

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

August 12, 2016

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: Approved Minutes of August 4, 2016 Commission Meeting

1. Call to Order. The meeting was called to order by Acting Chair Halsted, at the Ferry Building, Port of San Francisco, California at 1:07 p.m.

2. Roll Call. Present were: Vice Chair Halsted and Commissioners Bates (represented by Alternate Butt), Chan (departed at 3:39 p.m.), DeLaRosa (represented by Alternate Jahns – stepped out at 3:30 p.m.), Gioia, Gorin, Kim (represented by Alternate Peskin – arrived at 1:16 p.m.), McGrath, Nelson, Randolph, Sartipi, Sears, Spering (represented by Alternate Vasquez), Techel (represented by Alternate Hillmer), Wagenknecht, and Zwissler.

Acting Chair Halsted announced that a quorum was present.

Not present were Commissioners: Association of Bay Area Governments (Addiego), Santa Clara County (Cortese), Department of Finance (Finn), Speaker of the Assembly (Gibbs), U.S. Army Corps of Engineers (Hicks), State Lands Commission (Lucchesi), San Mateo County (Pine), Governor (Wasserman), U.S. Environmental Protection Agency (Ziegler).

3. Public Comment Period. Acting Chair Halsted called for public comment on subjects that were not on the agenda. There were no public speakers present to comment.

Acting Chair Halsted moved on to Approval of the Minutes.

4. Approval of Minutes of the June 16, 2016 Meeting Acting Chair Halsted asked for a motion and a second to adopt the minutes of June 16, 2016. Although she was not present she was impressed by the length and complexity of the minutes. .

MOTION: Commissioner Vasquez moved approval of the Minutes, seconded by Commissioner Nelson.

VOTE: The motion carried with a vote of 15-0-0 with Commissioners Butt, Chan, Jahns, Gioia, Gorin, McGrath, Nelson, Randolph, Sartipi, Sears, Vasquez, Hillmer, Wagenknecht, Zwissler, and Acting Chair Halsted voting, “YES”, no “NO”, votes and no abstentions.

5. Report of the Chair. Acting Chair Halsted reported on the following:

a. **New Business.** Does anyone have any new business to propose? She received no comments.

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BCDC MINUTES
August 4, 2016

b. **Next BCDC Meeting.** At our August 18th meeting, here at the Ferry Building, we may consider the following matters.

- (1) We may hold a public hearing and vote on a proposed restoration project in the Suisun Marsh.
- (2) We may hold a public hearing on the proposed development on Treasure Island.
- (3) We may vote on the proposed hotel in Alameda that we are holding a public hearing on today.
- (4) We may consider the outcomes of our recent Rising Sea Level Workshop.
- (5) We may have a briefing on planning for Highway 37 in light of rising sea level.

c. **Ex-Parte Communications.** That completes my report. In case you have inadvertently forgotten to provide our staff with a report on any written or oral ex-parte communications, I invite Commissioners who have engaged in any such communications to report on them at this point.

Commissioner Chan reported: I have received numerous communications on the issue of the hotel in the city of Alameda. I have some sample letters. I did not save all of them. I have received at least 100 emails opposing the project.

Commissioner Gioia reported: I have received a few emails on it from folks in Alameda.

Commissioner Butt reported: I received a voicemail message on the hotel, Item 8.

Acting Chair Halsted moved on to Executive Director's Report.

6. Report of the Executive Director. Executive Director Goldzband reported: I have not been with you for quite a while, as I had to miss our last meeting, for which I apologize.

Since then, summer has been going strong and it was punctuated this past Monday by Major League Baseball's annual trading deadline. Our family is saddened by the loss of Josh Reddick and Matt Duffy, but I am happy to report that BCDC is already in the upgrade mode. Our staff is maturing at a rapid pace and increasing its talent level consistently – and you'll hear today from some of our newer staff members. Canada's interesting writer, Douglass Coupland, once questioned whether Donald Duck traded up or down when he gave up his wings for arms. Our job as leaders is to consistently trade up so that we can get you the best information possible so that you can make thoughtful decisions.

Steve Goldbeck, Brad McCrea and I shall be visiting with our new Department of Finance analyst this month to let her know what BCDC does and how we do it. In addition, we are working together to make more concrete our monthly billing and budget reconciliation processes. Our senior staff is almost completely done with our budget building for this year and I shall ask for the Department of Finance's assistance as we contemplate their budget drills without a chief budget officer. Once again I want to assure you that our books are solid which is a great feeling. After we visit in Sacramento I will be providing you with a budget briefing. Earlier this week, Sharon Louie, Anna Yee and I met with our newest best friends from the Department of General Services to

plan for our move to the new building. We escorted them to the building so that they could see for themselves what we have seen. Suffice to say it was a positive experience all around. Our goal is to have all the financials and planning documents in order for the landlord to approve the budget to build out BCDC's space in time to move during the first quarter of next year.

As previously reported, staff has been moving forward on a number of enforcement actions. In March I issued a Violation Report and Complaint for the Imposition of Administrative Civil Penalties for numerous long-standing permit violations at a parking facility known as Park SFO in the City of South San Francisco. We are fortunate that the staff and the co-permittees were able to negotiate a mutually acceptable resolution subject to your review and approval. We were supposed to have an Enforcement Committee meeting on July 21st but it was not held due to a last-minute emergency that prevented a quorum from occurring. For that reason, the proposed stipulated order will be presented to the Commission for consideration today.

Second, as Steve discussed on June 16th, I issued an Executive Director Cease and Desist Order in April. In the next month I issued a Violation Report and Complaint to resolve violations of the McAteer-Petris Act and the Suisun Marsh Preservation Act involving unpermitted fill and development activities at an island known as Point Buckler. BCDC has been coordinating a multi-agency enforcement effort with staffs of the Regional Water Quality Control Board and EPA Region 9. Since then, the agencies have met twice to begin discussing potential resolution. The Enforcement Committee likely will consider this matter, followed in the coming months.

Finally, in May, I issued a Violation Report and Complaint for the Imposition of Administrative Civil Penalties regarding alleged permit violations and violations of the McAteer-Petris Act at a marina and residential development in San Rafael. That matter was scheduled to go before the Enforcement Committee in two weeks. The permittee has expressed a desire to negotiate a resolution. To allow more time for those settlement discussions, that matter has been rescheduled for the September 1st, followed by consideration by the Commission.

One more policy note – on Monday, I shall travel to Washington, D.C. to meet with representatives of the U.S. Army Corps of Engineers to ask them to reconsider the Army's decision not to engage with BCDC in mediation to resolve the outstanding issues regarding the Corps' consistency determination to conduct maintenance dredging in the Bay. I shall be accompanied by Tom Gibson, Chief Counsel of the California Natural Resources Agency and Joaquin Esquivel of Governor Brown's Washington, D.C. office. You will remember the Commission held two closed sessions to discuss possible litigation regarding this issue. I hope to return with good news at your next meeting.

Finally, there are three documents clipped together in your packet today that I would encourage you to take a look at. The first is an op-ed piece written by a friend of Commissioner Pine about rising sea level that was published in the Half Moon Bay Review. It demonstrates how productive a well thought out general education campaign can be.

Second, is an interview with BCDC's own Alex Zwissler, who has taken over (on a half-time basis) the role of Resilient by Design's project launch director. You will remember that Resilient by Design is our region's response to New York's Rebuild by Design. Alex has done an amazing job in the month that he has been with the organization and I am sure that he would be happy to answer any questions you may have on the project.

Finally, I have attached a memo from the San Francisco Bay Restoration Authority which now has the responsibility to distribute some \$500 million over the next 20 years for projects to restore and enhance San Francisco Bay. You will note that the Authority plans to adopt its multi-year work plan and budget later this year and release its first RFP for projects next summer.

That completes my report, Acting Chair Halsted, and I am happy to answer any questions you all may have.

Acting Chair Halsted asked: Are there any questions for of our Executive Director? (She received no questions) She moved on to Item 7 on the agenda.

7. Consideration of Administrative Matters. Acting Chair Halsted announced: Jaime Michaels is here if Commissioners have any questions or concerns regarding the listing that was distributed on July 29th. (No comments or questions were received. Acting Chair Halsted moved on to Item 11.

11. Briefing on Exemption from Commission Permit Requirements or Standards of Approval. Acting Chair Halsted announced: We are moving this item out of order for a reason. We are taking this item first and it is a staff briefing on exemptions. We think this may provide helpful context for Commissioners in considering Item 8, which is why staff suggested that we insert it beforehand. Chief Counsel Marc Zeppetello will provide the briefing.

Chief Counsel Zeppetello presented the following: My briefing will discuss a number of exemptions from BCDC jurisdiction, permitting requirements, and other policies or standards. Most of them are in the statute, either the McAteer-Petris Act or the Suisun Marsh Act; some are in regulation or in the Bay Plan.

In addition to providing a survey and a brief discussion of the exemptions I will highlight, in passing, a few matters where staff is dealing with issues under various exemptions and matters that will or may make their way to the Commission in the future.

The first one I would like to discuss is relatively straightforward. Government Code Section 66610 is the jurisdictional statute in the McAteer-Petris Act that defines San Francisco Bay and the shoreline band and other areas of the Commission's jurisdiction.

The very last sentence of that statute says that the jurisdiction of the Commission shall not extend to two areas, the Larkspur and Greenbrae Boardwalks that would otherwise be within the Commission's jurisdiction. The Commission has adopted regulations in Appendix A and Appendix B of the regulations, which provide legal descriptions of those areas that are excluded from the Commission's jurisdiction.

As I said, these geographic exclusions are straightforward and remove areas from jurisdiction. Therefore, unless there would be a change in the law it would be something we should not have to worry about.

Then there are a number of provisions in the McAteer-Petris Act and one in the Suisun Marsh Preservation Act that provide exemptions from the Commission's permitting authority for land or water uses that predated the existence of the Commission or were in the process of obtaining or had obtained all necessary approvals prior to that time.

The first one is Government Code 66632.1, which provides that nothing in the Act shall apply to projects where local government approvals and a Corps of Engineers permit had been obtained to allow diking or filling of the Bay and where that work had commenced.

The next one is Section 66654, which applies to any uses that are in existence in areas under 66610 subsections (b), (c) and (d) which are shoreline band, sloughs, I believe, or salt ponds, and managed wetlands. In those areas, uses which were in existence at the time of the Act may be continued provided – and it is perhaps in some cases an important provision – provided that no substantial change in use occurs.

The next statutory provision is 66655 which says that if prior to September 1969 an ordinance or permit had been issued authorizing a use within certain portions of the Commission's jurisdiction as defined in Section 66610, and a person has obtained a vested right to proceed with that project, that they do not have to obtain a permit from the Commission; again, providing that there is no substantial change in use in the future.

And then the final provision under the McAteer-Petris Act that I would address is 66656 and I have excerpted and paraphrased subsection (a), which says that any person claiming an exemption under certain provisions is required to file a claim of exemption with the Commission by January 1974. If they fail to do so then they give up their exemption. This statute was enacted to provide a deadline or a time frame for claims of exemption.

There is a memo in our office prepared by a former BCDC counsel that summarizes the claims of exemption that were filed under this provision. According to that memo there were 32 claims of exemption filed. Seven were denied, seventeen were withdrawn, four were undetermined, I guess in limbo, one was granted and three were granted in part and denied in part. The three exemptions that were granted in part and denied in part, all were for properties or projects in the East Bay; two I believe were marinas and one was just listed as a development company. The one exemption that was granted in full, or granted, was a project for the Port of Oakland to fill 150 acres for a marine terminal.

But these exemptions are not the sum total of projects that were exempted or have been exempted. In a number of cases the Commission has also entered into settlement agreements to resolve disputes and litigation regarding claims of exemption.

One example is relevant to the matter on the agenda today, the hotel, where there was a settlement agreement entered into in the 1970s for the Bay Farm Island in Alameda and that settlement agreement has been amended a number of times as development has proceeded and there have been certain changes in the land uses that were contemplated under that settlement agreement.

A second example of a settlement agreement is a project Galilee Harbor Marina in Sausalito that resolved litigation approximately 20 years ago. The settlement agreement authorized a continued residential marina in Sausalito and allowed for one 20 year extension of that continuing use. The first 20 years has expired and staff is now working with the property owners on a proposed supplemental amendment to that agreement to bring to the Commission for your consideration of whether or not to authorize that continued use.

I will come back to discussing some of those exemptions under the McAteer-Petris Act and issues that we are currently dealing with, but I first wanted to mention two provisions under the Suisun Marsh Preservation Act.

The first is Public Resources Code 29507 which contains a similar exemption to one that we just discussed under the McAteer-Petris Act that no person who has obtained a vested right or a permit from the Commission under the McAteer-Petris Act or from a local government shall be required to secure a permit under the Marsh Act. Again, however, no substantial use change may be made to such development without prior approval from the Commission.

And the second provision under the Suisun Marsh Preservation Act: As you know, generally a marsh development permit is required for any development in the Marsh and the Commission has authority to issue those permits with respect to the primary management area in the Marsh. There is a provision in the Marsh Act, Public Resources Code 29501.5 which says: Notwithstanding the provisions of 29500, which is the requirement to obtain a permit, within the primary management area no permit is required for any development specified in the component of the local protection program prepared by the Suisun Resource Conservation District and certified by the Commission. And this provision and this exemption is one of the issues that is raised by the enforcement action that Larry referred to at Point Buckler which you will hear about at some point.

Returning to the McAteer-Petris Act, I wanted to talk a little bit about some interpretations of some of the exemptions.

