San Francisco Bay Conservation and Development Commission
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Heron Bay Homeowners Association c/o Alan Berger, Representative Law Offices of Alan Berger 95 South Market Street, Suite 545 San Jose, CA 95113 Respondent	COMMISSION CEASE AND DESIST AND CIVIL PENALTY ORDER NO. CDO 2017.03 Effective Date: October 5, 2017

TO HERON BAY HOMEOWNERS ASSOCATION:

I. CEASE AND DESIST ORDER

Pursuant to California Government Code Section 66638, Heron Bay Homeowners Association, all of their agents and employees, and any other persons acting on behalf of or in concert with them (collectively, "the HOA") are hereby ordered to cease and desist all activity in violation of BCDC Permit No. M1992.057.01 ("Permit") or the McAteer-Petris Act ("MPA"). Specifically, the HOA is ordered to:

A. Cease and desist from violating the Permit and the MPA.

B. Fully comply with the Requirements of Sections III and IV of this Cease and Desist and Civil Penalty Order.

II. FINDINGS

This Order is based on the following findings. The administrative record in support of these findings and this Order includes all additional documents listed in the Index of Administrative Record.

A. **Settlement Agreement.** On June 16, 1994, BCDC and Citation Homes Central[1] ("Citation") entered into the "Agreement Regarding Limits of Jurisdiction and Land Uses" ("Settlement Agreement") that established BCDC's jurisdiction for the purposes of Citation's development project, the future Heron Bay residential development (the common areas of which are now owned by the HOA), and the public access required to authorize the project.

Regarding jurisdiction, the parties agreed that:

> *…the landward limit of BCDC's San Francisco Bay Jurisdiction, pursuant to Government Code Section 66610(a), is a line that is fifty feet bayward from, and that follows, the southwesterly boundary of the Roberts Landing property, from San Lorenzo Creek on the south to the extension*

[1] Heron Bay Homeowner's Association's predecessor in interest.

> *of Lewelling Boulevard on the north. From there the limit of BCDC's Bay jurisdiction proceeds westerly such that no portion of the Citation property lying northerly of the Lewelling Boulevard extension lies within either BCDC's Bay Jurisdiction or its Shoreline Band jurisdiction. Thus, between San Lorenzo Creek and the Lewelling Boulevard extension, BCDC has Shoreline Band jurisdiction within the first 50 feet of the project*. (Section 1)

The Settlement Agreement provided that that Citation would provide public access improvements including grading, fill, and landscaping, located both within BCDC's Shoreline Band jurisdiction and within areas outside of BCDC's jurisdiction, as specified in their forthcoming BCDC Permit. Further, Citation agreed to permanently guarantee all required public access areas located on its property for such purposes.

B. **Citation Permit.** On July 22, 1994, the BCDC issued Permit No. M1992.057 to Citation ("Permit") to authorize dredging and excavation activities to mitigate the impacts to public access that would result from the proposed Heron Bay development, consistent with the Settlement Agreement. The Permit required Citation to provide certain public access improvements, consistent with the Settlement Agreement, including but not limited to:

   1. Special Condition II.A.1, Plan Review, required that no work could commence until final precise plans had been reviewed and approved in writing by or on behalf of BCDC.
   2. Special Condition II.F.2, Public Access Permanent Guarantee, required the public access areas to be permanently guaranteed within 60 days of Permit issuance.
   3. Special Condition II.F.3, Public Access Improvements, required that prior to December 31, 1997, Citation would install a minimum of an 8-foot-wide paved path, with a minimum total of 4 feet of shoulder to connect Lewelling Boulevard with the marsh area and provide no fewer than 4 public access signs. The improvements were required to be developed in connection with other public access improvements required in BCDC Permit No. 1989.014.05 issued to the City of San Leandro ("City Permit").
   4. Special Condition II.F.4, Public Access Maintenance, required all required areas and improvements, including walkways, signs, benches, landscaping, and trash containers to be permanently maintained by, and at the expense of, the permittee and assignees.

C. Citation executed the Citation permit on July 12, 1994.

D. Pursuant to Amendment No. 1, issued on January 23, 1996, the Permit required all work to be completed no later than December 31, 1998.

E. On May 7, 1996, Steve Foreman, Project Manager for the Heron Bay development, submitted on behalf of Citation plans ("public access plans") for public access signs and interpretive signs.

   The scope of the public access plan did not include the Lewelling Boulevard extension trail.

F. Meanwhile, on October 12, 1999, Citation transferred to the HOA ownership of the common areas of the property and as a result, became the successor in interest to Citation under the Permit; in violation of the Permit, no formal assignment of the Permit occurred in connection with this transfer of ownership and BCDC was not otherwise informed of the transfer of ownership.

