



City of Emeryville

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March 23, 2017

VIA EMAIL ONLY

Undisclosed Recipients

Re: Your Complaint Regarding Emeryville Marina

Dear Concerned Citizen:

Over the past few weeks, the City of Emeryville (“City”) has received several complaints regarding issues at the Emeryville Marina (“Marina”). Instead of responding to each complaint individually, the City is providing one consolidated response to all complainants because the complaints raise the same issues. Overall, the complaints focus on the actions taken by the Marina operator, Safe Harbor Marina, LLC (“Safe Harbor”), which allegedly resulted in displacement of individuals from the Marina. The complaints request City assistance to intervene in the relationship between slip tenants and Safe Harbor. In addition, some complaints raise concerns about environmental conditions, public safety and fear of retaliation. As explained in further detail below, the City is not able to intervene in the actions being taken by Safe Harbor. In addition, I explain what actions are being undertaken by the City and/or Safe Harbor to address the other concerns.

I. Background

To explain why the City is not able to intervene as requested in the complaints, I will first provide background information as to the various laws that govern the Marina, as well as the relationship between the City and Safe Harbor.

State Lands Commission

The State of California granted the area known as the Emeryville Marina to the City through a series of uncodified statutes.¹ The granting statutes convey the State’s legal title in the land in trust to the City, with the State remaining as the trustor of the grant, and the people of the State of California (not just the people of Emeryville) as the beneficiaries of the grant.² As trustee, the City has a fiduciary duty to manage the

¹ See Chapter 515, Statutes of 1919; Chapter 921, Statutes of 1959; and Chapter 415, Statutes of 1968. Granting statutes can be found here: <http://www.slc.ca.gov/Programs/Grantees/Emeryville.html>.

² Pub. Resources Code, § 6009.1(a).

Emeryville Marina in a manner that is consistent with the public trust doctrine and the Public Resources Code.³

The State, through an agency known as the State Lands Commission, continues to have jurisdiction over the granted property to ensure that the City is fulfilling its duties as trustee.⁴ In general, the State Lands Commission considers private residential use at a marina, e.g., allowing liveaboards⁵, to violate the public trust doctrine.⁶ However, there are instances when the State Lands Commission has allowed a small number of liveaboards for limited periods of times and in limited circumstances in commercial marinas.⁷

San Francisco Bay Conservation and Development Commission

In addition, the San Francisco Bay Conservation and Development Commission (“BCDC”) has jurisdiction over the Marina. The City has held a BCDC permit since 1970, which authorizes that City to expand, improve, maintain and use the Emeryville Marina. The BCDC Permit was most recently amended in 2011. With respect to liveaboards at the Emeryville Marina, Special Condition II.E of the City’s BCDC Permit includes the following conditions (quoted in italics below):

1. *Live-aboard boats authorized to be moored in the marina pursuant to Paragraph I.A.1.m shall be those boats designed and used for active navigation but are distinguished from other navigable boats in that they are also used as a primary place of residence. No houseboats shall be moored in the marina.*
2. *Convenient and adequate parking, showers, garbage facilities sewage pumpout stations, and a minimum of one restroom facility shall be provided and maintained for use by occupants of the live-aboard boats.*
3. *The number of live-aboard boats shall at no time exceed 10% of the total number of berths or up to 38 berths, whichever is less.*
4. *Adequate tidal circulation shall be maintained in the marina.*
5. *Except as specifically authorized in Paragraph I.A.1.m of this authorization, no vessel moored in the marina shall become a long-term place or residence. Any violation of this condition shall be grounds for immediate termination of the berthing rights of any such owner or occupant.*

³ See, e.g., *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, *State of California v. County of Orange* (1982) 134 Cal.App.3d 20; *State of California v. City of Long Beach* (2005) 125 Cal.App.4th 767.

⁴ Pub. Resources Code, § 6009.1(a).

⁵ A liveaboard refers to an individual who lives on an otherwise operable vessel berthed at a marina.

⁶ See Letter dated June 19, 2015, from Andrew M. Vogel, Deputy Attorney General for Kamala D. Harris, Attorney General to Jennifer Lucchesi, Executive Officer, California State Lands Commission re: residential houseboat community at Redwood City’s Docktown Marina.

⁷ *Id.*, p. 2, fn. 2.

