

June 17, 2013

**SENT VIA EXPRESS MAIL**

Andrew Thomas  
City Planner  
Planning Division  
City of Alameda  
2263 Santa Clara Avenue, Room 280  
Alameda, CA 94501

**Re: Notice of Preparation of EIR for Neptune Beach Project**

Dear Mr. Thomas:

The East Bay Regional Park District (“Park District”) submits this comment letter in response to the Notice of Preparation (“NOP”) for the Neptune Beach Project (the “Project”) located on 3.89 acres owned by the federal government off of McKay Avenue (“federal property”) in Alameda.

**I. Background**

For more than 50 years the Park District has operated Robert W. Crown Memorial State Beach for the State of California. The Park District also operates Alameda Beach for the City of Alameda. Together Crown Beach and Alameda Beach make up the longest beach on the San Francisco Bay (collectively referred to herein as “the State Park” or “Crown Beach”).

In the 1980s, the beach had almost entirely disappeared due to erosion and Shoreline Drive was starting to fall into the Bay. At that time, the Park District led the effort to restore the beach with a multi-million dollar sand replacement project that recreated the beautiful beach we know today. Soon, the Park District will undertake another sand replacement project on Crown Beach to again restore the beach and protect against erosion. This multi-million dollar capital project is being undertaken to protect and improve this important resource for the benefit of Alameda residents and all who visit and enjoy Crown Beach.

Over the years, thousands of Alamedan families have enjoyed events like Concerts at the Cove, the Annual Easter Egg Roll, the Crown Beach Sandcastle Contest and the numerous charity runs and events that occur on the shoreline. Each year, over one million visitors use the beach and the Bay Trail. Tens of thousands of school kids visit Crab Cove to learn about marine habitats.

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More than five years ago, the Park District identified the existing federal property as an opportunity to transform Crown Beach and create a signature visitor center and park that takes advantage of the stunning setting. The vision for Crown Beach was captured in the Measure WW project language that was developed collaboratively with the City of Alameda prior to there being any proposals for residential development on the site. The Park District's plan was both recommended by the Alameda City Council and approved by more than 70 percent of Alameda voters. When Measure WW passed in 2008 with overwhelming support, nearly \$6.5 million was identified for the acquisition and development of the federal property for public park purposes, improvement of the Crab Cove Visitors' Center, and improving beach access and shoreline protection. The federal parcel is a critical component of the Park District's project and the only available property to expand and improve the park to the benefit of Alameda residents.

Given the Park District's long partnership with the City of Alameda and the significance of Crown Beach as a recreational resource, the Park District's Board of Directors was greatly dismayed when it learned that the City had rezoned the federal parcel for residential use without notification to the Park District and without any site-specific environmental analysis, including but not limited to, the impacts on the Park. Most troubling about the City's action was that while the Park District was being assured by the City that it would be kept apprised of any planning activities for the federal parcel (see Attachment A - email to Park District dated November 17, 2011, from Community Development Director Lori Taylor), the City **had already received** a request from Tim Lewis Communities ("TLC") to process a General Plan Amendment and to rezone the property. (See Attachment B - email dated November 14, 2011 from Andrew Thomas, City Planner to Lori Taylor, Community Development Director). This information was **never** disclosed to the Park District. Further, contrary to the City's own ordinances, the Park District was not provided notice of any of the hearings to rezone the site.

This federally owned property within the footprint of the State Park presents the last and only opportunity to improve and expand Crown Beach. As explained below regarding the Park Expansion Alternative, this parcel could be better utilized to extend the State Park by relocating park facilities now at the shoreline away from the cove to open up the shoreline for recreational use. Part of McKay Avenue could be closed allowing the Park to be unified across the existing street. The small Crab Cove Visitor Center could be relocated to the Glory of the Seas building. Open space areas could be expanded including enhanced trails, new group picnic areas, and a new amphitheater. Additional parking and better traffic circulation would be provided. The City and the Park District have the opportunity to partner together to transform Crown Beach to the benefit of all citizens of Alameda and the general public. There will be no other opportunities to expand the State Park other than with the federal property.

The current plan for development of 48 residences on less than 3.9 acres is inconsistent with the vision of the Park District and the members of the Alameda community for this property and will have significant adverse impacts on the State Park. The City has other available sites within its borders that are more appropriate to accommodate the proposed Project. The proposed housing

Project will benefit few and impact many, while the expansion of Alameda's crown jewel would benefit the entire community. The Park District urges the City to consider a Park Expansion Alternative as part of the environmental review process, as well as its comments contained herein.

## II. Process

The Park District notes that, consistent with issues raised in its pending legal proceeding with the City, that the City erred in not doing site-specific CEQA analysis last year **before** approving the Housing Element, amendments to the General Plan land use designation and zoning amendments for the Project site. Instead, the City improperly deferred site-specific environmental review until now, even though at the time it approved the General Plan and zoning amendments, it was aware for months that TLC, the project applicant, specifically requested those amendments and that TLC was planning for a 48-unit development. These facts were not disclosed to the public or in any staff report on the Housing Element, nor mentioned whatsoever in the CEQA addendum adopted by the City in connection with those approvals. While the City noted in a December 2011 staff report that it would prepare an environmental impact report or a negative declaration in connection with the Housing Element and the amendments to the General Plan and zoning, instead it chose to prepare a six-page addendum that relied on analysis that was up to nine years old, contained inaccurate assumptions, and was not specific to, or accurate regarding, the Neptune Point site.<sup>1</sup> That decision (to amend the GPA and rezone) did not undergo adequate site-specific environmental review at all.

