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June 14, 2016

**VIA EMAIL** to ethan.lavine@bcdc.ca.gov

Bay Conservation and Development Commission  
c/o Ethan Lavine  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102

**Re: June 16, 2016 Commission Meeting, Agenda Item No. 9  
1983.005.11 Permit Split Application – Purpose and Effect**

Dear Commissioners:

The Grand Marina Village Owner's Association ("HOA") seeks to amend Permit 1983.005.11 ("Amendment 11" or "Permit") by splitting it into two permits, each pertaining to property under sole ownership or control of one of the co-permittees of Permit 1983.005.11 (the "Application"). Detailed submittals provide the background supporting the Application, which is described in the Application Summary. This correspondence provides a succinct explanation of the reasons supporting approval of the proposed Permit split and responds to certain contentions made by Encinal Marina ("Encinal").

In short, splitting the Permit completes the final and intended step in BCDC's authorization of the Grand Marina Village home development. The issuance of separate permits is in the public interest, will continue to provide the maximum feasible public access established in Amendment 11, and does not impact any authorizations.

### **Project and Permit Background.**

Amendment 11 authorized a 40-home development in Alameda adjacent to Grand Marina, operated by Encinal. Because Encinal owned the home development project property at the time of permitting, Encinal and Warmington Homes (the developer and predecessor in interest to the HOA) became joint permittees on Amendment 11. After BCDC issued Amendment 11 in 2008, a Warmington entity purchased the development property from Encinal, completed the development in 2010, and conveyed the public access area within the home development to the HOA for management under recorded, BCDC-reviewed Conditions, Covenants and Restrictions (CC&Rs), as provided in Amendment 11.

**WEYAND LAW FIRM**  
A PROFESSIONAL CORPORATION

Email: [eshaw@wynlaw.com](mailto:eshaw@wynlaw.com)

June 3, 2016

Via Email

Ethan Lavine  
Principal Permit Analyst  
San Francisco Bay Conservation and Development Commission (BCDC)  
455 Golden Gate Avenue, Suite 10600  
San Francisco, California 94102-7019

Re: Proposal to Split Permit

Dear Mr. Lavine:

As you know this office represents Encinal Marina Limited.

It appears that the your summary of the proposal fails to address several concerns raised by Encinal. Fundamentally, given the parties disagreement over the proper interpretation of the permit and the responsibility for the expense of ongoing maintenance, the initial question would appear to be whether the Commission has jurisdiction to modify a permit to the detriment of one co-permittee over such permittee's objection.

The issuance of a governmental development permit generally creates a vested right in the permittee to the continued existence of the rights obtained under the permit. (See *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Com.* (1976) 17 Cal. 3d 785, 791.) Encinal contends that it has a substantial good faith argument that under the permit certain obligations are owed between the co-permittees to share maintenance expenses for the public access improvements in a fairer manner. Presently that dispute is pending in Alameda County, *Encinal Marina Ltd. v. Grand Marina Village Homeowners' Association, et al.*, Superior Court, Case No. RG15776148. In that action, Encinal seeks to recover damages from the co-permittees based on Encinal's payment of an excess share of maintenance costs for the public access improvements.

If the Court determines that Encinal's can state such a cause of action (and the Court has yet to rule), then splitting the permit would deprive Encinal of a material financial benefit it possesses under the existing language of the permit. Thus, splitting the permit would deprive it of such benefits, and would constitute and improper taking of Encinal's vested rights.

It would seem appropriate, therefore, at a minimum for the Commission to defer consideration of this application until such time as the civil action is resolved. By doing so, the Commission will ensure that there has been a definitive determination of Encinal's rights under the permit with respect to the co-permittees. Should the Commission act to split the permit, and should the Superior Court agree with Encinal's position, the Commission will have improperly have deprived Encinal of vested rights, leading only to more litigation.

