San Francisco Bay Conservation and Development Commission
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March 16, 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: Approved Minutes of March 2, 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, Yerba Buena Room, First Floor, San Francisco, California at 1:11 p.m.

2. **Roll Call.** Present were: Chair Wasserman, Vice Chair Halsted, Commissioners Addiego, Butt, Chan (Represented by Alternate Gilmore), Cortese (represented by Alternate Scharff), DeLaRosa (represented by Alternate Jahns), Gioia, Hicks (represented by Alternate Galacatos), Kim (represented by Alternate Peskin), Lucchesi (reported by Alternate Pemberton), McGrath, Nelson, Randolph, Sartipi (represented by Alternate McElhinney – arrived at 1:21 p.m.), Showalter, Techel, Wagenknecht and Zwissler.

Chair Wasserman announced that a quorum was present.

Not present were Commissioners: Department of Finance (Finn), Speaker of the Assembly (Gibbs), Sonoma County (Gorin), San Mateo County (Pine), Marin County (Sears), Solano County (Spering), U.S. Environmental Protection Agency (Ziegler).

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

There were no public speakers present to comment.

Chair Wasserman moved to Approval of the Minutes.

4. **Approval of Minutes of the December 15, 2016 Meeting.** Chair Wasserman asked for a motion and a second to adopt the minutes of February 16, 2017.

MOTION: Commissioner McGrath moved approval of the Minutes, seconded by Commissioner Scharff.

VOTE: The motion carried with a vote of 16-0-2 with Commissioners Addiego, Butt, Gilmore, Scharff, Jahns, Gioia, Peskin, Pemberton, McGrath, Nelson, Randolph, Showalter, Techel, Wagenknecht and Vice Chair Halsted and Chair Wasserman voting, “YES”, no “NO”, votes and Commissioners Galacatos and Zwissler abstaining.

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

a. **New Business.** Does anyone want to add items for us to consider in future meetings? Commissioner McGrath was recognized: I have been talking to the Bay Keeper about the abandoned boat problem. They are going to be considering drafting legislation. It is on the agenda for the Bay Planning Coalition. It is a problem in terms of the fiscal accountability and responsibility of marina owners but also in terms of the environment. At some point we might want to consider that there may be legislation drafted and coming your way.

Chair Wasserman continued the meeting.

b. **Chris Tiedemann**. I would like to congratulate our Deputy Attorney General, Chris Tiedemann on her new position. She will become the Deputy Secretary for Law Enforcement and Counsel at Cal-EPA. She replaces another of our former Deputy Attorney Generals, Alice Busching Reynolds, who is now Governor Brown's senior advisor for Climate, Environment & Energy. Chris has been our Deputy for many years and has been a trusted and invaluable counsel to the Commission and to many of us individually. We wish her luck and success in her new role. And we welcome Shari Posner in her place. Shari has advised us often.

c. **Next BCDC Meeting.** Our next meeting will be on March 16th. We will hold a public workshop on rising sea level here in this room.

I am going to save most of my remarks for the strategic planning workshop. Many of us have been fond of saying that even if we were able to stop greenhouse gas emissions tomorrow, the sea level would continue to rise. Unfortunately I think we may need to add to our commentary that if greenhouse gas emissions efforts are not continued and we do not reduce our emissions then that level of sea rise will increase and accelerate.

And as we see the assault on EPA we may need to change the commentary, the dialogue and some direction of our efforts.

d. **Ex-Parte Communications.** That brings me to ex-parte communications. If anybody wishes to put something on the record now please speak up.

Vice Chair Halsted reported: I would like to mention that I and several other Commissioners have received notes from the family of the applicant at the Alameda hotel for listening to them.

Chair Wasserman clarified: It was a thank you note.

Commissioner Gioia commented: So even if we get emails and we are not responding back, do you want us to report that as an ex-parte?

Vice Chair Halsted responded: We generally do, yes.

Chair Wasserman added: And again, you can communicate it here and there is value in doing so particularly when we are on the cusp of a hearing but we also do need to do it in writing.

Commissioner McGrath commented: An ex-parte communication as I understand it only involves those things that are pending as an adjudicatory matter. Since that has passed, it is not technically an ex-parte communication. On the other hand for all kinds of reasons it is important to put copies of such things in the record. So if there is ever an administrative record it includes that. I did get such and did not consider it an ex-parte communication because it was after the action and I contemplate no further action.