Preparing an EIR now does not fix the City's earlier mistake of deferring full CEQA analysis, because the City already chose to take the discretionary action of amending the federal property's General Plan and zoning. This is important for several reasons. First, the public and the City Council were denied the opportunity to consider and debate the policy decision to change the General Plan and zoning of this site to allow housing on publically owned property without the benefit of site-specific CEQA review as required by law. Second, by amending the zoning to bring the site in line with the City's Housing Element, the City severely restricted itself from potentially rejecting or conducting future CEQA review in connection with a housing project. (See Govt. Code 65583.2(i) (limiting the ability to require CEQA for certain housing projects).)<sup>2</sup>

The City has it within its power to fix this problem now. By acknowledging that a complete site-specific CEQA analysis should have been done before the federal property's General Plan designation and zoning were amended, the City should undo such amendments, and then prepare a site-specific EIR and reconsider whether a General Plan and zoning amendment for the site to residential use (or some other appropriate use such as parks and open space) is appropriate. This site should not have been included in the City's Housing Element (nor its land use designation and

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<sup>1</sup> By contrast, when the City of Pleasanton recently updated its Housing Element including general plan and zoning amendments, it prepared an environmental impact report that spanned over 500 pages.

<sup>2</sup> In addition, the State Housing Accountability Act (Govt. Code § 65589.5) restricts the City's ability to disapprove, condition, or require density reductions in residential projects.

zoning amended for residential uses) due to the presence of site constraints, including lack of access as noted in Section III., below. Proper environmental review must be performed **prior** to General Plan and zoning amendments being made, **not after**.

### **III. Access and Inadequate Project Description**

The project description contained in the NOP purports that access to the site “would be provided by McKay Avenue,” however, McKay Avenue is owned by the State of California. Both the Park District and the State Department of Parks and Recreation, through letters dated April 9, and May 22, 2013 (attached as Attachments C and D), informed the City that a private developer would not have easement rights for access (or utilities) over McKay Avenue through the purchase of the federal property and that any private use of McKay would over-burden the easement.

As such, the City should not deem this Project application complete. In a December 5, 2012 letter to TLC, the City made it clear that in order to deem the Project application complete, the City needed information describing access to the property, noting McKay is owned by the State. The State – the owner of McKay Avenue – has weighed in and unequivocally explained that access is not available over McKay for a private residential development, rebutting TLC’s claims to the contrary. As such, the project description is inaccurate by stating access is over McKay and so the project description must be changed to show how vehicular, utility and storm drainage access would be provided. Until such access is clearly established, the application for the Project should not be deemed complete.

Further, at the NOP scoping meeting held on June 5, 2013, the City acknowledged that it could not approve the Project if TLC does not have access. Since this is clearly the case at the present time, it makes far more sense to resolve that issue before spending the time, money and effort of the City and the public studying a Project that is not currently feasible from a legal standpoint, premised on General Plan and zoning amendments that were not subjected to proper CEQA review.

### **IV. Project Objectives**

The EIR will need to clearly state the Project objectives for the site. The Park District maintains that the objectives for this site should be consistent with the voter approved mandate presented in Measure WW, i.e., expansion of Park uses. Further, the Park District maintains that any private development that occurs on public land should provide a complimentary level of public benefits.

The proposed Project provides minimal benefit to the citizens of Alameda. It will result in increased traffic, reduced open space, will impact Park operations and resources at Crown Beach, and it will mean a permanently lost opportunity to expand access to the Bay shoreline.

The property at issue is public land, currently owned by the federal government and is adjacent to State parkland operated by the Park District for the benefit and recreation of the public, primarily the citizens of Alameda. As such, the key project objectives should include the maximization of the public benefits of the site, maximization of the public use and access to open space, to fully enhance such uses, and to avoid any impacts on Park use and public land.

## **V. Baseline**

The EIR must analyze the Project based on existing site conditions, including that the federal property has been vacant for years and not used for residential purposes. In fact, the EIR should not treat the federal property as having had its General Plan land use designation or zoning designations changed to allow residential uses since those actions were done without proper CEQA review prior to being considered by the City.

