

SAN FRANCISCO BAY CONSERVATION  
AND DEVELOPMENT COMMISSION

ENFORCEMENT COMMITTEE MEETING

BAY AREA METRO CENTER  
BOARD ROOM, FIRST FLOOR  
375 BEALE STREET  
SAN FRANCISCO, CALIFORNIA

THURSDAY, SEPTEMBER 7, 2017

9:30 A.M.

Reported by:  
Eduwiges Lastra

A P P E A R A N C E SEnforcement Committee

Greg Scharff, Chair

Mark Addiego

Geoffrey Gibbs

Marie Gilmore

Jill Techel

Counsel to the Committee

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Office of the Attorney General

BCDC Staff

Larry Goldzband, Executive Director

John Bowers, Staff Counsel

Adrienne Klein, Chief of Enforcement

Brad McCrea, Regulatory Director

Matthew Trujillo, Enforcement Analyst

Maggie Weber, Enforcement Analyst

A P P E A R A N C E SPermitteesBridgeway 558 Real Property LLC

Keith Garner, Attorney at Law  
Zachary Welsh, Attorney at Law  
Sheppard Mullin

Robert Freeman, Executive Officer  
Bridgeway 558 Real Property LLC

Heron Bay Homeowners Association

Alan Berger, Attorney at Law  
Law Offices of Alan Berger

Richard Brennan  
Heron Bay Homeowners Association

Brian Ritter  
Homeowner Association Services, Inc.

Public Speakers

Phillip Toste, Associate Engineer  
City of San Leandro Engineering and Transportation  
Department

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P R O C E E D I N G S

9:34 a.m.

1  
2  
3 MS. KLEIN: Good morning, Members. Commissioner  
4 Techel, could you please call the meeting to order and I  
5 will take roll.

6 ACTING COMMITTEE CHAIR TECHEL: All right, I am going  
7 to call the meeting to order. Roll call.

8 MS. KLEIN: Thank you.

9 Commissioner Techel?

10 ACTING COMMITTEE CHAIR TECHEL: Present.

11 MS. KLEIN: Commissioner Gilmore?

12 COMMITTEE MEMBER GILMORE: Here.

13 MS. KLEIN: And Commissioner Addiego?

14 COMMITTEE MEMBER ADDIEGO: Present.

15 MS. KLEIN: And Commissioner Gibbs?

16 COMMITTEE MEMBER GIBBS: Present.

17 MS. KLEIN: We have four present, which forms a quorum,  
18 thank you.

19 ACTING COMMITTEE CHAIR TECHEL: We are at Item 3,  
20 public comment. I don't have any comment cards for general  
21 public comment; is there anyone here who wishes to address  
22 the Enforcement Committee under general public comment?

23 (No response.)

24 ACTING COMMITTEE CHAIR TECHEL: If not we will go to  
25 Item 4, which is approval of the draft minutes from March

1 16, 2017. They were included in our packet. Do we have a  
2 motion on approval of the minutes?

3 COMMITTEE MEMBER GILMORE: So moved.

4 COMMITTEE MEMBER ADDIEGO: Second.

5 ACTING COMMITTEE CHAIR TECHEL: We have a motion and a  
6 second. All in favor say "aye."

7 (Ayes.)

8 ACTING COMMITTEE CHAIR TECHEL: Opposed?

9 (No response.)

10 ACTING COMMITTEE CHAIR TECHEL: The minutes are  
11 approved.

12 We are now on Item 5, a public hearing and possible  
13 vote on a recommended enforcement decision involving a  
14 proposed stipulated Cease and Desist and Civil Penalty Order  
15 No. CDO 2017.02.

16 At this point we will receive a report from staff on  
17 this item.

18 MS. WEBER: Good morning, Chair Techel and  
19 Commissioners. My name is Maggie Weber and Item 5 on the  
20 agenda today is the Executive Director's recommended  
21 enforcement decision on proposed stipulated Cease and Desist  
22 and Civil Penalty Order No. CDO 2017.02; that would be  
23 issued to Bridgeway 558 Real Property, the corporation that  
24 owns and operates the Trident and Ondine Restaurants in  
25 Sausalito.

1           The Trident and Ondine Restaurants are located on a  
2 pile-supported structure in the Bay that existed prior to  
3 BCDC, therefore the buildings on the structure are located  
4 in the shoreline band jurisdiction.

5           Here you can see what I just described and the location  
6 of the two violations subject to this enforcement matter.  
7 The placement, maintenance and use of unauthorized fill in  
8 the Bay consisting of a boat dock, gangway and pilings, and  
9 the placement, maintenance and use of unauthorized fill in  
10 the shoreline band consisting of a significant remodel of  
11 the restaurants.

12           This presentation includes a time line of events, a  
13 description of unauthorized work and permit violations and  
14 the key terms of the proposed Stipulated Order.

15           On August 16th, 1976 the Commission issued Permit No.  
16 M1975.102.00 to a former owner to authorize the removal and  
17 replacement of a single, split-level, 2,637-square-foot  
18 pile-supported dining deck attached to a preexisting pile-  
19 supported structure and for the replacement of caps and  
20 piles on a one-for-one basis at the existing restaurant.

21           In October 1999 staff received a report that an  
22 unauthorized boat dock and gangway and pilings had been  
23 placed in the Bay adjacent to the restaurants.

24           Staff contacted the former owner and learned that he  
25 was actively pursuing local approval, including a lease with

1 the City, to expand on the adjacent property. Both items  
2 are required to complete an application to enable BCDC to  
3 authorize the dock, gangway and pilings after the fact. As  
4 the property owner appeared to be pursuing the primary  
5 steps, staff delayed commencing an enforcement action until  
6 a lease and local approval had been obtained from the City.

7 On April 23rd, 2001, after the owner made no progress  
8 in completing the amendment application, staff commenced a  
9 standardized fine process. The standardized fine reached  
10 statutory maximum prior to May 2003 when Robert Freeman  
11 purchased the restaurants.

12 On November 23rd, 2003 staff commenced the standardized  
13 fine process on Mr. Freeman.

14 In 2004 Mr. Freeman transferred the property to  
15 Bridgeway, for which he is the Executive Officer.

16 In November of 2004 the standardized fine process for  
17 the boat dock, pilings and gangways reached the statutory  
18 maximum of \$30,000.

19 From 2004 until 2012 staff did not hear from  
20 Mr. Freeman or any Bridgeway representative.

21 Here is a photo of the unauthorized fill in the Bay,  
22 the gangway, boat dock and pilings.

23 On May 28th, 2012 Bridgeway submitted an incomplete  
24 permit application to remodel the restaurant. The  
25 application did not include a request for after-the-fact

1 authorization for the boat dock, gangway and pilings  
2 constructed more than a decade earlier. Without  
3 authorization Bridgeway commenced and completed the  
4 restaurant remodel.

5 On August 23rd, 2012 staff commenced the standardized  
6 fine process for the restaurant remodel.

7 In August 2013 the standardized fines reached the  
8 statutory maximum of \$30,000.

9 Between 2012 and 2015 staff made repeated but  
10 unsuccessful attempts to solicit a complete permit  
11 application.

12 Here is a photo showing the primary location of the  
13 unauthorized restaurant remodel.

14 In order to resolve this longstanding enforcement case  
15 on April 14th, 2017 staff notified Bridgeway that the  
16 Executive Director had terminated the standardized fines  
17 process, the fine for which had long ago had reached the  
18 statutory maximum of \$60,000.

19 On June 16th, 2017 staff issued a Violation Report.

20 Over the summer staff met with Bridgeway's agents,  
21 resulting in the provision of the outstanding information  
22 required to complete the amendment application consisting of  
23 property documents and a public access proposal.

24 Both the order and subsequently the permit amendment  
25 will require Bridgeway to provide a signed, ADA accessible

1 path from the street to an onsite public restroom and public  
2 shore viewing area where the public can enjoy sweeping views  
3 of the Bay and San Francisco. This is a copy of their  
4 approved public access site plan we received a few weeks  
5 ago.

6 The terms of the proposed order would require Bridgeway  
7 to cease and desist from all activity in violation of the  
8 McAteer-Petris Act and the permit, provide signed public  
9 access amenities including a restroom that shall be open  
10 during restaurant hours, two benches and a trash can that  
11 shall be available 24 hours a day, 7 days a week, pay a  
12 \$30,000 civil penalty and pay stipulated penalties for  
13 failure to comply with any terms of the stipulated order.

14 Here is a photo of the view from the future public  
15 shore viewing area.

16 This concludes staff's presentation. I will now turn  
17 the floor over to Keith Garner, Sheppard Mullin law firm,  
18 who will speak on behalf of Bridgeway. Thank you.

19 MR. GARNER: Thank you. Good morning, Commissioners  
20 and Chair Techel, we appreciate the opportunity to speak  
21 with you this morning. I am Keith Garner; I am an attorney  
22 here in the San Francisco office of Sheppard Mullin. With  
23 me today is my associate Zach Welsh and Mr. Bob Freeman, the  
24 Executive Officer of 558 Bridgeway. Maggie did a thorough  
25 and accurate job describing the situation in her report and

1 I am going to keep my remarks brief.

2 Some of the improvements, as was evident from the time  
3 line, that are at issue in the violation report, were made  
4 prior to my client taking title to the property through a  
5 bankruptcy proceeding more than a decade ago.

6 I want to stress that none of the activities that  
7 occurred, the violations that occurred, were done  
8 maliciously.

9 Regardless, my client supports the terms of the  
10 stipulated order, which we believe is a full and fair  
11 resolution of the alleged violations.

12 Bridgeway 558 believes that the restaurant draws many  
13 people to the Bay, it is a great way to activate the  
14 shoreline.

15 I want to say we appreciate staff's willingness to  
16 consider a variety of option in bringing this enforcement  
17 matter to a close. The terms were heavily negotiated and  
18 the public access improvements and the fine are costly for  
19 Bridgeway 558. As you may well know, restaurants run on a  
20 fairly thin margin; however, we are pleased to offer the  
21 public access improvements to resolve the dispute and bring  
22 this enforcement matter to a close.

23 So I would like to urge the Committee to approve the  
24 cease and desist order and with that we are happy to answer  
25 any questions you may have.

1           ACTING COMMITTEE CHAIR TECHEL: Okay, thank you. There  
2 is no one else that is going to testify in this case?

3           MS. WEBER: Not that we know of.

4           ACTING COMMITTEE CHAIR TECHEL: I don't have any  
5 comment cards either - I have one for Item 6 - so I will  
6 look to board members for questions, comments.

7           COMMITTEE MEMBER GIBBS: I have a few questions.

8           ACTING COMMITTEE CHAIR TECHEL: All right, we'll start  
9 with you.

10          COMMITTEE MEMBER GIBBS: So I want to make sure I  
11 understood one part of the narrative. I believe I heard  
12 something like between 2004 and 2011 staff was unable to get  
13 in contact with the restaurant owner, I don't know if it was  
14 Bridgeway or not; did I hear that correctly?

15          MS. WEBER: It wasn't that we were unable to get in  
16 contact with them, it's just, as you know, we have quite a  
17 few enforcement cases and I believe this one just kind of  
18 fell off of the focus. I'm sure Adrienne can speak to that  
19 more, if you --

20          COMMITTEE MEMBER GIBBS: Because I am sitting here  
21 imagining that if you rewrote it it would actually say,  
22 staff made repeated attempts to contact Bridgeway and they  
23 never responded; is that accurate?

24          MS. WEBER: Um.

25          COMMITTEE MEMBER GIBBS: I don't understand how a

1 matter like this can not have any contact for seven years so  
2 I would like to understand that first.

3 MS. KLEIN: We -- I believe the ball was left in 2012  
4 in Bridgeway's court and I would have to go back to my  
5 workload at that moment in time and figure out exactly what  
6 pulled me away. But we usually relied -- or in the past we  
7 relied more on the respondent to respond. So the trail -- I  
8 didn't pursue the case and it went dry.

9 COMMITTEE MEMBER GIBBS: Okay. So would it or would it  
10 not be accurate to describe this as kind of repeated  
11 recalcitrance over a period of years to respond to BCDC's  
12 efforts to get in touch and have a resolution? Because if  
13 it is that's one thing, if it's not that's another.

14 MS. KLEIN: I worked very patiently and consistently  
15 for a number of years to secure a filed application so that  
16 we could retroactively authorize the remodel and the boat  
17 dock, which we have always been ready and willing to do.  
18 But as you know, without the filing requirements we just  
19 can't get it past --

20 COMMITTEE MEMBER GIBBS: Were they responsive?

21 MS. KLEIN: No.

22 COMMITTEE MEMBER GIBBS: Okay. Then remind me, what is  
23 the amount of the fine, please?

24 MS. WEBER: The settled fine is \$30,000.

25 COMMITTEE MEMBER GIBBS: Okay. So first I'll ask you,

1 then I'd like to ask the respondent, why is it appropriate  
2 to ignore BCDC for seven years, apparently, and then at the  
3 end of the day we wind up with a fine of \$30,000, which  
4 seems to me not even a slap on the wrist?

5 MS. WEBER: The \$30,000 penalty was negotiated in  
6 collaboration with the public access amenities that  
7 Mr. Freeman, through his corporation Bridgeway, have agreed  
8 to provide. There haven't been any public access  
9 opportunities on this parcel since BCDC has come into  
10 existence. And as we all know Sausalito is definitely one  
11 of our focal points for tourism in the Bay Area and we  
12 thought that the public access package compensated for the  
13 respondent not paying the \$60,000 penalty.

14 MS. KLEIN: As you know, Commissioner Gibbs, the  
15 administrative maximum liability is \$30,000 per violation,  
16 regardless of severity or duration.

17 COMMITTEE MEMBER GIBBS: Do you believe that the owner  
18 of a restaurant in Sausalito, a bayfront restaurant, should  
19 know that it is necessary to get permits from BCDC before  
20 you expand or make improvements?

21 MS. KLEIN: In fact we had an application for the  
22 project before the project started.

23 COMMITTEE MEMBER GIBBS: Okay. May I turn to the  
24 respondent now?

25 ACTING COMMITTEE CHAIR TECHEL: Yes, sure.

1 COMMITTEE MEMBER GIBBS: You can just -- if you  
2 understand the theme of what I'm trying to get to I'd like  
3 to hear your thoughts.

4 MR. GARNER: I do. One thing I want to make clear, as  
5 I stated, some of the improvements in question were made  
6 before Mr. Freeman took title to the property. So they were  
7 done, the dock was the improvement that was done in 1999.  
8 He didn't come into ownership until I believe it was 2004,  
9 '03 or 2004. So it was later so he stepped into the middle  
10 of that.

11 I can't speak directly to the trail of communications  
12 between say 2003 when he took title and 2012 when the  
13 improvements to the deck were made. What I do know is that  
14 after 2012 there was -- an application was filed.  
15 Mr. Freeman through his architects and his agents did make  
16 attempts to complete the application and unfortunately it  
17 just took longer than expected.

18 We are happy that we were able to bring this to a  
19 resolution when we got involved, but I don't think it's a  
20 fair characterization to say that they ignored BCDC. There  
21 was -- Adrienne was correct, she was very patient in working  
22 with the applicant to get this resolved, as there was a  
23 constant stream of contact, it just was proceeding slowly.  
24 But we are happy to bring this to a resolution today.

25 COMMITTEE MEMBER GILMORE: Can I follow up on his

1 comment? So if I am understanding this correctly, there was  
2 a permit filed to complete the remodel of the restaurant; is  
3 that correct? But it was an incomplete permit.

4 MR. GARNER: There was a permit application that was  
5 filed, I don't know the exact date but it was in 2012, and  
6 it was related to the improvements with the restaurant.

7 COMMITTEE MEMBER GILMORE: So therefore the owner knew  
8 enough to file a permit application with BCDC but didn't get  
9 the permit approved and went ahead and did the remodel  
10 anyway.

11 MR. GARNER: The remodel took place before the permit  
12 was issued, yes.

13 COMMITTEE MEMBER GILMORE: Okay. I just wanted to make  
14 sure I had that correct. Thank you.

15 COMMITTEE MEMBER GIBBS: Would you care to offer a  
16 statement or have the owner offer a statement on why that's  
17 appropriate?

18 MR. FREEMAN: I'm Robert Freeman, Bob Freeman, Chair  
19 and Members. A lot of history here. I'm sure you don't  
20 want to go down Memory Lane although I guess I have to try  
21 to peel the onion here so everybody understands.

22 I was involved with the restaurant -- in '97 my company  
23 came in and leased the restaurant from the prior owners that  
24 bought the property from Mr. MacAnnan who filed the original  
25 permit in 1967, I think it was, or '76. In 1976 there was a

1 permit filed and he did work.

2 But anyway, I came in as President of the California  
3 Cafe Restaurant Corporation and we took over the operation  
4 of the restaurant and operated it for a few years.

5 The owners of the property, Fritz Arko, Past President  
6 of Pier 39, I'm sure you're all familiar with, and Linda  
7 Fotsch, were the major owners of the building and they  
8 basically decided to put the dock/pier/floats back in that  
9 were originally there and had been sunk by Mr. MacAnnan.

10 They pulled them up. Western Dock pulled them up,  
11 cleaned them up and reinstalled them. And that's -- at that  
12 point in time I as the operator of the restaurant, my  
13 company, we said we wouldn't take any responsibility for  
14 them because they hadn't had them permitted, et cetera, et  
15 cetera. Well, that music went on back and forth for I  
16 couldn't tell you how long.

17 In the meantime my company had a bit of a change. We  
18 brought in some new money and I traded my position in the  
19 company, my stock position in the company for ownership in  
20 the lease at 558 Bridgeway so I became the operator of the  
21 restaurant.

22 That went for a very short period of time, at which  
23 time there was a major upheaval there, a lawsuit with the  
24 landlords which were Mr. Arko and Ms. Fotsch. They had a  
25 major lawsuit that went on forever and ever and it is still

1 continuing to go on I might add. It included me with the  
2 largest judgment and I ended up -- as part of what I got was  
3 the property at 558 Bridgeway. In getting that property I  
4 got it with a \$5 million tag with the bank. So I didn't  
5 just get a bag of money, I got a bag of money with a hole in  
6 it so I have been digging ever since.

7 I had that restaurant as mine then since the early --  
8 the mid, what, 2004 or '05, whatever it was, '06, '07. Pick  
9 a -- '07, I guess it was. So I finally took that over as  
10 558 Bridgeway and I have been operating since.

11 I laid off most of the operating company. I have  
12 partners there so I am only a 50 percent owner of the  
13 restaurant and I own the property. It's not a corporation,  
14 it's me, so I don't -- it's not a -- it looks wonderful but  
15 it's not quite as wonderful as you think. I've had some  
16 major league headaches there.

17 When this work that was going to be done, it started  
18 out as a minor, minor tuneup, i.e., a paint and putty job.  
19 And the day we were to start the City said we had an ADA  
20 complaint. And that complaint, I'm sure that it came from  
21 the same place where I won the lawsuit, it came from the  
22 people that used to be involved.

23 The City took it to a heightened review, if you will,  
24 and so we had a major tuneup in terms of ADA. And it  
25 dragged us then through the summer, we lost one whole summer

1 of sales. It was actually one of the summers that it didn't  
2 rain a drop and it was just beautiful and even the winter  
3 was nice. So we lost basically a year of sales, which is  
4 almost impossible, and it drove the price tag of the work up  
5 to \$1.7 mill.

