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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOYCE YAMAGIWA, Trustee of The Trust Created Under Trust Agreement dated January 30, 1980, by Charles J. Keenan III and Anne Marie Keenan, for the benefit of Charles J. Keenan IV, as to an undivided 50% interest, and Trustee of The Trust Created Under Trust Agreement dated January 30, 1980, by Charles J. Keenan III and Anne Marie Keenan for the benefit of Ann Marie Keenan, as to an undivided 50% interest,

Plaintiff,

vs.

CITY OF HALF MOON BAY; COASTSIDE COUNTY WATER DISTRICT; and DOES 1-50,

Defendants.

Case No. C05-04149 VRW

(United States District Chief Judge Vaughn R. Walker)

YAMAGIWA'S OPPOSITION TO CITY'S MOTION FOR NEW FINDINGS AND TO AMEND JUDGMENT

Date: February 21, 2008
Time: 2:30 p.m.
Place: Courtroom 6 (17th Floor)

Trial Date: June 6, 2007

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INTRODUCTION

The City seeks to re-try the case by its motion for new findings and to amend the judgment (Doc. #221). For the most part, the City simply regurgitates the same unsuccessful arguments it made at trial. It tries to spin the evidence in its favor, as if repetition creates merit.

The Court has heard all of this before. The Court's 167-page Findings of Fact and Conclusions of Law (Doc. #211) meticulously reviewed the evidence — derived from the testimony of 22 witnesses and over 300 exhibits — and decided the case against the City. The City has succeeded only in creating more work for itself, Yamagiwa, and the Court. The City has *not* succeeded in demonstrating "clear error" in the Court's decision, so its motion should be denied.[1]

THE LEGAL HURDLE IS, JUSTIFIABLY, EXTREMELY HIGH

The City seeks to amend the Court's findings, under Fed. R. Civ. Pro. 52(b), and to alter or amend the Judgment, under Fed. R. Civ. Pro. 59(e).

Losing parties nearly always think they should have won. If they could simply file motions to revisit issues already submitted and decided, or seek new findings not previously proposed, every Court's workload would be instantly doubled. Recognizing that truism, the legal standard for such motions is exceedingly strict:

> "A motion for reconsideration under Rule 59(e) 'should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law.' " (*McDowell v. Calderon*, 197 F. 3d 1253, 1255 [9th Cir. 1999] [emphasis by the Court].)

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[1] Yamagiwa's motion for litigation expenses (Doc. #219) is set for hearing on April 24, 2008. Under the law explained in that motion, the City must not only pay its own attorneys' fees for bringing the present motion, but also Yamagiwa's attorneys' fees for opposing it.

A Rule 59(e) motion is properly denied when it simply re-hashes the same arguments previously made and rejected. (*Backlund v. Barnhart*, 778 F. 2d 1386, 1388 [9th Cir. 1985]; *Fuller v. M.G. Jewelry*, 950 F. 2d 1437, 1442 [9th Cir. 1991].)

By the same token, an extraordinarily good reason needs to be offered to support *new* arguments that could have been, but were not, made before judgment was entered.

> "Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.' [citation] . . . . A Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." (*Kona Enterprises, Inc. v. Estate of Bishop*, 229 F. 3d 877, 890 [9th Cir. 2000] [emphasis by the Court].)

See also, *Zimmerman v. City of Oakland*, 255 F. 3d 734, 740 (9th Cir. 2001) ("A district court does not abuse its discretion when it disregards legal arguments made for the first time on a motion to amend."); *Fay Corporation v. BAT Holdings I, Inc.*, 651 F. Supp. 307, 309 (W.D. Wash. 1987), *aff'd*, 896 F. 2d 1227 (9th Cir. 1990) ("Moreover, 'after thoughts' or 'shifting of ground' are not an appropriate basis for reconsideration."); *Costello v. United States*, 765 F. Supp. 1003, 1009 (C.D. Cal. 1991) ("[C]ourts avoid considering Rule 59(e) motions where the grounds for amendment are restricted either to repetitive contentions of matters which were before the court on its prior consideration or contentions which might have been raised prior to the challenged judgment.").

The standard is equally strict for a Rule 52(b) motion to amend the findings. "A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a particular finding of fact or a conclusion of law." (9A Wright & Miller, § 2582 [West 1995].)

The purpose of findings is to aid the appellate court's understanding of the basis of the trial court's decision. "This purpose is achieved if the district court's findings

are sufficient to indicate the factual basis for its ultimate conclusions." (*Vance v. American Hawaii Cruises, Inc.*, 789 F. 2d 790, 792 [9th Cir. 1986].) Here, the bases for the Court's decision are spelled out in extensive detail in the Findings of Fact and Conclusions of Law. While the City repeatedly asks for a finding of fact on certain isolated evidence it cites, the district court is not required to make findings on all facts presented. (*Rayonier, Inc. v. Polson*, 400 F. 2d 909, 923 [9th Cir. 1968].) Where a complete understanding of the issues may be had without separate findings, such findings need not be made. (*Hersch and Co. v. C and W Manhattan Associates*, 700 F. 2d 476, 479 [9th Cir. 1983]; *Weyerhaeuser Company v. Atropos Island*, 777 F. 2d 1344, 1352 [9th Cir. 1986].)

