

San Francisco Bay Conservation and Development Commission

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September 22, 2017

TO: Commissioners and Alternates

FROM: Enforcement Committee (Greg Scharff, Chair, Mark Addiego, Geoffrey Gibbs, Marie Gilmore, Sanjay M. Ranchod*, Jill Techel) **Absent*

SUBJECT: Enforcement Committee's Recommended Enforcement Decision Regarding Heron Bay Homeowner's Association; Proposed Cease and Desist Order and Civil Penalty Order No. CDO 2017.03
(For Commission consideration on October 5, 2017)

Recommendation

The Enforcement Committee recommends that the Commission adopt the Recommended Enforcement Decision on proposed Cease and Desist and Civil Penalty Order No. CCD 2017.03 ("Order") to Heron Bay Homeowner's Association ("HOA"), for the reasons stated below. This matter arises out of an enforcement action commenced by BCDC staff in 2014.

The Order requires the HOA within specified time frames to, among other provisions: (1) cease and desist from all activity in violation of BCDC Permit No. M1992.057.01 ("Permit"); (2) submit a fully complete and properly executed application for the second amendment to the Permit to obtain after-the-fact authorization for as-built public access and authorization for new public access amenities including eight bicycle "sharrows" and five directional Public Shore signs, one of which is double-sided, along Bayfront Drive; (3) following Permit issuance, install the new public access amenities; and (4) 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.

All other provisions are described in full within the Order. The Enforcement Committee has determined that the proposed Order is a fair resolution of the alleged violations.

On September 7, 2017, the Enforcement Committee held a hearing on this matter and, after considering staff's and respondent's presentations, determined that the proposed Order with three modifications is an appropriate resolution of the violations of the Permit and McAteer-

Petris Act. These modifications include: (1) eliminate the requirement to remove the “Permit Parking Only” signs along Bayfront Drive and, instead, require inclusion of the proposed display of such signs in the signage plan pursuant to Special Condition II.A of the Permit; (2) reduce the proposed civil penalty from \$124,500 to \$120,000 by removing the civil penalty for posting unauthorized signage; and (3) stay half the civil penalty for timely and complete compliance with the terms of the Order.

Attachments to this staff recommendation include: (1) the Violation Report; (2) the proposed Order; (3) the Permit; and (4) a vicinity map, site map, and two images of the site. The Respondent’s Statement of Defense can be found on our website at <http://www.bcdc.ca.gov/enforcement/2017/0907Agenda.html>

Staff Report

I. SUMMARY OF BACKGROUND TO THE ALLEGED VIOLATIONS

- A. **Settlement Agreement.** On June 16, 1994, BCDC and Citation Homes Central¹ (“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 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)

¹ Heron Bay Homeowner’s Association’s predecessor in interest.

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 would be specified in their 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 the Permit to Citation 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.
 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.

Citation executed the Citation permit on July 12, 1994.

BCDC Permit No. M1992.057.01, issued on January 23, 1996, required all work to be completed by December 31, 1998.

On May 7, 1996, Steve Foreman, Project Manager for the Heron Bay development, on behalf of Citation, submitted plans for public access and interpretive signs, ("public access plans"). The scope of the public access plans did not include the public access on Bayfront Drive. On May 13, 1996, BCDC approved Citation's public access plans.

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 requirements 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.

- C. **Enforcement History.** 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 three gates and fencing at the entrance of Heron Bay development to control access into the residential development for vehicles, bicyclists, and pedestrians and, in turn, to Bayfront Drive (formerly known as the Lewelling Boulevard extension) and Roberts Landing Slough, both of which are the public access areas required by the Permit. Upon receiving this report, BCDC staff determined that, if implemented, one gate would be located within BCDC's jurisdiction, as defined in the Settlement Agreement, and could discourage members of the public from being able to reach and use the required public access areas. As such, BCDC staff determined that the proposal would have required an amendment to the Permit to proceed. During its review of the permit history, staff discovered that the permittee had not recorded a permanent guarantee, as required by Special Condition II.F.2 of the Permit².

By letter on June 12, 2014, BCDC staff informed Cynthia Yonning, then HOA representative, that: (1) installation of the gate without first obtaining written authorization from BCDC through obtaining an amendment to the Permit would be a violation of the Permit and BCDC's law; and (2) 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 five-month-long period for the HOA to submit the draft instrument (November 4, 2014), and provided an additional four-month-long for the HOA to record an executed guarantee (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.³

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

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.

