

San Francisco Bay Conservation and Development Commission

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April 13, 2018

TO: All Commissioners and Alternates

FROM: Lawrence J. Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)

Sharon Louie, Director, Administrative & Technology Services (415/352-3638; sharon.louie@bcdc.ca.gov)

SUBJECT: Draft Minutes of March 15, 2018 Commission Meeting

1. **Call to Order.** The meeting was called to order by Chair Wasserman at the Bay Area Metro Center, 375 Beale Street, Yerba Buena Room, First Floor, San Francisco, California at 1:08 p.m.

2. **Roll Call.** Present were: Chair Wasserman, Vice Chair Halsted (represented by Alternate Chappell), Commissioners Addiego, Bottoms (represented by Alternate Galacatos-Departed at 3:10 p.m.), Chan (represented by Alternate Gilmore), Cortese (represented by Alternate Scharff), Gibbs, Gioia, McGrath, Peskin, Pine, Ranchod, Randolph, Sears, Spering (represented by Alternate Vasquez), Techel, Wagenknecht, Ziegler and Zwissler.

Chair Wasserman announced that a quorum was present.

Not present were Commissioners: Association of Bay Area Governments (Butt, Showalter), Senate Rules Committee (Alvarado), Department of Finance (Finn), Sonoma County (Gorin), Natural Resources Agency (Jahns), State Lands Commission (Lucchesi) and Department of Business Transportation & Housing (Sartipi).

3. **Public Comment Period.** Chair Wasserman called for public comment on subjects that were not on the agenda.

Mr. Bob Wilson commented: I am a resident of Redwood City and I attended the January 18, 2018 BCDC Commission meeting and was a bit alarmed by Executive Director Goldzband's comments regarding the intended use of fines that ought to go the Bay Fill and Clean-up fund but instead are going to be used to hire two more staff enforcement lawyers.

This practice is in clear violation of the intent of the Legislature (Code Section 66647). The code is clear: fines collected related to enforcement are to be used to clean up and enhance the Bay not expand the staff.

I was disappointed that no member of the Commission asked any questions regarding this use of funds. I was surprised that this action could be taken unilaterally without a vote.

There are already openings posted for these lawyers and your urgent action is needed.

Fines collected by BCDC in the last five years total approximately \$1.2 million. Why have they not already been used to improve the Bay?

**BCDC MINUTES
March 15, 2018**

Abatement is not about hiring lawyers to do enforcement. It does not mean filling the staff with more attorneys.

There is a more urgent need at BCDC than hiring staff. It is clear to me that the staff priorities need to be changed. A better use of existing resources would be to redeploy them to write better permits and to make room within the current budget to retain and train qualified engineers and inspectors.

If you really need more lawyers to work on enforcement this is a sign of a broken process. Take a look at the 190 backlogged enforcement cases. There is a problem here. It is not solved by lawyers.

Meeting minutes from the Enforcement Workshop held in October of 2016 showed the enforcement staff agrees the permitting process is broken.

Commissioners, please insist that the permit process be fixed and don't short-change our Bay.

Once it is fixed and you still have issues with funding please take that up with the Legislature; reverse this misguided decision of the Executive Director to use these funds to hire staff.

It is a bad process and it violates the intent of the law and it is wrong.

Using fines for enforcement staff is not a new practice. In fact, Executive Director Goldzband and Mr. McCrea are both on record from that same October meeting in 2016 that the use of funds from fines for staffing is inappropriate. They had already stopped this bad practice of previous administrations.

What changed and why? Budgets are here for a reason. Circumventing these boundaries is wrong. And while the finance staff of the state of California may be agreeing now with Executive Director Goldzband they did not make the law and they can't change it.

Be aware that this intended practice has been brought to the attention of the State Auditor. Commissioners, please get out in front of this issue and stop it. Remind Executive Director Goldzband that he should not be using these funds that are intended for restoration of the Bay.

Chair Wasserman stated: Since the subject matter of the comment has not been posted we are not going to respond at this meeting.

Mr. Rob Krenn was recognized: I am a Palo Alto resident. My comment is whether or not impartial deliberation is possible. When you consider a typical enforcement order there are various ways to handle it including recusing yourselves due to lack of information to deliberate impartially.