The first one is a California Supreme Court interpretation of the word "project" in Section 66632.1 which was: Nothing in this title shall apply to any project where local government approval and a Corps of Engineers permit has been obtained. What happened in this case is that Emeryville had a land use plan that had been developed for a property in baylands prior to BCDC being formed. After BCDC was formed there were changes made to the project to provide additional public access and preserve additional tidelands. Then the City took the position they were exempt and the Supreme Court decided that they were not, that the word "project" was a term of limitation and that if there is a fundamental change in the project and the purpose of the project it is a new project and subject to permitting jurisdiction. And the important point there is that these exemptions are for a particular project contemplated at the time or at the time the exemption was granted; they do not go on forever and they do not apply where changes have been made.

The next slide is a visual break. I wanted to set the stage for a second area of statutory interpretation involving these issues which arose in the context of proposed developments on the finger piers in San Francisco approximately 30 years ago when the Port and the City of San

Francisco were interested in developing the piers for office use and for office towers, which may have required the piers to be substantially modified or replaced in order to support those uses. A dispute developed between BCDC and the Port about that and the California Attorney General's Office provided two informal opinions in the form of legal advice to BDC regarding that.

The issue was the scope of BCDC's permit review when the work involved piers that predated BCDC. BCDC had taken the position that the piers, even though they are in the Bay and over water they were actually interpreted to be shoreline band. So the question was, if the piers were going to be replaced or repaired and new uses put on the piers, did those uses have to be water-oriented because they were in the Bay or not water-oriented because they were shoreline band?

In very summary form, the advice was that proposed work on a pier that does not involve additional coverage of the Bay and does not involve work on the pier itself can be treated as coming within the shoreline band and therefore the uses do not need to be water-oriented.

But if the work does involve construction on the pier or substructure, the scope of permit review would depend on the extent, nature and purpose of the work.

To break that down further, there are two extremes:

Minor repairs to decks or pilings that are necessary to keep up with ordinary wear and tear do not subject the uses to review for whether they are water-oriented.

On the other hand, at the other extreme, removal and replacement of all or substantial portions of a pier do constitute further filling of the Bay and therefore the uses had to be subject to evaluation for whether or not they were water-oriented.

And then there was a gray area in the middle where there was no real guidance provided by these opinions but it was left to BCDC if the proposed development falls between those extremes, it was to be a fact-based inquiry on looking at the nature and extent of the changes and what would be the purpose of the work or the new uses.

These informal Attorney General opinions, one was in 1986, the second in 1992, explained that they were based primarily on established principles of land use law that grandfathered uses at the time of an enactment of a zoning ordinance are generally exempted from requirements of the regulatory program as non-conforming uses by virtue of the fact that they pre-exist the regulatory program. But that over time those uses should either go away or they should come into compliance with the regulatory program. So that as improvements reach the end of their useful life and they undergo complete replacement they are then subject to regulation.

So BCDC prevailed in its dispute with the Port regarding the office towers but it did not solve the issues that the Port was facing with the lesser amount of maritime use in the city and the demands for the waterfront. So the limitations on this replacement policy resulted in a Bay Plan amendment that adopted something known as the Fill Replacement Policy, which is very convoluted and is no longer actually really applied but it provides in part that BCDC can permit fill on publicly-owned land for Bay-oriented commercial use, recreation purposes or public assembly

provided that the fill is a replacement pier that covers less of the Bay than was being uncovered and the amount of Bay-oriented commercial, recreation or public assembly uses don't cover more than 50 percent of the area of the Bay that was uncovered and that the remainder of the area is used for either public recreation, public access or open water.

I understand from Brad that probably the only time this policy was successfully applied was at the development of Pier 39. So this policy was a way to make an exception or sort of a way around the strict application of the non-conforming use principles. But in the end it didn't particularly help the Port and so in 2000 there were amendments to the Special Area Plan for the San Francisco waterfront which identified the northeast waterfront from China Basin to Pier 35 where the fill replacement policy does not apply and also where existing piers may be repaired or wholly reconstructed without triggering the water-oriented use test or the no alternative upland location test of Section 66605. However, the proposed use must still be consistent with the public trust.

So just as a sort of follow-up on these points. Within the past month as staff we were and are actually still discussing two pier projects in San Francisco where the permittees were doing, or proposed to do, repairs and maintenance on their piers and the staff determined that work was basically substantial modification that would increase the life of the structure and didn't come within the category of routine repairs but rather was substantial work, and that triggered a discussion of, 'how do we apply Bay Plan policies to these "replacement piers?" Do we need to consider public access? Do we need to consider climate change policies? How do we deal with Bay Plan policies in the context of something that's arguably replacement but in fact is an existing structure in current use with current tenants and limitations of space and infrastructure are already in place?'

The principles discussed with respect to these piers and the law of non-conforming uses raise broader issues for BCDC and BCDC staff that we are dealing with and will probably have to deal with more in the coming years as grandfathered and exempt projects reach the end of their useful life and need to be replaced.

One other example is a project, one of those partially granted exemptions that I spoke of previously, where the property owner came to BCDC last fall and it turned out they wanted to completely replace some of their docks in a marina; the docks were past their useful life. We had discussions internally again about how to apply the Bay Plan policies and particularly the marina policies to an existing, long-established marina but where the property owner was completely replacing existing structures. This marina did not have dedicated restrooms, which would be required; it did not have a pump-out facility and then public access. It turned out that there is a separate settlement agreement with this property owner about the shoreline that really already dealt with public access and was a constraint on what more could be done within the geographic spaces.

There are three more exemptions that I will just discuss briefly.

One is an exemption from various requirements for the replacement or rehabilitation of a preexisting residence. It is in our regulations at Section 10700 under the label "Minor Fill for Improving Shoreline Appearance."

The regulation deals with more than existing residential structures but I excerpted the language related to housing. The Commission may approve the placement of minor fill to improve shoreline appearance, including replacing an existing preexisting residential structure only if in addition to satisfying other requirements of the Government Code and the Bay Plan the Commission finds the fill is necessary; the amount of fill is the minimum necessary to improve shoreline appearance; the project would improve shoreline appearance; and the fill would not adversely affect the enjoyment of the Bay.

And then it goes on to say in Subsection (e) that with regarding to preexisting residences, the requirements of (b) and (c) are met if the replacement will not enlarge the size of a preexisting structure and will cover less of the Bay than the preexisting structure.

The bottom line of all this is that the regulation allows housing on the Bay, which is not a water-oriented use, to be replaced. So it does not have to meet the water-oriented use test and it also is deemed to meet these other provisions of being the minimum necessary and being fill to improve shoreline appearance if the property owner makes a house that is smaller than the house they previously had.

The final two issues that I wanted to address are there is an exemption in the Bay Plan for the water-oriented use test for houseboats in certain circumstances. The issue of houseboats and live-aboards is a broad topic and one that we will probably bring back at another time for another briefing. But I just wanted to highlight this because it ties into the residential use regulation I just talked about.

The Bay Plan acknowledges in the findings that a houseboat is neither a water-oriented use and that it is not a use that furthers the public interest and does not serve a statewide public benefit. So for all those reasons the Bay Plan says new houseboat marinas should not be authorized.

But then in Policy 4, and this is under Other Uses of the Bay and Shoreline, the Bay Plan says that the Commission should authorize houseboat use for residential purposes in existing houseboat marinas if a number of criteria are met; and there are about maybe ten of them in the Bay Plan.

So the Bay Plan on the one hand says houseboat marinas are not water-oriented and should not be allowed in new marinas, but houseboats can be allowed in existing marinas under certain criteria.

Another perhaps simple one to close with: In the Bay Plan there is a limitation on the geographic scope of your climate change policies. As you know, under the Coastal Zone Management Act we perform consistency reviews for federal activities and federally permitted projects that may affect the coastal zone, even if they are not within the Commission's jurisdiction under 66610. So generally the most common example would be in port priority use areas that may go beyond the 100 foot shoreline band but activities there outside the shoreline band could still affect the coastal zone. We do a CZMA review. But the climate change policies expressly state that they apply only to the area of the Commission's jurisdiction under 66610 and go on to say that the policies do not apply to CZMA review where the activities are outside the coastal zone.

So with that I will entertain any questions or defer back to the Chair.

Acting Chair Halsted continued: Thank you very much. We did not schedule a public hearing on this matter but if anyone from the public wants to comment on this matter we invite you to come forward now. (No comments from the public were voiced) Following that we will take Commissioner questions and comments.

Seeing none, are there Commissioner comments?

Commissioner McGrath delved deeper into the concept of vested rights via a hypothetical: Mr. Zeppetello, the concept is vested right; if you have done substantial construction in reliance on permits you have a vested right when a new rule comes into play. I want to probe just a little bit the scope of that. If there is a project, as many big projects are, that has three, four or five phases, and it is all approved by the local government. The first three phases were built right away, the market turned down, phase four was built some years later and phase five still has not been built. The vested right, as long as they were all necessary permits for the entirety of the development, does not expire while a developer waits for market conditions to be appropriate; is that correct?

Mr. Zeppetello replied: I do not know if I could comment universally but I would tend to think that is correct. It brings to mind again this marina we were dealing with in the East Bay where the property owner got the rights on the shoreline to build three buildings and had only built two. But he is hanging on, to his mind, and we recognize that he still has the entitlement to build that third building.

I think there could become issues in a CEQA context perhaps, for example, where someone could argue that over time and changed conditions. But I think generally I would agree with that.

Commissioner McGrath expounded further: The vested right is perhaps not universal. For example, the energy conservation requirements would apply to all new buildings but not the question of whether or not the building could be built in the first place.

Commissioner Peskin had follow-up questions: To follow up on Commissioner McGrath's question, I guess relative to the item that we will consider here in a little while. It would really go back to whether or not it is a project and that matter has been adjudicated by the State Supreme Court. And if the future phase changed then presumably it would be a new project. It is a statement but any comments on that, counsel?

Mr. Zeppetello answered: If it is the same basic project and it has not changed in size or scope or type of land use then I think it could be argued to be the same project. But if there is a change in circumstance or a change in the development plan, changes in use, change in size/scale, then under that Supreme Court case I would think there is an argument it is a different project.

Acting Chair Halsted asked for further questions or comments. Commissioners had no further questions or comments so she moved to Item 8.

8. Public Hearing on Daxa Patel's Application for BCDC Permit Application No 2016.003.00 for Construction of a Hotel and Parking Structure located at 2350 Harbor Bay Parkway, in the City of Alameda, Alameda County. Acting Chair Halsted announced: Item 8 is a public hearing on a permit application to construct a hotel and parking lot in Alameda. Jhon Arbelaez-Novak will introduce the project. Let me remind you that public comment will be limited to two minutes per speaker.

Permit Analyst Arbelaez-Novak spoke: Today you are scheduled for a public hearing on this matter; a vote is tentatively scheduled for August 18th.

On July 22nd you were mailed a summary of a major permit application to construct a hotel with public access amenities on a 1.5 acre undeveloped site on Harbor Bay Parkway in the city of Alameda. You can see on the map where it is located just right north of the Oakland Airport.

Within the Commission's 100-foot shoreline band jurisdiction the project includes a section of a five-story hotel with 98 rooms, an enclosed parking structure and guest parking lot.

As you can see on Exhibits B and C of the staff summary, the Applicant also proposes public access improvements within an area totaling about a quarter acre, including a 345 foot long shoreline pathway with seating and lighting, a sidewalk at Harbor View Parkway, access paths to the shoreline from Harbor Bay Parkway to the shoreline and landscaping improvements at adjacent properties owned by the city of Alameda.

Since mailing the staff summary the project plans have been revised to widen the public shoreline pathway from 18.5 feet to 21.5 feet. These plans also show the upper stories of the hotel cantilevered over the public paths leading from Harbor Bay Parkway to the shoreline. These revised plans have been provided to you today.

The life of the project is proposed to extend beyond the year 2100.

Because the project does not involve any Bay fill a formal risk assessment was not required. However, the applicant provided information on the risk of flooding at the site. As shown in the staff summary in Exhibit D, when taking into account future sea level rise and 100 year flooding, the public shoreline would remain protected by an existing shoreline protection system and thus the project proposal does not include adaptation strategies for the shoreline access areas.

Before stating the two primary project issues concerning the Commission I would like to bring your attention to the errata sheet on the staff summary which was provided to you today.

In summary, the corrected language covers revised square footage for the building and public shoreline path on page 4 and updated information on cantilevered sections of the building covering shoreline access pathways on page 9.

Additionally, yesterday afternoon we were informed by the applicant that they will be revising the proposed dedicated public access to include the landscaping surrounding the paved shoreline and access pathways. This should increase the width of the pathways from

approximately 7.5 feet to approximately 20 feet. As a result, the overall square footage of the public access will be larger than indicated in the errata sheet. The applicant will be presenting that information to you today.

In evaluating the proposed project you should consider whether it (1) would provide maximum feasible public access consistent with the project, including whether the public access is designed and would be managed to avoid impacts from sea level rise and flooding; and (2) would maximize public views to the Bay and the shoreline.

I would like to introduce James Heilbronner who will present the additional information about the project.

Applicant's Representative Heilbronner addressed the Commission: I am Jim Heilbronner, an architect in Oakland and we have been involved for a few months with this project in trying to redesign some things to make it more Bay-edge-friendly, so to speak. We have done a few things in response to the Design Review meeting held a few months ago, comments on the openness and viewability of the Bay, notwithstanding, of course, the fact that we have a new building on a site that does not have one today. So I think you will hear today mostly about the essence of putting a building on the site at all versus the details that we have been involved in discussions with both City staff and BCDC staff.

That said, I have to say both staff, City and BCDC have been great in leading the way on some new ideas that we have infused into the project. The collaboration between two agencies is unusual and good in this case. I think we have come up with some good ideas to maximize views and access paths. There is a little confusion about, what a path is and what an access area is, so we are open to the landscape areas that we will show you being preserved dedicated accessways through the property.

The first document is pretty simple; it is a land survey of what is there today. The outline in red is the two parcels that compose the project.