Encinal believes that the permit, fairly construed, is not as limited as its co-permittees contend. Encinal believes that the Warmington/Village interpretation of the permit is flawed. Encinal relied on the permit as written in proceeding to accept and sign-off on Amendment Eleven. Section II-B of the permit, as amended, sets forth the requirement that certain public access be provided in perpetuity as a condition of the granting of the Permit. Most significantly, Special Condition II.B.9. provides as follows:

“The areas and improvements required by Special Condition II-B 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.” (SAC, Ex. B at p. 8 (italics supplied).)

In connection with Amendment Eleven, the Commission ordered certain landscaping changes in the areas under Encinal’s control which increased its cost of operations. But for the changes to the permit to accommodate Warmington’s planned construction, those landscaping modifications would not have been imposed. Encinal believes therefore that an implied legal obligation on the part of the co-permittees to share that increased burden.

Co-Permittees rely on a single line in Section II.C.4 as the basis for their argument that their obligation under Section II.B. is limited to certain areas. In context, that provision provides:

“Homeowners’ Association; Approval of Covenants, Conditions and Restrictions (CC&Rs). If the permittees propose to establish an entity that has a membership, such as a homeowner’s association (HOA), the permittees shall submit to the Commission, prior to the sale of the first residence, a copy of the CC&Rs governing the homeowners’ association for final review and approval. The CC&Rs shall: (1) refer to and clearly identify the BCDC permit, include the public access and open space conditions, and indicate that the permit and any subsequent amendments thereto, binds the HOA and all successors and assigns in perpetuity to all conditions including the public access and open space conditions; (2) establish the authority of the HOA to impose charges on its members to assure that the HOA has sufficient financial resources to maintain all of the public access improvements to maintain all of the public access improvements and landscaping; (3) provide that the HOA has the legal authority to take any and all actions necessary to maintain all of the public access improvements and landscaping as required by the BCDC permit; (4) state that the owners, by taking fee titles to a lot in the project, agree that the HOA will be the sole representative for the owners to BCDC for permit violations or for future permit amendments and that the HOA can accept letters from BCDC and other communications such as violation reports on behalf of

the owners; (5) state that, if the HOA owns or controls property such as “common areas” that are subject to BCDC permit, the HOA can be held liable for violations of the permit but that the HOA will only be responsible for areas over which it has legal control; (6) state that the HOA is responsible to correct any violations of the BCDC permit including payment of penalties, collection of fees needed to fix landscaping and pathways, etc., and to reconstruct the project in compliance with the permit; and (7) provided that the HOA can collect fees sufficient to undertake the actions identified in this paragraph.”

By its plain terms, this paragraph is permissive (“permittees may”) and addresses only the provisions which may be included in an acceptable set of CC&Rs. Nothing in the text of Section II.C—captioned “Notice of Assignment”—suggests that the provisions of Section II.C. were intended to substantively limit the co-Permittees’ duties under Section II.B., duties imposed as a requirement for being granted the permission to construct the improvements detailed in Section II.A., which allowed, *inter alia*, for the construction of the townhomes. If these were limitations on such substantive rights, presumably they would have been included in Section II.B.

Section II.C.4.(5). discusses only a violation of the permit in the common areas, whereas other parts of Section II.C.4. discuss maintenance more broadly as applying to all public access requirements. And indeed, if Section II.C.4.(5) has the meaning urged by Defendants, Section II.C.4.(6). is rendered superfluous. Under standard rules of interpretation, the law favors an interpretation which gives meaning to each word and phrase in a writing.

This interpretation is further buttressed by the overall structure of the permit. Section I sets forth the authorization granted to the co-Permittees. Section II. imposes conditions on that grant: Section II.A. deals with plan and plan review; Section II.B. with public access and maintenance thereof; Section II.C. with “Notice of Assignment,” *i.e.*, how the co-Permittees advise purchasers of these problems (saying nothing about limiting II.A. or II.B). Sections II.D through II.N. discuss other permit requirements dealing with different considerations. Section III sets forth the BCDC’s findings and recommendations which support the grant of the Permit. Section IV. deals with general conditions applicable to all permits.

