

San Francisco Bay Conservation and Development Commission

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

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TO: Commissioners and Alternates

FROM: Lawrence J. Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)
John Bowers, Staff Counsel (415/352-3610; john.bowers@bcdc.ca.gov)

SUBJECT: Staff Report on Proposed Marriott Hotel Project, 2900 Harbor Bay Parkway, Alameda
(For Commission information only)

Background

In the 1970s, BCDC and Harbor Bay Isle Associates (HBIA), the principal owner of land located in an area known as Bay Farm Island (BFI) in the City of Alameda, disagreed over whether HBIA's development plans for BFI were or were not subject to BCDC's permit jurisdiction under the legal doctrine of vested rights. Rather than precipitate a lengthy and costly judicial proceeding to resolve this dispute, BCDC and HBIA voluntarily entered into a series of settlement agreements. The essence of these agreements is that BCDC waives the permit jurisdiction it believed it had the authority to exercise over the development of BFI in exchange for an agreement by HBIA to construct public access improvements and amenities along the shoreline of BFI and otherwise conform to development standards specified in the agreements. Most of BFI was developed residentially, but one area of BFI, referred to as Tract 4500, was proposed to be developed with commercial structures. The Third Supplementary (Settlement) Agreement (TSA) between BCDC and HBIA was created to establish development standards for this commercial development. BCDC and HBIA initially entered into the TSA in 1984. Since then, the TSA has been amended three times; the most recent amendment (the "Third Amendment") occurred in 2013.

Several months ago, Mr. Robert Leach, lead developer of Harbor Bay Hospitality, LLC ("HBH") contacted BCDC staff to request that staff determine whether HBH's proposed hotel project on the "Soft Urban Landscape Area" in Phase 3B of Tract 4500 would meet the standards for development along the Bay shoreline set forth in the TSA as amended in 2013. Staff reviewed the proposed project plans, provided some initial rounds of feedback, and, consistent with how BCDC staff has reviewed and processed a number of other projects proposed within the geographic area covered by the TSA (including another proposal for the same site which the City did not approve), informed HBH that its proposed hotel project as revised per staff feedback would comply with the TSA's development standards for the site. Staff further informed HBH, again consistent with how BCDC has operated under the TSA, that no BCDC permit would be required for the project provided that HBH enter into an agreement with BCDC to be bound by the TSA. (See Andrea Gaffney's September 25, 2018 letter to Mr. Leach attached.)

In recent weeks, however, a number of Alameda residents who live near the proposed development have contacted the Commission and staff. They maintain that HBH is not entitled to an exemption from BCDC permit requirements because HBH is not a party to the TSA. This memo summarizes the key provisions of the TSA that are applicable or potentially applicable to this project, presents arguments both for potentially requiring a permit and not requiring a permit, discusses the basis for the staff's position not to require a permit for this project, and includes a recommendation for Commissioners to consider.

Legal Analysis. Below is the staff's analysis of the legal issues surrounding this matter.

Question. Under the Amended Third Supplementary Agreement between the BCDC and Harbor Bay Isle Associates, are persons or entities who hold ownership interests in properties on Bay Farm Island that were owned by HBIA at the time the TSA was entered into required to obtain a permit under the McAteer-Petris Act ("MPA") for development activity representing the initial buildout of a site located in whole or in part within the area of BCDC's shoreline band jurisdiction?

Answer: The TSA contains support for both a positive and negative answer to the question above. Considerations of textual specificity and particularity support a positive answer, *i.e.*, that a permit is required. However, evidence of the intent of the persons who originally drafted and entered into the TSA, considered together with how both BCDC and HBIA have interpreted the TSA over the years of its existence, support a negative answer, *i.e.*, that a permit is not required because owners who are successors in interest to HBIA, such as HBH, may avail themselves of the benefits of the TSA enjoyed by HBIA.

Analysis

1. **General Principles of Interpretation of Contracts.** There are a number of general principles of contract interpretation under California law that are relevant to answering the question posed. Perhaps the most important rule is that "a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable...". (Cal. Civil Code § 1636.) In addition, "the language of the contract is to govern its interpretation, if the language is clear and explicit...". (Cal. Civil Code § 1638.) Similarly, "the whole of a contract is to be taken together, so as to give effect to every part...each clause helping to interpret the other." (Cal. Civil Code § 1641.) Ambiguous or uncertain terms of a contract "must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Cal. Civil Code § 1649.) Finally, it is relevant in interpreting a contract to take into account the conduct of the parties "subsequent to execution of the contract and before any controversy has arisen as to its effect...." 1 Witkin, *Summary of California Law*, "Contracts," § 772.