The second screen is the original site plan design that was approved by the City of Alameda. So the project has been entitled by the City and we are coming to BCDC under formal application after the fact, if you will. The red lines obviously show pedestrian ways around the project, on the north and south ends are public park areas. The two center lines are adjacent to the sides of the buildings that were deemed tight. And they were typical five foot sidewalks, not very pleasant, particularly next to cars. But that is the approved site plan.

The next site plan, if you can see it, clearly is that we have moved the building to the east to widen the public way along the water edge and did so by removing the bike path that parallels Harbor Bay Parkway with sort of a consensus of staff and us that the bike path along here was a duplication of this path along the water's edge. So widening the water's edge pathway makes sense. We still have a sidewalk along the street and obviously this is a pedestrian sidewalk here but also a bike path. So we reduced numbers of pathways from three to two, widening the one along the water. So the building is further away from the water by six feet from the approved site

plan, which allows a fatter walkway, which we have got landscaping up against the building, bench areas, fire pit areas, places to congregate, get out of the sun. In the evening time utilize those spaces as well. Park your bike. The project is required to provide bicycles for its occupants during the day and there is bike parking. We have not figured out where all of the bike parking spaces go but those are pretty flexible in the site planning.

This compares the original location. The red box is where the approved site plan is today. You can see the building is to the east of that. What we did on the sides of the buildings is basically pull the first floor inward 15 feet on both ends, which effectively increases the landscaping on both ends by that much. So to widen the view corridors on the north and south sides of the building we basically deleted program space inside the hotel. We eliminated two rooms on the first floor and part of the meeting room system on the south end. So the building is shorter on the first floor, the same length north to south on the second and upper floors, which is the cantilever that Jhon mentioned, the building still sticks out.

So the yellow represents access pathways where your feet can actually touch the ground, hardscape. The green is view corridors. Clearly you can see over the parking lot. But being very detailed, with cars there that are 4 to 4.5 feet tall you don't see through the cars very well. But these are sort of the clear pathway views in direct perpendicular fashion to the water.

And then landscaping which is required to go back to the City for detail review, as all the amenities are, when we go through the permit process with planning. We go back on the details of species. It will be consistent with the Bay planting requirements and signage and everything that goes with.

We built a computer model of this because the 2D views are a little bit difficult to understand. This is a view obviously looking towards the Bay, through the area that is between the parking structure and the hotel. So there is a pathway here very similar to some of the views that are shown in the BCDC guidelines. It has been referred to as a tunnel or archway. That has been widened by about 15 feet. So there is landscaping through there and a green wall and sculptural items to enhance the path that goes from the sidewalk in through to the main path along the water. So that is a closer shot of that.

This is a view from across the street, across from Harbor Bay.

Another view more from the north, again further from the north, the front of the building with the drop-off area for the cars at the front of the hotel. You can see here from the water side you have a significant amount of glass on the first floor. We are showing glass on the back side of the parking garage. There is no reason for that to be opaque so we can frost part of that, the lower part to hide the cars, but there is no reason for the garage not to be translucent also.

So along the path looking to the north, the 18.5 foot wide path with landscaping up against the building. This is the garage component. This is back to looking through the "tunnel" the other way back to the street.

Again, the pathway looking to the south and a view from the front. So this is the view on the north side of the building looking towards the Bay. This is the widened passageway or view corridor with the building at the second floor cantilevered out over the sidewalk right here. And I cannot touch that.

Bike parking can be just about anywhere. There is permanent bike parking today and temporary bike parking. There are lockers. I think we will have more bike parking hookup points here than in most buildings.

So that is sort of just a quick run-through of the model. Unfortunately it is a little bit out of context when you do a model like this but I wanted to demonstrate how much glass there is through the building. Even if you count the fact that the front of the building, the lobby is very open, that you can actually see through the lobby. The building is about 60 feet deep so you can see through the lobby. On the back side there is a pool inside so that is open glass, there are no rooms. So the first floor is very open where you can see through the building, depending on the cloud cover and the sun angle.

So overall the changes we made were to move the building to the east by about six feet, further away from the water. We widened the pathways or view corridors on the ends of the building. We have added some amenities, the fire pits and gathering areas that are more accessible from the lobby where the operator would allow guests to come in and use the lobby which has public seating and inside/outside so there is a good switch back and forth depending on the weather. We have got covered spaces outside so to some extent the cantilevers work well for shade. We could also do the same thing at the fire pit areas if we had some screening device above to block out the sun.

So widening the path along the water that was probably our biggest mission was to widen the public access along the water and push the building back a bit and taper down the amount of building that touched the ground, which we did.

The other big challenge was to move the bike path or eliminate the bike path along Harbor Bay, which the City is supportive of.

Questions?

Commissioner McGrath asked about existing approvals and vested rights: I am going to kind of repeat my line of inquiry. What exactly was approved on Parcel 1 that was recognized in the settlement agreement? What exactly had the City approved those many years ago? That can be addressed by either the applicant or the staff. I want to know what was approved, what had a vested right?

Regulatory Director McCrea asked: Is there anyone here from the City? I guess we do not have anyone here from the City. The settlement agreement was originally created in the 70s or the 80s?

Mr. Arbelaez-Novak stated: In the 1970s or 1980s. The latest amendment to the settlement agreement was signed in 2013.

Mr. McCrea continued: Right. Prior to that, though, there were a number of amendments. The first for this site, it was originally for a ferry terminal. The ferry terminal was then moved to the north.

Then the settlement agreement was amended to allow a restaurant and the restaurant was on paper for many years.

Several years ago, probably less than five, at the request of Harbor Bay Isle Association (HBIA) we amended the agreement again to allow instead of a restaurant, an office building with a restaurant component, so it would be restaurant-over-office.

That is where it stands today; that is where the agreement is. There is an authorization for that.

When the hotel proposal came in, because it is a different land use and because we think there is a significant and different impact on the shoreline; we said that it would require a permit. Getting to the exemptions that Marc talked about earlier now we could have handled it a couple of different ways. We could have handled it as a material amendment to the agreement but a permit seemed to make the most sense at this time.

Commissioner McGrath opined: So it is pretty clear to me that under the case that we talked about, this is a new development.

Mr. McCrea agreed: Yes.

Commissioner McGrath asked: So I have a couple of questions. The first one I think is fairly simple: Did the change to an office building come to the Commission or was that as a settlement?

Mr. McCrea replied: It did not, that was an administrative action.

Commissioner McGrath continued: So that was done administratively. Was there a footprint associated with that proposal?

Mr. McCrea answered: Yes.

Commissioner McGrath commented: I would sure like to see that footprint. My question here is: How much new burden is there on public views? In other words, what was vested? Certainly this is a lot bigger than a ferry terminal in terms of view. But in terms of the footprint and what is maximum, feasible public access, I would sure like to see the footprints that they had a vested right to and the changes, because part of what we are dealing with here is a comparison.

Mr. McCrea replied: We would be happy to bring that back to you.

Commissioner Chan commented: I had a question about the setback. My understanding is the hotel is 63 feet high but the setback from the water is 27 feet. Normally wouldn't it be a 63 foot setback? It is quite close to the water. For people who have gone out there and seen it, it is very close to the water.

Mr. Heilbronner answered: There is no requirement for a setback equal to the height. The building is 63 feet tall.

Commissioner Chan asked: Isn't there a general rule that BCDC has?

Mr. McCrea clarified: I think what you are referring to is a sort of rule-of-thumb that our Design Review Board, the advisory board to you who has reviewed this project and many projects around the shoreline use is the rule-of-thumb that generally speaking a good urban design principle is that the width of the public access should be at about the same size as the height of the structure, no less.

That is dependent really on the amount of real estate you have. The law requires that every project in and along the shoreline of the San Francisco Bay provide maximum feasible public access consistent with the project. That is the threshold; that is what the law says, maximum feasible public access consistent with the project.

This is a very narrow site, not unlike a lot of the sites on the Oakland shoreline along the Embarcadero in Oakland where you have long, narrow sites. They are complicated and they are difficult because to get to your program you also have parking. BCDC is requiring maximum public access. By the time you stack up all those things horizontally, the shoreline, public access, the program, the parking, the street that is usually adjacent to it; it is a lot of program to fit in there.

So generally speaking, you are right. On large projects we like to see this urban design principle sort of maintained. But it is only that, it is a rule-of-thumb. Again, the law is maximum feasible public access consistent with the project.

Commissioner Chan inquired: Do you think that the relatively small setback contributes to an intimidating presence of this building? There is nothing else out there that is that tall. I am sure you have all have gone out there, right?

Mr. McCrea replied: We have, yes, several times.

Commissioner Chan stated: There is nothing else out there that is five stories tall, anything near.

Mr. McCrea agreed: That is true, yes.

Commissioner Peskin commented: I am inclined to go back to that *BCDC v. Emeryville* 1968 case. I guess fundamentally it doesn't seem to me that an unbuilt project in a future phase is vested unless substantial work towards completion has been undertaken and in this case no work has been undertaken at all. I do not think that it is vested but that is my non-lawyer interpretation.

Deputy Attorney General Tiedemann commented: The settlement agreement is not a permit it is more akin to a land use plan or a zoning ordinance. At the point that the applicant is applying for a BCDC permit they have essentially acquiesced that this project – they might not agree with this – falls into something other than the office space/restaurant designation in the settlement agreement. So they are here for a permit. I do not think they had a vested right, as we use that term legally, to build anything by virtue of the settlement agreement. They might have had a vested right to avoid BCDC jurisdiction but they did not have a vested right to build the office, a restaurant or a hotel.

Commissioner McGrath stated: Counsel, refresh my memory; that is because the settlement agreement did not cover the ferry terminal, which was the designated use, because it would have involved fill in the Bay.

Ms. Tiedemann agreed: Right.

Commissioner Zwissler commented: If I understood what we just heard, as we are currently looking at these plans, these have not been approved by the City?

Mr. Heilbronner disagreed: They have been.

Commissioner Zwissler inquired: Have not?

Mr. Heilbronner reiterated: Have.

Commissioner Zwissler confirmed: Have?

Mr. Heilbronner reiterated: They have been, yes.

Commissioner Zwissler qualified further: The revised plans have been approved by the City?

Mr. Heilbronner: No.

Commissioner Zwissler clarified: That's what I was asking.

Mr. Heilbronner replied: Right. I'm sorry.

Commissioner Zwissler continued: So typically, if I understand this correctly, when permits come before us all the previous permits are already in place, we are sort of the last venue. I guess I am a little concerned that if we were to approve this project before the City approves it, that in some way might give the City some cover, given that this is a potentially controversial issue. I wonder if you could comment on that or if anybody has an opinion on that.

Mr. Heilbronner replied: Reading the language of the conditions of approval and the City Municipal Code, the Community Development Director/Planning Department has administrative power to review and approve minor changes. I'm sort of paraphrasing. Much like we are doing today, looking at design issues that are somewhat subjective and discretionary. Plants with a sidewalk, color of concrete, amenities like benches and bike racks. Those types of things are typically not part of a major development plan entitlement process. Certainly part of the presentation, certainly part and parcel of what is being presented, but there is latitude on all projects and I can show you every project that has latitude on minor things within the purview of staff, planning, building, fire and public works.

So I would say that the issues we are talking about today, frankly, are in a word, minor, in the world of land planning, impact, life safety, engineering, utility demands and so forth. We are not changing the structure of the building; there are no issues geo-technically. We are manipulating sidewalks, landscaping and pushing exterior walls of the building in and out which are not load bearing; again, playing with the parts. So I believe City staff, other issues aside, other issues aside that are looming, if you will. Other issues aside, I believe that on a normal day the issues we are talking about are within the purview of City staff to review and approve or deny or negotiate after BCDC is more satisfied with those very same issues. That is the trend that has been our past that is very common.

Interesting enough, while I was flipping back through the third amendment it talks about the office/restaurant project as the third amendment stipulated and it talks about a band width

on the sidewalk on the Bay of 12 feet. It is maybe good to go back and do some comparative work on what was perceived. I have never seen an office proposed development plan. I see scripture on trying to round about what the parameters are. I believe that what we will find is similar constraints on what was proposed as an office/restaurant use, which aside from what we are doing would have a different traffic pattern, would have different parking requirements, would be more onerous than a hotel use which is more quiet and anti-traffic patterns. But all that said, all that under the guise of the entitlement process with the City was approved, CEQA included, which it was exempt from, size of parcel, et cetera.

So we are open to going back to the City. We have no doubts. City staff has said repeatedly in the last month that they see the world the same way as I am professing to see it this afternoon. That it is minor and minor in the scope of their authority.

Commissioner Zwissler stated: But they are not here today.

Mr. Heilbronner replied: No.

Commissioner Zwissler had additional questions: The other question I have, this is of our staff is: It sounds like there is this iterative conversation going on. What options do we have in terms of our ability to seek additional modifications? In other words, at what point does this thing come to a close and we are given an up or down vote? How does that all work? Because it seems to still be iterative at this point.

Mr. McCrea stated: The up or down vote will be on August 18th.

Commissioner Zwissler asked: So that will be a final plan?

Mr. McCrea replied: This has local approval.

Commissioner Zwissler inquired: Will that approved by the City?

Mr. McCrea commented: This is a harder question to answer. My understanding - and Jim, maybe you can correct me - is that the approval, I believe it has to do with the zoning, right? Unfortunately, Andrew Thomas of the City of Alameda is on vacation. I had a conversation with him last week and I will tell you what my understanding is after Jim tells you what his is.

Mr. Heilbronner explained: The concern is that the project going back to the City for review of "changes" which we are obligated to demonstrate, transparent process certainly through the permit process it goes through the various departments of the City so there is nothing to hide. Again, it is an approval process. There will be changes from the entitlement drawings to be more exact and more precise that staff has purview over. They could certainly send it back to the drawing board and say, 'No, we interpret that against the entitlements' or 'You have to go back through process' which no one ever really wants to do.

