



**SIERRA
CLUB**

FOUNDED 1892

Re: Initial Study and Proposed Mitigated Negative Declaration for Repair of Damaged Lawful Non-Conforming Billboard Structure, Allpoints Outdoor, Inc. APNs 305-031-007, 305-031-008, and 305-031-009

Dear Supervisors and Director Ford,

The North Group of the Redwood Chapter of the Sierra Club has worked for decades to restore scenic coastal views along Highway 101 in the Humboldt Bay area. Our members strongly supported policies regulating billboards that were adopted during the 18-year General Plan Update process.

Commercial billboards pollute scenic views, which are protected in the Coastal Zone regardless of whether an area has been formally designated as scenic or not. "The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance." (Humboldt Bay Area Plan, Section 3.40).

The area in question adjacent to the Elk River is indeed scenic, with sweeping views of Humboldt Bay to the west, restored wetlands of a state wildlife refuge to the east, and agricultural lands with historic barns – interrupted only by commercial billboards standing in the wetlands along the Elk River.

We are deeply concerned about the potential precedent of giving away an entitlement to reconstruct a billboard in the Coastal Zone where none currently exists. There is no entitlement or vested right to reconstruct this sign, and a new billboard would never be permitted in this location. Why does the County want to give away development rights where there is no public benefit, but rather for private exploitation?

There are two reasons that there is no entitlement for a billboard in this location. First, the County's proposed Special Permit is a discretionary permit, therefore County land use planning and zoning regulations do not allow billboards on the subject property. Second, the original billboard was built on public trust land, and in California, the Public Trust Doctrine predates private property rights. Tidal wetlands are public trust lands, and the County's claim that the billboard is below the tidal elevation of 5.5' on average less than half of each month is no substitute for a jurisdictional determination by the State Lands Commission and/or Humboldt

Bay Harbor, Recreation, and Conservation District, which is responsible for protecting public trust resources in the Humboldt Bay area.

The Public Trust Doctrine protects sovereign lands for the benefit, use, and enjoyment of the public. These lands are held in trust by the State of California for public benefit, including access for boating, fishing, swimming, and hunting; natural resource protection, restoration, and management; and enjoyment of open space and scenery. *Marks v Whitney*, (1971) 6 Cal.3d at 251, 259–260.

According to the State Lands Commission, “The hallmark of the Public Trust Doctrine is that trust lands belong to the public and are to be used to promote publicly-beneficial uses that connect the public to the water.” In 1983, the California Supreme Court held that “the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” *National Audubon v. Superior Court*, (1983) 33 Cal.3 at 441.

Reconstruction of the fallen billboard would impair the Public Trust purpose of preservation of these tidelands in their natural state, is plainly inconsistent with any definition of open space, adversely affects the scenery, and should be denied on this basis. How can the County find that the minimal private economic gains here can legitimately thwart the public's property rights in the public trust?

The County has a responsibility to protect public trust resources, as do all local and state agencies. Humboldt County cannot justify the issuance of billboard permits merely because they promote commercial benefit. The issuance of such permits must be consistent with the protections afforded by the public trust doctrine. *San Francisco Baykeeper, Inc.*, (2015) 242 Cal.App.4th at 238.

The North Group Sierra Club strongly urges the Board of Supervisors to recognize and affirm the County's responsibility to protect public resources and deny the permit to reconstruct the billboard, which would grant an unprecedented entitlement where none exists.

Sincerely,

A handwritten signature in black ink that reads "Gregg Gold". The signature is written in a cursive style and is enclosed in a rectangular box.

Gregg Gold
Chair, North Group Sierra Club



JASON R. FLANDERS
J. THOMAS BRETT
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September 10, 2020

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Via Electronic Mail

RE: Initial Study and Proposed Mitigated Negative Declaration for Repair of Billboard

Dear Supervisors and Director Ford,

I write to you today on behalf of my client, Humboldt Baykeeper, a nonprofit organization that works to safeguard coastal resources for the health, enjoyment, and economic strength of the Humboldt Bay community. Humboldt Baykeeper objects to off-site, commercial billboards built in tidal wetlands around the Humboldt Bay area due to their impacts to public trust resources, visual/scenic resources, coastal wetlands, and other impacts to the environment.