The strict standards applicable to motions under Rules 59(e) and 52(b) make clear that such motions are designed as a remedy in those unusual cases where the Court somehow misapprehended the evidence. Here, the Court carefully reviewed the evidence, believed some and disbelieved other, and simply decided the case against the City. Clearly, this is not one of those cases where relief under Rules 59(e) or 52(b) is warranted.

THE CITY FAILS TO SHOW THAT REJECTION OF ITS STATUTE OF LIMITATIONS DEFENSE WAS CLEARLY ERRONEOUS

The City previously moved for summary judgment on the grounds that Yamagiwa's claim was barred by the statute of limitations. (Doc. #47, pp. 20-25.) The issue was extensively briefed by Yamagiwa (Doc. #80, pp. 15-26), and the Court thoroughly discussed and rejected the City's limitations defense in its ruling (Doc. #101, pp. 15-25). The City renewed the same defense at trial (Doc. #202, pp. 10-12), and it was rejected again, based on the same law. (Doc. #211, ¶¶ 347-352, at pp. 148-150.) There is nothing in the City's motion to justify a departure from the Court's previous rulings.[2]

[2] The City's attempted revival of its regulatory takings argument was likewise thoroughly briefed and rejected earlier. (Doc. #47, pp. 15-20; Doc., #80, pp. 9-15; Doc. #101, pp. 17-21.)

1 The City Miscasts Yamagiwa's Claim

2 The City's motion deliberately misconstrues Yamagiwa's case, and from that
3 take-off point argues that the suit was tardy. For example, the City pretends that
4 Yamagiwa sued for "unwanted surface water run-off" on her property. (Mtn., at p. 5:11.)
5 Not so. Yamagiwa sued for a physical taking, based on the City-caused wetlands on
6 Beachwood.

7 Properly defining the taking is, naturally, the key to properly analyzing the
8 statute of limitations defense. For example, in *Cooper v. United States*, 827 F. 2d 762 (Fed.
9 Cir. 1987), construction caused blockage on a river adjacent to a farm, flooding it in 1979.
10 The floodwater remained on approximately 200 acres of the farm's timberland for long
11 periods of time, stressing the trees, and they gradually began to die. Dead trees covered
12 about 1% of the total acreage in 1979, 10% in 1980, and 38% in 1984. Cooper acquired the
13 farm in 1982 and sued for a physical taking, based on the dead trees, in 1984. (*Cooper*,
14 827 F. 2d at 762-763.) The trial court found that the government had taken a flowage
15 easement in 1979, before Cooper owned the property, and ruled he was not entitled to
16 compensation.

17 The Federal Circuit reversed, because the trial court had not properly focused
18 on the taking that was alleged by Cooper — the destruction of timber:

19 > "We think that, *although the government may have taken a*
20 > *flowage easement, the plaintiff does not seek compensation for it*.
> Therefore, this case is not controlled by the cases cited by the
21 > trial court dealing with flowage easements." (*Cooper*, 827
> F. 2d at 763, emphasis added.)

22

23 The Court then applied the stabilization approach announced in *United States v.*
24 *Dickinson*, 331 U.S. 745 (1947) to Cooper's claim for compensation for the destruction of
25 the trees. "Although the operative force, flood water, was the same in both cases, it
26 operates differently, and at different times, to cause a taking of land by inundation, or a
27 taking of timber by suffocation." (*Cooper*, 827 F. 2d at 764.)

28

Here, the Court properly applied *Dickinson*'s stabilization approach *to the taking alleged by Yamagiwa*. (Doc. #211, ¶¶ 349-352, at pp. 148-150.) The City asks the Court to make the same mistake that the government urged in *Cooper* — focusing on a taking *other* than the one pursued by the plaintiff. Yamagiwa sued for damages due to the City-caused wetlands on Beachwood. There is no evidence that such wetlands existed on Beachwood — and certainly, no evidence that such wetlands had *stabilized* — before 2000. Yamagiwa, in fact, vigorously contested the presence of such wetlands on Beachwood even in 2000; but, through persistent litigation, the City was able to prove otherwise when the Court of Appeal reversed the trial court, at the City's behest, in 2005. (Ex 445.)

The City Did Not Carry Its Burden

The City, of course, bore the burden of proving its statute of limitations defense. (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.*, 39 Cal. 3d 57, 67 n. 8 [1985].) What did the *evidence* show about the presence of City-caused wetlands on Beachwood? First, the City approved the Vesting Tentative Map for the 83-home subdivision in July 1990. The City later found that *new wetlands* had developed on Beachwood by 2000 that "*were not known and could not have been known with the exercise of reasonable diligence*" in 1990. (Ex 179, at 9283; Doc. #211, ¶ 139, at p. 57.) If the new wetlands "could not have been known with the exercise of reasonable diligence" in 1990, when *could* they have been known?