That said, we do not believe the issues at hand are cause to go back through the entitlement process back to the Planning Commission, City Council. That is our belief system. There is certainly concern about that, which is a separate subject and I will use the word "political." I will say that there is a cloud about that needing to happen for re-scrutiny of the project due to legal issues, the challenges being brought to the project for other reasons.

Separate subject: The arrow of entitlement is pointing to the hotel use, the BCDC agreement and its amendments which yet not define "hotel," which prompted the idea and notion and a lot of discussion about a fourth amendment, not yet approved but drafted, that would be more succinct in saying "hotel." Doing that now is, I will say, after the fact also, after the entitlements were blessed and that is certainly a legal question of process procedure, cart before the horse. That fix, if BCDC approves the fourth amendment, that repair by the City to point the arrow to the right document probably would require action of the Council to restate, reset the arrow. That will bring it back through process, certainly with a public hearing and the conversations that you are going to hear today about height, weight, serial number, species, plants, colors and whether I got the cloud color right.

I suspect we are going back for the ride and it is going to be the same project. We are, again, open to design changes, putting glass on the back of the parking structure, trying to find some other ways to "mitigate mass." I think the original architect did okay with that. Can other things be done? Sure. Are we willing to tinker with that with City staff? Yes. But we believe the bulk of the approvals and the considerations by counsel will be the same, traffic, impact, noise. I will say CEQA-defined impacts would be the same.

So I am pretty confident that we will have the same impact package. Will it be different on discretionary items, design and innuendo? Yes, absolutely. To the better? I believe so, but it is all in the eyes of the beholder, that is what design review is all about. So after 40 years of doing it I cannot guess what is going to happen in the world of colors and bell bottoms and wide ties, I don't know. We are off to the races. But I do not believe BCDC's actions should be stymied by what may or may not have to happen with the City.

Mr. Zeppetello commented: I just wanted to comment on one point. It is correct that prior discretionary approvals need to be obtained before the application is filed as complete. This application at the time it was filed, there was a discretionary approval. At this point I do not believe that the Commission has grounds to deny this application just because it may need to go back for further staff review or even back to a planning board. The test is, as Brad stated earlier, it is either grant or deny based on maximum feasible public access, with our without additional conditions.

Commissioner Nelson commented: It is not uncommon for the Commission to request changes and work on changes with the applicant that requires them to go back to the local government for approval so counsel's comment makes sense.

Three specific questions about the design with regard to public access:

First is the bike path. Do I have this right that the way you were able to move the building away from the water is by relocating the bike path?

Mr. Heilbronner clarified: By eliminating the bike path along Harbor Bay.

Commissioner Nelson continued: By eliminating the bike path along Harbor Bay. And that is replaced, in part by the path along the waterfront?

Mr. Heilbronner answered: Right.

Commissioner Nelson requested: Just walk through the circulation around the project site. Bike paths are?

Mr. Heilbronner replied: So the traditional sidewalk, which in this case is on private property, not in the City right-of-way; what is in the City right-of-way is a landscaped parkway. In this case, like in some jurisdictions, the sidewalk is on private land. The bike path was on the long side of that sidewalk, which Brad pointed out pretty quickly, why duplicate pathways in such a relatively short site. We are not going for miles here. Why not combine the two and have the bikes come along here and they can switch track and come over this way and continue down the bike path.

Commissioner Nelson asked: And how does it connect at both ends?

Mr. Heilbronner stated: You can connect through here back past our site. This is off the site on City property connecting here or you can connect here south of the site. You could ride your bike this way, come along here, continue down the path or come back to the bike path, for what reason I don't know but just for fun.

Commissioner Nelson observed: But off the project site those connections are already in existence and they are off your property?

Mr. Heilbronner agreed: Yes, correct. And we are obligated to make some improvements to enhance that landscaping to fill in the blanks to dovetail our site with the City site.

Commissioner Nelson had additional questions: The second question is about public access parking. I do not think I heard anything about parking for public access here.

Mr. Heilbronner replied: Not on the site proper, no.

Commissioner Nelson continued: In that larger context is there a significant amount of public access parking in the area?

Mr. Heilbronner answered: No, there is not a lot of public parking, no.

Commissioner Nelson recalled details: And if I remember the staff summary properly, there aren't signs indicating that those walkways are public access; do I have that right?

Mr. Heilbronner explained: In the original submittal that was made I believe there is a signage package. We will have to go back and check that. We have modified a lot of the design drawings but I believe there was a sign sheet that went with the project but that will be more details to come on that. Public access signs and displays, even information about the Bay in that location; that would be part and parcel of those details I am talking about.

Commissioner Nelson stated: That is a smaller issue but with those cantilevered walkways it would be easy for the public to feel that that's not public access when in fact it is so I think signage is an important issue there.

Mr. Heilbronner replied: Sure, that is a good point.

Commissioner Gorin commented: I appreciate as a former planning commissioner and a person who spent a lot of time planning bicycle networks I appreciate the challenge that you have in front of you.

I have a couple of questions because I am not familiar with this context but I am looking at the context now, the context map. Are there buildings north and south of this so it is bare land?

Mr. Heilbronner replied: Yes.

Commissioner Gorin asked: I was just going to ask, what is the shoreline access on any kind of property uses along this area? Is it a larger shoreline access?

Mr. Heilbronner answered: Yes. The shoreline access or pathway continues north and south of this project for quite a ways. So we are filling in a blank, if you will.

Commissioner Gorin observed: It looks like the depth is maybe 25 feet from the shoreline to the hotel.

Mr. Heilbronner agreed: Correct.

Commissioner Gorin continued: And I guess my question; let me ask it a different way: Are there other uses that have a much larger shoreline access? In other words, are you closer to the Bay than other uses?

Mr. Heilbronner stated: Not within since there are none left and right or south and north of the project there is no comparative for quite a ways.

Commissioner Gorin voiced her concerns: As a person who has been a cyclist for a long time, both for transportation and recreation, just a comment. The path in front of or closer to the Bay than the hotel is lovely for visitors, not so lovely for a person who uses it for transportation. Obviously they can access on the parkway rather than the front. There is a very high accident rate between cyclists and pedestrians and other users on a multiuse path so it is a little wide but it is challenging.

Mr. Heilbronner opined: I believe a Class 1 bike path is 14 feet, which allows pedestrians and bike passageways, so this is 18 feet. Frankly, we have more room, we have 8.5 feet of landscape and we have room to play there, if you will, again, hardscape, softscape. But I believe the path for bicycle users and pedestrians is pretty wide but we can do more.

Commissioner Jahns had questions: Two questions. In this picture it is extended onto riprap. Is the bike path going to be put on riprap or is the riprap considered part of the widening of public access?

Mr. Heilbronner clarified: No, the riprap is not part of the dimensions you heard this afternoon, it is not part of the equation.

Commissioner Jahns asked for clarification: So the lower end of this, the red line, what does it indicate, the property boundary?

Mr. Heilbronner clarified: That is the property line, yes. There is more land, if you will. Technically from the property line there is more than 26 feet from the property line. Interestingly enough when we talk about setbacks, there is no right-of-way or adjoining properties to the west from which you would be set back. Setbacks are really an interesting device. Here you have completely open space or water that has no adjoining structures to be set back from.

Commissioner Jahns requested: Could you describe the bike path on either side of this and if that is the City's to maintain?

Mr. Heilbronner stated: Yes, it is the City's purview. The bike path maintenance is by the City.

Commissioner Jahns continued: And is it a similar surface on the City path as what you are proposing?

Mr. Heilbronner answered: Yes, in fact, we were trying to match up the pattern, the concrete pattern. We tried a couple of other wacky patterns and we stuck with matching up to what is adjoining us north and south.

Commissioner Jahns asked for a clarification: And last but not least, as I recall from the staff report, the area that the hotel is built on is going to be raised five feet above current grade but then this path we see at the bottom of our page is not going to be raised at all.

Mr. Heilbronner replied: The site varies right now in grade because it is just natural but it has been disturbed over the years. I believe the bike path elevation itself is about two feet higher than it is now in that area from grade. But it will match up with the north and south ends without a big transition. The site needs dirt fill to bring it up to the adjoining edges, if you will.

Commissioner Jahns addressed two other issues: It looked like in the staff report there was no analysis for wave action and the impact of both sea level rise and wave action or storms or king tides would have on the public access.

Mr. Heilbronner replied: The challenge for us and everyone that lives along the water's edge from here and around the country is sea rise. The projected sea rise in the sea plan that BCDC sanctions is currently a 16 inch sea rise, so this project is designed for a sea rise that meets the sea plan that BCDC points to. There is no scientific or regulatory criteria yet regionally, Bay-wise, California-wise that dictates zero elevation in the future considering sea rise.

And there are many, many numbers about what could be coming in the future from 2025 to 2100 and the science isn't science really enough yet to predict that. And each project trying to solve that in and of itself is impossible. There is no way for any one site to solve sea rise without the adjoining properties doing the same thing and everyone in the neighborhood and in the city.

So your specific question is really difficult because that is also difficult science to project. But the building is high enough and out of what we know today as sea rise elevation and current high tide to be out of harm's way flood-wise.

Commissioner Jahns asked: So you did not run any models, you did not consider that range?

Mr. Heilbronner replied: We did not do a model of study of all the possible interactions, no. We just went with the projected published sea rise consideration.

Mr. McCrea interjected: I am going to turn this over to Jhon or Jaime who know more about this than I do but there was some analysis that was done around that so I want to clarify that point. You will find this in the last exhibit of the application summary that is in your packets, Exhibit 12.

Mr. Arbelaez-Novak commented: The last exhibit that you have in the staff summary presents the elevations and projections for sea level rise and the 100 year flood elevations. That particular analysis was performed by the previous architect so that is why the site plans are a little bit different from what we have in the previous exhibits. As you can see, the current mean higher high water is 6.46 feet. The current height of the riprap is estimated at 14.25 feet. And here you can see, to answer your question, Commissioner, the hotel will be 5 feet above existing ground level, which will put it at about 17 feet, so about 3 feet higher than what the shoreline path is.

For this analysis the previous architect what they had used is a rise of 16 inches by the year 2050 and I believe they used 55 inches for the year 2100. So as you can see when you add 55 inches to the current mean higher high water plus the 100 year flood elevation it reaches a height of 14.12 in feet. For 2050 that level is 10.87 feet.

Commissioner Hillmer asked for clarification: Could you please clarify where the 100 foot shoreline band would be represented on this plan. Does it go back to the corridor of the buildings?

Mr. Arbelaez-Novak explained: Right. It is not shown in this particular site plan but in previous site plans the 100 foot shoreline band would be approximately here.

Commissioner Hillmer asked: And in the settlement agreement the previous footprint, did it encroach into that shoreline band?

Mr. Arbelaez-Novak answered: Yes. The hotel and the enclosed parking structure and all this section of the proposed public access would have been in the shoreline band.

Commissioner Hillmer inquired: But in the settlement agreement, the last amendment, how far into the shoreline band did the previous footprint encroach compared to this?

Chief of Permits Michaels fielded this question: So the previous proposal for the restaurant/office building, I do not remember exactly how much of that would have been in the shoreline band but at least part of it was. I do not know if it is similar but it is probably approximately the same.

Commissioner Hillmer asked: Were the heights of the buildings in the last amendment to the settlement agreement, were those single-story?

Ms. Michaels answered: No, I believe that previous proposal was a two-story proposal.

Commissioner Hillmer continued: And this is a five-story?

Ms. Michaels replied: Yes.

Commissioner McGrath explored further on this point: Following up on that same point. I am a little confused by the information on page 3 of the application summary where it talks about the shoreline easement area being 0.20 acres and a public sidewalk and bicycle of 0.14. That totals 0.34 acres of public use. What I am told at this stage is there is 0.23.

Mr. Arbelaez-Novak replied: That was adjusted to 0.25.

Commissioner McGrath observed: So there is actually less. So there is 0.09 of an acre less public access in this proposal than there was. I just wanted to make sure the facts were clear.

Mr. Arbelaez-Novak agreed: Right. The 0.20 acres that are you referring to in the settlement agreement are called for along the shoreline that calls for a shoreline path. The settlement agreement also calls for 0.14 acres along the inland section along Harbor Bay Parkway for a bike path and a sidewalk. So you are correct and it was 0.34 acres.

Acting Chair Halsted asked: Are there any further questions? We do have a lot of public comment coming so when we have finished with the Commissioner questions we will proceed to that. Is there anything more? May we then proceed to open the public hearing? Let me remind you that we are asking you to limit your comments to two minutes because we have at least an hour ahead of us.

Ms. Patricia Lamborn spoke: My name is Pat Lamborn. I am an Alameda resident for 25 years. I am opposed to building this hotel on this very small parcel.

You are looking at a Google Map picture. It is 1.5 acres. That yellow line there draws back. You can see that, I don't know if you can expand it, but that's 27 feet, right. So the riprap is there, there is an asphalt parkway; you measure it out 27 feet. That's where the hotel will be, rising for five stories, 63 feet. It has gone all the way from 100 rooms all the way down to 98. That's what you would be walking along and seeing on that tiny parcel of land.

This is the current – there is the riprap, there's the asphalt path. People ride bikes, walk on it, walk their dogs. That's my tape measure. So the tape measure is showing you that's 27 feet back. And this is as you walk along the Bay towards the path you asked about. People can currently access that cement sidewalk. There is also another bike path. You won't be able to get to it anymore once they build this hotel. Like they said, they are eliminating any bike path at all. This asphalt path will turn into 18.5 feet of concrete and then there is 8 feet of landscaping; that's what it is. That is what looms above you and it's not just for people, it's not just for kids riding their bikes trying to navigate a larger concrete path, it's also for migratory birds.

