

**CALENDAR ITEM  
C14**

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09/01/11  
PRC 6855.1  
V. Caldwell  
J. Frey

**CONSIDER THE DEFAULT AND TERMINATION OF A  
GENERAL LEASE – COMMERCIAL USE**

**LESSEE:**

Bruno's Island Yacht Harbor, Inc.  
1200 W. Brannan Island Road  
Isleton, CA 95641

**AREA, LAND TYPE, AND LOCATION:**

5.81 acres, more or less, of sovereign land in Seven Mile Slough, near the town of Isleton, Sacramento County.

**AUTHORIZED USE:**

The continued use, maintenance and operation of a commercial marina and bridge approach to Owl Harbor as shown on Exhibit A.

**LEASE TERM:**

35 years, beginning May 1, 1985.

**CONSIDERATION:**

\$13,334 per year, with the State reserving the right to fix a different rent periodically during the lease term, to be paid semi-annually.

**SPECIFIC LEASE PROVISIONS:**

Liability Insurance:

Combined single limit coverage of no less than \$1,000,000.

Bond:

\$20,000

**BACKGROUND**

On June 26, 1985, the Commission approved a 35-year General Lease – Commercial Use to Bruno's Island Yacht Harbor, Inc., (Lessee) for operation of a commercial marina which was developed with 148 berths and three accommodation docks, walkways, pilings and appurtenant facilities including a

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boat repair facility and a bridge approach to Owl Island. On August 17, 2004, the Commission approved an Amendment to the Lease and entered into the following negotiated settlement with the Lessee concerning a myriad of issues with the Lessee and defaults, including, but not limited to, the actual lease acreage occupied by the existing facilities, the land values used in computing the annual rent, and back rent:

- a. The lease acreage increased from 3.493 acres to 5.81 acres in recognition of the actual area occupied by the existing facilities.
- b. The annual rent increased from \$8,490 to \$13,334 to be paid semi-annually in a five year step-up program beginning in the 2004-2005 lease year and running through the 2008-2009 lease year and thereafter.
- c. Lessee agreed to pay \$25,000 as full payment of back rent over a five year period in annual payments of \$5,000 each.
- d. The surety bond or other form of security increased from \$5,000 to \$20,000 and was to be paid in \$3,000 increments annually until it reached a maximum of \$20,000 on September 1, 2008.

At the same meeting, the Commission approved the execution of an Agreement and Consent to Encumbrancing of Lease whereby the Lessee was allowed to offer the Lease as security for a commercial loan from Owens Financial Group, Inc. (Owens Financial). Under the terms of this agreement, the lender is permitted to cure defaults of the Lease by the Lessee and to foreclose on the Lease and assign it to a new Commission-approved Lessee.

**Previous Cured Defaults:** Between execution of the 2004 lease amendment and June 2007, the Lessee defaulted on provisions in the amendment. On June 20, 2007, Commission staff mailed a Notice of Default to the Lessee, with a copy to Owens Financial, for failure to pay rent, make installment payments for a surety bond or other form of security in the amount required, and provide a certificate of liability insurance. Subsequently, on August 31, 2007, Owens Financial cured the financial defaults of Lease by submitting a check for \$28,265.73 in rent and another \$9,000 for the bond. On September 11, 2007, a Certificate of Liability Insurance in the amount of \$1,000,000 was received and all defaults of the Lease were cured. An item to terminate the lease has been scheduled for the September 13, 2007 Commission meeting, but was removed since all the defaults were cured prior to the meeting. Since then, the Lessee

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has failed to make timely semi-annual rent payments, except that of May 1, 2009, but has ultimately paid the rent along with penalty and interest.

Commencing in 2006, the Lessee has attended several meetings with Commission staff and has brought along a representative from a company identified as ARI Company (ARI) to discuss continued outstanding defaults. Despite repeated requests from Commission staff, both in person and in writing, the Lessee has refused to clarify his business relationship with ARI, whether ARI is a contractor of the Lessee, a sublessee, an assignee of part of the Lease, or whether ARI acts on the Lessee's behalf in some other capacity. Regardless, ARI has continued to act as though it has the authority to act in the stead of Lessee. Additionally, written correspondence to our Lessee regarding the defaults has been returned to staff undelivered for various reasons. Consequently, staff has had difficulty communicating directly with the Commission's Lessee to resolve the defaults.

**Current Defaults Uncured:** On April 22, 2011, May 13, 2011, June 21, 2011, July 19, 2011, and August 9, 2011, Commission staff sent correspondence on the items listed below to the Lessee or his attorney setting forth the defaults of the Lease and requesting that they be cured. Owens Financial was copied on all of the letters. As of the posting of the September 1, 2011 Commission meeting agenda, none of the defaults has been cured.

