

JOANNE ROSENDIN  
DANA SACK

CHRISTOPHER J. DYAS  
BARBARA A. NASH, OF COUNSEL

SACK ROSENDIN, LLP

ATTORNEYS AT LAW

1437 LEIMERT BOULEVARD, SUITE B  
OAKLAND, CALIFORNIA 94602

TELEPHONE: (510) 286-2200  
FACSIMILE: (510) 286-8887  
WEBSITE: WWW.SACKROSENDIN.COM

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SAN FRANCISCO BAY CONSERVATION  
& DEVELOPMENT COMMISSION

Zachary Wasserman, Chairperson  
San Francisco Bay Conservation and Development District  
455 Golden Gate Ave., Ste. 10600  
San Francisco CA 94102  
Fax: 415-352-3606  
[zwasserman@wendcl.com](mailto:zwasserman@wendcl.com)

Re: Marriott Extended Stay Hotel Project, Shoreline Park, Alameda

Dear Chairperson Wasserman:

As a real estate attorney, you know as well as I that Staff Counsel is just plain wrong, as a matter of law, not opinion, both (1) when he relies on Section 19 of the TSA to decide that the TSA waiver of requiring a BCDC permit, applies to subsequent owners of raw land at Harbor Bay Business Park along the bay frontage and Shoreline Park, and (2) when he says that because the Staff, without Commission review or approval, let this same subsequent owner build without a BCDC permit twice before, that you are legally bound to let him do it every time, forever.

(1) Recording. Staff Counsel admits in the first two paragraphs of Part 3 of his memorandum, on pages 3-4, that the *only* language in the TSA which supports the BCDC Staff's position is language in Section 19 *which has already been deleted*. Therefore, the *only* relevant language remaining in the TSA is Section 3 which says BCDC will not require a permit for HBIA and says nothing about successors, and Section 5 which says the TSA does not apply "as to any other party than HBIA."

Recording of a document conveying an interest in real property puts the world on constructive notice that the document exists and is binding on persons who subsequently acquire interests in the property, including owners, tenants, lenders and other lienholders. It is standard-operating-procedure to recite in documents that are intended to be recorded, that the recording will have that effect. It is a very general and broad statement that anyone who expects to acquire any interest in the property, is going to be bound by all of the provisions of the recorded document.

Almost every mortgage and deed-of-trust ever recorded has included such a provision, *and* a general assignments provision, like "this agreement shall be binding upon and inure to the benefit of the successors to the parties hereto." Most mortgages and deeds-of-trust also include a due-on-sale clause, that any sale or other transfer of ownership of the property will make the loan or other obligation secured by the mortgage or deed-of-trust due and payable in full immediately. Those due-on-sale clauses always take precedence over the general recording clause and the general assignments clause. The general provisions about the agreement being binding on



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successors means that the provision which allows the lender to declare the loan due and payable in full whenever a sale occurs is also binding on successors. The successor does not get to continue the loan. Sections 3 and 5 put successor owners on notice that the BCDC permit exemption does not extend to successors who want to build new projects on the property.

“Civil Code §3534. Qualification of expression. Particular expressions qualify those which are general.”

“Code of Civil Procedure §1859. The intention of the Legislature or parties. In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; **and when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.**” (emphasis added)

In *Scudder v. Perce*, (1911) 159 Cal. 429, the termination provision of two physicians’ partnership agreement provided in the first sentence that they would “share and share alike,” and in the second sentence that Perce would get items A, B and C, and that Scudder would items D and E and no part of item C. When the partnership was terminated, it turned out that the specified division would not produce equal shares. Scudder persuaded the trial court and the Court of Appeals to award part of item C, because that would make their shares closer to even. The Supreme Court reversed, holding that when two provisions cannot be reconciled, then the more specific controls over the more general. The Supreme Court rejected the concept that one provision could be changed in order to reconcile it with the other.