Specifically, this letter is to inform you of our concerns regarding Humboldt County's (the "County") Initial Study and Proposed Mitigated Negative Declaration for Repair of Damaged Lawful Non-Conforming Billboard Structure, issued on August 11, 2020 (hereafter "IS/MND"). For the following reasons, we urge the Board of Supervisors to reject the IS/MND and uphold the Planning Commission's May 7, 2020 denial of the underlying application, previously submitted by Allpoints Outdoor, Inc. (hereafter "Allpoints"), for a Special Permit for Reconstruction of a Legal Nonconforming Billboard Structure.¹

I. The IS/MND's environmental baseline analysis is flawed and violates CEQA

Throughout the IS/MND, the County improperly characterizes the environmental baseline to reach "No Impact" or "Less than Significant Impact" determinations. The County's discussion of aesthetic impacts, for example, presumes that an existing billboard is part of the relevant environmental baseline; "[s]ignage has existed at this location for over 60 years and is therefore part of the environmental baseline...since no change in the baseline visual signature

¹ Record Number PLN-2019-10629

should result from the proposed repairs, impacts to the visual character of the setting may be viewed as less than significant” (IS/MND, p. 19). In its explanation on the less than significant impacts expected by the project, furthermore, the County reiterates that “[h]aving existed at the site for over sixty (60) years, repair of the billboard is unlikely to degrade the existing visual character or quality of public views of the site and its surroundings.” (*Id.* at 20). Indeed, the County frames the environmental baseline as including the now-destroyed billboard in its discussion of nearly all of potential impacts analyzed in the IS/MND.² This baseline approach is flawed.

Pursuant to CEQA 14 CCR § 15125, “the lead agency should describe the physical environmental conditions as they exist at the time environmental analysis is commenced....” Here, no *standing* billboard existed the time of the application; and indeed, there has been no standing billboard at the project site since late November of 2019. A baseline, such as the one proposed by the County, which takes consideration historical conditions (e.g. the *prior* existence of a billboard) is appropriate only where “where existing conditions change or fluctuate over time....” (14 CCR § 15125(a)(1).) No such circumstances exist here.

Even assuming that the billboard was otherwise lawfully present prior to its destruction, the key question for determining the proper scope of an environmental baseline is *not* whether the activities and conditions making up the supposed baseline are otherwise lawful / permitted at the time of the environmental review. Instead, the operative question is what actual existing activities and physical conditions are present in the project area. (See 14 CCR § 15125(a)(3) [“An existing conditions baseline shall not include hypothetical conditions, such as those that might be allowed...under existing permits or plans, as the baseline”]; *Accord. Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 322 [environmental baseline in mitigated negative declaration assuming the simultaneous operation of all boilers at an oil refinery was flawed, despite the fact that simultaneous operation was permitted, because “in ordinary operation any given boiler ran at the maximum allowed capacity only when one or more of the other boilers was shut down....”]) It is immaterial whether a standing billboard was previously present at the project site, or whether it was lawfully present prior to its destruction. What matters is the present conditions at the project site, which is notably characterized by the absence of a standing billboard.

Furthermore, it is also unclear from the IS/MND whether the existing wooden footings for the now-destroyed billboard were dug and filled with concrete. Here, the baseline provided by the County is impermissibly vague and misleading. To the extent that the now-destroyed billboard does *not* have concrete footings, the County may not explain away impacts from the newly proposed concrete footings (IS/MND, p.45) as part of the environmental baseline.

It is undisputed that if newly proposed today, the project could not be legally permitted due to its location in the tidal wetlands around the Elk River and Humboldt Bay, which would conflict with numerous zoning requirements. Notwithstanding the fact that the now-destroyed billboard may have been lawful when it was present, there is currently no standing billboard at

² Agriculture and Forestry Resources (IS/MND, p. 21); Biological Resources (*id.*, p.24); Geology and Soils (*id.*, p. 28); Hydrology and Water Quality (*id.*, p. 32); and Mandatory Findings of Significance (*id.*, p. 40).

the project site, and the construction process and ultimate features of any new billboard must be considered anew.

II. The Aesthetic Impacts of the Project are Significant.

The shortcomings of the IS/MND's baseline analysis is most apparent when considering aesthetic impacts. As the project site exists now, and as it has existed for nearly a year, there is no erect billboard obstructing the views of motorists on Highway 101, or individuals recreating in the wetlands adjacent thereto. This baseline condition will necessarily be adversely impacted if the billboard is reconstructed.

The significance of potential aesthetic impacts resulting from the project are underscored by the California Coastal Commission and CalTrans' efforts to remove numerous billboards along Highway 101 in recent years to protect scenic resources along Humboldt Bay, and by the designation of the Elk River area of the 101 Corridor, including the subject property, as an area of scenic and visual resources. According to the Humboldt Bay Area Plan (HBAP):

3.40 VISUAL RESOURCE PROTECTION

*** 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...

A. PLANNED USES [in part]: "Highway 101 provides many vantage points from which daily commuters as well as tourists can see flocks of shorebirds, waterfowl and other wildlife, including the magnificent egrets that to many people are a symbol of Humboldt County."

(HBAP, ch.3 p.55.)³ Permitting the repair of the now-destroyed billboard would clearly run counter to the aesthetic and scenic concerns expressed in the Humboldt Bay Area Plan that development "minimize the alteration of natural land forms..." Conversely, denying Allpoints' application and declining to adopt the IS/MND would support the preference expressed in the Plan for the restoration and enhancement of the "visual quality in visually degraded areas..." When compared against the appropriate baseline of no billboard, then, the resulting aesthetic impacts are clearly significant.

