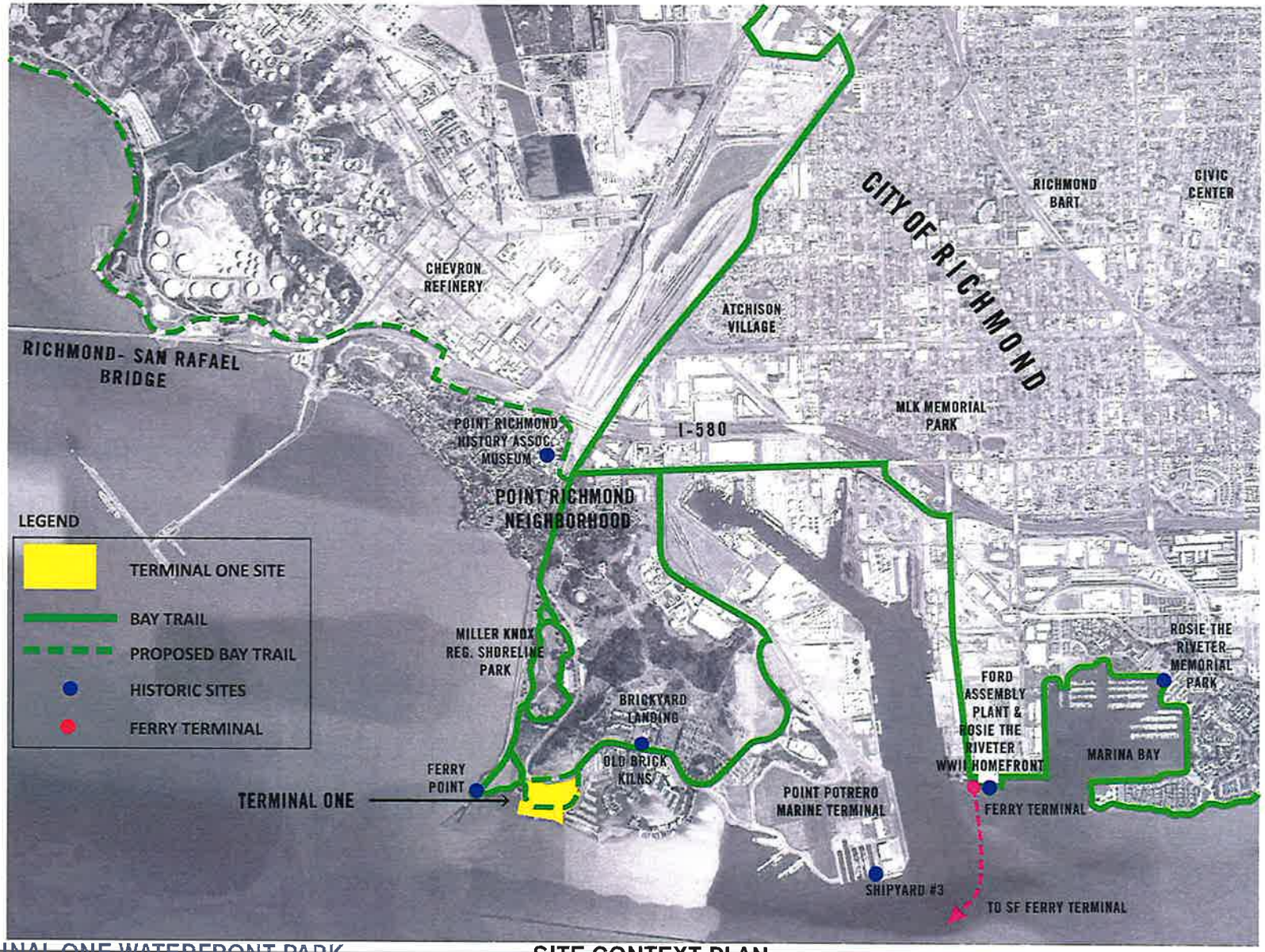


TERMINAL ONE WATERFRONT PARK

Bay Conservation and Development Commission 3.22.2018

SITE CONTEXT PLAN

LACONIA DEVELOPMENT LLC

CMG

Exhibit A

**TERMINAL ONE WATERFRONT PARK**

**Bay Conservation and Development Commission** 3.22.2018

**PRINCIPAL FEATURES OF WATERFRONT PARK**

LACONIA DEVELOPMENT LLC CMG

Exhibit B

October 4, 2019

Marc Zeppetello
Chief Counsel
San Francisco Bay Conservation and Development Commission
Bay Area Metro Center
375 Beale Street, 5th Floor
San Francisco, CA 94105

Re: Payment of Terminal One/Latitude Major Permit Application Filing Fee

Dear Marc,

When we submitted our formal BCDC application for the Terminal One/Latitude Project in November of last year, we also submitted a check in the amount of $26,860 to cover the BCDC Major Permit Filing Fee. As I explained in our April 19, 2019 Responses to Staff's Second Set of Comments, this filing fee was calculated based on the "Total Project Cost" ("TPC") of the Terminal One Waterfront Park Project, consisting of "all expenditures, including the cost for planning, engineering, architectural, and other services, made or to be made for designing the [Waterfront Park] project plus the estimated cost of construction of all aspects of the project both inside and outside the Commission's jurisdiction" (14 CCR Appendix M(d)). See **Attachment #1** to this correspondence entitled "Original BCDC Major Permit Filing Fee Calculation."

We did not include the costs of designing and constructing the Latitude Residential Project in our calculation of Total Project Cost for reasons our attorney John Briscoe discussed in his July 22, 2019 letter, a copy of which is attached for ease of reference. In your August 12, 2019 response to Mr. Briscoe's letter (also attached), you explained your reasons for concluding that the ". . . payment of $26,860 made . . . in November 2018 is not the applicable filing fee." Your letter further provides that if we ". . . would like the Executive Director to file [our] BCDC permit application as complete and schedule the application for a hearing before the Commission . . . ," we would need to submit revised TPC information that includes the costs of the Latitude Residential Project ". . . as well as payment for the balance due of the applicable application fee as determined based on that TPC information."

