ARNOLD LAROCHELLE MATHEWS
VANCONAS & ZIRBEL LLP

MEMORANDUM

TO: Jeff Palmer, General Manager, Ojai Valley Sanitary District

FROM: Joshua S. Smith

DATE: October 20, 2020

SUBJECT: CEQA Exemptions for OVSD's Acquisition of the 14,405-square foot Real Property Located at APNs 063-0-030-060 and 063-0-030-135 to Secure Permanent Access to the Waste Treatment Plant

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I. Introduction

This memorandum evaluates whether the Ojai Valley Sanitary District's ("the District") acquisition of the Property by eminent domain for purposes of securing permanent access ("Project") is subject to California Environmental Quality Act (Pub. Res. Code § 21100 et seq.) ("CEQA") and whether a categorical exemption, as provided in the CEQA Guidelines (14 CCR § 15000 et seq.) and the District's Administrative Supplement to the State CEQA Guidelines ("Admin. Supp."), applies to the Project.

II. Factual Background

The District is a special district formed pursuant to the Sanitary District Act of 1923 (Health & Safety Code §6400 et seq.). The District owns and operates a wastewater treatment plant ("WTP") and facilities located at 6363 North Ventura Avenue in Ventura County, CA east of the Ventura River, west of Highway 33 and 5.5 miles north of Highway 101. Historically, the District has accessed the WTP from two points of entry: 1) an entry point located off of Ventura Avenue at 6363 North Ventura Avenue ("Ventura Entry"); and 2) an access road located just south/southwest of Ventura Avenue and north of Canada Larga Road ("Access Road"). The City of Ventura is the primary user of the Ventura Entry, which it uses to access a city operated facility adjacent to the WTP. Over the years, the City of Ventura has made a number changes to the Ventura Entry. These changes have made it impossible for District's heavy trucks to enter the WTP from Ventura Entry. Thus, due to the changes to the Ventura Entry, the Access Road is the District's sole and primary point of entry to the WTP. Following the WTP's construction in 1963, the District initially accessed the WTP from the Ventura Entry. However, in the 1970s the District began utilizing the Access Road as its primary point of entry to the WTP because it provided the District a more direct access point to the WTP. The Access Road was initially a dirt road but was paved by the District in 1982 due to the frequency of use. Once paved, the Access Road became the District's sole point of entry.

The Access Road is partially located on the District's WTP and partially located on 14,405 square feet portions of two non-contiguous sections of real property, identified as Assessor's Identification Nos. 063-0-030-060 and 063-0-030-135 ("Property"). The District does not own this Property and the Property is co-owned by the Bonsall Smith Legacy Trust and the Shull Bonsall Family Trust ("Owners of Record"). The Access Road is also located on top of a recorded sewer pipeline easement held by the District. Because the Access Road serves as the primary access point for the WTP and is a necessary feature of the WTP that provides District staff a critical point of entry to the WTP in case of emergency, it is necessary for the District to secure and maintain permanent, unfettered access to the WTP via the Access Road. Thus, the District has engaged with the Owners of Record to purchase the Property. However, the Owners of Record rejected the District's offer to purchase the Property, prompting the District to seek acquisition of the Property by eminent domain.

III. The Project is Exempt From CEQA

An agency will normally apply a three-step process to determine whether a project requires an environmental impact report under CEQA. 14 CCR § 15002(k); Admin. Supp. § 3. The first step in this process is: 1) determine whether the proposed project is a "project" subject to CEQA and 2) if a "project", determine whether the project is statutorily or categorically exempt from CEQA. 14 CCR § 15002(k)(1); Admin Supp. § 4.1. If the project is exempt from CEQA, the agency does not need to apply the other steps and may prepare a notice of exemption for the proposed project. *Id.*; 14 CCR §§ 15061, 15062; Admin. Supp. §§ 1.3, 4.1.3.

The acquisition of the Property is a "project" under CEQA but is categorically exempt from CEQA pursuant to existing facilities exemption (14 CCR § 15301; Admin. Supp. § 4.1.2.6), the minor alterations exemption (14 CCR § 15304; Admin. Supp. § 4.1.2.6), and the accessory structures exemption (14 CCR § 15311; Admin. Supp. § 4.1.2.6). Thus, only the first step of the three-step process is discussed and applied in this memorandum. Additionally, as discussed below, none of the exceptions provided in 14 CCR § 15300.2 apply to the applicable categorical exemptions.