The Lessee has presently failed to perform under the obligations of the Lease and the 2004 Lease Amendment as follows:

- a. **Rent:** Failure to pay the first installment of annual rent in the amount of \$6,667 due on May 1, 2011. Penalty and interest are now accruing. The total amount due and owing as of September 1, 2011 is \$6,667 in principal, plus \$737.75 in penalty and interest for a total of \$7,404.75. Interest will continue to accrue at \$3.29 per day.
- b. **Insurance:** Failure to provide evidence that the Lessee is insured as required by Section 4, paragraph 8 of the Lease. The Lessee has tendered an insurance policy with insureds named Bruno's Island and ARI Company. Lessee has not provided documentation, as requested by staff, to ascertain whether Bruno's Island is in fact the Commission's Lessee. ARI Company is not the Commission's Lessee or an approved sublessee.

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- c. **Certificate of Good Standing from the Secretary of State's Office:** The lease requires the Lessee comply with all federal, State and local statutes and regulations during the term of the Lease. The Lessee has not maintained its Certificate of Good Standing with the Secretary of State's Office for several years as required by law. A Certificate of Good Standing was provided in the name of ARI Company. ARI Company is not our Lessee.
  
- d. **Bond:** The 2004 lease amendment increased the amount of the bond securing the Lease from \$5,000 to \$20,000, with the increase payable in five installments of \$3,000 per year. Lessee elected to tender the increase in the security bond in the form of cash and paid the first installment of \$3,000 in 2004. Lessee then defaulted on the next three installments and these were cured by the Owens Financial as noted above. Currently there remains an unpaid installment of \$3,000.
  
- e. **Maintenance of Lease Improvements in Good Repair and Safe Condition as Required by Section 4, Paragraph 4(b) of the Lease:** On June 27, 2011, Commission staff received an anonymous call reporting that the bridge at Bruno's Island had suffered damage and was unsafe to drive on. Allegedly the damage was caused by a fire truck responding to an emergency call.

A member of the Commission's engineering staff made a site inspection on June 28, 2011 and confirmed that there was significant structural damage concentrated around a single bent (part of the bridge sub-structure) near mid-span. The engineer states in her report that "It appears that the timber pile cap at this bent was crushed due to fungal deterioration (possibly dry rot) and heavy loading ...." The bent has been temporarily repaired using timber shims and wedges, 20-ton hydraulic jacks, steel I-beams, chains and come-alongs. The Commission's engineer notes that this repair is substandard.

The engineer further noted that adjacent bents were of similar age and condition as the one that failed, including one with noticeably significant fungal decay and horizontal cracking along the length of the pile cap. Additional concerns arise from missing stringers

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between some of the spans and damaged planking on the bridge deck.

The Commission's engineer was only able to make a visual inspection and recommends the bridge be shut down to all vehicular traffic until a full inspection (above and below the water surface) and repairs can be completed by a licensed professional engineer.

Commission staff believes the bridge presents a threat to public health and safety because of this state of disrepair. The bridge is the sole means of ingress and egress for the island and all vehicles including autos, motor homes and travel trailers must use it. The River Delta Fire Department has conducted its own inspection of the bridge and refuses to allow its big engine on the bridge and has stationed a smaller engine on the property until the bridge is repaired. The Lessee through its actions acknowledged the unsafe condition of the bridge because it has posted a 2 mile per hour speed sign on the bridge deck and coned off the portion of the deck over the damaged bent. Reportedly, heavy vehicles such as garbage trucks are not being allowed to cross the bridge.

By letters dated June 30, 2011 and July 8, 2011, Commission staff have urged the closure of the bridge and repairs by a registered engineer and have asked the Lessee to meet with staff to discuss this situation. To date, the Lessee has refused to do so.

Commission staff views the present condition of the bridge to be inconsistent with the standard of good repair and safe condition demanded by the Lease covenants and therefore a default of the Lease. Under the terms of the Lease, the Lessee has 60 days in which to cure this default commencing from receipt of written notice of the default. Staff believes its June 30, 2011 letter provided that notice. Commission staff has spoken with Owens Financial about the condition of the bridge and the repairs needed and Owens Financial has indicated it is not in a position to repair the bridge.

Section 4, Paragraph 11 of the Lease states that failure to pay rent in a timely manner, maintain a bond or other security device and insurance are immediate defaults of the lease with no period for their cure. The remedies provided to the Commission under this paragraph include ejectment, termination of the lease, or

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allowance for cure of the defaults and continuation of the Lessee's occupancy. Under the Agreement and Consent to Encumbrancing of Lease, Owens Financial has a right to cure the defaults upon 60 days notice from Lessor or to foreclose on the Lease and assign the Lease to a new Commission-approved Lessee.

Commission staff has been in contact with Owens Financial about the defaults as detailed above. Owens Financial has informed staff that it is in negotiations with the Lessee to renegotiate the terms of its loan to the Lessee. As part of its loan package, Owens Financial has stated that it would condition the new loan on the Lessee curing the defaults and require a professional engineer to review and approve the contractor's proposed repair estimate and final inspection of any repairs by a licensed engineer to evidence that the bridge repair is structurally sound. Finally, Owens Financial believes that, if the Commission seeks to terminate the lease, there is a risk that the Lessee will file a petition in Bankruptcy Court thereby delaying the exercise of its foreclosure rights on its loan and the lease, its assumption of the lease and deferral of sale of the lease to a new tenant.