Down the street this is the Stacy and Witbeck Building. It's at 2800 Harbor Bay Parkway. It's a two-story office building. So let's look at what their public access is. That's the 8 foot bike path. That's a 20 foot grassy median with trees. The pedestrian path is 14 feet. They had 33 feet of landscape. That's 75 feet.

Mr. Ron Curtis spoke: I will give my time to Pat Lambert.

Ms. Lamborn continued: That's 35 feet of landscaping, two separate, safe paths. It is a completely welcoming public access approach to the Bay. That is what you required of Stacy Witbeck.

Some of you now have pictures that I gave you. McGuire Hester is building a building, again, a two-story office building next door. They have the same setback, 75 feet.

I would say that you are not only hurting the public if you approve this project with that extremely small public access. What are you doing to other businesses? You required more of them. They gave up square footage. They maintain that. And as your own Design Review Board said, if you approve this project with 27 feet setback, what message are you sending to future development? It is a really bad precedent.

Ms. Reyla Graber addressed the Commission: I am just going to sort of piggyback on what Patricia was saying. That I believe the total setback for Stacy Witbeck from the riprap is at least 75 to 80 feet. So that would give you an idea. And this hotel is projected to be very, very close to the shoreline in comparison.

And I would like to mention something. I am not sure if this is correct. That the City gave limited approval to this hotel on the basis that it found sufficient parking. There is insufficient parking is my understanding. So I don't know how you can approve this hotel. There isn't sufficient parking for the public, for the guests. This is not a good plan.

And I am like a 40 year resident. I have lived on Bay Farm just down the road from this projected project. It's a very bad plan. It borders the shoreline trail, it's beloved by hundreds of people who bicycle and jog and walk along the trail. This hotel if built would be overbearing, intrusive and disruptive to the present peace and calm you find along the trail.

Mr. Gary Thompson spoke: I'm Gary Thompson. I live in Alameda. I use the area under discussion here regularly as does my family.

What I would like to do is just raise a couple of things that come by the Commission's own staff analysis where it states that the public access design guidelines state in part that public access must be designed in a manner that feels public, should provide, maintain and enhance visual access to the Bay and provide connections and continuity along the shoreline. In addition, "[a]ll bayfront development should be designed to enhance the pleasure of the user or viewer of the Bay." Policy 4 states, in part: "structures and facilities that do not take advantage of or visually complement the Bay should be located and designed so as not to impact visually on the Bay and shoreline."

This project does none of this. There's just too much building on too small a piece of property. Sixty-three feet high, five feet more sitting on its built-up pad is completely out of character for that area and I believe will not serve the public use at all. For these reasons we would ask that you please deny this permit.

Ms. Joyce August was recognized: I am a long-time resident of Alameda. I have lived there for over 30 years. I also use this bike path and I use the walking path. I also enjoy the visual view of the Bay. And I also have the privilege of having been a city planner when all of this land for Harbor Bay Isle was sand. I was hired by the City of Alameda as a planner to preserve the public's access to the waterway and to provide access along the entire lagoon system that exists. So I currently have a busman's holiday every time I go out there.

I have been out to the site very frequently and I have noted that the changes that were made through agreements with the final settlement through the auspices of Harbor Bay Isle Associates – I understand it is not an association and there are numerous, there are 20 homeowners' associations. I have spoken to many people who use this path, to use it as bike path, to take their children out there to train them to use the bicycle as well as preserve the environment.

What I recall in public hearings like this one is that there was a proposal for the ferry to take off from this spot and at that spot there might have been a boatel. I know that is something we don't use now; however, this is not a boatel. This is a wall against the Bay. It is something that was never envisioned and I would recommend that this be sent back to the Alameda City Council for review because the options that were provided were not legal in my estimation.

Ms. Patricia Gannon addressed the Commission: I live on Bay Farm Island in Alameda. I am also a member of Golden Gate Audubon and the Friends of the Alameda Wildlife Reserve.

I am here this afternoon to urge you to deny this building permit for this hotel. This five-story, 100-room, 82-parking space hotel is situated on a very small parcel of land.

Your Commission is charged with enforcing public access within your 100 foot shoreline band of jurisdiction. This hotel fits fairly within that area.

The oversized building sits right on the Bay Trail with only a 27 foot setback. This is a limited service hotel providing few amenities for guests only, not Alameda residents. The building blocks vistas and access to the Bay for the public and wildlife. One of the so-called public walkways goes through a covered garage and this parcel was zoned open space for 25 years.

This hotel is way oversized for this small parcel and is totally inappropriate for this site and the adjacent shoreline trail, which has been used extensively by many Alamedans for many years that enjoy spacious Bay views and hopefully future generations will continue to enjoy these views for years to come.

It will also negatively impact migratory shoreline birds and make it difficult for wildlife in general to navigate between the lagoons, the shoreline park and the Bay.

Please deny this building permit. Thank you very much.

Ms. Sandra Marder spoke: I just want to say as a homeowner at Harbor Bay for over 25 years and a regular user of the Bay Trails, I feel that considering that no other building in Harbor Bay is over two stories high and also the place where this hotel will be located would stick out and destroy the aesthetic of the area. Short and sweet.

Ms. Kira Comini commented: I have been an Alameda resident for over 30 years. I use that public access area a lot. I walk on it, I bicycle on it. It was not part of what I was going to say but it would be a travesty to combine the public walkway with the bicycling. I have been run over by bicycles as a pedestrian. This is worse than it was before to me over that.

But this is not in consistent use of the area as you have been told and I will not elaborate that. I will just say that as a member of the public I am counting on you to protect our beautiful shoreline and our public access and I ask you please to deny this permit.

Ms. Mona Patel spoke: I really think the times have changed. I know we don't build boatels but it's time we build hotels. Alameda is a growing city. It has a lot of corporate businesses coming in, a lot of housing built also on the shoreline and it does need a hotel.

Had the BCDC and/or the City put in their limitations before the land was on the market the Patels would not have bought that land. However, they have spent a lot of time and money on this project and the City apparently has approved it. I think we should go ahead and make some changes, whatever you need to do, but I think there is a desperate need.

This property, a hotel, it has enough clearance. I mean, I bike on the trails of Oakland Hills, every four miles there's a trail, four to eight feet. I bike and I have people walking with their dogs. I don't need any more space than that and this thing has 18 feet, for crying out loud. Come on, I'm not that thin (laughter) but hey, I can bike through six feet of trails on Oakland Hills.

I think President Obama and Jerry Brown really encourage the small businesswomen to get into businesses like that and I think the Patels should definitely build this. This will bring at least half a million dollars of transit occupancy tax to the City of Alameda and can you imagine what you guys can do to the City? Hey, there is no stopping you and there is no guessing how much more money you can get and make and it's time for you guys to beautify the shoreline.

Ms. Emma Becton-Flinn addressed the Commission: My name is Emma Becton-Flinn. I am a retired schoolteacher. I am a real estate broker. And like the Patels, I am a small, minority business owner. I have known the Patels for about 29 years. Ms. Patel is hardworking, ethical and a visionary.

Ms. Patel wants to develop a nice, state-of-the-art hotel on the San Francisco Bay in the city of Alameda. I am very proud of her and very supportive of her. But there are multiple reasons why I am also supporting this project.

Number one: There is a shortage of hotels in the Harbor Bay Parkway. Businesses are transporting their clients to San Francisco. I myself bring golf tournaments and family reunions to the area every year. This hotel project on the Alameda shoreline will be a perfect location to reside in. This hotel would be convenient to the Oakland Airport, to BART, golf courses and ferries. No cars will be needed for this hotel because it will supply transportation.

Also, the Harbor Bay could use the half-million tax revenue this project would generate to enhance the shoreline, repair your streets and keep up the infrastructure. This is the time for the City to take advantage of this increased tax revenue and diversity.

While planning this business park Harbor Bay placed a height restriction of 100 feet. Therefore it was known that eventually the shoreline could see a tall building.

Mr. Rich Krinks was recognized: My name is Rick Krinks. I am a long-time resident of Alameda. I actually live very close to the site and I have been a commercial broker for 26 years in Alameda and the East Bay and I have also been a property manager of two major marinas in the city of Alameda.

I applaud the work that you do as a Commission. Being involved in marinas and properties along the shoreline it is very important to have control over what happens. It is another layer for a developer, we know that. It is very difficult but you do a great job and I think everybody is happy about it, especially the people that travel the Bay Trail like I do when I run and I jog and I ride my bike and take my dog for walks.

I do go by this property a lot. I am very familiar with it as I bring many clients to that area. I have leased many spaces and helped people develop buildings there.

I am in support of the project. There may be some problems with scale and size and things like that but I am very much in support of the project. The city of Alameda needs more hotel rooms and meeting spaces and this would be a great asset, I believe, to the City. Thank you very much.

Mr. Tom Krysiak spoke: I am a 30 year resident of the Harbor Bay community on Sweet Road over there right by the ferry.

I have to admit that I dealt with BCDC on a couple of things on a very periphery basis when we were talking about the parking lot expansion that we sorely need over here by the Harbor Bay Ferry. Here about six or seven months ago one of your colleagues, I think his name was Ethan Lavine, published this paper saying that it's going to not be allowed to have this alternate parking plan where we were going to divert cars onto Harbor Bay Parkway because it obstructed the panoramic vistas of the Bay.

You know, I have to give you credit for that because it kind of sunk in that we do have too many cars and probably should not have anything obstructing the Bay, so that's where this became especially salient this afternoon when Commissioner Chan mentioned about this intimidating presence of this building here.

You've got to oppose the issuing of the permit on this. This building is just too massive. Sure, I like development in Alameda too but perhaps some measures can be made to move that location of the hotel away from the shoreline. We need that shoreline. The Harbor Bay residents, we really enjoy that area. All of us here in the gallery are big fans of that and you must think about opposing the permit here, it is very important. Thank you very much.

Ms. Tulsee Nathu commented: Some of the points I have is how SFO has wonderful waterfront airport hotels. The tourists when they go there they go and take pictures, their kids are in awe, and Oakland Airport has zero waterfront properties. This is an opportunity in the East Bay to share this beautiful place that we live and that we are discussing here today.

Another point I want to make is I have been there after-hours and it's late and it's extremely dark, it's desolate and scary. I think a hotel further down would liven up the area. There's North Face and Peet's Coffee and everything out there. I personally wake up early and go to work so for people that go to work there it would feel better and not as dark and desolate.

Lastly I just want to say that it is a business park. Previously it was given a 100 foot height restriction, which Emma was saying at the very tail end. Restaurateurs in the past couldn't pencil it; there is not enough traffic flow for owners and developers to make sense out of it.

So I do say that we consider this for the future owner and developer and can we set them up for success? Will it make sense for them? We are very approachable and hope to work with everyone and move forward with this project. Thank you, guys.

Mr. Chad Otten was recognized: I am on the Board of Directors of the Headlands Homeowners Association which is one of the neighboring associations to the proposed development.

Without being redundant I would like to echo that we are opposed to the proposed five story hotel.

A couple of points that I heard in listening to today's presentation by the developer, I did like the boat drawn up on the back side of the hotel. I don't know how that is going to work. But it's apparent that your efforts here today, and even with the design, that we are just definitely trying to squeeze in a building into a parcel that is much too small. You know, it's like trying to put a size 10 foot into a size 6 shoe, it's just too painful.

One point I would like to raise: The developer has talked about and the seller has talked about being unable to put a restaurant in there for the last 20 years. Well, keep in mind, the last 20 years there has been no development at the business park; there has been a tremendous recession. Now there is a lot of growth out there, there is a lot of building going on. It's not like we have a choice of ten different uses. This is the only use right now and they want to sell it.

The second thing you hear, it's about profit. I understand, I am a commercial real estate developer, a developer's right to build on a pad. But in this day and age we have the opportunity now with this economic growth to find a higher and better use for this parcel. Because once we build this we can't undo it, it's there forever.

I think it's important that now we put out some more marketing efforts if something is going to be built. Some better marketing efforts to find a better use that is more compatible with the neighborhood and the environment and the community around it. This was developed to keep the community and the residential thing separate from each other. And as stated before, the business park is already burdening the environment, the shoreline park and the neighborhoods so I think we can find a better use. Thank you.

Ms. Ivana Krajcinovic: I'm Ivana Krajcinovic, I'm a 16 year resident of Alameda. I am not opposed to a hotel but as you have heard today, there are major problems with this project and by the architect's own admission there have only been minor changes to the plan.

I don't want to repeat everything that's said. Just urge you to reject the permit until the changes match the scale of the problems that are in the current proposal. Thank you.

Mr. Steve Cvitanovic: Steve Cvitanovic here, resident of the city of Alameda for 20 years now; I am president of the Columbia Homeowners Association. We are really close to this proposed site. Our association has 209 homes and I could tell you that every resident that I have ever spoken to at our association does not like the idea of this hotel there and the board is firmly opposed to this project for numerous reasons.

I counted up the letters in the board packet that I was reviewing today before this meeting. There were 27 letters to the BCDC and 25 of the letters opposed this project, 25 of the 27. And the two that were in support of the project were from, not surprisingly, the Harbor Bay Isle Associates who stands to profit from this development and their managing agent.

You have heard the community here today speak about their strong feelings against this project and I share those feelings. I have ridden by. I have walked. I have run with my dog. I have been with my family by this site hundreds of times.

The idea that public access is going to improve is really a fallacy. There is plenty of public access right now; you've heard it from all the speakers before. I will gladly keep the public access we have right now so we don't have Alameda's version of the wall on the water.

I will say that the BCDC guidelines have seven public access objectives. Objectives 3 and 4 are to provide and maintain and enhance the visual access to the Bay and the shoreline. Approving this would clearly be contrary to those policy objectives.

Finally, I will note that the Commission staff on page 3 of the application summary said that this project would put a difficult burden on the shoreline so I will leave you with that.