2. **Factors Favoring an Affirmative Answer to the Question of Whether Under the TSA Successors to HBIA Are Subject To the BCDC’s MPA Permit Authority.** Proponents of the view that the TSA limits the applicability of an exemption from the BCDC’s permit jurisdiction only to HBIA cite section 5 of the TSA, which provides as follows: “5. **No Modification of Jurisdiction:** This Third Amended Third Supplementary Agreement does not constitute modification or application of BCDC jurisdiction or controls as to any other party than HBIA.”

Mr. Dan Reidy has held the position of HBIA’s counsel during the entire time that BCDC and HBIA developed and entered into the various agreements, including the TSA. He is the co-author of those agreements. Notwithstanding the apparently clear and unambiguous text of the above-quoted section 5 from the TSA, Mr. Reidy does not believe that it precludes owners whose title to property on BFI derives either directly or indirectly from HBIA from taking advantage of the exemption from the BCDC’s permit authority that HBIA enjoys under the TSA. Mr. Reidy calls attention to a 1983 letter from former BCDC Deputy Director Alan Pendleton explaining that, in contrast to the first two supplementary agreements settling disputed claims between the BCDC and HBIA, the City of Alameda will not be a party to the TSA. In Mr. Reidy’s view, Mr. Pendleton sought to prevent the City, as a future owner of shoreline areas of BFI, from taking advantage of the permit exemption provided thereby by adding section 5 to the TSA. The obvious problem with this interpretation is that the breadth of the text of section 5 clearly extends its “no modification” provisions to persons or entities other than the City.

Mr. Reidy also cites section 3 of the TSA, entitled “3. **BCDC Permits:**” in support of his view that the exemption from BCDC’s permit jurisdiction provided by the TSA extends, notwithstanding section 5, to parties other than HBIA. However, section 3 clearly states that the BCDC “will not require a permit *of HBIA* pursuant to [MPA] § 66632 for the private development...within the Shoreline Band at the Project, instead relying on this TSA....” (Emphasis added.) Thus, the permit exemption language of Section 3 of the TSA is clearly limited in its scope of applicability to HBIA as distinguished from successors to HBIA.

A final argument made by proponents of the view that HBIA successors are subject to BCDC’s permit authority is to invoke the precedent established by the permit proceeding that BCDC held for the RAM Hotel project on Harbor Bay Parkway proposed by Ms. Nina Patel. However, a critical feature of the RAM hotel proposal was that it was not consistent with the applicable land use designation in the TSA. It therefore does not serve as a precedent for projects that are determined to be consistent with the standards of the TSA.

3. **Factors Favoring a Negative Answer to the Question of Whether Under the TSA Successors to HBIA Are Subject to the BCDC’s MPA Permit Authority.** In testimony to the Commission at the Commission’s December 6, 2018, meeting, Joe Ernst, holder through one or more business entities of ownership interests in a number of the properties governed by the TSA, responded to the arguments that owners that are

successors-in-interest to HBIA are, under section 5 of the TSA, subject to the Commission's MPA permit authority by referring to section 19, entitled "19. **Recording;**" of the TSA. At least as originally drafted in 1984 through the Third Amendment to the TSA in 2013, section 19 described the TSA "as a binding agreement affecting general duties and obligations of present *and future* property owners of parcels in the Project area within the Shoreline Band." (Emphasis added.) Section 19 provided for the TSA to "be specifically referred to in the Final Map that is recorded in the Official Records of Alameda County with reference to Parcels in the Project area within the Shoreline Band" accompanied by a "statement that said property is subject to the provisions and conditions as set forth in the TSA." According to Mr. Ernst, the reference to "future owners" in section 19 reflects an intent on the part of the original signatories of the TSA, HBIA and BCDC, for successors to HBIA to enjoy the benefits of the TSA, principally the exemption from the BCDC's permit authority, so long as any developments they propose to undertake are otherwise consistent with the standards of the TSA. Mr. Reidy has stated to the Commission that he supports this interpretation of how the language of section 19 governs the applicability of the TSA to successors to HBIA.

