

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

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TO: Commissioners and Alternates

FROM: Lawrence J. Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)
Marc Zeppetello, Chief Counsel (415/352-3655; marc.zeppetello@bcdc.ca.gov)
Ethan Lavine, Coastal Program Analyst (415/352-3618; ethan.lavine@bcdc.ca.gov)

SUBJECT: Staff Recommendation for Proposed Findings to Support Denial of Application for Material Amendment to BCDC Permit No. 1983.005.11
(For Commission consideration on August 4, 2016)

Staff Recommendation: Findings to Support Denial of Application for Material Amendment to BCDC Permit No. 1983.005.11

The staff recommends that the Commission adopt the following findings:

1. On October 20, 1983, the Commission issued BCDC Permit No. 1983.005.00 (previously Permit No. 5-83) to Encinal Marina Limited (“Encinal”) to allow for the conversion of Encinal’s privately owned port into a 228-berth marina and the development of associated facilities including a shoreline public access trail and public access improvements. Encinal’s permit was subsequently amended on ten occasions between 1985 and 1990 to allow for enlargements and various improvements to its facilities. Under its original permit and the subsequent amendments, Encinal provided for and the permit required approximately 61,784 square feet of guaranteed public access areas, consisting of access to existing piers and platforms over the water, and, on the shoreline, walkways, plazas, landscaping, seating areas, two restrooms, parking, and other amenities.
2. By letters dated August 6, 2007 and March 3, 2008, Encinal and a residential developer, Warmington Homes California (“Warmington”), jointly applied for, and on May 7, 2008, the Executive Director approved, pursuant to California Code of Regulations, title 14, section 10822, Amendment No. Eleven to the permit (hereafter “Amendment No. Eleven” or “Permit”). Amendment No. Eleven authorized the construction of Grand Marina Village, a multi-home residential development of 40 units located inland of the marina and the shoreline park. Five of

these homes, totaling an area of 7,800 square feet, lie within BCDC's 100-foot shoreline band jurisdiction. The Permit allowed for reconfiguration of the marina parking lot to accommodate the homes, construction of new public streets, and changes and additions to the previously authorized public access improvements. The Permit linked the construction and use of the residential development to the construction of public pathways and landscaping along the southeastern edge of the shoreline park near Grand and Hibbard Streets; two new triangle parks located outside the Commission's jurisdiction with pathways and connections to the shoreline park; and a connection along the wharf adjacent to the Alaska Packer's Building that connects the wharf to Marina Cove Park to the southwest. The new public access improvements required by the Permit included benches, lighting, seating, signage, and landscaping to connect and unify the new and pre-existing public access areas.

3. In May 2009, Warmington assigned all of its rights and obligations under the Permit to Warmington Grand Marina Associates, LP ("WGMA"), and in September 2009, Encinal conveyed to WGMA certain property for the Grand Marina Village residential development. WGMA subsequently transferred certain of its property interests at the Grand Marina Village residential development to the Grand Marina Village Owners' Association ("HOA").

4. Since 2015, or earlier, the co-permittees have been engaged in a dispute over their responsibilities under the Permit regarding the ongoing maintenance requirements for the public access areas and improvements located on properties they each own and/or control. (*Encinal Marina Ltd. v. Grand Marina Village Owners' Association, et al.*, Alameda County Superior Court Case No. RG15776148.)

5. On September 1, 2015, the HOA applied for a non-material amendment to divide the Permit into two permits, one that would be issued to the HOA and the other that would be issued to Encinal, along the lines of property ownership and control. BCDC staff advised the co-permittees that one of the two co-permittees may not unilaterally request that a permit be split without the consent of the other co-permittee. The Executive Director determined that the application was incomplete because it was signed by only one of the co-permittees, but nevertheless denied the request to split the Permit administratively, as a nonmaterial amendment, on the grounds that the proposed amendment would constitute a material amendment.

