

From: [Rita August O'Flynn](#)
To: [Garrett_Jamie@SLC](#); [Crunk_Warren@SLC](#)
Cc: [Blackmon_Seth@SLC](#); [Mark O'Flynn](#); [Lucchesi_Jennifer@SLC](#)
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.
Date: Monday, September 11, 2023 8:54:19 AM
Attachments: [image004.png](#)
[image005.png](#)
[image006.png](#)
[image007.png](#)

Attention: This email originated from outside of SLC and should be treated with extra caution.

I wanted to provide the following in response to the letter provided by Warren Crunk in the email string below as it was received after I filed a claim for injunctive relief.

I believe Attorney Crunk's communication is further evidence of CSLC's attempts to deflect its regulatory and legal responsibility for the OHWM by making references to "ambulatory water boundaries".

The CSLC's own website, provides the following:

*"The Commission is **the recognized authority for determining the location of the ordinary high water mark** in California."*

"The Commission is authorized to establish the ordinary high water mark (or ordinary low water mark) by agreement or action to quiet title (Pub. Resources Code § 6357) and is a necessary party to any title or boundary action involving granted tide and submerged lands (Pub. Resources Code § 6308)."

*"Except for those locations where the boundary has been permanently fixed by either a court or an agreement with the Commission, the boundary of most of the lands under the Commission's jurisdiction is what is referred to as an ambulatory boundary because it moves. This movement is because the boundary is based on the location of the water. As a practical matter, this means that surveys taken on separate days may show the boundary at different locations. It is important to realize that a watermark on a beach is not the boundary. **The only way to accurately locate an ambulatory boundary is to have an area surveyed by a licensed surveyor with expertise in water boundaries** (emphasis added)." Additionally, the CSLC's website provides: "**Tips on how to conduct a Mean High Tide Line Survey where the boundary remains ambulatory: To determine the elevation of Mean High Tide Line on the shore one should use either the published Mean High Water elevation from a National Oceanic and Atmospheric Agency published tide station closest to the project or a linear interpolation between two adjacent tide stations, depending on the most appropriate approach in light of tidal regime characteristics.***

- The current tidal datum should be used (Presently NAVD88).*
- The most current tidal epoch should also be used (Presently 1983-2001 epoch)."*

Given the above, **I had every reasonable expectation** that: a) the **CSLC's surveyors have the expertise in water boundaries** and b) the survey conducted in February of 2020 would result in a **correct and legal OHWM my property**. Hogan Land Services is not authorized to establish an OHWM and their surveys to do not serve as legal documentation of the OHWM on my property, that's the responsibility of the CSLC.

CSLC did not determine tidal influence at any time at the subject location, thus any claims that the Commission now makes that **the Russian River at this location is ambulatory is unsupported**. Furthermore, It could be argued that avoiding determination of tidal influence allowed the CSLC greater latitude in establishing the OHWM in 2016 at 27.35 ft. As you know, this materially flawed OHWM claimed large swaths of the riverfront of 4 privately-owned for public use under the Public Trust Act. Having often observed a tidal influence on our property, I believe that, had tidal influence been determined back in 2016, it is likely that it the mean of the high tide, (the method recommended on your website for determining the OHWM on ambulatory bodies) would be inches, not feet above the low water mark. This would have negatively impacted the Russian River Recreation and Parks Districts plans to make broad public river access on private properties from a non-riverfront property.

While the CSLC may claim it had no mandatory duty to perform an OHWM, Bugsch statements in 17 March 2017 indicates that one was performed: "**Staff has now completed the survey locating the ordinary high water mark (high water) of the Russian River adjacent to Sonoma County Assessor's Parcel Numbers (APN) 071-220-018, 071-220-019, 071-220-020, 071-220-067, and 071-220-068, located in Guerneville, Sonoma County. Based on the field survey data, Commission staff determined that high water**

is located at Elevation 27.35 feet, NAVD88..." Bugsch's statements do set the expectation that the establishment of the OHWM would be done with **appropriate, accepted methods for doing so and in compliance with State and Federal law**. Once Bugsch letter went out, I believe the the CSLC was obligated to follow Pub. Resources Code § 6357 and Pub. Resources Code § 6308, which regulate the establishment of an OHWM.

We are in possession of a memo between CSLC surveyors, Daniel Frink and James Koepeke, of 20 June 2016 providing the costs of performing a determination of the OHWM at, what I interpret to be **\$71,900** (360 hours) including \$4,900 to determine tidal influence. Based on this memo, we are assuming that the repeat survey conducted in 2020 has an approximate cost of **\$34,450.00** (150 hours per the 20 June 2016 memo). Minus the cost of tidal determination, I estimate that the surveys alone have cost the CSLC **\$106, 350**, or **over 50% higher the original budget, which included tidal determination**.

We are also in receipt of a spreadsheet with hours for Ninette Lee and Daniel Frink with a total of 611 hours. Assuming 510 of these hours can be allotted to the preparation of the survey as noted above, this leaves 101 hours for Ninette Lee. Based on Lee's gross salary for 2020, her hourly rate is \$82.77 for a total of **\$8360.36**.

This means the CSLC has likely spent at least **\$114,710.36** on this matter to date **to perform 2 surveys**, but **still hasn't done the necessary boundary agreement or secured the Board approval needed to legally establish the OHWM**. We suspect this amount is significantly higher, given that we do not have the hours from other CSLC employees such as Brian Bugsch, James Koepke, and Jaime Garrett. It's unclear why these costs aren't being charged back to Russian River Recreation and Parks District, as the CSLC has the right to do.

We have, and continue to suffer because of the acts and omissions on the part of the CSLC and it's staff. This week we again had our permitted seasonal fence which protects our riparian restoration torn down by someone who thinks there is a right to public access on my property. To date, we have spent almost \$30,000 on our restoration project only to have our efforts thwarted by those who believe they have a right to be on our property because of "The California State Lands Commission". This was the 3rd time this year the fence was removed and is part of our ongoing damages in this matter.

