

San Francisco Bay Conservation and Development Commission

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March 8, 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; Potential Ongoing Violation of the Permit's Public Access Requirements by Restricting Public Access to Daylight Hours; BCDC Permit No. 2002.002.09

Dear Mr. Carr:

I am writing in response to certain statements in your letter dated February 28, 2018, indicating that Mr. Sanders may be continuing to violate the public access requirements of BCDC Permit No. 2002.002.09 by restricting public access at Westpoint Harbor to daylight hours only. If that is the case, this is to: (1) reaffirm that the permit requires Mr. Sanders to provide unrestricted public access to the permanently guaranteed public access areas and improvements at all times; and (2) direct Mr. Sanders to cease and desist from restricting public access to daylight hours.

Your February 28th letter responds to a draft letter from Adrienne Klein dated February 8, 2018 that granted a conditional certificate of occupancy for the Phase 2 boatyard. (Ms. Klein's final letter, which is substantially identical to the draft, is dated February 9, 2018.) Among other issues raised in your February 28th letter, which Ms. Klein may respond to under separate cover, you dispute her statement that the new public restrooms at the boatyard are to be maintained "in an unlocked condition, 24 hours per day as required by the permit." While claiming, incorrectly, that the permit does not require the restrooms to be unlocked 24 hours per day, you go on to make the extraordinary and unsupported claim that the BCDC staff has repeatedly acknowledged that "the hours of public access at the Harbor are restricted to daylight hours." The terms of the permit, and the evidence in record in this matter, are to the contrary.

The Permit Requires Mr. Sanders to Provide Unrestricted Access to Public Access Areas throughout the Site. Permit Special Condition II.B.1 (Public Access, Areas) provides that the required public access areas "shall be made available exclusively to the public for unrestricted access for walking, bicycling, sitting, viewing, fishing, picnicking, and related purposes." "Unrestricted access" includes access at all times. Therefore, Mr. Sanders may not restrict the public's use of required public access areas to daylight hours only.

Moreover, we directly addressed this issue with Mr. Sanders and his counsel David Smith last June, after Mr. Sanders submitted a proposed signage plan that included a proposed sign to restrict public access at Westpoint Harbor to certain hours and also posted such a sign at the harbor entrance. As stated in my June 19, 2017 email to Mr. Smith and Mr. Sanders (Administrative Record Document No. 89):

“I also explained last week that under the current permit there are no restrictions on the hours of public access at Westpoint Harbor, informed you that Mr. Sanders should not install any sign, as proposed in his June 7 signage plan, restricting the hours of public access, and further advised that if he erects such a sign, staff would consider it a knowing and intentional violation of the permit. When I visited the site yesterday, I observed that Mr. Sanders has in fact erected a sign at the entrance to the marina restricting the hours of public access.”

In response to my direction to immediately remove the sign restricting the hours of public access, Mr. Smith sent an email the following day, June 20th, confirming “that the noted sign has been removed.”

Thus, the unfounded assertion in your February 28th letter that the BCDC staff has “limited public-access hours at the Harbor to daylight hours” is incorrect. If Mr. Sanders is restricting public access to daylight hours, he is not doing so based on any statements or assurances by the BCDC staff and is in ongoing violation of the permit’s public access requirements.

The Permit Requires Mr. Sanders to Provide Unrestricted Access to the Public Restrooms Subject to Obtaining Approval to Impose Reasonable Rules and Restrictions. Pursuant to Permit Special Condition II.B.4, Phase 1B, f, both the public restrooms at the harbormaster’s building and the new public restrooms at the boatyard are required public access improvements. Therefore, Permit Special Condition II.B.1, cited above, requires Mr. Sanders to provide unrestricted access at all times to these public access improvements. Commission staff has also previously addressed this issue with Mr. Sanders and with Mr. Smith on behalf of Mr. Sanders.