G. On April 10, 2014, San Francisco Bay Trail staff informed BCDC staff that the HOA was seeking approval from the City Planning Commission to construct gates and fencing at the entrance of Heron Bay development to control access for vehicles, bicyclists, and pedestrians into the residential development and in turn, to Bayfront Drive and Roberts Landing Slough, both of which are the public access areas required by the City Permit and the Permit.

H. Upon receiving this report, BCDC staff determined that, if implemented, the proposal would require an amendment to the Permit because it would have discouraged members of the public from being able to reach the required public access areas. Further, no permanent guarantee had been recorded, as required by Special Condition II.F.2 of the Permit.

I. By letter on June 12, 2014, BCDC, informed Cynthia Yonning, then HOA representative, that installation of the gate without first obtaining written authorization from BCDC through amending the Permit would be a violation of the Permit and BCDC's law. BCDC staff also informed Ms. Yonning that the legal instrument to guarantee the public access had never been submitted to BCDC and must now be prepared, approved by BCDC staff, and recorded. Staff established a voluntary period for the HOA to submit the draft instrument to BCDC staff by November 4, 2014, and for the HOA to record an executed guarantee by March 1, 2015. Further, if either of the two deadlines were missed, staff stated it would commence the process for assessing standardized fines under section 11386 of the Commission's administrative regulations.

J. By letter dated June 13, 2014, Alan Berger, attorney representing the HOA, acknowledged the HOA's legal obligation as successor permittee under the Permit to fulfill all as yet unfulfilled requirements of that Permit, including but not limited to preparing and recording a public access permanent guarantee.

K. On June 19, 2014, the City of San Leandro Planning Commission denied the HOA's application to install the security gates. On September 2, 2014, the City Council denied the HOA's appeal of the Planning Commission's decision.

L. In the course of a June 2014 site visit, BCDC staff discovered the Bayfront Drive sidewalk appeared to be an approximately five-foot-wide sidewalk within an approximately 12-foot-wide landscaped corridor instead of an eight-foot-wide paved path with four feet of shoulder, as required by Special Condition II.F.3.c of the Permit.

M. On November 13, 2014, BCDC staff met with Mr. Berger, Jeff Tepper, the HOA's consultant, and four HOA board members to discuss the HOA's security concerns and the Permit violations. During this meeting, the HOA explained that it wanted to install security gates to address the recent increase in violent crimes in Heron Bay, which, in the opinion of the HOA, are crimes of opportunity committed by nonresidents freely entering the private streets of Heron Bay. BCDC staff suggested that a security kiosk without a gate, so long as it is accompanied by clear public access signage, would be more appropriate. The HOA verbally agreed to this alternative security strategy and inquired about how the HOA could resolve the violations. BCDC staff proposed that the HOA request authorization for the as-built site conditions on Bayfront Drive (after-the-fact) and new public access improvements consisting of bicycle sharrows and public shore parking as compensatory mitigation for the violations.

N. On January 7, 2015, the HOA again met with BCDC staff and proposed the following settlement package consistent with the discussions on November 13, 2014: (1) retain the as-built sidewalk and landscaping on Bayfront Drive; (2) provide a Class 3 bike lane including sharrows on Bayfront Drive; (3) modify the entrance at Lewelling Circle - located on City property - to include a drive through entry kiosk; (4) provide Bay Trail access/way-finding signage per BCDC guidelines beyond that required by the Permit; and (5) provide 10, daytime-only public shore parking spaces along Bayfront Drive. In response, while BCDC staff supported items 1, 2, 4 and 5, it expressed concerns that the kiosk proposal, if not accompanied by clear public access signage, could have a privatizing and thus discouraging effect on the public access required at the site. BCDC staff informed the HOA that local discretionary approval is necessary in order to file a permit amendment request.

O. On July 17, 2015, BCDC staff wrote the HOA a letter reiterating the legal instrument to guarantee the public access had not been submitted and the physical access improvements required by Special Condition II.F.3.c were still not in place; thus, the HOA is in violation of two Special Conditions of the Permit. BCDC staff provided the HOA with 30 days to submit an application to amend its Permit to resolve these violations; otherwise Staff would commence the standardized fine assessment process.

P. On September 17, 2015, BCDC staff received an application from Mr. Berger on behalf of the HOA to amend the Permit requesting authorization to: (1) install and maintain BCDC public access signage on Bayfront Drive; (2) install bicycle sharrows along the roadbed of Bayfront Drive; (3) build an entry kiosk within the City-owned Lewelling Traffic Circle; (4) install "welcome signage" on entry kiosk and the approach; (5) install benches and trash receptacles in the public access area beyond what the Permit already requires; and (6) install 15 daytime public shore parking spaces along Bayfront Drive.