In accordance with your direction, we have prepared a revised TPC estimate of **$211,475,449** for use in calculating the BCDC Major Permit Filing Fee that conforms to your interpretation of the Commission's regulatory definition of TPC. See **Attachment #2** to this correspondence entitled "Revised BCDC Major Permit Filing Fee Calculation."

Exhibit C

This TPC estimate incorporates the total project cost involved in the development of both the Terminal One Waterfront Park and the Latitude Residential Project, including:

1. **Terminal One Waterfront Park Project Costs -- $10,727,393.** The total cost of the Terminal One Waterfront Park Project (excluding the cost of repurposing the Wharf for public use as a park amenity which is addressed in #2 below under the heading "Wharf-Related Costs") incorporates both:
   (a) the soft costs (including the estimated costs for planning, engineering, architectural, and other services, incurred or to be incurred, for designing the Waterfront Park Project) plus
   (b) the hard costs (consisting of the estimated cost of construction of all aspects of the Waterfront Park Project both inside and outside the Commission's jurisdiction, including Shoreline Drive, the Bay Trail extensions, the Entry Plaza, the Central Promenade, and the Native Coastal Landscape Program).

2. **Wharf-Related Costs -- $5,072,555.** The total cost of repurposing the Terminal One Wharf for public use as the centerpiece of the Terminal One Waterfront Park Project incorporates both:
   (a) the soft costs (including the estimated costs for planning, engineering, architectural, and other services, incurred or to be incurred, for designing the seismic retrofit of and programmatic improvements to the Wharf) plus
   (b) the hard costs (consisting of the estimated cost of construction of the seismic retrofit of and programmatic improvements to the Wharf for the purpose of enabling its reuse as a public park amenity – all aspects of which are located inside the Commission's jurisdiction).

3. **Latitude Residential Project Costs – $195,675,501.** The total cost of the Latitude Residential Project incorporates both:
   (a) the soft costs (including the estimated costs for planning, engineering, architectural, and other services, incurred or to be incurred, for designing the Latitude Residential Project) plus
   (b) the hard costs (consisting of the estimated cost of construction of the Latitude Residential Project in its entirety, including site work, foundation, podia, garages, buildings, and landscape -- all aspects of which are located outside the Commission's jurisdiction).

The revised TPC estimate of **$211,475,449** results in a BCDC Major Permit Filing Fee of **$232,623** ($211,475,449 x .0011 = $232,623), of which we have already paid **$26,860**. See **Attachment #3** to this correspondence entitled "BCDC Major Permit Filing Fee Balance Due." I have enclosed with this letter a check in the amount of **$205,763** to cover the balance due on the BCDC Application Fee ($232,623 - $26,860 = $205,763).

Based on the payment of a filing fee that conforms to your reading of the Commission's regulations, we request that the Executive Director file our application as complete and schedule the application for hearing at the earliest available date.

Your August 12th correspondence also indicates that, after the "applicable fee" is paid, we ". . . may appeal the fee determination to the Commission by submitting a letter explaining why the fee is allegedly incorrect." This letter constitutes our appeal of the Executive Director's fee determination to the Commission. Our explanation of the reasons why the fee is incorrect are set forth in Mr. Briscoe's attached July 22, 2019 correspondence.

Sincerely,

J. Cleve Livingston
Terminal One Development LLC
(916) 947-6972

c/o Laconia Development LLC
1981 North Broadway, Suite 415
Walnut Creek, CA 94596

Enclosures:

Correspondence from John Briscoe to Marc Zeppetello dated July 22, 2019
Correspondence from Marc Zeppetello to John Briscoe dated August 12, 2019

cc:

Larry Goldzband
Brad McCrea
Ethan Lavine
Rebecca Coates-Maldoon
Andrea Gaffney
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*John Briscoe*
*(415) 402-2701*
jbriscoe@briscoelaw.net

July 22, 2019

**Sent via Email and U.S. Mail**
Marc Zeppetello
Chief Counsel
San Francisco Bay Conservation
and Development Commission
455 Golden Gate Avenue
San Francisco, CA 94102

Re: Terminal One Project, Richmond; calculation of application fee

Dear Marc,

Mayor and Commissioner Tom Butt wrote Brad McCrea recently asking whether the application fee had been paid. Brad replied by email late July 2: "No! And that's a problem." That's the full text of his message back. Brad copied me on it.

Brad's assertion is not correct. Terminal One Development LLC *has* paid the application fee, $26,860, in November of last year. I am hopeful the record is corrected.

You and I, though, do disagree on the proper calculation of the fee that the co-applicants, the City of Richmond and Terminal One Development LLC, must pay as a condition of having the permit application heard and decided by the Commission. In brief, you point to BCDC's regulations, which specify that the fee is to be based on the "total project cost" ("TPC" or "Total Project Cost"), including "all aspects of the project both inside and outside the Commission's jurisdiction" (see 14 CCR Appendix M(d)). We agree in concept with the use of a TPC-based methodology to determine the filing fee for a permit application, provided that the terms "project" and "project costs" are defined in ways that respect the statutory limits that have been imposed on BCDC's permitting authority by the Commission's enabling legislation. We take issue, however, both (a) with the way in which BCDC's regulations define "total project cost" to include project costs incurred outside BCDC's lawful regulatory jurisdiction and (b) with the way in which BCDC Staff defines "project," as the term is used for the purpose of calculating TPC. Specifically we disagree with Staff's defining "project" so as to include the Latitude Residential Project which, although it will occupy well over half the Terminal One Site, is not

subject to a BCDC permit requirement because it involves a change in the use of land entirely outside BCDC's jurisdictional reach, a change distinct from the public park project.

These two issues are not factors where a BCDC permit application involves a proposal to develop land that is entirely within the Commission's lawful regulatory jurisdiction. But in cases such as the present one, where more than two-thirds of the land area of the proposed development is outside BCDC's area of jurisdiction and where more than two-thirds of the costs of the proposed development are attributable to a residential project that does not even require a BCDC permit or Commission regulatory oversight, the way in which Staff proposes to calculate our filing fee is manifestly unfair and unreasonable. What is more, it is illegal.

