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29 April 2020

By E-Mail

Mark Zeppetello
375 Beale Street, Suite 510
San Francisco, CA 94105

Subject: Unconstitutional Use Of BCDC Administrative Penalty Funds

Dear Mr. Zeppetello:

Thank you for your letter of today responding to mine of 14 April raising concerns about BCDC's unconstitutional policy of spending administrative penalty funds entirely on staff salaries. Unfortunately, your letter does not resolve the Constitutional concerns. It also raises additional statutory problems.

Your letter does not dispute that all of the Bay Fill Clean-Up and Abatement Funds are spent on BCDC staff salaries. But you do dispute that BCDC has any kind of "policy" of spending the money it collects from administrative fines on staff salaries. Yes, this is BCDC's policy.

You are correct that the Legislature appropriates funds from the Bay Fill Clean-Up and Abatement Fund to BCDC. But your assertion that the Legislature has directed those funds "to be used by BCDC to pay for a portion of its enforcement staff" is incorrect. The Legislature has said nothing in those appropriations about BCDC hiring enforcement staff. Instead, the Legislature simply grants the money to BCDC outright, with only some minor reporting provisions, presumably entrusting BCDC to exercise good judgment within the law in how the money gets spent.¹

¹ The 2019 Budget Act (AB 74) appropriation of the Bay Fill Clean-Up and Abatement Fund reads, in its entirety, as follows:

3820-001-0914—For support of San Francisco Bay Conservation and Development Commission, payable from the Bay Fill Clean-Up and Abatement Fund493,000
Schedule:
(1) 2980-Bay Conservation and Development493,000
Provisions:

Once the Legislature appropriates the Bay Fill Clean-Up and Abatement Funds to BCDC, the McAteer-Petris Act gives BCDC ultimate authority over how those funds get spent, within certain statutory constraints. Government Code § 66647(b) is the relevant provision:

All moneys paid into the [Bay Fill Clean-Up and Abatement Fund] shall be available for expenditure by the commission or the executive director, when appropriated by the Legislature, for the purposes of removing fill, resource enhancement, or performing any other remedial cleanup or abatement actions within the commission's jurisdiction.

While this section refers to the both “the commission” and the “executive director” spending the funds, the Executive Director is ultimately “subject to the direction and policies of the commission”. (Government Code § 66635.) Because the Commission is ultimately responsible for BCDC’s expenditures, responsibility for every buck spent from the Bay Fill Clean-Up and Abatement Fund stops with the Commission itself.

The Commission, in turn, has made, or overseen, the policy decision of BCDC to spend all those dollars on BCDC staff salaries. This is precisely the type of structure—where the penalty adjudicator also decides how penalty funds get spent, even if the adjudicator does not personally benefit—the U.S. Supreme Court found facially unconstitutional in *Ward v. Village of Monroeville* (1972) 409 U.S. 57. This structure also distinguishes BCDC from the cases you cite, *Marshall v. Jerrico* and *American Bankers Mgmt. Co. v. Heryford*, which, as you note, each addressed the constitutionality of financial incentives that might encourage prosecutors to prosecute more. Here, the issue is not the incentives for BCDC’s prosecutors; it is the incentives for the Commission itself. The Due Process violation here arises from the financial structure that might

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- 1. The San Francisco Bay Conservation and Development Commission shall provide a list of enforcement cases and their disposition to the Legislature including: (a) the number of cases settled; (b) the number of cases that go to the Enforcement Committee, broken down by the number of settlements and cease and desist orders issued; (c) the number of enforcement cases closed; and (d) the number of cases in which amnesty is applied. The commission shall provide the dollar amount collected for each type of case.*
 - 2. The commission shall provide a summary on how its enforcement approach, process, and procedures have changed from the 2017–18 fiscal year, and a status of the backlog of cases.*
 - 3. On or before February 28 of each calendar year in the 2019–20 and 2020–21 fiscal years, the commission shall provide the information required in Provisions 1 and 2 of this item.*

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“tempt” BCDC as *adjudicator* “not to hold the balance nice, clear, and true between the state and the accused”. (*Ward* at 60.)

In addition to this basic Constitutional problem, your letter also raises a statutory question whether spending Bay Fill Clean-Up and Abatement Funds on general staff salaries is wholly consistent with the McAteer-Petris Act. The McAteer-Petris Act, as the name suggests, allows Bay Fill Clean-Up and Abatement Funds to be spent only on “removing fill”, “resource enhancement”, or “remedial cleanup or abatement actions”. (Gov. Code § 66647(b).) If the Constitution were no issue, this provision would otherwise allow BCDC to hire staff whose job is to go out into the Bay to remove fill, do cleanup, or enhance resources directly. But it does not authorize funds to be spent on staff’s pursuit of penalties.

Thanks to you and the rest of the BCDC ‘family’ for continuing your important work during these difficult times, and for considering these comments in the spirit of improving BCDC’s fairness and effectiveness under the law.

Sincerely,

/s/ Peter Prows

Peter Prows

cc: BCDC Enforcement Committee Members
Larry Goldzband, BCDC
Adrienne Klein, BCDC
Karen Donovan, BCDC
Priscilla Njuguna, BCDC
Shari Posner, Office of the Attorney General
Assemblymember Mullin, c/o Mario Rendon
John Coleman, Bay Planning Coalition