III. No Valid ODA Permit Has Ever Issued for the Billboard.

Public Records Act requests submitted by Humboldt Baykeeper to CalTrans demonstrate that no ODA Permit has been issued for the proposed project, and that, indeed, possibly no ODA Permit has *ever* been approved for this billboard, or the original permit has been revoked. If no ODA permit has *ever* issued for this billboard, it cannot be deemed a "legal" nonconforming use, as it was never legally permitted.

³ Humboldt County Local Coastal Program, Humboldt County General Plan, Vol. II, Humboldt Bay Area Plan (Dec. 2014), (available at <https://humboldt.gov/DocumentCenter/View/50844/Humboldt-Bay-Area-Local-Coastal-Plan>.)

Humboldt Baykeeper submitted a PRA request for the original ODA permit #15322, which is the permit number cited in the pending County staff report. In response, CalTrans first produced ODA permit #15332, which Baykeeper pointed out was a billboard built *north* of Eureka, and is not the billboard currently at issue. After additional correspondence, the District 1 CalTrans PRA Coordinator wrote that, “I attempted to obtain a similar document (i.e. Application for Outdoor Advertising Permit) for permit #15322 and was informed by out [sic] Division of Outdoor Advertising Permits that no such record exists.” Thus, CalTrans has no ODA permit #15322, contradicting the evidence provided in the Staff Report. “[A] writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record” is evidence “to prove the absence of a record in that office.” (Cal. Evid. Code § 1284.) It appears no ODA permit for this billboard exists, and the County cannot approve this proposed project until the ODA permit question is resolved.

Contrary to the County’s claims at the appeal hearing on July 28, 2020, the State of California Division of Highways began requiring Outdoor Advertising Permits in 1933, decades prior to the construction of the now-destroyed billboard (George Anzo, CalTrans Office of Outdoor Advertising, pers comm).

IV. Allpoints Lacks a Vested Property Right in the Billboard

Because the billboard was never lawfully permitted, Allpoints cannot claim a legally vested property interest in its continued existence or use. (See *Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1562, [finding no vested property right in non-conforming use, which was also unlawful due to the failure of the owner to obtain the required permits]; and *Ruiz v. New Garden Twp.* (3d Cir. 2004) 376 F.3d 203, 210 [“it is undisputed that a residential rental use of the property at issue was set up by the landowner in violation of state, county, and municipal laws, such use was null and void *ab initio*... The land owner had acquired no vested property interest in his unlawful rental use of the property.”]) Nor can Allpoints claim a vested right due to their prolonged non-conforming and unpermitted use. (See *Lockard v. Los Angeles* (1949) 33 Cal.2d 453, 466 [“no vested right to violate an ordinance may be acquired by continued violations.”])

Moreover, by virtue of its location within submerged wetlands, the proposed project location is subject to the public trust doctrine. (*Marks v. Whitney*, (1971) 6 Cal.3d 251, 259.) As a result, whatever rights Allpoints has in the subject property, it holds “those rights subject to the [public] trust, and can assert *no vested right to use those rights in a manner harmful to the trust.*” (*Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, 995 [emphasis added] [quoting *Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1185-86].)

V. The Reconstruction Project Should be Denied Because it is Situated in an Environmentally Sensitive Habitat Area.

The lack of an ODA permit for the now-destroyed billboard is especially relevant as the County relies throughout the IS/MND on Sections 313-131 and 313-132 of the Humboldt County Coastal Zoning Regulations, which the County maintains, “provide protections for lawfully established non-conforming uses and structures, including rights to continue these uses and structures, and conditions under which they may be expanded, structurally altered, or

reconstructed where damaged by casualty.” (IS/MND, p.33.) Indeed, the County relies on these provisions to justify the reconstruction of the billboard despite its location within an Environmentally Sensitive Habitat Area (ESHA); the IS/MND notes that “[t]he project is located within a wetland environment...recognized as an...(ESHA)...[D]evelopment of this type *is not normally permitted within ESHA*...the Coastal Act and local coastal zoning regulation provide protections for repair and maintenance of existing structures....” (*Id.*, p.25 [emphasis added].)

Per Section 313-131.2 of the Coastal Zoning Regulations, however, Section 313-131 applies only to “all nonconforming uses *which were in conformance with regulations applicable at the time the use commenced.*” (emphasis added.) Section 313-132.2 similarly clarifies that Section 313-132 applies only to “all nonconforming structures *which were constructed in conformance with the County Building Regulations applicable at the time of initial construction....*” (emphasis added.) It appears that the billboard was never legally permitted, and was therefore never in conformance with regulations applicable at the time the use commenced. Those provisions of the Coastal Zoning Regulations relied on by the County and allowing for continued use, expansion, alterations, and reconstruction, are, therefore, inapplicable.

