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SAN MATEO COUNTY

SEP 23 2011

Clerk of the Superior Court
Mark Brake
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

James Lawrence Benjamin and
Zoya Dorry Benjamin

Plaintiffs,

vs.

City of Half Moon Bay,

Defendants.

CASE NO. CIV 494372

STATEMENT OF DECISION

I. STATEMENT OF FACTS

The Kehoe Ditch, also known as the Kehoe Watercourse, lies adjacent to petitioner Benjamin's property in Half Moon Bay, California; it is a stream which feeds into the Pilarcitos Creek, and ultimately the Pacific Ocean. The Kehoc Watercourse is located within the Coastal Zone, within the meaning of Public Resources Code section 30103.

In January, 2009, the City of Half Moon Bay contracted with the California Conservation Corps to perform a drainage clearing project of about 2000 feet of the Kehoe Ditch. The contract specifies that the City would secure approvals and permits required by "any other state, federal, or local agency necessary to commence construction or operation of such projects."

1 The work described in the above contract was accomplished from February 9, 2009 to
2 February 11, 2009 and on a return visit in March, 2009. A chain saw and weed whacker were
3 employed in the work. Several arroyo willow trees were chopped down and two truckloads of
4 vegetation were removed. The work was performed without a Coastal Development Permit
5 issued by the City of Half Moon Bay or the Coastal Commission.

6 II. APPLICABLE STATUTES

7 A. California Coastal Act: Public Resources Code sections 30600 et. Seq: Coastal
8 Development Permit (CDP) required for all "development" located within the coastal
9 zone.

10 B. Public Resources Code section 30240: Environmentally sensitive habitat areas
11 protected against any significant disruption of habitat values.

12 C. Half Moon Bay Municipal Code section 18.38.020:

13 A. Environmentally Sensitive Habitat Areas: Habitats containing or supporting
14 unique species or rare and endangered species defined by the State Fish and
15 Game Commission

16 B. Riparian Area and Corridor: Any area of land bordering a perennial or
17 intermittent stream or their tributaries...Riparian corridors are the areas between
18 the limits of riparian vegetation, where limits are determined by vegetative
19 coverage, at least fifty percent of which is comprised of a combination of the
20 following plant species: red alder, jaumea, pickleweed, big leaf maple, narrow-
21 leaf cattail, arroyo willow, broadleaf cattail, horsetail, creek dogwood, black
22 cottonwood, and box elder.....

23 E. Wetlands.
24
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1 D. California Code of Regulations section 13252 (Title 14) elaborating on Public
2 Resources Code section 30610, which exempts repair and maintenance from the
3 requirement to obtain a Coastal Development Permit:

4 (a) For purposes of Public Resources Code section 30610(d), the following
5 extraordinary methods of repair and maintenance shall require a coastal
6 development permit because they involve a risk of substantial adverse
7 environmental impact:

8 (3) Any repair or maintenance to facilities or structures or work located in an
9 environmentally sensitive habitat area.....that include:

10 (A) The placement or removal, whether temporary or permanent, of rip-rap,
11 rocks, sand or other beach materials or any other forms of solid materials

12 (B) The presence, whether temporary or permanent, of mechanized equipment or
13 construction materials

14 III. FACTS NOT IN DISPUTE

15 The parties are in agreement that:

16 1) The Coastal Act provides a process by which a local government's Local Coastal
17 Program is adopted and certified and that Half Moon Bay accomplished this by
18 certification of its LCP and accompanying regulations.

19 2) The California Red-legged Frog and the San Francisco Garter Snake both qualify as a
20 rare and endangered species as defined by the California State Fish and Game
21 Commission.

22 FINDINGS:

23 IV. The Court finds that the Kehoe Watercourse is not a "Public Works" facility as defined by
24 the Coastal Act, Public Resources Code section 30114.
25

1 V. The Court finds by a preponderance of the evidence, based upon the testimony of Mr. Martin
2 Trso (Certified Geomorphologist) and Mr. Mark Jennings (Certified Herpetologist) that the
3 Kehoe Watercourse and adjacent Riparian Area qualify as an Environmentally Sensitive
4 Habitat Area for purposes of the Coastal Act, the Local Coastal Program of the City of Half
5 Moon Bay, and the HMB Zoning Ordinance for the following reasons:

6 A) The Kehoe Watercourse and adjacent riparian area contains or supports rare and
7 endangered species as defined by the State Fish and Game Commission, including the
8 California Red-Legged Frog and the San Francisco Garter Snake

9 B) The Kehoe Watercourse and adjacent riparian area qualify under the Zoning Ordinance
10 and LCP as a Riparian Area and Corridor.

