

San Francisco Bay Conservation and Development Commission

375 Beale Street, Suite 510, San Francisco, California 94105 tel 415 352 3600 fax 888 348 5190

State of California | Gavin Newsom – Governor | info@bcdc.ca.gov | www.bcdc.ca.gov

Item #8

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TO: Commissioners and Alternates

FROM: Brad McCrea, Acting Executive Director (415/352-3615; brad.mccrea@bcdc.ca.gov)
Karen Donovan, Attorney (415/352-3628; karen.donovan@bcdc.ca.gov)
Schuyler Olsson, Coastal Program Analyst (415/352-3668; schuyler.olsson@bcdc.ca.gov)

SUBJECT: **Executive Director’s Recommended Enforcement Decision Regarding Proposed Commission Cease and Desist Order No. CCD2020.001.00 Issued to City of Oakland**
(For BCDC Enforcement Committee consideration on March 12, 2020)

Executive Director’s Recommendation

The Executive Director recommends that the Enforcement Committee adopt the Recommended Enforcement Decision, including the accompanying proposed Cease and Desist Order No. CCD2020.001.00 (“Order”) to the City of Oakland (“City”), for the reasons stated below. This matter arises out of an enforcement action initiated by BCDC staff in February of 2019, following numerous reports of unauthorized activities over several months in Union Point Park, which is located within BCDC’s Shoreline Band jurisdiction.

The matter was previously discussed with the Enforcement Committee on July 24, 2019, October 10, 2019, and November 20, 2019. At the Enforcement Committee meeting on October 10, 2019, the Committee heard from Joe DeVries, Assistant to the City Administrator of Oakland, as well as a representative of The Unity Council and several members of the public, including the Harbormaster of the adjacent Union Point Marina. Mr. DeVries described the recent history of the Park, including the events that led to the opening of an enforcement matter. He also discussed a lawsuit, which is described in more detail below, that prevented the City from conducting cleanup and clearing activities in the Park for several months in 2019. Following the October meeting, at the direction of the Enforcement Committee, BCDC staff met with staff from the City to negotiate measures that the City would undertake to clear the Park of encampments and restore it to its original condition.

On November 20, 2019, Schuyler Olsson briefed the Enforcement Committee on the progress of BCDC’s talks with the City. Mr. DeVries also summarized the terms of a draft Encampment Closure and Park Restoration Plan that the City had developed for Union Point Park. Following the presentations, the Enforcement Committee discussed the matter and directed BCDC staff to work with the City to develop an agreed-upon proposed cease and desist order setting forth a schedule for clearing and restoring the Park.



BCDC staff and City representatives have worked jointly to develop the measures set forth in the proposed Cease and Desist Order No. CCD2020.001.00, and the City has agreed to pursue the measures necessary to restore Union Point Park, although the City notes that significant steps, including the identification of new funding, will be needed to achieve this goal.

Staff Report

I. SUMMARY OF BACKGROUND TO THE ALLEGED VIOLATION

A. Permitting Background

Union Point Park ("Park" or "Union Point Park")¹ was created more than ten years ago on a former industrial site in the City of Oakland, near Coast Guard Island, at 2311 Embarcadero East. The Park was the result of the collective efforts of a broad range of community groups, agencies, and individuals, including The Unity Council, Trust for Public Lands, Association of Bay Area Governments, State Coastal Conservancy, City of Oakland, and Port of Oakland. The Park is on trust lands held by the Port of Oakland and leased to the City. At the time the Park was developed, all of the entities involved envisioned an attractive public area offering views of Oakland Estuary that would be available to the residents of the neighboring area and others throughout the Bay Area for picnicking, biking, walking, and other public uses. The Park included children's play structures with a marine theme, and expansive lawns and gardens, benches, picnic tables, and barbeque facilities. The Bay Trail bike path runs along the park on one side, and the Oakland Estuary is adjacent to the Park.

