

San Francisco Bay Conservation and Development Commission

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October 21, 2016

TO: Commissioners and Alternates
FROM: Enforcement Committee
SUBJECT: Enforcement Committee's Recommended Enforcement Decision Regarding Proposed Stipulated Cease and Desist and Civil Penalty Order No. CCD 2016.04; Marina Village Associates, LLC
(For Commission consideration on November 3, 2016)

Recommendation

The BCDC Enforcement Committee recommends that the Commission adopt the Recommended Enforcement Decision on proposed Stipulated Cease and Desist and Civil Penalty Order No. CCD 2016.04 ("Stipulated Order") to Marina Village Associates, LLC ("MVA"), for the reasons stated below. This matter arises out of an enforcement action commenced by BCDC staff on March 14, 2015.

The Stipulated Order requires MVA within specified time frames to, among other provisions: (1) cease and desist from all activity in violation of BCDC Permit No. 2006.010.03; (2) remove unauthorized items located in the Bay and shoreline band that cannot be authorized after-the-fact; (3) apply for authorization for unauthorized activities in the Bay and shoreline band that can be authorized after-the-fact; (4) submit an engineering report that evaluates: (a) the frequency, duration, and extent of tidal flooding and post-flooding standing water in the public access area and (b) potential alternatives to reduce tidal flooding and post-tidal standing water in this area; based on consideration of potential alternatives recommended in the report, and obtain authorization to implement the recommended flood control measures; (5) pay a civil penalty of \$210,000 to the Bay Fill Clean-up and Abatement Fund; and (6) pay established penalties for late compliance with any term of the Order. All other provisions are described in full within the Order. The BCDC staff and Enforcement Committee have determined that the proposed Stipulated Order is a fair resolution of the alleged violations.

On October 20, 2016, the Enforcement Committee held a hearing on this matter and, after considering staff's presentation, as well as comments provided by Respondent's counsel and the public, determined that the recommended Stipulated Order was an appropriate resolution of the violations of the Permit and McAteer-Petris Act.

Report

Background. On September 27, 2007, the Commission issued BCDC Permit No. 2006.010.03, as amended through September 2, 2015 (“the Permit”), to MVA, to authorize the construction of a portion of eight homes in the shoreline band, a grocery store, a two-story mixed use building, a restaurant adjacent to the existing yacht club, and new public access including a 1,500-foot-long public access boardwalk, a kayak boat launch float and ramp, a 33,000-square-foot “Marina Green”, a small park, a six-foot-wide, 2,200-foot-long pathway along the breakwater and a children’s play area at existing Loch Lomond Marina located in San Rafael, Marin County.

On March 14, 2015, BCDC staff conducted a site visit and observed that MVA had placed rock riprap adjacent to and bayward of the Boardwalk, and that some unknown and probably upland activity had caused a large mud wave on the edge of the Bay west of the East Spit between Docks E and F, which had smothered an area of tidal marsh habitat of the same size. Staff further observed that the slope of the riprap appeared to exceed a 2:1 slope, and questioned whether the base of the riprap had been placed in the Bay because of the presence of marsh vegetation growing up through the riprap at the toe of the slope.

Following the March 14, 2015 site visit, BCDC staff reviewed the Permit file and commenced an enforcement investigation to assess MVA’s compliance with the terms and conditions of the Permit. Between March 20 and October 20, 2015, the BCDC staff investigation involved numerous communications with MVA’s representative, Todd Wright.

On November 20, 2015, BCDC staff sent MVA a letter that summarized the alleged violations of the Permit and McAteer-Petris Act and included proposed resolutions with a proposed settlement agreement attached. On November 25, 2015, Mr. Wright sent BCDC staff a letter confirming receipt of BCDC’s November 20th correspondence and stating that the letter would be forwarded to MVA “who will respond to you directly.” More than six weeks later, on January 7, 2016, BCDC staff emailed Mr. Wright (and mailed a copy of the email to John Arvin, Vice President, MVA) stating that in the absence of any effort by MVA to resolve this matter through the proposed settlement agreement, BCDC intended to prepare a complaint for administrative civil penalties and a cease and desist order. Between January 7 and May 20, 2016, Mr. Arvin did not contact BCDC.

On May 20, 2016, the Executive Director issued a Violation Report and Complaint for the Imposition of Administrative Civil Penalties to expedite resolution of the violations. After the Violation Report was issued, MVA and its counsel met with BCDC staff multiple times to discuss the violations and negotiate a resolution. On August 15, 2016, the Executive Director issued a Supplemental Violation Report and Complaint for the Imposition of Administrative Civil Penalties to eliminate two of the originally alleged violations, modify the scope of one originally alleged violation, and provide notice of seven additional alleged violations that had occurred, or that BCDC staff had become aware of, since mailing the original Violation Report on May 20, 2016.