Commissioner Scharff spoke: I want to report that after the hearing last time I did talk to members of the family. They were feeling unhappy and we talked about it. I do not think there was anything of real substance that we talked about. I also thought it was afterwards so I was not thinking it was an ex-parte communication.

Vice Chair Halsted commented: I had thought that it was not an ex-parte but I was advised that it would be wise to put it on the record.

Commissioner Showalter reported: I too received a communication from the party and did not respond because I made an inquiry about whether that would be appropriate or not and it seemed like it was not. I also received a thank you note, which I appreciated for the effort they took.

Commissioner Gilmore was recognized: I did receive a communication and it was after we had taken a vote on the subject. The subject of the communication I received was whether or not we could meet to discuss what had happened at the meeting. I bounced that back to the Supervisor.

Commissioner Peskin spoke: I received two emails from members of the family on February 7th for the meeting that I did not attend on February 16th and subsequently received one email from the project sponsor with regard to the Alameda Harbor Bay Hotel Project which I did not respond to and I forwarded that to Larry Goldzband.

Commissioner Butt reported: I was advised by our Executive Director that until we finished today's business that this was still a pending item. Any communication would be considered ex-parte. I was also advised that the email I got, provided I would just send it in to him, which I did, without initiating any response, would be all I needed to do and that I did not have to report it. However I should send it in so it could become part of the administrative record.

Commissioner Addiego added: Chair Wasserman in light of Mayor Butt's comment I too received an email and a thank you after the meeting. I had a brief conversation after the hearing in which I listened to some of their concerns and encouraged them to come to South San Francisco for investing. (Laughter)

Commissioner Nelson was recognized: I also received a thank you note which I will disclose online.

Chair Wasserman continued: I do think it will be worth a little session at one of our future Commission meetings because this is something that is easy to forget and misunderstand, when a matter is closed and the inconsistencies in the McAteer-Petris Act on this very subject. I will put that on a future item to be discussed.

That completes my report and I will turn it over to Brad McCrea. Larry is in Washington, D.C. with Steve Goldbeck our Deputy and our Chief Counsel Marc Zeppetello attending the NOAA Coastal Zone Managers meeting and the Coastal States Organization meeting. Brad will present the Executive Director's Report.

6. Report of the Executive Director. Regulatory Director McCrea reported: Larry, Steve and Marc will be back on Monday.

The one matter that I would like to bring to your attention is a matter of staffing. As you will recall, Todd Hallenbeck, one of our former permit analysts moved over to BCDC's GIS program and his departure on the Regulatory side of the office left a vacancy in Permits. Today, I'm pleased to report that Elena Perez has accepted our offer to fill that vacant position.

Elena holds a Bachelor of Arts in American Literature from UCLA (adding another Bruin to the staff), and she holds a Master of Marine Biodiversity and Conservation. Elena has recently served as a Research Assistant at the Charles Darwin Foundation in the Galapagos Islands developing best management practices for the diving industry. Prior to that she served as a Sea Grant Fellow at the Coastal Commission contributing to an analysis on sea level rise with a focus on environmental justice. While at the Coastal Commission she also helped prepare a workshop on the "Science of Sediment." Prior to her fellowship, Elena was a technical writer, a researcher at the Scripps Institute and a volunteer educator at the California Academy of Sciences. Unfortunately, she couldn't be here. We think she is in South America. (Laughter) But I expect that you will meet her soon. Please let us know if you have any questions or concerns about her appointment. She is scheduled to start a week from Monday on March 13th.

That concludes my report.

7. Consideration of Administrative Matters. Chair Wasserman announced: That brings us to Consideration of Administrative Matters. Erik Buehmann is here to answer any questions you may have on the administrative listings we mailed on February 17th. (No comments were received)

8. Commission Consideration of a Contract for Legal Consulting Services. Chair Wasserman continued: Item 8 is adoption of a contract for legal services to support the Commission's lawsuit against the United States Army Corps of Engineers. John Bowers will present the item.