During site visits on October 22, 2016 and December 8, 2016, staff found the public restrooms at the harbormaster’s building locked, in violation of the permit’s requirement that the restrooms be open and available to the public. See Violation Report/Complaint for the Imposition of Administrative Civil Penalties at ¶¶ VI.LL.5 and VI.QQ.7. As a result, in working with Mr. Smith in the Spring of 2017 to have Mr. Sanders finally open the required Phase 1B public access areas, staff explained to Mr. Smith, at a meeting on May 10, 2017, that the permit requires the public restrooms to be open and available to the public at all times. Following that meeting, in an email dated May 15, 2017 (Administrative Record Document 82), Mr. Smith responded that access to those restrooms “will be unlocked and unrestricted during daylight hours immediately,” but also acknowledged: “[w]e know that this is subject to ongoing discussion for ultimate resolution, and we appreciate your understanding on this interim agreement.”

Christopher J. Carr

March 8, 2018

Page 3

Commission staff has not alleged as a violation, nor proposed a penalty, for Mr. Sanders' failure to provide unrestricted public access to the public restrooms as required by the permit. However, the Executive Director's Recommended Enforcement Decision, dated November 6, 2017, states (on page 18) that "under the Permit, the restrooms are required to be open to the public at all times and Respondents are not authorized to close the restrooms at night." The Executive Director's Recommended Enforcement Decision further states (also on page 18):

"The permit allows Respondents to impose reasonable rules and restrictions for the use of public access areas 'to correct particular problems that may arise' (Special Condition II.B.7) upon approval of such rules and restrictions by or on behalf of the Commission, but Respondents have never requested approval to restrict access to the restrooms at night with supporting documentation of a particular problem."

Similarly, the proposed cease and desist and civil penalty order provides, in Section III.B (Conditions, Make Public Access Available), Paragraph 5:

"On and after the Effective Date of this Order, Respondents shall keep the public restrooms required by Special Condition II.B.4, Phase 1B, f (one set of two restrooms at the harbormaster's building and one set of two restrooms at the boatyard), open, unlocked and available for use by the public at all times, 24 hours per day, seven days per week. Respondents may request approval by or on behalf of the Commission to impose reasonable rules and restrictions for access to the restrooms in accordance with Permit Special Condition II.B.7."

Thus, if the Commission adopts the proposed order, Mr. Sanders will be required by both the permit and the order to keep the public restrooms open, unlocked, and available to the public at all times.

Your February 28th letter claims that "WPH has documented for the BCDC staff multiple times [that] there have been repeated incidents of vandalism and theft at the Harbor, with the restrooms at the Harbor being a particular concern." However, other than unsupported claims of potential "incidents" by Mr. Sanders and in some recent public comment letters from marina residents, the only documentation that has been provided to the BCDC staff are the two Redwood City Police "incident reports" included as Exhibit 58 to Respondents' Statement of Defense. Both those incidents relate to one apparently homeless man who visited various locations at the marina twice on a single day, and although the man reportedly took a shower in the restroom at the harbormaster's building, there is no report of any vandalism or theft.

In any event, as noted above, despite generalized concerns regarding use, or the potential for misuse, of the public restrooms, Mr. Sanders has never requested approval of proposed reasonable rules and restrictions on use of the public restrooms, in accordance with Permit Special Condition II.B.7.

Christopher J. Carr

March 8, 2018

Page 4

Conclusion. Mr. Sanders and some marina residents may have legitimate concerns associated with public access at Westpoint Harbor. Appropriate means to address such concerns may include installing more security cameras, hiring more staff, and more frequent police patrols, as well as reasonable rules and restrictions to correct particular problems that might arise. However, such generalized concerns do not warrant completely prohibiting public access to Westpoint Harbor from sunset to sunrise, which would thereby limit enjoyment of the required public access areas and improvements during those times to marina residents only by excluding other members of the Redwood City and Bay Area community.

In conclusion, and as stated above, if Mr. Sanders is currently restricting public access at Westpoint Harbor to daylight hours only, he is in violation of the permit's public access requirements and is hereby directed to cease and desist from restricting public access to daylight hours. If Mr. Sanders would like to propose reasonable rules and restrictions for use of the public restrooms to correct particular problems that may arise, in accordance with Permit Special Condition II.B.7, he remains welcome to do so at any time.

Please contact me if you have any questions.