## **VI. Alternatives**

The EIR must study a reasonable range of alternatives. This range should include both a Park Expansion Alternative as well as one or more off-site alternatives for the Project elsewhere within the City.<sup>3</sup>

### **A. Park Expansion Alternative**

As shown in the attached conceptual plan (Attachment E), the Park District proposes a Park Expansion Alternative to be studied in the EIR. The concept for Crown Beach is to create a welcoming, and resource-efficient park and visitor center that takes advantage of the San Francisco Bay setting. Under existing site conditions, the shoreline and the point are separated from the rest of Crown Beach by McKay Avenue, the park offices and a service yard. The conceptual plan and Park Expansion Alternative's goal is to open up the shoreline and unify the Park, while modernizing its design to enhance the experience of Park visitors. The Park District's vision is to renovate the historic Glory of the Seas building into a visitor and interpretation center either at its existing location or moved onto the federal property. The new visitor center would take advantage of panoramic Bay views and give visitors the feeling of being on a ship as a sensory reminder of the area's maritime history. Interpretation would continue to focus on the Bay's fragile habitat, as well as the site's history as both the Neptune Beach bathhouses and a maritime staging area during World War II.

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<sup>3</sup> Contrary to some comments by Planning Board members at the NOP hearing, use of the site for non-residential purposes would not mean that a residential project would need to be developed in a distant suburban greenfield development. Instead, a 48-unit project could be accommodated on other infill parcels within the City, including but not limited to Alameda Point.

The existing Crab Cove visitor center could be updated into a multipurpose building with the potential as a concession site for a Park-serving café. The shoreline area along Crab Cove would be improved with Bay friendly landscaping, providing an area for play, strolling, picnicking and enjoying the expansive views. A new amphitheater would be constructed as an overlook for interpretative lectures and other group activities. Access will be improved for multiple users including families with strollers, mobility impaired visitors, cyclists and pedestrians. Staff offices would be relocated to the existing 10,000 square foot building on the northeastern corner of the federal property. The corporation yard would be relocated next to the remaining federal property near McKay, insulating it from existing residential and park uses. Relocating these facilities will make those areas with the highest recreation value available to the public to enjoy. An entry point, additional parking (33 spaces, plus 4 ADA and 3 bus parking spaces) and an integrated bus turn around would also be included.

As noted, this alternative would reuse approximately half of the federal site for remodeled staff offices and the relocated Park service yard. The rest of the federal site would be converted to open space and include a drought tolerant meadow area, and new trail and group picnic sites. The alternative would also include a lot line adjustment to match the property line with the existing fence line on the western edge of the property bordering the Crown Harbor development.

This alternative would include approximately two acres of public open space, while facilitating improvements to adjacent Park areas to enhance public open space use and access at Crab Cove, as well as increase environmental education opportunities for children and adults. In addition, it would help alleviate parking and traffic impacts, would relocate the Park service yard away from the shore and residential and trail uses, and lessen impacts on Park resources and protected habitat. The alternative would promote the project objectives set forth above and due to the availability of land in the City for residential uses, would not prevent the City of achieving its Housing Element goals. In addition, this alternative is consistent with the vision to expand Crown Beach presented in the voter-approved Measure WW.

The Park District strongly encourages the City to include this Park Expansion Alternative for evaluation in the EIR that includes the voter approved vision for the property.

### **B. Off-Site Alternative**

The EIR should also study one or more off-site alternatives for the Project within the City to locate the project on other identified infill sites suitable for residential use, including other sites identified in the Housing Element and Alameda Point.

## **VII. Environmental Impacts**

### **A. Impacts on Crown Memorial State Beach Park**

The EIR must analyze the Project's impacts on recreation and natural resources managed by the Park District, including Crown Beach and surrounding areas including protected habitat. This must include impacts from the Project residents, their cars and pets.

The EIR will need to thoroughly evaluate all impacts to the resources and operations at Crown Beach – including potential impacts on the existing maintenance facility and the incompatibility of placing residential uses directly adjacent to that facility.

Further, the EIR will need to demonstrate its ability to comply with the McAteer-Petris Act – particularly in relation to its impact on shoreline access, water quality, and storm water drainage.

### **B. Traffic and Circulation**

The Housing Element CEQA Addendum's assumptions regarding the number of traffic impacts and vehicle trips generated by the Project and associated air emissions, including greenhouse gas emissions, are based on old information that did not include site specific analysis, including intersections in the vicinity of the Project site, and as such are not supported by substantial evidence or adequate analysis and should not be used for this EIR.

The EIR must analyze impacts on access to and from Alameda, including at the Alameda Tube, based on a realistic development pattern and supported assumptions. The land use data relied on in the City's 2009 Transportation Element EIR used unsupported and unrealistic growth patterns for the City that are far different than those reflected in the Housing Element and as proposed by the Project. For example, the 2009 Transportation Element EIR assumed in the entire traffic assessment zone for the Neptune Point assume an additional 22 single family and three multifamily households from 2007 to 2030. The Housing Element projected 95 homes on the federal property alone and improperly relied on the analysis in the Transportation Element EIR which used much different growth assumptions. Overall, the assumptions used in the Housing Element are grossly different from those used in the 2009 Transportation Element EIR and yet no new traffic analysis was performed nor were any significant impacts identified in the Housing Element CEQA addendum.

The EIR must use realistic and accurate assumptions for Project and cumulative impact analysis, including recognition of projected growth areas and traffic impacts on City intersections, as well as the Alameda Tube and the roadways approaching them. Such analysis must not be improperly deferred as it was in connection with the Housing Element.