The County may not rely on Sections 313-131 and 313-132 to justify the project, which will take place within an ESHA. The Board of Supervisors should exercise its sound discretion to preserve and restore this portion of the designated ESHA by upholding the denial of the Allpoints’ application and declining to adopt the IS/MND.

VI. The Reconstruction Project Conflicts with the Humboldt Bay Area Plan.

The proposed reconstruction project conflicts with several provisions of the Humboldt Bay Area Plan (HBAP) and should, therefore, be denied. In its discussion on the Land Use and Planning impacts of the proposed reconstruction project, the County states that:

The project also conflicts with certain provisions of the...(HBAP), which would ordinarily be applicable to projects involving new off-site /non-appurtenant signage (i.e. “billboards”)...the billboard lies within a strip of land adjacent to the western bank of the Elk River. The project area is characterized by plants and hydrology common to riparian areas and wetlands. Aquatic features such as rivers, wetlands, estuaries, and related critical habitat for rare and endangered species are all recognized and protected as...(ESHA) pursuant to...3.30 of the HBAP. Billboards are not a form of development which may occur within ESHA.

(IS/MND, p. 33.) As section 3.30 of the HBAP notes, proposed development occurring within ESHA are “subject to the conditions and requirements of [Chapter 3].” (HBAP, Ch.3 p. 43.) Nor does the HBAP limit the applicability of its provisions exclusively to “new” development as the IS/MND claims. (HBAP, Ch.3 p. 43.) The proposed reconstruction project will require the filling of concrete post holes at a depth of three-feet and five-feet, with a diameter of 18 inches. (IS/MND, p. 45.) These activities clearly fall within the HBAP’s definition of “development” which includes, inter alia, “the placement or creation of any solid material or structure....” (HBAP, Ch.5, p.2.) Finally, and as previously noted, the County concedes that the proposed reconstruction project is located within an ESHA in violation of the HBAP. (IS/MND, p. 25.)

The proposed reconstruction project is also inconsistent with the HBAP because it violates the HBAP's provisions governing wetland buffers in section 3.30.B. The HBAP prohibits, *inter alia*, land use or development in " (1) [t]he area between a wetland and the nearest paved road, or the 40 foot contour line (as determined from the 7.5' USGS contour maps), whichever is the shortest distance, or, (2) 250 feet from the wetland, where the nearest paved road or 40 foot contour exceeded this distance...." (HBAP, Ch.3 p. 47.) The proposed reconstruction of the billboard within a recognized wetland, and directly adjacent to Highway 101, conflicts with this provision of the HBAP.

The IS/MND completely fails to discuss how it will otherwise comply with the provisions and requirements of the HBAP. The only real analysis as to the potential Land Use and Planning impacts of the proposed reconstruction project, is the County's continued reliance on a flawed baseline analysis; "[b]illboard structures have existed at this site and in the vicinity for over 60 years. The project would not result in change beyond the environmental baseline for this site." (IS/MND, p. 33.) For the reasons detailed in Section I, *supra*, the County cannot properly rely on a baseline assuming an existing billboard because no standing billboard exists at the project site. Other than the IS/MND's flawed baseline analysis, there is no discussion as to how or whether the proposed project will comply with the provisions of the HBAP.

VII. The County's Analysis of Impacts to Biological Resources is Flawed.

The County's analysis of impacts to biological resources is flawed in several respects. First, the IS/MND assumes away any potential impacts to the condition of the wetland plants found near the project site because, according to the IS/MND, plant life in the "immediate vicinity of the billboard supports is indistinguishable from other areas further away hosting this same plant community." (IS/MND, p.24.) This conclusory statement is wholly unsupported by any evidence. Did a qualified biologist or botanist make the determination as to the relative health of the wetland plant life near the supports? What standards were used to make these comparisons? Without this information, it is impossible to tell how the County made this finding. Additionally, the County also notes that "[d]isturbance will be minimal as *many* of the footings will be available for reuse and the existing structure has been present on the cite for over 60 years." (IS/MND, p.24. [emphasis added].) This explanation ignores the fact that even existing footings will have to be re-dug and filled with new concrete to depths of three and five feet. Nor does the IS/MND evaluate the impact of new footings that will be required as part of the reconstruction project.

The County also relies on mitigation measure BIO-1 to avoid significant impacts. BIO-1 requires that "[p]ost hole digging and installation may only occur on days where the daytime high tide is 5.5 feet or less." (IS/MND, p.26). This mitigation measure is apparently based on the observations by County staff that "[a]t a site visit during a 5.4-foot high tide on August 1, 2020 it was observed that all existing billboard footings were dry and several feet above the high tide line. On average, the daytime high tide is at or below this level during half of the days each month." (IS/MND, p.25.) That the billboard footings appeared to be dry and above the high tide line for half of the days of each month says nothing about the subsurface conditions at the project

site, or whether the proposed footings, which will reach five to three feet deep, will encounter and/or adversely affect subsurface water within the wetland ecosystem.

