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OPEN LETTER TO THE PLANNING COMMISSION AND CITY COUNCIL ON THE PROPOSAL TO LOCATE A FERRY TERMINAL NEAR H'S LORDSHIPS RESTAURANT IN BERKELEY

As a representative of the windsurfing community, and as a Berkeley citizen who has served on the Waterfront Commission and understands the fiscal issues facing the Berkeley Marina, I urge the Planning Commission and the City Council to *oppose* locating a new ferry terminal near H's Lordships restaurant. The Water Emergency Transportation Authority (WETA) proposes selecting this site as the "environmentally superior" location, and is asking for support from the City. In fact, this site is not environmentally superior, as it conflicts with the adopted City Master Plan for the marina, eliminates recreation by windsurfers and fishermen, and jeopardizes the long-term financial stability of the marina. The EIR prepared by WETA did not even mention the existing recreational use at the site! Since the EIR did not analyze either recreational use or the City and BCDC's land use plans, it is fatally flawed and cannot be used to support any decisions, much less conclude that this site is environmentally superior.

RECREATIONAL USE IS PROTECTED BY THE CITY'S MASTER PLAN

Berkeley Marina consists of State Tidelands, granted to the City to develop recreational facilities for all citizens, not just those who own boats that are berthed in the marina or use the launch ramp. In fact, there are a number of different recreational facilities in the marina, from boating in the portion of the marina protected by breakwaters, to lower cost recreation such as fishing, launching non-motorized craft at different sites, and Shorebird Park and Adventure Playground, which cater to non-boating families and children. Development in the marina is guided by the Public Trust doctrine and numerous legislative policies that protect the public's rights to use the marina, but also by the City's own planning documents. The proposal to locate a ferry is inconsistent with the adopted master plan for the marina, adopted on July 8, 2003, in Resolutions No. 62, 142-N.S. and No. 62, 143-N.S. Figure 2.0 of the Marina Master Plan designates essentially the whole marina for recreation, and in particular includes a note for the small cove adjacent to Hs. Lordships "Enhance windsurfer activity." Policies contained in the plan make this more specific:

Enhance Windsurfer Activities at the point immediately to the west of H's Lordships Restaurant. Consider constructing large terraced stairs to improve windsurfer access (Figures 9, 10). Consider low maintenance material for the adjacent staging areas and screening these areas with landscaping. A new pedestrian path is needed that links with the existing pathway on the north side of the parking lot. New signage and benches should be installed. (Italics in original, page 38)

I have been working with City staff for six years on a project to implement that project, to develop a safe access point at this location. I have helped the City secure grant funding from the Coastal Conservancy to design and build this project, and the City has spent \$80,000 of that funding in developing a final design for windsurfing improvements at Hs. Lordships and other improvements implementing the Bay Trail in the Berkeley marina. Those facilities are not compatible with the conceptual design presented

by WETA. WETA proposes to establish a 400 space parking lot to serve ferry commuters. That would be bigger than the existing 320 space lot, and would eliminate areas now used by windsurfers for access. The EIR prepared by WETA neither revealed the existing recreational uses, nor established the land use policies adopted by the City.

Other recreational uses would also be adversely affected. Fishermen frequently park along seawall drive and fish from the rocks. Others simply come to the end of the land to relax and look at the Bay, parking along Seawall Drive. These uses are protected by language in the plan that establishes support for low cost water activities, and for enhanced access and use of the Marina for members of user groups and economically disadvantaged persons.

MAINTAINING AND INCREASING REVENUES FROM THE LEASEHOLD AREA WHERE H'S LORDSHIPS IS NOW LOCATED IS ESSENTIAL TO THE FUTURE OF THE MARINA

The area now under lease to H's Lordship is the second largest lease area within the marina. It has 320 parking spaces, behind only the Doubletree lot (495 spaces) and substantially more than the Skates Restaurant lot (133 spaces.) Currently, leases account for over 35% of the marina budget. For 2009, the marina manager estimated that lease revenues for Hs. Lordships would total \$122,000. By comparison, the estimated revenue for Skates is \$237,000. The H's Lordships facility, including parking, is about twice the size of the Skates facility, so there is a strong potential for increased revenue when the lease expires in 2017. Staffing costs at the marina are increasing by over \$110,000 each year, and the rates for berths at Berkeley are near the highest in central San Francisco Bay. Thus, it is critical to retain some capacity for increased revenues. There is no indication that WETA would pay equivalent rent to the City for their use of the existing leasehold, much less the market rate lease potential when the current lease expires.

