

November 10, 2020

Via email

Los Osos Community Plan and Final EIR

County of San Luis Obispo
Board of Supervisors
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Re: December 15, 2020 BOS hearing, Item No. 31

Los Osos Community Plan Update and related documents

Honorable Supervisors:

I submit these comments on behalf of Los Osos Sustainability Group (LOSG) in connection with your consideration of the Los Osos Community Plan (LOCP) and the final EIR (FEIR) for the LOCP, the revised County 2020 Growth Management Ordinance (GMO) LOCP, and related documents. As set forth below, and the separately filed comments of the LOSG, I urge you not to approve the LOCP and not to certify the FEIR until and unless the issues raised by LOSG are adequately addressed.

The EIR's analysis of the LOCP's impact on water supplies and the discussion of mitigation measures are deeply flawed and in violation of CEQA.

The EIR fails to adequately discuss and analyze baseline water supply issues and conditions. The EIR's discussion of the buildout population includes a comparison between the LOCP's population projections and the Basin Plan population scenario of 19,850. The EIR notes that the Basin Plan's projections were based on the land use categories in the Estero Area Plan (EAP). (EIR at p. 4.15-9). The EIR goes on to claim that compared to the EAP, "the proposed LOCP envisions substantial decreases in land use designated for residential and non-residential development." (Ibid.) This discussion suggests that in comparison to the EAP, the LOCP will result in meaningful reductions in development capacity, and presumably, in water demand.

The EIR's comparison between the LOCP, the EAP and Basin Plan projections, however, is patently misleading and inaccurate because the EAP does not represent any meaningful representation of population growth potential in Los Osos. Likewise, the LOCP and the EIR fail to adequately describe the current population in Los Osos or explain how much exempt housing including the single family and multi-family homes



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will be allowed¹.

As a 2010 Coastal Commission staff report explains:

The County has estimated buildout by 2020. However, potential buildout under the LCP is significantly constrained, including due to public service constraints, habitat, and rural/agricultural protection. Thus, it is not clear at the current time that buildout of that degree is possible, nor whether it could be found consistent with the LCP. The County has committed to rectifying buildout issues through an LCP amendment following the LOWWP. Specifically the proposed project includes condition 86, which states: *(Consistent with condition of approval #34 from CDP A-3-SLO-03-113). To prevent wastewater treatment system from inducing growth that cannot be safely sustained by available water supplies, the sewer authority is prohibited from providing service to existing undeveloped parcels within the service area, unless and until the Estero Area Plan is amended to incorporate a sustainable buildout target that indicates that there is water available to support such development without impacts to wetlands and habitats.*

Condition of Approval No. 6 specifically provides:

Wastewater Service to Undeveloped Properties. Wastewater service to undeveloped properties within the service area shall be prohibited unless and until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits, and any appropriate mechanisms to stay within such limits, based on conclusive evidence indicating that adequate water is available to support development of such properties without adverse impacts to ground and surface waters, including wetlands and all related habitats.

Accordingly, the EAP does not represent any meaningful projection of potential population and development growth in the project area.

Similarly, the EIR's reference to the Basin Plan's population projections is misleading and uninformative because the Basin Plan itself, rather uncritically, grafts population projections from the EAP, which the EIR then presents as independent population growth estimate. The Basin Plan's population growth projection is essentially meaningless, yet the EIR presents this population growth projection as a meaningful estimate of a potential population growth scenario if the LOCP were not adopted.

The July Staff Report to the Planning Commission perpetuated the same misunderstanding that the proposed LOCP somehow represents a compromise because it would actually reduce the growth potential as compared to the existing plan. The Staff Report stated: "One of the most significant

¹ / This issue is more fully explained in The Los Osos Sustainability Group (LOSG) comments, which are hereby incorporated herein by this reference.

changes in the draft community plan, compared to the existing plan, is a reduction in buildout. Buildout within the community would result in a potential population of 18,000, which is based on a potential capacity of 8,182 dwelling units. This is a 30% increase over the existing population and number of households currently in the planning area. The current buildout for Los Osos is 28,688.” While this assessment, strictly speaking, may be accurate, it is patently misleading because the current potential for growth is zero, because the CDP Condition 6 prohibits any new sewer connections until the area plan is revised to accurately reflect the growth that actually possible give the significant water supply constraints. A staff report that glosses over this important fact is therefore grossly misleading.

To meet CEQA’s informational purposes, the EIR must, at a minimum, explain that pursuant to the CDP for the LOWWP, no water-dependent future growth of any kind or magnitude would be possible in Los Osos until and unless the County has proposed a revised LOCP that can conclusively demonstrate the Los Osos groundwater basin is capable of accommodating any extra demand on the water supply. The EIR’s failure to discuss the strict development limits imposed by the CDP based on concerns about the availability of water supplies undermines the EIR’s fundamental informational purpose and constitutes prejudicial error. The EIR must be revised accordingly.

The EIR’s analysis of potential impacts to water supplies is flawed.