11 The Court makes no finding as to whether the Kehoe Watercourse qualifies as a
12 "wetland."

13 The Court's determination that the Ditch is an Environmentally Sensitive Habitat Area is
14 supported by documents originating from the 1987 development of the St. John's
15 Subdivision:

16 1) City of Half Moon Bay Resolution No. 33-88 Approving Final Map of St. John
17 Subdivision (recorded July 12, 1988) designating the Ditch Area as a "riparian buffer
18 zone"

19 2) Application for Coastal Development Permit for St. John's Subdivision, December 3,
20 1987, acknowledging on page 5 that the development is "in or near a sensitive habitat
21 area."

22 VI. The Court finds that the "repair and maintenance exception" to excuse the necessity of a
23 Coast Development Permit is inapplicable because of the "presence...of mechanized
24 equipment", to wit the use of a chain saw in the project. (Statute cited supra.)
25

1 VII. The very wording of 14 CCR section 13252 specifies the “presence of mechanized
2 equipment, whether temporary or permanent” as triggering a determination that such
3 “extraordinary methods of repair and maintenance require a coastal development permit
4 because they involve a risk of substantial adverse environmental impact” (underscoring
5 added by the Court). Thus the Court is bound by the language of the statute and need not
6 make an independent finding as to whether this clearing project specifically involved a risk
7 of substantial adverse environmental impact.

8 VIII. Accordingly, the Court finds that the Kehoe Watercourse and the adjacent Riparian Area
9 clearing project required a Coastal Development Permit since it involved removal of
10 riparian vegetation and alteration of the Kehoe Ditch, an Environmentally Sensitive Habitat
11 Area, and thus constituted development within the Coastal Zone.

12 IX. The Court further finds that the City of Half Moon Bay was on notice that the proposed
13 Kehoe Ditch drain clearing project was located in and adjacent to a Environmentally
14 Sensitive Habitat Area. This ruling is based upon the City’s acknowledged receipt and
15 review of numerous documents and studies related to the area:

- 16 1) Numerous email communications between City officers and plaintiff James Benjamin,
17 dated September 29-October 3, 2006.
- 18 2) Email string between HMB Planning Director Steve Flint and Kathy Marx , HMB
19 Project Planner, and Serge Glushkoff of California State Department of Fish and Game,
20 dated November 9, 2007 to November 13, 2007
- 21 3) March 9, 2007 Biological Assessment for Kehoe Ditch Bank Stabilization Project
22 prepared for City of Half Moon Bay by Rana Creek Habitat Restoration (Rana Creek)
- 23 4) August 2005 Habitat Assessment for the City of Half Moon Bay Kehoe Ditch Flood
24 Control Project prepared by Essex Environmental Inc. (Essex)

- 1 5) May 2006 Biotic Assessment, Phase 3, El Granada Transmission Pipeline Replacement
2 Project, Half Moon Bay, prepared by Coast Range Biological (Coast Range)
3 6) October 13, 2005 letter from H.T. Harvey and Associates to John Foley, Sewer Authority
4 Mid-Coastside , re. Biological Constraints Assessment for an area whose northern
5 boundary is the Kehoe Ditch

6 Though not all these studies or communications were specifically directed to the Kehoe
7 Watercourse project of 2009, the considerations underlying determination of ESHA were
8 extensively mentioned and discussed therein in the several years prior to undertaking the
9 February, 2009 endeavor.

10 X. The Court further finds that the reasoning of the Half Moon Bay Planning Director Steven
11 Flint that the Kehoe Ditch did not support or contain the Red-Legged Frog or the San
12 Francisco Garter Snake because "none had ever been seen there" is untenable for the
13 following reasons:

- 14 1) a) Rana Creek: pp. 4-5: Though no Red-legged frogs observed at the Kehoe Ditch, it
15 does provide suitable habitat for the frogs. Several have been recorded within .5 miles,
16 primarily at the Caltrans mitigation site, and the frogs disperse from breeding sites
17 ... "moving through landscape without apparent regard for vegetation or topography."
18 The ditch may provide breeding habitat for the RLF, and the open space supplies
19 "potential upland habitat."
20 b) Rana Creek p. 6: "SFGS may be present along the banks of the ditch in the riparian
21 vegetation."
22 c) Rana Creek p. 8: "Impact: California red-legged frogs that are potentially present at
23 the project site may be harassed or harmed in violation of the Endangered Species
24 Act."
25

1 2) a) Essex p. 11: "California red-legged frog....likely to occur in the project area.