Instead of answering this question by providing evidence about *wetlands*, the City seeks to re-cast and distort the case that Yamagiwa tried. Thus, the City prefers to discuss "unwanted surface water run-off" on Beachwood (Mtn., at p. 5:11); "impounding of water" (Mtn., at p. 6:6); " 'standing water' " (Mtn., at p. 7:7); "ponding" (Mtn., at p. 8:4); "the presence of wetlands vegetation" (Mtn., at p. 9:11); and "soil saturation" (Mtn., at p. 15:2). None of this is enough to establish the presence of *wetlands*. Not all standing water or saturated soil makes a wetland; the soil must be saturated within the upper one

1 foot for at least 18 consecutive days in more than 50% of the years of record. (Doc. #211,
2 ¶ 143, at p. 59.) Not all wet soils are hydric soils; particular color patterns and mottling
3 must be found by a field investigation. (Doc. #211, ¶ 144, at p. 59.) And not all
4 hydrophytic vegetation makes a wetland; a particular degree of wetness affinity must
5 *predominate* in a sample area approximately 10 feet in diameter. (Doc. #211, ¶ 145, at
6 p. 60.) *Nowhere* does the City point to evidence that Beachwood's post-1990 *wetlands*
7 were appreciable to a reasonable man outside the limitations period.[3]

8 What the *evidence* showed was the following: (1) in 1994, when the City
9 placed the $962,987.76 lien on Beachwood to pay for expansion of the sewage treatment
10 plant, it *did not* reduce the lien based on Beachwood being entirely or partially
11 undevelopable — it calculated the lien based on development of 83 homes on
12 Beachwood (Doc. #211, ¶ 201, at p. 86); (2) in 1996, when the City approved revised
13 assessments for the sewer treatment plant expansion, it once again did not reduce the
14 lien based on Beachwood being entirely or partially undevelopable (Doc. #211, ¶ 202, at
15 p. 87); (3) in March 1999, the City's Planning Commission found there was insufficient
16 information to conclude whether or not there were new wetlands on Beachwood (Doc.
17 #211, ¶ 132, at p. 54.) If the City's own Planning Commission couldn't decide whether
18 there were new wetlands on Beachwood in March 1999 — after hiring *two* experts to
19 prepare preliminary reports (Gideon's January 13, 1999 report [Ex 99] and Huffman's
20 March 11, 1999 report [Ex 91]) — how can Yamagiwa be reasonably charged with such
21 knowledge more than three years before she sued in May 2000?

22 The City tries to argue that the wetlands did not physically damage
23 Beachwood, and says there is no case law so holding. (Mtn., at p. 3:22 – 4:2.) In *Bethel*
24 *Investment Company v. City of Hampton*, 636 S.E. 2d 466 (Va. 2006), the Virginia Supreme
25 Court dealt with the statute of limitations in a case similar to this one. Bethel owned
26 six parcels zoned for residential development. In 1992, Bethel's wetlands consultant

27 [3] The City notes that the April 1990 Harding Lawson Report was *not* admitted into evidence, but
28 then attempts to draw some conclusions from it anyway. (Mtn., at p. 8:7-20.) This is patently improper, as the Report is not evidence. (*See, e.g.*, 9th Cir. Model Jury Instruction No. 3.2.)

found that 90% of its land was developable uplands, not wetlands. (*Bethel*, 636 S.E. 2d at 468.)

The City wanted to construct an industrial and commercial park on land it owned, but the development required the City to fill some wetlands. The City received permission from the Army Corps to fill the wetlands, so long as it offset the lost wetlands by creating new wetlands elsewhere. "Elsewhere" turned out to be on a City-owned parcel adjacent to Bethel's land. Bethel knew of the planned project and filed a written protest with the Army Corps in 1996, but the City's project went forward anyway. In 1998, the City constructed check dams in a stream and berms on its lands, in an effort to create the replacement wetlands. Its project was evidently a rousing success. In December 2004, Bethel sued the City for $10 million, alleging that the City's project had raised the water table on Bethel's adjacent land, converting 100 acres of it from developable uplands to undevelopable wetlands. (*Bethel*, 636 S.E. 2d at 468.)

The City claimed that the 5-year statute of limitations had run on Bethel's claim, because its project was built in 1998 and a witness had observed water backed up in a drainage ditch on Bethel's property in March 1999.

> "Bethel contended that its causes of action accrued when its previously developable uplands were converted into economically undevelopable wetlands in 2004 by reason of the City's actions, and not before." (*Bethel*, 636 S.E. 2d at 468.)

The trial court sided with the City, finding Bethel's complaint was barred by the statute of limitations. But the Virginia Supreme Court reversed. It held that accrual was a question of fact on which the City bore the burden of proof. (*Bethel*, 636 S.E. 2d at 469-470.) By submitting the issue to the trial court for decision, however, the City waived its right to have the issue decided by a jury. Because its submitted proof was inadequate, the statute of limitations defense was rejected and the case was remanded for trial. The state Supreme Court found that the mere presence of water on Bethel's

land did not trigger the statute:

> "[W]e cannot say that the mere presence of water in such a ditch is, in itself, injurious or damaging to the land and there was no further evidence from which injury or damage could be inferred. . . . The City bore the burden of proof on that issue [citation], and failed to carry it." (*Bethel*, 636 S.E. 2d at 470.)

In both *Bethel* and this case, a public project caused wetlands to develop on private property. In both *Bethel* and this case, the accrual of the statute of limitations is a question of fact on which the defendant City bore the burden of proof. If anything, the facts in *Bethel* required the landowner there to be *more* vigilant, because it knew in advance that the purpose of the public project was to create wetlands.