That is exactly what Staff Counsel is trying to do, have a general provision regarding the effect of recording, take precedence over Sections 3 and 5 which are specific and narrow. All of the other provisions of the TSA may continue to apply to BCDC and any subsequent owner of the property, but the one thing which will *not* apply to any subsequent owner is the BCDC permit exemption.

## (2) Past Mistakes by Staff Do Not Bind the Commissioners.

The Third Supplementary Agreement dates back to 1984. The initial settlement agreements date back to the 1970s. No other owner of property within 100 feet of the shoreline sought to construct a building without applying to BCDC for its own permit or exemption, until 2011 and again in 2016. Those three requests were reviewed by BCDC Staff only, and not reviewed or approved by the Commissioners. Only two of the buildings were constructed.

Staff Counsel asserts that these two actions by the BCDC Staff, 27 years later and 32 years later, somehow establish a legally binding precedent on the Commissioners. No legal authority is provided for this stunning suggestion. It means that the BCDC Staff can reverse the language of



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any agreement, permit or decision by the Commissioners, just by writing a letter to a property owner stating that the owner can disregard what the Commission approved or required.

On page 5 of Staff Counsel's memorandum, in the first sentence of Part 4, he starts the discussion of these prior letters to developers with, "It would not be unreasonable to find or impute an ambiguity, if not outright inconsistency between sections 5 and 19 of the TSA." First, as discussed above there is no ambiguity. The TSA says, on its face, unambiguously, that the BCDC permit exemption does not apply to successors. Second, Section 19 does not exist. It was intentionally deleted by action, vote and agreement of the Commissioners, not Staff. Third, as discussed above, Section 5 and Section 19 (if it still existed) would not create any ambiguity. The two provisions would be inconsistent. As discussed above, the Supreme Court and the Assembly, the Senate and the Governor, by enacting the statutes quoted above, have all held that when two provisions are inconsistent and not reconcilable, the correct solution is to apply the more specific provision.

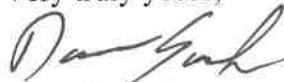
The only reason Staff Counsel gives for his discussion of the three letters purporting to extend the BCDC permit exemption to Joseph Ernst's company, is his incorrect assertion that, "it would not be unreasonable to find or impute an ambiguity . . ." Staff Counsel does not come out and state that there is an ambiguity, because he cannot. There isn't one.

Conclusion.

The citizens of the City of Alameda and the residents of Bay Farm Island want BCDC to examine the impact the proposed enormous monolithic wall of a hotel will have on public access to the shoreline and to Alameda Shoreline Park. The impact will be severe.

Please tell the BCDC Staff to require the property owner and the developer to submit a permit application, so that your staff can properly report to you what is really going to happen, before it is too late.

Very truly yours,



Dana Sack, Attorney on behalf of  
many Alameda and Bay Farm Residents

cc: Commissioners of BCDC  
Lawrence J. Goldzband, BCDC Executive Director  
John Bowers, Staff Counsel  
Joseph Ernst, Owner  
James Woo, Applicant/Developer/Buyer



