

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

June 3, 2016

Application Summary

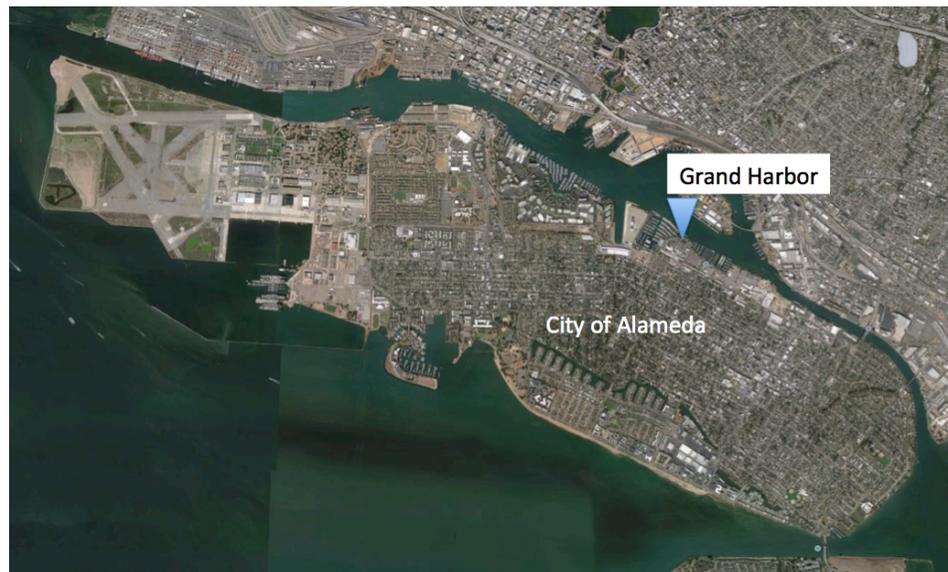
(For Commission consideration on June 16, 2016)

Numbers: BCDC Permit Application No. 1983.005.15A (Encinal Marina Limited) and BCDC Permit Application No. 1983.005.15B (Grand Marina Village Owners' Association)
Date Filed: March 29, 2016
90th Day: June 27, 2016
Staff Assigned: Ethan Lavine (415/352-3618; ethan.lavine@bcdc.ca.gov)

Summary

Applicant: Grand Marina Village Owners' Association

Location: In the Bay and within the 100-foot shoreline band, at Grand Harbor, located on the Oakland Estuary (southern shoreline) between Marina Cove Waterfront Park (west of site) and Grand Street (east of site), in the City of Alameda, Alameda County.



Project: The subject of the proposed permit material amendment(s) is to divide BCDC Permit No. 1983.005.11 (as amended through May 7, 2008) between the co-permittees by creating two separate permits that would identify the rights, responsibilities, and duties of each permittee based on property ownership and/or control. Only one of the co-permittees, Grand Marina Village Owners' Association (HOA), has applied for the material amendment; the other co-permittee, Encinal Marina Limited (Encinal), did not join HOA in requesting the proposed amendment. Encinal did not sign and does not support the application for the amendment.

Issues

Raised: The threshold issue is whether the Commission should consider materially amending this, or any, major permit based on an application submitted by only one of the co-permittees and, potentially, over the objection of the other co-permittee. If the Commission decides to consider this matter, the Commission staff believes that the primary issue raised by the proposed amendment is whether a permit split would ensure the maximum feasible public access determination and requirement under the existing permit, as previously amended, consistent with the Commission's law (McAteer-Petris Act) and policies of the San Francisco Bay Plan. As there are no other proposed substantive changes to the project, no other policies of concern to the Commission are raised.