6 So that was as close to the grave as I need to get so  
7 that's what went into the property. We've reopened then  
8 after that. Don Olsen was the architect; and actually he  
9 was an original architect for me back in the beginning of  
10 time he was doing it. Don was at all times, "Oh, don't  
11 worry, I'll talk to BCDC" or "I'll send them this" or "I'll  
12 send them this" so I didn't really get involved at all. And  
13 I never talked to anyone at BCDC until Adrienne, I think,  
14 spoke to me sometime during that construction project. At  
15 that I realized that things were not as good as they should  
16 be and I think that's around the time she suggested that  
17 maybe Mr. Olsen wasn't connecting all the dots. And as much  
18 as I like Don he was having a bit of a senior moment - we  
19 all have our chance to have that I'm sure - so we made the  
20 change at their recommendation to get someone else.

21 Then we had a lawyer that did other work for us, took  
22 over and he worked with them for a period of time. So I was  
23 not -- again I had no communication myself. So that went on  
24 for awhile and again the well went dry. We finally got the  
25 place reopened and struggled along with it.

1           Then our lawyer then, John Scheuring said that he knew  
2 Mr. Garner and that he would be the man to help get us to  
3 the finish line here and to get everybody to understand  
4 what's going on and get us finished.

5           Just so you understand. Back when the original --  
6 whenever we took over as California Cafe we took over the  
7 operation of the restaurant back in '97. And then in the  
8 late '90s, '99, we did a renovation inside, upstairs, of  
9 Ondine, the paint and putty job, and the addition of an  
10 elevator, so that made that ADA compliant at that point in  
11 time.

12           When we did that we put -- there was an outside  
13 lavatory which wasn't up to speed and we basically brought  
14 that up to speed at that point in time. I'm pretty sure  
15 that BCDC had requested that we make a lavatory available to  
16 the public, which we basically said we would do.

17           And we tuned that lavatory up; it needed to have the  
18 door changed and a few things to make it compliant to the  
19 newest standard. And so we had that lavatory available all  
20 these years but, you know, it's not been -- it wasn't  
21 required. At some point in time I thought it was but I  
22 guess it wasn't. But at this point in time it is now tuned  
23 up again and will be available for the public at all times  
24 we're open.

25           We're going to add a few benches where you can have a

1 reasonable look at the City, the views up on the board here.  
2 It's actually a little higher than that so you don't really  
3 have to look at the jagged fishing pier beside us, which is  
4 a city-owned pier which most people in Sausalito think I own  
5 it. They call it Bob Freeman's Pier and I get the stones.  
6 They think I'm the one with the derelict pier.

7 I talked to the City in the late '90s when we just got  
8 there and we talked about the possibility of rehabbing it  
9 ourselves to make it into something that would look a lot  
10 better and that was in, what, '99 or something and here we  
11 are, 2017 and it still looks like this. It's not been a bed  
12 of roses. So when people think that I'm a scofflaw I hope  
13 that that was not the final opinion.

14 So a long-winded answer but all the issues you brought  
15 up all dovetail and tie into it. If you have any questions  
16 on that I'm more than happy to try and answer.

17 COMMITTEE MEMBER GIBBS: Thank you for your answer.

18 Madame Chair, if it's appropriate could we hear from  
19 either the Executive Director or Mr. McCrea or Ms. Klein as  
20 to kind of the context of this settlement proposal and why  
21 they believe it's a good deal for BCDC?

22 MR. MCCREA: Good morning. As Maggie pointed out, in  
23 negotiations with settlements we often look at the whole  
24 package and the improvements in the public access area,  
25 providing public access that wasn't there before combined

1 with a penalty, per se, seems to be the right approach.

2 I think what you'll find as we go through -- let me  
3 back up a little bit and say, as you know the Enforcement  
4 Committee has been dormant for some time. Until our current  
5 Executive Director came on board our enforcement program was  
6 a bit stalled. We are bringing projects before you that  
7 have been lingering for a long time. And I think as we go  
8 through the months and years ahead and as we clear the deck,  
9 so to speak, of past enforcement cases, you will find that  
10 we are bringing seemingly stale projects to you. And that's  
11 just a function of us having this working, active program  
12 again and bringing these items through. So some of that,  
13 some of what we are talking about today is a function of  
14 that reality.

15 COMMITTEE MEMBER GIBBS: Thank you.

16 COMMITTEE MEMBER GILMORE: So I have to say that I  
17 appreciate the context both from -- I guess it's the  
18 applicant, the proponent, whatever -- sorry.

19 (Laughter.)

20 COMMITTEE MEMBER GILMORE: And staff's position. The  
21 one thing that concerns me, and I think maybe other members  
22 of the Committee, is there's always this tension between  
23 having people come before us and ask for forgiveness rather  
24 than permission. And I understand that having our  
25 enforcement process stalled lends itself to that a lot. I

1 would just caution as we ramp up our enforcement and we get  
2 to matters that aren't so stale that we really take a look  
3 at being harder on people who did not ask for permission and  
4 wanted to come and ask for forgiveness.

5       Because it really bothers me. I think people need to  
6 understand that the rules are there for a reason, it's to  
7 protect our Bay. I think there is this feeling that, oh, if  
8 I go ahead and I build something and I spend lots of money  
9 building it they can't possibly ask me to tear it down. And  
10 I want to nip that in the bud. So that is just my personal  
11 feeling so I just wanted to say that, thank you.

12       ACTING COMMITTEE CHAIR TECHEL: Mayor Addiego.

13       COMMITTEE MEMBER ADDIEGO: Thank you, Chair Techel.

14       I appreciate the question giving Mr. Freeman the  
15 opportunity to go through the travails of being a  
16 businessman. And I think it does lend a perspective that is  
17 important for us to hear because, you know, in the abstract  
18 just looking at this action and all the time that's gone by,  
19 there's a lot of frustration and it's genuine.

20       But when we understand the limitations up to this point  
21 of BCDC in the enforcement world, the resources that have  
22 been allocated for this, there's two sides of this coin and  
23 it's not all on Mr. Freeman. So I applaud you for coming to  
24 agreement with our staff and I am looking forward to a  
25 speedy resolution and moving ahead. That's really as much

1 on us as it is on you.

2 ACTING COMMITTEE CHAIR TECHEL: And it's important that  
3 we had this discussion, that we brought up these questions,  
4 because when we bring it to the full commission they will be  
5 looking to us to say, did you ask these questions? Because  
6 they're only able to read what they get in the packet. And  
7 so unless we can say, yes, Mr. Gibbs asked those really  
8 tough questions and we felt that we got answers that we will  
9 be better able to relate to the total Commission. Because  
10 they overturned us before and asked for a higher fine so we  
11 want to be sure that we have done our due diligence as we go  
12 forward.

13 Is there any other comments or are we ready for a  
14 motion?

15 COMMITTEE MEMBER GIBBS: You can just add: And then  
16 Mayor Gilmore expressed what he was really feeling in a much  
17 nicer, sweeter, more politic way than he ever could.

18 (Laughter.)

19 ACTING COMMITTEE CHAIR TECHEL: That's why we're a  
20 team. So I am looking for a motion on this item?

21 COMMITTEE MEMBER GILMORE: I will move approval of the  
22 staff recommendation.

23 COMMITTEE MEMBER GIBBS: I second.

24 ACTING COMMITTEE CHAIR TECHEL: We have a motion and a  
25 second. All in favor say "aye."

1 (Ayes.)

2 ACTING COMMITTEE CHAIR TECHEL: Opposed?

3 (No response.)

4 ACTING COMMITTEE CHAIR TECHEL: The motion passes.

5 COMMITTEE CHAIR SCHARFF: I abstain.

6 ACTING COMMITTEE CHAIR TECHEL: You abstain, yes.

7 At this point our Chair has arrived, just in time to  
8 take us through Item 6.

9 COMMITTEE CHAIR SCHARFF: All right. Does staff want  
10 to start with Item 6?

11 MS. WEBER: Yes, let me cue up the PowerPoint, hold on  
12 a second.

13 COMMITTEE CHAIR SCHARFF: I will just say for the  
14 public it is a Public Hearing and a Possible Vote on a  
15 recommended enforcement decision involving proposed Cease  
16 and Desist and Civil Penalty Order No. CDO 2017.03; the  
17 Heron Bay Homeowners Association.

18 MS. WEBER: Item 6 on the agenda today is the Executive  
19 Director's recommended enforcement decision on proposed  
20 Cease and Desist and Civil Penalty Order No. CDO 2017.03  
21 that would be issued to Heron Bay Homeowners Association.

22 This enforcement case was readily eligible for  
23 resolution for two years without the imposition of  
24 standardized fines and for a third year with the  
25 standardized fine process in place.

1           However, during this time the respondents did not  
2 submit a complete amendment request to enable staff to issue  
3 a permit with the public access requirements that match the  
4 as-built site conditions.

5           In May the standardized fines reached the  
6 administrative maximum and the formal enforcement proceeding  
7 is the next step available to achieve resolution.

8           The 629 unit Heron Bay residential development is  
9 located adjacent to the San Leandro Marsh and the Shoreline  
10 Trail Network in the City of San Leandro, Alameda County.

11           Here is a site map of the Shoreline Trail Network and  
12 the HOA property, which is identified in blue. The  
13 Shoreline Trail Network, identified in green, and the six  
14 public shore parking spaces located in Lewelling traffic  
15 circle, identified in orange, are public access areas  
16 required by both the City of San Leandro's BCDC permit and  
17 then duplicated in the residential development BCDC permit  
18 with the exception of the parking in the traffic circle,  
19 which the City agreed to last year and has implemented.

20           Pursuant to a 1994 settlement agreement BCDC entered  
21 into with Citation Homes, the developer of Heron Bay and the  
22 HOA's predecessor in interest, Citation was required to  
23 provide public access improvements, as I have just noted,  
24 almost identical to the City's public access requirements,  
25 located both within and outside BCDC's shoreline band

1 jurisdiction.

2 Identified in red is Bayfront Drive, the location of  
3 the physical violation subject to this proceeding, where  
4 Citation was required to provide a minimum eight-foot wide  
5 paved public access path for pedestrians and cyclists with a  
6 minimum four-foot wide shoulder, but instead constructed a  
7 five-foot wide paved public access path with two landscaped  
8 shoulders totalling about twelve feet.

9 As you can see, Bayfront Drive serves as the southern  
10 gateway to the City's Shoreline Trail Network. This  
11 enforcement proceeding addresses violations located on or  
12 affecting the outstanding Bayfront Drive public access  
13 requirement.

14 Today's presentation will include a time line of  
15 events, a description of the unauthorized work and permit  
16 violations, a summary of the HOA's statement of defense and  
17 staff's responses and the key terms of the proposed Cease  
18 and Desist and Civil Penalty Order.

19 On July 22nd, 1994, BCDC issued Permit No. M1992.057 to  
20 Citation.

21 In 1999 Citation transferred ownership of Heron Bay's  
22 common areas, including Bayfront Drive, to the HOA. As a  
23 result the HOA became the successor in interest to Citation  
24 under the permit; in violation of the permit, no formal  
25 assignment of the permit occurred in connection with this

1 transfer of ownership and BCDC was not otherwise informed.  
2 The absence of a permit assignment is the second violation  
3 subject to this proceeding.

4 In April of 2014 staff learned that the HOA was seeking  
5 approval from the City to construct three gates and fencing  
6 at the entrance of Heron Bay development to address security  
7 concerns, one of which would control vehicular, bicycle and  
8 pedestrian access to Bayfront Drive and Robert Landing  
9 Slough in the Shoreline Trail area.

10 Staff determined that the gate through which the public  
11 would reach Bayfront Drive could have an adverse impact on  
12 existing required public access and therefore it needed to  
13 secure BCDC authorization via a permit amendment prior to  
14 construction.

15 During staff's review of the permit history it  
16 discovered the permittee's failure to record a legal  
17 instrument to permanently guarantee the public access area,  
18 which is the third violation subject to this proceeding.

19 In June 2014 staff discovered the Bayfront Drive public  
20 access violation and informed the HOA of the three  
21 violations. The HOA acknowledged its legal obligation as  
22 successor of the permit to fulfill all outstanding  
23 requirements of the permit.

24 In recognition of the fact that the HOA would need to  
25 obtain local discretionary approval of any security

1 installations before it could file a complete BCDC permit  
2 application staff provided the HOA with a nine-month long  
3 voluntary compliance period for the HOA to obtain city  
4 approval. In June 2014 the City Planning Commission denied  
5 the HOA's first of two applications to install security  
6 measures and in September of 2014 the City Council denied  
7 the HOA's appeal of the Planning Commission's decision.

8 One year later in July of 2015, staff informed the HOA  
9 that the time had come to address the violation separate  
10 from their security concerns and requested an application to  
11 amend the permit to resolve the violations.

12 In September and October of 2015 staff received and  
13 responded to the HOA's first incomplete application to amend  
14 the permit.

15 Seven months later in May 2016, after not receiving any  
16 follow-up from the HOA regarding the application, staff  
17 informed the HOA that it was commencing the standardized  
18 fines process. At this time staff recommended that the HOA  
19 submit a request to amend the permit to resolve the  
20 violations separate from and in advance a still-desired  
21 amendment to install a security kiosk to avoid increasing  
22 the accrual of standardized fines while waiting for city  
23 approval of the kiosk.

24 In July of 2016 staff received the HOA's second  
25 incomplete application to amend the permit, which included a

1 request to construct the security kiosk.

2 In August staff responded and explained what the HOA  
3 needed to do in order to complete the application.

4 In December 2016 San Leandro's City Council denied the  
5 security kiosk but the HOA did not revise its application to  
6 remove the security kiosk.

7 Four months later in April 2017 staff notified the HOA  
8 that the Executive Director had terminated the HOA's  
9 opportunity to resolve the penalty portion of the  
10 enforcement matter using the standardized fines process and  
11 would commence a formal enforcement proceeding.

12 In May 2017 staff received the HOA's third incomplete  
13 application to amend the permit. Although the application  
14 did not include the kiosk it lacked most of the information  
15 outlined in the August 2016 letter.

16 In June 2017 staff informed the HOA of this fact.

17 Also in June 2017 the Executive Director commenced a  
18 formal enforcement proceeding by issuing a violation report  
19 and complaint for the imposition of administrative penalties  
20 for the violations.

21 In July 2017 staff met with the HOA to discuss the  
22 violation report, the status of the incomplete permit  
23 applications and the possible terms of the settlement  
24 agreement.

25 On August 18, 2017, staff mailed the HOA a draft

1 proposed stipulated order. On August 24 the HOA's attorney  
2 acknowledged receipt of the transmittal and expressed his  
3 intention to present the proposed order to the HOA board  
4 members at their meeting that night. Staff has received no  
5 further communication from the HOA or its attorney.

6 All the HOA needs to do to complete its amendment  
7 application is provide an Interested Parties List and a site  
8 plan that shows the dimensions of the as-built public access  
9 path and landscape buffers on Bayfront Drive. However,  
10 despite several requests from staff these two items remain  
11 outstanding.

12 The order requires the timely resolution of five  
13 outstanding violations:

14 The failure to submit and gain staff approval of a  
15 public access plan for the built public access pathway on  
16 Bayfront Drive, as shown in the photo to the right.

17 The failure to permanently guarantee the Bayfront Drive  
18 public access area.

19 The failure to provide the public access improvements  
20 on Bayfront Drive that are required by the permit.

21 The failure to assign the permit.

22 And the failure to remove unauthorized restrictive  
23 signage on Bayfront Drive, as shown in the photographs on  
24 this slide.

25 On August 15, 2017, the HOA submitted a Statement of

1 Defense arguing that no fine or penalty should be imposed  
2 and presented three arguments to support its position. The  
3 arguments are limited to those pertaining to the civil  
4 penalties as the HOA does not dispute the physical and paper  
5 violations nor the means to resolve them.

6 First, the HOA argues that it was unaware of the  
7 violations until 2014. Staff recognizes that the HOA  
8 inherited the violations and was not aware of them until  
9 2014, which is part of why staff provided a two-year  
10 voluntary compliance period before it commenced a  
11 standardized fines process in 2016. Daily administrative  
12 fines have not been calculated from when the violations  
13 occurred but from when the HOA was provided notice and  
14 direction of how to resolve them; with the exception of the  
15 restrictive signage violation, that was discovered last  
16 April on a site visit in connection with preparing the  
17 violation report.

18 Second, the HOA argues that it has cooperated with  
19 staff and attempted to resolve each of the violations since  
20 discovery. The duration of the enforcement matter,  
21 including three incomplete amendment applications,  
22 demonstrates that the HOA has been far from diligent in  
23 resolving any - not even one of the five - of the  
24 violations, despite extensive staff assistance.

25 The HOA has not removed the restrictive parking signs

1 and posted BCDC public shore signs nor completed the BCDC  
2 permit assignment form, let alone complete its amendment  
3 request. The legal instrument violation cannot be resolved  
4 until staff issues an amended permit.

5 Finally, the HOA argues that it is unable to pay the  
6 accrued \$124,500 fine. Since the HOA has not provided any  
7 records of its annual assessments and expenses staff cannot  
8 assess whether the penalty would create a hardship on the  
9 HOA. The HOA has only provided a statement of its available  
10 resources, of which the fine would consume 54 percent.

11 I would now like to introduce Staff Counsel John Bowers  
12 to discuss this issue further.

13 MR. BOWERS: Chair Techel and Members of the Committee,  
14 the HOA in its Statement of Defense advances the defense  
15 that the law that governs the activities of homeowners  
16 associations, like the respondent, limits their ability to  
17 assess their members to only matters relating to the  
18 maintenance and improvements in the common areas of the  
19 development; and therefore, that they lack the legal ability  
20 to pay any fines or civil penalties that this body might  
21 assess against the HOA. We simply do not agree that this is  
22 a correct interpretation of the law. It's called the Davis-  
23 Stirling Act, that governs the activities of homeowners  
24 associations like the respondent.

25 The law is found -- the Davis-Stirling Act is found in

1 the Civil Code of the statutes of the State of California  
2 and it states in relevant part, and I think this is the  
3 applicable provision that governs this issue, that HOAs have  
4 the authority to assess their membership in order to raise  
5 monies necessary or sufficient to enable the HOA to perform  
6 its obligations under the governing documents - and these  
7 are typically referred to as CC&Rs - and this Act, the  
8 Davis-Stirling Act.

9 As the HOA agrees and acknowledges in its Statement of  
10 Defense, one of its obligations under the CC&Rs or the  
11 governing documents is the maintenance and improvement of  
12 the common areas.

13 What we think is necessarily implicit in this grant of  
14 authority under this law is the authority to raise whatever  
15 costs are necessary to enable the HOA to apply for and  
16 obtain and comply with any governmental approvals that are  
17 necessary for these improvements in the common areas.

18 We also think that it is equally implicit in this grant  
19 of authority that the HOA has the ability to assess its  
20 membership for any costs that the HOA may incur as the  
21 result of any failure on the part of the HOA to comply with  
22 any necessary governmental approvals.