Sincerely,



MARC ZEPPELLO
Chief Counsel

cc: Mark Sanders

February 28, 2018

VIA E-MAIL (adrienne.klein@bcdc.ca.gov)

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Chief of Enforcement
San Francisco Bay Conservation and Development Commission
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Re: Phase 2 Boathouse: Conditional Certificate of Occupancy
(BCDC Permit No. 2002.002)

Dear Ms. Klein:

I write on behalf of my clients, Mark Sanders and Westpoint Harbor, LLC (together, "WPH"), in response to the draft letter you sent to Dawn Jedkins, DES Architects and Engineers, on February 8, 2018, *Subject: Phase 2 Boathouse: Conditional Certificate of Occupancy and Approval of a Plant Substitution (Permit No. 2002.002.07)*.

By your draft letter, you indicate that the San Francisco Bay Conservation and Development Commission ("BCDC") will "grant Westpoint Harbor with a conditional certificate of occupancy for the Phase 2 boatyard." You request that certain enumerated items be addressed within 30 days of the date of the letter. WPH appreciates your acknowledgment that the certificate of occupancy will be granted in accordance with the terms of your draft letter.

Regarding item numbers 3 through 9, the activities you describe have already been addressed or will be completed by WPH imminently. Additionally, the cleaning and furnishing of the restrooms you reference in item number 2 has been completed.

Regarding your request enumerated as item number 1 ("Partial Fence Removal"), WPH has no objection to removing sections of fence that you reference. In particular, the locations of the sections of fence that WPH will remove in the very near future are indicated by red lines on Figure 1, below. However, WPH seeks to clarify that you are not requesting removal of the portion of fence that serves as part of the sliding gate mechanism. The section in question is indicated by a green line on Figure 1. That section is part of the sliding gate shown in Figure 2, which is an excerpt from Sheet 4 of the plans entitled Westpoint Harbor - Phase 2 Boatyard Permit Amendment Request, Boatyard Fence and Balcony Addition at Boathouse A (August 2017). That section is necessary for the sliding gate to function. Please respond with a clarification of your request.