Here, of course, the City *did* have a full trial on the merits, with a full opportunity to present evidence to support its statute of limitations defense. The City could have presented expert testimony on when the "new" post-1990 wetlands first developed on Beachwood, but it did not do so. Instead, the City deliberately chose to put all its trial eggs in the "causation" basket, arguing that wetlands on Beachwood existed *pre*-TAAD. As in *Bethel*, the City did not carry its burden on the statute of limitations defense.[4]

The City's argument boils down to this: that Yamagiwa should have filed suit because the property occasionally had water on it. This is silly, because damages to Yamagiwa did not occur until the physical characteristics of the property matured into wetlands. Damages are a required element of a physical takings claim. (*Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 368 [1963] ["Actions for the taking and damaging of private property . . . are subject to the rule that proof of damage is an essential part of the plaintiff's case."]; *Northwest Louisiana Fish & Game Preserve Commission v. United States*,

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[4] Indeed, the City's trial strategy requires it to do a 180° turnabout to play the statute of limitations front-and-center in its Motion. At trial, the City's theory of the case was that its TAAD project did *not* cause Beachwood's wetlands; rather, the wetlands were natural and pre-existed TAAD. Now, the City's about-face requires it to argue that its TAAD project *so obviously caused Beachwood's wetlands* that Yamagiwa should have filed suit earlier. The two positions, obviously, are inherently irreconcilable.

446 F. 3d 1285, 1291 [Fed Cir. 2006] ["[A] claim does not accrue until the claimant suffers damage."].)[5]

The development of wetlands on Beachwood has progressed over time. (Doc. #211, ¶ 159, at p. 67.) When damage is progressive, the stabilization approach applies. That approach is a flexible standard which gives the benefit of the doubt to the injured landowner. The basis for the doctrine is that "procedural rigidities should be avoided" in progressive physical damage cases. (*Dickinson*, 331 U.S. at 749.)

> "The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' . . . [¶] The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' — when they are born, whether they proliferate, and when they die." (*Dickinson*, 331 U.S. at 748.)

California, too, follows the stabilization approach. The date of the taking is "the point in time when the damaging activity has reached a level *which substantially interferes with the owner's use and enjoyment of his property*." (*Smart v. City of Los Angeles*, 112 Cal. App. 3d 232, 235 [1980] [emphasis added].) In *Smart*, the Court held that a different statute of limitations accrual applied to an overflight noise case involving *undeveloped* property, because the noise did not substantially interfere with plaintiff's "*actual* use and enjoyment of the land." (*Smart*, 112 Cal. App. 3d at 238; emphasis by the Court).

> "It is by focusing on the impact of the governmental activity upon the property owner's *actual* use that the courts have determined a date of 'taking' in inverse condemnation actions." (*Smart*, 112 Cal. App. 3d at 238, emphasis by the Court.)

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[5] *Northwest Louisiana* is the case where a weed called hydrilla grew and ultimately overtook a recreational lake. The Court said that "*potential* harm" was not enough to trigger to statute; damages were required to be "quantifiable and present." (*Northwest*, 446 F. 3d at 1291.) Yet the City repeatedly speaks in the language of ***"potential"*** damage — not ***actual*** damage — in its brief. (*See, e.g.*, Mtn., at p. 4:16 ["*potential* physical damage"]; p. 5:8 ["*potential*" for damages]; p. 8:9 ["*potential* of damage"]; p. 17:8 [impermeable soils "*could*" lead to soil saturation].) A plaintiff who sues based on "potential" damages would be rapidly shown the courthouse door.

The Court properly concluded that Yamagiwa's physical takings case here would have been premature before the presence of wetlands on Beachwood had stabilized; the *earliest* that occurred was when the City itself documented new wetlands on Beachwood in 2000. (Doc. #211, ¶ 351, at p. 149.) The City failed to carry its burden at trial, and the re-hashed argument in its Motion fails yet again.

THE CITY FAILS TO SHOW THAT THE COURT'S RULING ON SUBSTANTIAL CAUSATION WAS CLEARLY ERRONEOUS

The Court found that the TAAD improvements "were clearly a substantial cause of the damage to Beachwood." (Doc. #211, ¶ 277, at p. 119.) In a scattershot argument, the City claims the Court's finding on substantial causation was "clearly erroneous" because: (1) pre-TAAD soil saturation that "*could* support hydrophytic vegetation" existed on Beachwood (Mtn., at p. 15:3) — and, apparently therefore *did* support it; (2) Dr. Huffman was right; and (3) none of the myriad project approvals took place under the City's LCP. These arguments run the gamut between fallacious and irrelevant.

To begin with, the City completely overlooks the *law* on substantial causation in the inverse condemnation context. As properly stated by the Court, "there must be a showing of 'a substantial cause-and-effect relationship excluding the possibility that other forces *alone* produced the injury.' " (Doc. #211, ¶ 271, at p. 117, citing *Belair v. Riverside County Flood Control Dist.*, 47 Cal. 3d 550, 559 [1988] and *California State Automobile Assoc. Inter-Insurance Bureau v. City of Palo Alto*, 138 Cal. App. 4th 474, 480-481 [2006].) Liability may be established when the public improvement is only one of several concurrent causes of the damage. (*Belair*, 47 Cal. 3d at 559.) Thus, to dispute substantial causation, it is not enough for the City to suggest a series of alternative "could haves" and "might haves" — the proposed alternative causative factors must have *alone* produced the injury to Beachwood.