And the enforcement orders prepared by staff are anything but impartial. A process that begins in a spirit of cooperative compliance will eventually morph into a CDO if the front end of that process breaks down.

CDOs by necessity are one-sided and accusatory. They indicate the permit holder's statement of defense followed by BCDC's arguments to support the violations.

The enforcement process seems to me that the entire matter is treated as if someone broke the law. Executive Director Goldzband has stated that permits are a kind of contract. It is law versus equity.

The issue is not whether the permit holder broke the law but whether the permit holder did something lawful but failed to deliver on a promise that resulted in an injury.

The remedy is not punishment but to restore equity such that the injured party is compensated as if injury never happened.

If there is no injury the violation is immaterial. To make that sort of evaluation you need much more information than you are typically provided or have the resources to pursue.

At least you would need evidence of injury that I failed to see when looking over your records of your many CDOs.

I think your enforcement process is outdated. There is an epidemic of violations all around the Bay. The context of force is not working.

Until there is some independent oversight to fix it we will continue to lose time and financial resources that can never be replaced.

I hope this misfortune is not irrevocably woven into BCDC's fabric. Thank you for your time.

Mr. Kevin Parker addressed the Commission: I am here to address the direction of this agency and your challenges as Commissioners.

Boaters are not your enemies. Remember it was 800 private boaters who put their lives on the line 70 years ago to rescue 300,000 allied servicemen from the beaches of Normandy and Dunkirk.

Duck clubs are not your enemies. Duck clubs have every incentive to restore the Bay to its pristine condition and preserve the wetlands for migrating wild fowl.

Restaurants are not your enemies. Restaurants provide people access to the Bay that would not normally have access. There is nothing more pleasant than a family evening spent having a lovely meal with a beautiful view of our wonderful San Francisco Bay.

Yet amazingly BCDC has conducted a steady campaign against small businesses that serve boaters, sporting clubs and restaurant diners.

In the last two years the staff has attempted to impose fines of almost two million dollars against just three businesses; three businesses that create jobs, three businesses that generate taxes, three businesses that are supported by voters.

In 50 years BCDC has evolved from stopping illegal filling in the Bay to harassing small businesses. That is not an evolution that anybody expected.

With punitive fines that are excessive and lacking in factual accuracy. This seems to be a double standard of playing here. One permittee gets fined while another one next door with the same situation seems to escape those same penalties.

Are some targets just juicier? Is there an assumption that because they have the ability to pay they will; or do you make a judgement that some shouldn't or can't fight back?

What about the public agencies on the staff's list of offenders? Where are the big fines and enforcement actions against those cities and counties and state agencies in violation? They seem to be largely absent from your agendas.

Several of you represent those agencies. Are you comfortable voting for financial penalties against those small businesses?

And if you are asked to vote for penalties against a neighboring city, how would you feel if your own agency were on the violation list?

Would someone consider this the very definition of a circular firing squad? The point is that while staff is dysfunctional the Commission itself is facing a crisis of its own. It is a crisis of impartiality and conflicting interests.

I am asking you to take a look at your duties and responsibilities. I am asking you to raise questions that you don't seem to be asking. I am asking you to understand that unlike most of the other commissions that you sit on this one has regulatory authority to impose deep, financial pain and hardship on small businesses.

I hope that you exercise your independence. Thank you.

Mr. Peter Leib addressed the Commission: My point has been covered so I am going to relinquish my time.

Chair Wasserman moved to Approval of the Minutes.

4. Approval of Minutes of the February 1, 2018 Meeting. Chair Wasserman asked for a motion and a second to adopt the minutes of February 1, 2018.

MOTION: Commissioner Scharff moved approval of the Minutes, seconded by Commissioner Ranchod.

VOTE: The motion carried with a vote of 18-0-0 with Commissioners Addiego, Gilmore, Scharff, Gibbs, Gioia, McGrath, Peskin, Pine, Ranchod, Randolph, Sears, Vasquez, Techel, Wagenknecht, Ziegler, Zwissler, Vice Chair Chappell and Chair Wasserman voting, "YES", no "NO", votes and no abstentions.