6. *Berths shall be rented to the general public without discrimination, and no right to use of an individual berth shall be granted or otherwise transferred that exceeds one year in duration.*

Emeryville Regulations

The City also has local regulations governing the operation, maintenance and use of the Emeryville Marina. In 2000, the Planning Commission approved a conditional use permit (UP99-16) for an Emeryville Marina Master Plan. In 2003, the Planning Commission issued a conditional use, design review and variance permits (UP03-07, DR 03-14, VAR03-02) for a project that revised the master plan, and included the repair, replacement, and addition of docks, as well as other improvements. Title 10 of the Emeryville Municipal Code, "Tidelands", also regulates the use of the Emeryville Marina. In general, Title 10 of the Emeryville Municipal Code prescribes rules of conduct to ensure compliance with the City's obligations as a trustee of the tidelands and with the BCDC permit conditions. Section 10-1.17 of the Emeryville Municipal Code provides that a person may only live on a vessel at the Marina with the written consent of the operator and in compliance with BCDC permits, rules and regulations.

Operation and Management of the Emeryville Marina: Ground Lease

In 2008, the City entered into a ground lease with Emeryville Marina, LLC to manage and operate the Marina ("Lease"). The initial term of the Lease expires on December 31, 2023.⁸ At the conclusion of the initial term, the tenant has the option to renew the Lease for up to another twenty-five years.⁹

Towards the end of 2015, Emeryville Marina, LLC, assigned its rights and obligations under the lease as tenant to Safe Harbor. The relationship between the City and Safe Harbor is governed by the Lease. Overall, the Lease affords the tenant (i.e. Safe Harbor) significant discretion in the management and operation of the Marina.¹⁰ Such discretion includes determining the terms and conditions on which to rent slips to vessel owners (referred to as "Slip Tenants"), and which includes establishing slip rent, late fees, etc.¹¹ The City is not a party to any lease between Safe Harbor and a slip tenant.

II. DISCUSSION

Complaints regarding Displacement

Several of the complaints received express concern that Safe Harbor's recent actions have the effect of displacement on individuals. These actions include increasing slip rents and enforcing the Marina's rules and regulations. Although Safe Harbor is afforded significant discretion in operating and maintaining the Marina, it must do so within the bounds of the law. The Lease between Safe Harbor and the City

⁸ Lease, § 1.03. The Lease is also available from the City Clerk. Please see Footnote 8 for contact information.

⁹ *Id.* § 6.01.

¹⁰ See, e.g., Lease, Art. 33.

¹¹ *Id.*

incorporates the requirements of the BCDC Permit into the Lease and requires Safe Harbor to operate and manage the Marina in a manner that is compliant with state law. Section 33.01 provides that liveaboards at the Marina shall not exceed either 10% of the total number of berths or 38 berths, whichever is less. In addition, to the extent that Safe Harbor is aware of unlawful uses at the Marina, under Section 19.02 of the Lease, Safe Harbor is required to take all reasonable steps to stop such unlawful use.¹² When Safe Harbor took over management of the Marina in late 2015, it discovered that there were uses at the Marina that were inconsistent with state law, including the BCDC Permit, and the Lease. Accordingly, Safe Harbor began taking reasonable steps to bring the uses at the Marina into compliance with the BCDC permit and Lease.

Unfortunately, considering state law, and the terms and conditions of the Lease, the City has no basis in which to interfere in the recent actions that Safe Harbor has undertaken. To the extent there is a dispute between Safe Harbor and a Slip Tenant arising from the rental of the slip, such a dispute is considered a private dispute, and thus, the City would not involve itself.¹³

Furthermore, the City's recently adopted "Residential Landlord and Tenant Relations" ordinance, codified as Chapter 40 of Title 5 of the Emeryville Municipal Code does not apply to the relationship between Safe Harbor and the Slip Tenants. The new ordinance, which becomes effective April 1, 2017, applies to residential housing units or dwelling units only.¹⁴ Although there are boats at the Marina used as a personal residence, a boat falls within the definition of vessel, not residential unit or dwelling unit, and thus, Chapter 40 does not apply to the relationship between Safe Harbor and a Slip Tenant.¹⁵

There are resources to assist individuals facing homelessness. Included as Attachment A is a list of agencies who may be able to assist.