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[zwasserman@wendel.com](mailto:zwasserman@wendel.com)  
[ahalsted@aol.com](mailto:ahalsted@aol.com)  
[mark.addiego@ssf.net](mailto:mark.addiego@ssf.net)  
[eddie.ahn.bcdc@gmail.com](mailto:eddie.ahn.bcdc@gmail.com)  
[newsha.ajami@gmail.com](mailto:newsha.ajami@gmail.com)  
[talvarado@spur.org](mailto:talvarado@spur.org)  
[josharce.bcdc@gmail.com](mailto:josharce.bcdc@gmail.com)  
[JArreguin@cityofberkeley.info](mailto:JArreguin@cityofberkeley.info)  
[Richard.M.Bottoms@usace.army.mil](mailto:Richard.M.Bottoms@usace.army.mil)  
[brush.jason@epa.gov](mailto:brush.jason@epa.gov)  
[tom.butt@intres.com](mailto:tom.butt@intres.com)  
[wilma.chan@acgov.org](mailto:wilma.chan@acgov.org)  
[chappell\\_jim@att.net](mailto:chappell_jim@att.net)  
[Malia.Cohen@sfgov.org](mailto:Malia.Cohen@sfgov.org)  
[dconnolly@marincounty.org](mailto:dconnolly@marincounty.org)  
[dave.cortese@bos.sccgov.org](mailto:dave.cortese@bos.sccgov.org)  
[Jenn.Eckerle@resources.ca.gov](mailto:Jenn.Eckerle@resources.ca.gov)  
[karen.finn@dof.ca.gov](mailto:karen.finn@dof.ca.gov)  
[Katerina.Galacatos@usace.army.mil](mailto:Katerina.Galacatos@usace.army.mil)  
[melrgilmore@gmail.com](mailto:melrgilmore@gmail.com)  
[john.gioia@bos.cccounty.us](mailto:john.gioia@bos.cccounty.us)  
[district5@bos.cccounty.us](mailto:district5@bos.cccounty.us)  
[Susan.Gorin@sonoma-county.org](mailto:Susan.Gorin@sonoma-county.org)  
[CGroom@co.sanmateo.ca.us](mailto:CGroom@co.sanmateo.ca.us)  
[dhillmer@cityoflarkspur.org](mailto:dhillmer@cityoflarkspur.org)  
[jholzman@google.com](mailto:jholzman@google.com)  
[Jane.Kim@sfgov.org](mailto:Jane.Kim@sfgov.org)  
[Jennifer.Lucchesi@slc.ca.gov](mailto:Jennifer.Lucchesi@slc.ca.gov)  
[dan\\_mcelhinney@dot.ca.gov](mailto:dan_mcelhinney@dot.ca.gov)  
[macmcgrath@comcast.net](mailto:macmcgrath@comcast.net)  
[barrynelsonwws@gmail.com](mailto:barrynelsonwws@gmail.com)  
[sheri.pemberton@slc.ca.gov](mailto:sheri.pemberton@slc.ca.gov)  
[Aaron.Peskin@sfgov.org](mailto:Aaron.Peskin@sfgov.org)  
[dpine@co.sanmateo.ca.us](mailto:dpine@co.sanmateo.ca.us)  
[David.Rabbitt@sonoma-county.org](mailto:David.Rabbitt@sonoma-county.org)  
[belia.ramos@countyofnapa.org](mailto:belia.ramos@countyofnapa.org)  
[sranchod@tesla.com](mailto:sranchod@tesla.com)  
[sean@bayareacouncil.org](mailto:sean@bayareacouncil.org)  
[greg.scharff@cityofpaloalto.org](mailto:greg.scharff@cityofpaloalto.org)  
[ksears@marincounty.org](mailto:ksears@marincounty.org)  
[Pat.Showalter@mountainview.gov](mailto:Pat.Showalter@mountainview.gov)  
[jimzspering@cs.com](mailto:jimzspering@cs.com)  
[tony.tavares@dot.ca.gov](mailto:tony.tavares@dot.ca.gov)



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[jtechel@cityofnapa.org](mailto:jtechel@cityofnapa.org)  
[jmvasquez@solanocounty.com](mailto:jmvasquez@solanocounty.com)  
[brad.wagenknecht@countyofnapa.org](mailto:brad.wagenknecht@countyofnapa.org)  
[ziegler.sam@epa.gov](mailto:ziegler.sam@epa.gov)  
[zwissler@comcast.net](mailto:zwissler@comcast.net)  
[larry.goldzband@bcdc.ca.gov](mailto:larry.goldzband@bcdc.ca.gov)  
[john.bowers@bcdc.ca.gov](mailto:john.bowers@bcdc.ca.gov)  
[jernst@srmernst.com](mailto:jernst@srmernst.com)

