

San Francisco Bay Conservation and Development Commission

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October 13, 2017

TO: All Commissioners and Alternates

FROM: Lawrence J. Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)
Sharon Louie, Director, Administrative & Technology Services (415/352-3638; sharon.louie@bcdc.ca.gov)

SUBJECT: Draft Minutes of October 5, 2017 Commission Meeting

1. **Call to Order.** The meeting was called to order by Chair Wasserman at the Bay Area Metro Center, 375 Beale Street, Board Room, First Floor, San Francisco, California at 1:09 p.m.

2. **Roll Call.** Present were: Chair Wasserman, Vice Chair Halsted, Commissioners Addiego, Bottoms (departed at 2:49 p.m.), Butt, Gibbs, Jahns, Lucchesi (reported by Alternate Pemberton), McGrath (represented by Alternate Ajami), Nelson, Peskin, Pine, Ranchod (arrived at 1:15 p.m.), Randolph, Sartipi (represented by Alternate McElhinney) and Techel.

Chair Wasserman announced that a quorum was present.

Not present were Commissioners: Alameda County (Chan), Santa Clara County (Cortese), Department of Finance (Finn), Contra Costa County (Gioia), Sonoma County (Gorin), Marin County (Sears), Association of Bay Area Governments (Showalter), Solano County (Spering), Napa County (Wagenknecht), U.S. Environmental Protection Agency (Ziegler) Governor and (Zwissler).

3. **Public Comment Period.** Chair Wasserman called for public comment on subjects that were not on the agenda.

Mr. Hunter Cutting spoke: I am a parent and volunteer with the Coalition to Save Clipper Cove. There have been a lot of setbacks for the proposal to take a third of the Cove for a private, luxury marina. We understand that TIDA staff is still pushing to have the proposal go forward.

Early this year we found out that the new marina will be devoted exclusively to large yachts running 40 to 80 feet in length. The developers propose to demolish the existing marina which serves small boats running 16 to 36 feet in length. The current marina is full and has a waiting list.

In April, the state of California issued a damning feasibility study on the marina. We learned for the first time that the developer is intending to rent out part of the marina as live-aboard berths charging \$3,250.00 a month per slip. This is a rate so exorbitant that the state noted that it might actually be illegal.

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The state is also very concerned about the dredging costs for the new marina. The state has revealed for the first time that the new marina may change the way the Cove fills in; the sedimentation and siltation patterns and necessitate hundreds of thousands of dollars in dredging costs every year. The state reports that two other marinas in the Bay Area have already defaulted on state loans for this exact same reason.

Because of all of this the state is very skeptical of the financing scheme and they have issued a set of financial conditions that the developers have yet to meet for their state loan.

Then in May, in response to all of this, the Community Sailing Center in Clipper Cove actually posted a detailed analysis specifying exactly how this new marina will choke down public access and reduce community programs in the Cove.

This marina is going to entirely block some youth sailors from the sheltered side of the Cove, entirely block some public access. It is also going to greatly reduce the STEM Program, the Science Education Program that is currently run on the Cove and serves over 2,000 fourth graders every year from the City of San Francisco.

Because of this the SFUSD science department has actually written to you asking BCDC to reject this proposed marina. We now have over two dozen teachers who have come together and spoken out about the impact of this marina.

Finally, that DBW report prompted the Sierra Club to go back and take a look at how this annual dredging and siltation will impact the eel grass beds in the Cove and it turns out that the project EIR for this project never envisioned any need for maintenance dredging or changes in siltation in the Cove.

Thanks for your attention today.

Chair Wasserman moved to Approval of the Minutes.

4. **Approval of Minutes of the September 7, 2017 Meeting.** Chair Wasserman asked for a motion and a second to adopt the minutes of September 7, 2017.

MOTION: Commissioner Nelson moved approval of the Minutes, seconded by Commissioner Addiego.

VOTE: The motion carried with a vote of 14-0-2 with Commissioners Addiego, Butt, Gibbs, Pemberton, Ajami, Nelson, Peskin, Pine, Ranchod, Randolph, McElhinney, Techel, Vice Chair Halsted and Chair Wasserman voting, "YES", no "NO", votes and Commissioners Bottoms and Jahns abstaining.

5. **Report of the Chair.** Chair Wasserman reported on the following:

a. I would like to welcome Dr. Rick Bottoms who has been appointed by the U.S. Army Corps of Engineers as its new representative to the Commission. Rick has replaced Jane Hicks, whom we want to thank for her service. Welcome aboard.

BCDC is going under the federal magnifying glass. It is time for our quinquennial (that's every five years) evaluation by NOAA's Office for Coastal Management, which oversees implementation of the federal Coastal Zone Management Act at the state level. This year, NOAA has chosen three areas on which to focus: public access; coastal resilience; and, sediment management. During the week of October 23rd, NOAA representatives will be here talking with stakeholders. There will be a public meeting at the Oakland State Building to receive comments on Wednesday the 25th at 6:00 p.m., and I shall meet with NOAA that week, as well.

The good news in there has been no break off of the Arctic Shelf since our last meeting.

I would bring to your attention an article in the Sunday, September 14th New York Times: 'Your Questions About Climate Change Answered'. It is worth looking it up in the archive. It is a very concise piece and has a good statement on rising sea levels.

The other thing I would like to bring to your attention is that a Berkeley poll last month which consisted of 2,000 people in the state of California were screened primarily for Gavin Newsome's supporters. Nonetheless, in terms of rating top priorities, 80 percent rated health care policies as their top one; 71 percent then rated climate change as their top priority and 67 percent then rated environmental policy as a priority and last was the economy and jobs.

Granted, it is a very favorable pool; but I think it is still a significant and encouraging number.

b. **Next BCDC Meeting.** Our next meeting will be held on October 19th, where we may: Hold a public hearing and vote on a proposed amendment to the Scotts Restaurant permit.

Hear a briefing on Caltrans' ideas about how some former Bay Bridge east span piers could be retained for public access purposes.

Commissioner McElhinney commented: BCDC has been involved in a very innovative bridge demolition project and it was going to take us two more seasons to demolish 13 marine foundations in the innovation of doing multiple piers on the same event that brought us into this year saving us 10 million dollars and a year of time out in construction and so far the 13 piers; there is only eight left to go.

We are going to do the first triple-pier implosion event on October 14th, another triple-pier implosion event October 28th, every other Saturday, and then November 11th, the last two planned marine foundation demolitions early on the morning of November 11th.

BCDC staff, the Army Corps, NOAA staff and Caltrans staff are working together on that pier retention for the remaining piers, Piers E2 from YBI, a possible viewing platform, public access point and from the Oakland shoreline piers 19 through 22 out in the water; there are visions for a public access viewing platform.

Instead of investing in the demolition of those piers we will be investing in public access. This will be a new presentation to BCDC and we are looking forward to that.

c. **Ex-Parte Communications.** This is an opportunity to disclose any ex-parte communications that you have not previously disclosed in writing. You do need to disclose them in writing. You do need to do this on contested matters and we do have some enforcement hearings today. If there is anybody who has had ex-parte communications on these subjects, now is the time to put it on the record. (No comments were voiced)

d. **Executive Director's Report.** Larry Goldzband will now present the Executive Director's report.

6. **Report of the Executive Director.** Executive Director Goldzband reported: Sometimes, no matter how hard you try to escape from work and renew yourself emotionally, physically, or spiritually, the cord just can't be totally severed. Last week, as you know, the Jewish High Holidays took place. Our synagogue recently purchased new prayer books specifically for the week and, wouldn't you know it, one of the first new readings described the need to seek resilience in our lives. Thankfully, it was a beautiful evening and there was no sign of rising sea level.

a. **Budget and staff.** A few weeks ago, we received word that the State Senate and Assembly Budget Committees were considering including funds for climate adaptation and resilience in their allocations of the Greenhouse Gas Reduction Funds – the cap and trade funds. Steve Goldbeck partnered with our friends from the Coastal Commission and the Coastal Conservancy to convince the Committees to include six million dollars to be split among the three coastal zone management agencies. Under the legislation signed by the Governor, the Conservancy will allocate four million dollars in grants to local governments as part of its Climate Ready grant program. The Coastal Commission will use a significant portion of its 1.5 million dollars for its local coastal plan grant program and BCDC will receive \$500,000 to assist local governments become more resilient through the Adapting to Rising Tides Program and other planning projects and our regulatory staff will use a portion to help permit applicants determine how best to prepare for rising sea level. Next month, I'll give you a full budget briefing that will include a description of the grants that BCDC is using to further our adaptation planning program.

Steve did a great job, especially in partnership with the other agencies, and we want to thank Claire and the folks from the Resources Agency for all of their good work as well.

