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November 4, 2016

City Council of San Leandro  
c/o Elmer Penaranda, Senior Planner  
City of San Leandro  
835 E. 14<sup>th</sup> Street  
San Leandro, CA 94577

Via Email and Hand Delivery

Re: File item 16-556; Heron Bay HOA kiosk proposal

Dear Honorable Council Members:

As you may be aware, I am the attorney for the Heron Bay Homeowners Association (hereinafter referred to as “the HOA” or “the association”). The purpose of this correspondence is to comment on and to disagree in part with the approval of the Permit Application of Heron Bay Homeowners Association for the installation of a kiosk by the City Planning Commission, which was granted on October 20, 2016. With the agreement of and advise of Senior Planner Elmer Penaranda, Heron Bay did not appeal the decision of the Planning Commission as the HOA agrees with and appreciates the Commission’s approval of the kiosk in general, but wishes to ask the City Council to modify two of the conditions for permit approval stated by the Commission.

The association accepts and is grateful for the decision of the Planning Commission. The association, however, disagrees with three conditions precedent imposed by the Commission on the granting of this approval. As the approval was advisory only, subject to the vote of the City Council, the association respectfully asks the City Council to grant the permit application for the installation of the kiosk with the following modifications from the recommendation of the Commission.

The HOA actually disagreed with three points made by the Planning Commission. Those three areas are as follows:

1. The HOA would prefer to have Anchorage closed to ingress traffic with all of the provisions stated in the permit application and as recommended for approval by the City staff. However, the HOA will accept the decision of the Planning Commission to

deny the closing of Anchorage and limit the HOA to the installation of cameras and license plate readers on HOA property in the Anchorage area.

2. The HOA disagrees with the recommendation to place City approved signage on the kiosk as the HOA has been diligently working with BCDC regarding their signage requirements. This issue is discussed in detail in the memorandum forwarded to Mr. Penaranda on November 3, 2016 by Mr. Jeff Tepper, the consultant and applicant for Heron Bay, and we will defer to that argument in this discussion.

3. The third disagreement is with the Planning Commission and City staff's recommendation regarding the permit restriction that would not allow the attendant at the kiosk, at any time of the day or night, to stop non-resident cars entering Bayfront and would prevent the attendant from asking those non-resident visitors the purpose of their visit. The HOA objects to this restriction as being illogical and unsupported by law.

The Planning Commission was understandably mindful of the intent of all to keep the bay trails open to the public as they have been for the past many years. We want to emphasize that Heron Bay has never asked for and does not intend to stop pedestrians or bicycle riders at the kiosk. They never have done so and do not intend to do so with or without the kiosk. They only ask for permission to briefly stop non-resident cars (all resident cars will have identifying stickers or similar) in order to direct those visitors to the open space area. As repeatedly stated the HOA has no interest in or plans to alter, modify or change open access to the public. However, the HOA is also mindful of the fact that this access is being and has been achieved primarily over Bayfront, which is a private street subject to certain easements. Mr. Tepper has discussed these easements in detail and we would refer the City Council members to that memorandum. We will comment on the highlights of those easements in this correspondence.

It is very important to note that the HOA has been closely working with BCDC, whose easement controls access to the bay trails, for over one year regarding the original gate application (which was denied by this Honorable City Council) and now for the kiosk. To date BCDC has been amenable to the concept of the kiosk on the HOA's private property subject to City approval of the kiosk. The HOA understands that if the City hopefully permits the installation of the kiosk that the HOA will have to submit a permit amendment to BCDC for approval. BCDC is the agency primarily charged with protecting the open-to-the-public concept to the bay trails. To date BCDC has not had an issue with the concept of the stop of non-resident cars at the kiosk as long as the stop is not considered a discouragement or impediment to the open use of the trails. As the HOA has repeatedly stated, they have no intention of discouraging the public's use of the trails. The HOA is only interested in keeping persons with criminal intent to the persons and property of Heron Bay from the Heron Bay property. The purpose of the brief stop at the kiosk is only to ascertain whether or not the persons are intending to use the trails and, if so, they will be welcomed. The HOA has even worked with BCDC to prepare a written script for the attendant to hand out to bay trail visitors. That script will be welcoming persons to the use of the trails. As the Council may already know, there is currently no parking for the public on Bayfront Drive. BCDC recognizes that there is no

public parking on the street and they have never suggested or mandated otherwise. We surmise that BCDC's current agreement with the City, which calls for the City to install 5-6 parking spaces in the roundabout, is the result of BCDC's and the City's recognition that there currently exists no parking for the public, which is readily accessible to the trails.

