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Sent: Monday, July 06, 2020 3:51 PM

To: Ford, John <JFord@co.humboldt.ca.us>

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Subject: Appeal of Allpoints Outdoor, Inc. Special Permit, PLN-2019-10629

John,

Attached are Baykeeper's comments on Allpoints Outdoor's appeal of the Special Permit for the billboard near King Salmon.

We are awaiting the results of a PRA request to CalTrans, which we should be getting any minute now - so we may have additional comments once we review those materials.

Thanks,

Jennifer Kalt, Director
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July 6, 2020

Mr. John Ford, Director, Planning & Building Department
3015 H Street
Eureka, CA 95501

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

Dear Director Ford,

On behalf of Humboldt Baykeeper's board, staff, and members, I submit these comments on 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).

Humboldt Baykeeper works to safeguard our coastal resources for the health, enjoyment, and economic strength of the Humboldt Bay community, and is a member of the California Coastkeeper Alliance and the international Waterkeeper Alliance. 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 that have not been assessed, since the County relied inappropriately on a Categorical Exemption under the California Environmental Quality Act.

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. **The proposed development is not consistent with the purposes of the existing zone in which the site is located.**

The reconstruction of a nonconforming structure that is damaged by any casualty is subject to Section 132.5.2 of the Humboldt County Code, which says, "The Director may approve a Special Permit for the reconstruction of a nonconforming structure that is damaged by any casualty if application is made within two (2) years after such destruction or damage and if the Director makes all of the required findings in Chapter 2 of this Code."

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Chapter 2: 312-17 REQUIRED FINDINGS FOR ALL PERMITS AND VARIANCES states:

17.1 REQUIRED FINDINGS FOR ALL PERMITS. Unless waived by State law, the Hearing Officer may approve or conditionally approve an application for a Special Permit, Use Permit, Coastal Development Permit, or Planned Unit Development Permit **only if all of the following findings are made:**

17.1.2 **The proposed development is consistent with the purposes of the existing zone in which the site is located,** or when processed in conjunction with a zone reclassification, is consistent with the purposes of the proposed zone.

Required Finding #2 in the May 7, 2020 Staff Report states that “The proposed development is consistent with the purposes of the existing zone in which the site is located” (page 20). And yet the Staff Report later explains that the zoning of the subject parcel is unknown, but speculates that Agriculture Exclusive (AE) is the most fitting land use and zoning, given the property’s characteristics and location. Other nearby parcels are zoned Public Facilities (PF) and Natural Resources (NR). However, **off-site/non-appurtenant signs (i.e., billboards) are not an authorized use in any of these zones.** (page 25)

II. **To protect public safety, billboards are not allowed below the floodwater level of stream channels upstream of highway bridges.**

Required Finding #3 in the May 7, 2020 Staff Report states that “The proposed development conforms with all applicable standards and requirements of these regulations (more particularly, the Supplemental Findings for Exceptions found in Section 41.1 of Chapter 2)” (page 20). Required Finding #4 states that “The proposed development and conditions under which it may be operated or maintained will not be detrimental to the public health, safety, or welfare; or materially injurious to property or improvements in the vicinity.” (page 20) County Code §312-41.2, Findings for Granting Exceptions, requires that the granting of the exception will not be detrimental to the public welfare.

These findings cannot be made since 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, upstream of the Highway 101 bridge, in conflict with CA Bus & Prof Code § 5403 (c), which states that

No advertising display shall be placed or maintained in “any stream or drainage channel or 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 or against the supports of the highway structure.”

Indeed, the wreckage of the billboard that has been laying where it collapsed more than six months ago poses a threat to public safety in the event of a flood that could sweep the debris into the highway bridge footings, blocking the flow and catching more debris, which could damage the bridge.