In this letter I first propose a method to cut this Gordian Knot in a way that's in keeping with both your enabling legislation and the underlying reasoning behind your permit fee regulations. I hope you find it acceptable. Second, I outline both the legal arguments supporting the fee that we have paid as well as the legal arguments against calculating the fee in this case as you propose. And third, if you do not accept our compromise proposal, and do not accept our legal arguments, I ask you to write me yours, with roughly the same depth and detail as I have written mine. That is a reasonable request, I trust you'll agree.

## I.

### A. Overview of Terminal One/Latitude Development Proposal

Our Major Permit Application describes the rezone of a 13.7-acre Bay-front site[1] the "Terminal One Site" or "Site" in the City of Richmond involving two separate and distinct development projects:

1. A 6.0-acre public waterfront park (the "Terminal One Waterfront Park") that will include the Site's entire 1,000-foot shoreline, a .7-acre portion of the Bay, and the Site's entire 3.5-acre 100-foot shoreline band; and

[1] Acreages and linear feet will be expressed in round numbers hereafter.

2. A 7.6-acre private housing development (the "Latitude Residential Project") that will occupy the interior of the site entirely outside the shoreline band.

The two projects will be developed concurrently by the City's developer co-applicant, Terminal One Development LLC.

The Terminal One site is presently owned by the City of Richmond. The public waterfront park will, after its construction, continue to be owned by the City. The housing development will become privately owned. The public park is approximately 6 acres in size, or 44% of the Terminal One property. Of that 6 acres, approximately 70% (4.2 acres) lies within BCDC jurisdiction. The rest of the park (1.8 acres) lies outside BCDC jurisdiction. What is more, not one square foot of the residential project lies within BCDC jurisdiction. Had these two projects involved two different developers, been processed separately by the City, or been developed sequentially in two separate phases, BCDC's records would contain no paper or electronic files relating to the Latitude residential development.

### B. Overview of Total Project Cost Assumptions Used to Calculate Fee Payment

The fee that we have paid is based on the total cost of the waterfront park (including both hard and soft costs), which is the only part of the proposed development within your jurisdiction—and even then, much of the park is outside your lawful authority. We'd be well within our rights, in law and fairness, to insist on a fee calculated solely on the area within your jurisdiction. But we have paid much more than that. What we have paid is generous, and a more-than-ample compromise of our disagreement. We ask you to accept what we have already paid as the application fee in full.

## II.

### A. Summary of Applicable Law

The McAteer-Petris Act prescribes the reach of the Commission's permitting authority, confining BCDC's "area of jurisdiction" (as applicable to the Terminal One site) to: (a) "San Francisco Bay" and (b) "a shoreline band" between the mean high tide line and "a line 100 feet landward of and parallel with that line" (Gov't Code section 66610(a) and (b)). Within those areas, the Act specifies the activities that require a BCDC permit: "Any person or governmental

agency wishing to place fill, to extract materials, or to make any substantial change in the use of any water, land or structure, *within the area of the Commission's jurisdiction* shall secure a permit from the Commission . . ." (Gov't Code section 66632(a); emphasis added). The Act greatly restricts the Commission's authority over proposed projects within the "shoreline band": "[T]he commission may deny an application for a permit for [such] a proposed project only on the grounds that the project fails to provide maximum feasible public access, consistent with the proposed project, to the bay and its shoreline" (Gov't Code section 66632.4).

The Act authorizes the Commission to require of applicants a "*reasonable* filing fee" for processing a permit application (Gov't Code §66632(c), emphasis added). Your agency has ruled that the "reasonable filing fee" is to be based on "total project cost," including "all aspects of the project both inside and outside the Commission's jurisdiction (see 14 CCR Appendix M(d)).

**B. Summary of the Legal Basis for the Filing Fee We Have Paid**

When the concept of "total project cost" was discussed at the last meeting of BCDC's Application Fees Working Group, Chair Zach Wasserman asked how "project" was defined. In response, Staff told the Chairman that the Commission's fee regulations do not include a definition of "project." Staff has defined "project" as it sees fit. While the regulatory framework established by BCDC does not define "project" for the purpose of calculating "total project cost," the Commission's enabling legislation is explicit in describing the types of projects that require a Commission permit and equally clear with respect to the types of projects that do not.

As noted above, in describing the "Powers and Duties of the Commission," Chapter 4 of the McAteer-Petris Act provides:

> "Any person or governmental agency wishing to place fill, to extract materials, or to make any substantial change in use of any water, land or structure, within the area of the commission's jurisdiction shall secure a permit from the commission . . .." Gov't Code section 66632(a).

This statutory language distinguishes the types of projects that are subject to BCDC's permitting authority and regulatory oversight from those that are not by two characteristics: What activity the project will entail, and where it will occur.

The Planned Area (PA) District zoning designation that has been assigned to the property contemplates not one, but two separate and distinct projects involving two separate and distinct

changes in land use – the Terminal One Waterfront Park and the Latitude Residential Project -- only one of which (the waterfront park) involves a change in use within the area of the Commission's jurisdiction.

When the Commission's regulations are read in the light of the authority the Legislature gave it, it makes no sense to insist that "total project cost" include the costs of a project irrespective of whether it requires a permit. The permit fee we have paid is based on reading "project" to refer to those projects that require a permit because they involve certain statutorily specified activities within the Commission's area of jurisdiction.

The TPC used to determine the filing fee we have submitted includes the all-in costs of the Terminal One Waterfront Park, most of which will be developed within the Commission's jurisdiction, but excludes the much higher costs of the Latitude Residential Project, which will be developed entirely outside the Commission's jurisdiction.

**C.e Summary of Legal Issues Raised by the Filing Fee BCDC Seeks to Imposee**

The filing fee Staff seeks to impose contravenes the statutory limits on BCDC's authority.

