

# San Francisco Bay Conservation and Development Commission

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**TO:** Commission Members

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**SUBJECT: Revised Stipulated Cease and Desist and Civil Penalty Order No. CCD2022.001.01 in BCDC Enforcement Matter ER2004.019, 224 Sea Cliff Avenue, San Francisco**  
(For Commission consideration on June 20, 2024)

## Executive Director's Recommended Enforcement Decision

### I. Summary

The Executive Director recommends that the Commission adopt this revised stipulated Cease and Desist and Civil Penalty Order No. CCD2022.001.01 ("First Amendment"), which amends CCD2022.001.00 ("Original CCD"), collectively referred to as the "CCD." BCDC staff developed the terms of this revised stipulated CCD cooperatively with legal counsel for the new property owner of 224 Sea Cliff Avenue (the "Property") and Respondent of the First Amendment (Edward Dudensing), who is different than the then-property owner that was the former respondent of the Original CCD (PSG Capital Partners, Inc. and PSG Mortgage Lending Corp., collectively "PSG").

While the specific terms of Section I (Commission Cease and Desist Order) of the First Amendment have been significantly restructured from Section I of the Original CCD, the substantive approach to resolving the underlying violations of the CCD in a manner consistent with BCDC's laws and policies has not materially changed. (Generally speaking, Respondent must seek all necessary permits in order to remove all unauthorized structures on and below the cliffs at the Property situated on public property which pose a geotechnical hazard, subject to certain limited qualifications.)

Furthermore, Section II (Civil Penalty Order) of the First Amendment requires Respondent to pay the \$90,000 administrative civil penalty previously required of PSG as the former respondent of the Original CCD. The U.S. Bankruptcy Court for the Northern District of California, San Francisco Division, required payment of this penalty as a condition of sale of the property to Respondent.

#### A. Background

A full recounting of the relevant background to this matter is set forth in Section I.A of the Executive Director's Recommended Enforcement Decision as adopted by the Commission

at the June 16, 2022 Commission meeting<sup>1</sup> as well as Section III.A of both the Original CCD as well as the attached revised stipulated First Amendment. A summary of the relevant background for purposes of the Commission's proposed adoption of the First Amendment is set forth below:

A portion of the Property is within BCDC's shoreline band jurisdiction. The cliffs below the Property, which are also within BCDC's shoreline band jurisdiction, are nearly entirely on land publicly-owned by the City and County of San Francisco (the "City"). The sandy beach below the City-owned cliffs is largely below the mean-high tide line ("MHTL") and is on land leased by the National Park Service ("NPS") from the State Lands Commission ("SLC") as part of the Golden Gate National Recreation Area.

Between 2002 and 2004 a former owner of the Property (Luke Brugnara), without required review, authorization, or permits from the City or BCDC, constructed an unauthorized deck, promenade, and stairwell that descends from the Property's rear boundary to the beach.<sup>2</sup> In 2004 NPS then also determined that the stairwell landing was constructed below the MHTL and therefore encroaches onto lands it leases from SLC. In 2004 BCDC staff also opened Enforcement Case No. ER2004.019 regarding the unpermitted structures.

The Property became the subject of multiple complex bankruptcy proceedings while owned by Mr. Brugnara, ultimately resulting in PSG foreclosing upon the Property on August 13, 2020. On April 1, 2022 BCDC staff mailed a Violation Report/Compliant for Administrative Imposition of Civil Penalties to PSG to resolve ER2004.019. On May 25, 2022 the Commission's Enforcement Committee held a public hearing and voted on a Recommended Enforcement Decision by BCDC's Executive Director<sup>3</sup> and voted unanimously (4-0-0) to recommend that the full Commission issue the Original CCD. On June 16, 2022 the Commission held a public hearing and vote on a Recommended Enforcement Decision by the Enforcement Committee<sup>4</sup> and of the members present voted 15-0-1 to adopt the Original CCD.

On February 5, 2024 former respondent PSG closed sale of the Property to Respondent Mr. Dudensing. Section IV.D of the Original CCD states in relevant part: "If a sale of the property is consummated BCDC staff will work with the buyer for 30 days to present a stipulated order to the Commission without civil administrative liability."<sup>5</sup> Respondent has cooperated

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<sup>1</sup> <https://www.bcdc.ca.gov/cm/2022/06-16-Enforcement-Committee-Recommendation-CCD2022.001-224-Sea-Cliff-Ave.pdf>.

<sup>2</sup> Brugnara misrepresented the unpermitted structures as an "existing condition" and located within his private Property boundaries on his building permit applications submitted to the City and thus did not receive legitimate authorization or approvals from the City prior to construction.