III. Customary Repair and Maintenance Rules Do Not Apply

The Special Permit was inappropriately characterized as allowing customary repair and maintenance, since a new billboard permit would never be allowed in this location. Given that the structure at issue will require entirely new footings and uprights, it is quite a stretch to consider customary repair and maintenance during its normal life, as described in Cal. Code Regs., tit. 14, § 2270:

“Customary maintenance” means any activity performed on a Display for the purpose of actively maintaining the Display in its existing approved physical configuration and size dimensions at the specific location approved on the application for State Outdoor Advertising Permit, or at the specific location officially recorded in the records of the Department for a legally placed Display, for the duration of its normal life...which includes the following activities:

- 1) Changing of the advertising message.
- 2) Adding an Extension to an outside dimension of a Display as incident to the copy for a temporary period up to three years.
- 3) The sale, lease, or transfer of the Display or its Permit.
- 4) Adding a Light Box.

Rather, the subject billboard is accurately described as damaged or destroyed; Cal. Code Regs., tit. 14, § 2271(b) states that

When the Department becomes aware of or identifies a damaged Display, the Department mails a written notice by certified mail to the Permittee beginning the 60-day time period for the Permittee to refurbish, replace, rebuild, or re-erect in kind or smaller the damaged Display and to place advertising copy.

The CalTrans Outdoor Advertising Agency has been derelict in its duties to issue such written notice despite being made aware that the structure had collapsed on or before December 26, 2019 (see attached letter to Mr. James Arbis, Northern Area Manager, Department of Transportation Division of Traffic Operations, Office of Outdoor Advertising dated May 29, 2020).

The permit before the Planning Commission was inaccurately characterized as falling under “customary repair and maintenance.”

For many years, this billboard has been maintained and repaired without County permits. According to California Code of Regulations Title 14, Division 5.5, Chapter 6, Subchapter 7, Section 13252,

“the following extraordinary methods of repair and maintenance shall require a coastal development permit because they involve a risk of substantial adverse environmental impact...(3) **Any repair or maintenance to facilities or structures or work located in or within 50 feet of an environmentally sensitive habitat area.**”

The only permit on record for this structure was issued by the CalTrans Office of Outdoor Advertising, which authorized a much smaller structure than what is proposed (15 x 25 feet, with four uprights vs. 22 x 40 feet, with seven uprights).

IV. Inappropriate Use of Categorical Exemption under CEQA

The approval of a new billboard permit in coastal wetlands is a discretionary project that will result in a change to the physical environment, and therefore, approval of the Special Permit is contingent upon compliance with CEQA. CEQA applies to “discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps.” Pub. Resources Code, § 21080(a); *see also*, *Friends of Outlet Creek v. Mendocino County Air Quality Management Dist.* (2017) 11 Cal.App.5th 1235, 1244.).

Pursuant to CEQA, a “project” is an activity which may cause either direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment (Pub. Resources Code § 21065(a)); “‘Environment’ means the physical conditions which exist within the area which will be affected by a proposed project including land, air...flora, fauna, ambient noise, and objects of historic or aesthetic significance” (Cal. Code Regs., tit. 14, § 15360); a “discretionary” project is one that is subject to judgmental controls, where the agency can use its judgment to decide whether and how to carry out a project (Cal. Code Regs., tit. 14, § 15002(i)).

CEQA has two purposes: environmental protection and informed self-governance. *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 690- 691. In addition, “[p]ublic participation is an essential part of the CEQA process.” Cal. Code Regs., tit. 14, § 15201. As the California Supreme Court has described:

the privileged position that members of the public hold in the CEQA process ... is based on a belief that citizens can make important contributions to environmental protection and on notions of democratic decision-making. CEQA compels an interactive process of assessment of environmental impacts and responsive project modification which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from

the process. *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 936 (internal quotes and cites omitted).