1.e The BCDC fee regulations require that the calculation of TPC include the costs "of alle aspects of the project both inside and outside the Commissions jurisdiction" (14 CCRe Appendix M(d)). The regulation disrespects the geographic limits of the McAteer-Petrise Act on the regulatory reach of the Commission (see, in particular, Gov't Code sectionse 66610 and 66632). Where the Act has established a limited territorial scope within whiche BCDC's regulatory authority can be exercised, BCDC cannot then use a grant ofe authority to impose a fee to override those territorial limits to extend the Commission'se jurisdictional reach. Where "aspects of the project" are "outside the Commission'se jurisdiction," they are beyond the reach of BCDC's regulatory powers and thee Commission lacks authority to require that the costs of such extra-jurisdictional aspectse of a project be included in TPC.e

2.e In applying BCDC's fee regulations to our application, Staff apparently takes the positione that where the Commission's regulations require the filing fee be based on Total Projecte Cost, the "project" that is the subject of the total cost calculation consists of thee amalgamation of changes in land use which the City of Richmond authorized when ite approved the rezone of the Terminal One Property to Planned Area (PA) District. Staffe makes no effort to distinguish between those types of projects which, under the McAteer-

Petris Act, are subject to BCDC's permitting authority because they involve certain statutorily specified activities "within the area of the Commission's jurisdiction," from those that are not (Gov't Code section 66632(a)). As a result, Staff contends that the TPC properly includes both:

- the cost of developing the public waterfront park -- which requires a BCDC permit because it involves a change in the use of land largely within the area of the Commission's jurisdiction; as well as

- the cost of developing the Latitude Residential Project -- which does not require a BCDC permit because it involves a change in the use of land entirely outside the Commission's area of jurisdiction.

This anomaly, where the cost of a change in land use is required to be included in the TPC used to calculate the filing fee for a permit that the change in land use does not require, reflects a fundamental and legally problematic disconnect between the way in which the filing fee is calculated and the scope of the permit process and regulatory oversight the fee is intended to support.

**D. Further Discussion of BCDC's Regulatory Over-Reach**

In the discussion of applicable law, I made note of the Legislature's grant of geographic authority to BCDC in Government Code section 66610, pointing out that, as applicable to the Terminal One site, subsection (a) confers jurisdiction over "San Francisco Bay," and subsection (b) confers jurisdiction over a shoreline band extending 100 feet inland from the landward extent of the Commission's "San Francisco Bay" jurisdiction. In its infancy as a regulatory agency, BCDC decreed that to build a pile-supported structure in the Bay was, so far as it was concerned, the same thing as filling the Bay with dirt or rock or concrete and steel. To be consistent with that position, BCDC adopted a rule that pile-supported structures that existed on September 17, 1965, the date BCDC was created, were not part of "the Bay" within the meaning of Government Code section 66610 (a).

(As an aside, and as we have pointed out before, the "Eagan opinion" of October 8, 1986 was a wrong reading of BCDC's authority. That opinion concluded that repairs to a pre-1965 pile-supported structure that extend its useful life have the effect of instantly transforming the structure from being within the shoreline band to being part of the Commission's "Bay" jurisdiction at the moment the repairs were completed. Or maybe begun. Or, perhaps, permitted

by BCDC. Under this metaphysical theory, at the chosen moment the Commission's Bay jurisdiction leaps landward the length of the wharf like a tsunami, and at the same moment, in the tsunami's wake, the shoreline band also leaps landward an equivalent distance. Regardless of its wrong legal conclusion, the Eagan opinion was never approved by the Office of Administrative Law, as it was required to have been for BCDC to use it as a rule, a standard, a policy -- a "regulation.")

I digress here to make a significant point not directly related to the fee question. Notwithstanding its generous conferral of geographic jurisdiction, the Legislature did impose constraints on BCDC's regulatory authority. For projects within the shoreline band, as I've noted, "the Commission may deny an application for a permit for a proposed project only on the grounds that the project fails to provide maximum feasible public access, consistent with the proposed project, to the bay and its shoreline." Gov. Code section 66632.4. Here, the entire area within BCDC's jurisdiction, every square foot of it, is being given over to public access. "Everything," some wise person must once have said, is the ultimate "maximum." How can one give to the government more than "everything"? A ground on which BCDC could deny this application is difficult to divine.

Let me turn back now to the fee BCDC proposes to charge for this application—a fee based on the "total project cost" for the entire 13-acre development, not just the costs of the portion within BCDC's lawful jurisdiction. Given the jurisdictional limitations imposed by BCDC's enabling legislation, the only portion of the Terminal One/Latitude development BCDC may legally scrutinize is the 4.2-acre portion of the 6.0-acre waterfront park. Yet you say that the fee must be calculated on the basis of the project costs not only for the 1.8 acres of the waterfront park outside your jurisdiction, but also for the costs of the nearly 8 acres of residential development that are also outside your jurisdiction—a separate and distinct change in the use of land over which BCDC has no authority whatever.

I presume BCDC would take the same position if only one acre of the 14 were within its jurisdiction, or a half acre, or merely 20 square feet. Just several years ago the University of California was considering a large development on the Golden Gate Fields ("GGF") site in Berkeley and Albany, a site comprising 137 acres. Redevelopment of the GGF site would essentially consist of two projects—a public waterfront park and a mixed-use second campus for UC Berkeley consisting of approximately five million square feet of private and public lab, office, R&D, retail, hotel and residential space.

One day BCDC will receive an application for the development of GGF, and it may very likely look like the project proposed for UC Berkeley a few years ago. Of the 137 acres of GGF (exactly ten times the size of Terminal One) only five percent is within BCDC jurisdiction. Everything within BCDC jurisdiction (and much more) will be public open space-- meaning little infrastructure and no above-ground construction. The five million square feet of office and commercial space will *all* be outside of BCDC jurisdiction. More than 99% of the "total project cost" will be for the construction of those five million square feet. Will BCDC's position be that the fee is to be calculated on the basis of all construction costs, hard and soft, of those five million square feet of development, all of which is outside its jurisdiction?