² At this time, staff was unaware of the HOA's failure to provide public access improvements required by Permit Special Condition II.F.3 and the other violations to the Permit, Settlement Agreement, and McAteer-Petris Act.

³ Even though both dates were missed, staff did not commence the standardized fine assessment process.

In the course of a June 2014 site visit, BCDC staff discovered the Bayfront Drive public access pathway 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.

On November 13, 2014, BCDC staff met for the first time with Mr. Berger, 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.

On January 7, 2015, the HOA again 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) install a drive through entry kiosk at Lewelling Circle on City property; (4) provide Bay Trail access/way-finding signage 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, if necessary, is a BCDC application-filing requirement.

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.

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.

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 because the proposed kiosk was to be located on property owned by the City and local discretionary approval, if necessary.

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

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 the 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. Without the still-required local discretionary approval for the kiosk, 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.

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.

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 the 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, quantity, and location of the license plate 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.

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.

On December 19, 2016, San Leandro City Council denied, without prejudice, the proposed security kiosk due, in part, 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’s 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.

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.

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.

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. 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.

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 the date of this staff report, items (2) and (4) are still outstanding.

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 McAteer-Petris Act (“MPA”).

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 to resolve the maintenance violation.

Additionally, although the HOA failed to install 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 its effort 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 proposed Order that the Executive Director recommended to the Enforcement Committee only addressed five of seven original violations of the Permit and McAteer-Petris Act because staff had 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.

On August 18, 2017, BCDC staff 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. Staff did not hear from Mr. Berger again until the Enforcement Committee meeting on September 7, 2017.

II. SUMMARY OF THE ALLEGED VIOLATIONS IN THE COMPLAINT AND PROPOSED ADMINISTRATIVE PENALTY⁴ (Daily Penalty Proposed x Duration of Violation = Accrued Fine)

Government Code Section 66641.5(e) allows the Commission to administratively impose civil liability on any person or entity for any violation of the MPA or any term or condition of a permit issued by or on behalf of the Commission in an amount which shall not be less than \$10, nor more than \$2,000, for each day in which that violation occurs or persists.

The Violation Report calculated fines from the date of occurrence of each violation. However, the proposed Order reduces the time period and instead calculates fines from the date the HOA was notified by staff of the existence of each violation and provided instructions of how to correct each one. In each case, the recommended daily fine amount is at the low end of the range provided in Section 66641.5(e). These two decisions are based on staff's desire to be reasonable and to acknowledge that while the violations are ongoing and have consumed considerable staff resources, they are not particularly serious and readily susceptible to resolution.

For each violation, the following lists: the recommended daily penalty, which is justified below in Section IV; the recommended duration in days, which is calculated from the date of notice by staff through June 16, 2017, the date of issuance of the Violation Report; and the total penalty as limited by the \$30,000 administrative maximum:

- A. Failure to submit and gain approval of public access plans for the Lewelling Boulevard Extension, in violation of Special Condition II.A.1, Plan Review, of the Permit (\$150/day x 308 days = \$30,000).

The duration of the violation is calculated from August 12, 2016, when BCDC staff responded to the HOA's second application to amend the Permit and requested public access plans, through June 16, 2017.

- B. Failure to permanently guarantee all public access areas, in violation of Special Condition II.F.2, "Public Access Permanent Guarantee," of the Permit (\$200/day x 1,098 days = \$30,000).

The duration of the violation is calculated from June 13, 2014, when Mr. Berger acknowledged the HOA's legal obligation to fulfill the permanent guarantee, through June 16, 2017.

⁴ As amended to remove complaints alleged in Violation Report Findings I.GG.2 and I.GG.5.

- C. Failure to provide required public access improvements⁵, in violation of Special Condition II.F.3.c, "Public Access Improvements," of the Permit (\$250/day x 945 days = \$30,000).

The duration of the violation is calculated from November 13, 2014, when the HOA met with BCDC staff and staff explained how the HOA could resolve the violation, through June 16, 2017.

- D. 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 (\$250/day x 608 days = \$30,000).

The duration of the violation is calculated from October 15, 2015, when BCDC staff responded to the HOA's first application to amend the Permit and requested it complete an assignment form, through June 16, 2017.

| 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) |
| Total | x | \$29,158 | \$6,008,000 | x | \$652,050 (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.*

⁵ 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.

