

**Enforcement Committee's
Recommended Cease and Desist and
Civil Penalty Order
No. CDO 2017.03
Heron Bay Homeowners Association**

Maggie Weber, Enforcement Analyst

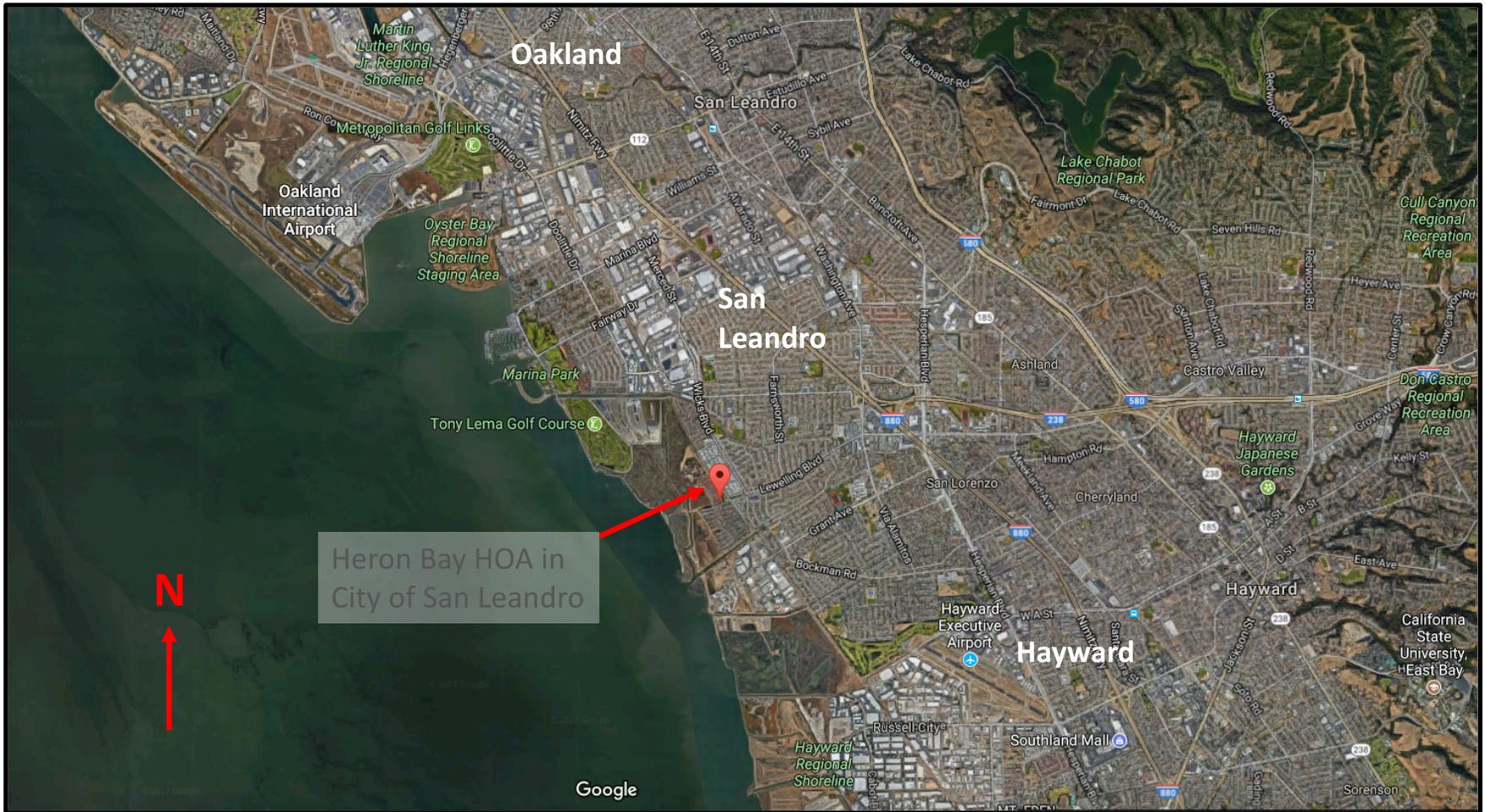
John Bowers, Staff Counsel

October 5, 2017



Making San Francisco Bay Better

Vicinity Map



Site Map



Staff Presentation

- Timeline of Events
- Description of Unauthorized Work and Permit Violations
- HOA Statement of Defense and Staff Responses
- Key Terms of Proposed Cease and Desist and Civil Penalty Order