Ms. Rosemary McNally addressed the Commission: I live in Alameda; I am a real estate broker also. I was getting tired, I had to leave.

But I just want to say four words. This project is not Bay-edge friendly.

Mr. Mark Sorensen commented: I am Executive Director of the Alameda Chamber of Commerce and I also serve on the Mayor's Economic Commission for Housing and Development in Alameda.

What I would like to say today is that this project, though we have listened to everyone before me, the City heard these same complaints as did the planning board and it moved forward from there. Right now this project does conform to the City's general plan, it conforms to the City's zoning ordinance, it also conforms with the Harbor Bay Business Park Development Agreement and it also agrees with the City Economic Development Strategic Plan.

Right now one of the problems we have, we represent a lot of major companies that work out on Harbor Bay. We have the Esplanade. We have Stacy and Witbeck. We have McGuire & Hester, V.F. Outdoors, Semifreddi's and Donsuemor. And one of the things that they are really looking for out there that affects their business is the fact that when they have people come into town on business there is no place for them to stay. And they are all looking for development out there of some type.

Right now, as has been mentioned before, this project will generate over \$400,000 to \$500,000 in transit occupancy taxes to the city of Alameda. It's a lot of money and it is also going to be providing a lot of jobs. This would also make them one of the top producers in the city of Alameda.

As you have seen, this project is going to be able to do pedestrian bike paths on Harbor Bay on the pathway out there and part of the Bay Trail that are currently not being able to be funded by the city of Alameda.

I have worked with the developer on this program for the last year and a half. I found them to be incredibly easy to deal with. They are willing to work with all the agencies to make this work.

So we are really hoping, as a member of the Chamber, that you will work with them and work out a deal on this. Thank you.

Mr. Richard Bangert spoke: I'm a resident of Alameda and I am speaking today on behalf of the Sierra Club. You received our comment letter. Our opposition to this project is focused on the impact it will have to the viewscape or viewshed, which many of the previous speakers have already well-articulated.

This project doesn't even come close to approaching the standards and generous setbacks like other places in Alameda. You've heard described just a short walk away how much more generous a setback there is for the buildings.

Out at Alameda Point the approved specific plan for the Seaplane Lagoon, it does allow for intense development on the north side of the Seaplane Lagoon and even some very tall buildings. But there will be no structure closer than 200 feet.

So I would say this is a project that doesn't even come close to matching up with other planning standards in Alameda.

And just to take off my Sierra Club hat and just put on my resident hat to comment on the process that has gone on that has led to this, this project has morphed under the radar of the citizens of Alameda since the days when it was approved for a ferry terminal which never happened. It's essentially gone under the radar and you can see by the number of comments received just by Commissioner Chan, not to mention the speakers here today, that if this were brought forward as a project from scratch today it would have never been rezoned for a hotel.

Ms. Irene Dieter commented: I am a resident of Alameda and I thank the Commissioners for their thoughtful comments and questions.

I think the developer has done what it can to try to make some design changes but it is impossible to do any design change that is going to make a difference because the project does not fit on this small parcel.

I recently attended a walk tour in Alameda along this same parcel where 50 to 60 people attended the Recs and Parks Department. When they found out what was going to be built there the mouths dropped, everybody was shocked and they were so pleased to find out that your Design Review Board saw it for what it was. It just does not work in this location.

We were also standing right across the street from there where there is this huge, empty lot where this hotel could be built.

And so I understand the desire for profit and I just think that if it were to come back to the City it would be reconsidered. It is true that three members of the planning board and the City, the Planning Director, are probably for this project, but the City Council and the citizens have not weighed in. Even when it was heard by the planning board there was hardly a quorum there and no one showed up because they weren't aware.

I think the design change by simply combining the walkway and the bicycle path together in front of this hotel is not desirable, it doesn't do anything. It's true what your Design Review Board said when it said that this offers little or no benefit to the public-at-large; it only is amenities for the patrons of the development, of the hotel.

Mr. Kerwin Allen commented: I am a resident of Alameda, Bay Farm Island for 20 years. I am also president of the Cantamar Homeowners Association. We are the homeowners association closest to this development; we are about an eighth of a mile as the crow flies. I am also a licensed civil engineer, which I will say that if nothing else it gives me the advantage of being able to look at the plans with a critical point of view and perspective. And I apologize ahead of time for belaboring some of the points that you have heard over and over.

I do not believe that these issues that we have talked about regarding scale and parking and views to be minor at all. I think they are very serious issues. Turning two bike lanes into a single bike and pedestrian lane is not a minor issue, it is a serious issue.

With all due respect to our hardworking city council in Alameda and the planning department, I believe that they erred in granting this permit for this proposal.

I agree with the comments made before that if they were doing it all over again it would not be approved and I would encourage the planning commission and the city council to open this issue back up to the public.

A five story building where no other building is more than three is significantly different. There is what is legal and then there is what is reasonable and I believe they are two different things.

A car stacker, which no one has mentioned today; there is a car stacker as part of this development. I haven't seen a car stacker west of Chicago in my entire life. I don't believe that it will be appropriate on tiny Harbor Bay Isle.

With that I'll take my leave. Thank you very much.

Mr. Ty Hudson spoke: I am here representing today UNITE HERE! Local 2850, which is the hotel and food service workers' union in the East Bay. Many of our members live in Alameda, many work in the restaurants and retail shops in the Oakland Airport very close to this site and also at the Hilton Oakland Airport and use the site for various reasons and in various ways.

Others have spoken more eloquently than I could about the ways in which this project limits and inhibits public access and views. I want to talk a little bit about what was previously contemplated on this site and what the City's zoning allows because people have made some claims about that.

As people have noted the property was originally zoned open space and would have allowed a restaurant, essentially a restaurant in the middle of the shoreline park. The shoreline park includes those two City-owned parcels on either side as well as the Bay Trail itself. The restaurant use, according to the plan development zoning, the plan development regulations of the City, was the only use allowed to project into the 25 foot setback from the park. This project essentially has between zero and five feet setback from the park.

When the BCDC agreement was amended to allow an office building it could never have been 100 feet tall or 63 feet tall or anything close because the plan development regulations require a 50 foot setback from Harbor Bay Parkway and for office buildings a setback from the Park, that includes the Bay Trail, of equal to the height of the building. So there would be absolutely no way to fit a 100 foot building or even anything over two stories, I don't think.

The zoning currently does not allow a hotel. It doesn't allow anything other than an office building, a restaurant or an office building with a restaurant or café on the ground floor. So the entitlements are in dispute and I urge you to deny the permit. Thank you.

Ms. Silvia Stollger: I'm an Alameda resident for more than 27 years.

I take care of an elderly lady and I take her for a walk in that area where they are going to build a hotel and I walk my dogs and I really enjoy that area. So building the hotel, a five story hotel building, blocks the view for the beautiful shoreline. That is my first point.

My second point: In the future, the other surrounding buildings, they're going to want to raise the buildings three more stories. So you want a five story hotel? The other surrounding buildings are two story hotels. In the future everybody is going to want to raise the building because that is the way Alameda works.

I am opposed to this project. I am opposed to this project because I don't want that they block the beautiful view of Alameda residents. And also they're not bringing good jobs for the residents of Alameda. I am a 2850 Union local and they are not bringing good jobs to the residents of Alameda.

Mr. Dan Reidy was recognized: Dan Reidy representing Harbor Bay Isle Associates, for shorthand HBIA, we were the master developer of the Harbor Bay Isle development on Bay Farm Island.

HBIA has been working cooperatively with BCDC for over 40 years, since the 1975 settlement agreement that Marc Zeppetello mentioned. In fact, I worked on the Mall since the early 1980s so I have a lot of scars from these meetings, all the BCDC Board meetings, the DRB and all the agreements.

But this is like the final link to finish the emerald necklace of the shoreline that goes all the way around, over three miles around the edge of Harbor Bay Isle. It's a real quality project of BCDC and HBIA because we arranged for the funding and the installation of the landscaping and public access improvements before they were dedicated to the City.

You have in your packet a letter from the President of HBIA, Tim Hoppen; it has some of the context and background. But I do want to make sure that you see that we reemphasize that HBIA recommends that this Commission approve the BCDC permit and do so without imposing crippling conditions that would make the hotel use infeasible.

Now on the issue of sea level rise, HBIA anticipated that this issue would come up and so we have in place a reclamation district, Reclamation District 2105. It has the power; it's recorded on the properties to be able to generate the funding to repair in the future whenever it's there. So all the properties in the business park would help pay for any necessary repairs if you had to bring up the date for wave action, for sea level rise.

And I wish I had more time. There were a lot of comments made about the zoning I could help create. But again, we recommend that you approve this from the perspective, the long-term perspective of the master developer of Harbor Bay Isle.

Acting Chair Halsted announced: We have no further cards and therefore I would ask for a motion to close the public hearing.

MOTION: Commissioner Vasquez moved to close the public hearing, seconded by Commissioner Wagenknecht.

VOTE: The motion carried with a vote of 16-0-0 with Commissioners Butt, Chan, Jahns, Gioia, Gorin, Peskin, McGrath, Nelson, Randolph, Sartipi, Sears, Vasquez, Hillmer, Wagenknecht, Zwissler and Acting Chair Halsted voting, "YES", no "NO", votes and no abstentions.

Acting Chair Halsted continued: We have closed the public hearing. Now we can come back to the Commission for questions and comments.

Commissioner Randolph discussed jurisdictional issues: I had a question going back to our jurisdiction of the maximum feasible public access. I have the impression but stand to be corrected that the appropriateness of the building, the height or mass of the building for the parcel, is something that would fall primarily within the jurisdiction of the City. And if they have gone through all the appropriate processes for the City then it would come back to maximum feasible public access, emphasizing the word "feasible."

It's a narrow lot and I think we need to ask, is the setback that we have now for the public right-of-way, is it the maximum feasible setback for that property? My question though would be, the other properties that were referred to earlier that are further down along the shore that have a wider setback, are those wider properties or are those also narrower lots?

Mr. McCrea replied: The areas at the other end of the shoreline fall under a different land use designation under the agreement. It's not exactly the way the agreement spells it out but it has different dimensional requirements.

Commissioner Randolph asked: So they are not comparable in that sense?

Mr. McCrea answered: So they are not comparable from a site plan perspective. Mr. Reidy, would you agree with that?

Mr. Reidy replied: Yes.

Commissioner Zwissler inquired: When the property was purchased how is it that the buyer could rely on the fact that this could be a hotel if there is all this ambiguity?

Mr. McCrea responded: I think that is a better question for the applicant.

Commissioner Zwissler continued: If you don't want to answer you don't have to, I am just trying to understand who is responsible for understanding that.

Ms. Mina Patel replied: When I put this property under the contract at that time I did my due diligence and according to the city of Alameda they mentioned that I can build a hotel, it has the right zoning. Also it has a 100 feet height restriction so I can go up to eight to nine story. So that was all approved. And all of the setback and everything was approved.

And also this project is already approved by the city of Alameda subject to the parking, but which is parking that I can share parking across the street with other businesses, which I already agreed to do that. So it is already approved.

And all these questions, all of these come up right now, I think I got mislead from somebody. And all of these residents were there. Why they didn't object and tell the City not to place a 100 feet height restriction on that lot? Now this is too late, I feel that way. Thank you so much.

Acting Chair Halsted continued: Thank you very much, we appreciate your input.

Commissioner Nelson had questions of staff: A couple of questions for staff to help us prepare for the vote at our next meeting. This is a challenging project. Obviously the applicant is trying to be creative in providing public access; at the same time the site is clearly very constrained.

So a couple of questions. First, when is the next DRB meeting and is there any chance this project with these changes would go back to the DRB?

Mr. Arbelaez-Novak responded: At the last DRB meeting when this project went for review on May 9th the DRB recommended that the project return for further review. The applicant decided not to do that. When the application was filed at the beginning of June it put us under our 90 day deadline. That 90 day deadline is on August 31st. Unfortunately, there are no additional DRB meetings before then.

Commissioner Nelson made some requests of staff: For our next meeting I am hoping that the staff can present us with two things. The first is similar projects, to the extent you can, in similar kinds of environments so we can have a sense of the kind of public access we have required elsewhere for similar projects.

And the second, we very seldom have denied projects for not providing maximum feasible public access so I am hoping the staff can give us some examples. Again, comparable ones if there are any, of projects where the Commission has decided that projects didn't provide maximum feasible public access.

So we can both look at the projects we have approved and those we have denied and see where this project fits.

Commissioner Hillmer requested of staff as well: Would it be possible also before the meeting where the vote is to take place to have an exhibit that shows in cross-section the area from the private property to the shoreline band of BCDC jurisdiction and what has been vested in relationship to that. For example, is a two story building allowed to encroach into the shoreline band as per the last amendment to the agreement?

Acting Chair Halsted replied: Let me ask staff if they can respond to that.

Ms. Michaels stated: We will try to put something together that reflects that.

Commissioner Hillmer added: Just the development envelope relationship, thank you.

Ms. Michaels replied: We will do that.

Commissioner Hillmer commented further: The reason I am asking that question, Madame Chair, is I think the three-dimensional aspects of this are very important. And I also observe that since the City has through its deliberations on the zoning has allowed a development standard of 100 feet, I would suggest that the entire site provides more opportunities to accommodate that 100 feet and the building footprint that would allow the building not to have to project into the 100 foot band. I do not think it is BCDC's responsibility to design the project but I think there are alternatives here that could, in my opinion, avoid encroachment at all into the 100 foot shoreline band.

Commissioner McGrath added: These are comments, generally not questions. I agree with Commissioner Randolph that the look of a city is the determination of the city. Our grounds for a project are not the bulk and the massing or whether or not it might have some impact on the Pacific Flyway but whether or not it provides maximum feasible access; that is the only circumstance under which we can deny a project. And I get that. But we have to drill down on that and I am very troubled by any number of factors that leave me to conclude that I cannot at this point conclude that this is maximum feasible public access; and I will go through them.