Prior to approving any discretionary project, an agency must fully disclose and analyze all of the project's potentially significant direct, indirect, and cumulative environmental effects. *See, e.g.*, Cal. Code Regs., tit. 14, § 15002(f). CEQA requires an agency to prepare an "environmental impact report" whenever there is a "fair argument" that a proposed project may have a significant adverse impact to the environment. Cal. Code Regs., tit. 14, § 15064(f)(1). CEQA mandates that public agencies avoid or minimize such environmental damage where feasible. Cal. Code Regs., tit. 14, § 15021(a). Pursuant to this duty, no public agency may approve or carry out a project where one or more significant effects on the environment may occur if the project is approved, unless certain narrow findings are made. Cal. Code Regs., tit. 14, §§ 15091, 15093. CEQA is "to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." CEQA requires agencies to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state," and to "[t]ake all action necessary to provide the people of this state with...enjoyment of aesthetic, natural, scenic, and historical environmental qualities." Pub. Resources Code § 21001(a), (b).

V. Impacts to Public Trust Resources

The parcel is entirely within coastal wetlands, yet potential impacts to wetlands and public trust resources have not been analyzed. The May 7, 2020 Staff Report states that the subject parcel is entirely within coastal wetlands, which are considered public trust resources.

Humboldt County is bound by the obligations of the Public Trust Doctrine. In California, the Public Trust Doctrine derives from the state's role as trustee over tidelands, submerged land, and land underlying inland navigable waters, which the state and its grantees hold for public trust purposes. *People v. California Fish Co.* (1913) 166 Cal. 576, 584. Government entities and agencies are required to consider and prioritize public trust uses including navigation, protection of fisheries, recreation, and preservation of trust lands in their natural state. *Marks v. Whitney* (1971) 6 Cal.3d 251, 259–260.

Numerous cases have held that municipal governmental entities, including cities and counties, are bound by the obligations of the Public Trust Doctrine. *See, Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1180 ["City lacks power under either the trust or the 1957 statute to shift a strip of tidelands to another use"]; *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1370. Indeed, "[a]ny action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full consideration of the state's public interest in the matter." *San Francisco Baykeeper, Inc. v. California State Lands Comm.* (2015) 242 Cal.App.4th 202, 234.

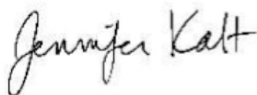
Even where property owners argue for a vested or grandfathered permitting right, there can be no legally vested right to impair trust resources. The public may successfully leverage the Public Trust Doctrine to enforce and defend public trust uses, even as against vested property rights. Marks, at 261-263 [“This littoral right is of course burdened with a servitude in favor of the state in the exercise of its trust powers over navigable waters”]; *see also*, People ex rel. Webb v. California Fish Co. (1913) 166 Cal. 576, 599 [Vested property rights in tidelands are “subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and controller of these public uses and the public trust thereof, to enter upon and possess the same for the preservation and advancement of the public uses and to make such changes and improvements as may be deemed advisable for those purposes”].

Thus, the County has the authority and affirmative duty to preserve and protect public trust resources that are affected by its decisions, so far as consistent with the public interest. Nat. Audubon Society v. Super. Ct. (1983) 33 Cal.3d 419, 426, 446-447. Furthermore, the state has the power and duty to *reconsider* decisions affecting the public trust, even those concerning vested property rights. Id. at 447 [“The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses... No vested rights bar such reconsideration”].

Here, the County has an affirmative duty to protect trust resources affected by any grant of billboard permits, which do nothing to advance the public interest and damage public trust resources. The United States Supreme Court has held that lands held in a public trust “cannot be alienated, except to be used for the improvement of the public use in them.” Long Sault Development Co. v. Call (1916).

We appreciate the opportunity to comment on the proposed project, and we urge the Board uphold the denial of this Special Permit.

Sincerely,



Jennifer Kalt, Director
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Cc:

Bob Merrill, California Coastal Commission, North Coast District Manager

Jennifer Olson, California Dept. of Fish and Wildlife, Senior Environmental Scientist

Jason Flanders, Aqua Terra Aeris Law Group