The fifth violation subject to this enforcement proceeding is “the placement of unauthorized restrictive signage on Bayfront Drive without a permit in violation of the permit requirement of Section 66632 of the MPA” and the Committee recommends modified remedial action and no penalty with respect to this violation. The Order Staff proposed required the HOA to remove these signs and assessed a \$4,500 fine for this violation. The Enforcement Committee rejected this recommendation and instead imposed a modified requirement for inclusion of the signs in a signage plan to be prepared by the HOA under the terms of the Permit and determined that no fine for this violation is appropriate because there is no BCDC required parking on Bayfront Drive and if a Public Shore sign is posted next to the “Permit Parking Only” sign, the restrictive sign will not create an unwelcoming approach to the shoreline.

III. DEFENSES AND MITIGATING FACTORS RAISED BY RESPONDENTS TO REFUTE LIABILITY FOR ADMINISTRATIVE PENALTIES; STAFF’S REBUTTAL EVIDENCE AND ARGUMENTS⁶

The HOA states that no fine or penalty should be imposed and presents three arguments to support its position. First, the HOA argues that it was unaware of any of the alleged violations until its first dealings with BCDC in 2014 (SOD Pages 3, 5, and 6). Second, the HOA argues that “it offends the basic concept of due process to charge the HOA with these ancient violations and the mounting fines when the evidence is absolutely clear that the HOA has cooperated with and attempted to resolve each of the issues over the past years since their discovery.” (SOD Page 6) Third, the HOA does not have the “extra monies or slush funds to pay for the potential fines.” (SOD Page 6). Each of these defenses is rebutted below.

- A. The HOA was unaware of the violations until 2014.** The HOA argues that it was unaware of any of the alleged violations until its first dealings with BCDC in 2014 when it applied to the City of San Leandro for security gates at the entrance of the planned community. (SOD Pages 3,5, and 6) Even though the HOA admits that it is the successor in interest to Citation and thus, it is bound by the terms the Permit, originally issued to Citation, the HOA argues that it should not pay a penalty for “violations that occurred some 19 years ago and which may have been in place for three or more years before the HOA even came into existence and took over the property from the developer.” (SOD Pages 5 and 6)

Although two of the violations, those cited in Paragraphs II.B (Failure to Permanently Guarantee the Public Access Areas) and II.C (Failure to Provide Public Access Improvements), occurred over two decades ago, staff has calculated proposed civil penalties on the basis of when the HOA was provided notice of these violations and granted a voluntary period to resolve without a penalty. BCDC staff discovered violations II.B and II.C in Spring of 2014 and provided notice to the HOA in June 2014.

⁶ The defenses contained in the HOA’s Statement of Defense, submitted on August 15, 2017, are limited to those pertaining to the Executive Director’s proposed imposition of civil penalties. Therefore, staff’s rebuttal to the SOD is limited to defenses to such penalties since that is the only contested issue in the proceeding.

Therefore, BCDC staff is merely seeking fines for the time period during which the HOA was on notice of the nature of the violations and how to fix them and yet failed to do so in spite of staff advice and assistance.

Pursuant to Government Code Section 66641.5(e), the civil penalty that the Commission may assess for any single violation is capped at \$30,000. Therefore, even though the violations are long standing, the law prevents BCDC staff from demanding excessive fines.

The HOA argues that “it is legally unsustainable to attempt now to charge a maximum fine for an issue that was not once raised by BCDC in their communications with the HOA.” (SOD Page 4) Pursuant to Government Code Section 66641.5(e), cited in Section II above, it is not legally unsustainable to charge a fine. Staff desired to resolve this violation without any fines but the HOA failed to appropriately respond to staff’s efforts. Staff then desired to resolve this violation with standardized fines but the HOA again failed to appropriately respond to staff’s efforts. Finally, staff commenced a formal enforcement proceeding, which has resulted in further progress but at the same time a further investment of staff resources. Staff has notified the HOA several times about each violation for which fines are being sought, as reflected in the factual record. Finally, the recommended amount of fines is at the low end of the administrative fine range provided for in Section 66641.5(e). With one exception, staff is not recommending fines for any time period before the HOA was on notice of the violations. A number of the violations are nevertheless susceptible to the administrative maximum fine of \$30,000 due to their duration.