23 So we feel that the HOA clearly has the ability to  
24 assess its membership for any costs associated with its  
25 obligations that this agency, BCDC, may impose on the HOA to

1 bring it into compliance with the permit and to assess any  
2 civil penalties against the HOA for any past non-compliance  
3 with the BCDC permits. Thank you.

4 COMMITTEE MEMBER GIBBS: Could I ask a question?

5 COMMITTEE CHAIR SCHARFF: Absolutely.

6 COMMITTEE MEMBER GIBBS: Counsel Bowers, it would shock  
7 me if this was the first time in California history a  
8 governmental body had tried to fine an HOA for a violation  
9 or alleged violation of its regulations. Has this been  
10 ruled on by a court, the interpretation that we're talking  
11 about?

12 MR. BOWERS: So far as I know it has not. I am not  
13 aware of any court decision that has specifically addressed  
14 this issue.

15 COMMITTEE MEMBER GIBBS: And the enabling legislation,  
16 what was the name of the statute? The Davis-something?

17 MR. BOWERS: Stirling. Yes, it's called the Davis-  
18 Stirling Act.

19 COMMITTEE MEMBER GIBBS: Does it provide in any of its  
20 other provisions that one of the things that an HOA should  
21 do is comply with relevant government regulations?

22 MR. BOWERS: It doesn't say that in any expressed way.  
23 I think it's implicit, though, that if the HOA is going to  
24 be doing things in maintaining the common areas, making  
25 improvements to the common areas, those activities are going

1 to require from time to time governmental approvals. As  
2 this HOA has sought and obtained on numerous occasions, both  
3 from the City of San Leandro where it's located and from the  
4 BCDC. Nobody has questioned the need for or the ability of  
5 the HOA to go out and obtain those kinds of governmental  
6 approvals.

7 COMMITTEE MEMBER GIBBS: So if they believe they have  
8 the power to obtain them, presumably they have the power to  
9 comply with them?

10 MR. BOWERS: Absolutely.

11 COMMITTEE MEMBER GIBBS: All right. Well maybe we have  
12 a test case here.

13 COMMITTEE CHAIR SCHARFF: Go on.

14 MS. WEBER: Thanks, John.

15 So the terms of the proposed order would require the  
16 HOA to cease and desist from all activity in violation of  
17 the permit, complete an application for the permit amendment  
18 by October 9th, 2017, record a staff-approved public access  
19 permanent guarantee no later than 30 days after the amended  
20 permit issued, remove all unauthorized signage by November  
21 4th, 2017, install public access amenities no later than 30  
22 days after the amended permit is issued, and pay a \$124,500  
23 civil penalty to the Bay Fill Cleanup and Abatement Fund  
24 within 30 days of issuance of the Order.

25 In order to determine the appropriate amount of

1 administrative civil liability, Government Code Section  
2 66641.9(a) requires the Commission to consider the following  
3 factors that are on the screen: Nature, circumstance, extent  
4 and gravity of violations.

5 Staff agrees that the HOA inherited the failure of  
6 Citation, its predecessor in interest, to fully comply with  
7 the permit. However, this enforcement proceeding is not  
8 about what Citation should have done but with the HOA's  
9 failure to fully resolve the violations in spite of having  
10 ample time and assistance to do so.

11 Whether the violation is susceptible to removal: All  
12 violations are susceptible to either removal or resolution.

13 The cost to the state in pursuing this enforcement  
14 matter: The state has spent hundreds of staff hours  
15 attempting to bring the HOA into compliance with its permit.

16 The violator's ability to pay, the effect on ability to  
17 continue business: The HOA has not disclosed nor provided  
18 any formal financial statements to demonstrate if the fines  
19 prevent its ability to pay its annual expenses.

20 Whether any voluntary removal or resolution efforts  
21 have been undertaken: The HOA has not undertaken sufficient  
22 steps to resolve this matter in a reasonable time period.

23 Prior history of violations: The HOA has no history of  
24 prior violations.

25 And finally, the degree of culpability: The

1 administrative penalty could have been avoided if the HOA,  
2 after receiving notice of the violations, had resolved them.  
3 Instead the HOA has caused BCDC to expend significant staff  
4 resources in trying to work with the HOA to resolve the  
5 violations.

6       Since 2014 the HOA has stated that it wants to resolve  
7 the violations and work with staff to amend the permit,  
8 which needs to happen before the permanent guarantee and  
9 failure to provide public access improvement violations can  
10 be resolved. But instead it has submitted three incomplete  
11 applications to amend the permit.

12       After staff responded to the first application the HOA  
13 ignored staff until the standardized fines process was  
14 commenced seven months later. Two months after that staff  
15 received and responded to the second application. Even  
16 though fines were accruing the HOA again ignored staff until  
17 it received notice nine months later that staff was  
18 initiating a formal enforcement proceeding.

19       On the basis of these factors staff determined the  
20 daily penalties listed in the second-to-last column on the  
21 civil penalties chart shown on this slide and page 10 of the  
22 staff report. Government Code Section 66641.5(e) allows the  
23 Commission to administratively impose civil penalties in an  
24 amount that shall not be less than \$10 nor more than \$2,000  
25 for each day in which the violation occurs or persists.

1 Daily fines have been calculated at the low end of the range  
2 because even though staff has spent way too much time trying  
3 to bring the HOA's permit into compliance, it's a simple  
4 case and staff doesn't understand why the HOA hasn't been  
5 able to file a complete amendment application.

6 Staff recommends a penalty of \$250 a day for each of  
7 the two most serious violations, which are the failure to  
8 take assignment of the rights and obligations of the permit  
9 and the failure to obtain after-the-fact authorization to  
10 legalize the as-built construction of the public access  
11 improvements. A daily penalty of \$250 is one-eighth of the  
12 potential maximum daily penalty.

13 Staff recommends a lesser penalty of \$200 a day for the  
14 failure to record the permanent guarantee prior to issuance  
15 of the amended permit because while currently required, it  
16 would have to be done a second time and therefore it would  
17 be unreasonable.

18 Staff recommends an again lesser penalty of \$150 a day  
19 for the failure to submit and gain staff approval of public  
20 access plans for the as-built public access because this is  
21 the simplest task.

22 Finally, staff recommends an again even lesser penalty  
23 of \$100 a day for the failure to remove an unauthorized  
24 restrictive signage on Bayfront Drive because it is the  
25 simplest task. The other one was just a simple task, I

1 apologize.

2 This concludes staff's presentation supporting the  
3 Executive Director's recommendation that the Enforcement  
4 Committee adopt the proposed Cease and Desist and Civil  
5 Penalty Order No. CDO 2017.003 to Heron Bay Homeowners  
6 Association. Thank you.

7 COMMITTEE CHAIR SCHARFF: So before you leave I had a  
8 question. Why would staff recommend such a low daily  
9 penalty for placement of the unauthorized restrictive  
10 signage on Bayfront Drive? That seems like the easiest  
11 thing they could do to resolve it, frankly; they could  
12 remove it right away, it doesn't seem like a problem, and it  
13 seems to have a big impact in that it discourages people  
14 from having public access.

15 MS. WEBER: I agree, Commissioner Scharff, it does seem  
16 like a very easy violation to resolve and does have impact,  
17 but it was a violation that the HOA wasn't informed of until  
18 the violation report was issued in June. So because the HOA  
19 didn't have as much notice of the violation beforehand with  
20 specific direction of how to correct we felt that we didn't  
21 want to penalize the HOA as much as the other violations.

22 COMMITTEE CHAIR SCHARFF: So they've had 45 days,  
23 right, of notice of this?

24 MS. WEBER: The duration of days was calculated from --  
25 for the other violations the duration of days is calculated

1 from when the staff first provided notice to the HOA with  
2 direction of how to correct the violations; and the last  
3 violation, the placement of the unauthorized signage, that  
4 duration is calculated from when I discovered the violation  
5 on a site visit to the issuance of the violation report.  
6 Just because we didn't know how long the negotiations would  
7 take we capped the duration when the violation report was  
8 issued.

9 COMMITTEE CHAIR SCHARFF: But why would the HOA believe  
10 that it would be acceptable to place that unauthorized  
11 signage there?

12 MS. WEBER: That is an excellent question that I can't  
13 answer for the HOA.

14 COMMITTEE CHAIR SCHARFF: And just to conform, we would  
15 actually have the right to raise that penalty on a daily  
16 basis if we so choose?

17 MS. WEBER: That is correct.

18 COMMITTEE CHAIR SCHARFF: Up to \$2,000 a day if we so  
19 chose?

20 MS. WEBER: That is correct.

21 COMMITTEE CHAIR SCHARFF: Thank you.

22 COMMITTEE MEMBER GILMORE: So I just want to ask one  
23 question. So as I read this and I listen to the staff  
24 report it sounds like the HOA concedes the violation and  
25 the major thing that we are here to argue about today is the

1 amount of the fine.

2 MS. WEBER: That is correct.

3 COMMITTEE MEMBER GILMORE: Okay, thank you.

4 COMMITTEE CHAIR SCHARFF: Anyone else?

5 Okay, can we hear from the HOA?

6 MR. BERGER: My name is Alan Berger. I am the attorney  
7 for Heron Bay Homeowners Association and I have served in  
8 that capacity for many, many years, predating our  
9 involvement with BCDC, and I thank the Commissioners for  
10 giving us their time today.

11 I will say at the outset that I have been a litigator  
12 for over 40 years and I am used to sitting quietly while one  
13 listens to the other side's presentation, that's the nature  
14 of it. I don't believe I have heard one in recent times  
15 that was as one-sided and as inflammatory and I certainly  
16 didn't expect it from a state agency but with the  
17 Commissioners' permission I will go through the terms.

18 Just because sometimes you jump ahead when you hear  
19 something that sticks, I did hear counsel's interpretation  
20 of the Davis-Stirling Act. It's a well-known act that I  
21 have been working with for more than 30 years. I would  
22 submit that his interpretation is wrong. The Commissioner  
23 suggests that it might be a test case. We are certainly  
24 willing to do that, let's hope it's not necessary, but if we  
25 want to test Davis-Stirling we can certainly do that.

1 I will just briefly mention the sign issue that the  
2 Chair mentioned and that will be addressed by Mr. Richard  
3 Brennan who is here today. He is an owner at Heron Bay, he  
4 is a board member and he is also a member of the City of San  
5 Leandro Planning Commission. Also with me is Brian Ritter  
6 who is the agent and manages the finances of the  
7 Association; he can talk to the issue about finances.

8 But I just -- I'll let Richard do it but I can't let it  
9 pass. The sign that we are talking about is not an  
10 inappropriate sign. The sign we are talking about, which in  
11 all of the discussions we have had with BCDC over the last  
12 three years was never mentioned until this June, that sign  
13 is a "Permit Parking Only" sign and meets all the California  
14 Vehicle Code legal requirements. That sign should have  
15 nothing to do with BCDC because the one thing that BCDC  
16 admits is that there is no public parking on Bayfront. That  
17 sign protects the residents of Bayfront from illegal  
18 parking. BCDC has no right to demand parking on Bayfront  
19 and has never alleged as such. I'll let Richard discuss it  
20 further; being a Planning Commissioner he is more familiar  
21 with that than I am.

22 I did want to state that there is one statement and  
23 perhaps it was incorrectly stated in our Statement of  
24 Defense. We do agree - the HOA - we do agree as to  
25 compliance with all of the issues that are listed in the

1 report with the exception of II.D, which is the permit sign  
2 that we are just talking about. If we said we agreed with  
3 removing that that's incorrect, we do not agree with  
4 removing that. All the other violations which I will  
5 mention, the alleged violations, we do agree to fix and  
6 quite frankly, we have always agreed to fix those.

7 I object to the characterization that somehow the  
8 Association has been dragging their feet and I would like to  
9 explain, as did the previous applicant here, why it took so  
10 long. And If we are going to talk about, you know, things  
11 falling in the crack and all, I trust that the Commissioners  
12 have read our defensive brief.

13 But the one thing that was not mentioned by staff, this  
14 permit was issued in 1994, as they said, to Citation Homes,  
15 which was the developer of the project. It was built by  
16 Citation and approved by the City of San Leandro in the  
17 current as-built condition.

18 Twenty years passed and BCDC did nothing on this  
19 project. Twenty years they didn't notify Citation or the  
20 successor in interest of the fact there was any permit or  
21 that there were any violations. Twenty years.

22 It was also 20 years that the City of San Leandro was  
23 in violation and BCDC did pursue that. They apparently  
24 negotiated an amended permit application by the City giving  
25 them five or six parking places in an area on public

1 property nearby.

2 But BCDC did nothing for 20 years. And the  
3 characterization that the Association is the one that's  
4 dragging their feet really gets my blood boiling. I will,  
5 however, address these issues. Because this came to the  
6 attention of BCDC not because of anything staff did, it came  
7 to the attention because of crime that was taking place in  
8 this area. The Association applied to the City of San  
9 Leandro to put gates at the entrance of this one street.  
10 This street is the only entrance or exit for Heron Bay.

11 Again, for 20 years this street provided access to the  
12 Bay Trails. That sign has been up there for that long.  
13 There was never any complaints. There is an allegation in  
14 BCDC's response that there were complaints about access to  
15 the Bay. No names were provided, no dates, no indication  
16 that that was true. But I would submit that if it was true  
17 it probably happened after the City -- after Heron Bay  
18 applied for the installation of gates, which definitely got  
19 people in the neighborhood fired up. So I would guess that  
20 for 20 years there were no complaints that they were aware  
21 of.

22 Because quite frankly, what is present at Heron Bay is  
23 a vast improvement over what was required in the permit.  
24 The permit required a gravel road and basically a dirt  
25 buffer zone. What's there is a nicely manicured sidewalk,

1 an asphalt street, landscaping that goes right down to the  
2 Bay and it's a vast improvement. Basically the HOA has  
3 agreed, if you want us to take it out and go back to what  
4 was we'll do that, but the staff has never done that because  
5 obviously what's there is a major improvement.

6 I will go down -- just over a couple of issues.

7 As was stated, Heron Bay is 629 homes consisting of  
8 single family homes and condominiums. The construction was  
9 all done with the approval of San Leandro. The maps that  
10 were filed and approved by the City of San Leandro is  
11 exactly what was constructed out there. Any violations  
12 should have been Citation's and they're the ones that should  
13 have paid for it. They didn't turn over the property to the  
14 Homeowners Association until 1999, five years after that  
15 permit was issued, and there were five years when BCDC could  
16 have demanded that Citation fulfill those conditions and  
17 they didn't do that.

18 Citation, of course, once they left the property, never  
19 advised the HOA that there was any permit at all or any  
20 violations. It was only when the City of San Leandro staff  
21 advised BCDC that, by the way they want to build this gate  
22 out here, that we got the first notice that we were in  
23 violation. And in fact, the first notice we had was a  
24 letter from BCDC to the city council the day that they  
25 denied the permit for the gate so we didn't even have any

1 notice that that was coming.

2 Since that time BCDC was well aware that the HOA tried  
3 to get this gate and gave that up, it was obvious that was  
4 never going to be approved by the city council. In fact,  
5 they have an anti-gate policy, if you can believe that.

6 So subsequent to that we went -- and during this time,  
7 by the way, HOA and myself included, and board members met  
8 with BCDC in their San Francisco offices several times, so  
9 it's not like there was no contact and no notice. We told  
10 them that we were going to abandon the gates and go to a  
11 kiosk. The kiosk that we were going to have with a guard  
12 was originally planned to be on city property so again that  
13 required city approval. We later discovered that there was  
14 no way the City was going to approve putting a kiosk on city  
15 property; staff would not approve it. Again, we told BCDC  
16 this all the time and they were perfectly aware that we  
17 needed city approval before we could go ahead and do these  
18 permit changes.

19 And I know that, you know, we're trying to protect the  
20 Bay. The residents of Heron Bay love the Bay Trails and the  
21 accesses. We are not trying to deny access, we are just  
22 trying to comply and protect our safety at the same time.

23 We submitted a permit application at BCDC's request in  
24 2015, we submitted one in 2016, we submitted one in 2017, so  
25 there was no lack of effort on our part. And in between

1 these applications we were talking to BCDC because they knew  
2 that were trying to restructure our membership so that we  
3 could build this kiosk. We needed a special assessment to  
4 do that, the City required that we do a special assessment  
5 to do that.

6 Finally in 2017 the kiosk was not being applied for.  
7 It may still be but it was not anywhere near access that  
8 would affect BCDC or concern BCDC.

9 And then we started applying in the 2017 application to  
10 fix all of the issues that we've agreed to fix. And again  
11 let me just say that it's not the situation I'm using your  
12 prior application, it's not the situation where somebody  
13 built something without a permit illegally. What happened  
14 here is just failure to flick the boxes and fill out the  
15 paperwork that still needed to be done.

16 But at all meetings and every application the HOA has  
17 agreed to do bicycle sharrows, which is one of the  
18 requirements. They have agreed to put up any signs that  
19 BCDC required, we have said that repeatedly; and it is in  
20 our application and we still agree to do that.

21 When we came down to the end of this we got this  
22 proposed Cease and Desist Order, which I did take to the  
23 board of directors because of the timing. And again, the  
24 HOA is non-paid board members who meet only once a month so  
25 it's not like I can, you know, say, let's meet next Tuesday

1 and we'll discuss that.

2       During that time period we did discuss it and the board  
3 felt that they can agree with all but one of the cease and  
4 desist items that are on here and I will go through --  
5 except for the permit parking sign. And they would agree to  
6 all of the timing requirements for the future should there  
7 be noncompliance. We've agreed to all of those penalties  
8 and the time periods involved.

9       The only reason that they agree to this was they didn't  
10 agree to the fines, because they don't think there should be  
11 any fines and I agree, and they didn't agree to the  
12 recitation of fault. It's like in a criminal case where you  
13 have to go in and say, hey, I'm guilty for all of this but  
14 now we agree. The HOA doesn't agree that they were guilty.  
15 They don't have any problem with doing all the items  
16 required, they don't have any problem with the Cease and  
17 Desist Order, they don't have any problems with the timing  
18 involved but they're not going to admit that these  
19 violations that were there as to have been committed.

20       Again, there has been full access to the property since  
21 the very beginning.

22       I just wanted to address briefly now some of the  
23 individual items. And I am looking back at the original  
24 report or the original list of violations dated, I think it  
25 was June 16th -- yes, June 16th, 2017. This makes up the

1 basis of the original seven violations that the HOA was  
2 charged with.

3 It was later determined, this year I might add, that  
4 there's actually a municipal utility district who is  
5 responsible for at least one of the items that the HOA was  
6 being charged with. I understand BCDC has dropped that,  
7 that is number E on the list, so that is out now. And  
8 again, BCDC now after 24 years since -- or 23 years since  
9 the original permit only found out now that that wasn't even  
10 the responsibility of the HOA to enforce, so that's gone.

11 But number one, which is II.A on the report: "Failure  
12 to submit and gain approval of public access plans for the  
13 Lewelling Boulevard Extension ..." Again, if this happened  
14 this happened back in 1994 to 1996 when the project was  
15 being built. We don't doubt that -- we don't argue that,  
16 you know, the HOA is the successor in interest, but I  
17 believe there is a due process violation when you try to  
18 charge somebody for something that happened that they didn't  
19 know about. And actually if you look at statistics in  
20 California, probably 90 percent of the owners in that  
21 project didn't even the homes back at the time the permit  
22 was allegedly violated. And actually, again, that failure  
23 to gain approval of public access plans, what was built is  
24 clearly better than what was required and nobody is telling  
25 us to take that out. I think BCDC has to admit that what

1 was actually built and approved and approved by the City of  
2 San Leandro is a vast improvement for public access.

