

Agenda Item #8

BAKER BOTTS LLP

101 CALIFORNIA ST.
SUITE 3600
SAN FRANCISCO, CALIFORNIA
94111

TEL +1.415.291.6200
FAX +1.415.291.6300
BakerBotts.com

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February 1, 2018

Chris Carr
TEL: 4152916208
chris.carr@bakerbotts.com

VIA E-MAIL (*David.Alderson@doj.ca.gov and Marc.Zeppetello@bcdc.ca.gov*)

David Alderson, Esq.
Supervising Deputy Attorney General
State of California Department of Justice
1515 Clay Street, Suite 2000
Oakland, CA 94612

Marc Zeppetello, Esq.
Chief Counsel
San Francisco Bay Conservation
and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

Re: Mark Sanders and Westpoint Harbor, LLC, Enforcement File No. ER2010.013;
Submission of Complete Enforcement Record to Commission and Scheduling
Commission Meeting

Dear Mr. Alderson and Mr. Zeppetello:

Mark Sanders and Westpoint Harbor, LLC (“Respondents”) insist that the full San Francisco Bay Conservation and Development Commission (the “Commission”) be provided with the complete Enforcement Record for the Commission’s hearing of the Enforcement Committee’s recommendation. Respondents also insist that the Commission conduct that hearing on February 15, 2018, as it was previously publicly and formally noticed by the “BCDC Enforcement Committee Meeting Summary” distributed on January 23, 2018.

The Commission Must Be Provided the Complete Enforcement Record

Under the Commission’s regulations, the Enforcement Record shall include, among other things:

- all timely filed statement of defense form(s);
- [. . .]
- minutes of all enforcement committee and Commission enforcement hearings
- [and]

February 1, 2018

all other materials maintained in the Commission's file for the enforcement matter[.]¹

The Enforcement Record submitted to the Commission for its review must comply with the regulation quoted above. Therefore, the transmittal to the Commission should include at least the following documents:

- all comments received from members of the public;
- all of Respondents' submissions, including the Statement of Defense with exhibits, the Objections to Executive Director's Recommended Enforcement Decision and Attachments, the Objections to Letter and Attachment from Citizens Committee to Complete the Refuge, the Objections to Declaration of Matthew Leddy, the Response to Staff's Objections to Declaration of Mark Sanders, and the Objections to Executive Director's Modified Recommended Enforcement Decision and Attachments;
- the Violation Report/Complaint for the Imposition of Administrative Civil Penalties;
- documents listed in the Violation Report/Complaint Index of Administrative Record and additional documents added to the Administrative Record after issuance of the Violation Report;
- the Executive Director's Recommended Enforcement Decision with attachments;
- the Executive Director's Modified Recommended Enforcement Decision with attachments;
- Staff's presentations given on November 16, 2017, and January 18, 2018; and
- the transcripts of the Enforcement Committee hearings held on November 16, 2017, and January 18, 2018.

The above records are posted to the BCDC website, which links to the specific records, and are part of the Commission's file for the enforcement matter.

Given the voluminous nature of the Enforcement Record, Respondents propose that all materials identified above be submitted on a USB flash drive to each member of the Commission along with the official notice of the Commission's February 15 meeting.

As soon as possible, please provide me an acknowledgement of your intention to transmit this complete Enforcement Record (as enumerated above) to every member of the Commission. If you refuse, you will give Respondents no option but to formally move the full Commission to direct that it be provided with the complete Enforcement Record.

The Commission Must Keep the February 15 Hearing Date

In addition, Respondents object to the Executive Director's arbitrary scheduling and subsequent rescheduling of this enforcement matter for Commission consideration. According to the "BCDC Enforcement Committee Meeting Summary" distributed by Adrienne Klein on January 23, 2018, and Mr. Zeppetello's January 25, 2018 email, the Executive Director scheduled this

¹ 14 Cal. Code of Regs. § 11370.

February 1, 2018

matter for consideration at the Commission's February 15, 2018 meeting. However, in an email sent to Respondents' counsel on January 30, 2018, Mr. Zeppetello stated that the Executive Director had informed him that the matter had been rescheduled for consideration at the Commission's March 15, 2018 meeting. It appears that the public has not been informed of this change.

No explanation for the scheduling and rescheduling has been provided to Respondents, and no consultation regarding Respondents' or their counsel's availability has occurred. Respondents' counsel are unavailable on March 15.

Furthermore, the arbitrary and unilateral scheduling of hearings before the Enforcement Committee and, now, the Commission creates an unnecessary and unwarranted imposition on members of the public. As you know, many stakeholders and observers are closely following BCDC's actions and have taken significant time out of their lives to attend and comment at the Enforcement Committee meetings. The public also plans to comment to the full Commission. Respondents' due process rights and the public's right to be heard should be prioritized over unexplained, unilateral rescheduling.

Respondents, and Respondents' counsel and supporters planned their affairs and calendars based on the notice that the hearing would be held on February 15. Changing the date to March 15 by executive fiat is a further slap in the face of the public, following on the offense at the most recent Enforcement Committee meeting at which members of the public had to demand that their comments be heard. This arbitrary, unilateral re-scheduling is a further violation of Respondents' due process rights. Respondents insist that the matter proceed before the full Commission on February 15.

If some legitimate necessity precludes the matter from being heard on February 15 (such as the lack of a quorum necessary for the Commission to take a decision), then Respondents insist that the Commission call a special meeting to hear the matter. Respondents also insist that the Executive Director consult with counsel for Respondents about their calendars.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Carr", written over a white background.

Chris Carr

CC: Tara Mueller, Esq.