Staff Counsel Bowers presented the following: As the Commission is aware last March the Commission authorized the Office of the Attorney General to institute litigation in the name of the Commission against the U.S. Army Corps of Engineers to seek a court order compelling the Corps to comply with what we believe to be the Corps' obligations under the Coastal Zone Management Act with respect to: 1. The beneficial reuse of materials dredged from San Francisco Bay, 2. Conducting dredging operations in a manner that is least damaging to the natural resources including fisheries of the Bay. In September of 2016 the Office of the Attorney General did file the litigation that the Commission had authorized against the Army Corps of Engineers.

Although your legal staff has full confidence in the ability of the Office of the Attorney General to prosecute the subject litigation we wish to ensure that the Office of the Attorney General has all the tools that we can make available to it to maximize the likelihood of a successful outcome.

In this regard we propose to enter into a contract in an amount not to exceed $25,000.00 with the law firm of Kilpatrick Townsend & Stockton to provide consulting services to the Office of the Attorney General and to your legal staff with respect to this pending litigation against the Corps.

Kilpatrick Townsend & Stockton is a firm that has a national reputation for expertise in the issues that are likely to arise in the Commission's litigation against the Corps. It has provided consulting services to other states such as Ohio and to local governments such as Cateret County in North Carolina with respect to the Corps' dredging practices and legal authorities applicable to those practices.

The Office of the Attorney General has indicated to us that it fully supports and concurs in this request and we therefore ask you for your approval of the proposed consulting contract.

Chair Wasserman asked: Are there any questions of Mr. Bowers or anybody else on staff about this matter? (No comments were voiced) I would entertain a motion to approve.

MOTION: Commissioner Showalter moved approval of the staff recommendation, seconded by Commissioner Nelson.

VOTE: The motion carried with a roll call vote of 18-0-1 with Commissioners Addiego, Butt, Gilmore, Scharff, Jahns, Gioia, Peskin, Pemberton, McGrath, Nelson, Randolph, McElhinney, Showalter, Techel, Wagenknecht and Zwissler, Vice Chair Halsted and Chair Wasserman voting, "YES", no "NO", votes and Commissioner Galacatos abstaining.

9. Commission Consideration of Proposed Findings to Deny Application No. 2016.003.00 for Construction of a Hotel and Parking Structure located at 2350 Harbor Bay Parkway, in the City of Alameda, Alameda County. Chair Wasserman announced: Item 9 is the adoption of findings of denial for the Harbor Bay Hotel and I will recuse myself and turn the gavel over to Vice Chair Halsted. (Chair Wasserman exited the room)

Acting Chair Halsted continued: Item 8 the Commission adoption of findings of denial for the proposed Fairfield Inn Project in Alameda that the Commission denied at our last meeting. Mr. Jhon Arbelaez-Novak will present the proposed findings.

Permit Analyst Arbelaez-Novak presented the following: On February 16th the Commission held a public hearing and a vote on a permit application to build a 98 room, four-story hotel and improve and construct public access space within the Commission's 100 foot shoreline band jurisdiction on Harbor Bay Island.

As required in Section 66632.F of the McAteer-Petris Act the permit application requires 13 affirmative votes for approval. The vote of the Commission was 11 affirmative, six negative and one abstention. As a result of the failure of the Commission to give the project 13 affirmative votes the Commission denied the permit application.

In accordance with BCDC Regulation 10514.E when the Commission votes on a permit application in a manner that is not consistent with the Executive Director's recommendation, the Executive Director shall prepare draft findings based on the statements made by those Commission members who voted consistent with the outcome of the vote and on such other materials as the Executive Director believes necessary to support the Commission's decision legally or as otherwise appropriate.

The Executive Director has prepared proposed findings, which are included in your packet today. Section 10514.E further specifies that after considering the findings only those Commission members who voted consistent with prevailing decision may vote on whether or not to adopt the findings to support the Commission decision.

In addition to voting on whether or not to adopt the proposed findings those six Commissioners who voted consistent with the prevailing decision to deny the application also have the option to make changes to the findings which will remand the matter back to the Executive Director to modify the findings and bring them to you again at a future meeting.

The first paragraph of the findings state a history of the project site, the settlement agreement between Harbor Bay Isles Associates and BCDC and the permit application.

The findings in support of the denial can be found in Item 10. The Commission denies the permit on the grounds the project fails to provide maximum feasible public access consistent with the project to the Bay and its shoreline as required by Section 66602 of the McAteer-Petris Act.