5. **Report of the Chair.** Chair Wasserman reported on the following:

a. **Commissioners.** I am pleased to report that Governor Brown's appointment of Commissioner Sanjay Ranchod to the Commission has been confirmed by the Senate. Congratulations and welcome in your full position as a Commissioner.

There are two headlines in today's paper that are of significance. One is the very instructive headline and videos on the front page of the New York Times today on rising seas threat to Easter Island.

This is very far away from us and does not have much effect on us. It does demonstrate the real problem of rising seas which threaten to take out most of the value of Easter Island. The waves are opening up graves and taking things away and taking away the economic viability of that area as well as a world cultural heritage resource.

Not much can be done to adapt Easter Island to that problem. It demonstrates the severity of the problem and the hard reality that even if we significantly increase our mitigation efforts regarding greenhouse gases the seas are going to continue to rise and there are areas that will have to be abandoned.

The second set of headlines is quite different. It is the youth who came out of school to protest over gun violence. It is a concern to all of us.

The important message from that is that we have across this country a younger generation from elementary schools all the way up who are willing to stand up and say, this isn't right and they are willing to stand up and say, things need to change. A little child may well lead us.

As you begin to hear more and more about the efforts of our Education Working Group, the fourth wave of our efforts to determine what we can do to adapt to rising tides to protect our built and natural environments, what we should do and how we are going to pay for it; you are going to hear increasing emphasis on reaching out to youth, to schools because while we will address stakeholders, cities, counties, regional agencies and organizations – real change, particularly change that has to occur over long periods of time as these changes to adapt to rising sea levels will, require the support of the young people who are going to inherit these problems from us.

And as I have said before, the reason we have the recycling bins in all public areas and in many, many private businesses today is not due to the wisdom of agencies like ours. It is due to the fact that the children were educated and came home and said, why are we doing this to our environment?

I was in the Indonesian Ocean snorkeling for 12 days and in the ocean and on islands as remote as one can imagine you saw the plastic debris that is polluting the oceans and the land around them. It is still an issue.

One of the things they gave us on that boat to remind us about the problem was metal straws so you don't have to take the plastic straw which may not make its way into the ocean here but will still make into landfill where it doesn't need to be.

There are things that we can all do. There is education we need to do. We have to face major problems here and there is hope.

b. **Next BCDC Meeting.** Our next meeting will be held on April 5th, where we may:

Hold a briefing by the state Ocean Protection Council on its updated guidance regarding estimates of future rising sea level.

Consider a report by Caltrans on the implosions of footings of the old east span of the Bay Bridge.

Hold a staff briefing on the work plan to help carry out our Strategic Plan.

Hold a briefing by the Bay Planning Coalition on Bay Boating and Marinas.

c. **Ex-Parte Communications.** That brings me to ex-parte communications. Many of us have received correspondence on the West Harbor issue. In my review of the ones that I have received they have all been sent to the Executive Director and therefore posted.

If anyone here has received one that they think is not true or has had personal conversations which have not been reported you may and should report them now although you also need to do so in writing.

Commissioner Pine stated: I will note that I did report through the disclosure forms a number of ex-parte communications.

Chair Wasserman continued: That turns us to the Report of the Executive Director.

6. **Report of the Executive Director.** Executive Director Goldzband addressed the Commission: Last time we met I described how putting together an agenda for a BCDC Commission meeting can be difficult but today's was not difficult. For the first time in my memory, the Commission will hold a meeting to concentrate on only one enforcement case. And, as you can see, there will be plenty of participants.

a. **Budget and staffing.** I am pleased to let you know that BCDC has been provided with the \$500,000 in cap-and-trade funds that we expected late last year. We are using them in a variety of regulatory and planning projects and I shall give you a full budget report as soon as possible.

I am also very happy to let you know that members of our senior staff have interviewed two very solid candidates to fill the role of Policy and Planning Director. I hope that we shall have an announcement for you within a couple of weeks.