And, because nothing stays the same, I want to let you know that Jaime Michaels, our Chief of Permits, has announced her retirement. A few of us were able to convince her about a year ago to stay around for another year, but she insists that it is time for her to move on. We shall miss her outstanding institutional history and her ability to frame questions clearly. We are now advertising for a new Chief of Permits and we'll be interviewing candidates during the week after next.

Although we'll be losing Jaime, we did gain some great temporary help in September and through the next week or so. Tim Ryan (stood and was recognized) is a Coro Fellow who is experiencing his first internship program with BCDC. He is a former student body President at Fresno State University – he's a Bulldog – and as President he lobbied California state legislators for affordable and accessible public higher education, founded a campus organization dedicated to spreading awareness about the Syrian refugee crisis and wrote his senior thesis on the effectiveness of international human rights agreements. Tim is working with our Enforcement staff and is working on four separate enforcement cases.

b. **Policy.** Another bit of good news is that the Federal Highways Administration has awarded its "Environmental Excellence Award" to Caltrans and its government partners that developed and permitted the innovative program to implode the remaining piers of the old Bay Bridge. As a Caltrans partner in this project, BCDC will be given recognition of its groundbreaking work on this project. So, Permit Analyst Tinya Hoang and Engineer Rafael Montes will travel to Sacramento in December to represent BCDC and receive the award that FHWA will bestow to Caltrans and its partners. And, next month, we have invited Caltrans to brief you on its ideas about how best to finish that project.

And, I want to give a big shout-out to Meichelle Liang of our staff. Meichelle is our crack accountant, as she was able to close our Fiscal Year 2016-17 books in mid-September – fully two months earlier than last year and three months earlier than the year before that, despite having to use the Department of Finance's FI\$CAL system that continues to provide us with no shortage of challenges. However, Meichelle is able to climb those mountains, and we are very grateful.

In your packet there is a marvelous article about your work at Hill's Slough and the approval thereof from our last meeting. There is also an announcement of the speaker series here at Bay Area Metro Center on resilience.

I want to let you know that on October 20th a forum on contaminated lands and disposal sites that will be hosted by the California EPA, the Resilient Communities Initiative and BCDC is going to occur to share information and resources and we will send this out to all of the Commissioners because we think that there are folks in your organizations who will be very interested. It will happen at our offices, in the state building on October 20th.

That concludes my report, Chair Wasserman.

Chair Wasserman moved to Item 7.

7. Commission Consideration of Administrative Matters. Chair Wasserman announced: That brings us to consideration of Administrative Matters. Brad will take the slings and arrows of any questions you may have. (No questions were voiced)

8. Continued Public Hearing and Possible Vote on an Application by the Port of San Francisco for Construction of Crane Cove Park at Pier 70, in the City and County of San Francisco; BCDC Permit Application No. 2016.006.00. Chair Wasserman announced: Item 8 is a continued public hearing and possible vote on an application by the City and County of San Francisco to construct Crane Cove Park at Pier 70.

We do not have any public speakers on this matter so I will entertain a motion to close the public hearing.

MOTION: Commissioner Peskin moved to close the public hearing, seconded by Vice Chair Halsted. The motion carried by a voice vote with no abstentions or objections.

Erik Buehmann will give an overview of the project.

Principal Permit Analyst Buehmann addressed the Commission: On September 29, 2017 you were mailed a recommendation on the application by the Port of San Francisco for the Crane Cove Park Project in the City and County of San Francisco.

The staff recommends that the Commission approve BCDC Permit No. 2016.006.00 to authorize the proposed project.

The staff recommendation contains special conditions.

The permittee will provide an approximately 111,156 square foot (2.5-acre) area of a public park within the 100-foot shoreline band and in the Bay, including a 1,500 foot long Bay Trail, a sandy beach for water access, a lawn, plaza areas, landscaping, picnic tables, signage and former industrial facilities repurposed for public access.

The Port may conduct limited special events within defined public areas located in the Bay and the 100-foot shoreline band for a maximum of 50 calendar days per year.

Special events would be limited to specific areas in the Commission's jurisdiction – in particular to the beach, lawn and two areas at the end of the craneways next to Slipway 4 (You can view the areas on Exhibit B, attached to the recommendation.)

The Port may hold non-ticketed and free public events, such as a farmer's market, for a total of up to 50 days per calendar year of the 50 special event days.

Ticketed public events, such as a music festival, may be only held a maximum of 12 times per year of the 50 special event days.

Private events, such as a wedding, are limited to the lawn and the craneways at Slipway 4. No private events may take place at the beach. Private events are limited to 12 days per year of the 50 special event days.

At the beach, only 12 days a year of the 50 special event days may be used for events and the events must be a water-oriented use such as boating or swimming events.

In addition, a maximum of two weekend days per month can be used for any special event.

The special events must be noticed to Commission staff before they occur and the Recommendation includes annual reporting requirements. The authorization for special events is limited to five years from the time the park opens. At that time, the Port can request an extension of the authorization based on the information collected in annual reports, and if necessary, a public life study of the public use of the space to determine whether the special events program is successful in bringing the public to the new park.

The Recommendation includes conditions related to flooding from storms and sea level rise. The Port must report to the Commission when there is flooding of any required public access area. Permanent restrictions due to flooding, which may occur after mid-century as sea levels rise, would require Commission approval and equivalent access would be required to ensure public access to the shoreline.

The Port will monitor the containment cap to ensure safe conditions for in-water access.

At the Commission hearing on September 7, the Port presented briefly its proposal to discuss with the Commission the possibility of creating a public access credit program. Findings related to this proposal can be found at the end of Page 23 of the Recommendation. Commission staff is just beginning discussions with the Port about this issue and will continue those discussions. This recommendation does not bind the Commission to any outcome and if Commission staff and Port discussions on a credit program either through an amendment to the San Francisco Waterfront Special Area Plan or a memorandum of understanding are fruitful, the issue will be brought to the Commission in the future.

As conditioned, the staff believes that the project is consistent with your law and Bay Plan policies regarding fill and public access.

And, with that, we recommend that you adopt the recommendation.

Mr. Buehmann noted that before conducting an event there must be written notice to BCDC staff 14 days before the event. There is an annual report required to be sent to Commission staff listing activities at the site. After the five year period there would need to be amendment to the permit to extend the time for that authorization.

Chair Wasserman had a request of staff: I would like to request that staff make that report to the Commission annually as part of our effort to look at how we are activating public access and how the site is really being used.

It the Port representative here and do you approve the conditions?

Mr. David Beaupre replied: Yes I do, thank you. I am with the Port of San Francisco.

MOTION: Vice Chair Halsted moved approval of the staff recommendation, seconded by Commissioner Peskin.

VOTE: The motion carried with a vote of 15-0-1 with Commissioners Addiego, Butt, Gibbs, Jahns, Pemberton, Ajami, Nelson, Peskin, Pine, Ranchod, Randolph, McElhinney, Techel, Vice Chair Halsted and Chair Wasserman voting, “YES”, no “NO”, votes and Commissioner Bottoms abstaining.

9. Public Hearing and Possible Vote on a Recommended Enforcement Decision Involving Proposed Stipulated Cease and Desist and Civil Penalty Order No. CDO 2017.02: Bridgeway 558 Real Property LLC. Chair Wasserman announced: Item 9 is a public hearing and vote on the Enforcement Committee’s recommended Enforcement Decision involving a stipulated cease and desist and civil penalty order that would be issued to Bridgeway 558 Real Property, LLC in Sausalito, Marin County.

Enforcement Committee member Commissioner Gibbs will introduce the matter and present the Committee’s recommendation.

Commissioner Gibbs commented: On August 16, 1976, at the existing Trident Restaurant located in Sausalito, Marin County, the Commission issued BCDC Permit No. M1975.102.00 to authorize the remodel and replacement of a single, split-level, 2,637 square-foot, pile-supported dining deck in the Bay, attached to a pre-existing pile-supported structure, and for the replacement of caps and piles on a one-for-one basis.

Without authorization, in October 1999, the permittee installed an 810-square-foot boat dock with two pilings and a 100-square-foot gangway in the Bay.

Also without authorization, in July 2012, the permittee remodeled the restaurant building and deck in the shoreline band.

BCDC staff initiated two enforcement actions in October 1999 and August 2012, respectively. Despite numerous attempts to resolve the violations, staff was unsuccessful until it commenced a formal enforcement proceeding in 2017, which resulted in the submittal of a complete application to amend the permit and a settlement with the permittee.

The Enforcement Committee met and we had a hearing and we came to a stipulated order which would require the permittee within specified timeframes to, among other provisions: number one, cease and desist from all activity in violation of BCDC Permit No. M1975.102.00; number two, provide signed, public access amenities including a restroom, two benches and a trash can; number three, pay a civil penalty of \$30,000.00 to the Bay Fill Cleanup and Abatement Fund; and number four, pay stipulated penalties for late compliance with any term of a stipulated order.