More specifically:

a. The project does not provide sufficient Bay-related activities and amenities to enhance the pleasure of the public to use and view the Bay and fails to provide variety, interest and attraction to the shoreline public access areas as required by the San Francisco Bay Plan Policy No. 2 on Appearance, Design and Scenic Views and Bay Plan Policy No. 7 on Public Access.

b. The building's proximity to the shoreline does not visually complement the Bay. The height and massing of the building will significantly obstruct views of the water and the vertical separation between the proposed hotel lobby and the adjacent public access area would preclude desirable, beneficial activation of the shoreline as required by Bay Plan Policy No. 4 on Appearance, Design and Scenic Views.

c. The building design and its proximity to the shoreline within the shoreline band will create an intimidating presence for the public making the shoreline and the public access provided within the shoreline band unwelcoming. A welcoming public access area is a guiding principle for all public access areas as stated in the Commission's Public Access Design Guidelines. The Guidelines should be used when designing public access areas as required by San Francisco Bay Plan Public Access Policy No. 12.

Acting Chair Halsted continued: We have a number who would like to speak.

Commissioner Gioia commented: For those of us who were not at the meeting; what is the voting procedure? You just said, only those who voted –

Acting Chair Halsted clarified: Only those six that voted to deny the permit. Before we get to the Commission discussion we have a number of people from the public who would like to add something to the record.

Commissioner Butt was recognized: The way I look at it; of the six people there are only three here and Commissioner Peskin is an Alternate. Can he vote?

Acting Chair Halsted replied: Yes. I was going to add that to Jhon's comments that Alternates can vote.

Commissioner Butt added: So that would be four of the six.

Acting Chair Halsted explained: That's right. So that would be a quorum of the six. We may proceed. We did not schedule a public hearing but we have a number of people who would like to say something. I have four cards here. The first speaker will be Daniel Reidy to be followed by Daniel Franco.

Mr. Reidy addressed the Commission: I am speaking on behalf of Harbor Bay Isle Associates. We are the master developer of the Harbor Bay Isle Development on Bay Farm Island.

I have copies of the settlement agreement with BCDC that I have worked on since 1982. I want to give some suggestions about your findings because the first two mention the settlement agreement. And then when you get into 10 there are the critical issues.

I have a particular concern about whether those who are going to vote on this really want to look at 10(C). The building's proximity to the shoreline within the shoreline band does not visually complement the Bay and the height and massing of the building will significantly obstruct views of the water.

The issue is - what is the vantage point that obstructs views of the water? In our master plan that was developed with Skidmore Owings & Merrill we have very significant open space parks on either side. They go on for hundreds and hundreds of feet.

If built, there would be one building in the middle. People driving down Harbor Bay Parkway or walking on the pathways would be able to look at the Bay from either side. It does not obstruct views of the Bay; only if someone is looking right at the building.

I think that is not a good, reasonable finding and I do not recall any of the members talking about their particular vantage point for a view.

Also, that the height of the building would be intimidating to the public; that is Item D. The issue is that under our current settlement agreement it could be built with a mixed-use office. It could be a commercial office building or a mixed use with a restaurant and an office building. Under the zoning of the City it can be 100 feet tall and with a variance, 156 feet. It would be an accent piece if it were a tall building. This is not a tall building. It is a four-story building.

The height of it is not intimidating to the public and to people shooting by on their bicycles or taking their kids past the building. The size of the shoreline park adjacent is already fixed in our agreement. The width of it from the shoreline edge is already fixed. So you are going to have a building there sometime.

If you just get an attitude that any building is going to obstruct; in a way you are saying that there can be nothing there. Thank you.

Mr. Daniel Franco spoke: I respectfully disagree with the gentleman who just spoke; he could not be more wrong. I thank you for denying this permit and I need to point out the eight days since San Jose flooded. We all know that could have been San Francisco. That could have been Oakland. It is just the luck of the draw that San Jose got hit.

There is no justifiable case for building anything. What we need is wetlands. I am here to remind you of that.

I will refer you to ClimateCentral.org. This is the big brains at Yale. This picture on my computer shows most of Alameda underwater. Do we really want that scenario? No. We need wetlands. Thank you.