The HOA argues that according to the US Census Bureau, the average length of homeownership is 5.9 years and only 37% of homeowners have owned their home for longer than 10 years and “considering these statistics, it is fair to assume that the great majority of the owners at Heron Bay did not own their homes when the alleged violations took place and had no responsibility for the creation of the same.” (SOD Page 6) These general, national-based statistics do not reflect that actual length of homeownership in Heron Bay, but regardless, as demonstrated in Section II above and in the preceding paragraph, the HOA is not being held responsible for fines that accrued prior to its knowledge of the violations to the BCDC permit. The fines reflect only a portion of the time when the HOA was aware of the violations and did not voluntarily follow through with its known obligations to comply with the Permit. This formal enforcement proceeding and demand for penalties is BCDC staff’s last resort to bring the Permit into compliance. Further, by purchasing a home in the Heron Bay development, the owners were all on notice that they were joining an HOA and, in doing so, were both receiving benefits and assuming responsibility for financial obligations that may have as their source events that occurred prior to their purchase.

- B. **The HOA has cooperated with and attempted to resolve each of the violations since its discovery.** The HOA alleges that “at all times since the HOA became aware of BCDC’s claim of permit non-compliance, and particularly during the past months, the HOA has

been diligently working on proposals that would satisfy all permit needs and best serve all members of the community who may wish to use the bay trails.” (SOD Page 7) The history of this enforcement matter demonstrates that the HOA has been far from diligent in resolving the violations and has failed to resolve them despite extensive BCDC staff assistance. The HOA further alleges that “it is the HOA’s understanding that [the violations] are now resolved and are being implemented, the HOA has not on any occasion refused to take every action demanded by BCDC to complete the amended Permit application.” (SOD Page 6) Actions speak louder than words and although the HOA has continuously “agreed” to complete the Permit application, the HOA has submitted three incomplete applications with insufficient effort to follow BCDC staff’s guidance.

1. **The Incomplete Permit Amendment Application.** As of the date of this report, the HOA still must provide BCDC staff with an interested parties list and a full sized and reduced sized site plan depicting as-built conditions and proposed public access; both outstanding items have been consistently requested by staff in each response to the three incomplete amendment applications.
2. **The Outstanding Alleged Violations.** It is unclear to BCDC staff how the HOA representatives could think that the violations are resolved and implemented since all five violations remain outstanding.
 - a. **Violation II.A (failure to submit public access plans)** will be resolved through the HOA’s submittal and BCDC staff’s approval of a public access site plan. “[The HOA] specifically denies that it has failed to submit and gain approval of public access plans.” (SOD Page 2) Even though the HOA, as it correctly acknowledges, had no part in designing the public access on Bayfront Drive, the submittal of this plan not only required by Special Condition II.A.1 of the Permit, it is an ongoing and inherited permit requirement and, since the public access layout does not match the Permit, is necessary to complete the HOA’s amendment application.
 - b. **Violation II.B (failure to permanently guarantee the public access areas) and Violation II.C (failure to provide public access improvements)** will both be resolved and able to be resolved once the amendment to the Permit, that will provide after-the-fact authorization for the as-built public access, is issued.

Regarding the permanent guarantee, the HOA argues that it has consistently agreed to permanently guarantee the public access areas after the amendment to the Permit is issued and that “it is erroneous to try and assess [the HOA] with a violation and a fine for an issue that they have conceded from the very beginning.” (SOD Page 3) BCDC staff agrees that the HOA has agreed to permanently guarantee the public access area after the amendment to the Permit is issued, however, due to the HOA’s failed efforts to complete an application, the Permit requirement cannot be fulfilled until the amended Permit is issued.

For two reasons, the HOA's ability to permanently guarantee the public access area hinges on the issuance of an amended Permit that accurately describes the public access. First, while the overall size and location of the public access is generally the same as currently required, a surveyed metes and bounds description of that area must be prepared and the surveyor will rely on an updated Permit exhibit that outlines this area, which is not yet available. Second, the amended Permit must be attached to the legal instrument that constitutes the permanent guarantee for recordation with Alameda County.

Regarding the failure to provide public access improvements, the HOA argues that "it is absurd to argue the existence of a violation when the as-built condition is far superior to that called for in the Permit." (SOD Page 4) During the Enforcement Committee Meeting, Mr. Berger, the HOA's attorney, incorrectly stated that "what is present at Heron Bay is a vast improvement over what was required in the Permit. The Permit required a gravel road and basically a dirt buffer zone." In reality, Special Condition II.F.3.c requires "A minimum 8-foot-wide paved path, with a minimum total of 4 feet of shoulder." The Permit envisioned a single trail to serve both bicycle and pedestrian access, however the as-built approximately 4-foot-wide sidewalk within an approximately 12-foot-wide landscaped corridor, constructed without plan approval, is not suitable to accommodate both uses. BCDC staff is willing to authorize the as-built conditions after the fact, so long as bicycle sharrows are painted on Bayfront Drive to create a clear path for cyclers, however, staff is unable to do so until the HOA completes its application to amend the Permit.