In 2004, BCDC issued Permit No. M2003.028.01 to the City of Oakland and The Unity Council for development of a park within the approximately 7-acre area comprising the southern end of the Park. Later, in 2010, BCDC issued Permit No. M2008.030.00 to the City and the Port of Oakland to construct and use an approximately 1-acre park in the area between the existing Union Point Park and the Coast Guard Island Bridge.

B. Violation Background

The Violation Reports issued to the City and its co-permittees allege several separate violations of Permit Nos. M2003.028.01 and M2008.030.00 ("Permits"). These violations stem from the failure by the City to maintain required public access areas and associated amenities at Union Point Park and the adjacent beach area. The violations are related to the unauthorized homeless encampments that have been present in the area for several years, as well as unauthorized materials and debris in the Commission's Shoreline Band jurisdiction related to the presence of the encampments. Unauthorized encampments have been present in various areas of the Park and nearby beach since at least early 2018. This has prevented the public from using the Park for its intended uses, caused damage to the Park and its amenities, and contributed to public health and safety concerns in the Park and adjacent areas. BCDC staff first contacted the City in July of 2018, before sending a formal letter to City staff in February of 2019. During the interim period, BCDC staff also visited the Park and observed tents and

¹ Permit No. M2003.028.01 was issued for a 7-acre area referred to in the permit as Union Point Park. Permit No. M2008.030.00 was issued for an approximately 1-acre area referred to as "Cryer Site Park," which, as noted in the Permit is adjacent to Union Point Park. The Cryer Site Park and Union Point Park areas are often referred to collectively as Union Point Park.

Recreational Vehicles (RVs) in the Park and required amenities and/or Park features that were either missing or in seriously degraded condition.

In 2019, at the direction of the Enforcement Committee, BCDC staff and City staff began a collaborative effort to develop a plan to resolve the situation at the Parks via issuance of a cease and desist order. The proposed Order requires the City of Oakland to undertake the measures set forth in the Encampment Closure and Park Restoration Plan developed by the City at BCDC's request. Measures to be undertaken by the City include: relocating the individuals residing in the Park and adjacent beach area to a temporary reprieve zone; providing services to the individuals residing in the reprieve zone, including social outreach and offering of alternative housing options, as well as portable toilets, wash stations, and weekly garbage pickup; and, no later than May 1, 2020, relocating the individuals in the reprieve zone to an area outside the Park and closing the reprieve zone. The measures also include implementing near-term restoration and encampment enforcement measures; developing and implementing long-term plans for park restoration, maintenance and enforcement; and fully restoring the Park and its amenities by 2021. In the near term, the City must install and maintain temporary lighting in the northwestern parking lot to promote the safe use of this area and reinstall a missing bicycle rack and public access signage. By June 30, 2020, the City must also complete a needs assessment for full restoration of the Park and undertake measures to budget for restoration. The proposed Order requires restoration of the Park to be completed no later than December 31, 2021, although, if the City determines that additional time is required for full restoration, the City may request an extension.

II. SUMMARY OF THE ESSENTIAL ALLEGATIONS IN THE VIOLATION REPORT

BCDC staff began receiving reports about the unsafe and degraded conditions in the Park in early 2018. A report in March 2018 described a violent attack in a homeless encampment in the Park. Since then, there have been other reports of violence in the homeless encampments in the Park, as well as reports of vandalism, arson, and theft from vehicles. Before the City initiated efforts in mid-2018 to clean up the Park, there were individuals living in RVs in the parking lots and a number of tents throughout the Park. BCDC contacted officials at the City on a number of occasions to discuss the conditions in the Park, and on February 1, 2019, BCDC, the State Coastal Conservancy, and the Association of Bay Area Governments sent a joint letter to the City, the Unity Council, and the Port of Oakland, expressing concerns with lack of maintenance and safety conditions in the Park.