Mr. Ernst's argument is weakened somewhat by the fact that the language from section 19 on which that argument is based was deleted from section 19 as part of the Third Amendment to the TSA that HBIA proposed and that BCDC approved in 2013. Mr. Reidy states that in making this deletion it was not his intent to change the essential character of the TSA; rather he was simply acting in accordance with the fact that the Final Maps referenced therein had already been recorded many years previously, as is indicated by the notation Mr. Reidy concurrently added to section 19 that "HBIA has complied with all the recording requirements specified in Paragraph 19 of the TSA..." In any event, as provided for in section 19, the TSA is notated and referenced on the Final Subdivision/Parcel Map for BFI Tract 4500, a fact that preserves the characterization of the TSA as an instrument that both binds and benefits "future owners" of property governed by the TSA.¹

As characterized in section 19 thereof, and as evidenced by the references to the TSA on the Final Maps for BFI Tract 4500, the TSA has the character, and is the functional equivalent, of a "covenant running with the land" (see generally 12 Witkin, *Summ. of Cal. Law*, "Real Property," §§ 445 – 453, or of an "equitable servitude" (see generally *Id.*, §§ 454 – 471). The essential characteristic of a "covenant that runs with the land" is that "a transferee or successor to the estate of one of the parties may be entitled to the benefits of a covenant, or may be bound by its obligations." (*Id.*, § 447.) Under the TSA, HBIA, as covenantor, is obligated to build out BFI Tract 4500 in accordance with the standards of the TSA. HBIA is also covenantee under the TSA because it will receive the benefit of an exemption from any otherwise applicable permit jurisdiction of BCDC if it

¹ See, e.g., Parcel Map No. 6024, as recorded on February 5, 1991, in Book 196 of Parcel Maps, at pages 12 – 13, in the Official Records of Alameda County. Under "Encumbrances," Note 4, #b, the parcels shown on the map are made expressly subject to the Second Amendment of the TSA.

fulfills its obligations under the TSA. Given the intent of the subscribing parties to the TSA reflected in section 19 that the provisions of the TSA bind and benefit “future owners” of parcels in BFI Tract 4500, under the above-referenced legal authorities these obligations and benefits pass to such “future owners.” See also Cal. Civil Code § 1468 (“Each covenant...shall...benefit or be binding upon each successive owner, during his ownership, of any portion of such land affected thereby...”) In these respects, the TSA exhibits the characteristics of a permit, the benefits and burdens of which pass to subsequent owners. See *County of Imperial v. McDougal* (1977) 19 Cal.3rd 505.

4. **Reconciliation of Contract Ambiguity or Internal Inconsistency.** It would not be unreasonable to find or impute an ambiguity, if not outright inconsistency, between sections 5 and 19 of the TSA. As noted above, under generally accepted principles of contract interpretation, one of the principal methods generally employed to resolve such an ambiguity or inconsistency is to examine the performance or conduct of the parties to the contract thereunder, “subsequent to its execution and before any controversy has arisen as to its effect.” Such an examination reveals a consistent and unwavering pattern of interpretation of the TSA. BCDC, in collaboration with HBIA, has applied the TSA to HBIA’s successor owners in the following instances:
 - a. **Stacey-Witbeck Building.** This structure is otherwise identified in BCDC’s records as “Building A.” In 2011, BCDC Chief of Regulatory Affairs Brad McCrea wrote to Mr. Ernst as follows: “We have finished our review of the site plans...that were submitted for Building A. After careful review, we have determined that the siting of Building A is consistent with the agreements described in the Second Amendment to the TSA for the Harbor Bay Isle Shoreline Park.” There is no suggestion in this communication that the BCDC’s permit jurisdiction does or even might apply to Building A.
 - b. **McGuire & Hester Office Building.** In a letter dated April 22, 2016, from Bay Design Analyst Ellen Miramontes to Derek Cunha, Ms. Miramontes states that “plans have been reviewed pursuant to the “Third Amendment to TSA, Harbor Bay Isle Shoreline Park...between HBIA and BCDC, and entered into on March 15, 2013.” There is no suggestion in this letter that the BCDC might have the ability to exercise its permit jurisdiction over the McGuire & Hester Office Building.
 - c. **Westmont Living Senior Residential Facility.** In a letter dated June 17, 2016, written after consultation with both Mr. Reidy as well as former BCDC Executive Director Mike Wilmar, whose term of office coincided with the initial drafting of the TSA, Principal Permit Analyst Ethan Lavine wrote that “we have determined that the plan, in concept, is generally consistent with the development standards contained in...the TSA....” However, Mr. Lavine went on to say that “it remains a matter of concern to the BCDC that Pacific Union Land Co. is not a party to the TSA. [Nevertheless,] we are allowing PU to avail itself of the benefit of the TSA (in the form of an exemption from the otherwise applicable permit requirements of the MPA)....”