Based on the Lessee's continued failure to cure the defaults described above, staff recommends the Commission authorize staff to terminate the Lease and eject the Lessee from the Lease Premises. This recommendation includes taking all steps necessary, including litigation, to seek the removal of all improvements from the Lease Premises, including the docks and appurtenant facilities including a bridge and boat repair facility, to seek restoration of the Lease Premises to its original condition; and to seek recovery of such other damages to which the Commission is entitled under the Lease. Actual termination and ejectment would occur only if the Secured Party Lender Owens Financial fails to cure the lease defaults or fails to foreclose on the loan and Lease and fails to seek assignment of the Lease to a new Commission-approved Lessee.

### **OTHER PERTINENT INFORMATION:**

1. Lessee owns the uplands adjoining the lease premises.
2. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines [Title 14, California Code of Regulations, section 15060(c)(3)], the staff has determined that this activity is not subject to the provisions of the CEQA because it is not a "project" as defined by the CEQA and the State CEQA Guidelines.

Authority: Public Resources Code section 21065 and Title 14, California

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Code of Regulations, sections 15060 (c) (3) and 15378.

3. This activity involves lands identified as possessing significant environmental values pursuant to Public Resources Code section 6370, et seq., but such activity will not affect those significant lands. Based upon the staff's consultation with the persons nominating such lands and through the CEQA review process, it is the staff's opinion that the project, as proposed, is consistent with its use classification.

**EXHIBITS:**

- A. Site and Location Map
- B. Legal Description

**RECOMMENDED ACTION:**

It is recommended that the Commission:

**CEQA FINDING:**

Find that this activity is not subject to the requirements of the CEQA pursuant to Title 14, California Code of Regulations, section 15060(c)(3) because the activity is not a project as defined by the Public Resources Code section 21065 and Title 14, California Code of Regulations, section 15378.

**SIGNIFICANT LANDS INVENTORY FINDING:**

Find that this activity is consistent with the use classification designated by the Commission for the land pursuant to Public Resources Code section 6370, et seq.

**AUTHORIZATION:**

1. Ratify staff's findings that Bruno's Island Yacht Harbor, Inc. is and has been in immediate default of its obligations under Lease No. PRC 6855.1 for failure: A) to pay rent in the principal amount of \$6,667 due May 1, 2011 plus penalty and interest in the amount of \$737.75, as of September 1, 2011, and continuing accrual at the rate of \$3.29 per day thereafter, B) to provide a certificate of insurance evidencing the Lessee and Lessor are insured as required by the Lease, C) to provide a bond or other surety device in the amount of \$20,000 as required by the Lease.
2. Ratify staff's findings that Bruno's Island Yacht Harbor, Inc. is and has been in default of its obligations under Lease No. PRC 6855.1

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for failure, within the 60 days notice sent by the Commission staff on June 30, 2011, to cure: A) its non-compliance with all statutes, rules and regulations of federal, State and local authorities by maintaining its Certificate of Good Standing with the Secretary of State, and B) not maintaining the improvements in good repair and safe condition by allowing the access bridge to deteriorate into an unsafe condition.

3. Authorize staff to issue a Notice of Termination and Ejectment to Bruno's Island Yacht Harbor, Inc., with a copy to Secured Party Lender, Owens Financial Group, Inc., for failure to cure the defaults set forth in Authorization 1 and 2 above.
4. Authorize termination of Lease No. PRC 6855.1 issued to Bruno's Island Yacht Harbor, Inc., subject to the right of Secured Party Lender, Owens Financial Group, Inc., to cure or cause to be cured the defaults of the Lease set forth in Paragraphs 1 and 2 of these Authorizations within 60 days of having received the Notice of Termination and Ejectment, as set forth in Paragraph 3, or commences foreclosure on the Lease pursuant to the Agreement and Consent to Encumbrancing of Lease filed on June 15, 2005 in the Offices of the Sacramento County Recorder or such longer period as the Executive Officer in his discretion deems appropriate, but not longer than a total cure period of 120 days from September 1, 2011.
5. Authorize staff of the State Lands Commission and the Office of the Attorney General to take all steps necessary, including litigation, to terminate Lease No. PRC 6855.1 and to eject Bruno's Island Yacht Harbor, Inc. from the Lease Premises and to seek the removal of all improvements from the Lease Premises including, but not limited to, docks, boat facility, and a bridge on and over the Lease Premises; to seek restoration of the Lease Premises to its original condition; and to seek recovery of such other damages to which the State of California is entitled under the Lease and law; provided, however, that this authorization shall not be effective until Secured Party Lender, Owens Financial Group, Inc., have failed to cure the defaults within 60 days of having received the Notice of Termination and Ejectment, or has failed to commence foreclosure of the lease pursuant to the Agreement and Consent to Encumbrancing of Lease filed on June 15, 2005 in the Offices of the Sacramento

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County Recorder, or such longer period as the Executive Officer in his discretion deems appropriate but not longer than a total cure period of 120 days from September 1, 2011.