The presence of the unauthorized homeless encampments and ongoing vandalism and crime in the area have made it impossible for the public to safely use the Park for walking, bicycling, sitting, viewing, fishing, picnicking, and related purposes as required by Special Condition II.C.1 in Permit M2003.028.01 and Special Condition II.B.1 in Permit No. M2008.030.00. In addition, the City has failed to maintain the landscaping, pathways, sitting areas, playground, public access signs, and site amenities, including benches, picnic tables, and bicycle racks, in violation of Special Condition II.C.3 of Permit No. M2003.028.01 and Special Condition II.B.4. of Permit No. M2008.030.00. These special conditions require the City to repair or replace public access amenities and cleanup litter or other materials deposited within the access area, and to keep the area free of encroachments and assure that public access signs remain in place and visible. As the homeless encampments became

established in Union Point Park and the adjacent area, the Park condition declined, and many amenities are now damaged or missing. The landscaping has also seriously degraded. Lighting, which is needed to promote the safe use of the Park and associated parking areas, is damaged or missing, and the bathrooms are in a condition that limits their use by the public.

In addition to the issues within the permitted Park areas, there are also abandoned vessels and other unauthorized materials and debris on the beach area that is adjacent to the Park, between the Park and Oakland Estuary on the northern portion of the property. This area is also within BCDC's Shoreline Band jurisdiction.

On December 2, 2019, BCDC issued two Violation Reports: one to the City and The Unity Council, the co-permittee on Permit No. M2003.028.01; and one to the City and the Port of Oakland, the co-permittee on Permit No. M2008.030.00. BCDC has not issued a Complaint for Civil Penalties and is seeking only injunctive relief to require the City to restore the Park and maintain it in accordance with the conditions in the Permits. The proposed Cease and Desist Order names only the City of Oakland, requiring the City to act in accordance with Encampment Closure and Park Restoration Plan that the City has developed in negotiations with BCDC staff, and to restore the Park and maintain it consistent with Permit No. M2003.028.01 and Permit No. M2008.030.00.

III. SUMMARY OF ESSENTIAL ALLEGATIONS EITHER ADMITTED OR NOT CONTESTED BY RESPONDENT

The City does not contest the allegation that, starting before 2018 and continuing until January 2020, there were encampments established in Union Point Park that encroached on public access areas and made conditions unsafe.

As noted in the Violation Reports, the City made several attempts to clean up the Park and relocate the encampments in 2018 and early 2019. After each of these cleanup efforts, homeless individuals returned to the Park, and encampments were reestablished. In March 2019, after the City posted notices and began initiating an effort to relocate people residing in encampments in the Park, individuals who had lived in encampments in the Park filed a lawsuit seeking immediate injunctive relief to halt the City's efforts. Shortly after this, in April 2019, the U.S. District Court for the Northern District of California issued a preliminary injunction enjoining the City from clearing the Park and requiring the City to negotiate with the plaintiffs regarding the City's noticing procedures for addressing personal belongings, and the City's policies regarding the availability of alternative housing arrangements for individuals being relocated from the Park. The injunction was lifted in August 2019, but before this, the City was precluded from undertaking cleanup efforts in the Park, during which time the homeless encampments remained and expanded while conditions in the Park deteriorated.

The City does not contest the allegations that it has inadequately maintained the Park improvements and amenities. In January of 2019, the Oakland Parks and Recreation Foundation released a "2018 Report on the State of Maintenance in Oakland Parks," and in this report, they stated that the Park was "completely unusable" and gave it a score of "F," which is the lowest possible score. The City has stated that it is evaluating the Park situation to determine the maintenance needs of the Park, and the City has included this process in the Encampment Closure and Park Restoration Plan.

The City also admits that the alleged violations of the maintenance conditions in the Permits have persisted since at least March 13, 2018 (for Permit No. M2003.028.01) and at least June 7, 2018 (for Permit No. M2008.030.00). The City has noted that it is confronting an unprecedented homelessness crisis that has impacted the Park. In January 2019, more than 4,000 people were experiencing homelessness in the City, and a number of the City's parks and public spaces have been affected by the increase in the number of unsheltered individuals and families in Oakland.