Thus at root there is a dispute as to the parties’ respective rights and duties under the Permit. BCDC appears to lack any procedures for dealing with a dispute between co-permittees as to their differing interpretations of a permit. Yet having a definitive interpretation of the permit would logically seem to be a prerequisite to the consideration of any lot split by the Commission absent the parties’ mutual consent.

Further, as changing the parties’ rights under an existing permit trigger considerations of vested rights, such changes would be proper and permissible only if the parties were accorded due process in connection with the interpretation process. This would seem to require some form of evidentiary presentation, cross-examination of witnesses and legal argument. That seems to be outside the scope of the Commission’s procedural framework, which focuses on the granting and enforcement of permits and not resolving the permittee’s internecine disputes. Indeed in

Ethan Lavine  
San Francisco Bay Conservation and Development Commission (BCDC)  
June 3, 2016  
Page 4

meetings with the BCDC staff about this issue, Encinal was repeatedly told that the BCDC would remain agnostic on the issue of interpretation. Encinal relied upon those comments in bringing this dispute to the attention of the courts.

One also must note that while Warmington/Village contend that it was always contemplated that the permit would be split, that is not the understanding of Encinal's present management. Looking at the material Warmington and its counsel have submitted, one notes that none of the critical communications about a future split of the permit appear to have been copied to or shared with Encinal.

For example, Warmington Village cite to the original Supplemental Information to the application for Amendment Eleven, but that Supplemental information was prepared solely by Warmington's consultant and Encinal has located no copy in its files of that document, and it is uncertain that such information was ever shared with Encinal. (In fact, when Encinal subpoenaed the BCDC file, the application was not included. Encinal's current management first saw the exhibits to the application when Warmington's counsel shared it.) The emails about the permit splitting process, such as Exhibit E, do not appear to have been copied to anyone at Encinal. It appears that virtually all communications about the amendment were between the BCDC and Warmington's representative, and no effort was made to keep Encinal in the loop.

Indeed, the first request to split the permit, Exhibit N, was not sent to Encinal by Warmington. Encinal learned of it only when the BCDC Staff—in the mistaken belief that the letter had come from Encinal—advised Encinal that any split would require the consent of both permittees.

Indeed, the requirement for mutual consent apparently has also been a constant theme from the Commission upon which Encinal has relied. It cannot give such consent until the rights and duties of the co-Permittees have been fully ascertained and interpreted.

Based on the above, Encinal would request that the Commission either deny the present application or defer its consideration until such time as the Court proceeding has concluded and definitively addressed the parties respective claims as to the proper interpretation of the permit.

Very truly yours,  
WEYAND LAW FIRM  
A PROFESSIONAL CORPORATION



Eric C. Shaw

Cc: Client



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June 6, 2016

**VIA E-MAIL**

Ethan Lavine  
Bay Conservation and Development Commission  
455 Golden Gate Avenue #10600  
San Francisco, CA 94102

**Re: Application to Split Permit 1983.005.11**

Dear Mr. Lavine:

On behalf of the Grand Marina Village Homeowners Association (“HOA”), this letter provides an initial response to the June 3, 2016 letter (“June 3<sup>rd</sup> Letter”) submitted by Encinal Marina Ltd.’s attorney regarding the June 16, 2016 hearing on the HOA’s application to split Permit 1983.005.11.

The June 3<sup>rd</sup> Letter contends: “it would seem appropriate ... at a minimum for the Commission to defer consideration of [the permit split] application until such time as the civil action [*Encinal Marina Ltd. v. Grand Marina Village Homeowners’ Association, et al.* (Alameda County Superior Court Case No. RG15776148)] is resolved.”

This contention is directly contrary to the Superior Court’s orders in the referenced civil action.

The Court twice sustained Defendants’ (including the HOA’s) demurrers<sup>1</sup> to Encinal’s complaint (with leave to amend). After Defendants demurred a third time to Encinal’s latest amended complaint, the Court set a hearing on that demurrer for May 10, 2016.