### **C. Biological Resources**

Proximate to the Project site are tidal mudflats which provide habitat for sensitive species. Crab Cove is a designated marine reserve where all plant and animal life is protected. To the east of Crown Beach is Elsie Roemer Bird Sanctuary which provides habitats utilized by aquatic and salt marsh bird and mammal species. The sedimentary habitat offshore Crown Beach supports an eelgrass (*Zostera* sp.) bed, which is considered a sensitive resource and provides nursery habitat for a variety of juvenile fish and food source for aquatic birds. There is an active nesting colony of the endangered California least tern located at the former Alameda Naval Air Station. The Project site is within the forage range for this colony of least terns. The EIR must analyze Project and cumulative impacts on these natural resources.

### **D. Air Pollution and Greenhouse Gas Emissions**

As noted above in regards to traffic, the Housing Element CEQA Addendum's assumptions regarding the number of traffic impacts and vehicle trips generated by the Project and associated air emissions, including greenhouse gas emissions, are based on old or unrealistic information that did not include site specific analysis, including intersections in the vicinity of the Project site, or supportable growth assumptions. The EIR for the Project should not rely on this inadequate analysis in its air quality and greenhouse gas emission analysis for the Project impacts or analysis of cumulative impacts.

### **E. Impacts on City services**

The EIR should analyze the Project's individual and cumulative impacts on, and the need for, additional City services created by this new residential population.

### **F. Noise**

The EIR should analyze the Project's noise impacts on surrounding properties, including residential and non-residential uses, including on Park wildlife and nearby protected habitat.

### **G. Sea-Level Rise**

The EIR should analyze the impacts of sea-level rise on the Project as well as the effect of bringing a residential population into an area that may be impacted by sea-level rise.

### **H. Cumulative Impacts**

The EIR should analyze cumulative impacts regarding all of the impacts studied in the EIR and must not rely upon incomplete and inaccurate analysis, in particular traffic and air quality



analysis contained in earlier EIR documents (such as the 2003 Housing Element Negative Declaration and the 2009 Transportation Element EIR) that relied upon incorrect and unrealistic growth assumptions as set forth above.

### **I. Mitigation Measures**

The EIR should explain and demonstrate how mitigation measures set forth in earlier environmental documents relied on by the Housing Element Addendum will be implemented and complied with by the Project, along with any Project-specific mitigation measures. The EIR must explain how identified mitigation measures will adequately address the impacts to which they are associated and that mitigation is not improperly deferred.

### **VIII. Conclusion**

Simply put, the Project should not go forward based on the erroneous rezoning and land use designation amendments that were done without proper site-specific environmental review. The City has it within its power to reverse this error and should take the opportunity to do so by vacating those actions with respect to this site and then conduct environmental review as to the change in use and consider proposed General Plan and zoning amendments in connection with the same.

Further, TLC has not established that it would have access, or utility and storm drainage rights over State-owned McKay Avenue. No such rights have been granted by State Parks to support private development of the federally-owned property, and the State has clearly stated that no such rights would exist for a private development. As such, the City should never have deemed the Project application complete.

The City should not compound prior errors. Instead, it should undo the earlier approvals based on the failure to perform adequate review and, then only if TLC can establish access rights, reconsider zoning and general plan amendments, along with the Project and feasible alternatives such as the Park Expansion Alternative.

Sincerely,

A handwritten signature in black ink, appearing to be 'MA', followed by a long horizontal line extending to the right.

Mike Anderson  
Assistant General Manager  
Planning, Stewardship and Development

Attachments

Andrew Thomas

June 17, 2013

Page | 10

cc: Danita Rodriguez, California State Parks  
Doug Siden, Board member, Ward 4  
Robert Doyle, General Manager  
Mayor Marie Gilmore  
Alameda City Council  
John Russo, City Manager  
Cecily Barclay, Attorney for TLC

ATTACHMENT     A    

-----Original Message-----

From: Lori Taylor [mailto:LTaylor@ci.alameda.ca.us]  
Sent: Thursday, November 17, 2011 1:45 PM  
To: Nancy Wenninger  
Subject: Rezoning inquiry for "Neptune Pointe" in Alameda

Hi Nancy,

Thank you for your inquiry about the process to rezone the 3.899 acre site known as "Neptune Pointe" on McKay Avenue, near Crab Cove and Crown Beach. Thank you for sharing the Park District's interest how this land is developed.

This site has long been used as government offices. However, the City had anticipated that the use would potentially change over time and identified this parcel as one that will be available to accommodate the City of Alameda's regional housing needs in our 2007 Housing Element. When the property was placed on the market several interested parties contacted us and we advised them of potential utility issues and the need for rezoning to allow different uses.

Currently this site is zoned Administrative Professional with a Government Combining Zone. The General Plan designation is "Federal Facilities". Any new private use of the site (other than federal facilities) will require a General Plan and Zoning Amendment which requires a public hearing before the Planning Board and a hearing before the City Council. The process can take between three and six months depending on the complexity of the request. In this situation, the applicant's ability to provide utilities to the site will need to be considered as part of the application. During each phase of the review, public comments are welcome and you will be encouraged to share your concerns.

Please let me know if you have further questions and I will do my best to get you answers.