Q. By letter dated October 15, 2015, BCDC staff informed the HOA that the application was incomplete pending the submittal of additional items, including but not limited to proof of adequate property interest and local discretionary approval because the proposed kiosk was to be located on property owned by the City.

R. On January 4, 2016, the City of San Leandro denied the HOA's kiosk proposal for public health, safety and general welfare concerns.

S. On May 26, 2016, after not having received a response to its October 15, 2015 letter, BCDC staff wrote to Mr. Berger, stating that it was commencing the standardized fine assessment process.

   BCDC staff again provided direction how to resolve both violations. For the failure to provide public access improvements on Bayfront Drive, the HOA could either: 1) obtain authorization for the as-built public access on Bayfront Drive and include new public access improvements to compensate the public for the absence of the required public access for many years; or 2) reconstruct the Bayfront Drive public access to be consistent with the Permit. For the failure to permanently dedicate the public access, the HOA was again directed to submit and gain staff approval of a legal instrument to dedicate the public access. Instructions for preparing an approvable legal instrument and a blank dedication form were enclosed with the letter.

   In addition, BCDC staff recommended that the HOA submit a request to amend the Permit to resolve the violations separately from, and in advance of, the desired amendment to install a security kiosk because, without the still-required local discretionary approval, the HOA would not be able to submit a complete application to BCDC, and waiting for such approval would stall resolution of the violations and, in turn, increase the accrual of standardized fines.

T. On July 13, 2016, Mr. Berger responded to the May 26th letter by submitting a second request for a second amendment to the Permit requesting authorization to: (1) retain the as-built public access (after-the-fact) in lieu of constructing the currently-required public access; (2) construct a security kiosk with an attendant on HOA property; (3) install license plate readers; and (4) provide new public access improvements consisting of bike "sharrows", six signed public shore parking spaces and public shore signs at Bayfront Drive.

U. On August 12, 2016, BCDC staff responded to Mr. Berger's July 13th amendment request and explained what the HOA needed to do in order to complete it: (1) obtain local discretionary approval for the security kiosk; (2) provide more details about the proposed project including width of path, the purpose of the security kiosk and how the attendant would ensure the public is not impacted by its presence; (3) explain why only six public access parking spaces are proposed instead of the ten that were proposed in January 2015; (4) state the purpose of the license plate readers and provide a site plan that shows what the readers will look like, the quantity the HOA is proposing to install, specific locations the HOA is planning to install the readers, and explain how the HOA

will ensure that the public will not be impacted by their presence; (5) provide a site plan to show the location of the proposed bicycle sharrows; (6) provide more information about the content and quantity of the public access signs; (7) provide project plans with a vicinity map, site plan, property lines, and all proposed development; (8) provide a signage plan; (9) provide environmental documentation; and (10) provide a list of interested parties. BCDC staff never received a response to this letter to finalize the second request for the second amendment to the Permit.

V. On October 20, 2016, City of San Leandro Planning Commission forwarded a recommendation of approval for the proposed security kiosk to San Leandro City Council.

W. On December 19, 2016, San Leandro City Council denied, without prejudice, the proposed security kiosk, in part, due to the clearly divided expression of views on the kiosk by Heron Bay residents present at the meeting. Although the proposal was supported by the HOA representatives, several Heron Bay residents and, therefore, members of the HOA, spoke in opposition of the proposed kiosk citing the expense of constructing, maintaining, and staffing it. Some residents voiced that it would be more cost effective to invest in surveillance cameras and license plate readers.

   On December 21, 2016, BCDC staff emailed Mr. Berger to inform him that because San Leandro City Council did not approve the kiosk, the permit amendment application could not be filed as complete and would have to be either revised to remove the kiosk from the proposal or withdrawn. Mr. Berger acknowledged receipt of the email.

X. On April 5, 2017, BCDC staff visited the site, with the Permit and approved plans, and identified the unauthorized placement of restrictive signage that was not subject to the standardized fine process initiated on May 26, 2016 or other correspondence.

Y. On April 14, 2017, after not receiving any communication from Mr. Berger (or the HOA), BCDC staff informed him by letter that the Executive Director had terminated the HOA's opportunity to resolve the penalty portion of the enforcement matter using the standardized fine process and a formal enforcement proceeding would be commenced.

Z. On May 15, 2017, Mr. Berger informed staff that he would submit a revised application to amend the Permit and a draft permanent dedication instrument for the public access area by May 18, 2017.