The 45-day window to respond to our claim has passed; we now have 2 years to take legal action. I do hope that the CSLC will give serious consideration to addressing this matter prior to costly litigation as we believe it can be easily remedied.

Please reach out to us via email if you wish to discuss.

Rita O'Flynn

PS. Please make sure this is including in the upcoming Board Meeting package under correspondence.

Sent from [redacted] for Windows

From: [Garrett, Jamie@SLC](mailto:Garrett.Jamie@SLC)
Sent: Tuesday, July 18, 2023 10:00 AM
To: [Rita August O'Flynn](mailto:Rita.August.O'Flynn); [Mark O'Flynn](mailto:Mark.O'Flynn)
Cc: [Crunk, Warren@SLC](mailto:Crunk.Warren@SLC); [Blackmon, Seth@SLC](mailto:Blackmon.Seth@SLC)
Subject: RE: Ordinary Highwater Mark at [redacted] River Lane Guerneville, CA.

Thanks Rita
Best,
Jamie

From: Rita August O'Flynn <rita_august@>
Sent: Tuesday, July 18, 2023 9:49 AM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>; Mark O'Flynn <markoflynn@>
Cc: Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>; Blackmon, Seth@SLC <Seth.Blackmon@slc.ca.gov>
Subject: RE: Ordinary Highwater Mark at [redacted] River Lane Guerneville, CA.

Attention: This email originated from outside of SLC and should be treated with extra caution.

Here is a copy of the claim we filed.

Rita O'Flynn

Sent from for Windows

From: [Garrett, Jamie@SLC](mailto:Garrett.Jamie@SLC)
Sent: Tuesday, July 18, 2023 9:43 AM
To: [Mark O'Flynn](mailto:Mark.O'Flynn); [Rita August O'Flynn](mailto:Rita.August.O'Flynn)
Cc: [Crunk, Warren@SLC](mailto:Crunk.Warren@SLC); [Blackmon, Seth@SLC](mailto:Blackmon.Seth@SLC)
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Mark,

This letter is in response to a request you made several months ago. I'm afraid I have not seen a recent claim in the past week. But please let us know if we missed something.

Thanks,
Jamie

From: Mark O'Flynn <markoflynn@>
Sent: Tuesday, July 18, 2023 9:36 AM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>; Rita August O'Flynn <Rita_August@>
Cc: Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>; Blackmon, Seth@SLC <Seth.Blackmon@slc.ca.gov>
Subject: Re: Ordinary Highwater Mark at River Lane Guerneville, CA.

Attention: This email originated from outside of SLC and should be treated with extra caution.

Hi Jamie,

Is this letter a formal rejection of our claim which was filed last week?

Mark O'Flynn Attorney at Law
DRE 01297176

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From: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>

Sent: Monday, July 17, 2023 4:06 PM
To: Rita August O'Flynn <rita_august@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@slc.ca.gov>; Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>; Blackmon, Seth@SLC <Seth.Blackmon@slc.ca.gov>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Rita,
Thank you for your patience. Attached is a letter from our Chief Counsel in response to your request.
Best,
Jamie

From: Rita August O'Flynn <rita_august@slc.ca.gov>
Sent: Thursday, June 22, 2023 10:47 AM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@slc.ca.gov>; Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Attention: This email originated from outside of SLC and should be treated with extra caution.

Any updates?

Rita

Sent from [redacted] for Windows

From: Garrett, Jamie@SLC
Sent: Thursday, June 15, 2023 12:00 PM
To: Rita August O'Flynn
Cc: Mark O'Flynn; Crunk, Warren@SLC
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Thanks for following up on this Rita, I will work with SLC management and try to get you a response soon.

Best,
Jamie

From: Rita August O'Flynn <rita_august@slc.ca.gov>
Sent: Thursday, June 15, 2023 10:26 AM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@slc.ca.gov>; Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.
Importance: High

Attention: This email originated from outside of SLC and should be treated with extra caution.

Hi Jamie,

As you can see from the email string, we have been trying to get resolution on legally establishing the OHWM for almost a year now. May we please have an update?

With Kind Regards,

Rita O'Flynn

Sent from for Windows

From: [Garrett, Jamie@SLC](mailto:Garrett.Jamie@SLC)
Sent: Thursday, October 6, 2022 9:01 AM
To: [Rita August O'Flynn](mailto:Rita.August.O'Flynn)
Cc: [Mark O'Flynn](mailto:Mark.O'Flynn); [Crunk, Warren@SLC](mailto:Crunk.Warren@SLC)
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Rita,
Attached are the emails to Marina and Nathan.

Best,
Jamie

From: Rita August O'Flynn <rita_august@>
Sent: Thursday, October 6, 2022 6:30 AM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@>; Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>
Subject: Re: Ordinary Highwater Mark at River Lane Guerneville, CA.

Attention: This email originated from outside of SLC and should be treated with extra caution.

May I have a copy of what was sent Marina and Nathan, referred to in your earlier email?

Rita O'Flynn

Sent from Samsung Galaxy smartphone.

Get

From: Rita August O'Flynn <rita_august@>
Sent: Saturday, September 17, 2022 11:42:56 AM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@>; Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>
Subject: Re: Ordinary Highwater Mark at River Lane Guerneville, CA.

Thank you for this update. Can you please share with us what has been communicated to Marina Herrera and Nathan Junge?

With Kind Regards,

Rita O'Flynn

Sent from Samsung Galaxy smartphone.