Luckily for the HOA, staff has determined that the public benefit provided by the as-built layout of the public access can be found to be equal to the public benefit that would have been provided by the layout of the public access required by the Permit, with the provision of public access signage and bicycle sharrows.⁷ As such, the violation can be resolved by amending the Permit to change the public access requirement rather than by undertaking an expensive construction project. Staff recognizes that the mechanism to resolve the physical violation is somewhat technical in nature. However, this does not diminish the importance of amending the Permit so that the authorization and requirements match the site conditions.

Staff has been unable to amend the Permit because the HOA, despite many requests from staff, has failed to provide an interested parties list and site plan that includes the dimensions of the as-built public access area. On August 7, 2017, the HOA submitted a site plan. On August 8, 2017, staff responded to the submittal, requesting that the plan be revised to include the as-built dimensions of the northern sidewalk and adjacent planter area. During the Enforcement

⁷ Staff does not agree that the layout is superior to what was required.

Committee Meeting, the HOA presented a revised plan in its presentation that provided the requested as-built dimensions that may meet staff's request. When staff asked why the HOA had not submitted the requested dimensions to staff, Mr. Berger stated, "I believe that I did send that [plan] but if not it will be delivered by tomorrow." As of the date of this mailing, staff has not received a copy.

- c. **Violation II.D (failure to assign the Permit)** will be resolved once the HOA completes the assignment form, most recently provided to the HOA by BCDC staff on July 18, 2017.
 - d. **Violation II.E (placement of unauthorized restrictive signage)** will be resolved as soon as the HOA submits, and receives approval of, a signage plan that includes the "Permit Parking Only" signs on Bayfront Drive, pursuant to Special Condition II.A of the Permit.
- C. **The HOA is unable to pay the potential fines.** The HOA argues that it is a non-profit consisting of 629 homes and vaguely cites that the Davis-Stirling Act bars the HOA from collecting dues for any purpose except for the maintenance and repairs of common areas (SOD Page 6), however fails to provide the proper citation to support this argument.

Counsel for the HOA has failed to respond to staff's request for a specific legal citation. Staff notes, however, that Cal. Civil Code Section 5600, a provision of the Davis-Stirling Act, authorizes an HOA like the respondent herein to assess its members for such costs as are "sufficient [to enable the HOA] to perform its obligations under the governing documents [CC&Rs] and this Act." As the HOA herein notes, one of the "obligations" it has under its "governing document" is the construction or installation of improvements on the common areas of the development, and, thereafter, the repair and maintenance of those improvements. Necessarily included in such costs are the costs of applying for, obtaining, and complying with the requirements of any governmental approvals that such construction and/or installation may necessitate. Also included by necessary implication within the authority of Section 5600 are such costs as the HOA may incur as a result of any failure to comply fully with the requirements of any such required approvals.

The HOA further argues that "[t]here are no extra monies or slush funds to pay for the potential fines such as those being presented by BCDC." Based on information provided in SOD Exhibit F, a balance sheet, dated July 31, 2017, the HOA's operating account has a balance of \$231,201.36 and, therefore, it states that a \$124,500.00 would take 54% of the total operating budget of the association. (SOD Page 6) In its recommendation the Enforcement Committee has reduced the civil penalty to be paid by the HOA to \$120,000, and has waived payment of ½ of that amount contingent on the HOA's timely fulfillment of the requirements of the Cease and Desist Order, thus reducing the HOA's ultimate financial liability under the Civil Penalty Order to \$60,000. 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 approximately 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 Meeting. The fines could have been avoided all together if the HOA would have worked with staff during the voluntary compliance period from June 2014 to May 2016.

IV. SUMMARY AND ANALYSIS OF UNRESOLVED ISSUES: APPROPRIATE CIVIL PENALTY

The primary unresolved issue is the appropriate amount of civil penalties for the HOA's violations of the Permit and the MPA. 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.