3 Number C is "Failure to permanently guarantee all  
4 public access areas ..." Staff has told us consistently,  
5 and we agree, that we cannot do that, we need a surveyor to  
6 do that, until the permit is granted. We have agreed in  
7 every application that we would do that, we're agreeing to  
8 the time line in the Cease and Desist Order to get that  
9 done. So to try to charge us \$30,000 for something that  
10 can't be done yet is preposterous and again I think that it  
11 fails due process.

12 D is "Failure to provide required public access  
13 improvements ..." I'm not sure what that means but it is  
14 certainly duplicative of the fact of II.A and I think that  
15 to charge an additional violation for basically the same  
16 thing is probably inappropriate. However, we have already  
17 agreed to do that.

18 And then finally on Item F it's: "Failure to agree in  
19 writing that it has read, understood, and agrees to be bound  
20 by the conditions of the ... Permit ..." I mean, seriously?  
21 Does anybody really think that any court would sustain that  
22 particular count? We have sent in three applications where  
23 we recognize that we are the successors in interest. We  
24 have had at least four meetings with BCDC where we have  
25 acknowledged that fact. We have written letters back and

1 forth, we have agreed to do this work and we have  
2 acknowledged that fact. To try to charge \$30,000 and say we  
3 haven't agreed in writing is absolutely preposterous.

4 And as, of course as to the sign, I assume that's the  
5 \$4,500 violation, I'll let Mr. Brennan speak on that but we  
6 simply cannot and will not remove that sign. And BCDC,  
7 again, has no parking on the project anyway so it's kind of  
8 a moot point to talk about that particular sign.

9 So basically I will let Mr. Ritter talk about the  
10 finances of the Association and what their restrictions are.  
11 But I want to remind the Commissioners that this is a  
12 nonprofit corporation. They don't have any assets other  
13 than their dues, and by law as a nonprofit they can't have  
14 any assets other than their dues. They don't make money,  
15 they don't rent out -- if they had a swimming pool they  
16 don't rent it out. They don't have any facilities that earn  
17 income other than the dues and the dues are calculated on a  
18 yearly basis to cover the actual operating expenses of the  
19 Association.

20 Could we do a special assessment of the members to pay  
21 for fines? Probably, although there is nothing in the  
22 Davis-Stirling Act that authorizes that. There is certainly  
23 nothing in the CC&Rs.

24 And I will state on the record that I have represented  
25 homeowners associations for more than 30 years, currently

1 represent about 150 associations, in the past probably 1,000  
2 associations, I have never had an association be charged  
3 with a fine from a public or municipal agency. I don't  
4 think there is any authority to do that.

5 But to do it nevertheless is, in my opinion, totally  
6 inappropriate, to charge homeowners who had nothing to do  
7 with the technical violations. It's just outrageous to say  
8 that they have to pay for something that BCDC didn't notice  
9 for five years when Citation still ran the property. I  
10 don't think any court would sustain a fine based on that  
11 basis.

12 And finally I just want to say that the overall picture  
13 here is that Heron Bay has always been, if you will, a  
14 protector of those trails. The owners there use the trails.  
15 They don't allow parking because they never had to and they  
16 never did for 20 years. But they have free bicycle access,  
17 free walking access. They notify the City when there is an  
18 issue on the trails. They have been custodians, they have  
19 no interest in any way in blocking what happens on the  
20 trails and on Bayfront. They have been good custodians.

21 And these violations are technical paper violations  
22 that should have happened a long time ago. And yes, it's  
23 taken three years to get to this point but it's taken three  
24 years -- and because of the HOA's applications, the various  
25 applications to the City -- and I might add the last one

1 that Ms. Weber referred to, the City Council denied the  
2 placement of the kiosk, but that was against the  
3 recommendation of the city staff that recommended the  
4 placement of the kiosk. And each time we did that  
5 application it took six months or more to get through city  
6 government to get that heard. And that's the reason that we  
7 started this in late 2014 and here we are in 2017.

8 And at this point I would yield to Brian Ritter who is  
9 the manager of the Association.

10 MR. RITTER: Thanks, Alan. I'll be brief here.

11 Essentially all of the funds that the Association  
12 collects from its owners are used to pay for the operation,  
13 maintenance and the contribution to a separate reserve for  
14 the repair/replacement of the common area improvements,  
15 which are all state-mandated by the way and they're paid for  
16 on a monthly basis by the 629 homeowners.

17 The Association is a nonprofit organization and it must  
18 budget annually so that the revenues do not exceed the  
19 expenses every year. Meaning that ever cent that is  
20 collected on an annual basis from the homeowners is used for  
21 the operation, maintenance and long-term savings for the  
22 repair/replacement of the common area improvements.

23 As the Association operates as a nonprofit organization  
24 these fines would represent a tremendous hardship on the  
25 owners, requiring a special assessment fee. It was touched

1 on that they could essentially raise dues or use, you know,  
2 funds that are in the operating account to pay for it.  
3 There are no slush funds in the operating account. If there  
4 ever is excess at the end of the year, which has been very  
5 little by the way in years past, that money is then rolled  
6 over either as retained earnings to offset future costs or  
7 it is put in the reserve funds to pay for major improvements  
8 such as the streets, which are going to be rehabbed this  
9 year or next year, at a cost of about \$1 million.

10 The reference to the Civil Code is actually 5605(b)  
11 which says that an association can raise dues up to 20  
12 percent a year without a majority quorum vote of the  
13 members. So what that accounts to is \$18 a unit or \$11,000,  
14 so that's how much the HOA can raise the dues currently year  
15 over year.

16 Furthermore, it's unfair to the current homeowners who  
17 unknowingly moved into the community without any type of  
18 notice that they would be subject to a huge fine from an  
19 entity that never sought compensation or corrective action  
20 from Citation homes between 1994 and October 12, 1999 when  
21 the Association was turned over to its members, nor from the  
22 HOA between October 12, '99 and 2014.

23 We also don't feel it's fair for any prospective buyers  
24 to have to pay for this fine who have no knowledge of this  
25 issue.

1           As Alan touched on, it is estimated that 95 percent of  
2 the current homeowners at least were not living in the  
3 Association when the HOA was turned over to the members from  
4 Citation and in no way should be liable for the mistake of  
5 Citation Homes for failing to meet the conditions of the  
6 permit and BCDC for failing to enforce the permit  
7 deficiencies with Citation Homes. Thanks.

8           MR. BERGER: I would now turn it over to Richard  
9 Brennan who is an owner, a board member and a member of the  
10 City of San Leandro Planning Commission.

11           MR. BRENNAN: So just a comment on that. My name is  
12 Richard Brennan; I am retired. I am a original homeowner in  
13 the Bay Walk portion of the Heron Bay.

14           It is noted that as of January 2017 I was nominated to  
15 the San Leandro Planning Commission. Since that time there  
16 have been no actions for Heron Bay before the Planning  
17 Commission. Myself and our city council member, who also  
18 lives in Heron Bay, have been informed by the city attorney  
19 that we would need to recuse ourselves from any actions at  
20 the city level regarding Heron Bay, which is why I feel free  
21 to come and comment to you today in my capacity only as an  
22 HOA board member, resident and owner of Heron Bay.

23           So the first thing I'd like to say is that the document  
24 that was put in the agenda today, it is not a document that  
25 I could recommend or move to the HOA board for signature by

1 our attorney because there are too many factual material  
2 errors in this document.

3 Let's start at the beginning.

4 The first incorrect statement appears in II.F where it  
5 says in October 1999 Citation transferred to the HOA  
6 ownership of the common areas. In fact, if you look at the  
7 city-provided map that's provided in the report you will --

8 COMMITTEE CHAIR SCHARFF: So you are on page 3 of the  
9 enforcement order, for the Commissioners up here?

10 MR. BRENNAN: I assume everybody is reading these  
11 things so yes, I am on page 3, item F of the Order CDO  
12 2017.003 dated 09/07, the one that was put in the agenda,  
13 and I feel that's the only document we can reference here.

14 So the HOA in fact owns what we call the common areas  
15 but they are only the common areas of the -- there's no -- I  
16 am short the ability to project here because there is no  
17 HDMI connector.

18 (Attempting to connect computer.)

19 MR. BERGER: We rely on Mr. Brennan. My daughter  
20 refers to me as a techno-peasant so we have to make sure he  
21 can set these up.

22 MR. BRENNAN: Okay, and how do we toggle between the  
23 machines?

24 SPEAKER: Tech staff is on its way.

25 MR. BRENNAN: New AV. I'm trying.

1 (Attempting to connect computer.)

2 MR. JACOBS: Mr. Chair?

3 COMMITTEE CHAIR SCHARFF: Yes.

4 MR. JACOBS: Ms. Klein just pointed out to me that some  
5 of the information being presented is not in the Statement  
6 of Defense so I would like to remind the Committee that  
7 there are specific procedures for receiving new information  
8 if the Committee is inclined to do that, but there is a  
9 general presumption that this Committee will proceed based  
10 on the information that was previously submitted.

11 COMMITTEE CHAIR SCHARFF: That's correct.

12 MR. BRENNAN: I am referencing only material that was  
13 provided in the agenda. I have pulled everything I am  
14 presenting from the agenda items so I assume it's all fair  
15 game for comments. I am not presenting anything new.

16 MR. JACOBS: It is up to the Committee to decide  
17 whether it feels that there is new information being  
18 presented, but if it decides that there is then there would  
19 need to be a decision about whether that is going to be  
20 allowed and there are procedures for that. I am not  
21 commenting on any particular statement made by anyone but  
22 just reminding the Committee of the procedures.

23 COMMITTEE CHAIR SCHARFF: Exactly. So noted.

24 MR. BERGER: And I would for the record say the  
25 document speaks for itself. If it's in the record then it's

1 there.

2 MR. JACOBS: Certainly.

3 COMMITTEE CHAIR SCHARFF: If you have an objection to  
4 anything specifically as not being in the record I think you  
5 should make it as to a specific document.

6 MR. BOWERS: I would like to lodge that objection. We  
7 are not talking about the material that is before you in the  
8 violation report, we are talking about the HOA's complaints  
9 or defenses to that material that are being presented to us  
10 for the first time. They were not in the Statement of  
11 Defense and that is a significant issue.

12 MR. BERGER: And I would state that the agenda items,  
13 we don't have a chance to comment on. We get the agenda  
14 after our defense was already filed. I think that as long  
15 as we're referring to documents that are before the  
16 Commission I can't see what the objection would be.

17 COMMITTEE CHAIR SCHARFF: I think your objection needs  
18 to be more specific as to which document -- which you do not  
19 feel is in the record already. You're just talking about  
20 the PowerPoint presentation as opposed to --

21 MR. BOWERS: I'm talking about the statements that are  
22 being made as we speak. Mr. Brennan is preparing to make,  
23 he is preparing to go through the proposed Cease and Desist  
24 Order and give him objections to some of the provisions of  
25 the Cease and Desist Order. These are objections -- these

1 are complaints or objections that were not set forth in the  
2 Statement of Defense.

3 MR. BERGER: Counsel can't be suggesting that we are  
4 not allowed to comment on materials that were filed by BCDC  
5 in the application.

6 COMMITTEE CHAIR SCHARFF: So I am prepared to allow it.  
7 I don't know how my fellow Commissioners feel. I would --

8 COMMITTEE MEMBER GILMORE: I just have one question.  
9 So what I'm hearing from counsel is that they had a copy of  
10 the Cease and Desist Order and your view is that if they  
11 wanted to make any objections to what was in the Cease and  
12 Desist Order as far as the facts, that it should have been  
13 in their written statement; is that what I'm hearing?

14 MR. BOWERS: No, that's not exactly correct. They  
15 had --

16 COMMITTEE MEMBER GILMORE: That's why I wanted to ask.

17 MR. BOWERS: They had the violation report. And the  
18 sections that are being referred to in the Cease and Desist  
19 Order are essentially identical to the provisions that were  
20 set forth in the violation report. So they are effectively  
21 adding new objections to the contents of violation report.  
22 That's essentially -- that's what I'm talking about.

23 MR. BERGER: And I'm saying as a matter of evidence  
24 that's a preposterous statement. This is argument that we  
25 are allowed to do. That's why we have a public hearing, to

1 argue the materials that have been submitted to the  
2 Commission.

3 COMMITTEE CHAIR SCHARFF: Okay. I am going to allow  
4 the materials to come in.

5 MR. JACOBS: Mr. Chair, for the record, I would be  
6 inclined to agree with that. The regulations speak to  
7 evidence and factual issues and so that is the primary  
8 concern, that new evidence not be presented at the hearing.

9 I am not seeing in the regulations any obstacle to  
10 either party, the respondent or staff, commenting, making  
11 argument, presenting interpretations. Specifically the  
12 regulations say arguing about the policy implications is  
13 allowed. So --

14 COMMITTEE CHAIR SCHARFF: If you see a particular piece  
15 of evidence that you believe to be new evidence please bring  
16 it to our attention, okay?

17 MR. JACOBS: I would be happy to do that, Mr. Chair. I  
18 would think that the staff is probably more familiar with  
19 the details of the factual record of this matter than I am  
20 so in general I would invite the parties to make whatever  
21 objections they feel are appropriate. But if I see  
22 something that I believe is problematic I'll certainly bring  
23 it to the Committee's attention.

24 One more related comment that I would like the Chair to  
25 indulge me in. Ms. Klein did approach me and privately

1 raised this issue. As the advisor to the Committee I am not  
2 supposed to have private conversations with either the  
3 respondent or staff; in that circumstance I simply repeated  
4 for the public record what she had said to me. But in the  
5 future I would encourage both staff and the respondent if  
6 they have objections or comments to make them publicly  
7 rather than privately to me.

8 MR. BERGER: We have no objection to Ms. Klein's  
9 comments today.

10 COMMITTEE CHAIR SCHARFF: All right, great.

11 Yes. As either side has objections, you know, please  
12 just make them.

13 MR. BRENNAN: And my apologies. I am not -- I had one  
14 legal course I think in my MBA program but that's it, that's  
15 the extent of my legal training, so I apologize if I've  
16 stepped on some toes.

17 But what I wanted to show here is that this map  
18 provided by the city after the agreement with BCDC - as you  
19 can tell by the parking which was not agreed to until last  
20 year - it actually shows that contrary to the statement in  
21 2.F., the lands in the marsh area are shown as being  
22 controlled -- so up here the L-shaped area in the top right  
23 is the Heron Bay development.

24 That property, the common areas of only that property,  
25 are owned by the HOA. The common areas that consist of the

1 Citation Marsh, the Bunker Marsh, the North Marsh are owned  
2 variously by the state and/or the city, primarily the city,  
3 and the HOA has no control over them at all.

4 Also in II.J and again in II.DD it says: "By letter ...  
5 Alan Berger, attorney representing the HOA, acknowledged the  
6 HOA's legal obligation as successor permittee ..." I just  
7 want to call to the attention another document that's filed  
8 here. It's the formation of the City of San Leandro  
9 Resolution 96-56 which again was the 1996 resolution which  
10 formed the Heron Bay Maintenance and Assessment District.  
11 This was passed by the city council in 1996, three years  
12 before the HOA existed, and forms a MAD, maintenance  
13 assessment district.

14 It is worth noting that contrary to the statement in  
15 the document the HOA does not fund the MAD, the MAD is  
16 funded directly through an incremental assessment yearly on  
17 each resident through the tax man. And that tax money goes,  
18 voila, back to the City of San Leandro with no hands on.  
19 It's a direct transfer. And the entire Heron Bay group of  
20 residents have funded more than \$5 million to the upkeep of  
21 this marshland over the duration of the project. I know of  
22 very few places where that kind of direct contribution to  
23 the preservation of the wetlands has been made by such a  
24 small group of residents.

25 The next item is this role of the MAD, the maintenance

1 assessment district. This is a city organization. It  
2 boggles the imagination that the staff could have arranged a  
3 settlement sometime in the last year with the City and the  
4 City forgot to mention that they managed this area. In  
5 fact, the notes do say that -- in II.DD it says on July 17  
6 the HOA informed BCDC staff of the MAD. After --

7 COMMITTEE CHAIR SCHARFF: So where are you? We are  
8 having trouble following along.

9 MR. BRENNAN: Oh, I'm in paragraph number -- page 8. I  
10 don't have the exact reference here.

11 MR. McCREA: I believe it's page 8.

12 MR. BRENNAN: Page 8, II.DD. This is on July 17th and  
13 then the second paragraph, "the HOA informed BCDC staff of  
14 the existence of a Maintenance Assessment District ..." One  
15 might have thought this would be a city responsibility, but  
16 perhaps not.

17 The second thing is on August 15th the HOA provided  
18 BCDC staff the agreement that created the MAD, which is that  
19 city council resolution from 1996.

20 What we have here is an ever-changing set of demands on  
21 the HOA based on the original misunderstanding that the HOA  
22 had direct control over these properties.

23 This combined with this ongoing process. We are now in  
24 our fourth permit cycle with the City of San Leandro - as  
25 you all know the time schedule that that takes - creates the

1 implication that we are somehow unresponsive to a whole  
2 bunch of issues, many of which it turns out to be not on our  
3 field, they are in fact issues that could only be resolved,  
4 some of which have not yet been resolved, by either the City  
5 or the City-managed MAD.

6 So let's get down to signage. In II.CC.2 and in II.DD  
7 it talks about the four public access signs. And once again  
8 as --

9 COMMITTEE CHAIR SCHARFF: Hold on a second, we have a  
10 question.

11 COMMITTEE MEMBER GILMORE: Sorry. Before you get onto  
12 the whole issue of signage, I am still a little bit confused  
13 about the MAD.

14 MR. BRENNAN: Everybody is.

15 COMMITTEE MEMBER GILMORE: Well, no, I mean, because  
16 this map here is not really helping me. What I want to know  
17 is who is responsible for the street? You're talking about  
18 the MAD being responsible for the wetlands; who is  
19 responsible for the street, this street?

20 MR. BRENNAN: What is called the 1450-foot Lewelling  
21 extension goes from the top of the map that is currently  
22 being projected, above the black dot just at the very edge  
23 of the border there, that is -- that down to the dot. The  
24 dot is a city-owned roundabout where they own the street and  
25 in cooperation with the MAD they do the landscaping into

1 their easement around that sidewalk.

2 From the dot down to the end of the black trail on the  
3 map is a approximately 500, 450 foot street called Bayfront  
4 Drive.

5 COMMITTEE MEMBER GILMORE: Right.

6 MR. BRENNAN: Which is a private street owned and  
7 managed and maintained by the HOA.

8 COMMITTEE MEMBER GILMORE: That's what I wanted to  
9 know.

10 MR. BRENNAN: From all the black trail is public trail  
11 managed by the City and the MAD and not on HOA land.

12 COMMITTEE MEMBER GILMORE: Okay, thank you. Thank you.  
13 That was the question I wanted answered, thank you.

14 MR. BRENNAN: Thank you.

15 And these issues are confusing and have been confusing  
16 to all parties involved because the original paperwork is a  
17 disaster, frankly.