Complaints regarding Environmental Conditions

Some of the complaints allege that there is unlawful dumping of human waste into the bay from the boats at the Marina. The City, Safe Harbor and the members of the Marina all have a vested interest in ensuring the quality of the bay water. Therefore, both the City and Safe Harbor take complaints of unlawful waste disposal in the bay very seriously. The current infrastructure at the Marina is designed to accommodate the small number of liveaboards allowed by the Lease and the BCDC Permit, plus the recreational use at the Marina, not the existing number of people residing on their boats. As the use of the Marina comes into compliance with the Lease terms, the burden on the existing infrastructure will be eased, lessening the unlawful disposal of waste.

¹² See also Emeryville Municipal Code, § 10.1.17 [requiring written consent and permission of Marina operator to have lawful liveaboard status].

¹³ Lease, § 33.03.

¹⁴ Emeryville Municipal Code, § 5-40.02(a).

¹⁵ Emeryville Municipal Code, § 10-1.01(g).

In addition, Safe Harbor is proactive in informing the members at the Marina on how to dispose of waste properly. There is a free pump out station available to all boats. There is also a mobile pump out station that is available for a fee. Safe Harbor informs new Slip Tenants of these options upon execution of a lease.

If you witness unlawful waste disposal at the Marina, I recommend you contact Safe Harbor immediately. They will then contact the U.S. Coast Guard, and other applicable agencies to ensure that the impacts from the disposal are mitigated as soon as possible. These agencies also have the capability to investigate who the perpetrators may be.

Complaints regarding Public Safety Concerns

Some complaints also raised concerns regarding threats to public safety. Prior to Safe Harbor taking over management, there were concerns of drug trafficking, prostitution, and other crimes at the Marina. Safe Harbor became aware of these public safety issues shortly after taking over management, and instituted a safety plan to ensure the safety of the Marina. Implementation of that safety plan takes time, and is a work in progress.

The first step was to communicate the existing rules and regulations to the members and to inform them that Safe Harbor would begin to enforce the existing rules and regulations. Members who failed to comply with those rules and regulations were warned and counseled repeatedly. If a member still could not comply, then Safe Harbor provides a 30 day notice to terminate the slip lease.

In addition to enforcing the rules and regulations, Safe Harbor has undertaken certain improvements to improve safety. There is a night time security firm patrolling the premises. A new key fob system is utilized to ensure that only members have access to the secured areas. Lighting at the Marina is in the process of being upgraded.

Finally, Safe Harbor has hosted events where members and public safety personnel from different agencies may interact. The purpose of such meetings is to ensure that members have the information they need to protect their own safety, and that both Safe Harbor and public safety personnel are aware of any public safety issues at the Marina.

Thus, if a crime has occurred, or you feel that your safety is threatened, you should contact the Emeryville Police Department directly at either at 510-596-3700 for non-emergency matters and 9-1-1 for emergency matters. You also may want to consider notifying Safe Harbor so they may take appropriate action as well.

Complaints Regarding Retaliation

Finally, several complainants communicated that they did not raise their complaint with Safe Harbor because they feared retaliation from Safe Harbor. An individual is always free to raise a complaint with the City. However, as discussed above, because of the

law and the terms of the Lease, the resolution of a complaint involving the Marina typically requires the involvement of Safe Harbor. Safe Harbor mentioned that they are undertaking activities designed to foster a community at the Marina, such as the Emeryville Marina Day, scheduled on March 18, 2017, and other social activities. Nonetheless, if you feel that your rights have been violated, you may contact either the State Bar of California Lawyer Referral Service at 866-442-2529 or the Alameda County Bar Referral Service at 510-893-7160. Please note that the City Attorney's Office represents the City of Emeryville, as an entity, not any one individual or resident of the City. The City Attorney's Office cannot provide you with legal advice.

I hope that this letter addresses your concerns. Copies of the Lease, the AG opinion cited herein, and the BCDC Permit are available to review at the Reception Desk at City Hall, 1333 Park Avenue, Emeryville, CA, during normal business hours and I will provide a copy of these documents to Safe Harbors. The documents are too voluminous to include as an attachment to this emailed letter.

Very Truly Yours



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Assistant City Attorney

cc: City Council
Michael Guina, City Attorney
Carolyn Lehr, City Manager
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