After Defendants informed the Court of the pending BCDC proceedings, the Court issued uncontested, and now final, rulings continuing the hearing on the demurrer to July 14 (and a case management conference) “to allow BCDC [to] vote on June 16, 2016.” Thus, the Court made it

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<sup>1</sup> In the litigation, the Defendants assert BCDC has jurisdiction to interpret Permit 1983.005.11, and to act on the HOA’s application to split that permit and that Encinal’s demand that the Court interpret the permit in BCDC’s absence is improper.

Ethan Lavine  
June 6, 2016  
Page 2

WENDEL, ROSEN, BLACK & DEAN LLP

explicitly clear (four weeks ago) that it is waiting for the BCDC proceedings to occur *before* it issues a ruling on the current demurrer.

The June 3<sup>rd</sup> Letter's suggestion that BCDC should wait for the Court to act directly contradicts the Court's ruling. The HOA respectfully submits that the June 16, 2016 BCDC hearing should go forward.

The HOA will provide a further response to Encinal's other claims and contentions asserted in the June 3<sup>rd</sup> letter in advance of the June 16 hearing.

Very truly yours,

WENDEL, ROSEN, BLACK & DEAN LLP

Wendy L. Manley

Enclosures (Court orders)

cc Eric Shaw (via email with enclosures)  
Marc Zeppetello (via email with enclosures)

Weyland Law Firm, A Professional  
Corporation  
Attn: Shaw, Eric C.  
2490 Mariner Square Loop, Ste: 213  
Alameda, CA 94501

Wendel Rosen Black & Dean LLP  
Attn: Williams, Todd A.  
1111 Broadway 24th Floor  
Oakland, CA 94607

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**Superior Court of California, County of Alameda**  
**Rene C. Davidson Alameda County Courthouse**

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Encinal Marina, LTD

Plaintiff/Petitioner(s)

VS.

Grand Marina Village Owners' Associat

Defendant/Respondent(s)

(Abbreviated Title)

No. RG15776148

Case Management Order

Complaint - Other Contract

**ORDER re: CASE MANAGEMENT**

The Court has ordered the following at the conclusion of a judicially supervised Case Management Conference.

**NO APPEARANCE REQUIRED ON MAY 10, 2016.**

**FURTHER CONFERENCE**

A further Case Management Conference is scheduled for 08/02/2016 at 03:00 PM in Dept. 16.

Updated Case Management Statements in compliance with Rule of Court 3.725, on Judicial Council Form CM-110, must be filed no later than 07/18/2016. If the foregoing date is a court holiday or a weekend, the time is extended to the next business day.

Matter continued to allow Court to rule on Demurrer before the Court on May 10, 2016 and to allow BCDC vote on June 16, 2016.

**NOTICES**

Clerk is directed to serve endorsed-filed copies of this order, with proof of service, to counsel and to self-represented parties of record by mail.

Any delay in the trial, caused by non-compliance with any order contained herein, shall be the subject of sanctions pursuant to CCP 177.5.

Dated: 05/10/2016

facsimile

  
\_\_\_\_\_  
Judge Stephen Pulido

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Order

Superior Court of California, County of Alameda  
Rene C. Davidson Alameda County Courthouse

Case Number: RG15776148  
Case Management Conference Order of 05/10/2016

**DECLARATION OF SERVICE BY MAIL**

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 05/11/2016.