The City states that BCDC must be made aware of the challenges the City faces with regard to funding for parks and park maintenance. The City of Oakland Public Works Department is charged with maintaining 134 City parks and public spaces, as well as 1,055 acres of Resource Conservation Area and landscaped medians and streetscapes and grounds at City facilities. The City has a Landscape and Lighting Assessment District (LLAD) parcel tax assessment that generates approximately \$20 million in annual revenue, but this does not provide for growth or adjustment with inflation or the consumer price index. Recent initiatives, including Measure DD, Measure WW, and other measures are generally restricted to supporting the creation of parks or other facilities, rather than ongoing maintenance of existing facilities.

In an effort to address declining conditions of parks, recreational facilities, and open space, the City Council submitted to Oakland residents a proposal for a new parcel tax, which is on the March 2, 2020 ballot for the Statewide Primary Election. As of the date of this report, the success of this initiative, Measure Q, is unknown. Without the additional funding, the City states that its challenges in maintaining City parks will continue.

IV. DEFENSES AND MITIGATING FACTORS RAISED BY RESPONDENT

A. Mitigating Factors

On February 21, 2020, the City submitted Statements of Defense and accompanying exhibits. Several of the exhibits, including, in particular, Informational Reports that have been provided to the City Council, discuss the difficulties in maintaining areas that have been cleared of encampments due to staffing capacity and legal requirements that must be satisfied before relocating individuals and their personal property. The Reports also describe challenges with the growing number of unsheltered people in the City and the limited funding available for addressing the homeless population and maintaining City parks.

Noting recent progress in addressing the homelessness crisis, the City describes the Permanent Access to Housing (PATH) strategy developed by the City as part of a roadmap for ending homelessness in Oakland. In 2019, the City created an update to build upon the foundation of previous planning efforts. As updated, the PATH strategy seeks to reduce homelessness by addressing several factors. Among other actions, it seeks to expand interventions once someone becomes homeless and also proposes to expand housing production. The PATH plan sets a goal, within the next five years, for Oakland to create 3,000 more units of deeply affordable rental housing and 2,000 more units of permanent supportive housing. The PATH plan acknowledges, however, that current resources are insufficient, and the overall homelessness crisis cannot be solved without expanding the revenues dedicated to addressing the issue of homelessness.

In addition to implementing the PATH plan, the City is also undertaking other activities to address the impacts of homelessness on City assets. The City has established an Encampment Management Team, as well as a dedicated Oakland Police Department team, and has provided health and hygiene interventions at encampments and established a safe parking program for individuals living in vehicles. Establishment of the Encampment Management Team resulted in the drafting of an Encampment Management Policy to provide clarity and coordination around all aspect of managing encampments in Oakland.

The City has also emphasized the issues that it faced in implementing measures to clean up the Park in 2019. As noted above, in March 2019, as the City was preparing to conduct a cleanup operation in a portion of the Park, a group of homeless individuals, with the help of advocates for the homeless, sought a Temporary Restraining Order from a federal court in San Francisco to prevent the City from moving individuals and their personal property. On April 23, 2019, court issued an order enjoining the City from cleaning up the Park and ordering the City to negotiate with the homeless plaintiffs regarding: (1) the City's policies and practices for allowing personal property to be reclaimed; and (2) the City's policies regarding alternative housing and shelter availability when ordering individuals to vacate an encampment. The injunction was lifted on August 12, 2019, and the City then began preparing to clear the Park. It is clear, however, that during the period that the City was constrained from conducting cleanup operations in the Park, the conditions deteriorated and reports on safety concerns and degraded conditions were ongoing.