- d. **Proposed Marriott Hotel.** In a letter dated September 25, 2018, to HBH, LLC, Bay Design Analyst Andrea Gaffney essentially reiterated the points in Mr. Lavine's letter to Pacific Union, finding the proposed hotel to be consistent with the standards of the TSA and, as a result, allowing HBH to avail itself of the exemption from the BCDC's permit authority contained in the TSA.

On the basis of these past instances of applying the TSA to projects proposed in the area governed by the TSA, it is clear that both BCDC and HBIA have consistently interpreted the TSA as granting to property owners who derived their title directly or indirectly from HBIA the ability to avail themselves of the TSA's permit exemption provisions provided their project is consistent with the standards of the TSA.

Conclusion. The Commission has the legal authority to continue, as it has in the past, to allow successors to HBIA to enjoy the benefit of the permit exemption provisions of the TSA, so long as such successors comply with the TSA's development standards. On the other hand, given the clear and unambiguous nature of the language of section 5 of the TSA, it would also be legally defensible for the Commission to decide to reverse course and determine that the benefits of the TSA are limited to HBIA as the original party thereto, and that, consequently, all other parties are subject to the BCDC's permit jurisdiction under the MPA.

As discussed above, staff has reviewed the plans for the proposed HBH Marriott hotel project and determined that, as revised per staff feedback, the plans meet the development standards in the TSA. Staff also informed HBH in September that, consistent with how BCDC has acted with respect to other projects in the area governed by the TSA, no BCDC permit would be required provided that HBH enters into an agreement to be bound by the TSA. Since that time, BCDC staff, HBH, and HBIA have negotiated (but have not executed) an agreement under which HBH would be bound by the TSA. That agreement also provides that when and if HBA is issued a certificate of occupancy for the project, the TSA would no longer apply and a BCDC permit would be required for any substantial modification of the project or for any future redevelopment of the site.

If the Commission were to decide, contrary to staff's determination, that HBH is required to apply for a BCDC permit, it is important to note that the sole issue before the Commission would be whether the project provides maximum feasible public access consistent with the project. See MPA § 66632.4 (the Commission may deny a permit for a proposed project in the shoreline band only on the grounds that the project fails to provide maximum feasible public access, consistent with the project). The Commission does not have the authority to determine whether or not a hotel is an appropriate land use at this location or to reject any findings by the City of Alameda as to the project's compliance with local zoning requirements, including provisions governing the project's height or overall size. With respect to the issues surrounding public access, based on its review of the project plans, BCDC staff believes that the project as proposed would provide considerable public access at the site and that the permitting process is unlikely to result in significantly greater public access than currently proposed.

If the Commission were to require a permit for this project, staff would prepare an analysis of the project's compliance with all applicable policies of the San Francisco Bay Plan. Such an analysis would consider the project's appearance, design, and impacts on scenic views, as well as the future viability of the proposed public access in accordance with as the climate change policies. In addition to the staff's analysis, the project would likely be reviewed by the Design Review Board. Through the permitting process, it is possible that HBH would agree to make, or the Commission would seek to require, further changes to the project design or the proposed public access. However, in staff's view, such potential changes likely would be relatively minor.

In evaluating a permit application, similar shoreline hotel projects permitted by the Commission would be used as precedent to gauge the appropriate quantity and quality of public access relative to the proposed development and impacts to the shoreline. One of the metrics that the Commission has used in the past to evaluate whether the size of a proposed public access area meets the legal standard of "maximum feasible public access" is to determine the ratio between the height of the proposed development and the width of the public access area that is being proposed in association with that development. Past actions by the Commission reflect determinations that a ratio of 1:1 or more is generally found adequate to create a feeling of open public space and thus to meet the maximum feasible public access test. The "height to width" ratio for the HBH hotel is approximately 1:1 so it compares favorably with other similar projects that the Commission has approved.

In addition, the proposed project improves the shoreline path, planting, and furnishings. It also provides public shoreline seating adjacent to a café which will invite people to enjoy views of the bay. The project is also providing five public shoreline parking space. These amenities are generally consistent with other shoreline hotel projects permitted by the Commission.

Recommendation

Staff recommends that the Commission not require a permit of HBH to develop the project in question.