Chad Finke Executive Officer / Clerk of the Superior Court

By   
Deputy Clerk

Weyland Law Firm, A Professional  
Corporation  
Attn: Shaw, Eric C.  
2490 Mariner Square Loop, Ste: 213  
Alameda, CA 94501

Wendel Rosen Black & Dean LLP  
Attn: Williams, Todd A.  
1111 Broadway 24th Floor  
Oakland, CA 94607

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**Superior Court of California, County of Alameda**  
**Rene C. Davidson Alameda County Courthouse**

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<p>Encinal Marina, LTD Plaintiff/Petitioner(s)</p> <p>VS.</p> <p>Grand Marina Village Owners' Associat Defendant/Respondent(s) (Abbreviated Title)</p>	<p>No. <u>RG15776148</u></p> <p>Order</p> <p>Demurrer to Complaint</p>
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The Demurrer to Complaint was set for hearing on 05/10/2016 at 03:00 PM in Department 16 before the Honorable Stephen Pulido. The Tentative Ruling was published and has not been contested.

IT IS HEREBY ORDERED THAT:

The Demurrer of Defendants Grand Marina Village Owners' Association and Warmington Grand Marina Associates, L.P. to the Second Amended Complaint of Plaintiff Encinal Marina, Ltd., pursuant to CCP § 430.10(d) and (e), is CONTINUED to July 14, 2016, at 3:00 p.m., in Department 16 of the above-entitled Court, located at 1221 Oak Street, in Oakland.

The Court will prepare the order and mail copies to the parties. Counsel for Defendants shall file and serve the Notice of Entry of Order.

NOTICE: Effective June 4, 2012, the Court will not provide a court reporter for civil law and motion hearings, any other hearing or trial in civil departments, or any afternoon hearing in Department 201 (probate). See amended Local Rule 3.95.

Dated: 05/10/2016

facsimile

  
\_\_\_\_\_  
Judge Stephen Pulido

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Order

Superior Court of California, County of Alameda  
Rene C. Davidson Alameda County Courthouse

Case Number: RG15776148  
Order After Hearing Re: of 05/10/2016

**DECLARATION OF SERVICE BY MAIL**

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 05/10/2016.

Chad Finke Executive Officer / Clerk of the Superior Court

By



Deputy Clerk

**Subject:** Proposed Permit Split

**Date:** Tuesday, June 7, 2016 at 4:27:09 PM Pacific Daylight Time

**From:** Eric Shaw

**To:** Lavine, Ethan@BCDC

To the extent that the Commission wishes to proceed with consideration of a permit split, Encinal believes that the split should envision joint responsibility for maintenance of certain aspects of the public access areas.

Since the HOA and its members certainly enjoy the landscaping along the shoreline, probably to greater extent than any other members of the public. Encinal therefore would propose that the areas marked in pink on the attached drawing be designated as areas which the parties must jointly maintain. This joint area would include the landscaping and asphalt pathway from Grand Street to the beginning (NE corner) of the Alaska Packer Building, and (1) Public Restroom SE corner of APB (closest to the HOA's two triangle parks).

If this is something the Commission would consider, further detail as to the exact areas can be provided.

With regard to the public interest in whether the permit should be split, it would seem that the staff summary has missed one critical issue: Encinal has only another decade or so on its lease, and is encountering difficulties in its negotiations with the owner of the property. Encinal's Marina is largely a relocatable asset. If Encinal cannot reach agreement on the renewal of its lease, it would likely sell or move the marina infrastructure to another location, it floats and not permanently affixed to its present location. As getting a permit for bay fill, such as the infrastructure, is difficult, this asset may have more value at another location. Encinal would then abandon the leasehold and the existing shoreline park would be left with no responsible party to maintain it.

. The revenue from the only remaining portion of the property, the Packer building, would be insufficient to support maintenance of the park by itself. And any new use of the property would need to convert some portion of the land presently used primarily as a parking lot and the public access areas into some type of commercial use to create an economically viable project.

As the HOA appears to be a far more permanent fixture in the BCDC's jurisdiction, it might be very short sighted of the Commission to split the permit and leave the existing shoreline park with no responsible party to maintain it.