Thank you,

Lori Taylor  
Community Development Director  
City of Alameda  
2263 Santa Clara, Room 190  
Alameda, CA 94501-4477  
(510) 747-6899

ATTACHMENT B

**From:** Andrew THOMAS  
**To:** Lori Taylor  
**Date:** 11/14/2011 12:23:39 PM  
**Subject:** Fwd: Neptune Pointe 3.89 acres on McKay Ave., Alameda Rezone R4

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>>> "James Meek" < prin03301@comcast.net > 10/21/2011 8:59 AM >>>  
Hi Andrew,

Attached above is my letter requesting the city of Alameda for a Rezone on the McKay Ave. property to R4. We finished our successful negotiations with the Federal Government and I would now like to move forward on all of the entitlements necessary to bring this wonderful project forward. In addition, I would like to set up an appointment to make sure I am providing you and the city all that it needs to make this a very smooth process. I look forward to getting together with you soon.

Best Regards,

Tim Lewis Communities

Director of Land

James Meek

3300 Douglas Blvd. Building 400 suite 450

Roseville, Ca 95661

(925) 949-6568

(916) 783-2303 Fax

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**Attachments:** RezoneAlameda.pdf

HOME BUILDING  
LAND DEVELOPMENT

3300 Douglas Boulevard  
Building 400, Suite 450  
Roseville, CA 95661  
918/783-2300  
918/783-2303 Fax  
License No. 482827

October 21, 2011  
Mr. Andrew Thomas  
Planning Services Manager  
City of Alameda  
2263 Santa Clara Ave., Room 190  
Alameda, CA 94501-4477

Dear Mr. Thomas

STL Company LLC recently entered into an agreement to acquire a 3.899 acre site, a portion of Assessor's Parcel Number #074-1305-026, known as "Neptune Pointe." This Federal Government owned property is located on the north side of McKay Avenue across from Crown Memorial Beach Park and Crab Cove.

STL has delegated its affiliate homebuilding company, Tim Lewis Communities (TLC) the responsibility for planning, design, entitlement, construction, and home sales on the Neptune Pointe site. TLC hereby requests that the City of Alameda adopt a General Plan Amendment and rezone of the Neptune Pointe property from its current use Government to R-4 (Medium Density Residential.)

TLC is based in Roseville, CA and has been building homes in the Sacramento region for 30 years. Our company currently has communities in both the Sacramento region and Reno, Nevada and is now entering the Bay Area market. TLC is an award winning builder recognized by NHQ, Eliant Surveys, the Building Industry Association of Superior California, and JD Power & Associates; TLC has twice achieved the highest JD Power rating in customer satisfaction and new home design from Sacramento homebuyers. TLC is known for its high quality homes with great attention to detail. Our company is also a green, eco-friendly builder; all four California communities are California Green Builder Certified, and solar panels are offered standard at three of these.

We plan for Neptune Pointe to be our signature project in the Bay Area and consider the Neptune site exceptional as it is only steps from San Francisco Bay, Crown Park, and retail shops along Webster Avenue. We are excited to work with the City of Alameda to make Neptune Pointe a very special place to live.

Sincerely,

A handwritten signature in black ink that reads "James L Meek".

James Meek  
Tim Lewis Communities  
925-949-6568

ATTACHMENT C

April 9, 2013

**SENT VIA U.S. MAIL AND FAX 510-865-4028**

Farimah Faiz  
Sr. Assistant City Attorney  
Office of the City Attorney  
City of Alameda  
2263 Santa Clara Avenue, Room 280  
Alameda, CA 94501

Office of the District Counsel  
Ted C. Radosevich, District Counsel  
Carol R. Victor, Asst. District Counsel  
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✉ tradosevich@ebparks.org  
✉ cvictor@ebparks.org  
✉ bpheng@ebparks.org  
☎ (510) 544-2005  
☎ (510) 569-1417

**Re: Access and Utility Rights for Federal Government Property on McKay Avenue**

Dear Ms. Faiz:

The purpose of this letter is to respond to the analysis provided by attorneys for Tim Lewis Communities ("TLC") dated March 22, 2013, regarding certain access and utility rights relating to the federally-owned property on McKay Avenue in the City of Alameda. Specifically, the East Bay Regional Park District ("Park District") strongly disagrees with the claim that once the property is conveyed to a private party, such as TLC, that it will enjoy unfettered access, utility and storm drainage rights over property owned by the State of California, namely McKay Avenue.

This is not the case. Without the express grant of rights from the State, a private owner would not have access or utility easement rights over McKay Avenue. Danita Rodriguez, Superintendent with California State Parks Department ("State Parks"), has confirmed that the State agrees with the Park District's interpretation of the applicable deed and the State will not grant easement rights to a private party over state-owned McKay Avenue for a private development. State Parks has been steadfast in this position and it has been communicated to TLC.

**Access and Utility Easement Issues**

The Crab Cove and Crown Beach property, including McKay Avenue, was originally granted to the State by quitclaim deed from the federal government's General Services Administration ("GSA") in 1961, with a corrected quitclaim deed recorded in 1969 in order to correct the legal description of the property. The express consideration of the transfer was for "the continuous use and maintenance of the premises [by the State] for a public park for public recreational purposes...." In both the original and corrected deeds, the federal government reserved to itself two easements over certain property identified therein as McKay Avenue.