18 Okay, to signage. You saw the pictures of the signage  
19 there.

20 COMMITTEE CHAIR SCHARFF: Now when you say "signage"  
21 you're talking about the permit parking signs?

22 MR. BRENNAN: Actually since we were on that one I can  
23 do that one first. We are talking about the, quote,  
24 "unauthorized signage." In the photo that was shown was a  
25 "No Parking" sign. So the signs in question which say no

1 public parking, private streets, are in complete compliance  
2 with the public access requirement that has been recorded in  
3 the permits from day one, which enumerate walking, sitting,  
4 bicycling, viewing, picnicking and related purposes. I did  
5 not hear motor vehicle, car, motorcycle parking, I didn't  
6 hear those words. And when they are enumerated so clearly  
7 and in such detail one can make, I think, a safe assumption  
8 that the other ones weren't included. So it is a private  
9 street, full stop. There was no provision for parking.  
10 Therefore in compliance with the private street control  
11 signage requirements of California Vehicle Code 21107.7, we  
12 are required to have those signs up there in order to  
13 enforce our control over our private streets. So we can't  
14 sign this document as it's presented. Who do I listen to,  
15 the Vehicle Code or BCDC?

16 COMMITTEE CHAIR SCHARFF: Okay, let me stop you right  
17 there. I just want to make sure we completely understand  
18 what you're saying. What you're saying is that you agree  
19 with all the violations, you just don't think there should  
20 be any fines, right, except for item number 7, which --

21 MR. BRENNAN: The two signage ones I think are the two  
22 that were --

23 COMMITTEE CHAIR SCHARFF: I think it's just one signage  
24 one, no?

25 MR. BRENNAN: There may have been one inadvertently.

1 The four public access signs.

2 COMMITTEE CHAIR SCHARFF: So let me just get  
3 clarification. The rest of the signage issues I thought  
4 were on the City --

5 MR. BRENNAN: Yes.

6 COMMITTEE CHAIR SCHARFF: -- or am I incorrect on that?

7 MR. BRENNAN: That's correct.

8 COMMITTEE CHAIR SCHARFF: Let me ask.

9 MS. WEBER: Thank you, Chair. So the City has as part  
10 of our settlement agreement we reached with them last year,  
11 the City installed several public access signs that were  
12 originally the responsibility of the HOA, and so that's why  
13 that violation dropped from the violation report to the  
14 staff report.

15 Staff doesn't necessarily have an issue with the  
16 unauthorized signage remaining but our issue is that the  
17 unauthorized signage is, in fact, unauthorized. It hasn't  
18 been submitted on any approved plans and it is not placed in  
19 conjunction with public access signs. Staff is concerned  
20 that the restrictive signage on its own without the public  
21 access signs on Bayfront Drive doesn't create a welcoming  
22 environment to the public accessing the south end of the  
23 shoreline trails. And so staff would be willing to not  
24 require the HOA to remove the signs but we do want them to  
25 apply for authorization to maintain the signs in conjunction

1 with very clear public access signage.

2 COMMITTEE CHAIR SCHARFF: Isn't restricting parking  
3 restricting public access in a big way?

4 MS. WEBER: I would agree with that. As you can see  
5 from the --

6 COMMITTEE CHAIR SCHARFF: So why would staff -- why  
7 would staff be okay with those signs remaining if that  
8 restricts public access?

9 MS. KLEIN: The permit does not have a public shore  
10 parking requirement.

11 MR. BRENNAN: Or vehicular access.

12 MR. BERGER: I just wanted to state that in the  
13 beginning when we were talking --

14 MS. KLEIN: Correct.

15 MR. BERGER: I'm sorry. In the beginning when we were  
16 talking about putting in gates and kiosks we did mention  
17 approving parking on the streets as part of the compromise,  
18 we talked about that, but that was taken off the table when  
19 we were denied the gates. I don't think staff contends that  
20 there is any right to parking. So to say that a permit  
21 parking only sign on our private streets, when clearly the  
22 public cannot park there, is somehow restrictive to Bay  
23 access. And I might point out that that sign has been there  
24 for at least 20 years without any complaints.

25 There is no parking on Bayfront for the public. The

1 public can park back on Lewelling, they can park in the new  
2 spaces in the circle that the City developed. But once you  
3 get to the end of that circle where Bayfront starts, those  
4 are private streets. I submit that BCDC has not right to  
5 say that we can't put up a sign that is in compliance with  
6 the Vehicle Code. Richard stated the Code section. But  
7 what that section says is that if you are going to tag and  
8 tow cars because Heron Bay has permit parking for their own  
9 residents and guests. If you are going to tag and tow cars  
10 you have to have that sign at every entrance. And that's  
11 why it's there so we simply can't take that one down.  
12 That's a deal point for us, obviously.

13 And I might also point out that Maggie didn't mention  
14 when we were talking about the other signs. The Association  
15 long ago and recently already agreed that we are installing  
16 five new signs to the exact dimensions and size that BCDC  
17 wanted, included one double-sided sign. And we did submit  
18 at BCDC's request a map showing exactly where those signs  
19 are going to go and the bicycle sharrows that we have also  
20 agreed to, all of which were basically approved as to  
21 location to BCDC. So it is not correct to say that sign is  
22 restrictive and there's no others. We've already agreed to  
23 put those signs in there.

24 COMMITTEE CHAIR SCHARFF: Let me ask staff to respond.

25 MS. WEBER: Thank you, Chair. Mr. Berger is correct,

1 they have agreed to install the signs. However, going back  
2 to the point in my presentation, until they complete their  
3 amendment application - and all they need to do to complete  
4 the amendment application is submit an Interested Parties  
5 List and a clear site plan with the dimensions of the as-  
6 built construction on Bayfront Drive - they we can file the  
7 application as complete, issue the amended permit and then  
8 the HOA will have the sufficient authorization under their  
9 permit to install the public access signs.

10 But until they complete their permit application we  
11 can't provide the authorization to install the signs and the  
12 signs will continue to not be in place.

13 MS. KLEIN: And we would do a plan approval for the  
14 signs as well following permit issuance.

15 MS. WEBER: Correct.

16 COMMITTEE CHAIR SCHARFF: So, Mr. Berger, why haven't  
17 you done this?

18 MR. BERGER: Why haven't we done what?

19 COMMITTEE CHAIR SCHARFF: What they just asked.

20 MR. BERGER: We have agreed to all of this and we --

21 COMMITTEE CHAIR SCHARFF: But why haven't you done it?

22 MR. BERGER: We haven't done it because nobody in their  
23 right mind would start doing piecemeal items when we're  
24 facing a \$124,000 fine and an enforcement action. We've  
25 agreed as part of the Cease and Desist that exactly the --

1 each one of those violations that we have agreed to complete  
2 has a time line on it established by BCDC of when it has to  
3 be done and the fine if we don't do it. We've agreed to all  
4 of that. But this was a package enforcement action.

5 Part of our problem is that this has been a moving  
6 target. We have had numerous meetings. I did two permit  
7 amendment applications without ever hearing that there was  
8 this problem with this one sign. You try to get everything  
9 wrapped up at once. If we would have been able to agree to  
10 the Cease and Desist and a negotiated fine we wouldn't be  
11 here right now. But because these items remain unclear we  
12 have agreed to do it the second that the permit --

13 And it's a little incongruous, by the way, to say, you  
14 haven't submitted your application. Because every time we  
15 submit the application we're told, but you haven't done this  
16 yet. We're kind of between a Catch-22 of what needs to be  
17 done first. But there is no disagreement that the signs go  
18 in. We drew the map where they're going to be, we drew the  
19 map where the sharrows are. We've submitted all of that.  
20 It's just a question of let's get this resolved and then we  
21 can do the work according to the schedule that BCDC has sent  
22 us.

23 MR. BRENNAN: We brought a map into a meeting with the  
24 BCDC up in the other office on September 16th showing  
25 sharrows, showing signage, requesting that they not allow

1 parking in the roundabout in violation of federal highway  
2 design standards, which they went ahead and did with the  
3 City. So I think we have done everything. Up on the screen  
4 is my attempt - I am not a draftsman or a civil engineer or  
5 a lawyer - to show what the easement is, that it far exceeds  
6 the original path plus gravel sides construction.  
7 Apparently this is not sufficient. We will -- once again  
8 the HOA, a nonprofit, will need to hire an engineer to go  
9 out and redraft this to some higher standard.

10 MS. WEBER: Chair Scharff, I would like to make note  
11 that the green square in the bottom left corner of the  
12 slide, staff hasn't seen those length and dimensions before.  
13 I have been asking for them for several months and this is  
14 the first time I have seen them today.

15 MS. KLEIN: And I would like to respond to the moving  
16 target point. We have been asking for a site plan showing  
17 the as-built dimensions of the public access, which are  
18 required so that we can describe the situation. If the  
19 permit requires something different than was built we are  
20 happy to accept what's been built. We also, obviously, gave  
21 the HOA the opportunity to return the site to the current  
22 authorization but that doesn't make sense. We need the  
23 information to write the permit; and until we have the plan  
24 -- we should have a crack at responding to a plan that we  
25 get. So the moving target is -- I would recharacterize as

1 responses to the first drawing that we were given, so that  
2 we can just get it complete with the information that we  
3 require.

4 MR. BERGER: I would just state that I believe I did  
5 send that map but if not it will be delivered by tomorrow.  
6 I'm pretty sure I sent it because we had to redraw it based  
7 on a discussion with Adrienne.

8 COMMITTEE CHAIR SCHARFF: So we are running out of time  
9 a little bit.

10 MR. BERGER: Right.

11 COMMITTEE CHAIR SCHARFF: I would ask that you wrap  
12 your presentation because the Commissioners have a lot of  
13 questions, I'm sure.

14 MR. BRENNAN: Sure. I think the questions will be  
15 worthwhile. I just wanted to show that there were two maps  
16 prepared. This was the original annotated site map with  
17 overwriting showing the as-built sidewalk, the potential  
18 sharrows and the potential sign locations; that was prepared  
19 on the 10th of August.

20 The other map was showing the maximum easement and that  
21 was prepared, I believe, on the 25th of August.

22 So the last one was I wanted to call to your attention  
23 the document that is also attached as an agenda item in the  
24 list of documents. It is Mr. Foreman's plans from 1996.

25 There was a statement by staff that said though the

1 City put in some signs that it should have been the HOA's  
2 responsibility. Actually, they are not at all the HOA's  
3 responsibility, nobody is doing us any favors here. If you  
4 look at the four arrows, there is an arrow right up at the  
5 top at the entrance. That is shown at Lewelling Boulevard.  
6 There is now a big circle there. That is fully a city  
7 street and city-maintained street and sidewalks.

8       There is another arrow halfway in the middle. That is  
9 the start of the interpretive center kiosk and the trail and  
10 that is maintained by the MAD and here it's shown next to  
11 the city park that is maintained by the City.

12       The third star is shown down at the junction of two  
13 trails. That is absolutely controlled by the MAD.

14       And the fourth arrow is over on the right hand side and  
15 that is once again the MAD.

16       The HOA has no control, no management, no oversight  
17 over any of those signs, it was never our job to put them  
18 in.

19       So finally, you know, what could we have agreed to  
20 here? We have the goal posts are moving, you know. There's  
21 changes and requirements. At the same time Item II.Q that  
22 we need proof of local discretionary approval. "Local  
23 discretionary approval" means the City of San Leandro  
24 Planning Commission. And we have run already three full  
25 cycles through the Planning Commission, first for the

1 vehicular gates - I stress vehicular because they did not  
2 block the sidewalk or the bicyclists - the kiosk in the  
3 center of the roundabout and now the kiosk to the side of  
4 the roundabout just behind the line where BCDC has  
5 authority.

6       So we are now on our fourth because the City has  
7 disapproved the -- they wanted us to go back and do a ballot  
8 in multiple languages, which we have just successfully  
9 concluded on the 24th of last month. So the HOA members  
10 voted to approve that on the 24th of last month. I don't  
11 believe that has been noticed to the BCDC staff yet.

12       So that is where we are, I invite your questions.  
13 Thank you.

14       COMMITTEE CHAIR SCHARFF: All right, Commissioners, any  
15 questions?

16       So I'll start and jump in when you're ready.

17       So the sense I get from this is that you're cooperation  
18 has not been very good, frankly, and that's my concern. I  
19 understand that Citation Homes, stuff that happened before,  
20 that's not really the issue here. The issue is that staff  
21 could have resolved this with you if you'd done what they  
22 asked. What I heard you say, Mr. Berger, is that you've  
23 really been unwilling to resolve this piecemeal. You could  
24 have resolved it earlier it seems, so I wanted you to  
25 address the cooperation issue with staff and why --

1           If staff could put up the violations and the fines.  
2           Because what we really have here is two issues. We  
3 have, should we fine you, and if so, how much? And then the  
4 other issue is, you're refusing to -- I'm unclear on the  
5 parking sign. I've heard staff say the parking sign can  
6 stay but you need to get authorization and put up other  
7 welcoming signs. And I heard you say "We would not remove  
8 the sign" but staff is not asking you to remove the sign, so  
9 I am confused on that issue.

10           So those seem to be the two issues before the  
11 Commission really.

12           MR. BERGER: I agree those are the two issues.

13           To address the last one, the staff clearly did say in  
14 their violation report that it was an inappropriate sign.  
15 They said it today. And you said yourself that you felt  
16 that the sign hampered the free access of the trail. That  
17 is simply not true.

18           As to the first point about lack of cooperation, I  
19 absolutely disagree. This is -- we have, again, inherited a  
20 nest. You say it's not relevant but it is certainly  
21 relevant to whether you should fine us and how much that  
22 this sat for 20 years with no problems.

23           COMMITTEE CHAIR SCHARFF: But the staff isn't seeking  
24 fines that go 20 years.

25           MR. BERGER: Oh no, of course not, because now in 2014

1 they have come in and said, you haven't cooperated since  
2 2014. And I will put those facts up against anybody. We  
3 have -- Yes, it takes six or seven months but you have to  
4 understand that in-between those permit applications we and  
5 the staff knew that we were still trying to get, A, gates,  
6 and B, a kiosk, and that required us going through the whole  
7 City of San Leandro permit process.

8 If the Commissioners will look at our second and first  
9 applications, in those applications, which were denied  
10 because of these technical grounds, in other words, you  
11 haven't done a guarantee, but then we get the Catch-22, you  
12 can't do the guarantee until the permit is approved. Those  
13 are the kinds of things we were dealing with.

14 But the only two things that we still have to do to be  
15 in compliance other than the paperwork issues are bicycle  
16 sharrows - and I'm not even sure that was in the original  
17 permit but we agreed to do it - and the signage. We have  
18 agreed from 2014 to do that. But it only makes sense to do  
19 it as a package.

20 But we said in several meetings with Maggie and I  
21 believe Adrienne present, give us your requirements. What  
22 signs do you want? And we've done that. This year when we  
23 said, "What signs do you want?" they told us exactly how  
24 many they want, one two-sided. This was only in July. And  
25 those, we not only agreed to that but we drew a map showing

1 exactly where they were going to be. First we did the map  
2 with the signs, and these were expensive colored maps. Then  
3 I got a call from Maggie and said, we want the map now that  
4 doesn't have the indication of where everything is. Just  
5 the drawing itself, not the footnotes, so we provided that  
6 map.

7 But I absolutely disagree that we have been dilatory or  
8 dragging our feet. What would be the point for us doing  
9 that? We are not asking that anything inappropriate be  
10 allowed to remain. We have agreed to put in whatever BCDC  
11 wants, whether or not it's part of the original permit.  
12 There was absolutely no motive for this association to drag  
13 their feet other than the fact that we had two very long --  
14 three very long city procedures that we had to deal with,  
15 which BCDC was advised of all along. In fact, they were so  
16 advised of it that they sent in documents objecting to what  
17 we were doing, but they knew that we were trying to get that  
18 done. So I absolutely disagree that we were in any way  
19 dilatory. Yes, it's a long time but you know what, 3 years  
20 isn't as much as 20 years.

21 COMMITTEE CHAIR SCHARFF: Okay, we have one public  
22 speaker, Phillip Toste.

23 Phillip, would you like to come speak?

24 MR. TOSTE: Good morning, Committee Members, BCDC  
25 staff. My name is Phillip Toste; I'm an Associate Engineer

1 with the City of San Leandro Engineering and Transportation  
2 Department and I have a letter from the City Manager that I  
3 would like to read into the record.

4 "Dear Committee Chair Scharff:"

5 "The Shoreline Trail is a great amenity  
6 treasured by the residents of San Leandro, as well  
7 as visitors from neighboring communities and the  
8 larger East Bay region."

9 MR. BERGER: If I may? I'm sorry, I don't mean to  
10 interrupt but I do object to this. We have had no notice of  
11 this, no copy of this, we haven't had any chance to look at  
12 it or respond to it and I think that's inappropriate in a  
13 public hearing.

14 COMMITTEE CHAIR SCHARFF: So noted. The public has a  
15 right to speak and the public has a right to come up and say  
16 whatever the public --

17 MR. BERGER: But this is not the public, this is a  
18 person reading a hearsay letter from somebody that purports  
19 to be with the City.

20 COMMITTEE CHAIR SCHARFF: Understood. Proceed.

21 MR. TOSTE: Thank you.

22 "The Trail serves as a regional recreational  
23 facility, but also as a tool to teach people about  
24 the fragile ecosystem within the marshland it  
25 traverses. To assure the Trail can be enjoyed by

1 as many people as possible, we need to ensure  
2 public access to it."

3 "As a condition for the construction of the  
4 Heron Bay Subdivision that started in 1994, a  
5 public access easement and pathway for pedestrians  
6 and bicyclists was obtained through the Lewelling  
7 Boulevard extension (Bayfront Drive), connecting  
8 the Lewelling Boulevard roundabout to the trail  
9 head at the west end of Bayfront Drive. The City  
10 wants to make sure that the condition is  
11 maintained, as it is imperative that there are no  
12 impediments to public access. City staff concurs  
13 that the Conditions and improvements required by  
14 Bay Conservation & Development Commission in the  
15 Cease and Desist and Civil Penalty Order No. CDO  
16 2017.03 are appropriate, and fully supports these  
17 actions to ensure public access to our shoreline."

18 "Sincerely, Chris Zapata, City manager, City  
19 of San Leandro."

20 COMMITTEE CHAIR SCHARFF: Thank you.

21 MR. BERGER: And I would just note for the record that  
22 the city was in violation for 20 years of the access that  
23 they say is so valuable.

24 COMMITTEE MEMBER GILMORE: Okay, I just want to make a  
25 couple of comments and I think I have one or two questions.

1           So while I appreciate, as my law professor used to tell  
2 me, you know, pounding on the table, about this being a 20  
3 year or 20-year-plus violation, I think what I am looking at  
4 right now is what has happened since your homeowners  
5 association had notice. I mean, we are not trying to go  
6 back and blame you for stuff that you didn't have notice  
7 about. We are looking at what happened since you had notice  
8 in and around 2014 and going forward from then.

9           So for me personally as a Commissioner, this may have  
10 happened 20 years in the past and it is interesting context.  
11 But for me, the 20 year violation that you are so adamant  
12 and so passionate about, while I appreciate your passion,  
13 really is, I'm sorry, almost irrelevant to me. So let me  
14 just tell you that right there.