Ms. Daxa Patel addressed the Commission: I am the applicant of the Harbor Bay Parkway Hotel. I respect everybody's vote. I wanted this to be a fair chance given to everybody. I am asking everybody to give me as an American citizen a fair chance that I did not get.

I am offering more access to the hotel than anybody in the past that you have approved. A hotel is a 24/7 amenity, 365 days a year. Everybody can come in. I cannot lock the door.

You cannot have an office building down the street that was approved; one of them is under construction. They do not have access. BCDC did not mention anything about that. There is a down-the-street housing project. And if you walk on the street and you try to get to the shoreline you do not have much access.

I have the most access than anything you passed on the Harbor Bay Parkway. I feel that this is not fair for me. Building heights and other things are not BCDC's jurisdiction.

I listened to your staff members and I incorporated everything that they suggested. Together as a developer with BCDC I am willing to improve that shoreline. Here you guys are stopping me. We are not doing our job because you do not want to improve the BCDC shoreline.

Please, I need a fair chance. Thank you so much.

Ms. Pat Lamborn was recognized: I am a resident of Alameda. I have been involved with addressing the Commission since September of 2015.

I want to express my gratitude because by holding a full Commission hearing to decide whether to issue a permit for this hotel you obeyed your mandate. You obeyed your legal jurisdiction. You have been lobbied for the last year and a half by Dan Reidy.

Dan Reidy represented the Harbor Bay Isle Associates and he also represented the developer purchaser of that parcel. He started emailing you in December of 2105. He continued with emails in January and February.

One of the emails is addressing the issue that the parcel has never been zoned for a hotel. He talks about the fact that he has agreed to call Andrew Thomas the Alameda City Planner. He says, "My only concern with Andrew's outline of points is that our understanding of the process going forward has always been that the public access improvements would go to BCDC's Design Review Board but that the project would not have to go the full Commission."

They have never wanted the project to come before you. You have made a decision. You have talked about public access. We are the public. We have come out in great numbers. We came to the Design Review Board. We came in August. We came in February. We have told you that it blocks public access. We have told you that it is an intimidating presence. We have cited your policies. What more could we do?

I know that you have just heard a very heartfelt message from the developer who is disappointed. The developer has known that the existing zoning ordinance which was actually passed by Mr. Reidy in 2014 is consistent with your third amendment to the third supplementary agreement which allows only an office building with possibly a restaurant or a coffee shop.

They attached your agreement with HBIA to their title insurance. They have known since they bought the property that it was under your jurisdiction and that its use was for an office building/restaurant.

At this point you have been consistent. Your ruling against this permit is consistent with our City's zoning ordinance. It is consistent with the third amendment. No matter how many times Mr. Reidy has emailed you; I have those as well – begging you, demanding, being angry that you have not issued a fourth amendment.

Please honor the vote you took when you listened to the public who you serve. Thank you.

Acting Chair Halsted continued: We are voting on the findings of denial prepared by staff. Only the six Commissioners or their Alternates who voted to deny the permit may vote on the proposed findings; that include Commissioners Butt, Gilmore, Gorin, Kim, known as Peskin, Sears and Showalter. I believe we have four here.

Is there a motion from those Commissioners?

MOTION: Commissioner Butt moved approval of the staff recommendation, seconded by Commissioner Peskin.

Commissioner Peskin commented: As Acting Chair Halsted indicated I am the Alternate for Commissioner Jane Kim and am familiar with the comments that she made at the February 16th meeting with regard to the design, with regard to the fact that the hotel is a public amenity that in this case was not providing greater access to the Bay. I am familiar with her comments relative to the fact that there were no restrooms for bikers or the public. And I believe that the findings at Number 10 are consistent with the statements made by Commissioner Kim on February 16th and will vote for the motion to adopt staff's findings.

VOTE: The motion carried with a roll call vote of 4-0-0 with Commissioners Butt, Gilmore, Peskin and Showalter voting, "YES", no "NO", votes and no abstentions.

10. Adjournment. Upon motion by Commissioner Peskin, seconded by Commissioner Gilmore, the Commission meeting was adjourned at 1:48 p.m.

Respectfully submitted,

LAWRENCE J. GOLDZBAND
Executive Director

Approved, with no corrections, at the
San Francisco Bay Conservation and
Development Commission Meeting
of March 16, 2017

R. ZACHARY WASSERMAN, Chair