Photograph of Heron Bay Residential Development taken looking west from the San Leandro Marshland Shoreline Trail by Maggie Weber on June 28, 2017

Timeline of Events

- **June 16, 1994** – BCDC and Citation enter into Settlement Agreement
- **July 22, 1994** – BCDC issues Permit to Citation
- **October 12, 1999** – Citation transfers ownership of public access area to HOA
- **April 2014** – Staff discovers Permanent Guarantee Violation
- **June 2014** – Staff discovers Public Access Improvements Violation

Timeline of Events

- **September 17, 2015** – HOA submits first application for second amendment to Permit
- **October 15, 2015** – Staff responds to incomplete application
- **May 26, 2016** – Staff commences standardized fine process
- **July 13, 2016** – HOA submits second application for second amendment to Permit
- **August 12, 2016** – Staff responds to second incomplete application

Timeline of Events

- **April 14, 2017** – Staff provided HOA notice that the ED terminated standardized fine process and commenced formal enforcement
- **May 19, 2017** – HOA submits third application for second amendment to Permit
- **June 14, 2017** – Staff responds to third incomplete application
- **June 16, 2017** – Violation Report issued
- **July 17, 2017** – Staff meets with HOA
- **August 18, 2017** – Staff mails HOA draft proposed stipulated Order

Alleged Violations – Section II of Staff Report

- A. Failure to submit and gain approval of public access plans
- B. Failure to permanently guarantee public access areas
- C. Failure to provide public access improvements

Photograph of unauthorized, nor guaranteed, Bayfront Drive public access area by Maggie Weber on July 24, 2015



Alleged Violations – Section II of Staff Report

- D. Failure to assign Permit
- E. Placement of unauthorized restrictive signage on Bridgeway Drive



Photographs of unauthorized restrictive signage in Bayfront Drive public access area by Maggie Weber on April 4, 2017 (left) and July 24, 2015 (right)

Civil Penalties

To determine the amount of administrative civil liability, Government Code Section 66641.9(a) requires the Commission to consider:

the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.

Civil Penalties

- **Nature, Circumstance, Extent, and Gravity of Violations**
 - HOA's failure to fully resolve the violations in spite of having had ample time and assistance to do so
- **All violations susceptible to Removal or Resolution**
- **Cost to State in Pursuing the Enforcement Action**
 - State has spent hundreds of staff hours
- **HOA's ability to pay**
 - HOA has not disclosed if fine prevents paying annual expenses
- **No voluntary removal or resolution efforts undertaken**
- **No prior history of violations**
- **Degree of culpability**
 - HOA's failure to respond

Civil Penalties Chart

Violations	Duration in Days	Minimum Penalty at \$10/day	Maximum Penalty at \$2,000/day	Proposed Daily Penalty	Total Proposed Penalty
Failure to submit and gain approval of public access plans	308	\$3,080	\$616,000	\$150/day	\$46,200 (capped at \$30,000)
Failure to permanently guarantee public access areas	1,098	\$10,098	\$2,196,000	\$200/day	\$219,600 (capped at \$30,000)
Failure to provide required public access improvements	945	\$9,450	\$1,890,000	\$250/day	\$236,250 (capped at \$30,000)
Failure to agree in writing that it has read, understood, and agrees to be bound by the conditions of the Permit	608	\$6,080	\$1,216,000	\$250/day	\$150,000 (capped at \$30,000)
Placement of unauthorized restrictive signage on Bayfront Drive	45	\$450	\$90,000	\$100/day	\$0
Total	x	\$29,158	\$6,008,000	x	\$656,550 (capped at \$120,000*)