A. <u>The Acquisition of the Property is a "Project" Under CEQA Because the Acquisition of the Property May Have a Reasonably Foreseeable Indirect Physical Change to the Environment</u>

CEQA defines "project" as an activity that 1) is undertaken or funded by, or subject to the approval of a public agency and 2) "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Pub. Res. Code § 21065; *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1186. The CEQA Guidelines expand on this definition, by including within the definition that a "project" is the "whole of the action" taken by a public agency. 14 CCR § 15378(a).

Here, the District's acquisition of the Property by eminent domain is an action undertaken by the District, and thus satisfies the first part of the "project" definition. The purpose for the acquisition of the Property is to secure permanent, unfettered access to the WTP via the Access Road on the Property. Although acquisition of the Property will not have a direct effect on the physical environment, it is likely that the District's acquisition of the Property may result in an indirect physical change to the environment if the District, as fee simple owner, improves, increases, or expands its current use of the Access Road. See *Union,* 7 Cal.5th at 1198; *Muzzy,* 41 Cal.4th at 381. Thus, the District's acquisition of the Property by eminent domain is a "project" under CEQA because it is reasonably foreseeable that the acquisition of the Property may result in an indirect physical change to the environment.

B. <u>The Project is Categorically Exempt from CEQA</u>

The second question in the CEQA analysis is whether the proposed project (i.e., the acquisition of the Property) is exempt from CEQA. 14 CCR § 15002(k)(1); Admin. Supp. § 4.1.2. There are thirty-three (33) categorical exemptions within the CEQA Guidelines. See 14 CCR §§ 15300-15329; Admin. Supp. § 4.1.2.6. CEQA does not apply to any of the categorical exemptions which have been listed and designated by the Secretary as exempt. Pub. Res. Code § 21080(b)(9); *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1101. An agency may combine several exemptions or rely on and cite several different exemptions to support a determination that CEQA review is not required for the proposed project. See *North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832 [Court of Appeal upheld some of water district's cited exemptions, but not all]. If the exemptions, taken together, cover the entire proposed project, the project is exempt from CEQA. *Surfrider Foundation v. California Coastal Commission* (1994) 26 Cal.App.4th 151; *Association for a Cleaner Environment v. Yosemite Community College District* (2004) 116 Cal.App.4th 629, 640. If a project is subject to a categorical exemption, the project does not require a formal environmental evaluation. *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810. Nor is the agency required to consider alternative or mitigation measures. *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, 858. A categorically exempt project may be implemented without any CEQA compliance whatsoever. *Association for Protection of Environmental Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 726. Here, the following categorical exemptions apply to the Project.

1. *Existing Facilities Exemption* (14 CCR § 15301)

The "Existing Facilities" exemption provided in the CEQA Guidelines applies to "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use." 14 CCR § 15301; Admin. Supp. § 4.1.2.6.

A key consideration in determining whether this exemption applies is whether the project involves "negligible" or "no expansion" of an existing or former use where neither the size nor scope of the existing facility is determinative of whether the exemption can be applied. *World Business Academy v. State Lands Commission* (2018)24 Cal.App.5th 476; *North Coast*, supra, 227

Cal.App.4th at 840; Admin. Supp. § 4.1.2.6. The examples listed in §15301 include: "existing facilities of publicly-owned utilities used to provide… sewerage" (§15301(b)); "existing highways and streets… and similar facilities" (§15301(c)); and "maintenance of existing landscaping, native growth, and water supply reservoirs" (§15301(h)). These examples, and the others provided in the CEQA Guidelines, are nonexclusive and it is appropriate for an agency to apply the exemption to activities that are similar to the listed examples. *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 817.

