

San Francisco Bay Conservation and Development Commission

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

Via Email Only

April 29, 2020

Peter Prows
Briscoe Ivester & Bazel LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
Email: pprows@briscoelaw.net

Dear Mr. Prows,

I have reviewed the letter that you sent to the San Francisco Bay Conservation and Development Commission (“BCDC”) Enforcement Committee on April 14, 2020. In the letter, you state that you were “surprised to learn that BCDC has an enforcement policy” that you suggest improperly directs the agency to spend the money it collects from administrative fines on staff salaries. That statement, however, is incorrect. BCDC does not have, and has never had, such an enforcement policy.

As your letter acknowledges, BCDC deposits all administrative penalties and fines that it receives into the Bay Fill Clean-up and Abatement Fund (“Bay Fill Fund”), a fund in the State Treasury, as required by Government Code section 66647(a). Through the annual Budget Act (after the State budget is proposed by the Governor and approved by the Legislature), the Legislature appropriates funds to BCDC for the agency’s annual budget. For several years, the Legislature’s appropriations have included funds from the Bay Fill Fund, pursuant to Government Code section 66647(b), to be used by BCDC to pay for a portion of its enforcement staff. Accordingly, BCDC’s use of those funds for that purpose has been approved by the Department of Finance, proposed by the Governor, and enacted by the Legislature as a matter of State law.

Contrary to the assertions in your letter, BCDC does not have authority over or otherwise control how the funds that BCDC deposits into the Bay Fill Fund are expended. Such funds are



available to BCDC only in the amount, and for the purposes, appropriated by the Legislature pursuant to Government Code section 66647(b).¹

Of equal importance, once the funds deposited in the Bay Fill Fund are appropriated for use by BCDC, the funds are not provided to the individuals charged with adjudicating administrative penalties. BCDC's enforcement hearings are conducted by an Enforcement Committee composed of five members of the Commission. 14 Cal. Code Regs. § 11310(b). Following a hearing, the Committee recommends a decision for adoption by the full Commission at a noticed public meeting. *Id.* § 11332. Pursuant to section 66622 of the McAteer-Petris Act, Commissioners serve without compensation and serve at the pleasure of their respective appointing powers. Therefore, Commissioners do not benefit from the funds that the Legislature appropriates from the Bay Fill Fund.

BCDC's use of funds appropriated by the Legislature from the Bay Fill Fund for enforcement staff salaries has no resemblance to the procedure that was held to be unconstitutional in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Both the United State Supreme Court and the Ninth Circuit have determined that it is permissible for an agency to have a prosecutorial function that is funded in part by the administrative penalties that the agency collects. *See, e.g., Marshall v. Jerrico*, 446 U.S. 238, 248-249 (1980) ("The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties."); *American Bankers Mgmt. Co. v. Heryford*, 885 F.3d 629, 637 (9th Cir. 2018) (citing *Turney v. Ohio*, 273 U.S. 510 [1927], and *Marshall v. Jerrico* and noting that the rigid requirements against financial incentives "apply only to public officials performing judicial or quasi-judicial functions, not to public officials acting in a prosecutorial or plaintiff-like capacity.").

BCDC appreciates your support for our efforts to responsibly conserve and develop Bay resources. I am sure that you also recognize how important it is for BCDC to continue fulfilling its mission notwithstanding the coronavirus pandemic. I invite you to read Enforcement Committee Chair Scharff's statement at the beginning of the Committee's meeting on April 9, 2020, in which he assured the public that BCDC will work with its permittees to ensure that

¹ Besides mischaracterizing Government Code section 66647(b) as giving BCDC responsibility over how money in the Bay Fill Fund is spent, your letter inaccurately cites several other Government Code provisions for the erroneous proposition that BCDC oversees the expenditure of penalties. Government Code section 66633 allows BCDC to accept appropriations from any public agency but does not authorize BCDC to determine how any such appropriations are spent. Government Code section 66634 provides that BCDC may take steps to attempt to obtain money for planning purposes from federal, state, or local sources, but does not address the expenditure of any funds obtained from such sources or the funding of BCDC enforcement functions. Finally, Government Code 66635 provides that the Executive Director is subject to the direction of the Commission, but says nothing about the expenditure of funds, including but not limited to any funds deposited into or appropriated from the Bay Fill Fund.

BCDC will not cause them to disregard state and local public health orders while performing their permitted functions.

Sincerely,

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Marc Zeppetello

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cc: Chair Scharff and Enforcement Committee and Members
Kevin Mullin, Assembly Member, c/o Mario Rendon -
John Coleman, Bay Planning Coalition -