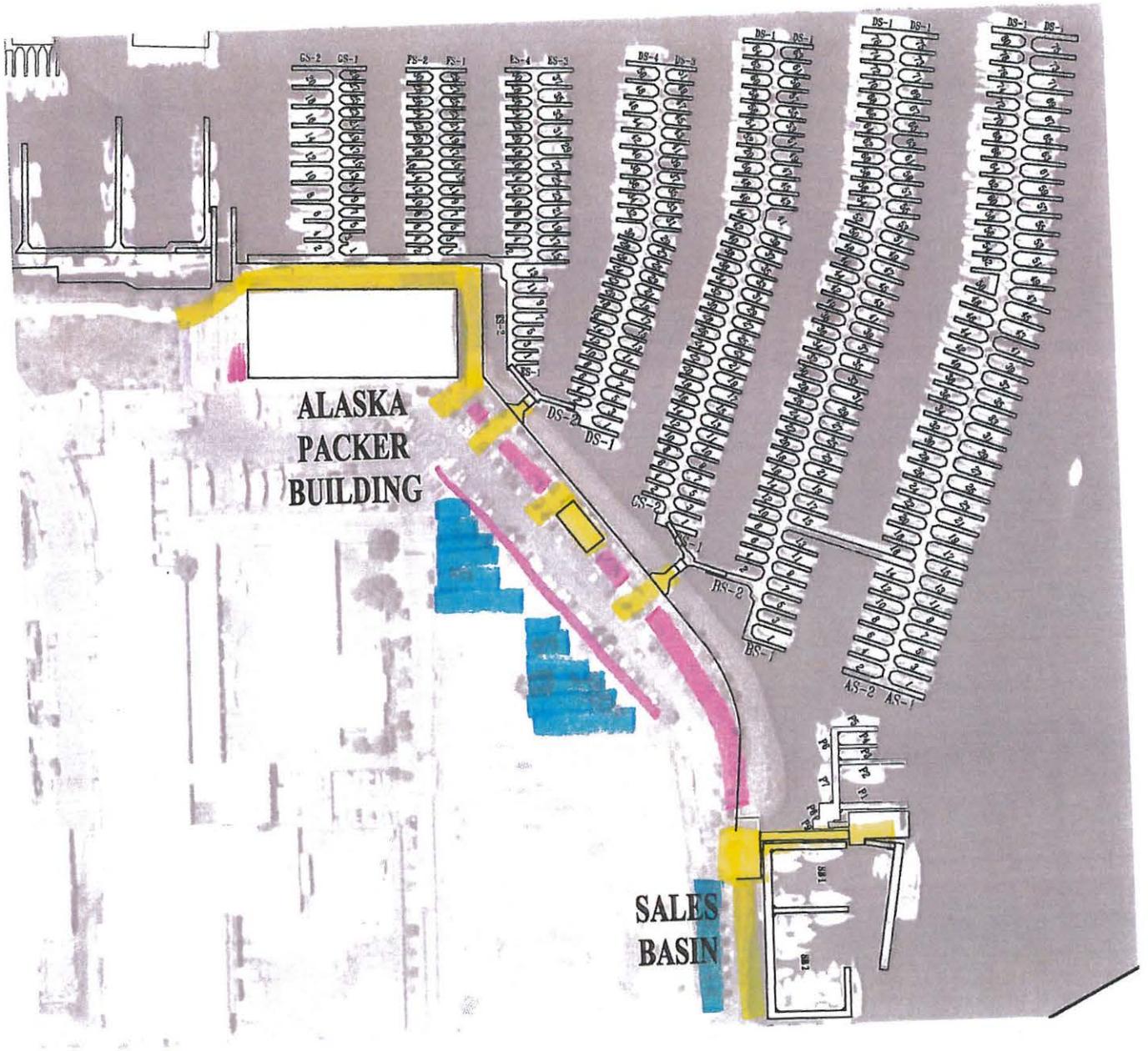
Eric C. Shaw

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ALAMEDA, CA 94501



- GRAND MARINA
- HOA
- SHARED



# GRAND MARINA KEY PLAN EXHIBIT A

(UPDATED 12/2013)

**Subject:** Permit split for 1983.005.11 - Encinal's "proposal"  
**Date:** Wednesday, June 8, 2016 at 12:42:02 PM Pacific Daylight Time  
**From:** Wendy L. Manley  
**To:** Lavine, Ethan@BCDC  
**CC:** Eric C. Shaw (eric@shawesq.com), Zeppetello, Marc@BCDC

Ethan,

Thank you for sending the "proposal" from Encinal that Encinal did not provide to the HOA.