Get

From: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Sent: Thursday, September 1, 2022 4:40:12 PM
To: Rita August O'Flynn <rita_august@>
Cc: Mark O'Flynn <markoflynn@>; Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Rita,

I appreciate the clarification. I was hoping that recording a record of survey with the revised elevations would address your concerns. But it seems like your request is to establish a boundary line at your property. The Commission's avenue for establishing a boundary is a boundary line agreement, which is governed by Public Resources Code section 6357. I am informing management on this request to get their perspective but, as I have mentioned in previous conversations, this does not seem like a situation where a boundary line agreement would be allowed since the boundary must be susceptible to being fixed and no longer ambulatory due to fill or artificial accretion. Even if we were to explore a boundary line agreement solution, such action requires at least a year to complete and must be approved by both the Commission and the Governor.

Commission management may have additional ideas to address this issue, but I want to be upfront that a November timeframe is unlikely. In the meantime, I have contacted both Marina Herrera at Sonoma Permits and Nathan Junge at Russian River Parks District to make sure they are aware Commission staff revised its elevation for the OHWM at your location, in case that information has bearing on their decisions.

Lastly, I will be out of the office from September 5th to September 23rd. In the event that we have any developments on our end while I am out, another Commission representative will contact you and let you know.

Best,
Jamie

From: Rita August O'Flynn <rita_august@slc.ca.gov>
Sent: Wednesday, August 31, 2022 4:52 PM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@slc.ca.gov>; Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>
Subject: Re: Ordinary Highwater Mark at River Lane Guerneville, CA.

Attention: This email originated from outside of SLC and should be treated with extra caution.

I am informed that, per ACE, tidal influence ends at the Vacation Beach dam.

Rita O'Flynn

Sent from Samsung Galaxy smartphone.

Get

From: Rita August O'Flynn <rita_august@slc.ca.gov>
Sent: Wednesday, August 31, 2022 4:44:17 PM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@slc.ca.gov>; Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Jamie,

I am aware of this. This amended survey also has an "ordinary low water mark" as determined by Hogan Land Services. Hogan Land Services is not authorized to establish an Ordinary Low Watermark and the one they have recorded sits above the Ordinary Highwater Mark; this is utter nonsense. Regardless, Permit Sonoma who has chosen to go with the earlier survey Hogan with the recorded with the 27.35 ft OHWM as a means of declaring 1/3 or my property as publicly accessible under the Public Trust. In discussion with Permit Sonoma they essentially blew off the amended Hogan Survey and were comfortable with the Commission's old survey map. This was hard to argue given Bugsch's statements in his September 2020 letter that the OHWM is ambulatory, a specific moment in time, and subject to change and that no amended map was included. As you know, none of Bugsch's statements are consistent with the regulatory definition of an OHWM, accepted standards for an OHWM (Army Corps of Engineers), and even the CSLC's own website.; I can only assume that this was intentional.

I need the Commission to formalize/finalize the 17 ft OHWM (20ft is consistent with the river when the summer dams are in place and cannot be considered the OHWM), before the end of November. There is an appeal hearing in December and I would like to submit the final OHWM along with an amended survey map to Permit Sonoma in advance. Without this, I expect Permit Sonoma to

confirm its approval of a public beach, inclusive of my property, forcing us into legal action. Should we reach this point, I will be asking that the Commission be compelled to determine whether there is tidal influence and, if there is, to conduct yet another survey to the standards acceptable for tidal bodies of water.

Please let me know if you have any questions or if you would like to discuss means to address this matter.

With Kind Regards,

Rita O'Flynn

Sent from for Windows

From: [Garrett, Jamie@SLC](mailto:Garrett.Jamie@SLC)
Sent: Wednesday, August 31, 2022 4:08 PM
To: [Rita August O'Flynn](mailto:Rita.August.O'Flynn)
Cc: [Mark O'Flynn](mailto:Mark.O'Flynn); [Crunk, Warren@SLC](mailto:Crunk.Warren@SLC)
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Rita,

Our staff is still working on this. In looking into this matter, we learned that an amended Record of Survey has been filed by Hogan Land Surveys showing the new 2020 elevations. Are you aware of this revised recording?

Thanks,
Jamie

From: Rita August O'Flynn <rita_august@>
Sent: Monday, August 29, 2022 12:11 PM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@>; Crunk, Warren@SLC <Warren.Crunk@slc.ca.gov>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Attention: This email originated from outside of SLC and should be treated with extra caution.

Do you have any updates for us?

Rita O'Flynn

Sent from for Windows

From: [Garrett, Jamie@SLC](mailto:Garrett.Jamie@SLC)
Sent: Friday, August 19, 2022 1:59 PM
To: [Rita August O'Flynn](mailto:Rita.August.O'Flynn)
Cc: [Mark O'Flynn](mailto:Mark.O'Flynn); [Crunk, Warren@SLC](mailto:Crunk.Warren@SLC)
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Rita,

I apologize for the delay. We are working internally on this issue, but we are currently short-staffed and working through requests as quickly as possible. I have informed management that you are frustrated with our response time and may speak at the

Commission meeting. I will let you know if I have any updates before then. If you do choose to speak, please note that our Commission meeting is on Tuesday, August 23rd (Not the 29th).

I hope you have a nice weekend,
Jamie

From: Rita August O'Flynn <rita_august@>
Sent: Friday, August 19, 2022 12:11 PM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.
Importance: High

Attention: This email originated from outside of SLC and should be treated with extra caution.

Hi Jamie,

It has been over 3 months since my most recent attempt to get this OHWM issue clarified and almost a month since the last update. I don't understand why this is so challenging as, per its website, the California State Lands Commission is "the recognized authority for determining the location of the ordinary highwater mark in California."

If this can't be solved internally, perhaps the matter needs to be escalated and presented to the Board at its upcoming meeting on August 29th.

Please let me know ASAP when and how the Commission intends to resolve this.

With Kind Regards,

Rita O'Flynn

Sent from [redacted] for Windows

From: Rita August O'Flynn
Sent: Wednesday, August 10, 2022 5:17 PM
To: Garrett, Jamie@SLC; Mark O'Flynn
Subject: Re: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Jamie, Do you have any updates?