Background

BCDC Permit No. 1983.005.11 authorizes development and activities at property owned or leased by the co-permittees, Grand Marina Village Owners' Association (HOA) and Encinal Marina Limited (Encinal). The effect of the proposed action would be to create two separate permits that identify the authorizations and responsibilities for each co-permittee under the existing permit* along the lines of property ownership and/or control of the underlying land on the basis of an existing lease, easement or legal agreement establishing maintenance responsi

* Amendment No. Eleven was the last amendment issued to BCDC Permit No. 1983.005.00. Approval of BCDC Permit No. 1983.005.15A and BCDC Permit No. 1983.005.15B would thus be exclusive of Amendments No. Twelve, Thirteen and Fourteen. Amendments No. Twelve and Fourteen were withdrawn by the applicant. Amendment No. Thirteen was never attached to a permit application because of a bookkeeping error.

bilities. The HOA independently applied for the application to split the permit. Encinal did not sign the application, and objects to the request to split the permit. Encinal was given concurrent notice of the HOA application and concurrently provided all documentation submitted therewith.

Unlike most business before the Commission, this application concerns no new proposed development. Rather, changes sought under the proposed material amendment are administrative in nature and do not seek to change the physical nature of the development already authorized and constructed pursuant to the aforementioned permit, as previously amended. As the co-permittees are not in agreement on the matter, the Commission is in the unusual position of considering an application for a permit amendment that has been submitted by one co-permittee without the public consent and concurrence of the other. Because of the unusual nature of this application, the following procedural background is provided.

On October 20, 1983, the Commission approved BCDC Permit No. 1983.005.00 (previously Permit No. 5-83) to allow for the conversion of Encinal's privately owned port into a 228-berth marina and the development of associated facilities including a shoreline public access trail and public access improvements. At that time, the HOA was not a co-permittee. Encinal's permit was subsequently amended on ten occasions between 1984 and 1990 to allow for enlargements and various improvements to its facilities. Under its original permit and the subsequent amendments, Encinal provided for and the Commission permit required approximately 61,784 square feet of guaranteed public access, consisting of access to existing piers and platforms over the water, and, on the shoreline, walkways, plazas, landscaping, seating areas, restrooms, parking, and other amenities.

In 2008, Encinal and a residential developer, Warmington Homes California (Warmington), jointly applied for and received Amendment No. Eleven to the permit, which authorized the construction of Grand Marina Village, a multi-home residential development of 40 units located inland of the marina and the shoreline park. Five of these homes, totaling an area of 7,800 square feet, lie within BCDC's 100-foot shoreline band jurisdiction. The amended permit allowed for reconfiguration of the marina parking lot to accommodate the homes, construction of new public streets, and changes and additions to the previously authorized public access improvements. The amended permit linked the construction and use of the residential

development to the construction of public pathways and landscaping along the southeastern edge of the shoreline park near Grand and Hibbard Streets; two new triangle parks located outside the Commission's jurisdiction with pathways and connections to the shoreline park; and a connection along the wharf adjacent to the Alaska Packer's Building that connects the wharf to Marina Cove Park to the southwest. In addition, the amended permit required the installation of new public access improvements, including benches, lighting, seating, signage and landscaping to connect and unify the new and existing public access areas.

As co-permittees to Amendment No. Eleven, Encinal and Warmington jointly assumed the obligations and duties pursuant to the amended permit, including maintenance responsibilities for the above-described public access improvements. Following the issuance of the amended permit, Warmington transferred its property interest at the Grand Marina Village residential development to the Grand Marina Village Owners' Association (HOA), at which time the HOA assumed the obligations and duties of the amended permit along with its co-permittee, Encinal. It is the Commission staff's understanding based on application materials submitted by the HOA that the co-permittees are presently in dispute over the responsibilities of each regarding the ongoing maintenance requirements of the public access areas located on property owned and/or controlled by Encinal. Amendment Eleven contemplated the conveyance of the property to a homeowners' association (with Conditions, Covenants and Restrictions), and provides that "the HOA will only be responsible for areas over which it has legal control."