Chief Counsel Marc Zeppetello addressed the Commission: Before responding on behalf of staff to the recommended enforcement decision I would like to review the options available to the Commission in reviewing a recommended enforcement decision from the Enforcement Committee. These are set forth in your regulations at Title 14, Section 11322 (b).

There are four options. The first option is that you may adopt the recommended decision without any changes, second, you may dismiss the entire matter by voting not to issue any proposed order, or third, you may adopt the recommended decision with regard to one or more aspects of the order and dismiss the remaining proposed orders by voting not to issue them, or finally, you may reject the recommended decision and decide to consider the entire matter de novo. And if you do that you must continue the public hearing to the next available Commission meeting date.

These options are available with respect to this matter, the stipulated proposed order on Bridgeway 558, and also with respect to the next matter, the Heron Bay Homeowner's Association.

With that I have a brief presentation. Here you see a vicinity map the site of the Trident and Ondine Restaurants located at 558 Bridgeway in Sausalito. It was a pre-existing structure prior to BCDC but was substantially rebuilt pursuant to a permit issued in 1976.

This map shows the location of the two violations at issue here; one was unauthorized construction of a boat deck, gangway and piles along the water in the back of the restaurant that began in 1999 or so, and the second was a remodel of the restaurant and building of a second story in approximately 2012.

This slide shows the timeline of events that Commissioner Gibbs has reviewed for you.

Bridgeway, the current owner, submitted an incomplete permit application to remodel the restaurant and then proceeded to do the work without getting a permit. Staff commenced a standardized fine process for this violation trying to get an application to authorize, after the fact, the remodel and the prior work from 1999.

Earlier this year the Executive Director terminated the standardized fine process and issued a violation report and complaint. That brought the property owner and counsel to the table and we were able to negotiate a stipulated order to resolve the matter and to have the property owner submit what was needed to have a complete permit application. Getting the complete application and finalizing the stipulated order happened simultaneously in August.

The public access proposal that the property owner has submitted is viewed favorably by staff. The property owner has proposed to make the currently existing, private, outdoor restroom available as a public restroom. The owner will also install two benches for public access and a number of signs.

The terms of the proposed order are that the property owner cease and desist from all activities in violation of their permit and that they maintain the signed public access amenities including the restroom, the benches, a trash can and the signage and that they pay a \$30,000.00 civil penalty.

The proposed order also includes stipulated penalties for failure to implement the public access proposals.

Originally, we had negotiated stipulated penalties for failure to submit the permit application on time but that got completed simultaneously with negotiating the order.

In negotiating resolution of this matter and compromising, the maximum penalty that would have been available for the two violations was \$30,000.00. In negotiating the matter staff gave credit for the public access amenities because of the cost of implementing them and constructing but also the long-term O&M obligations that the property owner is assuming for the term of the permit.

In conclusion, the staff supports the recommended enforcement decision and requests that you adopt the proposed stipulated order.

Commissioner Nelson had a request: Marc can you walk us through the unauthorized remodel? We want to make sure that the public access is appropriate.

Mr. Zeppetello replied: the unauthorized remodel was on the previously existing pile-supported structure that had been rebuilt in the late 1976 pursuant to the earlier permit. It was within the footprint of prior development.

Commissioner Peskin commented: the \$30,000.00 statutory maximum is for each violation. So, it is a total of 60?

Mr. Zeppetello answered: It could have been a total of 60.

Commissioner Peskin continued: As to the value of the ADA improvements and the bathroom improvements; do we have a sense of what those are worth?

Mr. Zeppetello explained: The property owner has provided us with a lot of information on that. They argued and presented evidence that they were going to be substantial over time. I just don't have the numbers.

Commissioner Butt had questions: What was the role or lack thereof of the city of Sausalito in these improvements? Did they both get discretionary and administrative review, permits and inspections?

Mr. Zeppetello replied: I believe that they did. One of the issues that dragged this out were issues about the lease and whether this boat dock in the back was extending on to a new lot and the lease had to be amended or modified. It eventually was. There was also an issue with ADA access and whether there was going to be a waiver from ADA requirements by the city. That process took a long time.

Commissioner Butt continued: My concern is that presumably being a waterfront city, the city of Sausalito knows about BCDC. I am curious why they went ahead and provided both discretionary and administrative permits for this without any involvement of BCDC.

Regulatory Director Brad McCrea spoke: They may have given their local approval but the property owner was not completing the BCDC application. They proceeded without our approval but they may have gotten approval from the city.

Commissioner Butt added: In my city if you are doing a waterfront project you have to provide evidence to the city that the project has been reviewed and approved by BCDC before they will issue a permit for it and certainly before they will issue an occupancy permit.

Mr. McCrea explained: In general, BCDC goes last. We ask for local, discretionary approval as part of filing the BCDC application.

Commissioner Butt continued: I would like to get a little more information on that because if local jurisdictions aren't playing any role in enforcing what BCDC does we got a big problem. Maybe you could look into that and get back to us. It is something that concerns me.

Mr. McCrea replied: Commissioner Butt we would be happy to pull together the information that we can to give you that answer. My experience is that it varies from city to city.

Chair Wasserman commented: I would ask staff to expand that effort and compile a list of the waterfront cities and whether or not they require BCDC approval before they issue either building permits or occupancy permits. It would not be before the discretionary approval. We typically come last. It seems to me they should require it as issuing the final action permits.

The reason it is worth the time and effort is it relates to whether we need additional authority or we've got some ways to do that in terms of our whole concern with adapting to rising sea level.

Commissioner Gibbs commented: We have two settlements before us today and the Committee in each case was satisfied that we came to a fair resolution. There is a growing sense of frustration that we keep seeing the, I'm-not-quite-sure-I-had-to-interface-with-BCDC phenomena. We are getting really tired and frustrated with that and these kinds of outreach efforts need to be done so that we don't keep encountering this excuse.

Mr. Keith Garner addressed the Commission: I am with the law firm of Shepard, Mullin here in San Francisco and I am here today on behalf of Bridgeway 558, Real Property, LLC. They are the owners and master lessor of the restaurant.

Mr. Bob Freeman who is the principal with Bridgeway 558 was able to attend the Enforcement Committee meeting but he is unable to attend today.

We generally concur with Mr. Zeppetello's presentation and the report that Commissioner Gibbs gave. My client did ask that I note that by the time he took over the restaurant in 2003 that some of the improvements that are at issue in the enforcement violation had already occurred. The other improvements were made, at least in part, in response to some ADA compliance issues. There was no malicious intent to subvert or ignore BCDC's regulations.

The terms of the agreement were heavily negotiated with staff and we considered a variety of options and evaluated those with staff and we appreciate staff's willingness to entertain those with us.

Ultimately, we believe the stipulated order represents a fair resolution to the alleged violations. Bridgeway 558 supports the public access improvements that were reviewed.

We believe that the seating facilities will provide a wonderful viewing opportunity for the public and that the public restrooms will also provide a much-needed amenity that is not currently available in that part of Sausalito.

My client did submit some information about the O&M costs over the course of 30 years which includes the cost of running the water, the maintenance and the supplies for the facilities and disposing of the refuse adjacent to the benches; the estimated total was \$150,000.00 over a 30 year period.

The penalty that was imposed we believe is reasonable in light of the ongoing public access improvements that are being provided as part of the settlement.

We look forward to bringing this enforcement matter to a close. We urge the Commission to adopt the stipulated cease and desist order. I am happy to answer any questions.

Commissioner Jahns had a question: Are there public access signs on the boat dock as well?

Mr. Garner replied: Not currently. I do not believe that they are proposed as part of the stipulated cease and desist order. My client had some safety concerns with making it public access.

Chair Wasserman commented: This went on a long time. This gives us some concern. In this instance there were some different approaches to enforcement previously. It is not a situation where there was a long resistance on the part of this owner. I think the fine is appropriate.

I would ask for a motion to open the public hearing.

MOTION: Commissioner Nelson moved to open the public hearing, seconded by Commissioner Techel.

MOTION: Commissioner Nelson moved to close the public hearing, seconded by Commissioner Techel. The motion carried by a voice vote with no abstentions or objections.

MOTION: Commissioner Ranchod moved approval of the Enforcement Committee recommendation, seconded by Commissioner Nelson.

VOTE: The motion carried with a vote of 14-0-2 with Commissioners Addiego, Butt, Gibbs, Pemberton, Ajami, Nelson, Peskin, Pine, Ranchod, Randolph, McElhinney, Techel, Vice Chair Halsted and Chair Wasserman voting, "YES", no "NO", votes and Commissioners Bottoms and Jahns abstaining.