The EIR’s analysis of water supplies is not based on adequate or appropriate thresholds of significance

The EIR’s thresholds of significance for analysis of impacts on water supplies are not appropriate and are not supported by substantial evidence. The EIR uses boilerplate CEQA Appendix G standards of significance based on consideration of whether the LOCP could result in a net deficit based on the model which is subject to substantial uncertainty. This threshold may be appropriate in communities where the main question is groundwater quantity is the main issue. In Los Osos, however, the quantity of groundwater in itself is not the main factor; while overdraft can have a direct adverse effect on the groundwater quality by exacerbating the critical problem of seawater intrusion, the main problem is seawater intrusion. Even if the additional growth allowed by the LOCP would not push the basin into a state of “overdraft,” according to the present Basin model, added development is likely to cause further seawater intrusion which is an ongoing problem..

Further, the EIR’s definition of “sustainable yield” allows further seawater intrusion (Basin Plan, pp. 110, 111). Evidence (low water levels and advancing seawater intrusion in Zone E) shows that even the recommended Yield Metric Target of 80 (80% of sustainable yield) may not avoid seawater intrusion. There can be no debate that saltwater intrusion must be considered a significant impact, which unfortunately is not addressed by this threshold of significance.

The EIR’s choice of a threshold of significance therefore was inappropriate and misleading and not supported by substantial evidence. An agency’s choice of threshold of significance must be supported by substantial evidence. (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059,1068.) “[T]he fact that a particular environmental effect meets a particular threshold

cannot be used as an automatic determinant that the effect is or is not significant.” Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal.App.4th 1099, 1109. Moreover, “a threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant.” (*Id.*)

In addition to considering the potential for causing overdraft, the EIR must be revised to include analysis of whether the LOCP could contribute to seawater intrusion and other adverse effects on the water supply, particularly on a cumulative basis. That is, the EIR must consider whether the additional increment of development, and the corresponding increase in demand for water, could make a significant contribution to a significant cumulative impact on seawater intrusion and the water supply.

An appropriate threshold of significance must also take into other environmental challenges to the viability of the basin, including the current nitrate contamination problem that is identified in the comments of S&T Mutual in the lower aquifer below the Zone D wetland the high salt accumulation in the Basin due to too little outflow if pumping is above about 74 % of yield as per the 2014 Yates review, as well as potential impacts on water dependent sensitive habitats.

The EIR (and the LOCP) compounds this problem by linking future development not to empirical data that conclusively demonstrates saltwater intrusion, nitrate contamination, and other potential adverse impacts are adequately addressed. Rather, the EIR explains that development under the LOCP can begin as soon as the mitigation programs proposed by the Basin Plan have been implemented. “The LOCP requires that Programs M+E+U+A+P and at least one of B, C, or S be successfully completed prior to development of land uses that use water from the Basin (Standard D1).” (FEIR at 4.15-12). Accordingly, while the EIR and LOCP link future development with the implementation of the Basin Plan Programs (i.e. mitigation measures), it does not ensure that these measures are effective before development is allowed.

The EIR’s discussion of the Project’s potential impacts, therefore, is defective and fails as an informational document because the EIR does not include any discussion of the likelihood that the proposed Basin Plan (e.g., seawater intrusion mitigation measures) will be effective, or on what kind of timeline.

The EIR does not include any adequate discussion of proposed mitigation measures

One of the FEIR’s fundamental flaws is its uncritical assumption that implementation of the Basin Plan Programs will inevitably and invariably result in adequate mitigation of saltwater intrusion, nitrate contamination, and other potential adverse effects of the LOCP on the same timeline predicted by the operative model. The introductory paragraph to FEIR Chapter 4.15, Water Supply, admits that the LOCP’s potential impact to water supplies “was evaluated by comparing the proposed project to the findings and recommendations of the Updated Los Osos Groundwater Basin Plan.” The EIR does not include any independent analysis of the adequacy of the Basin Plan programs and

recommendations, which the EIR uncritically accepts and adopted as mitigation measures which it concludes would reduce LOCP's impacts on water supplies to a less than significant level as reflected in the FEIR's conclusion that "implementation of the recommended combination of programs is anticipated to achieve a sustainable basin." (FEIR at 4.15-4.)

The EIR is legally inadequate because it does not explain why it "anticipates" the implementation of the Basin Plan would result in a sustainable Basin. Put another way, the FEIR does not include a discussion of the adequacy and feasibility of the proposed mitigation measures. Napa Citizens for Honest Gov't v. Napa County Bd. Of Supervisors ("Napa") (2001) 91 Cal.App.4th 342, 360 ("the EIR must propose and describe mitigation measures that will minimize the significant environmental effects that the EIR has identified. The EIR must contain an adequate analysis of the potential efficacy and feasibility of the proposed mitigation measures to support a conclusion that implementation of the mitigation measures would effectively mitigate the project's potentially significant impacts. Sierra Club v. County of San Diego (2014) 231 Cal.App.4th 1152, 1168.

