BAY PLANNING COALITION
303 WORLD TRADE CENTER
SAN FRANCISCO, CA 94111

# BCDC PUBLIC ACCESS REQUIREMENTS

## 1. McAteer-Petris Act and Bay Plan Public Access Policies

A central feature of the 1969 amendments to the McAteer-Petris Act was that maximum feasible access to the Bay should be provided consistent with the nature of a project. In addition, the San Francisco Bay Plan findings and policies on public access, adopted by reference in 1969, elucidates how BCDC is to fulfill this public access mandate. Since then, the interpretation of the Act and the Plan has been difficult, particularly as to whether public access should be provided at shoreline industrial and port sites where hazards to public access users may exist.

In 1979, the Public Access section of the Bay Plan was amended. That, along with Commission actions on permit conditions, has indicated a constant evolution in the interpretation of the original McAteer-Petris Act language. What was once considered "maximum" is now being defined as minimum; where at one time certain projects were excluded from an access requirement because of hazards at the project site, now no project is excluded.

The McAteer-Petris Act gave BCDC the legal authority to require public access as a condition to a permit. The Act contains three pertinent findings and declarations of policy regarding public access:

Section 66602:

> The Legislature further finds and declares that certain water-oriented land uses along the bay shoreline are essential to the public welfare of the bay area, and that such uses include ports, water-related industries, airports, wildlife refuges, water-oriented recreation and public assembly, desalinization plants and powerplants requiring large amounts of water for cooling purposes; that the San Francisco Bay Plan should make provision for adequate and suitable locations for all such uses thereby minimizing the necessity for future bay fill to create new sites for such uses; that existing public 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.

Section 66602.1

> The Legislature further finds and declares that areas diked from the bay and used as saltponds and managed as wetlands are important to the bay area...; that, if any such areas are authorized to be developed and used for other purposes, the development should provide the maximum feasible

public access to the bay consistent with the proposed project and should retain the maximum amount of water surface area consistent with the proposed project.

Section 66632.4

Within the portion or portions of the shoreline band which shall be located outside the boundaries of water-oriented priority land uses, as fixed and established pursuant to Section 66611, the commission may deny an application for a permit for a proposed project only on the grounds that the project fails to provide maximum feasible public access, consistent with the proposed project, to the bay and its shoreline.

Early in BCDC's history, the Commission strictly construed these public access provisions. Public access was only required where it was "consistent with the proposed project" and where there were no safety or use conflict issues raised. If a safety problem was a concern at the project site, then no access was required.

In the last nine years, the Commission has more liberally interpereted these sections of the Act to mean that public access, in some form or some place, should be required in all permits, including shoreline industrial areas and ports. If hazards exist at the project site, then public access should be provided off-site.

BCDC's current liberal interpretation of the Act is consistent with the liberal interpretation of environmental legislation. The specific question becomes though, is the present interpretation consistent with the intent of the California Legislature when it adopted the Act language?

A review of the different versions of the public access section and the sequences of the language recommended by the different legislators in 1969, provides insight as to what the Legislature had in mind when it finally concluded that the language adopted best stated its intent.

It is important to remember that the public access langauge in the Act did not exist in 1965, when BCDC was formed and directed to write a Bay Plan. That language was not adopted until 1969. Thus, the Legislature had the benefit of the Bay Plan findings, recommended policies and reports as a basis to formulate the law. The relevant Bay Plan public access policy states:

> "...maximum feasible opportunity for pedestrian access to the waterfront should be included in every new development in the Bay or on the shoreline, whether it be for housing, industry, port, airport, public faciltiy, or other use. If no such access can reasonably be provided,

> the development shoudl not be allowed on the waterfont unless it must of necessity be there (i.e., unless it is an industry requiring access to deep water, a shipping terminal, etc)."

2. Companion Bills and Amendments Preceding Adoption of the McAteer-Petris Act (AB 2057).

Per Senate Bill 309 (the 1965 bill which created BCDC for the purpose of preparing the Bay Plan), the Commission was to go out of existence after the Legislature's adjournment from the 1969 regular session.

A.B. 2057, introduced by Assemblyman Knox, extended the existence of BCDC and increased its powers. It was this legislation which added the pertinent public access provisions -- Sections 66602, 66602.1 and 66632.4. However, that language did not appear until July, 1969, in the final days of the session. There was no amendment and reamendment of this language in the A.B. 2057 versions, indicating that the public access language sprung from other bills.