We ask the Council to also be aware that as of the present time, there is no public vehicle access to the bay trails as there is no parking on Bayfront. At no time has BCDC maintained or contended that the public has the right to park on Bayfront. However, as part of the HOA's application to BCDC we have discussed the installation of several parking places on Bayfront to be used by the public during the hours the bay trails are open. The residents of Heron Bay will not be allowed to use those designated parking spaces during the hours they are reserved for the public visiting the trails. If finalized this will represent a tremendous benefit to BCDC, the City and the public in general. Part of the discussions with BCDC on the role of the attendant at the kiosk involve the attendant directing those persons who intend to visit the trails to the available parking on Bayfront. If the attendant cannot stop non-resident vehicles at the kiosk, then those visitors cannot be advised of the available parking on Bayfront and they will not be given the information regarding the trails, which is anticipated will be handed out by the attendant during the brief stop. Virtually every national and state park and many county parks (for example, Santa Clara County) have kiosks and attendants stopping, greeting visitors and handing out useful park information. The Planning Commission's thought that the stop at the kiosk is a denial of public access is simply without merit, factually and legally. It is particularly aggravating that the Commission even went so far as to deny the ability of the kiosk attendant to stop non-resident vehicles during the night hours when the bay trails are closed to the public. What would possibly be the City or BCDC's interest in denying stops to non-residents on private property when public access to the trails is not even possible. Heron Bay contends that to prevent stops 24/7 is beyond logic and constitutes an abuse of discretion as the restriction is without legal or logical justification.

While Mr. Tepper has ably outlined the history and the current state of the easements called out on the approved tract map for the project, we would offer the following additional comments. At least one member of the Planning Commission has repeatedly offered comments as to what she thought was the original intention of the City and BCDC when the project was first approved. She claims that the parties discussed the concept of parking in an area that we believe is now part of the trail. Notwithstanding the fact that her recollection of what she was told was the intent of the parties and the fact that this would be hearsay in a Court of Law, those "original intentions" are not relevant to the present discussion. What is important is what easements are shown on the Tract Map as approved by all jurisdictions with an interest in the development at the time the maps were approved. These easements, and only these easements, are enforceable as legally binding.

Tract map 6810 dated July 1996 is the map under which this project was constructed. The language on the map and the description of the easements, which was

approved by the City and presumably approved by BCDC pursuant to their permit dated two years earlier, defines the public access granted in the third paragraph. It is stated:

“And said over (sic: owner) hereby dedicates to the public forever, an easement for public ingress and egress to access the public trails, wetland buffer areas, and public interpretive center over, upon, and across those certain strips of land designated as “P.A.E.” (Public Access Easement) as delineated on this map.”

That is the language of the easement approved by the City and BCDC. No amount of hearsay on what discussions preceded this approval and no discussions of what might have been are relevant or legally enforceable. BCDC and the City are entitled to enforce the easements as written. No more and no less. Clearly the entities approving this easement 20 years ago did not intend to grant parking on Bayfront or to even allow vehicular traffic on Bayfront, a public street, except perhaps to drop off people at the trails. If they had intended to expand the easement to include unrestricted traffic or parking, they would have done so. Easements are charges against particular plots of land. As they are restrictions on another’s land, they are not subject to wistful interpretation or the hypothetical. They are what they say. As pointed out by Mr. Tepper in his memorandum, the easement on Bayfront to the trails called for in the plans is specified as an 8’ wide paved path and an additional 4’ shoulder. Obviously these dimensions do not allow for vehicular access and it is irresponsible to suggest that one was anticipated when there is no allowance for vehicles in the map or the permit. As to further meaning of the intent of the parties in approving the development and the map, one need only read the sixth paragraph of the approved map. It states:

“Private storm drain easements, private vehicle access ways, and private pedestrian access easements as shown on this map are for the benefit of the streets and lots tributary to the easement. The maintenance of these private facilities is the responsibility of the homeowner’s association. These easements re not offered for public use, and the use by the public shall be permissive only.”

Again, there is no question but that Bayfront is a public street, no public cars allowed, except with the permission of the HOA and no agency has ever contended otherwise. Heron Bay only asks, in conjunction with the guidelines to be established by BCDC, to briefly stop non-residents during the hours the bay trails are open to determine their intention. If their intention is to visit the bay trails, then the stop will be a helpful experience, directing the visitors to the park and perhaps to available parking, all provided at the largesse of the HOA. There was a suggestion at the Planning Commission that the kiosk constituted a “virtual gate.” This is a legally unsupportable position. Both in the former and the current City Master Plan there is no talk of virtual gates. The reference is not to be found in any public law. The brief stop at the kiosk, is designed to provide an additional layer of safety for the residents of Heron Bay and also to serve as a welcoming station to all members of the public who wish to use the bay trails and facilities. Heron Bay urges the City Council to approve the placement of the kiosk and to allow a brief, unobtrusive stop of non-resident vehicles for safety and welcoming purposes to users of the bay trails.

Respectfully submitted,

A Alan Berger  
Attorney for Heron Bay Homeowners  
Association

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