Meanwhile, we have welcomed our newest Sea Grant Fellow, the marvelous program sponsored by NOAA which costs a relatively small amount of state funds and provides BCDC and the Bay with a big bang for the bucks. Jackie Mandoske (stood and was recognized) earned her B.S. in Aquatic Biology from U.C. Santa Barbara and then earned her Master's degree in Marine Biodiversity and Conservation from the magnificent Scripps Institution of Oceanography at U.C. San Diego, so she converted from a Gaucho into a Triton. Before joining BCDC, Jaclyn worked at the City of San Diego to implement its Climate Action Plan and at the Waitt Institute on the issue of sustainable ocean management. She has researched and dived in California, the Caribbean and in the South Pacific.

I also need to let you know that we are sad to be losing Elena Perez. You'll remember that Elena is one of the two BCDC staff members who provided you with the Government Alliance on Race and Equity briefing last month. On the other hand, I am very happy to let you know that Elena has earned a Fulbright Scholarship and she will be working in the Galapagos starting next month.

From sadness to good news – Andrew Chin, BCDC's CIO, was awarded the California Chief Information Officer Academy Information Technology Leadership Award. He was one of only three staffers in the California Natural Resources Agency to earn the honor and one of 48 award recipients from among all the State's IT employees. Simply put, Andrew is a lifesaver in many technological ways and demonstrates creativity and leadership daily. He allows us to use cloud-based services and software to increase our limited technology capacity. He figures out how to explain things to staff members who aren't as technologically savvy and he certainly deserves the award.

b. Policy. I want to give you all a heads-up that we will be revising the hearing dates included in the Brief Descriptive Notice for the Bay Plan Amendments. The good news is that we are making progress on those BPAs, starting with input from the Bay Fill Working Group this morning and, soon, the newly formed Environmental Justice Commission Working Group. New Commissioner Teresa Alvarado along with Commissioner Vazquez have agreed to be a part of that working group. We plan to give you a full update on the progress of both amendments in May. In addition, BCDC has applied for NOAA grant funds to support the third Bay Plan Amendment to amend our mitigation policies which was identified in July 2017 by the Commissioners as the next priority.

Next week Steve Goldbeck, Marc Zeppetello and I shall be in Washington, D.C. with our counterparts from the California Coastal Commission and Coastal Conservancy staff to attend the annual Coastal States Organization meeting and NOAA's annual training with representatives from the Nation's other 31 coastal states. On Wednesday, we shall visit a number of members of our Bay Area congressional delegation and/or their staffs to talk about NOAA and its funding base, regional planning and other major issues.

Work continues to be busy for Andrea Gaffney, our dedicated Bay Design Analyst. Andrea has approved a variety of projects around the Bay during the past month including: trails and a classroom at Cooley Landing Park; Wind River Public Access Overlooks in Alameda; the new ferry terminal plaza at San Francisco's Pier 2; and new interpretive signage that was designed in collaboration with students at the Oracle High School. You have copies of that in your packet.

It is marvelous that students participated in this and led the effort. It fits within what BCDC has done with regard to access around the high school.

Meanwhile, during the past few weeks we have bombarded you with a slew of material. I hope that you have found or will find time to read the following:

First, one of the handouts we shall distribute in Washington is a copy of the letter that we and the Coastal Commission and Coastal Conservancy drafted in opposition to the President's proposed budget item that zeroes out funding for NOAA's Coastal Zone Management Program whose purpose is to ensure that there is a robust collaboration among all levels of government.

Second, I would like to point out the letter from the California Coastal Conservancy to the U.S. Army Corps of Engineers in support of San Francisco Bay being selected as one of ten projects in the Corps' pilot program to increase the beneficial reuse of sediment. You will remember that our two agencies along with the Bay Planning Coalition, Save the Bay and the Bay Institute helped draft the provision in the Corps' latest authorizing legislation that authorizes the program and mandates that the federal standard cannot be used as an excuse not to fund such beneficial reuse. We certainly hope that the application will be successful.

Last week we distributed a couple of newspaper articles on two very different issues. The first, by Paul Rogers in the San Jose Mercury News, describes a new study on subsidence along the Bay shoreline. Mr. Rogers quoted Steve Goldbeck at the article's conclusion and we very much appreciate that he reached out to BCDC to help his readers better understand the context. Finally, I want to keep you to please read this article because I want you to keep up to date on the ongoing trial in San Diego County for the coastal commissioners accused of not disclosing ex-parte matters.