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The first easement reserved in the GSA quitclaim deeds is the non-exclusive right to use McKay Avenue for “street purposes” by the federal government and in favor of the “Morrison Brothers Improvement Company.” The easement does not provide access rights to any other party (i.e., it is an easement in gross), nor does it grant a private party with any rights to expand McKay Avenue, to make any improvements on State property to accommodate private development, or for parking. Nothing in the analysis provided by TLC contradicts this fact.

Further, the owner of an easement may not change or increase the use of an easement in any manner that imposes a new or greater burden (a “surcharge”) on the servient tenement. (*Wall v. Rudolph* (1961) 198 Cal.App.2d 684, 696-697; *Bartholomew v. Staheli* (1948) 86 Cal.App.2d 844, 850.) The change in use from lightly-used government office to approximately 46 residential units would constitute an impermissible surcharge on the existing easement.

The second easement reserved by GSA in the quitclaim deeds is “the right to install, remove, replace, maintain and operate the sewer, water, gas, electrical and communications lines” in McKay Avenue. Significantly, this easement was limited to use “as long as may be required to serve Government-owned property.” As such, there is no right to locate utilities within McKay Avenue to serve private development at the site, nor is there any support for TLC’s claim that utility rights “will inure to the benefit of the private purchaser” of the property in question. The language of the easement reservation in the quitclaim deeds is plain – the easement can only be used to serve “Government-owned property.” Accordingly, the utility easement cannot and will not transfer to any private purchaser of the GSA property and would require the grant of an easement from the State, which, as mentioned above, has not occurred.

### **Storm Drainage Easement Issues**

TLC’s letter raises the issue of TLC’s right to use certain storm drain outfalls that apparently lie underneath McKay Avenue and extend south across State-owned property into San Francisco Bay. TLC or other third party is not entitled to claim a right to use the existing outfalls. TLC’s letter asserts that there are “several legal theories” that would give the GSA the continued right to use the outfalls – but only relies on the rarely-used theory of easement by estoppel.

Notably, no prescriptive easement exists for the outfalls. Since the State owns the property, acquisition of such an easement by prescription is prohibited by California Civil Code Section 1007, which provides that “no possession ... of any land ... dedicated to or owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof.” Section 1007 applies to one government entity seeking prescriptive rights against another government. (*City of Los Angeles v. City of San Francisco* (1975) 14 Cal.3d 199, 277.) Section 1007 would also prohibit the GSA from acquiring the alleged easement by estoppel, since the purported existence of such an easement similarly relies upon GSA’s long-term use of the outfalls as giving right to a title interest in favor of the GSA.

Further, the GSA would not be able to meet the standards applicable to acquisition of such an easement interest. In order to overcome the statute of frauds, the party seeking to apply the easement

by estoppel doctrine in a real estate context must have changed its position in reliance upon a promise by the other party, and the court must find that the relying party would otherwise incur an unconscionable injury. (1 Miller & Starr, Cal. Real Estate (3rd Ed. 2011) § 1.76.) An easement by estoppel involves reliance by the owner of the dominant tenement on the representations and conduct of the owner of the servient tenement of such a character that equity establishes an easement in order to prevent an injustice. Such cases usually involve an oral promise to grant an easement, and construction in reliance upon such promise. (E.g., *Rubio Canon Land & Water Ass'n v. Everett* (1908) 154 Cal 29, 32-35.)

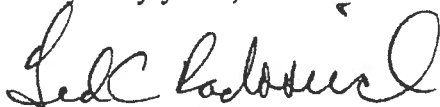
In this case, the federal government had control over the transaction since it granted the property in question to the State, and reserved certain limited easements. Additionally, the federal government actually executed and recorded two separate quitclaim deeds eight years apart, so could have easily reserved an easement for storm drainage facilities in the second deed if it felt such an easement was appropriate. There is no evidence that the federal government relied upon any representations made by the State in utilizing the outfalls without a recorded easement. Additionally, Government Code Section 11005.2 prohibits State agencies from conveying any real property interest without approval by the Director of General Services, and pursuant to *State of California v. Haslett Co.* (1975) 45 Cal.App.3d 252, 257-8, this requirement means that any alleged oral promise by a State representative cannot be utilized to create an easement by estoppel.

### Conclusion

Simply put, a private owner would not have access, utility or storm drainage rights over State-owned McKay Avenue, and no rights to allow such use have been granted by State Parks to support private development of the federally-owned property. This is the position of both the Park District and State Parks.

Please do not hesitate to contact me if you have any questions.