Finally, in its discussion on the potential conflict between the proposed project and “local polices or ordinances protecting biological resources...,” the County fails to discuss or analyze the conflicts between the project and the HBAP. (IS/MND, p.25.) Instead, the IS/MND only discusses the potential conflicts with the Coastal Zoning Act and Regulations or cross-references its discussion of Land Use and Planning impacts. The County’s analysis here is flawed for the same reasons stated in Sections V-VI, *supra*.

VIII. The County’s Fails to Consider its Obligations Under the Public Trust Doctrine.

The IS/MND is devoid of any analysis of the impact of the proposed project to the Public Trust, as required. The County is unquestionably required to ensure that the proposed project does not harm the public trust:

A county is a legal subdivision of the state and references to the “state” may include counties. [Citation.] Although the state as sovereign is primarily responsible for administration of the trust, the county, as a subdivision of the state, shares responsibility for administering the public trust and “may not approve of destructive activities without giving due regard to the preservation of those resources.”

(*Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 867-868 [first quoting, *Baldwin v. County of Tehama*, (1994) 31 Cal.App.4th 166, 175–176; then quoting *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1370, fn. 19.)

The proposed reconstruction project, furthermore, will certainly adversely affect the public trust. In 1971 the California Supreme Court held that: “There is a growing public recognition that one of the most important public uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state . . . , as open space . . . , and which favorably affect the scenery . . . of the area.” (*Marks v. Whitney*, (1971) 6 Cal.3d 251, 259.) Here, reconstruction of the fallen billboard would impair the Public Trust purpose of preservation of these tidelands in their natural state, is plainly inconsistent with any definition of open space, adversely affects the scenery, and should be denied on this basis. (*See, Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, 995 [quotations omitted] [“The State of California as trustee has a broad duty . . . to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases.”]) In addition, maintenance of a billboard here would adversely affect the wetland and therefore impair, to some degree, the public trust resources purely for private use. Conversely, the proposed project does not further any of the established common law public trust uses of fishing, recreation, navigation, or waterborne commerce. Rejection of this 60-year-old project is the quintessential reason the California Supreme Court held that the government “is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.” (*National Audubon v. Superior Court*,

(1983) at 33 Cal.3d 419, 447.) Such is the case at hand, where billboards were approved and erected long-before modern zoning and environmental laws were even enacted, but which project would conflict with present land-use standards. The private economic gains here cannot legitimately thwart the public's property rights in the public trust.

IX. Conclusion.

The US Geological Survey estimates that "more than 90 percent of the [California's] wetlands have been drained...."⁴ The Board of Supervisors is now presented with a unique opportunity to preserve and restore the wetland in and around the project site, which otherwise provides crucial biological and aesthetic resources. Thank you for your careful consideration of these issues. Please do not hesitate to contact us at any time if we may be of assistance.


Respectfully,



J. Thomas Brett
Jason R. Flanders
AQUA TERRA AERIS LAW GROUP

⁴ United States Geological Survey, California Wetland Resources, U.S. Geological Survey Water-Supply Paper 2425 (available at <https://www.fws.gov/wetlands/data/Water-Summary-Reports/National-Water-Summary-Wetland-Resources-California.pdf>)

BOS: # 11
cc: John Ford



July 27, 2020

RECEIVED

JUL 30 2020

BOARD OF SUPERVISORS

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Via First Class Mail and Electronic Mail

Re: Appeal of Allpoints Outdoor, Inc. Special Permit, PLN-2019-10629 (Eureka Area)

Dear Supervisors and Director Ford,

I write to you today on behalf of my client, Humboldt Baykeeper, a nonprofit organization that works to safeguard coastal resources for the health, enjoyment, and economic strength of the Humboldt Bay community. Humboldt Baykeeper objects to off-site, commercial billboards built in tidal wetlands around the Humboldt Bay area due to their impacts to public trust resources, visual/scenic resources, coastal wetlands, and other impacts to the environment.

This letter is to inform you of our concerns regarding Allpoints Outdoor, Inc.'s appeal of the Planning Commission's recent denial of the Special Permit for Reconstruction of a Legal Nonconforming Billboard Structure; Record Number PLN-2019-10629 (Eureka Area). We urge the Board of Supervisors to uphold the Planning Commission's denial of the Special Permit since the required findings cannot be made for the following reasons.

I. No Valid ODA Permit Has Issued, and Any ODA Permit is Highly Questionable.

Public Records Act requests submitted by Humboldt Baykeeper to CalTrans demonstrate that no ODA Permit has been issued for the proposed project, and that, indeed, possibly no ODA Permit has *ever* been approved for this billboard, or the original permit has been revoked. If no ODA permit has *ever* issued for this billboard, it cannot be deemed a "legal" nonconforming use, if it was never legally permitted.