10. Public Hearing and Possible Vote on a Recommended Enforcement Decision Involving Proposed Cease and Desist and Civil Penalty Order No. CDO 2017.03; Heron Bay Homeowners Association. Chair Wasserman announced: Item 10 is a public hearing and vote on a recommended enforcement decision involving a cease and desist and civil penalty order for the Heron Bay Homeowners Association in San Leandro.

I will start with Commissioner Gibbs giving the recommendation.

Commissioner Gibbs presented the following: On July 22, 1994, the Commission issued BCDC Permit No. M1992.057.00 to Citation Homes to authorize dredging and excavation activities to mitigate the impacts to City of San Leandro public access that would result from the proposed Heron Bay residential development and required public access amenities.

In 1999, Citation Homes sold the residential development to the Heron Bay HOA without complying with permit Special Conditions pertaining to required plan review and approval, a public access permanent guarantee, public access improvements and a permit assignment.

Also, the HOA placed unauthorized restrictive signage in violation of the McAteer-Petris Act.

BCDC staff became aware of these violations in 2014 and 2017, respectively, and despite numerous attempts to resolve them was unsuccessful. Staff commenced a formal enforcement proceeding on June 16, 2017, and although the parties have not reached an agreement, the only contested matter is the amount of the administrative civil penalty.

The Commission will consider and possibly vote on the Enforcement Committee's recommended enforcement decision. The Order would require the permittee within specified time frames to, among other provisions: (1) cease and desist from all activity in violation of BCDC Permit No. M1992.057.00; (2) apply for after-the-fact authorization for as-built public access amenities and authorization for additional public access amenities consisting of eight bicycle "sharrows" and five directional Public Shore signs, one of which is double-sided; (3) upon authorization, provide the public access amenities; (4) record a legal instrument to permanently guarantee the required public access area; and (5) pay a civil penalty of \$120,000 to the Bay Fill Clean-up and Abatement Fund, half of which would be stayed for timely and complete compliance with the requirements of the Order.

Chair Wasserman noted some time parameters: In recognition of the limited options and that there is really only one issue, the amount of the civil fine; we are going to limit each side to 10 minutes. That does not include questions and answers.

Staff Counsel John Bowers addressed the Commission: I am going to present the same PowerPoint presentation that we presented to the Enforcement Committee. I will accompany that with a condensed oral summary.

The site of this project is in the city of San Leandro located between the San Leandro Marina to the west and the Hayward Marsh to the east.

It is located directly on the shoreline of San Francisco Bay in an area that is also referred to as Robert's Landing.

There are approximately 649 residences in this development. It is directly adjacent to some very significant natural undeveloped areas.

Because of that fact, the negotiations that went into the permitting of this project were extensive and quite complicated. I would say, out of the ordinary in terms of the complexity of the matter.

I want to point out to you that this extensive timeline of events that reflects three separate unsuccessful permit applications because they were never completed by the HOA. This chronology reflects the extensive efforts by the staff to work with the HOA over a significant period of time to bring this project into compliance with the permit.

Those efforts were ultimately unsuccessful and that is what has led to this enforcement action.

Some of the alleged violations are as follows: there was a failure to submit and gain approval of public access plans, a failure to guarantee public access areas, a failure to provide public access improvements and finally, a failure to assign the permit at the time that the property was sold from Citation Homes to the HOA and then there was some unauthorized placement of signage on Bridgeway.

The takeaway message from this list of violations is that none of these violations are being contested by the respondent.

It was agreed that it was not necessary to remove the sign but it was necessary to accompany this sign with a public access sign that would minimize the deterrent effect that we felt the unauthorized sign was having on public access.

The only issue that is before us is the issue of civil fines and penalties. The HOA has agreed to all of the substantive requirements of the cease and desist order.

You see on this slide the factors that we are required to take into account in assessing civil penalties. The factor that I want to emphasize to you is the cost to the state in pursuing these enforcement actions. We expended significant time and resources trying to resolve this matter over an extended period of time.

We are not talking about violations here that are particularly egregious. The reason the fines are as high as they are is because of the amount of time that it took to resolve this violation. That is the major factor that has resulted in the fines being what they are.

The fines would be much more significant than they are but for the statutory cap. All of these fines would have been significantly higher than \$30,000.00 but our statute limits our civil fines and penalties to this amount per violation.

This is where we come up with \$120,000.00 fine, one-half of which will be waived if the HOA carries out its responsibilities in a timely manner under the cease and desist order.

The first thing that the HOA has said regarding these fines is that it is unfair to assess significant fines against the HOA in a situation in which the HOA did not even exist when the violations were originally committed by Citation Homes. The HOA became bound by the terms of the permit. They became responsible for these violations upon acquiring title to this property.

Commissioner Gilmore stated a response to this argument in very clear and articulate terms. She said, "All I want to make sure again is that you understand we are not penalizing you for something that happened before you became aware of all the issues because that would not be fair. I think the reason we are penalizing you is for the specifically non-actions and what we perceive to be non-cooperation since you became aware of the violations. And we want to try and incentivize you to take care of them as quickly as possible."

I endorse Commissioner Gilmore's statement and she had a very clear and correct understanding of that particular matter.

The second defense that I want to discuss was the defense that the HOA has worked in good faith to try to resolve this violation. Commissioner Scharff responded correctly to this defense when he said, I frankly buy staff's argument that cooperation has been a problem here. I think it has. That was his assessment of the situation.

To reinforce that I want to quote from two of the statements that were made by Commission staff member Maggie Weber at the hearing when she said in response to the HOA's arguments that the reason it took us so long to get this matter in front of you is that we had to go through the city of San Leandro permitting process and we had all these other things that we wanted to get approved by the city of San Leandro which was security gates and the security kiosk and we had all these security concerns. We instructed them at two critical points in the process of seeking to resolve this violation to separate these two efforts.

Maggie Weber's first statement before the Enforcement Committee was a quotation of her own that in one of her communications to the HOA she said that, "Time had come to address the violation of our law separate from their security concerns." In other words, we wanted to see progress in securing compliance with our permit separate and distinct from whatever other objectives the HOA might have had with regard to security matters. And that was in July of 2015.

In May of 2016, over a year later, we said the same thing to them. Maggie, in this case, in May of 2016; we want you to pursue the correction or the resolution of these violations separate from, and in advance of, a still-desired amendment to install a security kiosk which was one of the other objectives of the HOA.

We see here that we gave advice. We gave admonitions to the HOA advising them what they needed to do to bring them into compliance in a timely manner with our permit and those admonitions and suggestions were essentially ignored.

Finally, I want to mention the final defense that the HOA has raised is its inability to pay our fines. They have indicated to us that they have an operating account that has approximately, at the present time, \$230,000.00 in it and we are talking about a payment of a fine of \$60,000.00. They clearly have the resources with which to pay the civil fine that we are talking about here.

There is no question that this operating account is going to take a big hit but there are ways for the HOA to replenish that account. They are allowed under law to increase their assessments by a factor of 20 percent per year. We calculated that it would take about five years for them to replenish their operating account for the payment of our fine. If they want to do it more frequently they can have a vote of their members to authorize a higher assessment.

That is our response to the defenses that the HOA has raised to the assessment of civil fines and penalties.

We are recommending or asking you to issue an order that will require the HOA to cease and desist from all activity in violation of the permit. We want the Commission to issue an order that requires the submittal of a complete application for the modifications or for the discrepancies between the on-the-ground conditions at the site compared to what is required by the permit. We want the recordation of a public access guarantee. We want the permit-parking only signage to be included in a signage plan. And we want the public access amenities that the permit requires to be installed. Finally, the civil fine and penalty; the Enforcement Committee is recommending the assessment of \$120,000.00 penalty, half of which, \$60,000.00, will be waived in the event that the HOA does all of the things that I just mentioned in a timely manner.

Thank you very much. I will be happy to answer any questions.

Chair Wasserman continued: We will now hear from the permit holder and there was a certain lack of communication and you actually have 15 minutes.

Mr. Alan Berger addressed the Commission: I will point out that there was some issue in getting our statement of defense to the Commissioners. Hopefully that has been resolved. I am Alan Berger and I am the attorney for the Heron Bay Homeowners Association.

I would like to explain that the Heron Bay Homeowners Association is a non-profit corporation comprised of over 620 homes. The project was permitted in 1994 by Citation Homes and turned over to the Homeowners Association in 1999.

All of the violations for which BCDC is seeking fines were committed by Citation prior to the project being turned over. As stated in our statement of defense the HOA was not aware of any permit issues with BCDC or, frankly, the existence of BCDC until the HOA, because of increasing crime in the area, applied for a gated-entrance to the city of San Leandro in 2014.