- A. **Nature, Circumstance, Extent, and Gravity of Violations.** BCDC staff agrees that the HOA inherited the failure of Citation, its predecessor in interest, to fully comply with the Permit. This enforcement proceeding is not about what Citation should have done, but about the HOA's failure to fully resolve the violations in spite of having had ample time and assistance to do so. Bayfront Drive is the southern gateway to the extraordinary San Leandro Marshlands shoreline public trail network. It is of the utmost importance that Bayfront Drive provides a welcoming sense of arrival to the public to the San Leandro Marshlands through the installation of clear public access signage that directs non-locals to the trail network. The current condition of Bayfront Drive does not conform to the requirements of the permit. While this discrepancy is curable through a permit amendment so that the BCDC authorization accurately reflects the as-built public access, the fact that the discrepancy exists at all represents a serious violation of the Commission's permitting program.
- B. **Susceptible to Removal or Resolution.** All of the violations are susceptible to removal or resolution.
- C. **The Cost to the State in Pursuing the Enforcement Action.** The State has spent hundreds of staff hours in pursuing and attempting to resolve this enforcement action performing a thorough investigation of the Permit and Enforcement files, analyzing and

responding to three applications to amend the Permit, meeting numerous times with HOA and City of San Leandro representatives, conducting site visits, and finally, drafting enforcement documents.

- D. **HOA's ability to Pay and Effect on Ability to Continue Business.** The HOA claims that it is unable to pay a \$124,500 fine because it would consume 54% of its operating budget. However, the HOA has not disclosed whether or not this fine would prevent it from paying its annual expenses. The HOA could have resolved the violations without paying any fines but failed to cooperate with staff and, subsequently, has made partial but incomplete effort to resolve the violations.
- E. **Voluntary Removal or Resolution Efforts Undertaken.** The HOA argues that it has been, and remains, fully cooperative and desires to resolve the violations. Be that as it may, the HOA has been ineffective in submitting a fully complete amendment request disabling staff from issuing an amended Permit. Staff even allowed a two-year-long period for the HOA to make two proposals to the City for local discretionary approval, first for the security gates and then for a kiosk, before commencing a penalty clock against the HOA in recognition of the fact that such local approval constitutes a BCDC application-filing requirement. Nevertheless, since "date of denial of kiosk proposal," the HOA has not submitted a complete amendment request.
- F. **Prior History of Violations.** The HOA has no prior history of violations.
- G. **Degree of Culpability.** The administrative penalty assessment could have been avoided if the HOA, after receiving notice of the violations had resolved them. Instead, the HOA has caused BCDC to expend significant staff resources in trying to work with the HOA to resolve the violations. Since 2014, the HOA has stated that it wants to resolve the violations and work with BCDC staff to amend the Permit, which needs to happen before Violations II.B (failure to permanently guarantee the public access area) and II.C (failure to provide public access improvements) can be resolved, but instead, it submitted three incomplete applications to amend the Permit. After staff responded to the first application, the HOA ignored staff until the standardized fine process was commenced seven months later. Two months after that, staff received and responded to the second application. Even though fines were accruing, the HOA again ignored staff until it received notice nine months later that staff was initiating a formal enforcement process.
- H. On the basis of these factors, staff derived the daily penalties listed in Section II above. Staff recommends a penalty of \$250/day for each of the two most serious violations, which are the failure to take assignment of the rights and obligations of the permit and the failure to obtain after-the-fact authorization to legalize the as-built construction of the public access improvements. A daily penalty of \$250 is one eighth of the potential maximum daily penalty. Staff recommends a lesser penalty of \$200/day for the failure to record the permanent guarantee prior to issuance of the amended permit because, while currently required, it would have to be done a second time and, therefore, would

be unreasonable. Staff recommends an again lesser penalty of \$150/day for the failure to submit and gain approval of public access plans for the as-built public access because this is a simple task. Finally, staff recommended an again even lesser penalty of \$100/day for the failure to remove the unauthorized restrictive signage on Bayfront Drive because it is the simplest task. However, the Enforcement Committee determined not to adopt staff's proposal to require removal of these signs (requiring instead to require the HOA to include such signs in a signage plan to be prepared by the HOA under the terms of the Permit), and to impose no fine for this violation because there is no BCDC required parking on Bayfront Drive and if a Public Shore sign is posted next to the "Permit Parking Only" sign, the restrictive sign will not create an unwelcoming approach to the shoreline.

V. RECOMMENDATION

The Staff and the Enforcement Committee recommend that the Commission adopt recommended enforcement decision and the proposed Cease and Desist and Civil Penalty Order No. CDO 2017.03 ("Order") to be issued to the Heron Bay Homeowners Association.