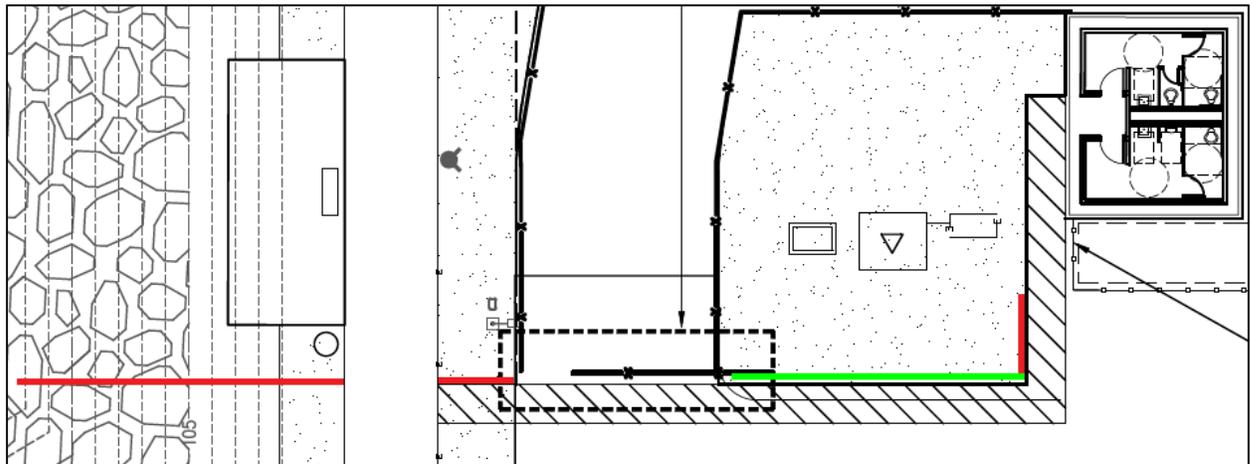


Figure 1

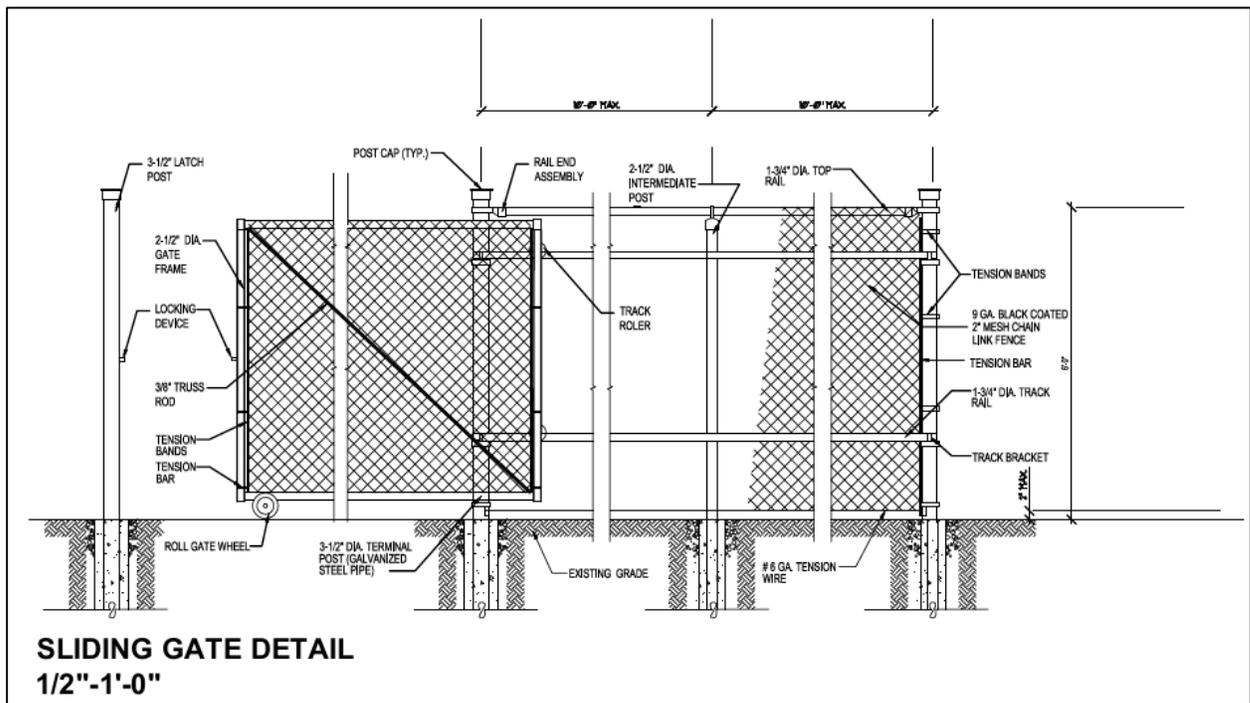


Figure 2

Regarding the portion of your letter that indicates that the new restrooms are to be “in an unlocked condition, 24 hours per day as required by the permit[.]” WPH notes that leaving the restrooms unlocked 24 hours per day would be a very bad idea. Furthermore, the Permit in no way whatsoever requires that the restrooms be unlocked 24 hours per day, contrary to your incorrect statement. The Permit says nothing about unlocked restrooms. Additionally, public access consistent with marina projects has been universally interpreted as including some control for safety and security, as practiced by all other marinas under BCDC jurisdiction. In fact, as has been repeatedly acknowledged by BCDC staff in the past, including you specifically, the hours

of public access at the Harbor are restricted to daylight hours. The limitation on public-access hours makes sense for multiple reasons, including the fact that visitors must pass through Pacific Shores Center property to physically access the Harbor and Pacific Shores Center's public-access hours coincide with daylight hours.

With BCDC staff's having limited public-access hours at the Harbor to daylight hours, it makes no sense to leave the restrooms unlocked 24 hours per day. As WPH has documented for BCDC staff multiple times, there have been repeated incidents of vandalism and theft at the Harbor, with the restrooms at the Harbor being a particular area of concern. In addition to property damage and loss, one must consider the personal safety concerns of WPH tenants and visitors. Your apparent insistence on 24-hour restroom access is not only not contemplated by the Permit, it is nothing less than a demand that WPH operate the restrooms so as to create a condition of public nuisance. WPH cannot in good conscience do this.

Sincerely,



Christopher J. Carr

CC: Marc Zeppetello (marc.zeppetello@bcdca.gov)