The City also states that it installed most, if not all, of the required improvements in the Park, although it also admits that these have not been maintained. After the Permits were issued, the City constructed the Park in accordance with the plans and installed the required amenities in accordance with the permit requirements. Reports also indicate that for several years, area residents visited the Park and engaged in activities in the Park with their children. Despite this, the Park is now severely degraded, and the violations are based on the existing condition of the Park, and the fact that some amenities, including, for example, public access signage, a bicycle rack, and certain picnic tables, are now missing. Thus, while the City and its partners originally constructed in accordance with the permit requirements, the Park does not currently comply with the permit requirements.

B. Affirmative Defenses

The City also argues that BCDC's claims of violation are barred, in whole or in part, because the acts that are the subject of the Violation Reports have occurred as a consequence of force majeure. In support, the City states that the homelessness crisis in the City is beyond the reasonable control of the City and was unforeseeable at the time BCDC issued the Permits to the City. BCDC notes, in rebuttal, that while the current extent of the unsheltered population in the City may not have been foreseeable when the Park was funded and BCDC issued the Permits, the presence of homeless encampments in the Park and the activities that resulted in violations were not unforeseeable as this problem developed and worsened over the past several years. The reports that BCDC has received indicate that there were several efforts to remove people residing in the Park, and that encampments returned because the City was no longer funding regular patrols and was devoting resources to other City areas that were also affected by the homelessness issue. This is not the type of unforeseeable circumstance that would support the affirmative defense of force majeure. Ensuring that the Park is usable for its

intended purposes is not beyond the reasonable control of the City. Notably also, Permit No. M2003.028.01 and Permit No. M2008.030.00 do not include provisions allowing for the City to be excused from performing the conditions due to force majeure. Rather, in the event of an unforeseeable event, BCDC's regulations allow for entities to request a permit amendment or seek an emergency permit to authorize unauthorized activities.

The City argues that it should not be strictly liable for violations, including unauthorized structures or materials, that were placed in the Park and adjacent areas by third parties. BCDC staff respond, in rebuttal, that Section 66638 of the McAteer-Petris Act authorizes the Commission to issue a cease and desist order if it determines that any person has undertaken or is threatening to undertake an action that (1) requires a permit from the commission without securing a permit, or (2) is inconsistent with any permit previously issued by the commission. The City has possession and control over the Park land pursuant to its lease with the Port and the City was aware that the Park conditions and conditions on the adjacent beach area had become a public nuisance. The City has also admitted that it allowed these conditions to persist, due in part to funding difficulties and staffing capacity, and despite conditions in the permits that required the City to prevent encroachments and ensure that the Park is available to the public for public use.

On January 6, 2020, the Port of Oakland, which was named in one of the Violation Reports because it is a co-permittee on Permit No. M2008.030.00, also submitted a Statement of Defense in response to the Violation Report, requesting that the Violation Report against it be dismissed by BCDC. The Port also asserted a number of defenses, including that that the Violation Report: (1) fails to state a claim against the Port; (2) fails to allege vicarious liability to the extent that BCDC might be relying on this theory; (3) is barred by the doctrine of unclean hands; and (4) improperly demands a gift of public funds. The Port also attached a copy of its lease with the City for lands on which the Violations occurred, highlighting the provisions that require the City to maintain the Park and associated public access improvements. In addition, the Port asserted and attached documentation indicating it had requested that the City take action to bring the Park into compliance with the lease sixteen times since 2014. While BCDC issued the Violation Reports to the Port and other co-permittees, BCDC is issuing the proposed Cease and Desist Order to the City only and is not proposing to issue injunctive relief against the other co-permittees. BCDC is also seeking only injunctive relief, and did not issue a complaint for civil penalties to any entities. Thus, the Port's asserted defenses are not relevant considering the relief that BCDC is seeking.

V. SUMMARY OF UNRESOLVED ISSUES

The City denies that it has failed to comply with Special Condition II.C.1. of Permit No. M2003.028.01 and Special Condition II.B.1 of Permit No. M2008.030.00, which state that the areas shown as Exhibit A of each permit shall be made available exclusively to the public for unrestricted public access purposes. In support, the City notes that the Park has remained open to the public during park hours and can be used for walking, bicycling, sitting, viewing, fishing and related public purposes. The City also notes, however, that barbeques and picnic benches are damaged or missing, making picnicking, which is also a listed public purpose, difficult. BCDC staff have also observed that some benches, and other seating areas were either damaged, missing, or inaccessible to the public due to the presence of encampments.