The HOA admits that it is the successor in interest to Citation Homes for the matter of the permit but feels that the fact that it was not a direct party to the permit agreement and had no idea of the existence of the permit, through no fault of their own, and lived with the existing condition for 20 years with no contact from BCDC must be considered in the matter and the imposition of the proposed fines.

All of the permit violations contained in the BCDC original cease and desist order have either been resolved or are the subject of an agreement between the HOA and BCDC staff.

BCDC at the enforcement hearing and then the findings presented to this panel have chosen to portray the HOA as dilatory in addressing alleged permit violations. In fact, nothing could be further from the truth.

We would point out that two of the original alleged violations have been dropped from the proposed order. The HOA has pointed out and the staff agrees that Items 2 and 5 on page 7 of the original report are the responsibility of a maintenance assessment district which BCDC only became aware of in 2017 when we supplied the information to them.

Therefore, only five of the original seven violations are currently being considered. We must point out that the HOA is in agreement with the proposed order and each of the dates for compliance except for the restricted parking sign which John just referred to on Bayfront.

The HOA only disagrees with the unreasonable imposition of fines for issues that have been agreed to for some time.

The HOA has presented applications for amended permits in 2015, 2016 and 2017. It is not accurate that we were doing nothing.

Each of these applications has been rejected for various reasons. In the first two in 2015 and 2016 it was because the Association was still trying to get a security kiosk and BCDC was negotiating for included parking on the private grounds.

However, in each of those applications the HOA has agreed to comply with each of the provisions of the citation permit. While the actual work to comply has not yet been completed as the amended permit applications were not approved; at no time has the HOA not been in agreement with the demands of BCDC.

The HOA has long agreed with the signage demands of BCDC which is a moving target; the most recent being a double-sided sign on Bayfront closest to the trails and the installation of bicycle sharrows. The fact that HOA has long been in agreement with BCDC's demands must weigh in any consideration of fines and magnitude.

The first violation is for failure to submit and gain approval of public access plans for the extension. This failure is solely on Citation. The HOA did not even exist when this failure occurred. However, in each of the rejected amended permit applications the HOA agreed to submit plans showing the exact as-built conditions; and, in fact, has done so.

It is important to note that all the parties agree that the current as-built condition is far superior to that which was required in the original permit.

And in each of the amended permit applications the HOA has offered to return the area to the exact requirements of the permit if BCDC so requires.

It is our understanding that BCDC recognizes that the existing is an improvement. With this in mind, how can the Commission suggest a \$30,000.00 maximum fine for this violation when the exact as-built conditions that have been present for 20 years without complaint is a decided improvement over the required condition and the failure to seek permission to build could not have been the HOA's responsibility.

The second violation is that the HOA has failed to permanently guarantee all public access. This is simply not true. The HOA and BCDC has consistently agreed that this permit and guarantee needs to be prepared by a surveyor to specifically define the approved easement and this work would be done after the amended permit is granted.

Each of the amended permit applications specifically guarantees this provision. The fact that it is not yet done is a product of the fact that the permit has not yet been approved.

Staff knows that the HOA has always agreed to this provision. It is unreasonable therefore to collect a \$30,000.00 maximum fine for an item that has been agreed to since the inception of the matter and says so in each of our amended applications; particularly since 2014 the lack of the guarantee has had no effect whatsoever on the use of the trails as have none of these violations have in any way affected the public use of the trails.

The third violation is failure to provide the required improvements. This is essentially the same as the first violation. The as-built condition is an upgrade. The HOA has consistently, in writing, agreed to remove all the improvements and return to the permit requirements of the demand of BCDC. Staff recognizes this is not an improvement, nevertheless, a maximum fine of \$30,000.00 is requested. This is palpably unfair.

The HOA is being fined for not doing something 20 years ago that BCDC does not even want today. The fine is unreasonable and redundant in light of the first violation which is failure to gain approval for the exact same work. No court would support these two proposed fines.

The fourth violation is for failure to agree in writing that the HOA, read, understood and agrees to be bound by the permit requirements. This violation is particularly egregious. In every contact with BCDC the HOA has consistently agreed with its successor and interest to Citation and as bound by the terms of the permit. Every application so states.

This week the HOA has provided a resolution of the Board memorializing this condition. It is an abuse of discretion to state that the HOA does not agree in writing when the same is not the case. The form of the writing is not specified and in not one response to the application has BCDC mentioned this requirement.

To assess a \$30,000.00 fine for this technical oversight has nothing to do with the actual use of the trails and constitutes an abuse of discretion.

The final violation relates to the presence of the restricted parking sign. I think BCDC has conceded this issue but Mr. Richard Brennan who is the vice-president of the Association will address this issue also.

I would finally point out that while providing a list of interested parties is a not a permit violation issue, the HOA has provided that document this week to BCDC. In conclusion, I would say the HOA is now in agreement with all that needs to be done to gain compliance, will submit a fourth application for an amended permit and will comply with all the dates established by BCDC for compliance. We have never had an issue with that.

None of the violations were the work of the residents of Heron Bay. The imposition of fines in the absence of continuing violations is unreasonable and may well be unenforceable.

I would like to submit this text as part of the record. I would yield to Mr. Richard Brennan who is the vice-president of the Association.

Mr. Richard Brennan spoke: My name is Richard Brennan and I am a Heron Bay resident for the last 20 years and I am vice-president of the Heron Bay Homeowners Association.

The three things are the role of the Heron Bay MAD which is fundamental to understanding the disconnect between all the parties involved here; the city, the Heron Bay Association and the staff.

Our first belief is that the current order that you are being asked to sign is in such disarray, has so many factual errors; if I was a Commissioner I would not want my name on that document. It is not a good document as it stands. We propose that you modify it.

We believe the proposed fines are disproportionate and we would like to have them mitigated.

The MAD is the agent that was constructed to do the maintenance in the Heron Bay Marshlands. Contrary to statements in all the documents, the Homeowners Association has nothing to do with the MAD. The MAD is an assessment on the residence that goes to the taxman, directly to the city. We don't have anything to do with it.

This is a fundamental misunderstanding and one that BCDC staff claimed to have not been aware of until July 17, 2017.

Interestingly, the 1996 permit that BCDC issued to the city of San Leandro that manages the MAD references the creation document, Resolution 9650 which creates the MAD. But the MAD is nowhere mentioned in the city permit.

If you believe that the permit follows the land what you end up with is at least four parties involved; BCDC, the city as a city, the city managing the MAD and Heron Bay and at no time have these parties been brought together to shake down who is on first. This is the fundamental disconnect between staff and all the other parties and has led to this extended duration of time.

The documents are terrible. They are in horrible shape and we need to resolve them.

As they note from the revision that the city has the majority, the city MAD has the majority, the access; we only have 450 feet of the access out of the 1,450 foot so-called Lewelling extension.

The signs that the narrative implies were graciously replaced by the city because the HOA refused to do so; they were never the HOA's to replace. They were the city's responsibility since 1996. We had nothing to do with those signs because they were in the MAD managed marshlands.

It should be noted that there are no violations of access that have ever been claimed that we are aware of that violate the public access requirements of unrestricted public access for walking, sitting, bicycling, viewing, picnicking and related purposes.

This is an enumerated list of exactly what you can do and none of that has ever been violated.

The HOA will file and we have agreed to all of this and we have agreed to it in presentations to the staff since 2015.

The as-built improvement is actually wider than is documented in the staff's report. It is six feet wide plus a 14 to 27 foot easement. It is bigger and nicer looking than what was required. We offered to turn it back into an asphalt trail with gravel margins and the staff said, that's okay, we will write it into the as-builts. So they have agreed to this since 2015.

The signs that were in violation; five were and have been the responsibility of the MAD; the MAD that is not mentioned anywhere since 1996.

HOA agrees that it will be bound to the conditions of the Citation permit; the portions that are assignable to the HOA. We never owned, we don't own all of the land in the Citation permit. The permit follows the land. We need all four parties at the table to resolve this.

The signs in question; you can clearly see and Commissioner Gibbs remembers the discussion here – the violation of that no parking sign is that there is a 12 by 18 sheet of aluminum with letters on it. That is the violation. The no-parking is a requirement of the California Vehicle Code for enforcing ownership on private streets and it is a private street. This is not a public access way. And we will provide a sign plan.

We have already erected the desired blue public shore access signs.

We think that the fines are inappropriate. We are requesting relief and I would make a further proposal. I think the document in front of you is in such bad shape it requires another round. I would like you to ask the staff to convene a meeting of the interested parties which has never happened before which is the city representing the Parks and Rec who owns the city park there, the city representing the MAD, the Management Assessment District that they manage, the HOA and the BCDC staff. We are all amicable.