2 CNDDDB search listed numerous occurrences within 5 miles of the project, with the
3 closest occurrences within 0.5 mile. Project area provides suitable habitat."

4 b) Essex p. 11. "San Francisco Garter Snake....likely to occur in the project area."

5 c) Essex p. 13: "Based on the suitable habitat available along the ditch..., there is a
6 high potential for CRLF to occur."

7 d) Essex p. 13: "Due to known occurrences within a 2000-foot radius of the project
8 site and documentation of movement in excess of 2000 feet of this species....presence
9 of the San Francisco garter snake should be assumed."

10 3) a) Coast Range p. 8: "Due to the documented occurrences in the vicinity and the
11 presence of suitable habitat, red-legged frog is considered to have a high potential for
12 occurrence in the Study Area."

13 b) Coast Range p. 9: "San Francisco garter snake is considered to have a moderate
14 potential for occurrence on the Study Area."

15 c) Coast Range p. 16: "Foraging and sheltering habitat for California red-legged frog
16 occurs in.....Kehoe Ditch." "Prior to beginning vegetation removal, a qualified
17 biologist shall survey the work area for red-legged frogs."

18 d) Coast Range report recommends mitigation measures to be undertaken for potential
19 presence of both endangered species.

20 4) Harvey p. 5: "California red-legged frogs should be considered to be present within
21 Kehoe Ditch, and potentially present in upland habitats on the site."

22 XI. The Court further finds untenable and illogical the Mr. Flint's reasoning determining that the
23 Kehoe Ditch was not a riparian area or corridor for the following reasons:

24 1) There is undisputed evidence that 90% of the vegetation in the Kehoe Ditch is arroyo
25 willow. The definition of a riparian corridor is an area covered by vegetative coverage "at

1 least fifty percent of which is comprised ofarroyo willow,... (other
2 plant species)...” Mr. Flint contends that because no other of the designated plant species
3 were mentioned in the various studies cited above, the vegetation could not be deemed a
4 “combination” of the specified plants; this contention defies logic and a reasonable,
5 rational construction of the statute.

- 6 2) Rana Creek specifically states “The Kehoe Ditch site contains willow riparian” (p. 3)
7 and furthermore recommends as mitigation efforts for any project “”All riparian trees
8 will be avoided when possible during construction activities. Thinning of trees is
9 acceptable, but no riparian trees over 4 inches diameter at breast height shall be
10 removed.”
- 11 3) Essex p. 5: “For purposes of this habitat assessment, the composition of riparian
12 vegetation is consistent with The City of Half Moon Bay’s Zoning Code, Title 18,
13 Chapter 18.38 definition of a Riparian Area and Corridor.
- 14 4) Harvey p. 3: “Kehoe Ditch, where mature arroyo willow forms a continuous riparian
15 canopy....” Uses the term “riparian zone.”
- 16 5) Statement of City Engineer Mo Sharma to the City Council of Half Moon Bay, February
17 17, 2009: “We also have ivy, this is not native to the riparian area, this is actually harmful
18 because it kind of overwhelms the riparian zone....”

19 XII. The Court finds questionable the assertion that the Kehoe Ditch project fell under the “repair
20 and maintenance” exception to the need to obtain a CDP for the work. The Public Works
21 Director of the City of Half Moon Bay, Mr. Paul Nagengast, in 2006 submitted an
22 application to the Coastal Commission for a CDP for “repair/reconstruct drainage ditch”
23 which included the Kehoe Ditch in the scope of its proposed work. A subsequent
24 memorandum from Mr. Nagengast (August 16, 2006) specifically acknowledges the need for
25 a CDP for “drainage ditch maintenance”. See also September 18, 2006 letter from California

1 Coastal Commission to Public Works Director Nagengast, entitled "Coastal Development
2 Permitting Requirements for Drainage Ditch Maintenance, which specifically states: "a CDP
3 is required for any maintenance of the City's drainage ditches located in an environmentally
4 sensitive habitat area that involves.....the presence, whether temporary or permanent, of
5 mechanized equipment or construction materials."