The Project falls within the "Existing Facilities" exemption because the Project involves the acquisition of property on which the District uses for ingress and egress to its waste treatment plant. The District currently uses the Property pursuant to a verbal license agreement with the Property's current owner. Recently the Property owner has leased out the Property to additional tenants and these tenants often park along the Property's access road, creating more hazardous conditions along the narrow access road. The District now seeks to acquire the Property in fee simple to ensure permanent access to the WTP and to prevent overcrowding on the access road. Thus, the acquisition of the Property is for the continued operation and maintenance of the District's WTP. This is consistent with the example provided in §15301(b). Additionally, the acquisition of the Property will not result in an expansion of the existing Access Road and the District will continue to use the Property for the purposes of ingress and egress to the WTP. As mentioned, the Property contains the existing Access Road and the purpose behind the acquisition of the Property is to permanently secure access to this road. This is consistent and similar to the example provided in §15301(c). It is also similar to a project that was found to be exempt in *Erven v. Board of Supervisors* (1975) 53 Cal.App.3d 1004, where a county service district sought to make road improvements. In *Erven,* the court found the road maintenance project to be exempt because the county service district only intended to repair and maintain the existing road and not undergo a significant expansion of the road system. *Id.*

The Project is also an effort by the District to ensure proper maintenance of the Access Road on the Property, including the District's ability to properly maintain the existing landscaping and native growth to prevent fire hazards and spread of invasive species. Currently, the District does not have the authority to conduct vegetation management or other routine maintenance activities along the Access Road. Securing the Property in fee simple will allow the District to effectively manage the landscaping and native growth along the Property and adjacent to the WTP to minimize any potential fire hazards. This is consistent with the example provided in §15301(h).

2. *Minor Alteration to Land* (14 CCR § 15304)

The Class 4 Exemption applies to "minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees, and/or vegetation except for forestry and agricultural purposes." 14 CCR § 15304; Admin. Supp. 4.1.2.6. Relevant examples include "minor trenching and backfilling where the surface is restored" (§15304(f)) and "fuel management activities within 30 feet of structures to reduce flammable vegetation" (§15304(i)). This exemption is applicable, in part, because the District's acquisition

of the Property may require the District to exercise a greater degree of maintenance and upkeep on the Access Road. Therefore, some road maintenance activities may become necessary such as backfilling and trenching. The District may also seek to reduce potential fire hazards along the side of the Access Road by engaging in some level of vegetation management.

3. *Accessory Structures* (14 CCR § 15311)

The Project is categorically exempt from CEQA pursuant to the exemption provided in §15311 of the CEQA Guidelines for "Accessory Structures." 14 CCR § 15311; Admin. Supp. 4.1.2.6. This exemption applies to the "construction or replacement of minor structures accessory to existing commercial, industrial, or institutional facilities, including… (b) small parking lots." *Id.* The Project is for the acquisition of an accessory structure to the WTP. The Access Road is very similar in character to "small parking lots" because the Access Road is often used to park and stage vehicles. If construction of a small parking lot is considered a negligible activity under the CEQA Guidelines and warrants an exemption, the District's acquisition of a pre-existing facility like the Access Road falls within the exemption because the acquisition of the Property does not require or involve any construction activities to construct a novel minor accessory structure.

C. <u>None of the Exceptions Listed in CEQA Guidelines § 15300.2 Apply to the Categorical Exemptions for this Project</u>

Categorical exemptions are not absolute and are subject to exceptions. 14 CCR § 15300.2; Admin. Supp. § 4.2.1.6. If a public agency decides that an exemption applies, it must also ensure that an exception to the exemption does not apply to defeat the exemption. *World Business Academy,* supra, 24 Cal.App.5th at 491; *Berkeley Hillside,* 60 Cal.4th at 1103 [an agency may not apply a categorical exemption without considering whether it is foreclosed by an exception]. Although a determination that an activity or project is categorically exempt constitutes an implied finding that none of the exceptions to the cited exemptions exist (see *San Francisco Beautiful v City & County of San Francisco* (2014) 226 Cal.App.4th 1012, 1022), an analysis of why the exceptions do not apply is provided below.

