



**MILLER STARR
REGALIA**

ITEM 14(a)
Miller Starr Regalia

1331 N. California Blvd. T 925 935 9400
Fifth Floor F 925 933 4126
Walnut Creek, CA 94596 www.mslegal.com

Anthony M. Leones
anthony.leones@mslegal.com
925 941 3261

November 8, 2013

VIA U.S. MAIL, AND E-MAIL (MARK.DELAPLAINE@COASTAL.CA.GOV)

California Coastal Commission
Mark Delaplaine
Manager, Energy, Ocean Resources
and Federal Consistency Division
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219
Mark.Delaplaine@coastal.ca.gov
(415) 904-5289

Re: Public Comment on Item 14(a) of California Coastal Commission
November 14, 2013 Agenda

Dear Mr. Delaplaine:

Miller Starr Regalia represents CBS Outdoor Inc. ("CBS") in connection with its outdoor advertising operations in Humboldt County, and wishes to alert the California Coastal Commission (the "Commission") to certain illegalities that are present in the draft revised findings and conditions of approval that staff have proposed with respect to the Eureka - Arcata Route 101 Corridor Improvement Project ("Project"), proposed by the California Department of Transportation's ("Caltrans") between Arcata and Eureka. Specifically, there exists in the approval documents a finding and a condition of approval that would require the unqualified removal of billboards. The illegalities that inhere in these proposed actions are of a constitutional size, as explained in this letter. Moreover, their adoption under the current process would result in violations of procedural due process.

Lack of Notice. As a threshold matter, CBS objects to the Commission's failure to provide it with adequate notice of the condition of Project approval that would require the removal of billboards in Humboldt County, a protected property interest maintained by CBS. CBS received no letter notice regarding the Commission's action, which is required by the California Government Code and constitutional law. CBS only learned of this action on Thursday, November 7, 2013, which is only seven days prior to the Commission's consideration of the revised findings and conditions of approval, and months after the Commission first considered the Project.

Findings and Conditions of Approval to which CBS objects. We have reviewed the Commission's document entitled "Revised Findings on Consistency Certification," available at <http://documents.coastal.ca.gov/reports/2013/11/Th14a-11-2013.pdf>, and are concerned that certain findings and conditions regarding the Project will constitute an illegal taking under the federal and state constitutions.

As you are aware, Caltrans has proposed to improve Route 101 by removing uncontrolled left turn lanes and replacing them, in part, with an interchange at the Indianola Cutoff. It appears that the Commission believes that this raised interchange will have visual impacts, and Commission staff has proposed the following finding:

The Commission finds that the visual impacts from the proposed Indianola Interchange, with its raised elevation and 240,000 cu. yds. of grading, could be mitigated through the removal of billboards and other overhead infrastructure along the corridor and widening of the view towards the bay through the interchange, and thus that if modified in accordance with Condition 2 (Visual Impact Mitigation), the project would be consistent with the scenic view protection policy (Section 30251) of the Coastal Act.

(Revised Findings on Consistency Certification, p. 3.) A corresponding condition of approval, as proposed by staff, reads as follows:

2. Visual Impact Mitigation. Prior to or concurrent with its submittal to the Commission of a coastal development permit application for the project at issue, Caltrans will develop and submit a plan to the satisfaction of the Executive Director to provide mitigation for the visual impacts of the project by removing, to the maximum extent feasible, all billboards along the corridor, as well as other overhead infrastructure (such as power poles and power lines), and by steepening the inside slopes proposed for the Indianola interchange to maximize the view towards the bay from Indianola Cutoff. Caltrans will implement the approved plan.

(Revised Findings on Consistency Certification, p. 7.)

In summary, it appears that the Commission is formally considering approval of a condition that potentially would remove all billboards along the 10-mile stretch of Route 101 between Arcata and Eureka, where this removal purportedly serves as mitigation for visual impacts associated with the proposed Indianola Interchange, the footprint of which appears to be less than 1 mile (if not less than ½ mile). The only qualification to this mitigation measure is that the removal action be carried out "to the maximum extent feasible," where such feasibility is not defined.