15           At the beginning of staff's presentation my  
16 understanding was that there were two things that were  
17 outstanding in terms of not having a completed permit. One  
18 was the drawings that you have spoken so eloquently about  
19 the last couple of minutes; but the other thing is that  
20 there was a requirement that you provide an Interested  
21 Parties List. Why has that not been done?

22           MR. BERGER: Again, there is really no excuse for that.  
23 I am not even sure what is included in that but that is an  
24 issue that obviously we can produce forthwith.

25           COMMITTEE MEMBER GILMORE: I'm sorry. See, this is

1 what in my mind makes it rather difficult for me. Something  
2 like that would be really easy to produce, given how many  
3 public hearings you have had before city bodies. Because  
4 the City is required to notice, publicly notice, and they  
5 usually keep lists of those people and organizations that  
6 they provide notice to. It would be very simple for you to  
7 have asked the City for that list and submitted it to BCDC.  
8 I mean, it's not like you would have to do any work. That  
9 is just one piece of evidence for me that goes, "You guys  
10 aren't really trying to push this ball forward" and that  
11 really bothers me.

12 MR. BERGER: And I understand that and I am unclear as  
13 to what a city list of people who had objections to the  
14 gates of the kiosk has to do with this particular permit.

15 COMMITTEE MEMBER GILMORE: Well, it provides a list of  
16 interested parties.

17 MR. BERGER: But the interested parties as to the  
18 installation of a kiosk or a gate.

19 COMMITTEE MEMBER GILMORE: Or simply what is going on  
20 with the property. What I am saying to you is, rather than  
21 starting from scratch and saying, "Oh, this is a really  
22 difficult thing to do. We have to scour the bushes as to  
23 people who could be interested in these particular issues."  
24 There was an easy starting point for you and you could have  
25 submitted it. And if BCDC said, "Well, this is not really

1 what we're looking for" you would have had a stronger leg to  
2 argue, "Gee, we're trying to comply. And okay, we'll go  
3 back and now scour the bushes." But to not do anything when  
4 that list would have been really easy to come by is a little  
5 bit baffling to me.

6 MR. BERGER: I accept what you're saying. I disagree,  
7 obviously. We can obviously produce it but I don't think  
8 there is anybody interested in this other than perhaps the  
9 City and MAD, which is run by the City. I disagree that any  
10 of the public would be an interested party to this  
11 particular issue. And if they were I don't know how I would  
12 list them.

13 MR. BRENNAN: Wouldn't that city list have been  
14 provided by the City in their Interested Parties List on  
15 their permit revision? Just asking.

16 COMMITTEE MEMBER GILMORE: I don't know if that was a  
17 requirement of their permit.

18 MR. BERGER: Let me just say, I accept what you're  
19 saying. You know, there's lots of things that could have  
20 been done here. But again, we are looking at this as a  
21 package to get this resolved so that we don't have a  
22 continual moving target. I don't have any problem with that  
23 but that actually is a requirement to get the amended permit  
24 granted but it is not one of the violations that is the  
25 subject of fine.

1 COMMITTEE MEMBER GILMORE: I understand. But part of  
2 the problem for me is cooperation and moving this forward  
3 and it seems like we are arguing over whether or not we  
4 should fine you and the amount of fine, and for me  
5 cooperation is relevant to both of those questions.

6 MR. BERGER: And again, I would just read what it says  
7 which we have agreed to. It says:

8 "By no later than October 9th, 2017, the HOA  
9 shall submit to the Executive Director a fully  
10 complete and properly executed application for the  
11 second amendment to the Permit. The outstanding  
12 items to be submitted shall include:"

13 "1. An Interested Parties List;"

14 So in my opinion, we had until October 9th to do that.

15 MR. McCREA: If I may? The reason we are here and the  
16 reason we issued the violation report was because of the  
17 lack of cooperation. So that's why we had to put these  
18 things into the violation report was to, for lack of a  
19 better term, force the issue.

20 COMMITTEE MEMBER GILMORE: Right.

21 COMMITTEE CHAIR SCHARFF: So that for me is the issue.  
22 You know, in your presentation, I've got to say, when you  
23 said "We would not remove the sign" even if BCDC told you  
24 to. That doesn't sound cooperative.

25 MR. BERGER: It's not cooperative. And I don't mean to

1 sound dictatorial about it but that sign is important to the  
2 health and safety of every resident there and I don't think  
3 BCDC has any right to say that that's a restrictive sign.  
4 So yes, that's what I said and that's what I meant. If  
5 that's not cooperative well then so be it, you know, there's  
6 other forums, but we're trying to get this resolved. And I  
7 think even BCDC admits now that that sign doesn't have to  
8 come out. If you didn't like my tone I apologize but that's  
9 a sign that we take very seriously.

10 COMMITTEE CHAIR SCHARFF: So what I'm hearing from  
11 staff, and what it seems from BCDC staff, is that you have  
12 not been cooperative and that's why we're here.

13 MR. BERGER: Well, that's for you to decide, okay.

14 COMMITTEE CHAIR SCHARFF: Right. And so what I really  
15 want to understand a little bit is how do we get this  
16 resolved? I mean, BCDC staff has put forward a bunch of  
17 conditions of when you need to do things by in this Cease  
18 and Desist Order.

19 MR. BERGER: And we have agreed to all of those.

20 COMMITTEE CHAIR SCHARFF: And you said you were going  
21 to do all of these things.

22 MR. BERGER: All except remove the sign, yes. And  
23 within the time limits provided there.

24 COMMITTEE CHAIR SCHARFF: So BCDC staff has also said  
25 you don't need to remove the sign if you do -- and I guess I

1 wanted to get clarification of that. Go ahead.

2 MR. BOWERS: Chair Scharff, I'd like to try to shed  
3 some additional light on this thing. I would like to  
4 propose that we change the language of one of the conditions  
5 of the proposed Cease and Desist Order so that it offers an  
6 alternative to the -- right now it requires the sign to be  
7 removed.

8 COMMITTEE CHAIR SCHARFF: Right.

9 MR. BOWERS: I would like to add the alternative of  
10 obtaining authorization for the sign by the specified  
11 deadline and have that be what the Cease and Desist Order  
12 requires. But I hope --

13 COMMITTEE CHAIR SCHARFF: So do you have proposed  
14 language? If we are going to approve something.

15 MR. BOWERS: Well, it would read -- for condition III.C  
16 it would say: "By no later than November 4, 2017, remove"  
17 and this is where I would insert the phrase "or obtain  
18 authorization for the unauthorized "Permit Parking Only"  
19 signs located on Bayfront Drive."

20 COMMITTEE CHAIR SCHARFF: So "or obtain authorization  
21 for" correct?

22 MR. BOWERS: Yes.

23 COMMITTEE CHAIR SCHARFF: Okay. Okay, go ahead.

24 MR. BRENNAN: Can I ask for a point of clarification?  
25 Is this authorization, for instance, the authorization of

1 the positioning of the signs along the Bayfront corridor  
2 there?

3 MR. BOWERS: It will be addressed in the context of an  
4 overall signage plan --

5 MR. BRENNAN: Okay.

6 MR. BOWERS: -- for this permit.

7 MR. BRENNAN: But we are acknowledging that these are  
8 Vehicle Code required signs.

9 MR. BOWERS: So as part of -- you are going to submit a  
10 signage plan that is going to include but not be limited to  
11 these "No Parking" signs, okay. And then we're going to,  
12 we're going to look at that plan and we're going to either  
13 approve it or we're going to say where we have some issues  
14 with the plan.

15 MR. BRENNAN: Actually our initial drawing, that I hope  
16 I've emailed, noted that the new signs were going to go  
17 above those signs so it was mentioned in our drawing.

18 COMMITTEE CHAIR SCHARFF: Okay.

19 MR. BOWERS: But if we make that change I hope  
20 Mr. Berger can now say that he is able to approve or consent  
21 to the Cease and Desist Order portion of what we have in  
22 front of us.

23 COMMITTEE CHAIR SCHARFF: So that's where I was going  
24 with this. So yes. So with that language could you consent  
25 to the Cease and Desist Order?

1 MR. BERGER: No.

2 COMMITTEE CHAIR SCHARFF: So why not?

3 MR. BERGER: Sorry, no. Only because -- I understand  
4 what counsel is saying, but that allows BCDC to deny that  
5 particular provision. And the punitive provisions of this,  
6 which I have agreed to on every other item, would call for a  
7 fine of \$250 a day if we don't remove that sign, which is  
8 what this says, and it gives them arbitrary discretion to  
9 say "remove it." So no, I can't agree to that.

10 MS. WEBER: Chair, I would like to make a note that as  
11 you have seen in other stipulated orders we include a  
12 section for stipulated penalties for failure to comply with  
13 the order. Because the HOA did not agree to a stipulated  
14 order, this is a contested Cease and Desist Order and there  
15 is no provision for daily stipulated penalties if they do  
16 not comply.

17 MR. BERGER: I'm sorry but Item IV.2 of your violation  
18 says: Failure to remove the "Permit Parking Only" signs on  
19 Bayfront Drive required by paragraph II.D, one to seven days  
20 late, \$250 per day, per sign, eight and more days late, \$500  
21 per sign.

22 MS. WEBER: I believe that's a copy I sent to you in  
23 confidential settlement negotiations, that's not the copy of  
24 the Order that was provided for this hearing.

25 MR. BERGER: Well, it may be confidential but you

1 referred to it several times during the hearing so I think  
2 you opened that door.

3 MS. WEBER: I did not refer to the stipulated order  
4 during the hearing, I've referred to the order that is  
5 before the Commissioners today.

6 COMMITTEE CHAIR SCHARFF: So let me just get back to  
7 this issue and see if we can understand the difference in  
8 the language. So what I am trying to get to here is BCDC  
9 staff has said the sign can stay but you need a signage plan  
10 that will include more welcoming signs that will also go up,  
11 right?

12 MR. BERGER: Yes, but --

13 COMMITTEE CHAIR SCHARFF: So wait. So instead of  
14 saying, "No, we are not going to remove the sign" can we be  
15 more specific about a signage plan and welcoming signs that  
16 may address counsel's concern that it's -- maybe that would  
17 help her, maybe it wouldn't.

18 MR. BERGER: No, I understand. But with all due  
19 respect, Item F.2 already talks about the installation of  
20 the signs that have been approved by the HOA and BCDC.

21 MS. WEBER: It's Item E.2, you're looking at the wrong  
22 order.

23 MR. BERGER: I'm sorry. Well I've just got an earlier  
24 document. We've already agreed to the signage and drawn it  
25 on the map.

1 COMMITTEE CHAIR SCHARFF: So are the signs in E.2, are  
2 those the signs that would address Item C?

3 MS. WEBER: Yes.

4 COMMITTEE CHAIR SCHARFF: So why do we need Item C?

5 MS. WEBER: Well we need --

6 COMMITTEE CHAIR SCHARFF: If they have to do those  
7 signs anyway why do we need Item C? And I mean, if we do  
8 then tell me, but I don't see why we do.

9 MR. McCREA: Item C can be changed. I think we still  
10 need it but it doesn't need to say "remove the sign." I  
11 think what we should do is change it. Especially I think we  
12 should do this, if the Respondent agrees, that we should  
13 change it to say that it needs to be authorized. Because  
14 what we are trying to do is create a welcoming procession  
15 from the public street through the private street to the  
16 public shoreline.

17 COMMITTEE CHAIR SCHARFF: So what does that mean, the  
18 point of view that it has to be authorized? What does that  
19 mean?

20 MR. McCREA: What it allows us to do is to make sure,  
21 as John Bowers mentioned, that the comprehensive signage  
22 package, that all of the language and the verbiage of the  
23 signs together sends a signal to the public that they are  
24 welcome towards the shoreline. By authorizing it we then  
25 have the ability for the BCDC staff to review the verbiage

1 of that sign to make sure that it works and is compatible  
2 with the public shore signs.

3 COMMITTEE CHAIR SCHARFF: So what would that language  
4 look like?

5 MR. McCREA: I have my idea but I actually think it  
6 might be helpful for the Respondent to help us craft that  
7 language.

8 MR. BERGER: I guess my problem -- and again I am being  
9 labeled as uncooperative and I don't mean to be but I'm a  
10 lawyer protecting my client. I don't see how we can agree.  
11 I mean, I don't have any problem submitting permission to  
12 put the sign but that begs the question, because that  
13 implies by definition that BCDC has the right to say "You  
14 can't have that sign." And I'm saying that BCDC has no  
15 right to require that and the Vehicle Code requires the  
16 sign. So I just don't see how I can agree to anything that  
17 refers to that particular sign.

18 MS. KLEIN: We could accept plan approval for the  
19 parking sign.

20 MR. BERGER: I didn't understand that, I'm sorry.

21 MS. KLEIN: Rather than including an express  
22 authorization in the amendment it would be required to  
23 secure plan approval. So we require the parking shore  
24 parking signs and those signs include the permit parking  
25 signs as well.

1 MS. WEBER: And based on the settlement agreement,  
2 Bayfront Drive is located in BCDC's shoreline band  
3 jurisdiction and therefore we have authority to authorize  
4 all signage within our jurisdiction.

5 MR. BERGER: We seriously disagree with that.

6 COMMITTEE MEMBER GIBBS: Mr. Chair?

7 COMMITTEE CHAIR SCHARFF: Commissioner Gibbs, go for  
8 it.

9 COMMITTEE MEMBER GIBBS: There's two things I don't  
10 understand right now. The first, everybody can maybe help  
11 me understand; the second, Mr. Berger.

12 MR. BERGER: Yes.

13 COMMITTEE MEMBER GIBBS: The first is this: If I  
14 understand this correctly, there is permit parking only on  
15 this street, much like there is in many streets in San  
16 Francisco and in some other heavily congested areas, so you  
17 need a permit to park on that street. That would seem to me  
18 to be a City of San Leandro responsibility, in general.

19 MR. BERGER: No. No, I'm sorry, I just need to correct  
20 you. These are private streets.

21 COMMITTEE MEMBER GIBBS: Okay, they're private streets.

22 MR. BERGER: The permit parking is managed and  
23 administered by the HOA, not the City.

24 COMMITTEE MEMBER GIBBS: By the HOA, okay, fair enough.  
25 So bottom line, we are trying to improve access to the

1 shoreline. Maybe just say, and maybe other people have  
2 experienced this as well, there is nothing that will ruin  
3 your day at the shoreline more than parking somewhere, going  
4 and enjoying your shoreline and coming back to find a \$50  
5 ticket because you didn't know because there wasn't a sign.

6       So I'm not sure why we're arguing about the sign. If  
7 they can't park there, frankly I think the sign should stay  
8 and there should be other trail access signs and signal  
9 signs and everything saying, the shoreline is here but you  
10 can't park here, you've got to drive a couple more blocks to  
11 find where you can park. So it seems we are going round and  
12 round and round about this when there is a clear-cut and  
13 common sense that the very people that we are trying to  
14 protect would frankly be happy that we're doing -- because  
15 again, you don't want to go to the shoreline and then come  
16 back and find a big ticket, or worse, maybe be towed.

17       MR. BRENNAN: If I may address the look and feel of the  
18 signs?

19       COMMITTEE MEMBER GIBBS: Please.

20       MR. BRENNAN: The HOA had tentatively agreed based, I  
21 think, on Adrienne's or Maggie's proposal, that we needed  
22 the official, blue, shoreline over thataway signs. We had  
23 proposed that that be placed, I believe, on the four light  
24 posts on Bayfront, which happen to be the four light posts  
25 that also have the No Parking sign. So they will be the

1 same density, they will be, you know, public shoreline,  
2 arrow thataway, public street, no parking. The City on the  
3 roundabout has public parking, four hour maximum, dusk to  
4 dawn type of a sign. That is the official parking per last  
5 year's agreement apparently with the City, which we have not  
6 seen a copy of.

7 So it appears -- oh, and there was also a request that  
8 the first sign be double-sided so that the welcoming shore  
9 sign could be seen if you're coming off the trail or if  
10 you're coming down the street; we've agreed to that. So the  
11 density of signs exactly matches.

12 There is one additional sign which is the long verbose  
13 sign that's the one that, you know, quotes chapter and verse  
14 and gives the tow company number and the CVC code and all of  
15 that and that's placed by law at the entrance to the private  
16 development and we have placed them also at the entrance to  
17 each of the private streets off of Bayfront. So that's the  
18 sign topology.

19 I could show you, I have a document here from 2015.  
20 We'd already agreed to signs, sharrows, all of that since a  
21 September of 2015 meeting. This is water under the bridge  
22 as far as we're concerned.

23 COMMITTEE CHAIR SCHARFF: So I just need to clarify  
24 from staff on this a little bit. These signs are within our  
25 100 foot shoreline band? No?

1 MS. WEBER: They are not within our 100 foot shoreline  
2 band but there was a settlement agreement entered into in  
3 1994 with BCDC and Citation Homes that created our shoreline  
4 band jurisdiction in this location.

5 COMMITTEE CHAIR SCHARFF: Okay. So I just want to  
6 address Commissioner Gibbs, his issue here.

7 So these signs are within our jurisdiction due to the  
8 settlement agreement?

9 MS. WEBER: Correct.

10 COMMITTEE CHAIR SCHARFF: So this is not a city  
11 ordinance, this is the fact that they have a private street.  
12 They still have the right to allow no parking there because  
13 we don't have that in our permit, right, but we control the  
14 signage because it is in our band; is that correct?

15 MS. WEBER: Correct.

16 COMMITTEE CHAIR SCHARFF: So given that we can't say  
17 anyone can park there for shoreline access. We agree with  
18 that, right, staff?

19 MS. WEBER: Correct.

20 COMMITTEE CHAIR SCHARFF: Okay. Then I agree with  
21 Commissioner Gibbs that we obviously need a sign because you  
22 wouldn't want people to get tickets or whatever and that  
23 needs to be enforced. They seem to agree with that and you  
24 seem to agree with that.

25 MS. WEBER: Correct.

1 COMMITTEE CHAIR SCHARFF: Where the -- the confusion in  
2 this item seems to be that you want welcoming signs but they  
3 seem to agree to welcoming signs. So I am trying to figure  
4 out why we can't have an agreement on this.

5 MR. BERGER: On behalf of the HOA, we have agreed to  
6 all of the terms of the Cease and Desist Order and the  
7 future possible penalties with the exception of that one  
8 provision; we have always agreed to that. It is in my  
9 Statement of Defense that we agreed to it.

10 COMMITTEE CHAIR SCHARFF: So what language would you  
11 suggest?

12 MR. BERGER: That sentence just doesn't need to be  
13 there. There shouldn't be any violation listed for that  
14 particular sign and there shouldn't be any fine attached to  
15 it.

16 COMMITTEE CHAIR SCHARFF: Well, but you need to have a  
17 signage authorization, which you never obtained from BCDC  
18 when you put your packet out. That's the essence of the  
19 violation, unless I'm wrong.

20 MS. WEBER: Correct.

21 MR. BERGER: Well, we disagree with that, okay. I  
22 understand that. Again, we get back to the due process  
23 argument about you're going to fine the homeowners for not  
24 applying for a sign that by the Vehicle Code they're  
25 required to do.

