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*By E-Mail*

BCDC Enforcement Committee  
375 Beale Street, Suite 510  
San Francisco, CA 94105

*Subject:* Unconstitutional Use Of BCDC Administrative Penalty Funds

Dear Chair Scharff and Enforcement Committee Members:

For decades this firm has been a friend of BCDC and a key supporter of its efforts to responsibly conserve and develop San Francisco Bay, even when we have found ourselves on opposite sides of BCDC on various issues. It was in this vein that I was surprised to learn that BCDC has an enforcement policy that, under U.S. Supreme Court precedent, constitutes a per se violation of Due Process. I write to suggest that BCDC immediately change this policy, lest it risk the invalidation of each and every enforcement decision it makes and undermine public confidence in BCDC's fairness. Please include this letter in the public records and minutes of the next Enforcement Committee meeting.

The problem arises from how BCDC spends the money it receives from administrative fines. Fine moneys are deposited in the Bay Fill Clean-Up and Abatement Fund. But those moneys are not spent on Bay fill clean-up or abatement; they are spent entirely on staff salaries.<sup>1</sup>

The Due Process problem with BCDC adjudicating a penalty, and then turning around and spending that penalty money on itself, is obvious: BCDC cannot hold fair penalty hearings so long as it has a direct pecuniary interest in the very penalty it sets.

The U.S. Supreme Court has held that this penalty structure "necessarily involves a lack of due process of law". (*Ward v. Village of Monroeville* (1972) 409 U.S. 57, 60.) In *Ward*, the Supreme Court found it per se unconstitutional for an administrative decisionmaker to both adjudicate penalties and oversee the spending of those penalties for the benefit of that agency. Yet BCDC continues to both adjudicate administrative penalties and oversee the spending of those penalties. (*See* Pub. Res. Code §§ 66633

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<sup>1</sup> Enforcement Committee Minutes for November 14, 2019 at 6-7 ("Over the past several years the [fine] funds have been spent on staff salaries").

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(BCDC authority over funds), 66634 (additional BCDC authority over funds), 66635 (Executive Director is “subject to the direction and policies of the commission”), 66647(b) (BCDC responsibility for spending moneys in Bay Fill Clean-Up and Abatement Fund).) BCDC’s expenditure of administrative penalty funds on BCDC staff salaries is unconstitutional.

BCDC should immediately change its unconstitutional policy of spending the penalties it adjudicates on itself.

Sincerely,

*/s/ Peter Prows*

Peter Prows

cc: Larry Goldzband, BCDC  
Mark Zeppetello, BCDC  
Adrienne Klein, BCDC  
Karen Donovan, BCDC  
Priscilla Njuguna, BCDC  
Shari Posner, Office of the Attorney General  
Assemblymember Mullin, c/o Mario Rendon  
John Coleman, Bay Planning Coalition