Humboldt Baykeeper submitted a PRA request for the original ODA permit #15322, which is the permit number cited in the pending County staff report. In response, CalTrans first produced ODA permit #15332, which Baykeeper pointed out was a billboard built *north* of Eureka, and is not the billboard currently at issue. After additional correspondence, the District 1 CalTrans PRA Coordinator wrote that, "I attempted to obtain a similar document (ie. Application



for Outdoor Advertising Permit) for permit #15322 and was informed by out[side] Division of Outdoor Advertising Permits that no such record exists.” Thus, CalTrans has no ODA permit #15322, contradicting the evidence provided in the Staff Report. “[A] writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record” is evidence “to prove the absence of a record in that office.” (Cal. Evid. Code § 1284.) Thus, it appears no ODA permit for this billboard exists, and the County cannot approve this proposed project until the ODA permit question is resolved.

Further, the ODA database print-out included in the Staff Report indicates that the landowner of the subject billboard is “Calif. Div. of Highways” (Attachment 2, page 10). This contradicts other assertions in the Staff Report regarding property ownership, and no project approval can be rendered under these circumstances.

Indeed, these inconsistencies raise the question of whether this subject parcel is within State Lands Commission jurisdiction, as several billboards along Highway 101 between Eureka and Arcata are or were before they were removed. Accordingly, Humboldt Baykeeper submitted a request to the California State Lands Commission for jurisdictional determinations on APN 305-031-007, -008, and -009 on July 23, 2020, since it was not evident whether the County had issued a referral to this trustee agency while processing this the permit application, which request the State Lands Commission expects to fulfill within 2-3 weeks. As such, the State Lands Commission should also be considered a CEQA trustee agency, and should be afforded the opportunity to review and comment on the proposed project. (*See*, Pub. Resources Code, § 21070 [“Trustee agency” means a state agency that has jurisdiction by law over natural resources affected by a project, that are held in trust for the people of the State of California.”])

II. The Proposed CEQA Exemption Violates CEQA.

The proposed CEQA exemption is unavailable for this project because unusual circumstances exist that may result in numerous significant environmental effects. Moreover, the County has failed to adequately assess the project’s effects. “CEQA places the burden of environmental investigation on government rather than the public.” (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.) Rather than fully analyze the project’s effects, the County seeks to mitigate these effects through discretionary conditions approval, thereby circumventing the required CEQA review. As a result, the staff reports’ CEQA determinations are unsupported by substantial evidence, and incorrect. If the County and the project proponent do not wish to undertake adequate CEQA review, then the project can (and should) simply be denied. (*See, Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal. App. 4th 837, 848-852.) The proposed project, however, cannot be lawfully approved based on a CEQA categorical exemption.

First, there is a “reasonable possibility” that the proposed project may cause significant effects due to its “unusual circumstances,” and therefore cannot be categorically exempt from CEQA. 14 Cal Code Regs §15300.2(c). The nonconforming use alone constitutes an “unusual circumstance.” *See, City of Santa Clara v LAFCO* (1983) 139 Cal.App.3d 923, 932 [“the ‘unusual circumstances’ of the inconsistency between the rezoning and general plan removed



the proposals from that exemption.”) Here, there is no dispute that the project, if newly proposed today, could not be legally permitted due to its location in the tidal wetlands around the Elk River and Humboldt Bay, which would conflict with numerous zoning requirements. The staff report itself admits that these are unusual circumstances, stating that “Development is generally not allowed in ESHA except under *unusual circumstances* and this location is characterized by ESHA. Most of the population would not want to see a proliferation of billboards;” Draft Finding 9 also states that “[t]here are special circumstances or conditions associated with the proposed development.”

Second, these unusual circumstances clearly give rise to a reasonable possibility that the proposed project may have one or more significant environmental effects. However, the County obfuscates these potential effects by imposing numerous conditions of approval to mitigate or avoid effects, without first undertaking the required CEQA review. (*See, Salmon Protection & Watershed Network v County of Marin* (2004) 125 Cal.App.4th 1098, 1102 (“*SPAWN*”)) [“If a project may have a significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant. . . . Mitigation measures may support a negative declaration but not a categorical exemption.”]; *Azusa Land Reclamation Co. v Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1200.) In *SPAWN*, for example, Marin County approved a project based on a CEQA categorical exemption that was “subject to conditions meant to minimize ‘adverse physical effects on the natural environment.’” (*SPAWN* at 1103.) Here, the proposed Condition 6 and Condition 7 do the exact same thing:

Condition 6

“The plan shall detail all anticipated construction activities and *incorporate useful measures to minimize any potential adverse environmental effects . . .*”

Condition 7

Prior to commencing any work, the applicant shall submit a Reconstruction Plan for review and approval by the Planning Director. Reconstruction must be performed on a like-for-like basis. The plan shall focus on re-use of as many of the original groundbased supporting members (posts and footings) from the existing structure as is safely possible. Any footings not re-used must be safely decommissioned or removed, whichever is the least environmentally impactful option. Any new ground disturbing activities, posts, or structural components shall be within as close proximity to the existing structure’s footings and footprint as is safely possible. ***The reconstruction plan shall include measures for avoiding any potential adverse environmental effects through minimization of all ground disturbance.*** At a minimum the plan shall include:

- Repair and reuse of existing footings and support posts wherever possible
- Removal of posts where repair or reuse of footings or supports is not possible. Posts shall be removed only ***to the extent that potential adverse environmental effects are minimized to the greatest extent feasible.***



- Revegetation of areas where existing footings have been retired or removed. Revegetation shall occur using spoils from areas where excavation of new holes is required.
- Sisting of new vertical support posts (or a similar method) where the existing footings retain integrity and damaged posts are broken off well above ground.