Rita O'Flynn

Sent from Samsung Galaxy smartphone.

Get

From: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Sent: Wednesday, July 20, 2022 5:17:11 PM
To: Rita August O'Flynn <rita_august@>; Mark O'Flynn <markoflynn@>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Rita and Mark,

I wanted to let you know that I discussed your request to establish an ordinary high water mark elevation at your property. I do not have a substantive update at this point but your request is being elevated. I hope to have more information in the near future.

Best,
Jamie

From: Rita August O'Flynn <rita_august@slc.ca.gov>
Sent: Friday, July 15, 2022 3:05 PM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>; Mark O'Flynn <markoflynn@slc.ca.gov>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Attention: This email originated from outside of SLC and should be treated with extra caution.

We will call you

Sent from [redacted] for Windows

From: Garrett, Jamie@SLC
Sent: Friday, July 15, 2022 3:03 PM
To: Mark O'Flynn; Rita August O'Flynn
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Mark,
For some reason I am getting a voicemail stating that [redacted]. I will try again. But also feel free to try calling me at 916-574-0398.

Best,
Jamie

From: Mark O'Flynn <markoflynn@slc.ca.gov>
Sent: Friday, July 15, 2022 2:48 PM
To: Rita August O'Flynn <Rita_August@slc.ca.gov>; Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Subject: Re: Ordinary Highwater Mark at River Lane Guerneville, CA.

Attention: This email originated from outside of SLC and should be treated with extra caution.

Hi Jamie,

Would you please place the call for our teleconference this afternoon at 3 p.m.?

You can call us at [redacted].

Thank you,

Mark O'Flynn Attorney at Law
DRE 01297176

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From: Rita August O'Flynn <rita_august@>
Sent: Wednesday, July 13, 2022 8:45 AM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Jamie,

Can we please set up a time to speak this week? If you can give me some days and times, I will set up a call.

Thanks,

Rita

Sent from [Mail](#) for Windows

From: [Rita August O'Flynn](#)
Sent: Friday, June 24, 2022 3:29 PM
To: [Garrett, Jamie@SLC](#)
Cc: [Mark O'Flynn](#)
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Thank you Jamie. This has been a very difficult situation for us and I am sure you can understand my frustration. I look forward to hearing what you find out.

With Kind Regards,

Rita

Sent from for Windows

From: [Garrett, Jamie@SLC](#)
Sent: Friday, June 24, 2022 3:16 PM
To: [Rita August O'Flynn](#)
Cc: [Mark O'Flynn](#)
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Hi Rita,

I hope you are well also. Sorry for the delayed response. I just got back from vacation this week and have been catching up on emails. I will have to check on your question and get back to you. Typically, our surveys get formalized if they are associated with a formal action by the Commission, such as a boundary line agreement. This is a little different since there is no proposed action. I

will do some digging and let you know what I find out.

Have a great weekend,

Jamie

From: Rita August O'Flynn <Rita_August@>
Sent: Sunday, June 12, 2022 7:12 AM
To: Garrett, Jamie@SLC <Jamie.Garrett@slc.ca.gov>
Cc: Mark O'Flynn <markoflynn@>
Subject: RE: Ordinary Highwater Mark at River Lane Guerneville, CA.

Attention: This email originated from outside of SLC and should be treated with extra caution.

Dear Jamie, I hope this email finds you and your loved ones well.

I am writing regarding the September 25, 2020 Ordinary Highwater Mark determination by the California State Lands Commission at the above referenced location. Can you please let me know what steps are necessary to formalize this determination with the Board of the Commission?

With Kind Regards,

Rita O'Flynn

Sent from for Windows

From: [CSLC CommissionMeetings](#)
To: [CSLC CommissionMeetings](#)
Subject: FW: Recreational Lease Annual CPI Adjustment Protest
Date: Thursday, October 12, 2023 1:39:39 PM
Attachments: [CSLC CPI Protest Letter 10-5-23.pdf](#)

From: Carol Evans <cevans@>
Sent: Tuesday, October 10, 2023 6:48 PM
To: Lucchesi, Jennifer@SLC <Jennifer.Lucchesi@slc.ca.gov>; Bugsch, Brian@SLC <Brian.Bugsch@slc.ca.gov>; Lee, Ninette@SLC <Ninette.Lee@slc.ca.gov>; Blackmon, Seth@SLC <Seth.Blackmon@slc.ca.gov>; Senator.Dahle@senate.ca.gov; Senator.Alvarado-Gil@senate.ca.gov; Assemblymember.Dahle@assembly.ca.gov
Subject: Recreational Lease Annual CPI Adjustment Protest

Attention: This email originated from outside of SLC and should be treated with extra caution.

Dear Recipients,

Attached is a letter which was delivered today via U.S. Mail to California State Lands Commissioners Lt. Governor Eleni Kounalakis, State Controller Malia Cohen and Department of Finance Director John Stephenshaw, in which we are protesting the inclusion of an annual Consumer Price Index (CPI) adjustment to our base rent for a pier and two buoys on Lake Tahoe.

We apologize for its length, but it's an issue with a history and an issue with far-reaching consequences that can only be understood with a thorough explanation. After reading this letter and digesting and analyzing its contents, our hope is that we can all work together to find an immediate solution to stop unprecedented, unjustified and unfair annual CPI adjustments in State Lands Commission leases which are also subject to local Benchmarks. It's an illegal double-dip whose damaging impact will grow every month until it is resolved.

Perhaps the following analogy will help illustrate part of the issue: [Investor-owned utilities in California can only raise rates by filing a General Rate Case \(GRC\) with the California Public Utilities Commission \(CPUC\)](#). The GRC process allows utilities to request rate increases to cover the cost of providing service to customers. [The CPUC reviews the request and determines whether the rate increase is justified based on the utility's expenses and investments](#).