We communicate with all and we have a cordial relationship but not an effective one. We need to all get in the same room and shake this down and come out with who owns what because the city permit has errors, the one that was written in 2016 and there is nothing that can be done about the permit until this process happens. Thank you very much for your attention.

Commissioner Ranchod had a question: it was presented to the Commission that the issue before us is the amount of the penalty and not other terms of the cease and desist order. That does not seem to be consistent with what you are saying.

Mr. Brennan replied: Well, miraculously my comments to the enforcement hearing did not seem to make it to this body. So I am re-presenting it because they were not acknowledged.

What I am saying is that there are factual errors, misstatements of fact in that cease and desist order. I don't think the Commission likes to sign those kinds of documents therefore I would recommend you not sign it and we deal with it in the next 30 days and come back to you next month with an agreement.

Mr. Berger explained: I just wanted to clarify that. I think Mr. Brennan's comments of the mistakes in fact are in the findings of fact. The actual language of the cease and desist order and the time periods involved with that we have already agreed to. We don't have an issue with that.

Commissioner Butt weighed in: It sounds to me like that Citation was the original permittee and the Homeowners Association is the successor in interest for that permit. The city which apparently is serving as the Board of the MAD is not a successor in interest nor is anybody else. Am I missing something? It sounds like the HOA is the only successor in interest to the permit.

Mr. Berger responded: No. There was a permit that the city of San Leandro also signed. They were also out of compliance for 20 years but staff has reworked that and an amended permit has since been granted to the city of San Leandro which included the inclusion of six parking places at the front of the Heron Bay property. There was a permit with the city but the city is not the successor in interest to any of the terms that Citation agreed to.

Mr. Bowers commented: Mr. Berger makes a good point. If we had had the level of cooperation that we received from the city of San Leandro, and we had similar issues under the city of San Leandro permit, we would not be standing here today. That is the difference.

I want to make the point again that these violations are not particularly egregious violations therefore we have assigned them a fairly low daily fine on the scale of daily fines that we had to apply under our statute.

What has caused these fines to be as high as they are is the length of time that these violations have been allowed to continue and persist. That has been the issue here.

And if you look at that chronology of events you can see exactly why all of that time has been taken. We have gone back and forth and back and forth, one application after another trying to get these matters resolved. We simply have not had the level of cooperation that we are expecting to get from our permittees.

Chief of Enforcement Adrienne Klein spoke: The city permit has been amended by staff recently to address issues in that permit after the meeting with the HOA in which we became aware of the role the MAD played and the area that it covers. We realize that we have to again amend the city permit and correct that error. And we have already been in contact with the city and they will be cooperating with the submittal of that amendment request.

Mr. Berger commented: I disagree that we created this long delay. We personally met with BCDC staff in San Francisco with my entire Board of Directors on at least four occasions. And that is a major inconvenience for unpaid, non-profit Board members.

On the first two permit applications in 2015 and 2016 we were specifically still trying to work with the city of San Leandro. BCDC was completely aware of that and, in fact, they were still responding to the city about requests for kiosk and guards and all the rest of that are attendants. And they were still in the first two permit applications asking for parking places that were not allowed in the permit and we were negotiating with that.

There were a lot of issues here. There were a lot of mistakes that both people made. I would submit that from 2015 to 2017 if you read the three permit applications we had already agreed to all of the terms that are currently being fined. Had they been completed yet; no, because the permanent guaranteed can't be done until the permit application is amended.

We had agreed to each and every one of those terms during that time period. I might add that the two years or so that it took to get to this point is a lot less than the 20 years that we were even unaware that BCDC had an issue with this property.

Mr. Brennan added: I am gratified to hear from Adrienne that work is underway on a further revision. I think the latest is five so it must be six to the city permit which until now has not mentioned the role of the MAD.

The permit coming towards the HOA mentions dredging. We don't have a coastline or a canal, an estuary near us. We don't do dredging. The city maintenance assessment district funded by the homeowners separately from the HOA would need to do dredging. The process currently underway redoing the city permit would be beneficially enhanced by joining us all together, come to the table; slice and dice the original flawed permit and come up with a resolution.

Chair Wasserman addressed staff: John or Adrienne do you wish to address either of two issues; one is this issue of the incomplete applications, I gather there were three of them, and then second is the dredging issue.

Mr. Bowers replied: Let me make one point very clear. None of the requirements that we are imposing on the HOA fall within the scope of this maintenance assessment district. We removed all of the things from our area of concern that were subject to the MAD. That is a non-issue at this point because we have taken care of that.

I don't know about the dredging. Dredging is not anything that is required or is authorized by our permit.

Ms. Klein addressed the dredging issue: There was dredging initially in this location and that is a legacy of the authorization. We haven't said when the development was built BCDC issued a second permit nearly identical to the original permit to the city. What we have done with the city permit is tease out the pieces of the city permit that only apply to the HOA. What we intend to do with the permit amendment that relates to the development, the residential development, is tease out the pieces that belong exclusively to the city. Whether the dredging will remain in both permits I don't know off the top of my head but these are matters that the staff can handle administratively separate from the enforcement proceeding.

Chair Wasserman announced: We have a motion to open the public hearing on this matter. We have no public speakers on this item.

MOTION: Vice-chair Halsted moved to open the public hearing, seconded by Commissioner Nelson.

MOTION: Vice-Chair Halsted moved to close the public hearing, seconded by Commissioner Nelson. The public hearing was closed by a voice vote of Commissioners.

Commissioner Peskin had some reservations: I am reluctant on this. I think that the Homeowners Association has some good arguments. And certainly having the incentive to doing it earlier and having the fees be less makes sense. I find some of their arguments compelling. I looked at the last case at \$30,000.00 plus improvements in this case; in the previous case the project sponsor knew about it for many years. In this case it's a handful of years. I would respectfully suggest a lessor amount. I find the arguments compelling.

Chair Wasserman asked: Are you working towards an amendment to the motion?

Commissioner Peskin answered: Yes. I would like to do it with staff interaction and I appreciate Mr. Bower's comments. I would cut it in half.

Chair Wasserman continued: So I would take that as an amendment to the amount. Is there a second to the amendment?

Deputy Attorney General Shari Posner advised: The amount of the fine cannot be modified.

Chair Wasserman commented: We can drop an element completely but we can't actually modify an element.

Ms. Posner concurred: Correct. So you can vote on parts of the order and send it back.

Commissioner Techel commented: I think we did hear the \$120,000 fine and we did decide to add the stipulation that if they move forward with the appropriate actions quickly that we would forgive half of that so their fine would be \$60,000.

Chair Wasserman clarified a point: There is only one motion on the floor and that is to accept the recommendation of the Enforcement Committee.

MOTION: Commissioner Butt moved approval of the Enforcement Committee recommendation, seconded by Commissioner Techel.

VOTE: The motion carried with a vote of 13-2-1 with Commissioners Addiego, Butt, Gibbs, Jahns, Pemberton, Ajami, Nelson, Pine, Ranchod, McElhinney, Techel, Vice Chair Halsted and Chair Wasserman voting, “YES”, Commissioners Peskin and Randolph voting “NO”, and Commissioner Bottoms abstaining.

11. Public Hearing and Possible Vote on the Albany Beach Restoration and Public Access Phases 2 and 3 Project by the East Bay Regional Park District to Enhance Albany Beach and Construct a New Segment of Bay Trail Cities of Albany and Berkeley, Alameda County; Material Amendment No. One to BCDC Permit 201.005.00. Chair Wasserman announced: Item 11 is a public hearing and possible vote on the Albany Beach Restoration and Public Access Project by the East Bay Regional Park District. Hanna Miller will introduce the project.

Permit Analyst Hanna Miller presented the following: On September 22nd you were mailed a summary of the application by the East Bay Regional Park District to enhance the Albany Beach Park and to create almost one mile of Bay Trail adjacent to the Golden Gate Fields Racetrack and the cities of Albany and Berkeley.

The project is located within the San Francisco Bay Plan designated waterfront park beach priority use area. This project is for Phases 2 and 3 of the Albany Beach Restoration and Public Access Project.

The Commission authorized Phase 1 which involved improvements along the Albany neck on February 5, 2015.

The proposed project would involve improvements within 7.57-acre area within the Commission’s jurisdiction. The Park and Bay Trail would occupy 4.44 acres. The existing park is heavily used by pedestrians especially those with dogs, bicyclists, kite surfers, kayakers, sun bathers, picnickers and anglers.

The Park was designated as a San Francisco Bay Area water trail site in June of this year. The project would replenish and expand the beach and would create a 20-space parking lot, a toilet, 1.1 acre non-tidal habitat area which would include sand dunes, a seasonal wetland and a rain garden, an open-use area and approximately 4,983 linear feet of Bay Trail.