1. *Location Exception Does Not Apply*

The "Location" exception provided in CEQA Guidelines § 15300.2(a) does not apply to the existing facilities exemption because the existing facilities exemption is not within "[c]lasses 3, 4, 5, 6, and 11." 14 CCR § 15300.2(a); Admin. Supp § 4.1.2.6. Additionally, the exception does not apply to the minor alterations to land exemption because the Project site is not in a "particularly sensitive environment" nor located within an environmental resource. Although located near the Ventura River, the Property itself is not immediately adjacent to the Ventura River and is far enough from the river's banks to not be considered or classified as riparian habitat. There is no potential for the acquisition of the Property to create or cause a significant impact to the Ventura River because the use of the Property will remain constant and unchanged. See *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 320-322 ("*CBE*") [where a project involves ongoing operations or a continuation of past activity, the

established levels of a particular use and the physical impacts thereof are considered to be part of the existing environmental baseline].

2. *Cumulative Impact Exception Does Not Apply*

The "Cumulative Impact" exception in CEQA Guidelines § 15300.2(b) does not apply to the Project because there will not be "successive projects of the same type in the same place over time." 14 CCR § 15300.2(b); Admin. Supp. § 4.1.2.6. The "same type" and "same place" language used in the exception restricts the scope of this exception and has been interpreted by courts narrowly and literally. See *North Coast*, supra, 227 Cal.App.4th at 876; *Robinson v. City & County of San Francisco* (2012) 208 Cal.App.4th 950, 958.

3. *The Significant Effect/Unusual Circumstances Exception Does Not Apply*

CEQA Guidelines § 15300.2(c) provides that "[a] categorical exception shall not be used for any activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." 14 CCR § 15300.2(c); Admin. Supp. § 4.1.2.6. This exception applies if the proposed project will have an impact on the physical environment. If there is no change from existing baseline physical conditions, the exception does not apply. *North Coast,* 227 Cal.App.4th at 872; see also *CBE*, supra, 48 Cal.4th at 320-322 [where a project involves ongoing operations or a continuation of past activity, the established levels of a particular use and the physical impacts thereof are considered to be part of the existing environmental baseline]. The acquisition of the Property will not change or alter the District's ongoing operations and the use of the Property will remain the same. Thus, the Project will not result in a significant effect on the environment because there will be no change in the existing baseline physical conditions of the environment. Therefore, this exception does not apply.

4. *The Remaining Exceptions Do Not Apply to the Project*

The other exceptions listed in CEQA Guidelines § 15300.2 do not apply because the Project site is not on or near a scenic highway (§15300.2(d)); is not located on a hazardous waste site (§15300.2(e)); and does not involve or cause an adverse effect to a historical cultural resource (§15300.2(f)). Admin. Supp. § 4.1.2.6.

D. The Common Sense Exemption Applies to this Project

The CEQA Guidelines include a "common sense exemption." 14 CCR § 15061(b)(3); Admin. Supp. § 4.1.2.7. This exemption applies when "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." *Id.* If the common sense exemption applies, "the activity is not subject to CEQA." *Id.* This exemption was adopted to prevent the possibility that an "obviously exempt" type of project not listed in the categorical exemptions "might be required needlessly to comply with the requirements of CEQA." *Myers v. Board of Supervisors* (1976) 58 Cal.App.3d 413, 425. The exemption acts as a catchall provision to ensure that a project not covered by the statutory or categorical exemptions may

nonetheless be found exempt if it fits within the terms of the "common sense exemption." *Muzzy Ranch*, supra, 41 Cal.4th at 380.

"[W]hether a particular activity qualifies for the common sense exemption presents an issue of fact, and the agency invoking the exemption has the burden of demonstrating it applies." *Id.* at 386. Here, the facts of the Project support the use and application of the common sense exemption. The Project is for the acquisition of the Property. The acquisition is necessary for the District to secure permanent access to its WTP. The District has used the Access Road since the mid-1980s and has used the access road in the same manner during this time. The acquisition of the Property will not change the District's use of the Access Road, but merely allows the District to maintain the use indefinitely. Thus, the acquisition will not have a significant effect on the environment because the acquisition of the Property will not change or alter the District's use and will not lead to any change in the Property's physical environment. Therefore, there are sufficient facts to support these findings with certainty that the proposed activity has no potential to cause adverse impacts to the environment. Admin. Supp. § 4.1.2.7.