6. In denying the HOA's request to split the Permit as a non-material amendment, the Executive Director advised the HOA, if it remained interested in pursuing the matter, to submit a letter application for the requested amendment to split the Permit and to request that the Commission consider the amendment at a scheduled public hearing. The Executive Director noted that an application for a material amendment to a major permit is subject to the same requirements as an application for a major permit, including the requirement that the application be signed by both co-permittees. However, because the requested amendment would be based on the apparent inability of the co-permittees to agree on whether, or how, the Permit should be split, the Executive Director indicated that, in this case, the HOA may request that the Commission consider the HOA's application without obtaining Encinal's signature because that is the threshold issue of the dispute that the HOA would be seeking to resolve.

7. On December 18, 2015, the HOA applied for a material amendment to the Permit, to divide the Permit between the co-permittees, based on property ownership and/or control, and create two separate permits that would identify the rights, responsibilities, and duties of each permittee. In its letter application, the HOA confirmed, as requested by the Executive Director, that the HOA had asked Encinal to jointly submit and sign the application for a material amendment, and the HOA documented that Encinal had refused to do so.

8. The Commission considered the material amendment to the Permit requested by the HOA at a public hearing on June 16, 2016. As presented in the staff recommendation, the requested material amendment raises two issues: (1) whether the Commission should amend this Permit based on an application submitted by only one of the co-permittees and over the objection of the other co-permittee; and (2) whether the requested amendment would ensure the maximum feasible public access under the Commission's laws and policies, as the Commission determined was the case in issuing the Permit. Staff recommended that the Commission: (1) consider the application; and (2) amend the Permit by issuing two permits, one to the HOA and the other to Encinal, that would divide responsibility for maintenance of the public access areas and improvements based on the property owned and/or controlled by each co-permittee. Representatives of the HOA and Encinal were present and provided comments and arguments to the Commission. The HOA supported, and Encinal opposed, the requested amendment.

9. After considering the requested material amendment, the application summary, the staff recommendation, and the comments and arguments of the HOA and Encinal, the Commission denies the requested material amendment to the Permit on the following grounds:

- a. The Permit provides, in Standard Condition IV.D, that “the terms and conditions of this amended permit shall bind all future owners and future possessors of any legal interest in the land and shall run with the land.” Therefore, when the HOA acquired certain property interests in the Grand Marina Village residential development, the HOA became subject to and bound by the terms and conditions of the Permit, and became a co-permittee, together with Encinal.
- b. When there are two or more co-permittees, BCDC regulations, including the application form, require that an application for a material amendment to a major permit be signed by all co-permittees. 14 C.C.R. §§10310(a), 10824, and Appendix D (BCDC Application Form). The application for the requested material amendment was submitted and signed by HOA, but not by Encinal, and, therefore, is incomplete.
- c. As co-permittees, Encinal and the HOA are jointly and severally responsible to maintain the public access areas and improvements required under the Permit, regardless of where those areas and improvements are located.¹ Continued joint and several responsibility for maintenance of the public access areas and improvements required by the Permit furthers the objective of providing maximum feasible public access to the shoreline.
- d. The requested material amendment would divide responsibility for the public access areas and improvements based on the geographic areas owned and/or controlled by each co-permittee. This would result in an obligation for Encinal to maintain a smaller public access area than was its responsibility prior to Amendment No. Eleven. However, authorization of the residential development at Grand Marina Village under Amendment No. Eleven imposed additional public access maintenance obligations on property owned or controlled by Encinal. Because the total package

¹ It is not necessary to decide, and the Commission makes no finding regarding, whether the co-permittees are jointly and severally responsible for Permit conditions or requirements applicable to Encinal’s marina that have been in effect since prior to Amendment No. Eleven.

of public access benefits that enabled the Commission to determine that Amendment No. Eleven provided maximum feasible public access is interconnected between the properties now separately owned and/or controlled by the co-permittees, dividing the public access obligations based on the geographic areas owned and/or controlled by each co-permittee is not reasonable or appropriate. The Commission finds that there is no evidence in the record as to a reasonable and appropriate basis for dividing responsibility for maintenance of the public access areas and improvements between the co-permittees.