In contrast, our rent was increased in 2023 by 7.4%. We already know it will increase by another 5.4% in 2024, which is explained in the letter. This is a two year increase of 13% with absolutely no justification or review. We are leasing lake bottom, for which the State Lands Commission incurs absolutely no expenses, ever. These CPI increases will continue automatically in perpetuity with no review by the Commission and no possible justification.

Our Lake Tahoe pier and buoy leases are set by a benchmark determined by reviewing slip and buoy rents at commercial marinas every five years. This approach has been adopted in order to meet the statutory requirement that rent on private recreational piers and buoys "be based on local conditions and local fair annual rental values."

To our knowledge, the interaction of rent rate benchmarks and annual CPI adjustments has never been analyzed. As we point out in our letter, allowing this policy to continue is artificially inflating local rents in direct conflict with statutory language.

We respectfully request that you give our letter serious consideration and that we hear from you in the very near future that work will begin to correct this egregious situation.

Sincerely,
Carol & Tony Evans

Antony C. Evans & Carol Ross Evans

**P.O. Box
Tahoma, CA 96142**

October 5, 2023

Via U.S. Mail

Lieutenant Governor Eleni Kounalakis
Commissioner, California State Lands Commission
1021 O Street, Suite 8730
Sacramento, CA 95814

State Controller Malia M. Cohen
Commissioner, California State Lands Commission
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P.O. Box 942850
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Finance Director John Stephenshaw
Commissioner, California State Lands Commission
Department of Finance
915 L Street, Suite 1000
Sacramento, CA 95814

Subject: General Lease – Recreational Use Lease Number 8368
 Rent Payment Under Protest

Dear Commissioners:

Notice is hereby given that we are paying our annual rent under protest on Lease Number 8368 for a pier and two mooring buoys on Lake Tahoe, and we reserve the right to contest this payment in the future.

Our lease renewed in 2022, thus 2023 is the first year we have had to pay the stated lease rent plus an additional amount based on the insertion of a Consumer Price Index (CPI) adjustment in our lease. We believe there are serious and fatal flaws in the application of an annual CPI adjustment in private recreational leases under the Commission's jurisdiction, which are becoming more evident and damaging the longer these CPI adjustments remain in place.

This is not the first time we have voiced concern and opposition to the insertion of an annual CPI adjustment in leases on Lake Tahoe. Our written opposition and testimony before the Commission dates back to 2013 when regulations were first proposed to allow an annual adjustment based on California's change in the Consumer Price Index for private recreational leases. We have been consistent in our opposition at every possible opportunity – in 2014 when the Commission began inserting a CPI adjustment in new leases, in 2017 and 2018 when the Commission proposed unsuccessful Lake Tahoe Benchmarks, and most recently in 2021 when we were very involved in the final adoption of the new Lake Tahoe Benchmark.

The concern and fear we have expressed over the past 10 years, that applying an annual CPI adjustment in our Lake Tahoe leases would go terribly wrong, has come true in ways even beyond what we had predicted. It is imperative that the Commission fix the problem they created as soon as possible because the consequences and costs will only become greater the longer this policy stays in place. Once lessees get hit with consecutive years of extremely high rent increases, it could and should become a huge embarrassment to the Commission as more lessees begin to understand what they were coerced into when they were required to sign a lease with an annual CPI adjustment.

The CPI is a poor substitute when there is actual market data. Actual market data is exactly what drives the Lake Tahoe Benchmark. There is no need for a CPI adjustment when rents are determined by a benchmark. This is not just a Lake Tahoe lessee issue. The Commission's CPI adjustments are inflating and distorting local market conditions across the state and will yield future benchmarks that will be artificially higher as a direct result. This is so misguided and wrong that it is difficult to find the words to describe what a tremendous injustice is being inflicted upon all Commission lessees.

In summary, we are objecting to an inappropriate use of CPI, the specious use of CPI, the illegal use of CPI, wrong assumptions about CPI, unequal application of CPI, the incompatibility of CPI and the Tahoe Benchmark, the distortion of future Tahoe benchmarks, and the loss of the benefits and principles of the 2021 Tahoe Benchmark. We are most familiar with the Lake Tahoe Benchmark and its pier and buoy rental history, so our concerns discussed below focus in particular on Lake Tahoe leases, but the arguments would apply to any rent collected by the Commission which is subject to a CPI adjustment and a Benchmark.

We respectfully request you to immediately address this egregious policy and direct Commission staff to quickly, transparently, and fairly rectify this unacceptable situation for Commission lessees who are being subjected to an annual CPI adjustment in conjunction with a Benchmark, retroactive to the introduction of an annual CPI adjustment in Commission leases. The Benchmark is the most accurate, reliable and fair method to determine rent. The CPI adjustments are discretionary and must be abandoned, along with a plan to put rents back on an equal footing so that lessees are guaranteed they are paying equal rents for equal uses, and that rents during a lease term are quantifiable, certain and fair.

Inappropriate Use of CPI

We have consistently stated since 2013 that it is grossly improper to use a CPI adjustment in private recreational pier and buoy leases. The addition of a CPI adjustment in a residentially-oriented lease is unfair and unheard of, and this policy needs to stop. As owners of private piers and buoys, we already have the continuing responsibility for absorbing the ever increasing costs of maintaining and insuring them. The Commission, as landlord, assumes zero responsibility for anything in your lease. Following is an excerpt from a letter to the Commission dated January 20, 2021, from Steven A. Herum, an attorney representing the Meeks Bay Vista Property Owners Association during the Dore Report debacle:

"A CPI is typically used in a non-residential setting to make a landlord whole for cost increases. Here, in contrast, the Commission does not pay property taxes, insurance or

maintenance, in other words it has no operating cost, and this fact militates against imposing a CPI. Furthermore and putting a finer point on the argument, the Commission incurs no cost in administering leases since related staff costs are charged back to the lessee."