Violations. In summary, the violations of the Permit or the McAteer-Petris Act alleged by the Executive Director, in the Original Violation Report and as modified and supplemented by the Supplemental Violation Report, include the following:

1. The placement of riprap adjacent to the Boardwalk at a slope steeper than the authorized 2:1 grade that was not engineered and lacked plan approval.
2. The unauthorized stockpiling of construction materials in the shoreline band that caused a mudwave that resulted in unauthorized fill. The mudwave's dimension observed by staff is roughly.
3. The unauthorized work in the Bay and shoreline band to repair the seawall, Boardwalk, and riprap destroyed by a large mudwave.
4. The unauthorized placement of riprap in the Bay and shoreline band in two different locations on the East Spit.
5. The unauthorized placement of electrical posts and associated electrical wiring in the Bay and shoreline band located adjacent to the Boardwalk.
6. The unauthorized placement of many utilities in the dedicated public access area located in the shoreline band.
7. Failure to submit to the Executive Director, gain staff approval of, and record, two instruments that dedicate the required public access and open space areas to the public by March 31, 2016.
8. Failure to submit written certification of contractor review prior to commencing any grading, demolition, or construction.
9. Failure to record the amended Permit on all parcels affected by the Permit with Marin County within 30 days after execution of amended Permit.
10. The failure to provide and make available for public access use by March, 2016, a park, playground, and restroom on the East Spit, and a striped pathway on existing asphalt to connect the park located on the West Spit to the existing public access located on the adjacent property, among other amenities.
11. Failure to establish two membership associations that recognize the requirement to maintain all the public access improvements.
12. The unauthorized placement of riprap possibly in the Bay and in the shoreline band at the northeastern edge of the East Spit, adjacent to the unauthorized switch gear cabinet located on the landward end of the east spit.

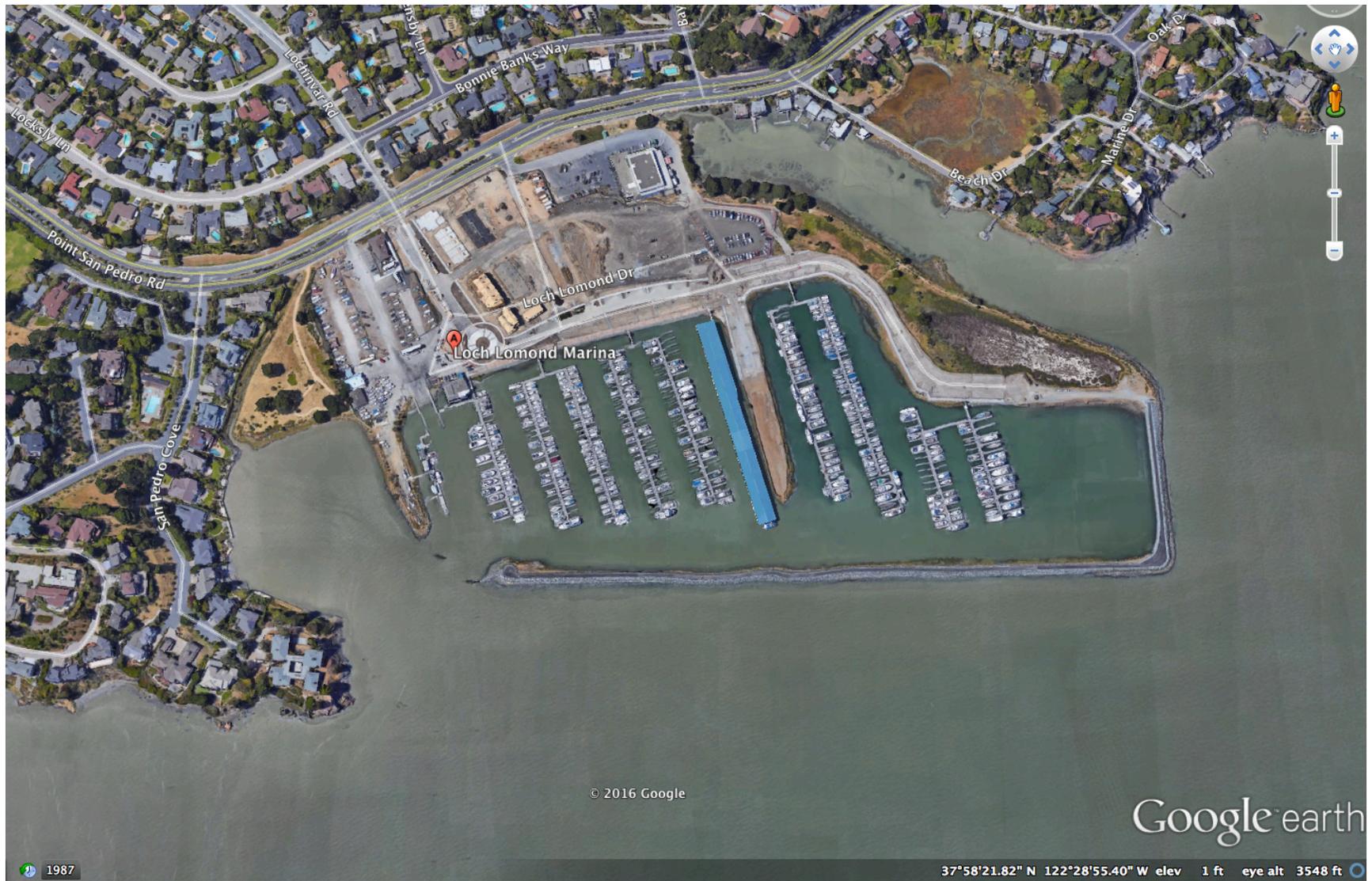
Negotiations and Settlement Agreement. After receiving the first and second Violation Reports, MVA and its counsel met with BCDC staff to initiate settlement discussions. During negotiations, BCDC staff determined that any agreement reached between the parties needed to address and rectify the frequent tidal flooding and post-tidal standing water in the public access area located between the east parking lot and the head of the breakwater trail based on