Encinal's proposal seeks to impose on the HOA "shared" responsibility for maintenance of public access areas that have been an obligation of Encinal long before Amendment 11 to, and the HOA's involvement in, the Permit.

Encinal's proposal, even if it was in proper form and contained necessary detail, neither enhances nor assures maximum public access. Rather it perpetuates the uncertainty by making Encinal and the HOA jointly responsible to maintain public access on Encinal's property. By contrast, the HOA's permit split would make unambiguous the responsibility for maintenance of public access areas owned or controlled by each party (as contemplated by Amendment 11 and the approved CC&Rs) and thus enhances and preserves maximum public access.

The threat that Encinal may walk away from the Permit does not create any uncertainty about future maintenance of public access. A succeeding lessee or landowner would assume such responsibility as BCDC permits run with the land. What this threat does expose is Encinal's demand that BCDC help it avoid costs Encinal agreed to accept when it received the original Permit (and its benefits) under which it proceeded to operate the Marina, by improperly transferring such costs to the HOA.

Regards,  
Wendy

*Wendy L. Manley, Esq.*

Wendel, Rosen, Black & Dean, LLP

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Amendment 11 required certain additional public access as a condition of the home development, including creation of approximately 21,300 square feet of new public access on the home development property to be owned or controlled and maintained by the HOA. Amendment 11 also required additional improvements (benches, signs and landscaping) to the existing public access owned or controlled by Encinal and required by prior permit amendments authorizing Encinal projects long before and unrelated to the home development. In total, Amendment 11 increased public access in the area by approximately 27,000 square feet and reduced the public access area on property owned or controlled by Encinal by more than 3,000 square feet.

### **The Permit Addresses the HOA's Maintenance Responsibility.**

The home development authorized by Amendment 11 was not a joint project between Encinal and Warmington,<sup>1</sup> nor was it subject to the original permit or the ten earlier amendments. Amendment 11 specifically contemplated that once the home development was completed, an HOA would be created and CC&Rs would reflect that "the HOA will only be responsible for areas over which it has legal control." (Amend. 11 Sec. II.C.4.)<sup>2</sup>

Encinal explicitly agreed it would maintain its own property when it signed both Amendment 11 and the application on which it was based which expressly stated that Encinal would maintain public access on its property.<sup>3</sup>

Amendment 11, however, made Encinal's **sole** obligations under all prior amendments into joint obligations by the systematic conversion of the word "permittee" to "permittees" (plural).<sup>4</sup>

The unintended confusion created by the use of the plural "permittees" regarding obligations under the Permit is a straightforward case of poor draftsmanship that Encinal seeks to exploit for its sole benefit.<sup>5</sup>

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<sup>1</sup> The Purchase and Sale agreement explicitly states that Encinal and Warmington were not partners with respect to the home development project.

<sup>2</sup> CC&Rs containing such language were recorded December 21, 2009.

<sup>3</sup> Not surprisingly, except for certain small areas, no agreement or access easement was created that establishes an obligation to maintain -- in perpetuity -- the property of the other.

<sup>4</sup> Clearly, however, BCDC did not intend the HOA would become jointly responsible for other marina-specific responsibilities such as dredge spoil disposal, notifying Encinal's tenants of the permit, or maintaining Encinal's public access area.

<sup>5</sup> In 2015, Encinal initiated a lawsuit making a variety of claims supporting its contention that HOA share in the maintenance costs of public access areas on Encinal's property. The Court twice found that Encinal has failed to state an adequate legal claim. The Court has deferred ruling on a pending demurrer (motion to dismiss) to allow the Application to be heard by BCDC.