Can we seriously believe this is the result the Legislature had in mind when it authorized BCDC to impose a "reasonable" fee?

Charging a fee for work to be done outside your jurisdiction is regulating outside your jurisdiction. BCDC in the past, as you know, has sought to arrogate to itself regulatory powers the Legislature never granted it—as by asserting regulatory authority beyond the jurisdictional areas prescribed in section 66610. These efforts have been ruled illegal. See, e.g., 1986 OAL Determination No. 6, September 3, 1986. Given its relevance to the issue at hand, it may be helpful to revisit the Office of Administrative Law's ("OAL's") 1986 Determination.

This OAL Determination held in relevant part that the Commission "has jurisdiction over a very limited territory—basically the Bay, a narrow strip of Bay shoreline, and the Suisun Marsh" (1986 OAL Determination No. 6 at p. 6) and that the Commission is not authorized to regulate a '*a function or activity* [that] *is outside the area of the Commission's jurisdiction'* [emphasis added.]" (1986 OAL Determination No. 6, at p. 7, quoting from Gov't. Code Section 66653). The OAL expands on this determination in the following excerpt from page 12:

> "[T]he Legislature has granted the Commission the power to adopt regulations deemed necessary to carry out the functions mandated by the McAteer-Petris Act (regulating Bay development) and the Suisun Marsh Act (regulating Marsh development). The critical feature of both of these grants of quasi-legislative power is the *limited* territorial scope within which the powers may be exercised. Any doubt as to the narrow scope of these quasi-legislative powers is removed by Gov't. Code section 66653 . . .. Whatever may be the legal effect of the Commission's San Francisco Bay and Suisun Marsh Protection Plans, Gov't. Code section 66653 makes clear that the writ of the Commission

> does not run outside its territorial jurisdiction. As the [Bay Planning] Coalition itself recognizes, ". . . *nothing* in its creating legislation *authorizes BCDC* to attempt *to regulate* land use *beyond* the geographic boundaries of *its jurisdiction*.' [emphasis added.]" (1986 OAL Determination No. 6, at p. 12, quoting from the Bay Planning Coalition's "Request for Determination," at p. 10 (footnote omitted).)

If the Commission is not authorized to regulate land use outside its jurisdiction, then surely BCDC is without legal authority to require that the development costs of the Latitude Residential Project, which is wholly beyond BCDC jurisdiction, be included in the calculation of a filing fee for a permit.

**E. Constitutional Issues Raised by the Filing Fee BCDC Seeks to Impose**

The gross unfairness of your method of calculating the application fee is manifest. So too is its unlawfulness, its unconstitutionality.

The U.S. Constitution requires that conditions associated with land-use permits, including fees, have a nexus with, and be at least roughly proportional to, the impacts the project may have. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 391; *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 837; see *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595, 626 (Kagan, J., dissenting). Justice Kagan's dissenting opinion in *Koontz* is particularly significant because she acknowledges that the *Nollan/Dolan* principles now apply to "permit conditions requiring monetary payments." Calculating fees based on a project's impacts outside BCDC's lawful jurisdiction bears no nexus, much less rough proportionality, to the project's impacts within BCDC's jurisdiction. How you propose to calculate the fee in this instance violates the U.S. Constitution.

And it violates the California Constitution, which in Article XIII A § 3 prohibits the State from imposing any "tax" (defined as any "charge") that exceeds the "reasonable costs to the state of providing the service." (See also *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal. 4th 643, 671 (land-use "fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development").)

Subsection (d) of Article XIII A Section 3 provides:

> "(d) The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount

> is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."

The burden that is assigned to BCDC by subsection (d) -- proving that the filing fee BCDC proposes to charge Terminal One is not a tax -- is not a burden the Commission can meet. First, before BCDC can prove that the amount of the fee "is no more than necessary to cover the reasonable costs of the governmental activity," the Commission must be in a position to prove the costs of its regulatory activities are reasonable . . .." If the "governmental activity" that is at issue involves the regulation of land uses over which BCDC has no lawful authority, then how can the costs associated with that extra-jurisdictional regulatory activity be proven a reasonable exercise of regulatory authority? And if the governmental activity itself cannot be proven reasonable, then how does BCDC intend to meet its constitutional burden of proving the reasonableness of the costs of the governmental activity which serve as the measure of the fee amount that may be charged?

Second, because a permit applicant's extra-jurisdictional land uses are not subject to BCDC's permit requirement, they pose no burden on and receive no benefit from BCDC's permit program. By requiring that the Total Project Costs used to calculate the permit filing fee include the costs of developing land uses over which BCDC has no authority, the Commission is imposing a manner of allocating its regulatory program costs that will burden the permit applicant without any benefit while, at the same time, benefiting BCDC without any burden. That is precisely the opposite of the fair and reasonable relationship between allocated costs and the burdens/benefits resulting from the governmental activity that Article XIII A Section 3(d) intends.

## III.

### A. Request for Concurrence or Explanation of Reasons for Rejecting the Fee We Paid

In this letter we have proposed a more-than-fair resolution of our disagreement, and outlined both the legal considerations that support the way in which the fee we have paid was

calculated, and those legal considerations that call into question the underlying fairness and legality of the approach you used in calculating the fee you propose to impose.

As I wrote at the outset, if you decline our proposal, and disagree with my reasoning, please do me the favor of writing me yours, in roughly the same detail.