6 Half Moon Bay's Planning Director Flint testified that the exception for Repair and
7 Maintenance (CCR 13252 supra.) was not considered and did not factor into his decision not
8 to obtain a Coastal Development Permit for the Kehoe Ditch.

9 Nevertheless, in presenting the project to the Half Moon Bay City Council, City Engineer
10 Mo Sharma represented that all the work would be with hand tools only, in direct
11 contradiction of the contract under which the work was performed.

12 While Mr. Sharma's misrepresentations may have been inadvertent, these statements
13 constitute further circumstantial evidence that the Half Moon Bay city officials deliberately
14 circumvented the requirement of obtaining a Coastal Development Permit for the work on
15 the Kehoe Ditch.

16 XIII. Accordingly, the Court finds that the City of Half Moon Bay knowingly and intentionally
17 failed to obtain a CDP for the Kehoe Ditch Project of 2009, thereby depriving the public in
18 general, and plaintiffs/petitioners in particular, of the ability to be heard concerning the
19 impacts of this project upon the stream, the environment and the community as a whole.

20 DAMAGES AND PENALTIES

21 XIV. Having found that the City's failure to obtain a CDP was knowing and intentional, the
22 Court, in imposing appropriate penalties, will take into consideration the factors listed in
23 Coastal Act section 30820:

- 24 1) Nature, circumstance, extent and gravity of the violation: The work done on the
25 Kehoe Ditch was not particularly extensive; removal of two truckloads of trees and

1 branches from a 2000-foot ditch does not reflect significant deforestation. The
2 photographs submitted as exhibits display a substantial amount of vegetation still
3 remaining or regrown on the project site. The testimony of Mr. Jennings established a
4 “substantial change to the vegetation” which had the effect of opening the stream,
5 removing biomass for potential habitats, increasing the water temperature, deleting
6 food sources for smaller animals and rodents, and potentially opening the area for
7 predators; though this potential existed, no evidence was presented that these grave
8 impacts were realized.

9 Mr. Trso testified that the geomorphologic impact of the project was to create visible
10 erosion of the banks and a destabilization of the soil in the creek bed, with resultant
11 gullyng. While Mr. Jennings also expressed concern about the disturbance of the
12 sediment which would dislodge food sources for the frogs, Mr. Trso deemed the
13 sediment loss to be “relatively minor.”

- 14 2) Sensitivity of the resource; restorability: Since neither the California Red-legged Frog
15 nor the San Francisco Garter Snake has been located at the Kehoe Ditch, either before
16 or after the February 2009 project, the Court has no evidence upon which to gauge
17 either the sensitivity of the resource or the actual impact of the work upon these two
18 endangered species. With regard to the willow riparian cover, the Court finds that the
19 City of Half Moon Bay undertook reparative efforts by the replanting of arroyo
20 willow trec stalks at some point after the work was done; unfortunately many of these
21 replacement willows have not survived due to the extensive growth of cape ivy.
- 22 3) Cost to the state of bringing the action: None.
- 23 4) Voluntary cooperation, past history, and culpability: Evidence was presented that
24 before the work was done, an educational presentation concerning the habitat and the
25 protected species was given to the Corpsmen working on the Ditch.

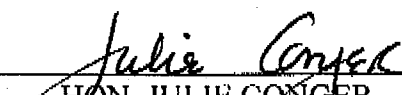
1 XV. In summary, the Court finds that the Kehoe Ditch cleaning project of February, 2009, was a
 2 knowing and intentional violation of the Coastal Act, but that the impact upon the
 3 environment was not substantial. Accordingly, minimum civil penalties of \$1000 for each
 4 day that the violation persists will be imposed per statute.

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 6 Judgment shall be entered in favor of Petitioners James Lawrence Benjamin and Zoya
 7 Dorry Benjamin.

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 9 Petitioners/plaintiffs to prepare judgment in accordance with this Statement of Decision.

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Dated: September 15, 2011



 HON. JULIE CONGER
 JUDGE OF THE SUPERIOR COURT