(In case you are not aware of the Commission's practice, lessees are required to pay all staff costs when a new lease is written, or any amendments are made to an existing lease. When our lease renewed in 2022 we paid a deposit of \$1,500 with the assurance any unused funds would be refunded. Instead, we were charged an additional \$411.99. This was for a boilerplate lease that had no material changes from the prior lease. The deposit for a lease amendment is also \$1,500, although staff recommended when the new Tahoe Benchmark was adopted in 2021, that the deposit be reduced to \$1,000 for lessees wanting to recalculate their rent. Since we were nearing the end of our lease, it didn't make economic sense for us to amend our lease, so we don't know what the actual staff cost to amend turned out to be.)

Specious Use of CPI

The insertion of an annual CPI adjustment in a private recreational pier and/or buoy lease is a specious use of the CPI. Even if the Commission had any costs associated with our leases, none of the rent money for Lake Tahoe piers and buoys stays with the Commission. One hundred percent of the rent is transferred to the Lake Tahoe Science and Lake Improvement Account. According to a Commission Staff Report dated December 8, 2021, the Commission had transferred almost \$7.9 million into the Account. Another \$1.2 million appears to have been transferred in each of the following 2 years into the Account for a total of \$10.3 million. However, the latest information available on the California Natural Resource Agency website page describing their accomplishments shows the total of all project allocations from the Account to date is \$2,765,388. What happened to the other \$7.5 million? We found \$2.3 million in the approved 2023-24 State Budget for the Lake Tahoe Science and Lake Improvement Account that is being held in a Reserve for Economic Uncertainties. It's good to know there is a funding source to refund all the specious rent increases that have been over-collected since 2014 from Tahoe recreational pier and buoy lessees when the annual CPI adjustment originated.

Among recent projects funded by the Account are reimbursements to the Tahoe City PUD for a new restroom at the Lake Forest Boat Launch and to the North Tahoe PUD for new benches picnic tables and trail maintenance in Tahoe Vista. These hardly sound like projects the Legislature had in mind when the Account was created by SB 630 (2013), namely aquatic invasive species prevention, projects to improve public access to sovereign land in Lake Tahoe and projects to improve near-shore water quality monitoring. These two Account-funded projects to already well-funded local public agencies sound more like a clever scheme to supplant local public agency funds.

Illegal Use of CPI

We also share Mr. Herum's concern expressed in his 2021 letter, below, that questions the legality of the imposition of an annual CPI adjustment in our lease:

"First, the statute and regulations generally do not grant to the Executive Director sufficient authority to impose CPI adjustment to leases without first providing notice as required by Due Process concepts and an opportunity to be heard at a duly noticed Commission meeting."

What Mr. Herum refers to is the fact that there was never an official action or notice on the part of the Commission before CPI adjustments began being added to leases in August 2014. Below is the only reference to changes in leases, which totally omits any mention or hint of a CPI adjustment, from the transcript of Executive Director Jennifer Lucchesi's Report to the Commission on June 19, 2014:

"Third, I wanted to update the Commission on some new general lease language that staff has developed specifically tailored for general leases recreational use, also known as rec pier leases. In response to various concerns expressed about the length and complexity of the Commission's general lease terms for recreational pier leases. Those were expressed back in our February and April meeting.

Staff has been working on a more simple, shorter, transparent, and easier-to-read recreational pier lease language. The bottom line is this new language includes straightforward, simple terms as opposed to complicated terms full of legalese. I'm happy to announce that staff has completed that effort and will be utilizing the simpler lease general term language beginning at the Commission's August meeting."

Mr. Herum's 2021 letter continues:

"Second, Public Resources Code section 6503.5(a) restricts the Commission's determination of rent to "local conditions and local fair market annual rent" but omits CPI as a factor. This approach coheres to the statutory guideline, section 2003(a) which lists factors to consider in determining rent. The list dispenses with CPI as a factor and specifically narrows the factors to be consider[ed] in determining rent for buoys and piers as follows: "For leases for a recreational pier or buoy, rent shall be based on local conditions and local fair annual rental values." In short, neither the statute nor the administrative regulation affirmatively and expressly authorizes the imposition of CPI when determining and adjusting rental rates."

We are also of the opinion that the Commission is misinterpreting the administrative regulation used as authority for an annual CPI increase. 2 CCR Sec. 1900 (m) and (n) specify an annual CPI rent adjustment "to determine the adjusted minimum annual rent [emphasis added] for each year subsequent to July 1, 2014." Sec. 2003(b)(6) further establishes that the "minimum annual rents" for recreational leases is \$125. Sec. 2003(c) provides that minimum annual rents will be recalculated every five years using the formula in 1900(m). Read together, the annual adjustment formula in 1900(m) is only to be applied to the "minimum annual rent" every five years. Clearly, no Tahoe leases fall under that category. Our Lake Tahoe leases have their own definition of rent in 2003(a)(10) – "For leases for a recreational pier or buoy, rent shall [emphasis added] be based on local conditions and local fair annual rental values."

Further, Sec. 2003(e)(1) generally allows for rent adjustment during the lease term which "may [emphasis added] include application of the California Consumer Price Index." It does not say shall, it does not say annually.

Rent Free History: Current Commission members may not be aware that prior to 2012, Lake Tahoe pier and buoy leases were statutorily determined to be rent free due to the public benefit derived from privately installed and maintained piers and buoys. Pier and buoy owners were only charged a flat lease fee every 10 years. Benefits include providing safe harbor for distressed or disabled vessels, protecting the public from navigational hazards located near shorelines, eliminating or decelerating erosion along shorelines and providing navigational aids to members of the public. Piers also benefit the fish population in Lake Tahoe, particularly where the lake bottom is predominantly sandy, by enhancing littoral fish habitat with feed and cover.