Prior to the amendment application to split the permit presently before the Commission, the staff received two applications for a non-material amendment to divide the subject permit along the lines of property ownership and control—one by Warmington (dated May 22, 2014) and one by the HOA (dated September 1, 2015). In response to both of those applications, the staff advised the applicants that one of the two co-permittees may not unilaterally request that a permit be split without the consent of the other. In addition, regarding the HOA's September 1, 2015 application, notwithstanding that the Executive Director determined that the application was incomplete because it was signed by only one of the co-permittees, the Executive Director denied the request to split the permit administratively, as a nonmaterial amendment, on the grounds that the proposed amendment would constitute a material amendment.

In denying the HOA's September 1, 2015 request to split the permit as a non-material amendment, the Executive Director advised the HOA to submit a letter application requesting that the amendment for a permit split be handled by the Commission with a scheduled public hearing instead of being handled administratively. The Executive Director noted that an application for a material amendment to a major permit is subject to the same requirements as an application for a major permit, including the requirement that the application be signed by both co-permittees. 14 C.C.R. §§ 10824, 10310(a) and Appendix D (BCDC Application Form). However, in this case, because the requested amendment is based on the apparent inability of the co-permittees to agree on whether, or how, the permit should be split, the Executive Director indicated that the HOA may request that the Commission consider the HOA's application without obtaining Encinal's signature because that is the threshold issue of the dispute that the HOA is seeking to resolve.

The HOA reapplied for the proposed action in a letter requesting a material permit amendment dated December 18, 2015, received in this office on December 21, 2015. In its letter, the HOA confirmed, as requested by the Executive Director, that the HOA had asked Encinal to jointly submit and sign the application for a material amendment and documented Encinal's refusal to do so. By requiring the HOA to apply for a material amendment to divide the permit, the Executive Director ensured that the dispute would be heard and resolved before the Commission with the benefit of a public hearing. The proposal is discussed further in the Staff Analysis section below.

Encinal Marina Limited—Project Description (BCDC Permit No. 1983.005.15A)

Project

Details: The proposed permit split would result in the continued authorization to the permittee, Encinal Marina Limited, for the following activities:

1. **In the Bay:**
 - a. **Dredging.** Dredge approximately 13,000 cubic yards of material to create a basin for the marina addition. The spoil will be deposited at an upland location partially within the Commission's jurisdiction, with no run-off entering the Bay, and at a Corps of Engineers authorized disposal site or outside of the Commission's jurisdiction.

- b. **Fill Removal.** Remove approximately 37,650 square feet (.86 acres) of deteriorated piles and wharving from Berth 6 and the existing fuel dock. An additional 3,940 square feet of fill consisting of a dilapidated structure built over the water will be removed from the Bay near Grand Street, for a total fill removal of 41,590 square feet (.95 acres) from the Commission's jurisdiction.
 - c. **New Bay Fill.** Place and use new Bay fill for the following purposes:
 - (1) Pile-supported and floating fill for a 389 berth marina – 83,461 square feet;
 - (2) Pile-supported and floating fill for floats for a yacht sales facility – 4,700 square feet;
 - (3) Pile-supported and floating fill for docks for a yacht repair facility – 7,150 square feet; and
 - (4) Riprap materials along approximately 930 linear feet of shoreline facing the marina berthing for shoreline protection – 24,750 square feet (4,583 cubic yards).
 - d. **Live-Aboard Boats.** Use up to ten percent of the total berths (37 berths) for live-aboard boats. The berths shall be located throughout the marina as shown on Exhibit B (attached) to afford maximum security (Amendment No. Six).
2. **Within the 100-foot Shoreline Band:**
- a. **Fuel Dock Building.** Construct and use a two-story building for a harbor-master office, snack shop, public restroom, and offices for an existing fuel operation over an approximately 1,200-square-foot portion of the existing fuel dock. (No new fill is authorized for this purposes) (Amendment No. Ten).
 - b. **Yacht Repair Facility.** Establish a yacht repair facility with a boat hoist at the southwest end of the site.
 - c. **Warehouse Conversion.** Convert the existing 24,000-square-foot warehouse building at Berth 6 (known as the Alaska Packer's Building), into smaller industrial storage and manufacturing units by partitioning the interior and otherwise remodeling the building.
 - d. **Driveways and Parking.** Reconfigure and repave driveways and parking areas as generally shown on Exhibit A (Amendment No. Eleven).
 - e. **Public Access.** Improve and use a total of approximately 58,877 square feet of public access including: (1) approximately 55,854 square feet of shoreline park consisting of walkways, plazas, and landscaping along the shoreline, access on existing piers and platforms over the water including the fuel dock and pier, the wharf deck adjacent to the Alaska Packer's Building, area along the inland side of the Alaska Packer's