**The Enforcement Committee reduced staff's proposed \$124,500 penalty to \$120,000 by removing the \$4,500 civil penalty that accrued for posting the "Permit Parking Only" sign without approval. The Enforcement Committee also proposes to stay half the civil penalty for timely and complete compliance with the terms of the Order. The proposed Order requires the HOA to pay a \$60,000 penalty within 30 days of issuance. If the HOA does not timely pay the \$60,000 penalty, or fails to timely comply with any term of the proposed Order, the remaining \$60,000 penalty is due within 30 days of receiving notice from staff that the HOA has failed to comply.*

Summary: HOA Statement of Defense and Staff Response

1. The HOA was unaware of the violations until 2014. The HOA argues it is unfair and unreasonable to hold the HOA accountable for violations committed by Citation
 - Staff commenced standardized fines two years after HOA received notice
 - Administrative fines are calculated after actual or constructive notice was provided
2. The HOA has cooperated with Staff and attempted to resolve each of the violations since discovery, however, the HOA was delayed because of ongoing City of San Leandro hearings for the security gate and kiosk
 - HOA has submitted three incomplete Permit amendment applications
 - All violations remain outstanding
3. The HOA is unable to pay the potential fines
 - HOA was give a two-year voluntary compliance period

**1. The HOA was unaware of the violations until 2014.
The HOA argues it is unfair and unreasonable to hold
the HOA accountable for violations committed by
Citation**

“And I want to make sure, again, that you understand, we are not penalizing you for something that happened before you became aware of all of the issues, because that would not be fair and that would not be reasonable. I think the reason that we are penalizing you is for the actions or specifically non-actions and what we perceive to be noncooperation since you became aware of the violations and we want to try to incentivize you to take care of them as quickly as possible based on the schedule that is set out here.” – Commissioner Gilmore, Enforcement Committee Hearing, September 7, 2017 (Transcript page 108)

2. The HOA has cooperated with Staff and attempted to resolve each of the violations since discovery, however, the HOA was delayed because of ongoing City of San Leandro hearings for the security gate and kiosk

“I FRANKLY BUY STAFF’S ARGUMENT THAT COOPERATION HAS BEEN A PROBLEM HERE, I THINK IT HAS;....” - COMMISSIONER & EC CHAIR SCHARFF, EC TRANSCRIPT, P. 107.

“One year later in July of 2015, staff informed the HOA that the time had come to address the violation separate from their security concerns and requested an application to amend the permit to resolve the violation...

Seven months later in May 2016, after not receiving any follow-up from the HOA regarding the application, staff informed the HOA that it was commencing the standardized fine process. As this time, staff recommended that the HOA submit a request to amend the Permit to resolve the violations separate from and in advance of a still-desired amendment to install a security kiosk to avoid increasing the accrual of standardized fines while waiting for city approval of the kiosk.”

– Maggie Weber, Enforcement Analyst, Enforcement Committee Hearing, September 7, 2017 (Transcript page 30) See: Violation Report Sections VI.S and VI.X; Index Documents 13 and 17

3. The HOA is unable to pay the potential fines

The operating account's current balance demonstrates that the HOA has the ability to pay this penalty. Pursuant to Civil Code § 5605(b), the HOA may choose to gradually (i.e., over an approximate 5 year period) replenish the operating account through raising its association dues up to 20% a year without a majority vote of a quorum of HOA members or, in the alternative, if the HOA wants to replenish its operating account more rapidly, it could request a greater increase in regular assessments or a special assessment by a vote of its members, as explained by Brian Ritter, the HOA manager, during the Enforcement Committee Hearing, September 7, 2017. *See: page 16, Staff Report*

Terms of the Proposed Order

- Cease and Desist from all activity in violation of the Permit
- Submit a complete application for the second amendment to the Permit
- Record public access permanent guarantee
- Include unauthorized PPO signage in signage plan
- Install public access amenities
- Pay \$120,000 civil penalty to the Bay Fill Cleanup and Abatement Fund; half of the civil penalty will be stayed for timely and complete compliance with the terms of the Orders