There are countless anecdotal instances where private piers and buoys have helped to prevent dangerous health and safety issues, examples of which we have provided the Commission in the past. There were two major incidents this summer in our neighborhood of Rubicon Bay on the west shore of Lake Tahoe which demonstrate the continuing public benefit of private piers and buoys. The first was in June when the hot air balloon that launches from South Lake Tahoe was caught in heavy winds and could not put down on the floating landing barge. It was blown all the way across the lake to Rubicon Bay where the pilot had to land the basket and its occupants in the lake to prevent crashing into the rocky shoreline and cabins. He was able to lay the balloon down on a private pier, but the 12 basket occupants were dumped in the water over their heads and were luckily able to reach piers on either side of the pier covered with the deflating balloon. It was a very cold windy day, and three adjacent cabins brought the basket occupants towels and blankets and took them into their homes to dry their clothes and feed them while they waited for land transportation. Here's a video from the incident taken from the landing barge. www.youtube.com/watch?v=jJE2LkQhhjA

In another incident that was widely reported, a small aircraft crash-landed into Rubicon Bay in July. A nearby boater saw the accident and was able to rescue the pilot and passenger who miraculously popped up in the water from the sinking aircraft. There are no public piers in Rubicon Bay, but the boaters took them to a nearby private pier where emergency personnel were able to provide treatment and transport them to the hospital. These are only two recent incidents we're aware of because they happened in our bay. Many life-saving incidents, perhaps not as dramatic as these two examples, occur all over Lake Tahoe every year.

Lake Tahoe can become very dangerous in a matter of minutes and there are no natural safe harbors and very few public marinas scattered around the 72 miles of shoreline, making our private piers and buoys a vital asset to public safety. In fact, 2 CCR Sec. 2003(e)(4) provides: "Rent may be discounted or waived for use of sovereign lands if the Commission, at its sole discretion, determines that a significant regional or statewide public benefit is provided or accrues from such use." No doubt the survivors of the above two incidents would testify to the public benefit of private piers on Lake Tahoe.

CPI Assumptions Wrong

None of the current Commission members were involved in the discussion on the CPI issue when the regulations were being promulgated in 2013-2014, so you would not be aware that we were initially assured by Commission staff that they did not intend to subject our leases to a CPI adjustment. When staff later changed their mind, we presented evidence of how high the CPI had historically increased (1974 – 10.2%, 1975 – 10.3%, 1979 – 10.7%, **1980 – 15.6%**, 1981 – 10.9%), and staff assured us that would never happen in the future and that CPI increases would remain in the 1% to 2% range and it was no big deal.

As shown below, staff's assumptions held for a while, but then in 2020, inflation began creeping up and now the CPI is a very big deal. The June 2022 CPI was 8.3%. The concern and fear we have expressed over the past 10 years, that applying an annual CPI adjustment in our Lake Tahoe leases would go terribly wrong, has come true in ways even beyond what we predicted.

Below is an example of how a new \$1,000 annual pier lease issued in 2014 with a CPI would look today. The first adjustment would have been in 2015 using the 2014 CPI, with **compounding** adjustments every year after that using the prior year change in the CPI. The 2023 rent would be \$1,324, a **32.4%** increase in 9 years! No one signing a lease in 2014 would have ever expected their rent would increase by more than 30% during the term of the lease. Had staff's prediction of no more than 2% been accurate, the 2023 rent would have been \$1,183, an increase of 18.3%. That's not as outrageous as reality, but it is still very wrong to be adding any CPI to our leases because the Commission landlord had zero costs associated with our leases, the rent doesn't even go to the Commission, and there is a huge surplus in the Lake Tahoe Science and Lake Improvement Account.

**California Consumer Price Indices
Calendar Year Averages – All Urban Consumers
Percent Change***

Year	CA CPI % Change	Annual Rent	% Change from Base Rent
2013	1.5%		
2014	1.8%	1,000	
2015	1.5%	1,018	1.8%
2016	2.3%	1,033	3.3%
2017	2.9%	1,057	5.7%
2018	3.7%	1,088	8.8%
2019	3.0%	1,128	12.8%
2020	1.7%	1,162	16.2%
2021	4.3%	1,182	18.2%
2022	7.4%	1,232	23.2%
2023		1,324	32.4%

*Source: California Department of Finance

Unequal Application of CPI

When we received our 2023 rental invoice from the Commission, it showed our rent from our new 2022 lease last year was \$1,336 “with an annual Consumer Price Index, Dept of Industrial Relations adjustment using the month of February.” The “CPI Rent” for 2023 was listed at \$1,434.79. There was no other explanation of how the rent was calculated. We looked up the CPI number for February 2023, and it was 5.4%, but our increase was 7.4%. Confused, we contacted the Commission for clarification.

The explanation was the Commission used the change in CPI from the prior year, which was 7.4% in February 2022, so our October 2023 rent is based on the change in CPI between

February 2021 and February 2022. Why use old data when more recent data is available? We also found out the CPI adjustment is not uniform for every lease. It depends upon what month your lease renews, e.g. October-November renewals like ours use a February CPI number, December-January renewals use an April CPI number, etc. Why is it based on lease renewal month? That totally distorts the concept of equal rents for equal uses. The result is that although all Tahoe leases should be charged the same per square foot rent based on the Tahoe Benchmark – this is not happening because of the distortion being caused by the annual CPI adjustments based on varying monthly CPI numbers. Side-by-side identical piers will have different lease amounts depending on what month the lease renews, so will buoys. Did anyone think this through?

Every lease with a February or March renewal month will be hit with an 8.4% increase based on the June 2022 CPI number. If you're lucky enough to have a lease renewing in August or September of next year you'll *only* get hit with a 5.4% increase, the lowest CPI change during 2022.