PROTECTION OF EXISTING WATER ACCESS IS MANDATED BY NUMEROUS STATE POLICIES

San Francisco Boardsailing Association represents windsurfers and kite boarders, water recreationalists who have used the water and shoreline of the East Bay for over 30 years. There are only a handful of sites that have sufficient wind, water depth, and staging areas for this activity. Those include Point Emery, the South Basin of Berkeley Marina, Albany Beach, Pt. Isabel, and the cove next to H's Lordships. Windsurfing is a class of recreation that is protected in State policy beginning with the Constitution, and continuing through to the legislation that establishes the Bay Conservation and Development Commission, and most recently, legislation establishing a Bay Water Trail on San Francisco Bay. The policy framework begins with Section 4 of Article 10 of the Constitution that provides:

No individual ... shall be permitted to exclude the right of way to such water ... or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of the State shall always be attainable for the people thereof.

These constitutional rights are preserved and protected in both the MacAteer-Petris Act and the Navigation Code. The former provides that "...existing access to the shoreline and waters of the San Francisco Bay is inadequate and that maximum feasible public access, consistent with a proposed project, should be provided." More specific guidance is given in A. B. 1296, now Public Resources Code Section 66690 et seq. the legislature declared "Water-oriented recreational uses of San Francisco Bay, including ...sailboarding...are of great benefit to the public welfare of the San Francisco Bay Area."

Further goals, articulated under the State's constitutional authority (Section 66692(d)) include "...improving access to, within, and around the bay..." (Section 66691(f).) Thus, windsurfing falls within the provisions of the Constitution, and represents a fundamental right that may not lightly be displaced.

In 2006, BCDC updated its Bay Plan Recreation Policies, and those policies provide an additional overlay of protection for existing recreational uses. First, Berkeley Marina is established on Plan Map 4 as a Waterfront Park, and notes to the plan map state:

Preserve...windsurfing access. Possible ferry terminal. Allow if compatible with park and marina use. (emphasis added)

To clarify the intent of this section, the following specific language was added:

Ferry terminals may be allowed in waterfront park priority use areas and marinas...provided the development and operations of the ferry facilities do not interfere with current or future park and recreational uses and navigational safety can be assured. Terminal configuration and operation should not disrupt continuous shoreline access. Facilities provided for park and marina patrons, such as parking, should not be usurped by ferry patrons...

The proposal to utilize the entire parking lot and displace the windsurfing rigging areas is in direct conflict with this policy.

WETA'S EFFORTS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT ARE FATALLY FLAWED AND CANNOT BE RELIED UPON

Despite specific language protecting windsurfing access in the Berkeley Marina Plan and the Bay Plan, the draft EIR for this project includes no discussion of recreational impacts. The only language in the document discussing recreation is the simple, conclusory statement:

Alternative B parking area borders Shorebird Park. In neither case would project construction affect access to or use of the parkland. (p. 4-38)

This statement is incorrect. The entire marina is a waterfront park, and, as noted earlier, the site plan shown in the EIR would displace windsurfing rigging and parking areas and fishing access. The document also does not include any discussion of the impacts of ferry operation, and safety zones, on recreational boating staged out of the South Basin.

On February 19th, at a joint meeting before the Waterfront Commission and the Transportation Commission, WETA staff indicated that they have no intention of correcting the document and circulating it for comment again. They indicated that mitigation measures would be added in the final EIR and that would cure the errors in the document. This fails to meet the legal standards for an adequate EIR. Court cases have established that the public has a right to comment on all significant impacts, and on proposed mitigation measures. The substantive standard in the law is that alternatives which avoid significant impacts are to be selected if feasible.