Very truly yours,



Ted C. Radosevich  
District Counsel

cc: Danita Rodriguez, California State Parks, Superintendent  
Cecilia Barclay, Esq. Attorney for TLC  
Carol R. Victor, Assistant District Counsel  
Todd A. Williams, Esq., Attorney for Park District





DEPARTMENT OF PARKS AND RECREATION •  
Diablo Vista District  
845 Casa Grande Road  
Petaluma, California 94954-5804

Major General Anthony L. Jackson, USMC (Ret), Director

ATTACHMENT D

May 22, 2013

Ms. Farimah Faiz, Senior Assistant City Attorney  
Office of the City Attorney  
City of Alameda  
2263 Santa Clara Ave.  
Room 280  
Alameda, California 94501

RE: EBRPD's Letter to City of Alameda, dated April 9, 2013  
Access and Utility Rights on McKay Avenue

Dear Ms. Faiz:

The purpose of this letter is to convey to the City of Alameda that the California Department of Parks and Recreation (DPR) concurs with the East Bay Regional Park District's (EBRPD) position citing the lack of access and utility easement rights across Robert W. Crown Memorial State Beach (State Beach) for the benefit of the private housing development that Tim Lewis Communities (TLC) proposes to build on the property currently owned by the federal government adjacent to the State Beach. The State Beach is owned by DPR but operated by EBRPD under an operating agreement with DPR. EBRPD explained its position in detail in its April 9, 2013 letter to the City.

The access and utility easement that TLC would like to use was reserved by the federal government to serve its property when it deeded a portion of its land to DPR for the State Beach. The easement runs along McKay Avenue across the State Beach. TLC claimed in a March 22, 2013 letter to the City from Cecily T. Barclay, acting on TLC's behalf, that the easement runs with the land and would belong to TLC upon its purchase of the federal property. State Parks disagrees with this analysis and supports the conclusion of EBRPD that the easement applies only to "Government-owned property." Because the property would no longer be Government-owned, the easement would terminate upon transfer of the federal property to the private developer. Even in the unlikely event that the easement did not automatically terminate, use of the easement to serve a 45-home subdivision would still be impermissible because it would significantly overburden the easement.

DPR also supports EBRPD's analysis regarding the non-existence of a storm water drainage easement on the State Beach property for the benefit of the federal property. No storm drain easement exists, because the federal government never reserved such a right, even though it

could easily have done so at the same time it reserved the McKay Avenue access and utility easement. It had a second opportunity to claim a drainage easement when it revised the deed to correct the legal description to the McKay Avenue easement, but again failed to do so. DPR knows of no promises made to the federal government regarding a storm drain easement, so there is no reason why the principle of estoppel should be invoked. In any event, there were no promises made to TLC, so there is no basis for TLC to claim estoppel. If the federal government claims that it has a storm drain easement despite the absence of written documentation, it would have to perfect that easement through the appropriate legal proceedings prior to its sale of the property. And even if the federal government were able to perfect the easement, there is no assurance that TLC would also be able to establish its right to use the easement upon purchase of the federal property.

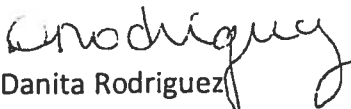
DPR cannot support granting TLC a new easement for the private development because the easement would be inconsistent with DPR's mission, which is to "provide for the health, inspiration and education of the people of California by helping to preserve the state's extraordinary biological diversity, protecting its most valued natural and cultural resources, and creating opportunities for high-quality outdoor recreation."

DPR is also concerned about the potential adverse impacts of the proposed 45-unit housing development on the State Beach and the neighboring public parkland. These impacts include significant traffic and parking problems, the need for increased security, conflicts between residents and park visitors and the negative effect of domestic animals on the shoreline's diverse wildlife.

DPR urges the City to support and protect Robert W. Crown State Beach and Crab Cove from the negative impact of development, because the parks are valuable assets of the community and the State. DPR also urges the City to use this opportunity to encourage the expansion of recreational opportunities in the area.

Please contact me at (707) 769-5665 ext. 224 if you wish to discuss this further.

Sincerely,



Danita Rodriguez  
Diablo Vista District Superintendent (Acting)  
California State Parks

Attachments

Cc: ✓ Ted C. Radosevich, District Counsel, EBRPD  
Marilyn Paik, General Services Administration

CITY OF ALAMEDA

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March 22, 2013

Farimah Faiz  
Office of the City Attorney  
City of Alameda  
2263 Santa Clara Avenue, Room 280  
Alameda, CA 94501

Re: Access and Utility Rights for Federal Government Property on McKay Avenue

Dear Farimah:

The City has requested an analysis of certain access and utility rights that accompany federally-owned property on McKay Avenue in the City of Alameda, as the City wishes to better understand what rights Tim Lewis Communities will have when it develops this property. The following is a summary of Tim Lewis Communities' position on this issue.

The first section below describes access and utility easements in favor of the United States over adjacent property owned by the State of California. The next section details storm drainage rights the federal government holds to serve its property. This letter concludes with a brief statement of the federal government's position.

#### *Access and Utility Easements*

In 1961 the United States deeded surplus property at the southern end of McKay Avenue on San Francisco Bay to the State of California for use as a public park. The federal government retained adjacent property to which it still holds title, located on McKay Avenue, west of Crown Memorial State Beach and Crab Cove.

As part of the surplus property transfer, the United States reserved for itself non-exclusive access rights over the property it transferred commonly known as McKay Avenue. The United States also reserved for itself utility rights on such property, specifically "the right to install, remove, replace, maintain and operate the sewer, water, gas, electrical and communications lines in, over and under [the property] as long as may be required to serve Government-owned property."