Requiring the removal of billboards, without limitations, violates constitutional and statutory protections against illegal takings. The removal of billboards in this context would constitute an illegal taking, and neither the Commission nor Caltrans has the authority to implement the proposed condition.

Per California Code of Civil Procedure section 1240.030, which embodies important policies that inhere in the state and federal constitutions, the power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

- (a) The public interest and necessity require the project.
- (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
- (c) The property sought to be acquired is necessary for the project.

Here, the unfettered condemnation of billboards is not “necessary” for the Caltrans’ Project. Again, the removal of billboards is presented as a mitigation measure for visual impacts associated with the proposed Indianola Interchange, an improvement that, at most, would occupy a footprint of a mile or half-mile. Moreover, it is important to recognize that the mitigation is meant to address the possibility that the interchange may obstruct views of Arcata Bay, meaning only those portions of the interchange that exceed certain grades will in fact cause a visual impact. The documentation provided by the Commission with respect to Item 14(a) fail to identify, with any specificity, the exact extent of the impact. .

Understanding the scope of any visual impact would occupy a stretch of Route 101 that does not exceed 1 mile (and, in fact, likely occupies much less distance), it is inconceivable why removal of billboards along the entire Project corridor — a length of as much as 10 miles — is necessary. Moreover, the Commission’s action would be further limited by various practical considerations. For instance, certainly there exist billboards that do not obstruct views of the bay, such as signs located on the eastern side of Route 101, or signs located on the western side of Route 101 that do not obstruct views due to intervening vegetation or topography. Removal of such signs has no mitigation value whatsoever. All that aside, the Commission has not evinced that billboard removal is the *only* way to mitigate impacts, thereby making this action necessary. Alternative beautification measures must be considered and ruled out.

This calculus of necessity is reflected in another important and analogous constitutional test — the test for whether an action qualifies as an unlawful exaction. It is surprising that Caltrans or another party has not challenged the proposed condition as an unlawful exaction, given the burdens and liabilities that implementation of this condition would create.

Requiring the removal of billboards qualifies as an ad hoc, possessory exaction, and evokes what is known as the *Nollan/Dolan* test. This test derives from two landmark U.S. Supreme Court decisions, and essentially requires:

- (a) That there be an “essential nexus” present, meaning the exaction must substantially advance a legitimate state interest (*Nollan v. California Coastal Commission*, 483 U.S. 825, 837-39 (1987)); and
- (b) There must be a “rough proportionality” between the magnitude of the exaction and the nature and extent of the project impacts that the exaction is intended to address (*Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994)).

The second part of the test is most relevant to the inquiry here. In adopting the rough proportionality test, the Court in *Dolan* said “[n]o precise mathematical calculation is required, but the [public agency] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” (*Dolan*, 512 U.S. at 391.)¹ Thus, not only must exactions be tied to project impacts in a topical way, but a public agency must demonstrate the severity of the exaction is tethered to the severity of the project impact, and quantify the analysis if possible.

As explained above, the Commission cannot justify the removal of billboards along a 10-mile corridor where it means to offset the visual impacts of a traffic improvement that, at most, occupies a mile or half-mile of space.

In summary, it is inconceivable why the unfettered removal of billboards operates as appropriate mitigation for an impact that is discrete in its geographic reach. Accordingly, the Commission’s approval of the subject condition of approval would constitute an illegal taking, and violate other constitutional protections.

Limiting the term of an existing display’s operating life would violate the Outdoor Advertising Act. Even if the Commission and/or Caltrans had the authority to remove billboards in this context, the wording of the condition would result in violations of the Outdoor Advertising Act. (Gov. Code § 5200 et seq.)