In a August 7, 1969 letter from then Deputy Attorney General, E. Clem Shute, Jr., "Some of the Significant Additions and Changes in the McAteer-Petris Act as Amended by A.B. 2057" are discussed. He states:

> The Bill lists the priority water-oriented land uses; the commission may add to this list . . . . In non-priority areas, commission jurisdiction extends to a review of a proposed shoreline development to determine whether the development will provide the maximum feasible public access to the bay and shoreline which is consistent with the development. . . . Within the priority areas, the commission is authorized to review permit applications to insure that proposed uses are consistent with the particular priority use for that area and to determine if maximum public access consistent with the proposed project will be provided.

The tone of the letter suggests that in some circumstances public access would be inappropriate to a project and while the project would be permitted, public access may not be required (as long it was consistent with the priority use).

Six other bills were also introduced during the 1969 legislative session which contained provisions regarding BCDC's duties and powers. Three of these companion bills contain public access language. None of them were voted upon by either house. However, the type and variety of public access amendments in the bills, compared to what was ultimately adopted, arguably exposes the legislature's intent: In some circumstances, public access is appropriate, in other circumstances it is not. Further, since no specific reference was ever made to in-lieu access, such was never contemplated or was specficially excluded.

The first such companion bill, S.B. 117, was introduced by Senator Marks on January 16, 1969 and amended March 6, March 13, March 26 and July 9. It was the the July 9, 1969 version which added the following:

> Section 66602:
> The Legislature further finds and declares that . . . some shoreline areas should be designated and reserved on a regional basis for high-priority water-related uses of substantial public benefit to the region as a whole, including ports, water-related industry, . . . . [T]he public access to San Francisco Bay and its shoreline is presently insufficient and maximum feasible public access should be provided. . . .
>
> Section 66605:
> The Legislature further finds and declares. . . that (a)Filling in San Francisco Bay . . . shall be approved only if it meets these conditions: . . . (3) Maximum feasible opportunity for public pedestrian access to the waterfront is included and will be permanently guaranteed, unless it cannot reasonably be provided and the project must of necessity be located at the proposed site. . . .

A second companion bill, S.B. 839, was introduced by Senator Dolwig on March 28, 1969 and subsequently amended. The key provisions of the bill were:

> 62003.1:
> The Legislature further finds and declares that, in the public interest, shoreline areas should be designated and reserved on a regional basis for high-priority bay-related uses of substantial public benefit for the region as a whole, including ports [and] water-related industry, . . . .; and further finds and declares that the maximum feasible public access to San Francisco Bay and its shoreline is needed and should be provided.
>
> Section 62300(11)
> Development, as defined in Section 62010, in a shoreline area . . . should be approved only if maximum feasible opportunity for public pedestrian access to the waterfront is included and will be permanently guaranteed, unless it cannot reasonably be provided and the project must of necessity be located at the proposed site.

The final companion bill which contained public access language was S.B. 1181, introduced by Senator McCarthy on April 8, 1969. This version recommended the following language:

> 66632(d):
> . . .A permit may be granted for a project if the project is either (1) necessary to the health, safety or

> welfare of the public in the entire bay area, or (2) for a purpose which is in accordance with the commission's plan for the particular areas in question, provided, however, that where a proposed project provides substantial public benefits and complies with local zoning regulations of the city, county or city and county having zoning jurisdiction over the proposed project, a permit shall be granted as of right notwithstanding any conflict with the commission's plan.
> . . .
> For purposes of this title, substantial public benefits shall include, but not be limited to, the following: 1. Port facilities, including but not limited to wharves, docks, piers, slips, quays, marine terminals, containership facilities and areas for directly related ancillary activities such as . . . (Emphasis added).
> . . .
> In granting a permit under this chapter, the commission may attach reasonable terms and conditions pertaining and limited to. . . . In addition, taking into consideration the nature and character of the particular land use proposed for a project, the commission in granting a permit hereunder, may also require that a reasonable portion of the shoreline of the completed project be established as a permanent shoreline over which there shall be permanent public access.

The McCarthy language specifically found that certain projects provide "substantial public benefits" and therefore, such projects should be permitted. Even though it concluded with the public access requirements, the implication is that those requirements are subservient to certain public benefits.

There is enough evidence from all of the bills, and even the final language in AB 2057, to conclude that the Legislature was aware of and acknowledged the concern about the incompatibility of public access with certain developments which otherwise should be permitted.

The language leaves it open to BCDC's judgment as to when or where, if at all, access will be required. One may argue the language does not preempt BCDC from requiring access on all permits no matter what the use because the Act, and general administrative agency law, gives the Commission broad discretionary authority to interpret its legislation. While this may be true, it seems that a reasonable interpretation is that the intent of the legislation was not to give BCDC carte blanche in requiring access.