The Trail would include two overlooks and would have a 200 foot long bridge portion where the Trail would cut into the Cliffside at Fleming Point.

There would be two beach entrances both of which would include accessible beach paths that extend to the water.

This project does not involve any Bay fill.

Large portions of the replenished beach area are anticipated to regularly flood by mid-century.

The expanded beach area would flood during a current 50-year storm event and during a two-year storm event in the year 2050.

The proposed elevation of approximately 2,300 linear feet of the Trail would be elevated above the level at which flooding is anticipated by the year 2050. Approximately 920 feet of the Bay Trail between the southern end of the beach and the fishing peninsulas that exist near Fleming Point would be flooded by a 50-year storm event currently and a two-year storm event in 2050.

The remaining 1,763-foot long portion of the Trail would extend down to Gilman Drive and is anticipated to be flooded during a 50-year storm event by the year 2050.

Climate Change Policy 7 states, "Until a regional sea level rise strategy can be completed the Commission should evaluate each project proposed on a case-by-case basis to determine whether the public benefits, resilience to flooding and capacity to adapt are worth it.

The policy lists several types of projects including a public park that should be encouraged if the regional benefits of the project outweigh the risk of flooding.

The staff summary lists the issues raised by the project, in particular: whether the proposed project is consistent with the McAteer-Petris Act provisions on public access and the San Francisco Bay Plan policies regarding the priority-use designation for the site, public access and recreation.

Here to present the project is Chris Barton from East Bay Regional Park District.

Mr. Barton addressed the Commission: My name is Chris Barton I am with East Bay Regional Park District and I am the project manager for the Albany Beach Restoration and Public Access Project.

East Bay Regional Park District is a two-county special district. We have 55 miles of shoreline. We have been in the business of maintaining and operating parks and restoring parks for the past 83 years.

There is a long history getting us here today to amend the BCDC permit that we originally moved forward with in Phase 1 of the project. I have Patrick Miller here who will be going over the specifics of the proposal.

Commissioner Butt announced: I just realized that East Bay Park District is a client of my architectural engineering firms so I am going to have to recuse myself. (Commissioner Butt exited the room)

Mr. Barton continued: The project is located along the East Bay shoreline in the city of Albany.

The project originated with the East Shore State Park General Plan which went through a long planning process. It took 22 months to go through this process. Numerous stakeholder meetings were held.

Some of the key guidance we obtained from this project is, number one: to expand the dune area behind the existing beach, number two, create non-motorized watercraft access to the south portion of the beach.

Back in 2011 the Park District went forward with the feasibility study and it is a 14-month planning process that we went through. Six public meetings were held and we also met with BCDC staff and other regulatory agencies. It was good to receive input at that time.

The purpose of the feasibility study was to also establish the site program and to look at the compatible and best use of the property with the General Plan.

We had several workshops that we went through with the city to get public input. At Workshop 2 we had more than 80 comments. The consensus was to provide restrooms, benches, non-motorized watercraft access and better beach access.

There was some back-and-forth on this project because there are a lot of uses out there. Some preferred to see no development at all and others proposed improvements that were not consistent with the General Plan.

The proposal that is in front of you today is a balance and compromise.

What comes out of this General Plan and the feasibility study is the project description. That is at the heart of the EIR and there is also a condemnation lawsuit that the Park District is going through in order to require a 2.88 acre parcel behind the beach.

There is some CEQA litigation that went on and there was a settlement agreement with Golden Gate Fields.

The EIR process went on for 50 months. The project description really is the core and heart of that. So we are working hard to implement the project that was identified. We've also been successful in putting together about seven million dollars in grant funding for this project which is also based on the project description that came out of the General Plan and feasibility study process.

Our project goals are as follows: number one, to implement the McLaughlin East Shore State Park General Plan. We updated the name recently; and to correct the landfill erosion, to improve the quality and function of existing facilities, to improve the habitat out there, to accommodate multiple recreation uses and finally, to keep the Bay Trail on the Bay. We went through a lot to keep the Bay Trail on the Bay at this location.

On this slide you see the different phases of the project and some detail into the specifics of each phase. Patrick Miller will cover Phase 2 and 3 in his presentation.

We were able to remove about 26 tons of debris from the Bay in Phase 1. We removed over 20 tons of creosote timbers.

Mr. Patrick Miller addressed the Commission: I'd like you to appreciate the fact that this is a 2.0 acre existing paved parking lot. The design of this project is to reclaim that parking lot as park and habitat and landscape space and a people space.

The existing sand dunes will be expanded to the east. The parking will be on the east side of what is now paved parking lot.

This project provides a whole array of public access amenity features. It is a public access project.

The beach area itself will have expanded sand dunes and they will be fenced because that is one of the mitigation measures through the EIR. It will have a restroom. It will have a parking lot. It will have one space dedicated for loading and unloading whether it be for wind surfing or kayaking or picnicking or any other kinds of uses. It will have an expanded access to the beach; two separate beach mats for ADA accessibility down to the high water line. It will have a picnic area. It will have expanded open-space areas to be used for a variety of recreational purposes.

And as the public really likes, it will have a new restroom. The current porta potty that the city of Albany has leaves a little to be desired. It will also have about 26 parking spaces for bicycles.

The second part of this project is the one-mile section of the Bay Trail. This Bay Trail once completed will provide a continuous link between Emeryville and the National Park Services Crane Pavilion out in Richmond which is about a ten mile stretch off-highway bicycle trail; a shared-use trail.

The Trail has some permanent sections that are generally above sea level concerns. In the middle of the Trail is Fleming Point at a 55-foot height. It gives a wonderful view of the entire San Francisco Bay from the East Bay.

There are two relocatable sections. We use that term because this is an easement on Golden Gates Field property. They do have long-term goals for other kinds of development where those sections of Trail may be relocated based on those future plans.

The Bay Trail involves a complicated set of engineering considerations because of the slope, the geology and the positioning of the easement at the edge of the bluffs and the Bay.

We also have to make sure that existing drainage from all the Golden Gates Fields parking areas can be accommodated. There will be two overlooks on either side of Fleming Point off of the Trail, all accessible.

Around this area we will have retaining walls with a 200-foot long bridge built into the side of the bluffs. There will be another vista point on the south side of Fleming Point. All of these designs are to make sure that the Trail is accessible. The Trail is totally consistent with the Bay Trail guidelines adopted by ABAG last year.

On behalf of the Park District that we have completed everything that is checked above and we are now in the permitting phase and we ask for your favorable approval of this permit amendment because we would like to get this project under construction in 2018.

Chair Wasserman opened the public hearing.

Ms. Pam Young was recognized: I am here representing the Golden Gate Audubon Society. Golden Gate Audubon supports restoration of beach habitat. However, the risk from this project of harmful impacts to wildlife and the habitat on which they depend appear to be high.

This is a very small space with a lot of users. And the Park District has focused on accessing these spaces for recreational opportunities for humans but what about the wildlife?

The Park District and the Commission have an equal responsibility and duty to protect access for wildlife.

Going forward let's keep in mind that this entire project area takes place on just seven acres. The public access plans invites a potentially excessive burden on this fragile seven-acre site from high-human activity.

The project description states extensive use by kite surfers, water trail site launch plans, extra parking and even bicycle parking.

What is going to happen to this precious habitat? Even the Commission recognizes from its own findings the irreplaceable ecological value of the Bay and the shoreline as a vital aquatic ecosystem.

Development and public access inevitably results in significant harmful effects to the Bay's ecosystem function.

The kind of intense public access described here fragments and degrades the ecosystem.

The more protection that can be provided from such impacts the less fragmented the ecosystem will be and the Bay's productivity will be protected.

We ask that you reduce the footprint of the proposed recreational features and protect the shoreline and beach ecosystem. Keep in mind on just seven acres this project envisions only 1.1 acres for sand dunes, seasonal wetland and other vegetated areas.

When you consider the buffer of the area that will be impacted by human activity adjacent to this you will have less than 10 percent of the acreage for wildlife and habitat.

GGs urges that you follow the guidelines in your own Commission and also the guidelines in the McLaughlin East Shore General Plan for following your duty to protect habitat for wildlife and for preventing the kind of impacts here.

We recommend that you consider such recreational activities at the Marina and protect the last remaining wetlands. Thank you.

Mr. Andrew Sullivan addressed the Commission: I will make an impassioned plea to maintain recreational access to the Bay. I use this beach almost every day to walk my dog, to play with my children, to kite, to paddle board and to kayak. I have worked with many of the people involved with this project to try to accommodate as many uses as possible.

I am here representing the interests of kite boarders. Kite boarding is the fastest growing sport on the water. It is very important that BCDC be aware of some of the unique needs of kite boarders to keep our access safe.