Two final points to make: First, you will soon receive an e-mail from Reggie Abad (was recognized) of our staff who is compiling a list of emergency contact information to be used by Chair Wasserman and/or me should we need to contact you during a critical period. This information will not be made available to the public or the rest of the BCDC staff. Reggie will provide you with a form; feel free to use it or to discard as you wish.

Finally, speaking of disclosure, I want to remind you all that your FPPC Form 700s are due on April 2nd – 18 days from now. Currently, only nine Commissioners have submitted the required forms. Please do not delay.

That concludes my report, Chair Wasserman, and I'm happy to answer any questions you may have.

Chair Wasserman asked: Are there any questions for the Executive Director? (No questions were voiced)

Commissioner Gioia commented: I just want to make it clear that the forms are due at the end of the month so the folks that haven't filed have not violated anything.

Executive Director Goldzband added: April 2, eighteen days.

7. Consideration of Administrative Matters. Chair Wasserman stated: Item 7 is Consideration of Administrative Matters and Brad McCrea sent to us the administrative listing on March 9th. Does anybody have any questions about administrative matters? (No questions were voiced)

8A. Closed Session on Pending Litigation: (1) Mark Sanders and Westpoint Harbor, LLC v. San Francisco Bay Conservation and Development Commission, San Francisco Superior Court Case No. CPF-17-515880; and (2) Enforcement Committee's Recommended Enforcement Decision Involving Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01, Mark Sanders and Westpoint Harbor, LLC.

Chair Wasserman announced: Item 8 is a closed session regarding pending litigation regarding Mark Sanders and Westpoint Harbor LLC. Therefore, I am now asking the Commissioners to join me crossing the hall to the Claremont Room which can be accessed through the Board Room. Everyone else can remain here and we will rejoin you just as soon as we are finished. Commissioners, please ensure that all electronic equipment is off we are not broadcasting in any way.

I am going to say it is going to be 45 minutes. That is a rough guess. I would be surprised if it is less than that.

Upon resuming the meeting Chair Wasserman reported to attendees: We have completed our closed session regarding Mark Sanders and Westpoint Harbor LLC and did not take a reportable action.

8. Consideration of and Possible Vote on the Enforcement Committee's Recommended Enforcement Decision Involving Proposed Commission Cease and Desist and Civil Penalty Order No. CDO 2018.01; Mark Sanders and Westpoint Harbor, LLC.

Chair Wasserman stated: Item 8 is Commission consideration and possible vote on the Enforcement Committee's recommended enforcement decision, including a proposed Commission Cease and Desist and Civil Penalty Order, that would be issued to Mark Sanders and Westpoint Harbor, LLC for alleged violations at Westpoint Harbor, in Redwood City, San Mateo County.

Chair Wasserman opened a public hearing and 26 members of the public addressed the Commission. Their comments are detailed in the verbatim transcript.

The public comment was closed after all the comments were received.

MOTION: Commissioner Vasquez moved to close the public hearing, seconded by Commissioner Gioia. The motion carried by a voice vote with no abstentions or objections.

MOTION: Chair Wasserman moved to remand the matter to the Enforcement Committee to consider any additional information and evidence from staff and from the Respondent and consider any appropriate modifications to the proposed Order by staff or by Respondent. The motion was seconded by Commissioner Sears.

VOTE: The motion carried with a vote of 18-0-0 with Commissioners Addiego, Gilmore, Scharff, Gibbs, Gioia, McGrath, Peskin, Pine, Ranchod, Randolph, Sears, Vasquez, Techel, Wagenknecht, Ziegler, Zwissler, Vice Chair Chappell and Chair Wasserman voting, "YES", no "NO", votes and no abstentions.

9. **Adjournment.** Upon motion by Commissioner Peskin, seconded by Commissioner Gilmore, the Commission meeting was adjourned at 4:10 p.m.

Respectfully submitted,

LAWRENCE J GOLDZBAND
Executive Director

Approved, with no corrections, at the
San Francisco Bay Conservation and
Development Commission Meeting
of April 19, 2018

R. ZACHARY WASSERMAN, Chair