Building, and pedestrian pathway connecting the wharf along the Alaska Packer’s Building to Marina Cove Waterfront Park to the southwest; and (2) 3,032 square feet of sidewalk and pathways between the two triangle parks and the parking lot (Amendment No. Eleven).

Grand Marina Village Owners’ Association—Project Description (BCDC Permit No. 1983.005.15B)

Project

Details: The proposed permit split would result in the continued authorization to the permittee, Grand Marina Village Owners’ Association, for the following activities:

1. Within the 100-foot Shoreline Band:

- a. **Driveways.** Reconfigure and repave driveways as generally shown on Exhibit A (Amendment No. Eleven).
- b. **Public Access.** Improve and use a total of approximately 31,657 square feet of public access including approximately 13,362 square feet of walkways, and landscaping approximately 6,873 square feet of walkways, benches, and landscaping within the East Triangle Park, and approximately 11,422 square feet of walkways, benches, and landscaping within the West Triangle Park (Amendment No. Eleven); and
- c. Construct 40 single-family homes, five, or 7,800 square feet, of which are in the Commission’s jurisdiction as generally shown on Exhibit A (Amendment No. Eleven).

Staff Analysis

A. **Issues Raised:** The staff believes that the primary issues raised by the application is whether the permit split maintains the maximum feasible public access required under the existing amended permit consistent with the McAteer-Petris Act and the Bay Plan policies. As there are no other proposed substantive changes to the project, no other policies of concern to the Commission are raised.

1. Public Access

- a. **Maximum Feasible Public Access.** Section 66602 of the McAteer-Petris Act states, in part, that “existing public access to the shoreline and waters of the...[Bay] is inadequate and that maximum feasible public access, consistent with a proposed project, should be provided.” In addition, the Bay Plan policies on public access state, in part, that “a proposed fill project should increase public access to the Bay to the maximum extent feasible...” and that “access to and along the waterfront should be provided by walkways, trails, or other appropriate means and connect to the nearest public thoroughfare where convenient parking or public transportation may be available.”

The Commission must determine whether the proposed division of the permit ensures that the permitted project would continue to provide maximum feasible public access to the shoreline and Bay consistent with the Commission's public access policies.

In the original (1983) BCDC permit to Encinal, the permit provided for and required approximately 60,000 square feet of public access area along the 1,000-foot-long shoreline between Grand Street on the east and the Alaska Packer's building on the west. The subsequent ten amendments to Encinal's permit provided for and required an additional approximate 1,784 square feet of public access improvements to the walkways, plazas, landscaping, and piers and platforms over the water. Consequently, per Amendment No. Ten of the permit, Encinal was authorized and required to provide a total of 61,784 square feet of public access area and improvements.

When Warmington joined Encinal as a co-permittee (2008) under Amendment No. Eleven to the permit, 29,035 square feet of public access improved area—7,707 square feet of which are in the Commission's jurisdiction—was added, and an approximately 2,546 square feet of previously authorized and required public access area was deleted. Amendment No. Eleven resulted in a total net gain of 26,499 square feet of public access.

The total public access provided and required in Amendment No. Eleven to the permit is 88,210 square feet. The access improvements authorized and constructed under the permit include: (a) pathways, benches, lighting, seating, trash receptacles, landscaping, barbecue areas, and signage along the shoreline park (on Encinal's and the HOA's property); (b) at least eight benches, appropriate lighting, and signage along the wharf (on land controlled by Encinal); (c) a strip of a 12-foot-wide striped and marked pedestrian pathway (on land controlled by Encinal); and (d) pathways, benches, lighting, seating and signage within the west and east triangle parks (located inland of the public parking lot adjacent to the residential development on the HOA's property).