First of all, there is a shortage of parking, perhaps 46, perhaps more. I do not see exactly where the 10 public parking spaces are but I can't imagine hotel guests not using them. I have seen that other places along the shoreline including along the Oakland Estuary where guests to a hotel park wherever they can and don't pay much attention to signs.

Second, I look at the cross-section and I know in the 1983 storms there was a three-foot super-elevation in the Bay, surge in the Bay. That affects not only whether or not water might overtop but whether or not the path itself will be stable in the long-term. This is all filled land. When you load it, it loads the mud underneath it and it settles differentially; moving a bike path out from the street to that gives me real concerns about safety.

I bicycle two or three times a week on the Bay Trail. When I am on the Bay Trail with a lot of pedestrians I'm careful. I know what I'm doing and I know I have to slow down. Not everybody does but at least I'm careful and slow down. But sending people from a street perhaps onto the Bay Trail and back to the street has a mixing effect that I am not sure the City transportation people have looked at. I am not at this stage at all comfortable with that. I am not at all comfortable with that in terms of expectations. It looks like we had public use areas of 0.34 acres and now they are 0.25 acres; I would like a better explanation of that. Brad, it's great that you are trying to be creative but I don't know that it works in this circumstance or is reasonable.

Then there is the question of the reasonableness of use. One of the most compelling pieces of testimony was from the labor union. I don't care whether there is a project labor agreement, that has nothing to do with what we can do, but what exactly the zoning restrictions were in terms of setback is relevant to what should be paid for a parcel of land and what a reasonable use is. That was perhaps the most interesting testimony that I heard. What does anybody buying a piece of land like this with that zoning have a right to expect? I want to understand that.

I certainly support the use, visitor-serving uses gets people to the shoreline, they can help pay. Hotels and marinas make a tremendous amount of sense. The TOT is a big plus. But I don't see it here devoted to making sure that there is a net improvement over the public access that was long ago agreed to in terms of area or amenities.

I am going to make a comment about Design Review that is rather irreverent. I understand as representing the Port of Oakland the frustration that an applicant can have with the Design Review Board. When a Design Review Board suggested in the context of a marine terminal that we could make 7th Street into the Champs-Élysées my head just about exploded and I wanted to go to the Commission, I did not want to deal with the Design Review Board. On the other hand they have very good ideas about how to make projects work.

While an applicant has the ability to bring it to the Commission, they are not always well-served by doing so when there are fundamental issues, public safety, shortage of parking, differential settling of that path. My riding partner just had a very serious bicycle accident going 30, 40 miles an hour into an area where there is settlement. That bike path out in front, if you put bicycles commuting at any speed is kind of a recipe for that. I ride the Bay Trail all around the Bay; I know the places where it is really bad. Trying to load it behind and then put the high-speed bicyclists out in front of the hotel I don't think is a good idea. So I have those concerns.

Commissioner Sears had concerns with public access: I am really struggling with the public access part of this. Following up on Commissioner Nelson's comments, on page 7 of our staff report is a table that shows similar permitted projects and I thought it was very thought-provoking.

The first project was two hotel buildings totaling 10,560 square feet and the proposed public access for that project was over four times as large at 46,501 square feet.

The second project was for an office building/café totaling 8,314 square feet and there the proposed public access was nearly twice as much at 15,729 square feet.

And we get now to this proposed project where the project is 17,211 square feet and with the additions that we heard about today in the public access that's 10,858 square feet.

For this project if you flipped the numbers and the building was 10,858 square feet and the public access was 17,211 square feet you would be a little more in the frame of reference of the other projects but still short of what some of the other ratios were. I think if there are other similar permitted or denied projects that would provide additional fuel for thought that could be very helpful. But in the context of what this Commission has addressed before and the decisions we have made before – I obviously acknowledge not all parcels are created equal and there are challenges on this parcel – but I think it is important that we do reflect on the ratios that we have considered to be appropriate when considering public access and I am very troubled by where we are on this project currently.

Mr. McCrea added: Commissioner Sears, you are absolutely right. We use the law, we use the policies, we use the public access design guidelines and we certainly use precedent, things that the Commission has approved in the past, to guide us in the analysis that the staff does.

A column that is missing on this chart, and I apologize for that, is how big the sites were. Because when you determine what maximum feasible public access is it depends in a large part on how much real estate you have. The public access design guidelines, I just pulled it up and this gets to Commissioner's Chan's question about buildings having an intimidating presence. That word comes from the public access design guidelines. It calls to "Design public access so that the user is not intimidated nor is the user's appreciation diminished by large building masses, structures, or incompatible uses." That, of course, is something we take very seriously and it depends on the amount of space you have. To achieve that design principle you have to either increase the space around the building or you have to reduce the building mass and that is what we have been grappling with.

Commissioner Sears replied: I understand that. Thank you, Brad.

Acting Chair Halsted continued: If there is nothing more we will close this matter and return at our next meeting to consider it for a vote. Thank you very much to all of you who have shared your thoughts with us and we will reflect upon them.

Acting Chair Halsted moved to Item 9.

9. Commission Consideration of Proposed Findings to Deny the Grand Marina Village Owner's Association's Application for Material Amendment to BCDC Permit No. 1983.005

Acting Chair Halsted announced: Item 9 is Commission consideration of findings to support denial of the application for a material permit amendment requested by the Grand Marina Village Owners' Association. Chief Counsel Marc Zeppetello will introduce the proposed findings.

Mr. Zeppetello addressed the Commission: The reason that this matter is back to you from the last meeting is that under the Commission's regulations on findings on permits, Regulation 10514, in situations where the Commission's vote is consistent with the Executive Director's recommendation the findings and conclusions contained in the recommendation prepared by staff shall become the Commission's findings and conclusions.

But in this case the staff had recommended granting the material amendment that had been requested but the Commission voted to the contrary, so in this situation the regulation provides that when the Commission has voted on an application in a manner that is not consistent with the Executive Director's recommendation, the Executive Director shall prepare draft findings based on the statements made by those Commission members who voted consistent with the outcome of the vote and on such other materials as the Executive Director believes necessary to support the Commission's decision legally or as otherwise appropriate.

The Executive Director has prepared proposed findings which are in the packet under this agenda item and I will go over them briefly. After considering the findings only those Commission members who voted consistent with the prevailing decision may vote on whether or not to adopt the findings. You also have the option to make changes to the findings or to essentially remand the matter back to the Executive Director to modify the findings and bring them to you again at the next meeting.

So the findings prepared by the Executive Director, I will not go through them in detail. The first eight paragraphs are a chronology of the permit and the requested permit amendment and the staff recommendation and the materials that were presented prior to the hearing. The findings in support of the denial are in Paragraph 9 in essentially four parts.

First, that the permit has a standard provision that provides that it runs with the land so that when the homeowners association acquired property interests in the property that is subject to the permit they became bound by the permit and subject to the terms and conditions together with their co-permittee, Encinal. That is the first point.

The second point is that when there are two or more co-permittees, the regulations and the application form – which is actually part of the regulations – require that the application for a permit or for a permit amendment be signed by both permittees. In this case that was not done, therefore the application was incomplete.

The third aspect is that the Commission finds that the co-permittees, Encinal and the homeowners association, are jointly and severally responsible for the maintenance of the public access areas and improvements required under the permit. And that continued joint and several responsibility furthers the objective of providing maximum feasible public access.

And finally the fourth item addressed in the findings is that as proposed in the requested amendment and as proposed in the staff recommendation, the permit would have been split so that public access responsibilities were in accordance with property owned and controlled by each of the co-permittees. There was discussion that that was not an appropriate basis to split the permit because although Encinal might have had a smaller geographic area of responsibility than it had in the past, there were additional improvements required on Encinal's property as part of the development of the residential homes and therefore it was not appropriate to split the permit on the mere basis of ownership and control, and that there was no other evidence in the record presented to the Commission on which an appropriate basis was apparent to divide the permit.

So with that I will note that the homeowners association did provide a letter just this afternoon shortly after noon that I believe has been provided to the Commission. I will not attempt to respond to that now but I believe they will probably be making comments and if appropriate I may respond after. Also either now or later I would be happy to answer any questions.

Acting Chair Halsted continued: We did not schedule a public hearing on this matter but if the applicant's representative, Grand Marina Village Owners' Association, the co-permittee, Encinal Marina Limited, or anyone from the public wants to comment, you are welcome to do so.

Ms. Manley addressed the Commission: My name is Wendy Manley; I am here on behalf of Grand Marina Homeowners' Association to comment on the proposed findings for the Commission's decision June 16th to deny the application to split Permit 1983.005.11.

We respectfully object to the proposed findings as is detailed in greater detail in the letter.

The underlying premise to the proposed findings is that the HOA and Encinal are jointly responsible for maintaining all of the public access area and this premise completely ignores language in the permit that expressly limits the HOA's maintenance responsibility to property it owns or controls. If these findings are adopted as written then the Commission will be amending, retroactively amending the permit as well as revoking the HOA's vested interest in that permit without due process.

The permit says the HOA can be held liable for violations of the permit, but only for areas over which it has legal control. That means the HOA is not responsible for maintaining Encinal's property, it is not responsible for maintaining the public access improvements on Encinal's property, whether they were imposed as part of Amendment Eleven or some prior amendment.

BCDC agreed to the limited language when it issued the permit and there was a reason for that. There were concerns at the time that joint responsibility would be an issue with the Department of Real Estate – the Bureau now – approval of the CC&Rs for the project. In fact, BCDC imposed that limitation in the permit and then adopted the permit.

The limiting language eliminates the joint maintenance responsibility in this permit specifically, so BCDC decided this issue over eight years ago when it issued the permit with that limiting language and now the Commission in the proposed findings completely ignores the limited language in the permit.

The proposed findings also ignore the evidence in the record and in some cases it's completely contrary to the evidence in the record. The application, for example, does include language that provides that the Encinal Marina would continue to maintain the property that has a public access area of its own. Encinal signed that application. And the proposed findings also ignore the CC&Rs which incorporate that limited language, which the Bureau of Real Estate relied upon when it issued the public report, which the property owners relied on when they purchased the property.

The HOA respectfully requests that the Commission reopen the hearing and reconsider its decision in light of the actual terms of the permit so that the adopted findings can be consistent with the permit and the record. Thank you.

Mr. Eric Shaw was recognized: I represent the Encinal Grand Marina. Essentially I just received this lengthy letter as I was out the door this afternoon so I have had no time to check any of the case law or actually analyze the legal arguments that they are making.

But it seems to me that fundamentally what they are trying to do is get you to reconsider the vote you made a few weeks ago.

But beyond that, they are arguing vested rights, which is exactly the same argument that Encinal Marina was arguing as a basis for refusing to split the permit. We have relied on the joint permit and the obligations thereunder.

Further, we interpret the permit differently and that is an issue presently pending before a Superior Court of California. They are entitled to seek their interpretation there and have their interpretation adopted. We are seeking to have our interpretation adopted. The interpretation of the permit was not placed before the Commission; and as far as I can tell the Commission has

no regulations by which I can raise a declaratory relief action to seek an interpretation of the permit before you. If I could, if there was an administrative remedy we would have done that. But there is not one, therefore we have filed a lawsuit. They are attempting to pull the rug out from under our lawsuit by having you rule on this sub silentio and deny our rights. That is in a nutshell what is going on here.

We would urge you to adopt the findings that the staff has prepared. Thank you.

Acting Chair Halsted asked: We have questions and comments from Commissioners then?

Commissioner Nelson commented: I am not tempted; I suspect the Commission is not tempted to revisit the decision about the permit issue, splitting the permit. But it is important that we get the findings right. I was hoping that, Counsel, you could respond to the homeowners' association representative's statement that these findings represent a retroactive amendment of the underlying permit.

Mr. Zeppetello stated: As I understand it their argument is essentially that there is a sentence in the permit relating to the CC&Rs for the homeowners association that states that the homeowners association will only be responsible for property it owns and controls. That was an issue that was discussed, Ms. Manley made that point at the hearing, but it was not a matter that was discussed by any of the Commissioners or as a basis for your decision so it was not addressed in the proposed findings. I can respond further but that is why we didn't address it in the permit. As I presented it at the hearing in June, our view is that the homeowners' association and Encinal are jointly responsible for the maintenance obligations.

Commissioner McGrath commented: I support the findings as drafted. The compelling part is the last sentence which says, "There is no evidence in the record as to a reasonable and appropriate basis for dividing responsibility for maintenance" et cetera, as was proposed by the applicant.

And to the claim that there is no factual basis, it is very nice that the Commission prepares such nice minutes. I will point to my own comments on page 36 and page 37 and the response by Brad McCrea which said indeed the proposal to build homes resulted in changes in landscape and changes in use to the other recreational facilities, particularly the bathrooms for the homeowners that added costs that would not have been required except for the homes. So there is a factual basis that there were costs, those costs are not limited by the property boundaries, so I think the findings capture that.

Executive Director Goldzband commented on a procedural matter: Let me let you all know what the process is from now, which is that, only those Commissioners who voted to deny the requested permit amendment at the June 16, 2016 meeting who are here today may vote whether or not to adopt these proposed findings. That vote will be decided by a majority vote of those who are actually here to vote on that proposal. There are nine people who are allowed to vote on this matter. They are Commissioners Gioia, Peskin, McGrath, Nelson, Sears, Vasquez, Hillmer, Wagenknecht and Zwissler.

Acting Chair Halsted asked: Are there any questions about what our Executive Director just said? (No questions were voiced)

Is there a motion?

MOTION: Commissioner McGrath moved approval of the findings as recommended by the staff, seconded by Commissioner Wagenknecht.