3. The 1969 Bay Plan and 1979/1983 Bay Plan Amendments:

The original 1969 Bay Plan findings and policies regarding public access remained unaltered for ten years, notwithstanding

the increasingly liberal interpretation of the language. In 1979, by Resolution #65 (see Appendix 'A') the Commission amended the Bay Plan as follows (1969 language is lined out; new language is underlined):

> In addition to the public access to the Bay ~~((that will be))~~ provided by waterfront parks, beaches, marinas, and fishing piers, maximum feasible ~~((opportunity for pedestrian))~~ access to and along the waterfront and on any permitted fills should be ~~((included))~~ provided in and through every new development in the Bay or on the shoreline, whether it be for housing, industry, port, airport, public facility, or other use, except in cases where public access is clearly inconsistent with the project because of public safety considerations or significant use conflicts. In these cases, access at other locations, preferably near the project site, should be provided whenever feasible. ~~((If no such access can reasonably be provided, the development should not be allowed on the waterfront unless it must of necessity be there (i.e., unless it is an industry requiring access to deep water, a shipping terminal, etc.).))~~

The key addition is the language which allows BCDC to require access (when feasible) at other locations when use conflicts on the project site occur.

The purpose behind amending the Bay Plan was the Commission's belief, based on its then several years of experience, that the public access policies wre not being carried out and, unless more forcefully applied, would lose credibility. Thus, in the Commission's eyes, the broad public access mandate established for it in the Act was not being fulfilled to its maximum extent.

Throughout the extensive public testimony, Commission debate on these amendments and minutes to these meetings show that only infrequently was there any specific discussion or recognition of the significant policy transition being made by BCDC from the 1969 Bay Plan to the 1979 amendments. No one questioned whether or not the addition of the language allowing BCDC to require off-site access conditions was a legal extrapolation from the McAteer-Petris Act. Only one commissioner raised the issue of whether BCDC was moving away from the original intent of the Act and the Plan which recognized that there are legitimate reasons why access should not be required, at all, of certain applicants in specific circumstances. The result of the application of the 1979 amendments has meant that virtually no project is exempt from access requirements. The phrase "whenever feasible" is being rendered superfluous.

APPENDIX 'A'

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
30 Van Ness Avenue, San Francisco 94102 557 - 3686

March 30, 1979

RESOLUTION NO. 65
Adopting the Public Access Supplement
to the San Francisco Bay Plan; Adopting Amendments
to the Bay Plan Findings and Policies on Public Access,
Appearance and Design, and Scenic Views; Certifying the
Negative Declaration on the Supplement
and the Bay Plan Amendments;
and Amending the Commission's Coastal Zone Management
Program for San Francisco Bay

WHEREAS, on January 20, 1977, the Commission approved a program for preparation of a Public Access Supplement to the Bay Plan to assist both applicants and the Commission in satisfying the requirements of the McAteer-Petris Act; and

WHEREAS, tentative drafts of all the elements of the Public Access Supplement (the Bay Shoreline Element, the Appearance and Design Element, and the Implementation Element), and a staff draft of the Supplement itself have been the subject of numerous hearings before the Commission; and

WHEREAS, the Bay Shoreline Element of the Public Access Supplement consists, in part, of geographically specific findings and conclusions for the entire shoreline of the Bay, and these were presented to the public in a series of eight evening meetings held in 1977 and 1978 at various locations around the Bay; and

WHEREAS, the Implementation Element of the Public Access Supplement recommends amendments to the Bay Plan Findings and Policies on Public Access, Appearance and Design, and Scenic Views; and

WHEREAS, Government Code Section 66652 provides that:

> "The Commission at any time may amend, or repeal and adopt a new form of, all or any part of the San Francisco Bay Plan, but such changes shall be consistent with the findings and declarations of policy contained in this title.
>
> "Such changes shall be made by resolution of the Commission adopted after public hearing on the proposed change, of which adequate descriptive notice shall be given. If the proposed change pertains to a policy or standard contained in the San Francisco Bay Plan, or defines a water-oriented use referred to in Section 66602 or 66605, the resolution adopting the change shall not be voted upon less than 90 days following notice of hearings on the proposed change and shall require the affirmative vote of two-thirds of the Commission members. If the proposed change pertains only to a map or diagram contained in the San Francisco Bay Plan, the resolution adopting the change shall not be voted on less than 30 days following notice of hearing on the proposed change, except that changes proposed under Section 66611 shall not be voted on less than 90 days following such notice and shall, except as provided by Section 66611, require the affirmative vote of the majority of the Commission members."; and

WHEREAS, on June 15, 1978, adequate descriptive notice in the form of a brief descriptive summary of proposed amendments to the Findings and Policies on Public Access, Appearance and Design, and Scenic Views of the San Francisco Bay Plan was given to the public, was mailed to all persons known to have a particular interest in said amendments, and in addition was given wide publicity in the media; and