Sincerely yours,

BRISCOE IVESTER & BAZEL LLP

John Briscoe

JB:tr

cc: Larry Goldzband
Brad McCrea
Rebecca Coates-Maldoon
Andrea Gaffney
Ethan Lavine
Paul Menzies
Cleve Livingston

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State of California | Gavin Newsom – Governor | info@bcdc.ca.gov | www.bcdc.ca.gov

# Exhibit D

August 12, 2019

John Briscoe
Briscoe Ivester & Bazel, LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104

**SUBJECT: Terminal One Project, Richmond; Permit Application Fee**

Dear John:

This is in response to your letter dated July 22, 2019, concerning the San Francisco Bay Conservation and Development Commission ("Commission" or "BCDC") permit application fee for the proposed Terminal One Project in Richmond. In November 2018, Terminal One Development LLC and the City of Richmond (collectively "Co-Applicants") submitted a BCDC permit application for the Terminal One Project (BCDC Permit Application No. 2018.006.00). The Terminal One Project would redevelop an approximately 13.7-acre shoreline site with a mix of uses including, but not limited to: a 6.0-acre public waterfront park; and a 7.6-acre, 316-unit residential development. The Terminal One Project site includes areas that are in the Commission's Bay jurisdiction (Gov't. Code § 66610(a)), in the Commission's shoreline band jurisdiction (Gov't. Code § 66610(b)), and outside the Commission's jurisdiction.

As you know, the Commission has adopted by regulation a set of permit application fees.[1] The fees are categorized by the type of permit application and, with some exceptions not relevant here, are based on total project cost ("TPC"). The Commission's fee regulation defines TPC to mean: "all expenditures…made or to be made for designing the project plus the estimated costs of construction of all aspects of the project *both inside and outside the Commission's jurisdiction.*"[2]

Your letter claims that "the way in which Staff proposes to calculate our filing fee is manifestly unfair and unreasonable," as well as illegal (July 22nd letter at 2), and suggests that the proper calculation of the permit application fee for the Terminal One Project is a matter on which you and I respectfully disagree. However, your disagreement is with the clear and unambiguous regulatory definition of TPC. Just as the Executive Director cannot waive the required payment of the applicable fee before filing a permit application as complete (14 C.C.R. § 10311(b)), I do not have the authority or discretion to negotiate and compromise on the applicable fee for the

[1] Title 14 of the California Code of Regulations, Division 5, Appendix M, § (b).
[2] *Id.* § (d)(1) (emphasis added).

Terminal One Project. Doing so would require applying the regulatory definition of TPC contrary to its terms and in a novel manner differently than has been case for other permit applicants. If Terminal One Development LLC believes that the applicable fee is incorrect, it may, after paying the fee, appeal the fee determination to the Commission. 14 C.C.R. Div. 5, Appendix M, § (j).

**BCDC'S PERMIT APPLICATION FEES ARE PROPERLY BASED ON TPC**

The McAteer-Petris Act authorizes the Commission to require payment of a reasonable filing fee and reimbursement of expenses for the processing of a permit application. Gov't. Code § 66632(c). In addition, the California Constitution authorizes the imposition of a charge or fee "for the reasonable regulatory costs to the State incident to issuing licenses and permits." Cal. Constitution, Article XIIIA, §3(b)(3). A regulatory fee is valid provided the fee does not exceed the reasonable costs of the governmental activity for which the fee is charged and the manner in which those costs are allocated to a payor bears a fair or reasonable relationship to the payor's burden's on, or benefits received from, the governmental activity. *Id.* § 3(d).

The application fees for most Commission permits have been based on TPC since 1975, when a definition of "total project cost" substantially identical to the existing definition was added to the Commission's permit fee regulation. Basing permit application fees on TPC is reasonable because fees determined in this manner are generally proportional to the regulatory costs incurred by the Commission and staff in reviewing and processing an application, with larger, more complex projects being assessed a higher fee than smaller, less complex projects. Basing permit application fees on TPC is also reasonable because under both the McAteer-Petris Act and the California Environmental Quality Act ("CEQA"), the Commission and staff are required to consider an entire project in processing a permit application, including the relationships between the portions of a project located inside and outside the Commission's jurisdiction, respectively, and the potential impacts of the portion located outside its jurisdiction on the portion inside its jurisdiction.

The Commission's permit application fees were established with the goal of recovering from permit applicants, on an annual average basis, 20% of the Commission's total regulatory program costs.[3] Thus, the application fees are directly related to the costs of the Commission's regulatory program and do not exceed the reasonable costs of that program. Moreover, because application fees based on TPC are generally proportional to the regulatory costs incurred in reviewing and processing an application, the manner in which the costs of the Commission's regulatory program are allocated to permit applicants bears a fair or reasonable relationship to an applicant's burden's on, or benefits received from, the Commission's regulatory activity.

[3] *See* 14 C.C.R. Div. 5, Appendix M, § (c)(1)(C).

**A PROJECT IS THE WHOLE OF THE PROPOSED ACTION**

You "agree in concept with the use of a TPC-based methodology" to determine a permit application fee, provided the terms "project" and "project costs" are defined in ways that respect the statutory limits of the Commission's permitting authority. (July 22nd letter at 1.) However, the fact that only a portion of a project may be geographically located in the Commission's jurisdiction and, therefore, only the proposed development or uses associated with that portion of the project may require a Commission permit, does not detract from the suitability of TPC as a reasonable measure of the staff time and regulatory cost to review and process a permit application.

As you know, CEQA and the CEQA Guidelines define the term "project" to mean "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," including any activity involving the issuance of a permit or other entitlement for use "by one or more public agencies." 14 C.C.R. § 15378(d); Pub. Res. Code § 21605. Consistent with this definition, the City of Richmond's Draft Environmental Impact Report ("EIR") describes the Terminal One Project as including "the following components, which would be constructed on the approximately 13.3-acre Terminal One project site (project site):

1. Up to 334 residential units…
2. Park areas, paths, trails, and shoreline improvements, including:
    - A public, waterfront park, the largest feature of which would be a public pier (Terminal One Pier), re-purposed from a former Industrial pier, and
    - An extension of the Bay Trail which would ring the project site…
3. Improvements to existing roads and the creation of new roads, including a shoreline road…, and
4. Other improvements, including:
    - The development of retail uses that would service neighborhood and visitor uses, and
    - The development of a pedestrian and bicycle-oriented promenade, extending north to south through the project site...."[4]

[4] City of Richmond Terminal One Project Draft Environmental Impact Report (Feb. 2016), at 2-2. Reflecting this description of an integrated mixed-use project, the Draft EIR further states, under the heading "Basic Project Objectives," that the Terminal One Project shall, among other things: (1) "[t]ransform a former industrial site into a new waterfront community…"; and (2) "[p]rovide access to waterfront open space for public use, including public recreation and park areas and a shoreline connection between existing Bay Trail segments to the west and east of the site." *Id.* at 2-3.