1 COMMITTEE CHAIR SCHARFF: That's a separate issue. The  
2 fines, right now we haven't gotten to.

3 MR. BERGER: Okay.

4 COMMITTEE CHAIR SCHARFF: What we are trying to figure  
5 out is, on a going forward basis, you know --

6 MR. BERGER: But why --

7 COMMITTEE CHAIR SCHARFF: How do we get you guys to do  
8 what you need to do?

9 MR. BERGER: Have BCDC remove that sentence. That sign  
10 has been there for 20 years. They didn't even know about it  
11 until this year and so it's obviously never affected anybody  
12 in the past. And as Commissioner Gibbs says, it prevents  
13 people from parking and getting their cars yanked without  
14 notification.

15 MR. McCREA: Mr. Chairman?

16 MR. BERGER: I don't find it unfriendly, the fact that  
17 you're warning people this is a permit parking area.

18 MR. McCREA: We have some proposed language.

19 COMMITTEE CHAIR SCHARFF: Okay, proposed language.

20 MR. BOWERS: So let me make one more attempt at some  
21 language that hopefully Mr. Berger will find acceptable.  
22 And that is to revise the language of this particular  
23 provision to require the inclusion of the existing Permit  
24 Parking Only signs in an approved signage plan that will be  
25 submitted to the BCDC and approved prior -- no later than

1 November 4th, 2017.

2 MR. BERGER: No problem with that language, okay.

3 COMMITTEE CHAIR SCHARFF: That's acceptable to all of  
4 you?

5 MR. BRENNAN: That's clearly acceptable to me.

6 COMMITTEE MEMBER GIBBS: I've got two more things.

7 COMMITTEE CHAIR SCHARFF: All right.

8 COMMITTEE MEMBER GIBBS: So there has been some  
9 dialogue between you and Mr. Berger just now over the past  
10 about 10 minutes where it seems that both of you are saying,  
11 we have agreed to everything except that one signage, that  
12 is now agreed to; but I thought that the fines had not been  
13 agreed to.

14 COMMITTEE CHAIR SCHARFF: No, the fines have not.

15 COMMITTEE MEMBER GIBBS: Okay. So we have agreed to  
16 everything but the fines?

17 MR. BERGER: Right. And what I tried to say before,  
18 and probably unartfully, we agree to now all the terms in  
19 the Cease and Desist Order. We disagree with the inclusion  
20 of all the findings of facts, which recited all the things  
21 that we allegedly did. I don't have any problems, and I  
22 don't think they're necessary, for the Cease and Desist  
23 Order. We'll sign the Cease and Desist Order and the future  
24 penalties, we just didn't want the eight page recitation of  
25 all the things that we allegedly did.

1 MR. BOWERS: If I can respond? I mean, we can include  
2 a provision in the Cease and Desist Order to the effect that  
3 you don't agree with all of the factual recitations in the  
4 Cease and Desist Order if that makes you feel more  
5 comfortable.

6 MR. BERGER: It definitely does. It's typical in a  
7 civil settlement where both sides agree that neither side is  
8 admitting any harm. I have no problems if we can add that  
9 language.

10 COMMITTEE MEMBER GIBBS: Okay.

11 MR. BOWERS: We can add that language.

12 COMMITTEE MEMBER GIBBS: We're making progress.

13 COMMITTEE CHAIR SCHARFF: We are. But, you know --

14 MR. BERGER: I apologize that the Commissioners have to  
15 be the mediators of doing this.

16 COMMITTEE CHAIR SCHARFF: All right. So then comes the  
17 questions of fines and there's really several things we  
18 could do. We could impose the fines as suggested by staff,  
19 we could cut the fines, we could say we are going to impose  
20 the fines but if you achieve all of these things by the  
21 dates certain then you have to pay none of the fine or you  
22 have to pay a certain percentage of the fine. It seems that  
23 those are the choices between the Commission but I wanted to  
24 hear from other Commissioners of what they thought the  
25 options were.

1 COMMITTEE MEMBER GIBBS: One more thing?

2 COMMITTEE CHAIR SCHARFF: Go ahead.

3 COMMITTEE MEMBER GIBBS: Could we go to the - I need to  
4 understand this - the picture of the now notorious but  
5 agreed upon sign, the picture on the street.

6 MR. BERGER: It's on the left, yes.

7 COMMITTEE MEMBER GIBBS: On the left. So if I  
8 understand the testimony today, Mr. Berger, and thank you  
9 for your spirited presentation.

10 MR. BERGER: I apologize if it was too spirited.

11 COMMITTEE MEMBER GIBBS: There has been a crime problem  
12 in the area and you have been seeking to gate the streets  
13 because unauthorized people have been coming in and  
14 committing crime; did I understand that correctly?

15 MR. BERGER: In fact, a murder.

16 COMMITTEE MEMBER GIBBS: Okay.

17 MR. BERGER: In addition to other physical crimes, yes.

18 COMMITTEE MEMBER GIBBS: Okay. So that, if you look at  
19 the picture on the left, that fence along the left there,  
20 who does that belong to? Is that the homeowners' or does  
21 that belong to --

22 MR. BRENNAN: On the left side of the street those  
23 fences, the wooden fences are the property of the homeowner.

24 COMMITTEE MEMBER GIBBS: Of the homeowner?

25 MR. BRENNAN: Those are individual single family

1 residences. The whole development is a PD, a planned  
2 development, but those are single family residences, one  
3 residence to a plot on the left hand side. On the right  
4 hand side where you see the taller, sound-type wall, those  
5 are condominiums. Those are 2 to 8 residences per plot.  
6 And the landscaping -- contrary to what was stated it is not  
7 a 5 -- it's a 6 foot sidewalk. Four foot to the left and 4  
8 to 12 feet on the right. It's quite a bit wider than the  
9 original trail requirement that was imposed on us and it's a  
10 lot prettier.

11 COMMITTEE MEMBER GIBBS: So the fencing on that right  
12 hand side belongs to the HOA?

13 MR. BRENNAN: Yes, it does.

14 COMMITTEE MEMBER GIBBS: And the trees that are right  
15 here going along next to the cars?

16 MR. BRENNAN: HOA.

17 COMMITTEE MEMBER GIBBS: HOA.

18 MR. BRENNAN: And that light post is an example of the  
19 four light posts that I mentioned.

20 COMMITTEE MEMBER GIBBS: Okay. So imagine with me if  
21 you will, Mr. Berger, sometimes things that criminals do and  
22 vandals do, they come in and in the middle of the night they  
23 chop down all the trees. Okay? Imagine that.

24 MR. BERGER: Okay.

25 COMMITTEE MEMBER GIBBS: And the trees are in the

1 street. And whether or not it's a private street people,  
2 the public can drive up and down the street, right?

3 MR. BERGER: Absolutely.

4 COMMITTEE MEMBER GIBBS: Okay. And it is now a safety  
5 hazard. So some government body says, we need to get these  
6 trees removed. Who do they come to to get the trees  
7 removed?

8 MR. BERGER: Well, it would be hard to say how a  
9 government body would have jurisdiction but if they had an  
10 issue they would come to the HOA board.

11 COMMITTEE MEMBER GIBBS: Okay. And how would it get  
12 paid for?

13 MR. BERGER: The removal?

14 COMMITTEE MEMBER GIBBS: Yes.

15 MR. BERGER: Yes, the HOA would have to pay for it.

16 COMMITTEE MEMBER GIBBS: Okay, all right, thank you.

17 MR. BERGER: Although again, I don't understand how the  
18 City would have jurisdiction to remove private trees on a  
19 private street but it's theoretically possible, I guess.

20 COMMITTEE MEMBER GIBBS: Thanks.

21 COMMITTEE CHAIR SCHARFF: Commissioners, anyone else?

22 All right, then I'll move this forward a little bit  
23 further. So I think the question before us is fines. I  
24 frankly buy staff's argument that cooperation has been a  
25 problem here, I think it has; however, I am interested in

1 getting this resolved. On the other hand, I am not sure how  
2 resolvable this is, frankly, on the fine issue. So I guess  
3 I am open. I guess I am open to saying, are you willing to  
4 pay any fines? Or if we impose any fines are you going to  
5 basically move forward without trying to resolve, without --  
6 that's really the question.

7 MR. BERGER: I was authorized by the Board to offer  
8 \$25,000 in resolution.

9 COMMITTEE CHAIR SCHARFF: Okay.

10 MR. BERGER: And have offered that to BCDC.

11 COMMITTEE MEMBER GILMORE: So can I just point out, and  
12 I am going to give my colleague over here the credit, that  
13 if you take the amount of the proposed fine and you divide  
14 it by the number of homeowners it's a little over, it's like  
15 \$220, \$215 a homeowner, to make all of this go away. And  
16 the reason I mention that is because we had a discussion,  
17 partially in jest earlier, of this being a test case. And,  
18 you know, you talk about attorneys' costs, court costs and  
19 whatever, that seems to me that that would be a lot more  
20 than \$220 per homeowner. Just saying.

21 COMMITTEE MEMBER TECHEL: I look at this list of  
22 penalties and it seems like we have had a lot of discussion  
23 about the signage and that we have come to an understanding  
24 that the signage they put up was legal under the  
25 requirements, so I would look at this and say I would be

1 willing to take the \$4,500 out of the penalties because I  
2 think I have a different understanding of the signage.

3 But what concerns me about the understanding of the  
4 homeowners is they went forward for a gate. They wanted to  
5 gate this off.

6 COMMITTEE CHAIR SCHARFF: That's right.

7 COMMITTEE MEMBER TECHEL: And they didn't seem to  
8 understand that this was public access. And the argument of  
9 you unknowingly moved in or they didn't understand, but the  
10 truth is they didn't understand that when they moved forward  
11 with that request. I agree, I did the same sort of math. A  
12 fine that says, "It's your responsibility to keep this open"  
13 I think would keep everybody understanding the importance  
14 and their responsibility for the public access.

15 MR. BERGER: May I just say that it was never not open.  
16 This is not a fine for restricting access. Yes, we imposed  
17 the gate because somebody had gotten murdered in our  
18 complex. We got opposition from the City and immediately  
19 from BCDC. The gate proposition was dropped. But it was  
20 always open so it is not fair to say that the Association  
21 proposed that it not be open. We didn't even know about the  
22 requirements at the time the gate was presented to the City.

23 MR. BRENNAN: In addition, the gate as proposed did not  
24 constrain the public access easement as granted, bicycling,  
25 walking, picnicking, none of that; it was a vehicular gate

1 only. So there was no constraint of the easement other than  
2 you had to walk by the vehicle gate.

3 COMMITTEE CHAIR SCHARFF: I would consider a gate  
4 possibly being not welcoming.

5 MR. BRENNAN: That was gone in 2014.

6 COMMITTEE CHAIR SCHARFF: But I don't think that's the  
7 issue.

8 MR. BRENNAN: Well you raised it.

9 COMMITTEE CHAIR SCHARFF: So I am going to throw this  
10 out for my colleagues and I'd like to think about it. I  
11 also agree that we should probably remove the \$4,500 fine.  
12 Though I will say my real reason for that is that it's about  
13 45 days, I think you could have put a signage package  
14 together. And I don't think BCDC staff would have had you  
15 remove the sign, I think it was the failure, frankly, to put  
16 the signage package together and to be working on that and  
17 the cooperation. So I also could impose the sign, I  
18 wouldn't feel bad about it either.

19 I think the rest of the fines are well taken, but on  
20 the other hand I would like to give you some incentive to do  
21 this. I guess if it was just me ruling on this I would  
22 suggest that if you complete -- that we impose all the fines  
23 except the \$4,500; but that if you complete all of the items  
24 by the dates set forth in the Cease and Desist Order that  
25 you don't have to pay 50 percent of them. I think that

1 would be incredibly generous on our part but I would suggest  
2 that because I think we want you to get this done but I do  
3 think you have not been cooperative.

4 COMMITTEE MEMBER GIBBS: And so the total would be  
5 somewhere around \$60,000 if I'm getting it correct?

6 COMMITTEE CHAIR SCHARFF: If they actually do get  
7 everything done.

8 COMMITTEE MEMBER GIBBS: The total would be somewhere  
9 around \$60,000? Okay.

10 COMMITTEE CHAIR SCHARFF: Correct.

11 COMMITTEE MEMBER ADDIEGO: Yes, Chairman Scharff, I can  
12 support your compromise proposal.

13 COMMITTEE MEMBER GILMORE: I can too, I think that is  
14 fair and reasonable. And I want to make sure, again, that  
15 you understand, we are not penalizing you for something that  
16 happened before you became aware of all of the issues,  
17 because that would not be fair and that would not be  
18 reasonable. I think the reason that we are penalizing you  
19 is for the actions or specifically non-actions and what we  
20 perceive to be noncooperation since you became aware of the  
21 violations and we want to try to incentivize you to take  
22 care of them as quickly as possible based on the schedule  
23 that is set out here; so I could support that  
24 recommendation.

25 COMMITTEE MEMBER TECHEL: I think I can support it too,

1 although I -- maybe this has a technicality. Is it within  
2 our authority to move forward with such a proposal?

3 MR. BOWERS: Yes.

4 COMMITTEE MEMBER TECHEL: Okay.

5 MR. BOWERS: Yes.

6 COMMITTEE MEMBER TECHEL: And with the understanding  
7 that sometimes the total Commission board, as I referred to  
8 earlier, feels that we weren't punitive enough.

9 COMMITTEE MEMBER ADDIEGO: Developing a reputation.

10 COMMITTEE MEMBER TECHEL: Yes. That this happens  
11 quickly I think would be important for us to show to our  
12 board that there was a good reason for us doing this.

13 COMMITTEE MEMBER GIBBS: Mr. Chair, I just asked a  
14 mathematical question but I didn't get to the point which is  
15 that I support your compromise proposal.

16 COMMITTEE CHAIR SCHARFF: Thank you.

17 COMMITTEE MEMBER GIBBS: Thank you.

18 COMMITTEE CHAIR SCHARFF: Mr. Berger, here is a chance  
19 to exit on a grace note.

20 MR. BERGER: I appreciate that. I don't have the  
21 authority to do that. I think that if the board comes to  
22 that conclusion that, you know, that's appropriate. We have  
23 our remedies or we have the right to agree to it, which, you  
24 know, we will take to our board, but I can't do it with one  
25 board member.

1 COMMITTEE CHAIR SCHARFF: No, that's perfectly  
2 understandable. But it is not really a settlement, we are  
3 imposing this.

4 MR. BERGER: No, that's what I'm saying, if you impose  
5 it then we have our, you know, we'll react to it.

6 COMMITTEE CHAIR SCHARFF: Right. You have your  
7 remedies.

8 MR. BERGER: I appreciate the concept and the offer,  
9 though.

10 COMMITTEE CHAIR SCHARFF: And the way it would be  
11 written, obviously, is that if you don't achieve this by the  
12 date then we are at the full fine.

13 MR. BERGER: Right.

14 COMMITTEE CHAIR SCHARFF: Without the \$4,500.

15 MR. BERGER: Understood.

16 COMMITTEE CHAIR SCHARFF: Okay.

17 COMMITTEE MEMBER GILMORE: Can I just ask a question?  
18 This is a procedural question. So assuming that we impose  
19 this today. This goes back to the full Commission and the  
20 full Commission can choose to accept our recommendation, not  
21 accept our recommendation at all, and/or impose greater --

22 COMMITTEE CHAIR SCHARFF: No, they can't. So what the  
23 Commission does is they have to either accept it --

24 COMMITTEE MEMBER GILMORE: Or reject it.

25 COMMITTEE CHAIR SCHARFF: -- or reject it. And then if

1 they reject it they have to hear it themselves or have us  
2 come back and rehear it.

3 COMMITTEE MEMBER GILMORE: Okay.

4 MS. WEBER: I have a question about language. So would  
5 you propose that \$60,000 be due within 30 days of issuing  
6 the Order and then another \$60,000 due if after a certain  
7 date it's clear that the HOA isn't in compliance or would  
8 you prefer \$120,000 due within 30 days of issuance and we  
9 hold?

10 COMMITTEE CHAIR SCHARFF: I would prefer \$60,000 due  
11 within -- you know, 30 days seems reasonable to me. You  
12 said they had the money in the bank but I would be open to  
13 hearing about that issue.

14 I was thinking 30 days on that fine. And then I was  
15 thinking that if they miss any of the dates, at BCDC's  
16 discretion the rest of the money is due within 30 days.

17 MS. WEBER: Thank you.

18 COMMITTEE CHAIR SCHARFF: Because I could see giving  
19 BCDC some discretion where if they're a day late on it for  
20 some reason that you might decide that they are working hard  
21 on this and it is not their fault.

22 COMMITTEE MEMBER GILMORE: Can I make one comment?

23 COMMITTEE CHAIR SCHARFF: Sure.

24 COMMITTEE MEMBER GILMORE: I would agree with that but  
25 I believe I heard that the HOA only meets once a month.

1 COMMITTEE CHAIR SCHARFF: That's why I was thinking  
2 about the 30 days.

3 COMMITTEE MEMBER GILMORE: Yes. So could we make that  
4 a little bit longer?

5 COMMITTEE CHAIR SCHARFF: It depends. When is their  
6 next meeting?

7 COMMITTEE MEMBER GILMORE: Yes.

8 MR. BERGER: September 28.

9 COMMITTEE MEMBER GILMORE: Okay, well then we're good.

10 COMMITTEE CHAIR SCHARFF: So we're good within the 30  
11 days.

12 COMMITTEE MEMBER GILMORE: We're good, okay.

13 MR. BERGER: If they can decide to do it within three  
14 days. That's a little tight, 30 days.

15 MR. BOWERS: Well the 30 day time period is actually a  
16 function of our statute; the 30 day payment period is in our  
17 law.

18 MS. WEBER: And 30 days after Order issuance would be  
19 November 4th, because the Order isn't actually issued until  
20 it goes before the Commission on October 5th.

21 MR. BERGER: I just wanted to make clear for the record  
22 that whether or not the board agrees to this proposal this  
23 does not -- because we have been accused of being dilatory,  
24 I understand the comment. We plan on proceeding with  
25 fulfilling all of the rest of these conditions, whether we

1 object to the Order of the fines or not. That's acceptable  
2 to the Commission?

3 COMMITTEE CHAIR SCHARFF: That you continue to move  
4 forward?

5 MR. BERGER: Yes, that we can fulfill all these  
6 requirements regardless of whether we agree to the fine  
7 provision of the Order. I see no reason for us now not to  
8 do the items that we talked about.

9 COMMITTEE CHAIR SCHARFF: We would want you to move  
10 forward and get these items done as quickly as possible.

11 MR. BERGER: Okay, good.

12 COMMITTEE CHAIR SCHARFF: The only thing I do raise is  
13 the issue of if you do all these items but you do go to  
14 court over the amount of the fines, do we have an issue with  
15 that? Would it be that we'd require that this matter ends  
16 or do we require -- because I can see that, right?

17 MR. BERGER: With all due respect, I don't see how you  
18 can make that requirement. If we -- I mean, unless BCDC  
19 staff now tells us they are not going to accept our amended  
20 application where all these things are done.

21 COMMITTEE CHAIR SCHARFF: No.

22 MR. BERGER: They're done, you know. Yes. And we  
23 would object -- if we are going to object we'd object to the  
24 fine portion of it.