AA. On May 19, 2017, BCDC staff received from Mr. Berger a third request for a second amendment to the Permit requesting authorization to: (1) maintain the as-built public access on Bayfront Drive; (2) install additional public access signage and multi-directional bicycle "sharrows"; and (3) postpone the submittal of a draft permanent guarantee until 30 days after the amendment is issued, once the area to be dedicated as public access is finalized. The proposal now excluded the public shore parking along Bayfront Drive.

BB. On June 14, 2017, BCDC staff responded to Mr. Berger's May 19th amendment application request and stated that the following information and materials were required, essentially as already outlined in its August 12, 2016 letter: (1) the width of the as-built pedestrian path; (2) project plans depicting the location of the proposed bicycle "sharrows", the bicycle access lane, the public access signage and the dimensions of the as-built pedestrian path; (3) a signage plan showing required, but missing public access signs, and proposed new signage; and (4) a list of interested parties. In regard to the outstanding permanent guarantee to dedicate required public access, BCDC staff agreed that it would be appropriate to postpone submitting a draft document until the Permit is amended since it will modify the required public access area. As of August 29, 2017, items (2) and (4) are still outstanding.

CC. On June 16, 2017, the Executive Director commenced a formal enforcement proceeding by issuing a Violation Report and Complaint for the Imposition of Administrative Civil Penalties ("Violation Report") for seven violations to the Permit and the McAteer-Petris Act ("MPA").

1. Failure to submit and gain approval of public access plans for the Lewelling Boulevard Extension[2], in violation of Special Condition II.A.1, Plan Review, of the Permit.
2. Failure to provide the four BCDC public access signs as depicted on final approved plans for Shoreline Trail Segments 2 and 3, in violation of Special Condition II.A.2, "Conformity with Final Approved Plans," of the Permit.
3. Failure to permanently guarantee all public access areas, in violation of Special Condition II.F.2, "Public Access Permanent Guarantee," of the Permit.
4. Failure to provide required public access improvements[3], in violation of Special Condition II.F.3.c, "Public Access Improvements," of the Permit.
5. Failure to maintain the interpretive signs located on Shoreline Trail Segment 3, required by Special Condition II.F.3 of the Permit, in violation of Special Condition II.F.4, "Maintenance," of the Permit.
6. Failure to agree in writing that it has read, understood, and agrees to be bound by the conditions of the Citation Permit, in violation of Special Condition II.K, "Permit Assignment," of the Permit.
7. Placement of unauthorized restrictive signage on Bayfront Drive without a permit in violation of the permit requirement of Section 66632 of the McAteer-Petris Act.

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[2] The "extension of Lewelling Boulevard" is present day Bayfront Drive.

[3] A minimum 8-foot-wide paved path, with a minimum total of 4 feet of shoulder within the approximately 1,450-foot-long Lewelling extension.

DD. On July 17, 2017, BCDC staff met with Alan Berger, the HOA's attorney, the HOA's consultant, and three HOA board members to discuss the Violation Report, and the status of the incomplete application to amend the Permit and possible terms of settlement.

At this time, the HOA informed BCDC staff of the existence of a Maintenance Assessment District operated by the City and funded by the HOA that is responsible for maintaining, among other areas, Shoreline Trail Segments 2 and 3. Subsequently on August 15, 2017, the HOA provided BCDC staff the agreement that created the Maintenance Assessment District entitled, "City of San Leandro Resolution 96-56," issued on April 15, 1996 by the City Council. The agreement transfers the liability for the violation alleged in Violation Report Finding I.GG.5 from the HOA to the City, which is presently coordinating with BCDC staff to install new interpretive signs on Shoreline Trail Segment 3 that will resolve the maintenance violation.

Additionally, although the HOA failed to provide the four BCDC public access signs as depicted on final approved plans for Shoreline Trail Segments 2 and 3, in violation of Special Condition II.A.2, "Conformity with Final Approved Plans," of the Permit, the City provided all four signs in 2017 as part of their efforts to resolve BCDC Enforcement Case No. ER2014.016 (City of San Leandro) and therefore, the HOA is also relieved from liability for the violation alleged in Violation Report Finding I.GG.2.

Therefore, the Order only addresses five of the seven original violations of the Permit and the MPA because staff has determined the two alleged violations cited in Findings I.GG.2 and I.GG.5 of the Violation Report are unwarranted because the City installed the approved public access signs and has taken responsibility for the maintenance of the signs installed on Shoreline Trail Segments 2 and 3.

EE. On August 15, 2017, the HOA submitted a Statement of Defense to BCDC staff.