It Was The City's Duty to Maintain Its Easement – Not Yamagiwa's Obligation To Demand That It Do So

The City starts off by castigating Yamagiwa for not telling the City that it needed to maintain its storm drain inlet on Beachwood. (Mtn., at p. 12:9-11.) As the owner of the easement, the *City* had the legal duty to maintain and repair its facility, which was within its easement. (*Colvin v. Southern California Edison Co.*, 194 Cal. App. 3d 1306, 1312 [1987] ["Such an easement carries with it not only the right but also the duty to maintain and repair the structure or facility for which it was created."]; *Herzog v. Grosso*, 41 Cal. 2d 219, 228 [1953]; *McManus v. Sequoyah Land Associates*, 240 Cal. App. 2d 348, 356 [1966].) The Court properly so concluded. (Doc. #211, ¶ 278, at pp. 119-120.)

Moreover, to show that Yamagiwa's supposed failure to ask the City to perform its legal duty was the *sole* cause of the wetlands on Beachwood, the City must show that it *would have* maintained the Beachwood storm drain if only Yamagiwa had asked. To the contrary, when Yamagiwa *did* ask the City to clean the inlet in 1999, the City did not do so; and there is absolutely no evidence that the City would have acted any differently earlier.

There Is No Evidence To Support the City's Ponding/Saturation Argument

The City next constructs an obtuse argument about ponding, saturation, and hydrophytic vegetation. It goes like this: (1) the key issue is whether hydrophytic vegetation existed on Beachwood pre-TAAD (Mtn., at p. 14:4-7); (2) ponding is not required for hydrophytic vegetation to grow, only soil saturation is (Mtn., at p. 14:27-28); and (3) "micro-depressions in which soil saturation *can* occur" existed on Beachwood pre-TAAD, which potential soil saturation "*could* support hydrophytic vegetation" (Mtn., at p. 15:2-6). The end point of this bereft argument is that certain things *could have* happened, but not that anything *did* happen. This is nothing but an intellectual ponzi

scheme — a house of cards of multiple speculation that proves nothing.[6]

Dr. Huffman's Opinions Were Properly Rejected

The attempt to resurrect Dr. Huffman's expert testimony falls particularly flat. The Court noted that the causation opinions of Dr. Huffman and Dr. Josselyn were "diametrically opposed." (Doc. #211, ¶ 160, at p. 67.) The Court then carefully analyzed Dr. Josselyn's opinion testimony and Dr. Huffman's opinion testimony (Doc. #211, ¶¶ 161-215, at pp. 67-93), explaining in detail why the former was accepted and the latter rejected. To now argue that Dr. Huffman's "expert qualifications are beyond reproach" (Mtn., at p. 15:27) is a paradigm example of exactly what Rule 59(e) or 52(b) motions are *not* supposed to contain.

The City then shifts back to "deliberate misconstrual" mode by pretending that the Court found that interpretation of aerial photographs is *never* an acceptable method of analyzing historic wetlands. (Mtn., at p. 16:10-22.) The Court said no such thing. The City's argument is like saying that, because methods exist by which experts can reconstruct automobile accidents, the opinions of anybody who employs such methods must necessarily be correct. Something more than a Ph.D. is required to convince the trier of fact of the soundness of an expert's opinions— but here, Dr. Huffman was unable to explain why some dark spots on the aerial photography were wetlands and other dark spots were not. (Doc. #198 [7/12/07 Transcript] Huffman, 1472:3 – 1474:15.) And Dr. Huffman's opinion that the aerial photos showed arroyo willows on Beachwood pre-TAAD (Doc. #198 [7/12/07 Transcript] Huffman, 1471:19 – 1472:2; 1587:16-18) was directly contradicted by the City's own 1976 plant association map, which showed *no arroyo willows* on Beachwood (Doc. #198 [7/12/07 Transcript] Huffman, 1588:19 –

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[6] Along the way, the City also manages to miscite some trial testimony. The City says there were "unsuccessful" attempts to farm Beachwood in the 1940s and 1950s (Mtn., at p. 15:15-17), but the evidence cited shows farming, not *unsuccessful* farming. The City also asserts that Whelen saw pre-TAAD standing water on Beachwood "in the winter months" (Mtn., at p. 15:17-20), but Whelen later clarified on re-direct that he was talking about *post*-TAAD wintertime water — in the depressions that were dug *as part of* the TAAD project. (Doc. #190 [6/6/07 Transcript] Whelen, 172:2-7].)

1590:21). In sum, the problem with Dr. Huffman's testimony was that his aerial photographic interpretation *in this case* was highly unconvincing, and contradicted by mounds of other evidence.

The time for the City to have its main expert witness convince the Court of the validity of his opinions was at trial, not now.

<u>The LCP Argument Is Yet Still More Definition-Shopping</u>

Lastly on causation, the City argues that the multitude of project approvals and mapping on Beachwood (by *inter alia* the Coastal Commission, the Department of Fish & Game, the United States Fish & Wildlife Service, and the City itself) do not call Dr. Huffman's opinions into question, because "not one took place under the City's LCP, using the LCP's definition of wetlands." (Mtn., at p. 18:18-19.) This is still more of the very same definition-shopping methods that the evidence showed the City had previously employed with Beachwood.