(Emphasis added.) Clearly, each of these conditions is intended to avoid potentially significant environmental effects, without first assessing the scope or nature of these effects, nor assessing CEQA-compliant mitigation measures and alternatives to reduce or avoid such effects. How many new holes will be dug into the wetlands? Will dug out materials simply be spread across the remaining wetlands, with potential effects? If existing broken poles were treated with wood preservatives, could surrounding soils be contaminated? How will new concrete be safely poured into tidal lands? Does all concrete have to dry before the tide rises and the construction becomes submerged? How will the project applicant decide which poles are removed and which stay? Does filling wetlands with concrete impede a wetland's natural functions?

Owing to the lack of environmental review and uncertainty regarding the scope of the project and its adverse effects, the proposed conditions of approval plainly and impermissibly defer any such analysis and mitigation of project effects to after project approval. (See, *Sundstrom, supra*, 202 Cal.App.3d 296; *POET, LLC v. Calif. Air Resources Bd.* (2013) 218 Cal.App.4th 681, 738; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 944; see also CEQA Guidelines, § 15121(a).) These actions simply cannot be taken outside the procedural and substantive requirements of CEQA.

Numerous additional conditions of approval are clearly designed to avoid potentially significant environmental effects. Condition 15 requires that "Use of pressure-treated wood is prohibited." If pressure-treated wood were *not* prohibited by this discretionary condition of approval, such treatment chemicals could have potentially significant environmental effects.¹ Again, a mitigation measure disguised as a condition of approval cannot be used to support a categorical exemption. But for Condition 15, the proposed project could have significant adverse effects by utilizing highly toxic wood treatment chemical within the Elk River wetlands.

Similarly, the effects of night lighting upon breeding and migratory birds are adverse and well documented,² and the project therefore conditions approval on mitigating such effects. See, Finding 11 ("Conditions of Approval have been included restricting the sign from employing motion, sound, mechanical devices, blinkers, flashing lights, animation, red, green or amber lights or unusual lighting"); see, Condition 13 ("No sign lighting is authorized"). This does not support a categorical exemption, and CEQA review is required.

Indeed, the proposed project approvals contain a host of additional conditions of approval that are designed to mitigate potentially significant environmental effects, without CEQA

¹ See Attachments 1 and 2, incorporated by reference.

² See Attachment 3, incorporated by reference.



review. *See*, Condition 2 (“The project is located adjacent to an access-controlled segment of US 101. If proposing to utilize Highway 101 to access the sign site during reconstruction and/or subsequent maintenance activities, permission shall first be secured from CalTrans through an encroachment permit or similar means”); Condition 6 (“Prior to commencing any work, the applicant shall submit a Best Management Practices Plan for the review and approval by the Planning Director. The plan shall detail all anticipated construction activities and incorporate useful measures to minimize any potential adverse environmental effects”); Condition 10 (“Sign copy shall be restricted and limited to avoid any movement that could distract motorists. No electronic or projection screens shall be permitted. No decals that shimmer, rotate, revolve, twirl, or move in the wind or by electronic means shall be permitted.”)

Another effect inadequately considered is flood damage. Proposed Condition 5 simply requires that “[t]he project shall comply with the Flood Damage Prevention Ordinance (HCC 335-1), as necessary,” without any analysis of what is necessary. Prior Baykeeper comments noted concern over “advertising displays . . . located below the floodwater level of any stream or drainage channel where the advertising display might be deluged by flood waters and swept under any highway structure crossing the stream or drainage channel,” and noted that “the subject parcel is entirely within the FEMA Special Flood Hazard Area, FIRM Flood Rating: Zone A, Panel Number 0839G, adjacent to the Elk River, and upstream of the Highway 101 bridge.” In response, the staff report notes that the structure withstood major floods in 1955 and 1964, but the staff report lacks substantial evidence to support this conclusion, citing only to photos of the billboard that were taken many years after these flood events, with ample time to have rebuilt a fallen or damaged billboard. Indeed, the Staff Report fails to recognize at all that the project applicant has never sought permit approval to repair or reconstruct the billboard when damaged or fallen—though without question such work *must* have had to have occurred at some point over the past 50 years. In addition, the floods of 1955 and 1964 were over 50 years ago, and since that time human-caused climate change has resulted in higher sea levels and more powerful storms that the billboard must withstand going forward, and for which storms of 1955 and 1964 are not substantial evidence. Further environmental review is required.