WHEREAS, on February 1, February 15, March 1, and March 15, 1979, public hearings were held on said amendments by the Commission; and

WHEREAS, the Commission staff, pursuant to Section 15080 of the State Environmental Impact Report Guidelines, has prepared and circulated through the State Clearinghouse a draft Negative Declaration for the Supplement and the proposed amendments to the Bay Plan; and

WHEREAS, on March 15, 1979, the Commission conducted a public hearing on the Supplement and the Bay Plan amendments as proposed amendments to the Commission's Coastal Zone Management Program for San Francisco Bay;

NOW, THEREFORE, BE IT RESOLVED, that, pursuant to the State Environmental Impact Report Guidelines and the Commission's Regulations, the Commission certifies the Negative Declaration for the Public Access Supplement and the Bay Plan amendments, dated January 5, 1979;

BE IT FURTHER RESOLVED, that the Commission adopts the Public Access Supplement to the San Francisco Bay Plan, consisting of the text with appendices as proposed by the staff in the "Final Staff Draft" of the Public Access Supplement, dated March 12, 1979, as modified by the addendum dated March 30, 1979, and the eight detail maps at a scale of 1:24,000 on file in the Commission offices, such Supplement to serve as an advisory guide to the Commission and others in providing and maintaining public access to and along the shoreline of San Francisco Bay;

BE IT FURTHER RESOLVED, that, pursuant to Government Code Section 66652, the Commission adopts the amendments to the Bay Plan contained in the document entitled: "March 30, 1979, FINAL DRAFT, APPENDIX C -- PUBLIC ACCESS SUPPLEMENT, PROPOSED BAY PLAN AMENDMENTS TO: FINDINGS AND POLICIES ON PUBLIC ACCESS, APPEARANCE AND DESIGN, AND SCENIC VIEWS: AND PORTIONS OF PART V," and transmitted to the Commission with the Staff Recommendation on the Public Access Supplement.

**BE IT FURTHER RESOLVED, that the Commission adopts both the Public Access Supplement and the amendments to the Bay Plan as amendments to the Commission's Coastal Zone Management Program for San Francisco Bay.**

We hereby certify that:

The foregoing Resolution was adopted by the San Francisco Bay Conservation and Development Commission at its meeting of April 5, 1979 by a vote of 20 affirmative, 0 negative.

JOSEPH C. HOUGHTELING
Chairman

Date: June 13, 1979

MICHAEL B. WILMAR
Acting Executive Director

Several sections of the Subdivision Map Act (Government Code Sections 66478.1 through 66478.14) are intended to implement the above provisions of the Constitution regarding public access to navigable waters. One section is particularly applicable to the Bay:

> 66478.11 Subdivision fronting on coastline or shoreline; provision for reasonable public access; access available near subdivision.
>
> (a) No local agency shall approve either the tentative or the final map of any subdivision fronting upon the coastline or shoreline which subdivision does not provide or have available reasonable public access by fee or easement from public highways to land below the ordinary high water mark on any ocean coastline or bay shoreline within or at a reasonable distance from the subdivision.
>
> Any public access route or routes provided by the subdivider shall be expressly designated on the tentative or final map, and such map shall expressly designate the governmental entity to which such route or routes are dedicated.
>
> (b) Reasonable public access, as used in subdivision (a), shall be determined by the local agency in which the subdivision lies.

(c) In making the determination of what shall be reasonable public access, the local agency shall consider:

(1) That access may be by highway, foot trail, bike trail, horse trail, or any other means of travel.

(2) The size of the subdivision.

(3) The type of coastline or shoreline and the various appropriate recreational, educational, and scientific uses, including, but not limited to, diving, sunbathing, surfing, walking, swimming, fishing, beachcombing, taking of shellfish and scientific exploration.

(4) The likelihood of trespass on private property and reasonable means of avoiding such trespasses.

(d) Nothing in this section shall require a local agency to disapprove either a tentative or final map solely on the basis that the reasonable public access otherwise required by this section is not provided through or across the subdivision itself, if the local agency makes a finding that such reasonable public access is otherwise available within a reasonable distance from the subdivision.

Any such finding shall be set forth on the face of the tentative or final map.

(e) The provisions of this section shall not apply to the final map of any subdivision the tentative map of which has been approved by a local agency prior to the effective date of this section.

(f) The provisions of this section shall not apply to the final or tentative map of any subdivision which is in compliance with the plan of any planned development or any planned community which has been approved by a local agency prior to December 31, 1968. The exclusion provided by this subdivision shall be in addition to the exclusion provided by subdivision (e).