Notably, even though the City contends that the Park is open to the public for public uses, the City also admits the allegation in the paragraph VI.D. of the Violation Report issued to the City and the Port of Oakland that the City told BCDC staff on July 28, 2018, that they were generally unable to conduct maintenance work in the Park, because residents in the Park were threatening City workers. BCDC staff have also received several other reports describing dangerous fires, drug use, and multiple violent attacks, as well as accumulated trash and debris, damaged or poorly maintained amenities, dumping of waste, graffiti, prostitution, rats, vandalism, and threats to tenants of the neighboring Union Point Marina and acts of arson at the marina's shower facility. Furthermore, on June 23, 2019, a seven-year-old boy was shot in the Park.

In light of the Park conditions, BCDC staff disagree with the City's assertion that the Park was available to the public for public access purposes as envisioned by the Permits. The Park conditions improved when the residents were moved to the temporary reprieve area. Nonetheless, BCDC staff note that many of the reports that they have received from members of the public state that they felt unsafe in the Park and that the presence of the encampments deterred them from using the Park. These reports and the observed conditions in the Park make it clear that while, prior to the cleanup activities conducted in January 2020, it was possible to walk, bicycle, view, fish, and possibly sit in certain areas of the Park, most members of the public did not feel safe doing this, even during the daylight hours. Encampments also blocked off large sections of the park entirely, and damaged lighting made it unsafe to use the Park after sunset.

As noted above, the City also asserts that it provided the required improvements in the Park, although it also admits that many of these have not been maintained. BCDC does not agree that this is a defense to any of the violations and notes it has never contended that the improvements were not constructed, but instead asserts that many amenities are either missing entirely, severely degraded, or were otherwise inaccessible to the public due to the presence of encampments.

Notwithstanding these disagreements, the City and BCDC have jointly negotiated a plan to clear the Park of the remaining encampments and restore it so that it can be safely used. BCDC has also worked with the City to develop the proposed Order to ensure that this will be done.

VI. NEGOTIATIONS AND AGREEMENT REGARDING MEASURES NEEDED TO RESOLVE THE VIOLATION

From October 1, 2019, to February 26, 2020, BCDC staff and City staff worked together to negotiate and agree on measures to resolve the violations, and the Enforcement Committee was updated on the progress of these discussions at its meetings on October 10, 2019, and November 20, 2019. The City first began developing its Encampment Closure and Park Restoration Plan at BCDC's request in October of 2019. BCDC staff provided feedback on the drafts of the Plan, and on February 26, 2020, after several months of negotiation, BCDC staff and City staff came to agreement on the proposed Cease and Desist Order No. CCD2020.001.00, which references and closely follows the measures described in the City's final Encampment Closure and Park Restoration Plan. The measures in the proposed Order have been developed with the City's input, and with agreement from the City, to ensure that City staff is able to fully comply with each of the terms and conditions.

VII. RECOMMENDATION

The Executive Director recommends that the Enforcement Committee adopt the accompanying proposed Cease and Desist and Civil Penalty Order No. CCD2020.001.00 requiring the City of Oakland to undertake the measures necessary to clear Union Point Park of unauthorized homeless encampments and restore the Park to its intended use as an area available to the surrounding communities and other Bay Area residents for walking, bicycling, sitting, viewing the Oakland estuary, fishing, picnicking, and other related purposes. Adopting this proposed Order will also require the City to maintain the Park in conformance with the Special Conditions in the Permits issued to the City and its co-permittees.

Attachments to this staff recommendation include: (1) the Violation Reports; (2) the Statements of Defense; and (3) the Order.