San Francisco Bay Conservation and Development Commission

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

February 2, 2018

Sent by E-Mail

Christopher J. Carr
Baker Botts L.L.P.
101 California Street, Suite 3600
San Francisco, CA 94111

SUBJECT: Mark Sanders and Westpoint Harbor, LLC; Commission Meeting to Consider Enforcement Committee's Recommended Enforcement Decision

Dear Mr. Carr:

This is in response to your letter dated February 1, 2018, to David Alderson and me insisting that: (1) the full Commission be provided with the complete enforcement record for the Commission's meeting in this matter; and (2) the Commission conduct that meeting on February 15, 2018, as indicated in the email that BCDC staff sent to Enforcement Committee members and interested parties on January 23rd, summarizing the January 18th Enforcement Committee meeting.

The Commission's regulations do not require the enforcement record, as specified in 14 C.C.R. § 11370, to be provided to the full Commission when it is to consider an Enforcement Committee's recommended enforcement decision. Prior to an enforcement hearing, the regulations require the Executive Director to provide to the Enforcement Committee (or to the Commission if the enforcement hearing will be held before the full Commission, which did not occur here): (1) the Violation Report; (2) Statement of Defense and exhibits; and (3) the Executive Director's recommended enforcement decision. *Id.* § 11324. In contrast, when the Enforcement Committee's recommended enforcement decision is referred to the full Commission, the regulations require the Executive Director to provide to the Commission only the Committee's recommended enforcement decision. *Id.* § 11331.

The differences between what the regulations require to be provided to the Enforcement Committee and the full Commission under these circumstances are consistent with the following Commission regulation stating that, "[w]hen the Commission acts on a recommended decision, the Commission shall allow representatives of the staff, each respondent, and members of the public an opportunity to present their respective arguments on the recommendation..." *Id.* § 11332(a). In other words, when the Commission considers the Enforcement Committee's recommended enforcement decision, the Commission is not considering the matter *de novo* based on the entire enforcement record (although it may determine to reject the recommended enforcement decision and decide to consider the matter *de novo* at a subsequent meeting; see *Id.* § 11332(b)(4)).



Although the regulations do not require the complete enforcement record to be provided to the full Commission, and even though all the records identified on page 2 of your letter are available to the Commissioners on the BCDC website, the Executive Director has no objection to your suggestion that copies of all the records posted on the BCDC website for this enforcement matter, as identified in your letter, be provided to each Commissioner on a USB flash drive. This is to confirm that we will provide each Commissioner with a USB flash drive containing these records identified on page 2 of your letter when the Enforcement Committee's recommended enforcement decision is mailed to the Commissioners.

As for the date this matter will be considered by the full Commission, there is no merit to, and you have cited no legal authority in support of, your demand that the Commission is required to consider this matter on February 15th.

To begin with, the Commission cannot consider this matter on February 15th, as you have demanded, both because the February 15th meeting has been cancelled, as announced at yesterday's Commission meeting, and because the Enforcement Committee's recommended enforcement decision has not yet been received by staff, and therefore likely cannot be mailed to the Commission and Respondents at least 10 days in advance of the meeting as required by 14 C.C.R. § 11331.

Moreover, contrary to your assertion, the email distributed on January 23rd that summarizes the January 18th Enforcement Committee meeting was not a formal notice that the Commission would consider this matter on February 15th. The Commission's clerical staff typically mails and posts on the Commission's website meeting notices and agendas, in accordance with the requirements of the Bagley-Keene Open Meeting Act, two weeks prior to a Commission meeting. But even after a meeting notice has been mailed and posted, the Executive Director and the Commission Chair retain the discretion to defer consideration of, or otherwise reschedule, a matter. *Id.* § 10243; see *Coal. of Labor, Agric. & Bus. v. Cty. of Santa Barbara Bd. of Sup'rs*, 129 Cal. App. 4th 205, 210 (2005) (Legislature has left to public agency the task of setting its agenda).

Following the January 18th Enforcement Committee meeting, this matter initially was tentatively scheduled to be considered by the full Commission on February 15th, as reflected in the January 23rd email referenced above and my January 25th email to Mr. Alderson and you. However, on January 25th, the Executive Director informed me that the matter had been rescheduled for consideration at the Commission's March 15th meeting at the request of the Commission Chair, who is unable to attend on the next two potential Commission meeting dates, either February 15th or March 1st.

Your letter states that "Respondents' counsel are unavailable on March 15." At both Enforcement Committee hearings on this matter, Respondents were represented by you and two other lawyers with your firm. If it is the case that all three of Respondents' counsel are unavailable on March 15th, and that none of you is able to modify your schedules in order to be present on March 15th, please provide a statement of unavailability as to each of you and I will forward this to the Executive Director for his consideration. Otherwise, the matter will remain scheduled for the Commission's March 15th meeting.

Christopher J. Carr
February 2, 2018
Page 3

In terms of notice to the public, pursuant to Government Code section 11125, notice of the Commission meeting at which this matter will be considered is not required to be provided until 10 days in advance of the meeting. However, in light of the tentative Commission meeting date that was previously provided to the interested parties in the above-referenced January 23rd email, and which has now been rescheduled, we will send out another email to those parties on Monday to inform them of the new date. This will provide members of the public who received the email with ample advance notice (far more than the legally required notice) and opportunity to plan accordingly if they desire to submit comments prior to or attend the rescheduled meeting at which the Commission will consider the Enforcement Committee's recommended decision.

Sincerely,


MARC ZEPPELLO
Chief Counsel

MZ/lc
Enc.

CC: David Alderson, Supervising Deputy Attorney General
Tara Mueller, Deputy Attorney General