And, it is hogwash.

First, although the City's LCP was not fully certified by the Coastal Commission until 1996, the City's definition of wetlands in its 1996-certified LCP *was the very same* as the City's definition of wetlands in its 1985-certified Land Use Plan. (Doc. #211, at p. 48, n. 5 [Coastal Commission certified the City's Land Use Plan in 1985]; ¶ 136, at p. 55 [City's LCP definition of wetlands in 2000 was the same as the definition of wetlands in its 1985 certified Land Use Plan]; ¶ 148 at p. 60 [City's definition of wetlands has been in effect since 1985]; ¶ 149, at p. 62, n. 7 [City's definition of wetlands has not changed since 1985].) So the City's 1990 approval of the Beachwood Vesting Tentative Map, and its 1991 approvals of importation and placement of fill on this supposedly wetland-covered property, used *exactly* the same definition of wetlands as that contained in the LCP certified by the Coastal Commission in 1996.

Second, Dr. Huffman testified that he in fact used *the Coastal Commission's definition of wetlands* in analyzing wetlands on Beachwood (Doc. #197 [7/11/07 transcript]

Huffman, 1428:20-22). But, no matter; according to Dr. Huffman, the Coastal Commission's definition of wetlands is "the same definition that the City used in March of 2000 when it denied the coastal development permit for the Beachwood Property." (Doc. # 197 [7/11/07 transcript] Huffman, 1430:9-13.) And, the *Coastal Commission*'s definition of wetlands hasn't changed since the 1970s. (Doc. #198 [7/12/07 transcript] Huffman, 1577:16-1578:22].) So the Coastal Commission's 1983 approvals of TAAD and its 1991 approval for stockpiling fill — by *de minimis* waiver, no less (Ex 159)— used the same definition of wetlands as the one in the City's certified LCP.

Thus, the City's argument that the definitional world of wetlands changed precipitously when its LCP was certified in 1996 (and, inferentially, that nothing before then matters) is wholly contradicted by the evidence. The City's definition of wetlands hasn't changed since 1985, and the Coastal Commission's equivalent definition of wetlands hasn't changed since the 1970s. All those prior approvals *do* impeach Dr. Huffman's trial opinions after all.

Unlike a fine wine, the City's arguments on causation have not improved with age. They were properly rejected at trial, and deserve to be rejected again.

THE CITY HAS FAILED TO DEMONSTRATE CLEAR ERROR ON ITS AFFIRMATIVE DEFENSES

<u>There Is Nothing New on the Consent Defense</u>

The City offers nothing new on its consent defense. The Court properly rejected it on summary judgment (Doc. #101, at pp. 25-27) and again after trial (Doc. #211, ¶¶ 343-346, at pp. 147-148.) There is simply *no* evidence that Yamagiwa (or even any predecessor owners) ever consented to *the formation of wetlands* on Beachwood. That's the relevant factual issue, and the City failed to carry its burden at trial.

The Mitigation Defense Is Just a Rerun of the Statute of Limitations Defense

The City's reassertion of its mitigation of damages defense is the same as its statute of limitations defense, dressed up in slightly different clothes. A landowner has no "duty to mitigate" damages before the landowner reasonably knows there *are* damages. The City simply *assumes* that Yamagiwa suffered damages from City-caused wetlands years before she did, and then argues from its baseless premise that Yamagiwa should have filled the depressions on Beachwood to reduce her "damages."

Modern case law refers to the mitigation issue as "the avoidable consequences doctrine," finding use of the word "duty" to be inapt because there is no cause of action for breach of the "duty." (*State Dept. of Health Services v. Superior Court*, 31 Cal. 4th 1026, 1043 [2003].) The doctrine has been applied in inverse condemnation cases. (*Albers v. County of Los Angeles*, 62 Cal. 2d 250, 269-271 [1965] [injured landowner may *augment* compensation by recovering money spent in reasonable but unsuccessful effort to reduce damages].)

As explained by the California Supreme Court:

> "Under the avoidable consequences doctrine as recognized in California, a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure. *The reasonableness of the injured party's efforts must be judged in light of the situation existing at the time and not with the benefit of hindsight.*" (*Health Services*, 31 Cal. 4th at 1043-1044, emphasis added, citations omitted.)

The City would deny Yamagiwa any recovery in excess of $485,000 based on the assertion that her predecessor, Pilarcitos Valley Associates, should have filled certain depressions on Beachwood back in 1991. (Mtn., at p. 21:13-16.) This is exactly contrary to the Supreme Court's edict above, that reasonableness be judged based on the circumstances at the time, *not* based on hindsight. In 1991, Pilarcitos had just received a Vesting Tentative Map from the City the year before, for 83 residential lots on

Beachwood. (Ex 147.) The City had adopted a Negative Declaration for the Beachwood subdivision, finding that it would *not* infringe on "sensitive habitats," which was defined by the City *to include wetlands*. (Doc. #211, ¶ 186, at pp. 78-79.) In light of these uncontradicted facts, the City has not established that Crowell should have filled the City-dug depressions on Beachwood — or, more precisely, that it was *unreasonable* for him *not* to have done so.