### **The Commission has Authority to Grant the Application and Split the Permit on the Request of One Co-Permittee.**

Encinal relies on the internally inconsistent language in Amendment 11 to provide leverage against the HOA to demand funds to pay for maintenance on its property. Consequently, it opposes splitting the permit, erroneously claiming the Commission cannot act without Encinal's consent (i.e., its signature on the Application). Rather, BCDC regulations require applications be "properly executed," but do not expressly require, in the case of joint permits, signatures of all permittees in all cases.<sup>6</sup> Regardless, the Executive Director may, in his sole discretion, waive application requirements,<sup>7</sup> and the Commission has authority to do any and all things necessary to carry out the purposes of the McAteer-Petris Act.<sup>8</sup> The Commission may consider and approve the Application without Encinal's signature.

Encinal declined invitations in March, 2015 and December, 2015 to support the Application, and chose instead to pursue litigation. Indeed, Encinal has been on notice of the permit split for years, received (concurrently with delivery to the Commission) copies of the Application and all supporting documentation, and has had every opportunity to engage. Encinal only responded, so far as we are aware, two weeks before the Commission's June 16, 2016 hearing. Without directly informing the HOA or providing any supporting detail, Encinal proposed a slightly altered scheme of joint management with the HOA, the party Encinal attempts to hold hostage with its demonstrated intransigence. Encinal also threatened to vacate its property if it does not get its way. In sum, Encinal has had ample opportunity to participate and is not denied due process by adoption of separate permits.<sup>9</sup>

### **The Commission Can and Should Split the Permit.**

Numerous reasons support the split of Amendment 11, including the following:

- Separate projects by separate parties on separate property warrant separate permits. Encinal and the HOA share only a property boundary. Separate permits would properly reflect each party's responsibility for maintaining only public access areas on property each owns or controls.<sup>10</sup>

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<sup>6</sup> 14 CCR Sections 10824, 10310(a).

<sup>7</sup> 14 CCR Section 10311.

<sup>8</sup> Government Code Section 66633.

<sup>9</sup> *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Com.* (1976) 17 Cal.3d 785,791, relied on by Encinal, simply states the rule that where a property owner has performed construction work in good faith reliance on a building permit, it acquires a vested right to complete construction allowed by the permit. Here, no party has been prevented from completing construction in accordance with the permit. Encinal's misinterpretation of the permit does not create a vested right.

<sup>10</sup> As the agency responsible for issuing and enforcing the Permit, the Commission is the appropriate body to interpret its terms.

- Separate permits do not prejudice Encinal whose obligation to maintain public access area on its property will be reduced by some 3000 square feet.
- Separate permits would ease BCDC permit administration and enforcement and enable unencumbered future amendments.
- Separate permits would not authorize any physical change to any property, and would not alter the public access area.
- Separate permits are in the public interest by ensuring the maximum feasible public access is protected and the maintenance responsibility is unambiguous.

**Conclusion.**

Amendment 11 specifically limits the HOA's maintenance responsibility, but has created confusion with respect to the responsibilities of the co-permittees. Taking advantage of this confusion, Encinal demanded the HOA pay for maintenance of public access areas Encinal owns or controls and has long been obligated to maintain under prior amendments authorizing Encinal's projects.<sup>11</sup>

Because separate permits would clarify maintenance responsibilities the Application is in the public interest, preserves the public access property and is fair to the HOA and Encinal. Separate permits are appropriate for separate projects by separate parties on separate properties, and are necessary to resolve an intractable dispute between the co-permittees.

The HOA respectfully requests that the Commission grant the Application to split the permit.

Very truly yours,

WENDEL, ROSEN, BLACK & DEAN LLP

Wendy L. Manley

cc: Marc Zepettelo  
Eric Shaw (attorney for Encinal)

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<sup>11</sup> Encinal has not offered to share in the cost to maintain the HOA's public access property.