reports received by BCDC staff from the public and City of San Rafael that the flooding of this area is an ongoing issue that occurs during regular high tide events. As such, staff determined this portion of the public access area regularly floods and will continue to cause maintenance and accessibility issues unless corrective action is taken.

The Violation Reports proposed a total penalty of \$563,500; BCDC staff ultimately agreed that they would accept MVA's proposed penalty of \$210,000 if MVA committed to resolving the flooding issue by preparing a report and implementing its recommendations, after obtaining a permit amendment. The cost of the report and implementation of its recommendations is not limited so long as it is not unreasonable and the flooding issue is rectified.

The contents of the Stipulated Order is not limited to a \$210,000 penalty and remediating the tidal flooding and post-flooding standing water issues in the public access area. In summary, the Stipulated Order requires MVA within specified time frames to, among other provisions: (1) cease and desist from all activity in violation of BCDC Permit No. 2006.010.03; (2) remove unauthorized items located in the Bay and shoreline band that cannot be authorized after-the-fact; (3) apply for after-the-fact authorization for unauthorized activities in the Bay and shoreline band that can be authorized after-the-fact; (4) submit proof of recordation with Marin County of a legal instrument that permanently guarantees required public access areas; (5) submit for review and concurrence proposed CC&Rs for each and every membership association that may in the future assume responsibility to maintain public access improvements; (6) make available for public use public access amenities that were required to be opened by March 2016; (7) submit an engineering report that evaluates: (a) the frequency, duration, and extent of tidal flooding and post-flooding standing water in the public access areas located at (i) the east spit and (ii) between the east parking lot and the head of the breakwater trail and (b) potential alternatives to reduce tidal flooding and post-tidal standing water in this area; and obtain authorization to implement the recommended flood control measures; (8) pay a civil penalty of \$210,000 to the Bay Fill Clean-up and Abatement Fund; and (9) pay established penalties for late compliance with any term of the Stipulated Order.

On September 13th, BCDC staff and MVA reached a settlement in principle on the terms of an agreement, which is provided in the proposed Stipulated Order. The BCDC staff and Enforcement Committee have determined that the proposed Stipulated Order is a fair resolution of the alleged violations and will provide BCDC with important data regarding the impacts of sea level rise on public access areas that were required prior to the 2011 adoption of BCDC's sea level rise policies. Attachments to this recommendation include: (1) The Stipulated Order; (2) The Permit; (3) a Vicinity Map and two images of the site; and (4) Letters of Public Comment.



**Vicinity Map – Loch Lomond Marina
San Rafael, CA**



Loch Lomond Marina
San Rafael, CA



**Shoreline Public Access at Loch Lomond Marina (Google Streetview)
San Rafael, CA**