Similarly, in approving the rezoning of the Terminal One Site to a Planned Area (PA) District, the Richmond City Council considered the entire proposed development to constitute a single project consisting of a number of components. The PA Plan for the Terminal One Project, which is attached as an exhibit to the City Council ordinance approving the re-zoning of the property, states that the PA Plan "contemplates the development of a mix of uses on the Terminal One property, the two principal components of which will consist of:

- a residential neighborhood with 323 residential dwelling units; and
- a public waterfront park with parkland-related amenities that will feature the existing Terminal One Pier repurposed for public use and a shoreline extension of the Bay Trail."[5]

Thus, there is no merit to your claim that the PA District "zoning designation that has been assigned to the property contemplates not one, but two separate and distinct projects." (July 22nd Letter at 4.)

To the contrary, it appears that the first time the Terminal One Project was described as consisting of "two separate but distinct development projects" – a 6.0-acre waterfront park and a 7.6-acre residential development – is in the Co-Applicants' BCDC permit application.[6] Moreover, it appears that the Co-Applicants have improperly segmented the Terminal One Project in this manner solely to support Terminal One Development LLC's contention that, for purposes of the BCDC permit application, the project consists solely of the 6.0-acre waterfront park and, thereby, to justify providing a TPC figure related solely to the costs associated with the waterfront park, rather than the entire Terminal One Project.

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[5] City of Richmond Ordinance No. 13-16 N.S., An Ordinance of the City Council of the City of Richmond, California, Rezoning to Planned Are (PA) District the Terminal One Site Located at 1500 Dornan Drive for the Terminal One Project (PLN14-316) (July 19, 2016) ("Richmond Ordinance"), at Exhibit B (Planned Area Plan for the Terminal One Project) at 1. In approving the rezoning, the City Council also found that "[t]he proposed PA plan would result in superior urban design as the project provides for two residential building types…, a small visitor and neighborhood serving retail area, and enhanced public open spaces (new waterfront park, repurposed Terminal One pier and Bay Trail extension)…." Richmond Ordinance at 2.

[6] Terminal One Development LLC and City of Richmond, BCDC Permit Application, Box 2, Attachment #4, Appendix A (Detailed Narrative Description of the Terminal One Project), at 1. Although you claim the waterfront park and residential development are "separate and distinct" projects, you acknowledge that "the two projects will be developed concurrently." July 22nd letter at 2-3.

Box 2 of the Commission's permit application is entitled "Total Project and Site Information," and, in addition to requesting TPC, calls for specified information about, among other things, the square-footage of and proposed structures and uses in the various portions of the project site within the Commission's jurisdiction (*i.e.,* Bay, shoreline band, etc.) and outside the Commission's jurisdiction. Notwithstanding their attempt to characterize the Terminal One Project as limited solely to the waterfront park, the Co-Applicants provided without objection the detailed information required by Box 2 of the application for all portions of the Project, both within and outside the Commission's jurisdiction, including Project details for both the waterfront park and residential development.[7]

The Commission has the authority to require the total project and site information called for by Box 2 of the application to enable it to fulfill its responsibilities under both the McAteer-Petris Act and CEQA to evaluate not only the portion of a project within its jurisdiction but also how any portion of a project outside its jurisdiction will relate to and may impact the portion within its jurisdiction. In the case of the Terminal One Project, this evaluation will include, but not be limited to: (1) the demand for public access generated by the residential and retail components of the Project, and the anticipated impact of such demand on existing and proposed public access; (2) traffic, parking, and circulation issues, including how people would get to the site, where parking and other circulation features would be located, and the potential for use conflicts between Project residents and the public; (3) the Project's impacts on Bay and shoreline views from nearby public roads and from the Central Promenade, which would cut through the residential development and is intended to provide waterfront views through that development; (4) the Project's sea level rise adaptation strategy, including measures to ensure that the public access areas would remain viable for as long as the residential development is in place and that certain public access features (*e.g.*, the Bay Trail Loop) would serve as flood protection for the residential development; and (5) the Project's contaminant containment strategies (including a Deep Soil Mix barrier and a slurry wall), which would be located within the 100-foot shoreline band, need to be implemented to protect both the residential development and public access areas, and also relate to sea level rise adaptation. In view of these and other interrelationships between components of the Project within and outside the Commission's jurisdiction, your assertion that "the only portion of the Terminal One/Latitude development BCDC may legally scrutinize" is the portion within its jurisdiction (July 22nd letter at 7) is unfounded.

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[7] Your contention that "not one square foot of the residential project lies within BCDC jurisdiction" (July 22nd letter at 3) is incorrect. As shown by the Annotated Site Plan submitted as part of the BCDC permit application, an approximately 98-square-foot portion of the southwest corner of condominium Building One, as well as several walkways connecting individual residences to the sidewalk along Shoreline Drive, are located in the 100-foot shoreline band. BCDC Permit Application, Box 2, Attachment 4, Appendix B-1, Illustrative Project Description, Terminal One Waterfront Park, Annotated Site Plan.

Similarly, you are simply incorrect in claiming that "[c]harging a fee for work to be done outside [the Commission's] jurisdiction is regulating outside [its] jurisdiction." (July 22nd letter at 8.) As discussed above, the Commission's permit application fees are based on TPC because TPC is a reasonable measure of the regulatory costs incurred by the Commission and staff in reviewing and processing an application. Basing the Commission's application fees on TPC does not regulate development outside its jurisdiction, and such fees are not a charge or assessment for the value of proposed development, whether located inside or outside the Commission's jurisdiction.[8]

**BASING PERMIT APPLICATION FEES ON TPC IS CONSTITUTIONAL**

The Takings Clause of the Fifth Amendment to the United States Constitution applies to conditions of project approval imposed by a government agency, including conditions requiring the dedication of land or the payment of a fee to mitigate project impacts. The United Supreme Court has held that there must be an "essential nexus" between a legitimate state interest (*i.e.,* the purpose of a permit condition) and the permit condition, and that a permit condition must be roughly proportionate to the impact to be addressed by the condition. However, the Commission's permit application fees are not imposed as a condition of project approval or to mitigate for project impacts. As discussed above, the Commission charges a permit application fee to recover a portion of the regulatory costs incurred by the Commission and staff in reviewing and processing a permit application. The federal and state cases cited on page nine of your letter, and the principles of "essential nexus" and "rough proportionality" that govern conditions of project approval, simply do not apply to the Commission's permit application fees.