The EIR improperly tiers on the Basin Plan

The EIR's approach essentially amounts to tiering on the Basin Plan and adopting its analysis and findings. CEQA allows an agency to "tier" an EIR on the information and analysis contained in a previously prepared EIR. Pub. Res. Code §21068.5, 21093, CEQA Guideline §15152. Tiering is used to avoid unnecessary duplication when the issue has been adequately addressed in a previous EIR. When an EIR has been certified for a program or plan, the lead agency must use a later projects environmental impacts using a tiered EIR under some circumstances. Pub. Res. Code §21094(a_

The EIR's reliance on the Basin Plan and deferral to the Basin Plan's conclusion that the proposed programs would adequately mitigate seawater intrusion is misplaced because the Basin Plan was never reviewed pursuant to an EIR. CEQA doe not authorize an EIR to tier on a basin plan or similar plan or program unless the plan's impacts and proposed mitigation measures were adequately vetted by preparing and certifying an EIR. The FEIR's

Moreover, California cases have long held that lead agencies may not rely on "paper water" to approve development. Paper water refers to water whose availability is speculative and not guaranteed. Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal. 4th 412, 432. Here, the surplus water supplies that the County hopes would become available as a result of the implementation of the Basin Plan Programs is highly speculative because its availability is dependent entirely on a model whose reliability has not been established. There is no adequate (conclusive or otherwise) evidence or analysis to justify the EIR's blind reliance on the efficacy of the Basin Plan Programs or the predicted timelines. The most recent Adaptive Management Technical Memorandum (TM) convincingly demonstrates this point. With respect to continued treatment of the persistent nitrate contamination in the upper aquifer, the TM explains that

Based on the nitrate trends currently identified in Lower Aquifer groundwater, provisions for future nitrate removal at LA8, LA9, and 17E11 and/or blending with low-nitrate water from other wells through an interconnected community water system are recommended. To the extent that these provisions may not be included in the existing infrastructure programs, modifications to the LOBP would be appropriate. Long-term NO₃-N concentrations in Lower Aquifer groundwater are expected to equilibrate below 5 mg/L (less than half the drinking water standard), but will peak at higher concentrations in the above production wells before declining.

This paragraph demonstrates that the Basin Plan must be modified because the existing programs (i.e. mitigation measures) for addressing the nitrate contamination are inadequate and must be supplemented with new and expanded measures to address the nitrate trends identified in the basin. This statement also makes clear that this trend had not been previously predicted. Moreover, the model is clearly not capable of predicting a reliable timeline for when the nitrate concentrations can be expected to decline to safe levels and that the nitrate levels will continue to peak until they would decline presumably as a result of the operation of the proposed mitigation measures.

Similarly, the TM notes that “the sustainability of the 2017 infrastructure and pumping distribution depends in large part on discharges to the Broderson leachfield, which over time will create a groundwater mound to push water through the regional aquitard and into the Lower Aquifer.” (TM at p. 9.) The TM also notes, however, the “trend of increasing chloride at LA11 reflects the current condition” which shows the discharge of treated wastewater at the Borderson site has not so far reached the point of reducing saltwater intrusion. (Ibid.) The TM warned, however, that the contours of the saltwater intrusion front can vary significantly from year to year depending on a variety of factors. “Continued advance of seawater in Zone E toward LA11 is a reminder that the basin is still recovering from the effects of decades of overdraft, and the groundwater mound beneath the Broderson site is still years away from becoming fully functional as a means of mitigating seawater intrusion in the Lower Aquifer.”

The EIR does not adequately discuss the uncertainty inherent in the model’s prediction concerning the efficacy of the proposed mitigation measures. Likewise, the EIR fails to discuss the uncertain nature of the Basin Plan’s predicted timelines for the mitigation programs, attempting instead to describe these timelines as approaching near mathematical certainty. While the EIR admits that “the Basin Plan contains a level of uncertainty” (FEIR at 4.15-6), it does not include any discussion of this uncertainty as would be required to make informed decisions about the potential impacts and mitigations of the LOCP.

LOCP Standards include D(2)(b), which provides that if the data indicate that the completed programs have not been effective in reducing groundwater demand, increasing the perennial yield or facilitating seawater retreat as predicted in the Basin Plan, then the development of new residential units shall be limited accordingly.” (FEIR 4.15-11.) This Standard shows that the LOCP itself admits a level uncertainty, which the FEIR unfortunately fails to discuss. If the level of uncertainty, as the

Sustainability Group argues, is high, then the LOCP should not be considered, let alone approved until the programs are fully implemented and proven to be effective. If, on the other hand, the County contends the level of uncertainty is low, then where is the evidence and analysis that supports this contention.

The FEIR and the LOCP attempt to address the model's uncertainty by pointing out that the rate of allowable development under the LOCP would be subject to review pursuant to the GMO. This review process, however, does not amount to adequate mitigation against potential impacts to the basin because under CEQA, the County must assume the additional growth under the LOCP will be fully realized. More than a decade ago, the California Supreme Court in [Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova \(2007\) 40 Cal. 4th 412, 444](#), as modified (Apr. 18, 2007) confirmed that “[w]hile it might be argued that not building a portion of the project is the ultimate mitigation, it must be borne in mind that the EIR must address the project and assumes the project will be built.”

Sincerely,

Babak Naficy

Babak Naficy, Counsel for LOSG

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