...it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects... (CEQA Section 21002)

If alternatives that would avoid significant impacts are not feasible, all feasible mitigation measures that would reduce the impacts must be adopted. In this case, the document neither discusses the recreational impacts nor the inconsistencies with the City Marina Plan and the Bay Plan. It is an accepted practice in CEQA that any inconsistency with an adopted plan is a significant impact, and generally, adverse impacts on recreation, particularly recreation that has constitutional standards of protection, are significant impacts. Because of the failure of the document to identify these impacts, no systematic effort to evaluate alternatives or mitigation measures that would avoid the land use conflicts and recreational impacts was contained in the draft EIR. These oversights cannot be cured except by revision and recirculation of the EIR.

The standards articulated by the courts have been incorporated into the CEQA Guidelines, see as well the statutory guidance in Section 21092.1, which provides in relevant part:

When significant new information is added to an environmental impact report ...the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21152 before certifying the environmental impact report.

Again, the purpose of such review is to allow the public to review and comment upon all significant impacts, and alternatives and mitigation measures that might reduce or avoid those impacts.

ARE THERE OVERRIDING BENEFITS FROM USING MARINA PARKLANDS FOR FERRY PURPOSES?

The stated objective of the ferry system is to provide emergency service in the event that an earthquake renders some aspect of the transportation system unusable. But would that really be accomplished? According to Robert Gammon in the November 26, 2008, issue of the "East Bay Express", the ferries could carry up to 1700 passengers per day, at a cost of \$58 million. That is dramatically less than the 160,000 that cross the Bay by BART, or the 15,000 that use AC Transit to cross the Bay. So we can tell it doesn't really provide much in the way of emergency capacity, wouldn't it be nice to know how much it would cost? If the **maximum** ferry use occurs, 1700 people per day, 5 days a week, 50 weeks each year, and a discount rate of 5% is used to estimate the value of that construction cost over time, **each** passenger ride involves a construction **subsidy of about \$6.82!** This simple estimate uses only the opportunity cost of the public investment, it does not include operational costs—personnel, fuel and maintenance—that are certain to increase the per rider costs. If ridership is less than anticipated, as it was when the previous ferry service went out of operation, the subsidy could be 2 to ten times higher. While there are pros and cons to subsidizing different forms of transportation, I strongly object to public subsidy that usurps recreation at the Berkeley marina yet provides no real emergency capacity.

ALTERNATIVES ARE AVAILABLE THAT WOULD HAVE LESS PHYSICAL IMPACT

Construction of a new ferry terminal at the H's Lordships site would require fill for at least one new breakwater and a new dredged channel. The EIR indicates that 150,000 cubic yards of dredging would be required, about 40% more than using the existing channel into Berkeley marina. Policies established

by BCDC call for minimizing dredging and Bay-fill, and it is not clear how these policies have been rationalized with the proposal to create and maintain a new navigational channel and breakwater—or how these impacts would be mitigated.

ARE THERE ANY CARBON REDUCTION BENEFITS FROM FERRIES?

According to “TPL Employee Commuter and Business Travel Carbon Footprint “, June 28, 2007, each passenger mile associated with ferry travel has a carbon emission signal about twice that of a bus, and about 3.4 times that of a subway. Even cars seem to have a lower carbon signature than ferries. So should we subsidize a form of transportation that has a greater impact on global warming than any of the alternatives, and ignore the adverse impacts on existing users?

CONCLUSION

San Francisco Boardsailing Association has worked hard to establish clear policies and guidance that protect the handful of sites where our members now reach the Bay. These policies are readily available in the Berkeley Marina Plan and the BCDC Bay Plan, and represent policy guidance for consideration when an agency such as WETA is considering a project. However, these materials are only as good as the research skills of the public agency. In this case, WETA neglected to consider recreational impacts, or the policies that protect recreation, and thus find themselves with an EIR that they cannot use to select the H’s Lordships site. Please don’t endorse their slipshod analysis.

Very truly yours,

Jim McGrath