FF. On August 18, 2017, BCDC mailed Mr. Berger a draft of a proposed stipulated Order. On August 24, 2017, Mr. Berger acknowledged receipt of the proposed Order and expressed his intention to bring the proposed Order to the attention of the HOA board members at their meeting that night.

GG. On September 7, 2017, the Enforcement Committee held a noticed public hearing to consider this Order and all comments pertaining to this Order. Upon the recommendation of the Enforcement Committee, the Commission considered and approved this Order at a public meeting on October 5, 2017.

III. CONDITIONS

A. On and after the Effective Date of this Order, the HOA shall cease and desist from all activity in violation of the Permit, and the MPA.

B. **Complete Application to Amend Permit.** By no later than 30 days after the issuance of this Order, the HOA shall submit to the Executive Director a fully complete and properly executed application for the second amendment to the Permit. The outstanding items to be submitted shall include:

1. An Interested Parties List; and
2. A full sized and a reduced sized site plan that must include, at a minimum, a vicinity map, site plan, property lines, the dimensions of the as-built public access on Bayfront Drive, the bicycle sharrows, a scale, a north arrow, and finally, the date and name of the person who prepared the plans.
3. A signage plan that includes a) all signage that under the permit the HOA is responsible for installing and maintaining, including but not limited to the signage required by Section III.D.2 of this Order, and b) the "Permit Parking Only" signs located on Bayfront Drive.

C. **Record Public Access Permanent Guarantee.** By no later than 30 days after the second amendment to the Permit is issued, excluding the time period(s) during which the draft guarantee is held by staff counsel for review, the HOA shall submit proof of recordation with Alameda County of a BCDC staff-approved legal instrument that permanently guarantees the public access areas required by Special Condition II.F.2 of the Permit.

D. **Install Public Access Amenities.** By no later than 30 days after the second amendment to the Permit is issued, the HOA shall make available for public access use:

1. A total of eight bicycle sharrows along Bayfront Drive (four each direction) painted consistent with the amended Permit; and
2. Five directional Public Shore signs, one of which is double-sided, installed consistent with the amended Permit.

IV. CIVIL PENALTY ORDER

The basis of the civil penalties is discussed in Section IV of the Recommended Enforcement Decision, dated August 29, 2017, which is incorporated herein by reference.

A. Pursuant to California Government Code Sections 66641.5(e) through 66641.9, the Commission hereby assesses and orders the HOA to pay a civil penalty of $120,000. This penalty shall be reduced to $60,000 so long as the HOA 1) complies fully with and fulfills all of the requirements of Section III of this Order in a timely manner, and 2) makes a $60,000 payment in the manner required and by the deadline specified by Section IV.B below. This penalty payment shall constitute the HOA's full and complete satisfaction of their liability for civil penalties for all alleged violations summarized in Paragraph II.CC that have not been dismissed, as summarized in Paragraph II.DD.

B. Payment of the above-assessed civil penalty shall be made as follows. Pursuant to Government Code Section 66647, within 30 days of the Effective Date of this Order, the HOA shall remit a penalty payment to the Commission by cashier's check, in the amount

of $60,000, payable to the "San Francisco Bay Conservation and Development Commission – Bay Fill Clean-Up and Abatement Fund." The HOA shall make a further payment in the amount of $60,000 within 30 days of its receipt of notification from the Executive Director of the HOA's failure to either 1) satisfy one or more of the requirements of Section III of this Order, or 2) make a payment of $60,000 as required by the preceding sentence.

V. TERMS

A. Under Government Code Section 66641, any person who intentionally or negligently violates any cease and desist order issued by the Commission may be liable civilly in the sum of up to $6,000 for each day in which such violations persist. In addition, upon the failure of any person to comply with any cease and desist order issued by the Commission and upon the request of the Commission, the Attorney General of the State of California may petition the superior court for the issuance of a preliminary or permanent injunction, or both, restraining the person or persons from continuing any activity in violation of the cease and desist order.

B. This Order does not affect any duties, right, or obligations under private agreements or under regulations of other public bodies.

C. The HOA must conform strictly to this Order.

D. This Order does not constitute a recognition of property rights.

E. This Order is effective upon issuance thereof.

VI. OPPORTUNITY FOR JUDICIAL REVIEW

Under Government Code Sections 66639 and 66641.7(a), within thirty (30) days after service of a copy of a cease and desist order and civil penalty order issued by the Commission, any aggrieved party may file with the superior court a petition of writ of mandate for review of the order pursuant to Section 1094.5 of the Code of Civil Procedure.

FOR THE SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION

Dated: _____ _____

LAWRENCE J. GOLDZBAND
Executive Director