Quitclaim Deed Between the United States of America and the State of California (dated Aug. 15, 1961; recorded Dec. 14, 1961).

Eight years later, in 1969, the United States reiterated these rights when it issued a second deed to correct the description of land included in the original deed. The corrected quitclaim deed expressly provided that it did not alter prior easements and reservations affecting the property. The federal government quitclaimed its interest in the property "SUBJECT TO all easements, liens, reservations, exceptions or interests of record or now existing on the premises" and "SUBJECT ALSO to all of the terms, conditions and covenants" contained in the August 1961 deed. Corrected Quitclaim Deed Between the United States of America and the State of California (dated Apr. 9, 1969; recorded May 20, 1969).

Since the corrected quitclaim was recorded in 1969, the United States has not relinquished any of the rights it reserved under the 1961 and 1969 quitclaim deeds, including access and utility rights over McKay Avenue to serve the adjacent 7-acre property still owned by the federal government. At present, the federal government plans to sell the western 4 acres of this adjacent property to a private party.

In opposition to the impending sale, the East Bay Regional Park District now claims the United States does not hold access and utility rights over the State-owned park land. Yet the Park District never has explained why this is so, given the title history cited above. As discussed, this history establishes the federal government's rights to use the quitclaimed property to provide access and utilities to the property it retained on McKay Avenue. These rights run with the land and will inure to the benefit of the private purchaser once the property is sold.

### *Storm Drainage Rights*

To provide for storm drainage on the property it retained, the United States long has relied on outfalls to San Francisco Bay located on the property it deeded to the State of California that extends west of McKay Avenue into San Francisco Bay. The United States has used these outfalls continuously since they were built in the 1940s, though no written instrument confirms the federal government's rights to such use.

In light of the federal government's uncontested use of the outfalls for more than six decades, the United States has the right to their continued use and improvement, as necessary. Additionally, this right is transferrable to a private purchaser of the property served by the outfalls.

There are several legal theories under which the United States could claim rights to use of the outfalls, the most straightforward of which is easement by estoppel. Under this equitable doctrine, the owner of the dominant tenement gains an easement by estoppel by virtue of that owner's reliance on the representations and conduct of the owner of the servient tenement. Here,

Farimah Faiz  
March 22, 2013  
Page 3

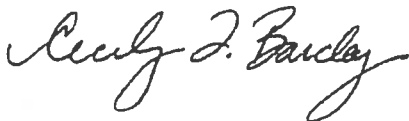
the United States has relied since 1961 on the State of California's willingness to allow the United States to use outfalls on the quitclaimed property. Following this lengthy, unbroken course of conduct, the State would be estopped from alleging that the federal government or its successor lacks the rights to use and, as needed, improve the outfalls. Rather, a court would grant the United States an easement by estoppel to prevent the injustice of allowing the State to block, belatedly, the federal government's use of the outfalls. This is a particularly likely outcome because such injustice would include the continued use of storm drain pipes and outfalls in serious disrepair, whereas the improvement rights would result in a far superior, cleaner storm drain system that will benefit nearby residents and users of San Francisco Bay.

*Federal Government's Position*

I have provided the above analysis to Marilyn Paik, the attorney working on this matter for the federal government's General Services Administration (GSA). Ms. Paik has stated that, regarding the rights reserved in the referenced quitclaim deeds, GSA has never relinquished any of these rights nor other rights as provided under applicable law.

Please do not hesitate to contact Ms. Paik or me with any questions you may have.

Very truly yours,



Cecily T. Barclay

cc: Marilyn Paik, General Services Administration  
James Meek

LEGAL26084300 1

- NEW STAFF OFFICES (REMODEL EXISTING 10,000 SF 2-STORY BLDG)
- NEW STAFF PARKING LOT (22 SPACES + 2 ADA)
- NEW PARK SERVICE YARD
- NEW DROUGHT TOLERANT MEADOW
- GSA PROPERTY LINE
- LOT LINE ADJUSTMENT TO EXISTING FENCE LINE
- NEW GROUP PICNIC SITES
- NEW EXPLORATION TRAIL
- NEW DROUGHT TOLERANT MEADOW
- EXISTING ROCKY SHORELINE INTERTIDAL RAMP



- EXISTING ROCKY SHORELINE INTERTIDAL RAMP
- EXISTING GLORY OF THE SEAS VISITOR CENTER
- NEW CRAB COVE OVERLOOK AMPHITHEATER

- EXISTING NEPTUNE PICNIC AREA
- EXISTING PARKING LOT (33 SPACES + 2 ADA)
- EXISTING CRAB COVE VISITOR CENTER POTENTIAL CONCESSION CAFE SITE
- NEW PARKING LOT (31 SPACES + 4 ADA & 3 BUS)
- NEW ENTRY PLAZA
- POTENTIAL RELOCATION SITE FOR GLORY OF THE SEAS

**CONCEPTUAL PLAN**  
**ROBERT W. CROWN MEMORIAL STATE BEACH**  
 ALAMEDA, CA 6/14/2013