VOTE: The motion carried with a vote of 9-0-0 with Commissioners Gioia, Peskin, McGrath, Nelson, Sears, Vasquez, Hillmer, Wagenknecht, and Zwissler voting “YES”, no “NO”, votes and no abstentions.

10. Public Hearing and Vote on a Recommended Enforcement Decision Involving Proposed Stipulated Cease and Desist and Civil Penalty Order No. CCD 2016.001; Trux Airline Cargo Services and the City of South San Francisco Acting Chair Halsted announced: Item 10 is a public hearing and vote on a Proposed Stipulated Cease and Desist and Civil Penalty Order to Trux Airline Cargo Services and the City of South San Francisco. First, Chief of Enforcement, Adrienne Klein will give a very brief overview of the process. Then, Maggie Weber will summarize the violation report and proposed Stipulated Order.

We ask Commissioners to please stay with us to get through this matter.

Chief of Enforcement Adrienne Klein addressed the Commission: I am your Chief of Enforcement. My job is to set the stage so that you understand your role in this enforcement proceeding. Maggie Weber will present the details of the case comprised of a violation report and complaint for civil penalties. That is the staff’s allegations of violations.

The permittees have an opportunity to respond with a statement of defense. Staff then prepares a recommended enforcement decision. That goes either to the Enforcement Committee or the Commission along with the cease and desist and civil penalty order which is proposed until adopted by you.

You have three options today, but four were considered by the Enforcement Committee. You may adopt the staff recommendation in full or in part. You may dismiss the recommendation. You may remand it to the Enforcement Committee or the staff. And if the Enforcement Committee had taken an action you could reject their recommendation and consider the matter de novo. Maggie Weber will now present the matter.

Enforcement Analyst Maggie Weber spoke before the Commission: My name is Maggie Weber and I am an Enforcement Analyst with the Commission staff. I am presenting a proposed stipulated cease and desist and civil penalty order that was scheduled to go before the Enforcement Committee on July 21st but that meeting was not held unexpectedly due to an emergency that resulted in a lack of quorum.

The stipulated order is comprised of a cease and desist order and penalty order that was negotiated and agreed to by the permittees.

Staff recommends that the Commission adopt this recommended enforcement decision, dated July 22, 2016, and proposed Stipulated Cease and Desist and Civil Penalty Order No. CCD 2016.01 that would be issued to Trux Airline Cargo Services and the City of South San Francisco, signed by the Respondents on July 21, 2016. From here on out, the Respondents will be referred to as Trux and the City, respectively.

The Stipulated Order codifies the agreement that staff has reached with Trux and the City to resolve the three outstanding violations and settle the civil penalties that have accrued for all eleven violations.

This proposed Stipulated Order arises out of an enforcement action commenced by BCDC staff on November 16, 2001, which was never resolved, and recommenced on July 30, 2015, against Trux and the City, concerning compliance issues with BCDC Permit No. 1998.011.02, which authorizes a long term parking structure in the shoreline band in the City of South San Francisco located on both private and publicly owned property. As you can see here, the parking structure is located just north of San Francisco International Airport.

Staff determined to recommence this enforcement proceeding last year because Trux and the City had approached staff about materially amending their BCDC Permit to authorize an additional parking structure in the shoreline band. This seemed like a good opportunity for staff to resolve the old, outstanding violations to the Permit. Please be aware that the material amendment that will come before you this fall is not in any way contingent upon this matter.

In the process of re-commencing this enforcement investigation, staff discovered additional violations that were not addressed in 2001, or have occurred more recently.

Now, let's take a moment to orient everyone to the site. Here, you can see the existing parking structure near the bottom center of the aerial image. The new parking structure is proposed directly north of the current structure. The green and yellow lines show where the as-built and re-aligned sections of the public access path and bike lanes are located, that were authorized after-the-fact in the fourth amendment to the Permit that was issued on May 10, 2016.

On the right side of the aerial image starting from the north, you can see the locations of the "finger" parking, the eight public access parking spaces, the finger park, and the location of the missing Bay Trail, Public Shore, and Public Shore Parking signage. The perimeter of the finger parking area and the adjacent Bay in between is the required open space area to be protected as wildlife habitat.

The Stipulated Order, on pages two and three, alleges 11 violations, referred to as Violations A through K. The unresolved violations: (A) the recordation of permanent guarantee for the public access area, (B) the recordation of permanent guarantee for the open space area, and (G) the maintenance of the public access area, are highlighted here in red and are subject to the proposed Stipulated Order. Only violations A and B are ongoing from 2001.

The remaining violations are new to the 2015 recommencement of this enforcement investigation.

We realize that you have several documents before you this afternoon and that all of them must be taken into consideration in making your recommendation. Before I go into greater detail about the violations I would like to take a moment to identify all of these documents.

First, you have Staff's Recommended Enforcement Decision, dated July 22nd, which was revised after settlement negotiations with Trux and the City and slightly modified after the July 21st Enforcement Committee meeting was cancelled.

Second, you have the Stipulated Cease and Desist and Civil Penalty Order that was signed by Trux and the City on July 21st. This is the recommended agreement before you today.

The remaining documents listed on the slide were not mailed but are electronically available on BCDC's website.

The first document, the July 22nd Staff Recommendation that you received in the mail expands on the eighth document, the June 21st Staff Recommendation and covers the events that transpired between June 21st and July 8th.

The second document, the Stipulated Order that you also received in the mail supersedes the seventh document, the order dated June 21st.

A point of clarification should be made about these documents. As I just mentioned the Violation Report was issued on March 23, 2016 and alleged that Trux and the City committed eleven violations.

After the Violation Report was issued Trux and the City made a tremendous effort to resolve these violations. At this time only three violations previously mentioned, the permanent guarantees for the public access and open space areas and the maintenance of the public access areas remain unresolved and subject to the Stipulated Order.

Both Trux and the City are actively working with staff to resolve these two. As of yesterday, staff has approved documents for both permanent guarantees. We are just waiting for proof of recordation with San Mateo County to fully resolve these violations.

Violations C, D, and E all relate to Trux and the City's failure to provide and maintain required public access signage including missing Bay Trail, Public Shore, and Public Shore parking signs and the obstructed and fallen public shore parking signs as you can see in the photographs located in the top row of this slide.

On April 6, 2016, Trux and the City submitted photographs, as shown on the bottom row of this slide, of the newly installed and/or visible Bay Trail, Public Shore and Public Shore parking signs that were either missing or obstructed from view. These violations are now resolved.

Violation F, the failure to screen the parking structure by not placing landscaping on its south and east sides to reduce the visual impacts of the structure from the public access areas was resolved on June 16, 2016. On this slide you can see before and after photos of the new landscaping that has been installed to screen the east side of the parking structure.

Violation G, the failure to maintain the BCDC-required public access improvements, is still not completely resolved, but as you can see, Trux and the City have made great progress. Staff is presently working with Trux and the City to resolve the outstanding maintenance issues. Earlier this week staff approved plans to replace the trash cans and provided comments for revising the Public Access Planting Plan. The Planting Plan should be consisted with on-site conditions, provide landscaping for sparsely covered areas of the finger park, replace all dead and dying plants; replace broken header board in the finger park. For a full list of the outstanding maintenance issues that the Stipulated Order requires be resolved within 45 days of the July 21st date, please see page 5, paragraph 15 of the Stipulated Order.

Violation H, the failure to provide monitoring reports for the wildlife habitat surrounding the “finger” parking areas, was resolved on February 9, 2016, prior to the issuance of the Violation Report.

Violation I, the failure to authorize the as-built and desired realignment of sections of the public access walkway and changes to the width and location of sidewalks and bike lanes was resolved with the issuance of Amendment 4 to the Permit, which provided after-the-fact authorization. The trail realignment was necessary because the original location authorized by the Permit was not feasible. Trux and the City coordinated with staff and agreed upon a new location for this section of the public access trail. However, Trux and the City went ahead and built this portion of the trail without amending the Permit to obtain the proper authorization. The recently issued Amendment 4 finally provides the necessary authorization.

Violation J, construction of two 5-foot wide bike lanes verses two 8-foot wide bike lanes on both sides of North Access Road was also resolved with the issuance of Amendment 4 to the Permit which provided after-the-fact authorization and an extension of time to satisfy the public access width requirement.

Violation K, placement of an unauthorized gate and fence in the shoreline band was also resolved with the issuance of Amendment 4 to the Permit which provided after-the-fact authorization.

The terms of the Stipulated Order includes both cease and desist and civil penalty orders. The Stipulated Order codifies the agreement that staff has reached with Trux and the City to resolve the three outstanding violations, Violations A, B, and G, which are the failure to record permanent guarantees for the public access and open spaces areas and the outstanding public access maintenance issues, respectively.

The cease and desist order starts on page 4 of the Stipulated Order. Paragraph 13 requires Trux and the City to submit proof that the permanent guarantee for the public access area has been recorded with San Mateo County.

Also on Page 4, Paragraph 14 requires Trux and the City to submit proof that the permanent guarantee for the open space area has been recorded with San Mateo County.

On Page 5, Paragraph 15 requires Trux and the City to resolve the outstanding public access maintenance issues.

All three of these violations shall be resolved within 45 days of July 21st, excluding the time periods in which staff holds documents for review.

The civil penalty order starts on page 6 of the Stipulated Order.

Paragraphs 17 and 18 require Trux and the City to pay a civil penalty of \$210,000 to the Bay Fill Cleanup and Abatement Fund, \$10,000 of which shall be suspended if Trux and the City fully comply with the conditions of Paragraphs 13, 14, and 15. If Trux and the City fail to comply, under paragraph 19 of the Stipulated Order, Trux and the City are liable for stipulated penalties in the amount of \$200 per day for each unresolved violation. This penalty payment shall constitute Trux and the City’s full and complete satisfaction of their liability for civil penalties for all eleven alleged violations. The Violation Report proposed \$315,000 in civil penalties. After considering

Trux and the City's statements of defense, staff lowered the proposed penalty to \$255,000. The \$210,000 penalty amount was reached in settlement negotiations between staff, Trux and the City. Staff believes this amount is fair and reasonable.

Staff would like to thank Trux and the City for their hard work over the last few months to resolve these long standing violations, and their commitment to working with staff to resolve the outstanding violations and close this enforcement case in the upcoming months. I will now turn the podium over to Trux and the City. Thank you.

Mr. Robert Simms addressed the Commission: My name is Robert Simms and I am the president of Trux Airline Cargo Service and Park SFO. I appeared before this Commission in 1998. At that time we were asking for a permit to construct Park SFO. I want to report that after receiving the permit Park SFO has been a tremendous success.

We have provided an airport-related service to the general public of off-airport parking at the most economical and reasonable price for the parking public.

In addition to that, we have also provided public access for the public. We have also provided open space for the public.

I want to report that in all, the projects have been very, very successful.

As Maggie pointed out, it has been so successful that we will be coming back to this Commission with an expansion project. I want to emphasize that under all circumstances, since 1998, we have been cooperative with BCDC and its policies with regards to public access and open space. We will continue to do so.

As we proceed to try and fulfill the outstanding obligations as we go forward, we will do that with those as well.

I would like to thank you for the original approval and ask you for your consideration at some point in the future when we come again to present our permit. Thank you very much.

Mr. Brian McMinn spoke before the Commission: I am Brian McMinn the Public Works Director for the City of South San Francisco and I am glad that we are concluding 18 years of history on a permit and can move forward.

Over the life of the permit there has been staff turnover at the City but I can speak to the involvement over the last two years when I say that there has been continuous effort and communication on the part of the permittees.

At no time did the permittees say that we would not comply with the requirements of the permit or request from staff.

This action stemmed more from time.

The only outstanding issues to be resolved will be resolved within the time limits in the Stipulated Order.

We look forward to continuing to work with BCDC staff and return on a more positive note with further plans for Park SFO. Thank you.

Acting Chair Halsted asked: Is there anyone from the public who would like to address us. We will open the public hearing. (No comments were received)

Is there a motion to close the public hearing?

MOTION: Commissioner Peskin moved to close the public hearing, seconded by Commissioner Zwissler.

VOTE: The motion carried with a vote of 14-0-0 with Commissioners Butt, Gioia, Gorin, Peskin, McGrath, Nelson, Randolph, Sartipi, Sears, Vasquez, Hillmer, Wagenknecht, Zwissler and Acting Chair Halsted voting, "YES", no "NO", votes and no abstentions.

Acting Chair Halsted asked: Are there questions or comments from the Commission? (No comments or questions were voiced) Is there a motion and a second on the staff recommendation?

MOTION: Commissioner Nelson moved approval of the staff recommendation, seconded by Commissioner Randolph.

VOTE: The motion carried with a roll call vote of 14-0-0 with Commissioners Butt, Gioia, Gorin, Peskin, McGrath, Nelson, Randolph, Sartipi, Sears, Vasquez, Hillmer, Wagenknecht, Zwissler and Acting Chair Halsted voting, "YES", no "NO", votes and no abstentions.

Executive Director Goldzband spoke: First of all, thank you very much for staying. The next meeting in two weeks will likely be as long, if not longer, than this meeting.

The second thing is, I want to give a shout out to the Enforcement staff. This is the first time in many years that the full Commission has actually heard something about the enforcement program with regard to an actual action.

You will be hearing more from the Enforcement staff during the upcoming few months. That will also include a new enforcement strategy that we will want the Commission to consider that, if approved, we will then turn into an actual policy.

12. Adjournment. Upon motion by Commissioner Wagenknecht, seconded by Commissioner Nelson, the Commission meeting was adjourned at 4:15 p.m.

Respectfully submitted,

LAWRENCE J. GOLDZBAND
Executive Director

Approved with no corrections, at the
San Francisco Bay Conservation and
Development Commission Meeting
of August 18, 2016

R. ZACHARY WASSERMAN, Chair