CBS operates as many as 90 outdoor advertising displays in Humboldt County, and all of these signs fall squarely within the jurisdiction of the Outdoor Advertising Act.²

¹ In *Dolan*, a city required a developer to dedicate a 15-foot strip of land adjacent to a greenway for a public pedestrian and bicycle pathway, finding in part the project would generate increased traffic, and that use of the pedestrian/bicycle pathway would offset some of the traffic demand and lessen the increase in traffic congestion. With respect to the pedestrian/bicycle pathway, the Court did not dispute the project’s traffic impacts, but it emphasized that “the city must make some effort to quantify its findings in support of the dedication ... beyond the conclusory statement that it could offset some of the traffic demand generated.” (*Id.* at 395-96.)

² While many provisions of the Outdoor Advertising Act apply only to signs that sit within 660 feet of, or otherwise near, a qualifying highway, the state law and constitutional principles that the current proposal would violate — i.e., section 5412

Insofar as the Commission's condition of approval mandates the removal of lawful signs, and does not contemplate the payment of just compensation to CBS, it would violate the Act.

In relevant part, the Act provides that "no advertising display which was lawfully erected³ anywhere within this state *shall be compelled to be removed ... whether or not removal or limitation is pursuant to or because of this chapter or any other law, ordinance, or regulation of any government entity, without payment of just compensation, as defined in the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure*" (Gov. Code § 5412.) The Commission's condition of approval fails to contemplate the payment of just compensation, and therefore is inconsistent with section 5412 of the Outdoor Advertising Act. It also violates the state and federal constitutional protections against illegal takings upon which section 5412 is founded.

* * *

In summary, the subject condition of approval constitutes an illegal governmental taking of CBS's property, as these illegalities are defined in the federal constitution, the state constitution, the Code of Civil Procedure, and the Outdoor Advertising Act, and the decisions that interpret these frameworks. Moreover, by failing to properly notice sign owners of the Commission's actions in a timely manner, the Commission has violated constitutional and statutory protections that guarantee the citizenry due process. Accordingly, we respectfully request that the Commission rescind any actions it previously has taken with regard to the removal of billboards, and modify the current proposal to limit the scope of such removal in a manner that satisfies all applicable law. To satisfy due process requirements, the Commission should hold another public hearing before considering any further revised findings or conditions of approval.

Please note, CBS reserves its right to submit further comment on any environmental review that the Commission or Caltrans has undertaken or must undertake pursuant to the California Environmental Quality Act ("CEQA;" Pub. Res. Code § 21000 et seq) or federal law, especially with regard to any last-minute or unnoticed changes to the Project and/or its mitigation measures (which would appear to give rise to unstudied traffic, air quality, and noise impacts from demolition work, both individually and cumulatively). CBS also reserves its right to comment on any plan that Caltrans must submit to the Commission under the terms of the currently proposed condition of approval regarding billboard removal, and hereby requests

of the Outdoor Advertising Act, as discussed below — apply to signs located "anywhere" within the State of California.

³ "Lawfully erected" is a term of art, and refers to displays that were erected in compliance with laws and ordinances in effect at the time of their construction. (Bus. & Prof. § 5216.1.) There exists a rebuttable presumption that older signs are lawfully erected. (*Id.*)

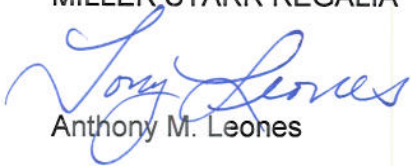
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that both agencies provide CBS with proper, written notice when Caltrans' plan is complete and available for the Commission's review.

We thank you for your attention to these important matters, and remain available to the Commission and to staff for any questions.

Very truly yours,

MILLER STARR REGALIA

A handwritten signature in blue ink, appearing to read "Tony Leones", is written over the typed name.

Anthony M. Leones

AML/SRM:kli

cc: Collin Smith, Ryan Brooks, Chris Steinbacher, CBS Outdoor