As noted above, when Yamagiwa acquired the property by foreclosure sale in December 1993, the 83-lot Vesting Tentative Map was still in place. The reasonableness of Yamagiwa's conduct thereafter is also undisputed. She paid $337,700.72 to pay off the TAAD assessments on the property. (Doc. #211, ¶ 228, at p. 98.) She paid $974,589.90 in assessments to expand the City's sewage treatment plant. (Doc. #211, ¶ 233, at p. 100.) The City did not reduce the lien it placed on Beachwood based on the property being partially or totally undevelopable in 1994, nor in 1996. (Document. #211, ¶¶201-202, at pp. 86-87.) By June 12, 1997, Yamagiwa had already begun the process of obtaining the Beachwood coastal development permit from the City. (Ex 754.) The City managed to delay the process for three more years and then explicitly found that the wetlands it discovered on Beachwood in 2000 were not known and *could not have been known with the exercise of reasonable diligence* in 1990. (Ex 179, at 9283; Doc. #211, ¶ 139, at p. 57.) Under California law, whether an injured party has acted reasonably to minimize damages is a question of fact. (*Ortiz v. Bank of America*, 852 F. 2d 383, 387 [9th Cir. 1988].) Based on all of the evidence, it is only with 20/20 hindsight that the City can argue that Crowell or Yamagiwa should reasonably have filled in depressions on Beachwood.

Properly considered, the City's mitigation of damages argument is really just a replay of its statute of limitations argument. In order to be required to *mitigate* damages, one must first have *suffered* damages. (*Health Services*, 31 Cal. 4th at 1043 [doctrine applies to one "*injured* by another's wrongful conduct"]; *Valle de Oro Bank v. Gamboa*, 26 Cal. App. 4th 1686, 1694 [1994] [reversing defense based on mitigation of damages

because "there was no damage for the Bank to mitigate" at the time of its alleged failure to act].) Here, the City's argument on mitigation is hopelessly circular: the 1991 approvals by the City and the Coastal Commission allowing Pilarcitos to import fill to the property are themselves evidence of *a lack of wetlands on Beachwood*, because the importation would not have been permitted if Beachwood were truly wetlands-filled. Hence, the City cannot use the fact of the approvals — which show a *lack* of wetlands — to create a reasonable obligation, or "duty," to place fill to *prevent* future wetlands from developing.

The City next argues that it only prevented Crowell from draining water on Beachwood "after the wetlands had formed." (Mtn., at p. 22:2.) This is both factually and legally erroneous.

It is factually erroneous because the City called the police and every other Agency it could think of to prevent Crowell from pumping water off the property on February 2, 1999. (Ex 156.) No one, at that time, had yet concluded that there were new wetlands on Beachwood. In fact, five weeks later, on March 15, 1999, the City Planning Commission found there was still insufficient information to determine whether or not there actually *were* new wetlands on Beachwood. (Doc. #211, ¶ 132, at p. 54; Ex 163.)[7]

It is legally erroneous because *after* the wetlands had formed is the *only* timeframe in which mitigation of damages could possibly be relevant. As explained above, there is no obligation to *minimize* damages until there *are* damages. The City effectively thwarted everything Yamagiwa tried to do to minimize her damages from the City-caused wetlands, as the Findings accurately recite. (Doc. #211, ¶ 354, at pp. 150-151.)

[7] Crowell's action was based on the report issued by Melanie Mayer Gideon, the City's wetlands consultant #1. Gideon's report was dated January 13, 1999, but she explicitly recognized her task to be "to determine whether there is *potential* wetlands on the property and if further wetland study is warranted." (Ex 99, at p. 1, emphasis added.) Gideon thus only found "potential" wetlands on Beachwood that required further investigation — further investigation that the City never asked Gideon to do. (Doc. #211, ¶¶ 118-120, at pp. 48-49.)

THE CITY FAILS TO SHOW CLEAR ERROR ON DAMAGES

The City argues that Yamagiwa's purchase *of the note* on Beachwood for $1 million in 1993 is somehow connected to the property's fair market value in 2006. This is sophistry.

First, Yamagiwa did not buy *the property* for $1 million in 1993 — she bought the note, on which the Peppers were the obligors. (Doc. #195 [7/6/07 transcript] Yamagiwa, 1208:3 – 1213:6.) Had the Peppers made timely payments on the note, Yamagiwa never would have become the owner of Beachwood. Buying a note at a discount reflects the value of the debt, with a market-based assessment of the likelihood of payment. The value of the debt on Beachwood has never been an issue in this case.

Second, when Yamagiwa did acquire Beachwood at a foreclosure sale in December 1993, she bid in the amount of the debt — the amount owed to her by the Peppers on the note. A "full credit bid" at a foreclosure sale is made by bidding in the unpaid principal, interest, costs, fees, and other expenses of foreclosure. (*Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1238 [1995].) Here, the credit bid was $3,609,560. (Ex 567.)