25 COMMITTEE CHAIR SCHARFF: Okay. And that's out of our

1 control. I just wanted to make it clear for all.

2 MR. BERGER: Okay. I appreciate that, thank you.

3 COMMITTEE CHAIR SCHARFF: All right, anything further  
4 on this?

5 MR. BOWERS: Before we vote I would like to just  
6 summarize what I understand the changes to be so that we can  
7 vote on --

8 COMMITTEE CHAIR SCHARFF: A clear motion.

9 MR. BOWERS: Have a clear understanding of what we are  
10 voting on. So we have talked about -- actually there are  
11 four changes as I see them. We have made a change to the  
12 special condition requiring removal of the unauthorized  
13 signage.

14 COMMITTEE CHAIR SCHARFF: And that's Item C.

15 MR. BOWERS: That's Item C. We have agreed to --

16 COMMITTEE CHAIR SCHARFF: Why don't you read that  
17 language just so everyone is clear and for the record what  
18 it is.

19 MR. BOWERS: The passage or that condition would now  
20 read: "By no later than November 4, 2017, include the  
21 "Permit Parking Only" signs located on Bayfront Drive in an  
22 approved signage plan."

23 COMMITTEE CHAIR SCHARFF: Okay.

24 MR. BOWERS: That's what that section will now read.

25 And we have agreed at Mr. Berger's request to insert a

1 provision that states that the agreement -- the Cease and  
2 Desist Order shall not require the Respondent to agree to  
3 all of the factual assertions. We'll work that language  
4 out.

5 COMMITTEE CHAIR SCHARFF: Correct.

6 MR. BOWERS: And then we have agreed on a Civil Penalty  
7 Order, a modified Civil Penalty Order along the lines that  
8 the Chair has outlined.

9 COMMITTEE CHAIR SCHARFF: So we have -- they have not  
10 agreed to it.

11 MR. BOWERS: No, I understand that. We are talking  
12 about the Cease and Desist Order and Civil Penalty Order  
13 that will be the recommended Orders that will go from this  
14 body to the Commission.

15 COMMITTEE CHAIR SCHARFF: Correct.

16 MR. BOWERS: And then finally I want to call your  
17 attention to an errata sheet that we have provided to you  
18 that makes a small, technical change to the last provision  
19 of the order, which is paragraph VI.

20 COMMITTEE CHAIR SCHARFF: Okay.

21 MR. BOWERS: So the Order as modified along the lines  
22 that I have just indicated is now the Order that is before  
23 you for a vote and approval.

24 COMMITTEE MEMBER GILMORE: Wait, is that VI or IV?

25 Page 10, Opportunity for Judicial Review, is that what you

1 are discussing?

2 MR. BOWERS: Yes. It should be, it should paragraph  
3 VI, Roman numeral VI.

4 COMMITTEE MEMBER GILMORE: Okay.

5 MR. BERGER: Now I'm confused, I'm sorry. The document  
6 I was just handed shows page 10, Item IV.

7 COMMITTEE MEMBER GILMORE: Yes, that's the question I'm  
8 asking because he said VI, my page says IV.

9 COMMITTEE CHAIR SCHARFF: It should be VI, it should be  
10 VI.

11 COMMITTEE MEMBER GILMORE: Okay, it should be VI.

12 MR. BERGER: I might, if anybody wants to be precise,  
13 it is also "Opportunity." I am not sure what that word is.

14 MR. JACOBS: Mr. Chair, I just have a question about  
15 the closing of the public hearing, which per the regulations  
16 occurs after the various interested parties and the public  
17 have addressed the Committee and the Committee has finished  
18 asking questions of the various interested persons. At that  
19 point the Committee would close the public hearing --

20 COMMITTEE CHAIR SCHARFF: And then we'd vote.

21 MR. JACOBS: -- and could deliberate amongst itself  
22 publicly and then would vote.

23 COMMITTEE CHAIR SCHARFF: All right, I will close the  
24 public hearing seeing no one further wishing to speak, no  
25 cards, and I assume Commissioners have no more questions of

1 them. We can have further deliberations or we can have a  
2 motion.

3 COMMITTEE MEMBER TECHEL: I will make the motion that  
4 John Bowers just explained to us, the changes in the Cease  
5 and Desist Order.

6 MR. JACOBS: Mr. Chair, I apologize if I missed it but  
7 was there a change presented to the Committee to implement  
8 the Committee's intention to waive half of the penalty if  
9 half is paid within 30 days?

10 COMMITTEE CHAIR SCHARFF: There was.

11 MR. JACOBS: Okay, then I apologize for missing it.

12 COMMITTEE CHAIR SCHARFF: So just to recap the  
13 penalties. The penalties would be the proposed penalties in  
14 the penalties chart, which is right here, less the \$4,500  
15 which we are removing. So the total penalties would  
16 actually be -- I guess it would be exactly \$120,000. So  
17 \$60,000 of that will be payable within 30 days. The  
18 remaining \$60,000 will not be payable if they meet all of  
19 the requirements within the Cease and Desist Order; and if  
20 they are not met they will be due within 30 days.

21 MR. JACOBS: Mr. Chair, clarification of that. I  
22 understand that the full amount will be due if the various  
23 conditions in the Cease and Desist Order are not met. But I  
24 think, and I just wanted to clarify, that the Committee  
25 intended to make the full amount payable if half is not paid

1 within 30 days?

2 COMMITTEE CHAIR SCHARFF: Yes.

3 MR. JACOBS: In other words, there are two  
4 requirements --

5 COMMITTEE CHAIR SCHARFF: There are two requirements.

6 MR. JACOBS: -- for waiving half the penalty: One is  
7 compliance with the conditions and the other is payment of  
8 half of the penalty within 30 days.

9 COMMITTEE CHAIR SCHARFF: That is correct.

10 MR. JACOBS: Thank you.

11 COMMITTEE CHAIR SCHARFF: Thank you for that.

12 COMMITTEE MEMBER GILMORE: Do you need a second?

13 COMMITTEE CHAIR SCHARFF: Yes.

14 COMMITTEE MEMBER GILMORE: I'll second.

15 COMMITTEE CHAIR SCHARFF: All right. Mr. Jacobs, do  
16 you need a moment to just go through it and see if there is  
17 anything else that is unclear?

18 MR. JACOBS: Mr. Chair, that's all that I noticed, that  
19 I had a question about.

20 COMMITTEE CHAIR SCHARFF: Thank you. With that I  
21 believe we can vote. All in favor of the motion?

22 (Ayes.)

23 COMMITTEE CHAIR SCHARFF: All opposed?

24 (No response.)

25 COMMITTEE CHAIR SCHARFF: No opposition and no

1 abstentions. That passes unanimously.

2 Thank you very much.

3 MR. BERGER: Thank you very much for all your  
4 attention.

5 COMMITTEE CHAIR SCHARFF: Okay, now we are on to our  
6 next item, which is a report from the Chief of Enforcement.

7 MS. KLEIN: Nothing in my report is urgent and I am  
8 happy to postpone it unless you would like me to --

9 COMMITTEE CHAIR SCHARFF: Is it more than 15 minutes?

10 MS. KLEIN: No.

11 COMMITTEE CHAIR SCHARFF: Why don't we hear it?

12 MS. KLEIN: Since time is short, apologies to Executive  
13 Director Goldzband but I am going to slightly preempt part  
14 of his report, which is just to let you know that Greg Ogata  
15 has taken a new position with Genentech and I would like to  
16 acknowledge his professionalism and skills and hard work  
17 with BCDC as the Dredging Secretary for two years and the  
18 Legal Secretary for two years. He has been especially  
19 helpful the past year with all the enforcement proceedings,  
20 lots of document preparation and filing and we greatly  
21 appreciate his work. We will miss him and we wish him  
22 wonderful success in his new career; thank you, Greg.

23 COMMITTEE CHAIR SCHARFF: Yes, thank you very much,  
24 Greg, for all that you have done for BCDC.

25 MS. KLEIN: Okay. So I just wanted to update you on

1 three of the issued Orders.

2 Oh, first of all, my apologies. We expect to hold two  
3 more Enforcement Committee meetings this year. On Thursday,  
4 October 15th you will consider a recommended enforcement  
5 decision regarding violations at Westpoint Harbor in Redwood  
6 City, San Mateo County; and on November 2nd you will  
7 consider a recommended enforcement decision to Sonoma-Marin  
8 Area Rapid Transit and North Coast Rail Authority.

9 COMMITTEE CHAIR SCHARFF: What was the date in October  
10 again?

11 MS. KLEIN: The 19th. I'm sorry, I misspoke.

12 And the November 2nd date might change depending on the  
13 Respondent's response to the violation report which they  
14 have just received, it had been sent this week.

15 Updates on three issued Orders:

16 Marina Village Associates, which is located at Loch  
17 Lomond Marina in San Rafael, Marin County. The Order was  
18 issued on November 3rd, 2016 and they have complied with all  
19 of their requirements. Of note is that while all the  
20 requirements have been achieved, many were achieved past the  
21 due date. This was a stipulated Order. Staff did grant two  
22 extensions but there was an accrual of \$8,100 of stipulated  
23 penalties. Thank you, Maggie Weber, for all of your hard  
24 work on the Order compliance. And we are evaluating the  
25 filed application and will be issuing the second amendment

1 related to these violations before the end of the year.

2 Point Buckler Club LLC and John Sweeney unfortunately  
3 have not complied with any of the terms of the Cease and  
4 Desist Order issued on November 18th, 2016. This matter is  
5 in litigation as I believe you are aware. In preparation  
6 for a Solano County Superior Court hearing on October 27 the  
7 Attorney General Shari Posner and staff are preparing a  
8 brief on the merits of the BCDC and also the Regional Board  
9 Orders.

10 Scott's Jack London Seafood, Inc. at Jack London Square  
11 in Oakland has also complied with the terms of its Cease and  
12 Desist Order issued on April 7th. They recently filed their  
13 application as complete and you will consider that matter at  
14 your meeting on October 5th. They have paid one of three  
15 portions of their penalty, two more are not yet due. So  
16 there is that. There will be two more years until full  
17 compliance can be achieved.

18 On the enforcement strategy: I wanted to update you on  
19 some of the initiatives that we have presented and talked  
20 about.

21 Of the 30 cases that have a prioritization score of 60  
22 or more, which was the limit that we chose to consider the  
23 top priority cases of the about 200, two are currently  
24 subject to an Order, Marina Village and Point Buckler, two  
25 more are scheduled for your consideration which I just

1 mentioned, a fifth was recently resolved at the staff level  
2 and if we have time Maggie will present that momentarily.  
3 Seven others are being or will be addressed by us through  
4 permits or amendments to resolve the violations similar to  
5 the two proceedings we had this morning and also some of  
6 them will require more Orders.

7 We are also in the process of assessing how to  
8 prioritize the remaining 18 of that 30 for action as staff  
9 time becomes available.

10 She was going to try to make it today. We had a summer  
11 intern from Stanford through their Stanford in Government  
12 Program. Claire Miles assisted us with some of the backlog  
13 cases. We assigned her two of the low-priority cases that  
14 we would never otherwise get to; and with the supervision of  
15 Matthew Trujillo and Maggie Weber she researched files, did  
16 site visits and wrote two 35 day enforcement letters. So  
17 we'll follow those projects.

18 Claire also helped us assess the status of the scope of  
19 violations for the Caltrans department. So we had also  
20 talked about looking at large permit holders like the Ports  
21 of San Francisco, Oakland. And Caltrans we didn't mention  
22 to you but that is another large permit holder. So they  
23 have got about, I believe, close to 80 permits with us and  
24 that doesn't include region-wide permits.

25 So Clair took a look at a 10 year old audit that

1 Caltrans had itself prepared. We know of 13 violations.  
2 They suggest that 69 of their permits are in compliance. So  
3 we have a better -- we have a good -- she created a nice  
4 table summarizing the permit requirements, the violations  
5 that we know of and we just sort of have that document  
6 available now. We are not planning on presenting it to  
7 Caltrans or pursuing those cases but we have taken a small  
8 step forward in assessing that.

9 This is helpful -- part of this is because Caltrans,  
10 once it closes out a project, doesn't have funding to  
11 implement issues. So in addition Claire has identified for  
12 us the nature of the violation. Was it a failure to  
13 implement the permit, was it a failure to provide monitoring  
14 reports to tell us how restoration, for example, is doing,  
15 or is it a failure to maintain? So we categorized the  
16 violations that way because that implicates their ability to  
17 or not to fund the needed work.

18 And with that I would like to give Matthew and John and  
19 Maggie a chance to quickly summarize the results of three  
20 enforcement cases. At the last meeting we gave you some  
21 case presentations which you found useful. We can skip that  
22 if you'd prefer, with some lessons learned for each of  
23 those.

24 COMMITTEE CHAIR SCHARFF: Sure. We just want to finish  
25 by 12:30 so we've got five minutes. We can also get more

1 information at a later date.

2 MR. TRUJILLO: Good afternoon, Commissioners, staff,  
3 members of the public.

4 Today's case that I'm presenting is about Waldo Point  
5 Harbor, Enforcement File ER2015-056, in the city of  
6 Sausalito, Marin County.

7 This is a picture of the site. The kind of red  
8 splotchy area is the extent of the site.

9 And here is a summary of the required public access.  
10 This is important to know because this is what the  
11 violations were about.

12 Essentially they had 8 to 10 foot wide public access  
13 paths and observation piers throughout the harbor as well as  
14 irrigated landscaping. The last two, the public parking and  
15 the public park, while required by July 31st, 2018, are in  
16 construction now, so I am going to be dealing with -- or  
17 rather I dealt with the public access paths and the  
18 landscaping during this case.

19 These violations were discovered during a tour, a  
20 guided tour by staff at the harbor, of BCDC staff. I was  
21 there myself in October 2015. During the tour I noticed  
22 that there were issues with the permit. I informed the  
23 staff at Waldo Point Harbor at the time and asked them to  
24 resolve these issues voluntarily.

25 I'm sorry, there's a typo here. But in July of 2016 I

1 revisited the site and found that the issues had not been  
2 resolved voluntarily and so I sent them a notice of the  
3 violations in August 2016.

4 They were able to resolve all of the violations except  
5 for one without incurring any fines.

6 Violations included storage of private belongings in  
7 the public access, failure to maintain landscaping, using  
8 the public access as a staging grounds for construction  
9 projects, and this unauthorized structure, it's a mailbox  
10 structure that is actually on a dedicated public access kind  
11 of belvedere or overlook into a view corridor.

12 This is the one that they were not able to resolve  
13 without accruing a fine of \$3,280, which they did by  
14 incorporating it into a pending permit amendment. And the  
15 reason they were able to keep that as opposed to having to  
16 remove it is because they were able to demonstrate to staff,  
17 enforcement staff, that in fact the Harbor had built a  
18 little more square feet of public access than the permit  
19 required and so we kind of used that as a bank. And we  
20 found that be preferable to do this because it helped to  
21 resolve this more straightforwardly and with less conflict  
22 of all parties involved.

23 That is the end of my presentation. If you have any  
24 questions, feel free.

25 COMMITTEE CHAIR SCHARFF: Good job.

1 MR. TRUJILLO: Thank you.

2 COMMITTEE CHAIR SCHARFF: Thank you very much.

3 MR. BOWERS: Chair Scharff, Commissioners, I am going  
4 to very briefly describe to you what I think is an  
5 interesting experience we recently had with an island in the  
6 Suisun Marsh called Chipps Island, which is very near to the  
7 eastern limit of our jurisdiction under both the McAteer-  
8 Petris Act and under the Suisun Marsh Preservation Act.

9 The island is the site of some longstanding violations.  
10 There were some illegal activities involving levee repair  
11 that involved the placement of a shipping container in a  
12 portion of the levee that was considered to be weak and in  
13 danger of breaching. There was also the placement of some  
14 docks in the slough that is directly adjacent to Chipps  
15 Island and then there was some other authorized levee repair  
16 work that did not appropriate permits under the Suisun Marsh  
17 Act.

18 Just this spring we were approached by the Department  
19 of Water Resources, a state agency of the State of  
20 California, explaining to us that there was a desire on the  
21 part of DWR to purchase Chipps Island; and in connection  
22 with that purchase DWR explained to us that they wanted to  
23 seek to resolve these outstanding violations. The  
24 activities that I just described to you were also the  
25 subject of a Notice of Violation from the Army Corps of

1 Engineers so there were two permitting agencies that DWR was  
2 concerned with working with.

3 We reached an agreement whereby once DWR purchased this  
4 island and took title to it that it would remediate these  
5 violations in the form of removing the shipping container,  
6 removing the docks and incorporating the levee repairs into  
7 a large-scale wetland restoration project. DWR's ultimate  
8 plan for Chipps Island is to restore it to its former status  
9 as a tidal wetland.

10 I understand that this restoration is for the purpose  
11 of providing mitigation for the water supply tunnel project  
12 that DWR is also undertaking.

13 A final aspect of this resolution of this matter  
14 involved the payment by the current owners of the island of  
15 a \$15,000 penalty, which is the penalty that has accrued,  
16 that accrued under the Suisun Marsh Preservation Act to the  
17 Commission upon close of escrow. In other words, they will  
18 take a portion of the proceeds of the sale of the island  
19 that they are going to receive from DWR, \$15,000 of that is  
20 going to be paid to BCDC.

21 So we get two good outcomes here: Number one, we get a  
22 resolution of these longstanding violations; and number two,  
23 we get the payment of some appropriate amount of a penalty  
24 for these violations having occurred.

25 So thank you very much.

1 COMMITTEE CHAIR SCHARFF: Thank you.

2 MS. KLEIN: And part of the reason that we didn't  
3 pursue the case is because we lack administrative civil  
4 penalty authority in the Marsh Act and therefore we can't  
5 send 35 day letters and an Order would be without civil  
6 penalties. We waited a while but a good solution came.

7 COMMITTEE CHAIR SCHARFF: So are we looking for a  
8 legislative fix on that? It shouldn't be that hard to get  
9 someone to carry it, so why are we not? Should I just call  
10 Marc Berman up right now? He seems to be all over sea level  
11 rise.

12 EXECUTIVE DIRECTOR GOLDZBAND: Yes, Marc Berman,  
13 Senator McGuire, you know.

14 COMMITTEE CHAIR SCHARFF: Those are the type of people  
15 who would love to carry this.

16 EXECUTIVE DIRECTOR GOLDZBAND: There are 17 people  
17 there who probably would say yes.

18 For us to do that -- Larry Goldzband, Executive  
19 Director. For us to do that, Members, we actually have to  
20 decide first what it is we actually want to accomplish and  
21 then from that figure out what the best way is of doing so.

22 I have no doubt that in the next 12 to 18 months as the  
23 enforcement team, knock on wood, grows, that we will have  
24 discussions about what types of changes we think would help  
25 them and all of you do your jobs better.



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I, EDUWIGES LASTRA, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing San Francisco Bay Conservation and Development Commission Enforcement Committee meeting and the recording was thereafter transcribed.

I further certify that I am not of counsel or attorney for any of the parties to said meeting, or in any way interested in the outcome of said matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of September, 2017.



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September 18, 2017

RAMONA COTA, CERT\*\*478