Finally, you argue that the Commission's application fees violate the California Constitution which prohibits the state from imposing any "tax" that exceeds the reasonable costs of providing the service. (July 22nd Letter at 9.) Thus, you appear to suggest that charging a permit application fee based on TPC is not reasonable, and that such a fee may instead be a tax, in those cases in which a substantial portion of the TPC relates to the cost of proposed work or development for the portion of a project located outside the Commission's jurisdiction. In particular, you claim that basing the permit application fee for the Terminal One Project on TPC

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[8] In claiming that past Commission efforts "to arrogate to itself regulatory powers the Legislature never granted it" have been ruled illegal, your July 22nd letter mischaracterizes the decision of the Office of Administrative Law ("OAL") in 1986 OAL Determination No. 6 (Sept. 3, 1986). In its background discussion of BCDC's authority, OAL cited various provisions of the McAteer-Petris Act limiting the geographical extent of the Commission's jurisdiction, but OAL did not make any rulings in that regard. 1986 OAL Determination No. 6, at 6. To the contrary, OAL held that two paragraphs of a study on diked historic baylands of San Francisco Bay, which set forth policies on such baylands located partly *within* the Commission's jurisdiction, were regulations that should have been promulgated pursuant to the Administrative Procedure Act, but that the remainder of the study was not a regulation. OAL also noted that the Legislature had expressly authorized the Commission, pursuant to Government Code section 66653, to provide advisory comments concerning provisions of the San Francisco Bay Plan relating to functions or activities located outside the Commission's jurisdiction.

is unfair and unreasonable because more than two-thirds of the Terminal One Project site is outside the Commission's jurisdiction and more than two-thirds of the Project's costs are attributable to proposed development outside the Commission's jurisdiction. (July 22nd letter at 2.)

As discussed above, the California Constitution authorizes the imposition of a charge or fee "for the reasonable regulatory costs to the State incident to issuing licenses and permits." Cal. Constitution, Article XIIIA, §3(b)(3). And as also discussed above, TPC is a reasonable measure of the regulatory costs incurred by the Commission and staff in reviewing and processing a permit application. Moreover, a Commission permit application fee would not be a tax even if, in a particular case, it could be argued that the fee does not bear a reasonable relationship to the benefit received by the applicant because a substantial portion of the TPC (and, therefore, the basis of the fee) relates to proposed work or development located outside the Commission's jurisdiction. A regulatory fee does not become a tax simply because the fee may be disproportionate to the services rendered to individual payors; the question of proportionality is not measured on an individual basis, but rather it is measured collectively considering all payors. *Cal. Farm Bureau Fed'n v. State Water Resources Control Bd.* (2011), 51 Cal. 4th 421, 438; *Cal. Ass'n of Prof Scientists v. Dep't. of Fish & Game* (2000) 79 Cal. App. 4th 935, 939, 948; *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal. App. 4th 178, 194; *see also San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal. App. 3d 1132, 1135.

**THE CO-APPLICANTS HAVE FAILED TO PAY THE APPLICABLE PERMIT APPLICATION FEE**

The BCDC permit application submitted by the Co-Applicants states a TPC of approximately $15.8 million. When it became apparent to BCDC staff that this figure did not include the costs of all aspects of the Project both inside and outside the Commission's jurisdiction, as required by the Commission's fee regulation, staff requested multiple times that the Co-Applicants provide the TPC associated with the entire Terminal One Project. To date, this information had not been provided but, instead, Terminal One Development LLC continues to assert that for purposes of the BCDC permit application the Project consists solely of the waterfront park. Terminal One Development LLC has conceded that the costs of the residential development have not been included in the TPC calculation, and your letter indicates that the figure of $15.8 million is less that 1/3 of the TPC of the entire Project. Thus, the payment of $26,860 made by Terminal One Development LLC in November 2018 is not the applicable filing fee.

As noted above, payment of the applicable permit application fee is an application filing requirement that the Executive Director cannot waive. 14 C.C.R. § 10311(b). Moreover, "[w]henever the Executive Director determines that the stated project cost does not appear to include the total project cost or to reflect accurately all project costs, he or she shall return the application unfiled… or the Executive Director shall hold the application unfiled until the applicant verifies the total cost figures by having an estimator selected by the Executive Director and prepaid by the applicant review and certify as complete and accurate all project costs." 14 C.C.R. Div. 5, Appendix M, § (d)(4).

If the Co-Applicants would like the Executive Director to file their BCDC permit application as complete and schedule the application for a hearing before the Commission, please submit within 30 days TPC information that includes the cost of all aspects of the Terminal One Project both inside and outside the Commission's jurisdiction, as required by the Commission's fee regulation, as well as payment for the balance due of the applicable application fee as determined based on that TPC information. Alternatively, please advise if the Co-Applicants would prefer to prepay an estimator selected by the Executive Director to prepare a complete and accurate estimate of TPC. Otherwise, the Executive Director shall return the application unfiled.

Assuming the Co-Applicants provide the TPC information and pay the balance of the applicable fee as necessary to move forward with their BCDC permit application, after paying the applicable fee, they may appeal the fee determination to the Commission by submitting a letter explaining why the fee is allegedly incorrect. *Id.* § (j)(2). On behalf of the Executive Director, I would submit a letter opposing the appeal, and the Commission would hear appeal and determine the correct fee at the time it votes on the application. *Id.* § (j)(3).

Sincerely,

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