<sup>3</sup> <https://www.bcdc.ca.gov/enforcement/2022/05-25-CCD2022.001-224-Sea-Cliff-Ave-Executive-Directors-Rec-Enf-Dec-Exhibits-item-7.pdf>.

<sup>4</sup> See footnote 1.

<sup>5</sup> While presentation of this revised stipulated First Amendment has occurred beyond the 30-day timeframe specified in Section IV.D of the Original CCD, this delay is not due to any fault of Respondent. In hindsight, specification of a 30-day timeframe to present a revised stipulated First Amendment to the Commission was both overly aggressive and overly optimistic. No further administrative civil penalty is proposed against Respondent for the additional time it has taken to present this revised stipulated First Amendment to the Commission beyond the 30-day timeframe specified in Section IV.D of the Original CCD.



with BCDC staff since before the sale of the Property to Respondent closed and has worked in good faith since then to abate the underlying violations of this matter.

## **B. Revisions to Stipulated CCD2022.001.01**

In drafting the First Amendment pursuant to Section IV.D of the Original CCD, BCDC staff critically reviewed the entirety of the Original CCD to determine how best to revise the CCD accounting for present circumstances and the change in ownership to a Respondent who is both a bona-fide purchaser and much more proactive and cooperative than the prior respondent. On its face, the First Amendment has been refined as compared to the Original CCD, though BCDC staff believes that the substantive approach to resolving the underlying violations of the CCD in a manner consistent with BCDC's laws and policies has not materially changed from the Original CCD to the First Amendment.

Section I.C of the Original CCD in relevant part required that the then-respondent:

By July 1, 2022, submit for review and approval by BCDC staff a design plan prepared by a geotechnical engineer, a structural engineer, and a landscape architect to remove structures placed on the cliffs below 224 Sea Cliff Avenue between 2002-2004; mitigate any such structures that cannot be removed without adversely affecting the stability of the cliffs by grinding them down to the contour of the cliff face and/or covering them with contoured shotcrete; and restoring the visual condition of the site.

In reviewing the Original CCD BCDC staff determined that the requirement in Section I.C was overly-prescriptive of the ultimate outcome and as part of revised First Amendment instead re-structured Section I to focus on *the process* that BCDC staff desires Respondent to follow in order to fully resolve the CCD consistent with BCDC's laws and policies. New Section I.B requires Respondent to instead:

- submit studies and plans identifying unpermitted structures that pose a significant risk with respect to stability of the cliffside if retained in place (Section I.B.1.a);
- identify a methodology for removing such structures in a manner that would not pose an increased significant risk with respect to stability of the cliffside as compared to retention of said structures (Section I.B.1.b);
- for any structures for which removal is determined to pose an increased significant risk with respect to stability of the cliffside as compared to retention of said structures, identify a solution for first removing as much of the structures as possible and then retaining any remainder of the structures in place in a manner that minimizes the risk of stability of the cliffside and otherwise can be found consistent with BCDC's laws and policies, assuming retention of the structure (Section II.B.1.c);
- remove all structures on any publicly-owned property, except to the extent any remnant portions on property owned by the City cannot be reasonably removed due to infeasibility or increased significant risk with respect to stability of the cliffside as compared to retention of the remnant portions, subject to concurrence by BCDC and the City (Section II.B.2.a.i);

- remove any structures on Respondent's private Property determined by BCDC to pose a significant issue with respect to stability of the cliffside; (Section II.B.2.a.ii);
- identify which unpermitted structures (if any) on Respondent's private Property are proposed to remain in place because they will not pose a significant issue with respect to stability of the cliffside, subject to concurrence by BCDC, for which Respondent must seek after-the-fact authorization in order to keep in place (Section II.B.2.b).

The remaining provisions of Sections I and II in the First Amendment have been updated to be tailored to the current Respondent but are not particularly noteworthy in their deviation from the Original CCD other than, as previously mentioned, that Respondent must pay the \$90,000 administrative civil penalty previously required of PSG as the former respondent of the Original CCD. Likewise, the Factual and Legal Findings in Sections III.A and .B of the First Amendment, respectively, have also been updated to be tailored to the current Respondent, but are similarly not particularly noteworthy in their deviation from the Original CCD.

## **II. Unresolved Issues**

Proposed Commission adoption of the First Amendment does not present any unresolved issues because Respondent and BCDC staff have worked together to reach mutual agreement as to the terms of this revised stipulated CCD.

## **III. Previous Enforcement Actions**

No prior enforcement actions have been taken in this matter. Commission adoption of the proposed First Amendment would amend the Original CCD, both of which pertain to ER2004.019.

## **IV. Recommendation**

The Executive Director recommends that the Commission adopt this Recommended Enforcement Decision which would amend the Original CCD and replace it with the First Amendment to the CCD.

## **V. Proposed Order**

The proposed First Amendment consistent with this recommendation is attached.