Third, Yamagiwa's acquisition of the property at foreclosure has nothing to do with the property's fair market value. " '[I]t is common knowledge that at forced sales such as trustee's sales the full potential value of the property being sold is rarely realized.' " (*Melendrez v. D & I Investment, Inc.*, 127 Cal. App. 4th 1238, 1254 [2005].) The law reflects this by *excluding* reliance on foreclosure sales to prove fair market value. A prior sale of the subject property may be taken into account in assessing fair market value *only* when the sale "was freely made in good faith." (Evid. Code § 815.) Yamagiwa's purchase at the foreclosure sale was <u>not</u> a sale "freely made" under Evid. Code § 815:

> "<u>The law has regularly excluded reliance on true 'forced sales' such as those</u> under execution, or <u>under foreclosure</u>, but such sales involved the element not only of

> some haste, but of a compulsion on the part of the property owner to take whatever price is offered by the highest bidder, regardless of its relation to actual value or to the owner's willingness to accept that price." (*Redevelopment Agency v. Zwerman*, 240 Cal. App. 2d 70, 75 [1966], emphasis added.)

Finally, damages in inverse condemnation are measured by the *diminished fair market value* of the property. (Doc. #211, ¶ 266, at p. 116; ¶ 317, at p. 137.)[8] The City's own appraiser, Walt Carney, opined at trial that the undamaged value of Beachwood as of 2006 was $34,030,000, and that its damaged value was $7,410,000. The Court rejected Carney's opinions and adopted Arthur Gimmy's opinion that the undamaged value of Beachwood as of 2006 was $39,000,000 and its damaged value was $2,205,000. (Doc. #211, ¶ 235 at p. 102; ¶ 251 at p. 110; ¶¶ 376-379, at pp. 164-165.) It is certainly not "manifest injustice" — as the City claims (Mtn., at p. 22:18) — to award Yamagiwa $36,795,000 in damages *when the City's own appraiser opined as to similarly significant damages of $26,620,000.*

Both sides' appraisers properly recognized that Yamagiwa's 1993 purchase of the Peppers' note has nothing to do with determination of damages in this case, because it has nothing to do with fair market value. Yamagiwa would be entitled to the same amount of damages regardless of whether she underpaid or overpaid for the property, inherited it from her aunt, or won it in a poker game. The City's diversionary tactic has no basis in law, is contrary to the City's own evidence at trial, and deserves to be rejected.

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[8] Consider two hypothetically identical side-by-side homes in Half Moon Bay, both with the same market value of $1.2 million. The owners of Property A bought it in 1965 for $25,000, while the owners of Property B bought it in 2004 for $1 million. If both owners put their homes up for sale today, nobody would reasonably argue that Property A's owners "deserve" less for their property because they paid significantly less for it many years ago. Fair market value has nothing to do with "profit" or "basis" — it reflects what the market would pay for the property on the date of value.

THE COURT'S JURISDICTIONAL RULING
WAS NOT CLEARLY ERRONEOUS

Lastly, the City repeats its jurisdictional argument, which was thoroughly briefed (Doc. ##209, 210) and decided by the Court. (Doc. #211, ¶¶ 363-368, at pp. 155-161.)

The City's only new point clearly misreads a previous stipulated judgment that concluded prior litigation between the parties in the trial court, so the City could appeal the trial court's ruling that the contested areas on Beachwood were not wetlands.[9] (The City's successful appeal of that ruling, of course, is what exposed it to the $36.8 million judgment in this case. Had the City simply chosen not to appeal the previous ruling, 83 homeowners would be residing on Beachwood now, and the City would be enjoying an increased tax base rather than a large liability.)

The City takes out of context one phrase from the previous stipulation, which reviewed all of the causes of action in the prior litigation and disposed of them. The claim for refund of assessments was originally asserted as the Third Cause of Action in Case No. 413013. (Doc. #46, Exh. 444, ¶ 3(c), at p. 2.) When the stipulation was signed in 2003, the assessments claim was moot because the trial court had mandated that the City issue the Coastal Development Permit to Yamagiwa, allowing development of Beachwood. The parties' stipulation recites this history, and states that the Third Cause of Action is therefore being dismissed as moot. (Doc. #46, Exh. 444, ¶ III, at p. 7.) The language of the stipulation that the City wrenches out of context is from ¶ V of the stipulation, and the sentence begins thusly:

> "Yamagiwa shall dismiss with prejudice all *remaining causes of action* in these three consolidated actions *which have not been otherwise resolved as described above*. . . ." (Doc. #46, Exh. 444, ¶ V, at p. 8, emphasis added.)

[9] The stipulated judgment was not offered or introduced as an exhibit at trial, though it was previously before the Court on summary judgment briefing. (Doc. #46, Exh. 444.)

Since the Third Cause of Action *was* "otherwise resolved as described above" (i.e., in ¶ III of the stipulation), the later language that the City quotes (from ¶ V of the stipulation [Mtn., at 25:7-8]) is clearly not applicable to the assessment claim.[10]

The only thing that is "clearly erroneous" on the jurisdictional issue is the City's latest contortion of its already-rejected argument.

CONCLUSION

Nothing in the City's motion meets the standards under Rules 59(e) or 52(b). Yamagiwa respectfully requests that the Court deny the City's motion.

Dated: January 31, 2008 MANATT, PHELPS & PHILLIPS, LLP

By: /s/ Edward G. Burg
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[10] In addition, the previous stipulation did not even mention Yamagiwa's claim for refund of assessments against Coastside County Water District. That claim, properly construed as a substantive due process claim, was Yamagiwa's Fifth Cause of Action in the present suit, and (even though subsequently dismissed) formed an independent basis for the Court's subject matter jurisdiction. (Doc. #211, ¶ 365, at p. 158.)