This effort is a model that might be revisited whenever BCDC is looking at other access issues that require recreational uses.

I wanted to address the height of the grass in the area that was designed to be made available for kilters and other recreational users and I pointed out that two-foot high grass does not work for kilters because we run our lines and we set up our kites and they would be quickly entangled. It would not be a functional space for us or anybody else who wants to rest there. They have agreed to modify that requirement in the plan to make sure that there is as level as possible of a surface for those recreational uses.

Thank you for being open to the accommodation of kilters.

Chair Wasserman noted for the record: We do have an email from Shirley Dean, the president of the Board of Citizens for East Shore Parks endorsing the project and the recommendation.

Ms. Rochelle Nason commented: I am a member of the Albany City Council although I am here speaking only on my own behalf. I am an almost daily user of this area.

I can speak for the Council and the people of Albany that there is tremendous excitement about this project. We are very eager to see this happen and appreciate all of the work that everyone has put into it.

Back in May the City Council passed a resolution about the project. Some people thought that we were expressing reservations. What we were expressing was the idea that we would like to coordinate with you on assuring that parking and circulation work well down there.

There is a little bit of a possibility that we would see with a lot of wonderful, free unlimited parking being created right by the beach that we are going to have people circling around trying to get those spaces, waiting for them and we would like to try to consolidate the public parking together and we want to help make that happen if it becomes a possibility in the future.

I was encouraged when I heard about the relocatable easement arrangement with Golden Gate Fields because perhaps we can talk in the future about relocatable parking if a better place becomes evident and if it is city of Albany property; we are eager to work with the East Bay Regional Park District to make that happen.

We have strong support for the project and thanks to all for the hard work.

MOTION: Commissioner Ranchod moved to close the public hearing, seconded by Commissioner Addiego. The motion carried by a voice vote with no abstentions or objections.

Commissioner Nelson commented: I had heard that there were concerns about kite board access so I am really pleased to hear that this has been worked out and that we have kite boarders here who are pleased with the project.

I did want to discuss the comments of the Golden Gate Audubon Society. I completely agree with your comments that this Commission has a responsibility to do what we can to protect remaining wetlands, however, I am an occasional user of this site and this is an extremely heavily used site.

I have noted a number of features here that I think are important. First, the pathway along Fleming Point is raised. I was wondering whether that pathway was going to be at the edge of the Bay or up on the bluff and it's the latter which I think significantly protects wildlife access on the Bay shoreline. That is a very steep bluff.

The access to the beach, the beach area is going to be modestly expanded but it is hard to argue that this is anything other than an improvement to habitat because of a significant area of land that is currently asphalt is going to be turned into dunes and seasonal wetlands. I want to make sure that I heard correctly that those wetlands and the dunes are going to be fenced because the Golden Gate Audubon Society expressed concerns about human impacts on that habitat and that certainly is a valid concern. Fencing could reduce those impacts. I wanted to make sure that I had that right.

Ms. Miller replied: Yes. There will be a four-foot tall fence that will extend around the 1.1 acres. A tiny portion of the dunes will extend just outside of the fence but the vast majority is protected and there would be three gates to allow for maintenance.

Commissioner Nelson continued: I have a question for staff as well. Golden Gate Audubon Society asked the Commission to enforce our existing laws to protect wildlife and beach habitat from off-leash dogs. I am wondering whether there are any permit requirements here. Do we have permit requirements elsewhere regarding that issue? Off-leash dogs have been a huge issue in other shoreline areas around the Bay Area. I thought I would ask you to address that.

Ms. Miller explained: We do not have any permit conditions related to off-leash dogs. There are no BCDC policies that relate to this.

Mr. Chris Barton commented: Regarding the leash requirement; the project is located within McLaughlin East Shore State Park. There are a set of rules in the East Shore State Park General Plan. It is highly restrictive. It says that dogs are not allowed off-leash. However, enforcement because of the historic use of the property; when it was closed as a landfill it was immediately used for public access and became a de facto off-leash dog area. It has become very popular.

When East Shore State Park was established, that use continued. The Park District is proposing to develop a parking lot with permit amendment. Our rules for a developed area are that dogs need to be on-leash. That is with limited police resources. We have a lot of serious crimes that are going on around the shoreline. Leash violations tend to be lower than auto burglaries or violent crimes.

We have to prioritize our resources. We try our best to implement and enforce our Ordinance 38 where it says that dogs need to be on-leash in developed areas.

It is not perfect because of limited resources. That is why you see an area where there are a lot of dogs.

Commissioner Ranchod commented: I agree with Commissioner Nelson's comments. I may be the only Commissioner who is a resident of Albany and I utilize this area frequently as well.

I want to echo the comments about the excitement that a lot of the residents of Albany have. This will be a significant enhancement of the public experience there.

It is not a pristine area. It can be significantly enhanced. I am excited about the public access and utilization of the area.

With respect to the concerns raised by the Golden Gate Audubon Society letter and comments here; is there anything else in the record and the extensive public process that some parts of the project were developed through that addressed these concerns? Were they raised earlier as well or is this the first time that they are being brought to the attention of folks?

Ms. Miller replied: This has been extensively discussed and Chris can get into the history of it. This was thoroughly analyzed in the EIR.

Mr. Barton added: This issue of wildlife has come up in the EIR process. We looked at the existing baseline condition and it is a wild, rough condition as it is. We are proposing to protect a good portion of it and to expand the area. From an environmental impact standpoint there is a plus there.

The Park District is committed to habitat restoration where we can and that is one of the reasons why we want to establish those dunes. This area was hit hard by the Cosco Busan oil spill.

U.S. Fish and Wildlife has reviewed our restoration plan and is excited and happy to be able to fund this to improve the habitat value.

With the first phase of the project we installed roosting islands and birds are using those areas. We are seeing a lot of rock weed that is coming in and we are able to successfully expand and create more diversity and create tide pools in the sub-tidal areas.

Ms. Miller made the staff recommendation: On September 29th you were mailed a copy of the staff report recommending the Commission to authorize the proposed project as conditioned.

This recommendation includes special conditions that require the permittee and Park to maintain the site, develop a comprehensive signage plan that would alert users to high-traffic areas and how to report flooding events, provide a continuous Bay Trail segment despite changes in property ownership or Trail alignment and to develop an adaptation plan for public access areas that are vulnerable to flooding and sea level rise.

Following the mailing further discussions with the applicant took place and changes were made to the recommendation. Most of these changes were minor in nature and corrected typographical errors.

However, I would like to bring your attention to two different changes that were provided to you on an errata sheet. On page 11 of the recommendation, Special Condition 2 (D)(3) on maintenance; as amended, now states – At the 0.95 acre open-use area required herein the permittee shall maintain landscaping in order to facilitate use by the public such as for kite surfers and general park sitters.

Special Condition II (D)(7) further outlines long-term maintenance and adaptation planning for the project site.

And then on page 13, Special Condition II (D)(7) pertaining to flooding and sea level rise now states, An area of the improved beach and approximately 2,685 linear feet of the San Francisco Bay Trail are low-lying and not resilient to future flooding.

By November 1, 2032; or 10 years following completion of the project construction, whichever is earlier; the permittee shall submit to the Commission for its review and consideration a sea level rise and flooding adaptation plan for the 2,685 foot long portion of the San Francisco Bay Area Trail and the beach area and other public access areas authorized and required herein.

The adaptation plan shall analyze one: how the public access improvements required herein including the recreational beach and Bay Trail have responded to significant flooding events and two: potential adaptation techniques for any public access area experiencing significant inundation and consequent damage or sustained public closures. If by November 1, 2033 the permittee and the Commission determine it is not feasible to adapt the access required herein the permittee shall propose and within one year provide equivalent access at a nearby location to the extent that suitable public property is available.

Any resulting modifications of the public access areas required herein may result in a subsequent permit amendment.

As conditioned with these changes the staff believes that the project is consistent with your law and Bay Plan policies regarding the priority use area designation, public access and recreation. And with that we recommend that you adopt the recommendation.

Chair Wasserman asked: Does the applicant accept the conditions?

Mr. Chris Barton replied: Yes.

MOTION: Commissioner Ranchod moved approval of the staff recommendation, seconded by Commissioner Randolph.

VOTE: The motion carried with a vote of 14-0-0 with Commissioners Addiego, Gibbs, Jahns, Pemberton, Ajami, Nelson, Peskin, Pine, Ranchod, Randolph, McElhinney, Techel, Vice Chair Halsted and Chair Wasserman voting, “YES”, no “NO”, votes, no abstentions and the recusal of Commissioner Butt.

12. **Adjournment.** Upon motion by Commissioner Nelson, seconded by Commissioner Ajami, the Commission meeting was adjourned at 3:28 p.m.