The proposed action to divide the permit would in no way reduce the total amount of public access provided at the site, nor would it in any way change the improvements previously required under Amendment No. Eleven. It would assign the public access areas and improvements authorized and required of each permittee on the basis of actual ownership of the underlying land or control of land either through a lease, easement or a legal maintenance agreement.

Under the proposed split, 31,657 square feet of BCDC-required public access area would be under the control of the HOA, including the East and West Triangle Parks, and a portion of the shoreline park (Exhibit C).

The public access area under the control of Encinal would total 58,877 square feet and would include the remainder of public access available at the site, including the remainder of the shoreline park, which includes paths, landscaping, benches, picnic tables, a BBQ, and other public access improvements (Exhibit B). Amendment

No. Eleven did not require any net increase to the public access area on Encinal's property. However, it did require new public access improvements on Encinal's property as detailed above.

The Commission must determine if the public access areas and improvements that are provided for under the divided permit—effectively two separate permits—would continue to ensure that the maximum feasible public access consistent with the authorized project is not diminished or changed. That is, does the act of dividing the permit into two permits provide that the public access areas and improvements required of each permittee result in the maximum amount feasible given the authorized improvements?

- b. **Ongoing Maintenance Program.** Bay Plan policies on public access state, in part, that public access improvements “should include an ongoing maintenance program....” The permit, as amended, requires that:

“[t]he public access areas and improvements required by the permit shall be permanently maintained by, and at the expense of, the permittees. Such maintenance shall include, but is not limited to, irrigation of landscaping and repairs to all path surfaces, replacement of any plant material that dies or becomes unkempt, periodic clean-up of litter and other materials deposited within the access or open space areas, removal of any encroachments into the access or open space areas and assuring that the public access signs remain in place and visible.”

If the proposed action were approved by the Commission, the maintenance obligations of the permit would remain the same. However, the proposed action would clearly divide the maintenance responsibilities along the lines of property ownership and control of the underlying land through a lease, easement, or legal maintenance agreement. The divisions correspond to physical markers (i.e., curbs, edges of sidewalks) that delineate the boundaries of the areas for which each permittee would retain maintenance responsibilities.

Encinal reportedly contends that it should not be solely burdened with the increased costs of maintaining the public access improvements required on its property, some of which came about as a result of the multi-home residential development. The HOA contends that neither Warmington during purchase negotiations, nor the HOA as successor, expressly or impliedly agreed to accept maintenance responsibility on property it neither owned nor controlled, and that Amendment No. Eleven expressly addressed the issue. Language within BCDC Permit No. 1983.005.11 appears to support the HOA's position, in that a special condition requires the recordation of a Declaration of Covenants, Conditions, and Restrictions (CC&R) identifying public access maintenance responsibilities prior to the transfer of property to a homeowners' association. Per that special condition, the recorded CC&R is to state that if the HOA owns or controls common areas subject to the permit, “the HOA will only

be responsible for areas over which it has legal control.” There is some ambiguity in the permit, however, in that all authorizations and duties within the permit fall jointly to the permittees; the language does not distinguish between the duties and obligations of one permittee versus another.

The Commission must determine whether the proposed action would in any way impair the ability of the permittees to comply with their ongoing public access maintenance responsibilities, and thus conflict with related Bay Plan policies.

B. Relevant Portions of the McAteer-Petris Act

1. Section 66602

C. Relevant Portions of the San Francisco Bay Plan

1. *San Francisco Bay Plan* Policies on Public Access

Exhibits

A. Proposed Public Access Division Based on Underlying Land Ownership and/or Control

B. Proposed Public Access Exhibit (Encinal’s Permit)

C. Proposed Public Access Exhibit (HOA’s Permit)