The rent increases caused by these high CPI increases will be there forever because it compounds every year. We already know that our rent will be hit with a 5.4% increase in 2024 (based on the February 2023 CPI). That will calculate to \$1,512 – a 13.2% increase in only the first two years of our lease! Assuming our lease continues to increase by 5% per year, the rent in the final year of our 10 year lease would be \$2,127 – a **59.2% increase** from our benchmark-determined base rent of \$1,336. This is ridiculous and a further indication of what is wrong with a CPI adjustment. This needs to be stopped and equalized.

Also, how is the Commission determining rent for new pier and buoy leases? The Tahoe Benchmark will not be updated until 2026, so leases starting this year will be at the Benchmark rate. That means if our neighbor's lease renews the end of next year, he will be paying the Benchmark rate on his buoys of \$273, but by the end of next year we will be paying \$309 per buoy ($\$273 \times 7.4\% \times 5.4\%$). Again, did anyone think this through? This discrepancy will become larger every year until the next Benchmark is adopted. And then what happens? Will the Commission require everyone to amend their leases in order to receive equal treatment and have to cough up a minimum of \$1,000 to correct the Commission's flawed policy? This also needs to be stopped and equalized.

Tahoe Benchmark and CPI Incompatible

The Commission will continue updating the Tahoe Benchmark every five years based on commercial marina rental rates as Commission staff has determined that is the best methodology to meet the statutory requirement that “rent shall be based on local conditions and local fair annual rental values.” As stated in the December 8, 2021 Commission Staff Report on how to determine the Tahoe Benchmark, “The recommended method is simple, efficient, easy to understand, and more transparent than any of the other methods analyzed. . . Because staff can update the benchmarks using this methodology, updates would not require any additional funding to hire a consultant every 5 years, resulting in a substantial savings of time and money.”

We agreed with staff’s assessment at that time, and worked very hard between 2017 and 2021 to find a mutually acceptable Tahoe Benchmark methodology. What no one wanted to talk about, however, was how an annual CPI adjustment would interact with the Benchmark, and despite our best efforts we were unsuccessful in convincing the Commission to stop using an annual CPI adjustment. As pointed out above, the Tahoe Benchmark methodology and an annual CPI adjustment are completely incompatible, and the situation will become worse every year. The two concepts for setting rent, five-year Benchmark updates vs. annual CPI increases, cannot be equitably combined. Rents are completely inconsistent and all over the place now with no relationship to the Benchmark. Unfortunately, it will be impossible for the next Tahoe Benchmark update to be “simple, efficient, or easy to understand” because of the current unequal rent calculations being caused by an annual CPI adjustment.

Future Tahoe Benchmarks Distorted

Even more concerning, and throwing further doubt on the reliability, equity and veracity of future Tahoe Benchmarks, is the fact that Commission staff is in the process of also adding an annual CPI adjustment to commercial marina leases when they renew. This will intentionally and irreparably distort any opportunity to determine rent based on local conditions, because the Commission is inappropriately influencing local conditions by artificially increasing commercial marina rents with a CPI. The CPI is a poor substitute when there is actual market data. True market data is the entire basis of the current Benchmark methodology.

Most commercial marina rents are based in part on gross income. There is no better measure of the local conditions and local fair annual rental values than the actual local market. When costs for commercial marina operations go up due to inflation, the marina operators are the first to know and it is up to them to adjust their rental rates to the public in order to stay profitable. Those increases would naturally be reflected in the next Benchmark update.

When the Commission adds a CPI adjustment to marina rents, marina operators have no choice but to also pass that cost on in their public rental rates. So both the actual costs of operating a marina and the phantom costs of a specious CPI adjustment by the Commission will distort any future Benchmarks. Changes in the local market caused by inflation will automatically be

reflected in marinas’ gross income as their public rental rates increase, which will then automatically be reflected in the next Benchmark. The Commission has no business interfering in the local market by adding on a specious CPI adjustment to commercial marina rents. This is getting two bites from the same apple and is artificially inflating the next Benchmark. Private

pier and buoy owners will be overcharged, first with the CPI adjustment in their own leases, and second when the Benchmark is updated using doubly inflated marina rates. It is wrong and it needs to be stopped and equalized.

Benefits and Principles of 2021 Benchmark Gone

Finally, one year of a CPI adjustment completely erased any benefit from all the hard work Commission staff and stakeholders put into the 2021 Lake Tahoe Benchmark. It feels like a slap in the face, and it's only going to become worse and more distorted every year. Under the 2012 Benchmark our pier and buoy rent was \$1,410. The 2021 Benchmark reduced our rent to \$1,336 in 2022, and in one short year, with only one CPI adjustment, our rent increased to \$1,435 and the benefit of all the work that went into the 2021 Benchmark was forever gone.

It is extremely irritating, disappointing and discouraging that the hundreds of hours of staff work, and the work and expense incurred by our Meeks Bay Vista Property Owners Association in helping to develop a mutually acceptable Tahoe Benchmark methodology to determine a fair rent based on local conditions, was a total waste of time and money. One more flaw in the Commission's lease policy is that rent for the entire term of a lease should be quantifiable. Pier and buoy owners are required to sign a lease with a term of 10 years, but the rent is only specified for the first year of the 10 year term. At least under our old leases, before the CPI adjustment was added, we knew what the rent would be for the first five years, and that there would be a rent adjustment for the final five years, if appropriate. Now we have no idea what the rent will be from year to year because of an unknown CPI factor. This is wrong and must be stopped. No responsible person or entity, including the great State of California, would sign a lease without being able to quantify the cost for the entire term, while still assuming the liability and responsibility for all the other provisions of the lease for the entire term.

Sincerely,



Antony C. Evans
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Carol Ross Evans
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cc: Via Email

Jennifer Lucchesi, Executive Officer
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Assembly Megan Dahle,
Meeks Bay Vista Property Owners Association Board of Directors