Finally, the staff report provides several statements specifically in support of a CEQA categorical exemption, some of which are inaccurate or unsupported by substantial evidence. (Staff Report at 8-9.) The staff report is wrong to consider the billboard part of the “baseline” conditions, since no upright billboard existed at the time this application was made. (*See* CEQA Guidelines, § 15125 [“Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective.”]) No standing billboard existed at the time of application, and the construction process, and ultimate features of any new billboard, must be considered anew.

Additional substantial evidence supports a finding that the proposed billboard, in this location, has a reasonable possibility of a significant, adverse environmental effect. First, the County recently approved two billboards, *not located in wetlands*, based on a CEQA mitigated



negative declaration.³ Second, the aesthetic effects of the billboard should be compared against a baseline of no billboard at all, and any such aesthetic effects could clearly be significant, due to the location of the proposed billboard. Third, and relatedly, there has been a concerted effort by the Coastal Commission, Caltrans, and the community at large, to remove historically-permitted wetlands from wetlands.

The California Coastal Commission and CalTrans have removed numerous billboards along Highway 101 in recent years to protect scenic resources along Humboldt Bay. The Elk River area of the 101 Corridor, including the subject property, is an area of scenic and visual resources. According to the Humboldt Bay Area Plan,

3.40 VISUAL RESOURCE PROTECTION

*** 30251. The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development⁴ 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. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

A. PLANNED USES [in part]: “Highway 101 provides many vantage points from which daily commuters as well as tourists can see flocks of shorebirds, waterfowl and other wildlife, including the magnificent egrets that to many people are a symbol of Humboldt County.”

In Section 3.40 (B)(5), the Humboldt Bay Area Plan determined that the Highway 101 Corridor from Field’s Landing to Arcata is worthy of evaluating as a scenic designation, and calls for a Scenic Route Study:

The Humboldt County Board of Supervisors shall initiate the preparation of a Scenic Route Study pursuant to the adopted Scenic Highways Element of the Humboldt County General

³ Stott Outdoor Advertising, Case No. CUP-10-16, on file with the County and fully incorporated herein by reference.

⁴ Chapter 5, Definitions: “DEVELOPMENT – means, on land, in or under water, the placement or creation of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid or thermal waste; grading, removing, dredging, mining or extraction of any materials...construction, reconstruction, demolition or alteration of the size of any structure, including any facility of any private, public or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z’berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).



Plan for the portion of Highway 101 between Eureka and Arcata and that portion south of Fields Landing, inclusively.

The Scenic Route Study shall be prepared by the County Planning Department in cooperation with the California Department of Transportation. The content of the Study is outlined in Appendix E. A special emphasis of the study shall include opportunities for Cal-Trans, the County, and the Humboldt Bay Harbor and Conservation District to eliminate billboarding between Eureka and Arcata, through acquisition and other means, and to identify suitable areas for clustered signing.

The proposed project would conflict with these plans and policies and thereby gives rise to a reasonably possibility that it could have significant effects upon aesthetic resources.

III. The Staff Report Fails to Accurately Assess Public Trust Doctrine Requirements.

The Staff Report is incorrect that “[t]he project does not threaten any public trust uses that may occur in the location where the billboard is sited.” (Staff Report at 14.) In 1971 the California Supreme Court held that: “There is a growing public recognition that one of the most important public uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state . . . , as open space . . . , and which favorably affect the scenery . . . of the area.” (*Marks v. Whitney*, 6 Cal.3d 251, 259.) Here, reconstruction of the fallen billboard would impair the Public Trust purpose of preservation of these tidelands in their natural state, is plainly inconsistent with any definition of open space, adversely affects the scenery, and should be denied on this basis. (*See, San Francisco Baykeeper v. California State Lands Commission* (2015) 242 Cal.App.4th 202, 233 [“the title which a State holds to land under navigable waters is . . . held in trust for the people of the State, . . . free from obstruction or interference by private parties”.]) In addition, maintenance of a billboard here would impair, to some degree, the public trust uses of fishing access, recreation, and navigation, purely for private use. Rejection of this 60-year-old project is the quintessential reason the California Supreme Court held that the government “is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.” (*National Audubon v. Superior Court*, (1983) at 33 Cal.3d 419, 447.) Such is the case at hand, where billboards were approved and erected long-before modern zoning and environmental laws were even enacted, but which project would conflict with present land-use standards. The private economic gains here cannot legitimately thwart the public’s property rights in the public trust.

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Humboldt Baykeeper
Objections to Allpoints Billboard Reconstruction
July 27, 2020



IV. Conclusion

Thank you for your careful consideration of these issues. Please do not hesitate to contact us at any time if we may be of assistance.

Respectfully,


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