driest year on record in the Mokelumne River basin and the driest year on record for the East Bay;
- the snow depth at Caples Lake, a Mokelumne basin snow survey reference point, was at 52 percent of average as of April 19, and the California Department of Water Resources' April Bulletin 120 forecast of the forecasted runoff on the Mokelumne River is at 43 percent of average;
- on March 22, 2021, the State Water Resources Control Board sent a warning letter to EBMUD which noted the unusually dry conditions prevailing throughout California, and urged EBMUD to begin planning for potential water supply shortages by taking actions such as increasing water conservation and diversifying water supply portfolios; and
- EBMUD's Board declared its water supply will be deficient for meeting customer demand.

Moreover, since the April 27 drought Resolution, EBMUD's water supply projections for this water year have continued to decline, with EBMUD's anticipated end-of-September storage levels now 65-70 thousand acre feet lower than previously projected in late April.

The drought reveals current deficiencies in EBMUD's water supply and highlights the importance of preserving sources of supply for current and future customers within the EBMUD Ultimate Service Boundary (USB).¹ Those sources include the remaining conservation potential within the USB. The County and the project developer have been relying on that conservation potential as the source of water for the project. They may no longer do so.

Similarly, the County and the developer have been assuming that EBMUD's USB – which currently excludes the project site – will be expanded to include it. Again, they may no longer do so. EBMUD's Policy 3.05 ("Considerations for Extension of Water Beyond the Ultimate Service Boundary") provides:

The District will not extend water to areas outside the present Ultimate Service Boundary (USB) of the District, if such extension would result in ... A reduction in the quantity of water available to District customers to satisfy existing or projected levels of demand.... The phrase "District customers" ... shall mean (i) existing water service customers of the District and (ii) future customers, located within the present USB, but not now receiving water service.

Here, as noted, an extension to accommodate the project would reduce the quantity of water available to District customers by using up conservation potential that would otherwise make more water available to address the recently-declared deficiency and further deficiencies predicted to occur in the future. Therefore, EBMUD may not extend water to the project.

Also, EBMUD's Policy 3.01 ("Annexations") provides:

Annexations are subject to the following conditions:

- The territory shall be within EBMUD's Ultimate Service Boundary.....

Opposition shall be expressed to all proposed annexations outside of the Ultimate Service Boundary unless:

- a) The requested annexation is a small boundary adjustment found by EBMUD to be in its best interest based on the following conditions:

¹ The USB defines the territory within which EBMUD has planned to provide water service. The current drought is not the only threat to EBMUD's water supplies. Other threats (including climate change, etc.) are explained in a May 27, 2021 letter from EBMUD's General Manager, Clifford Chan, to County Administrator Monica Nino. Mr. Chan's letter, which is incorporated here by this reference, indicates that, as a result of these threats, in coming years the deficiency is predicted to worsen.

- (1) The property and dwelling units are the smaller part of a larger development project located primarily within the Ultimate Service Boundary; ...
- (4) The cumulative number of dwelling units outside the Ultimate Service Boundary added as a result of such small boundary adjustments shall not exceed 100 in any two-year period;... and
- (6) EBMUD Policy 3.05 - Considerations for Extension of Water Beyond the Ultimate Service Boundary, and Policy 9.03 – Water Supply Availability and Deficiency, are satisfied with regard to the effects of extension of water beyond the Ultimate Service Boundary....

Here, condition (1) is not met because the entire project is located outside the USB. Condition (4) is not met because the project on its own would add 125 dwelling units outside the USB. Condition (6) is not met for the reasons discussed above. Any one of these failures would require EBMUD to oppose annexation.

Finally, EBMUD's discretion to promulgate and implement Policies 3.01 and 3.05 is protected under California law. *California Water & Tel. Co. v. Public Utilities Commission* (1959) 51 Cal.2d 478, 492 ["...a public utility may not be compelled to extend its service beyond the territorial limits of its dedication."].

In sum:

- EBMUD previously considered the possibility of entering into an agreement with the developer to fund intra-USB conservation efforts to free up water supply for this extra-USB project;
- Now, because of the drought, EBMUD has determined that its duty to current and future intra-USB water customers precludes it from entering into such an agreement; and
- EBMUD's determination is entitled to deference.

Therefore, the project needs to find a new source of water. The EIR must be revised to reflect the new source and its impacts. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 430-31. Once revised, the EIR must be recirculated.

Very truly yours,



Brian S. Haughton

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