



DANA POINT BOATERS ASSOCIATION | PO BOX 461, DANA POINT, CA 92629-0461

PHONE: 949-485-5656 | WEBSITE: [HTTPS://DANAPOINTBOATER.ORG](https://danapointboater.org)

October 17, 2022

To: Orange County Board of Supervisors

RE: October 18, 2022, Orange County Board of Supervisors Meeting, Agenda Item 14

Dear Supervisors,

Dana Point Boaters Association has the following comments regarding Agenda Item 14 on your October 18, 2022 Agenda referenced as: Approve Ground Lessor's Estoppel Certificates and Agreements to Bank OZK.

The Ground Lessor's Estoppel Certificate and Agreement in the lead paragraph include the language **"This ground lessor's estoppel certificate and agreement (this "Agreement") is furnished by Landlord to Lender. Landlord understands that Lender is relying upon Landlord's statements and agreements in connection with making and maintaining the Loan."**

Section 1 (e) reads:

1. Landlord Representations and Warranties: Landlord hereby represents and warrants to Lender (and shall be estopped from asserting any matter to the contrary as against Lender), as of the date hereof, as follows:

(e) There exists no default by Landlord under the Ground Lease, nor any state of facts which with the passage of time or the giving of notice or both would constitute a default on the part of Landlord. To the knowledge of Landlord, there exists no default by Tenant under the Ground Lease, including, without limitation, Section 3 and Section 5 of the Ground Lease, nor any state of facts which with the passage of time or the giving of notice would constitute a default on the part of Tenant.

From the Ground Lease:

From the Ground Lease Section 3.2.2 Restrictions and Prohibited Uses. Without expanding upon or enlarging the Permitted Uses of the Property and Improvements set forth in this Lease, the following uses of the Property are expressly prohibited:

(a) The Property shall not be used or developed in any way which violates an Applicable Law, the CDP, the LCP or the Tidelands Grant.

Dana Point Boaters Association questions how the County can attest there is no default under the CDP or the LCP when the current configuration of the day use boater parking is under enforcement review by the California Coastal Commission. Secondly, the recent publication of the new slip layout is not in compliance with the CDP or LCP.



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The Coastal Development Permit # 5-19-0971 and LCP Policy 4.2. 2-6, which are the governing documents for the revitalization, state, " the average slip length shall not exceed 32 feet and that the net loss of slips harbor-wide shall be minimized and shall not exceed 155 slips. The proposed development will result in an average slip length of 32 feet and a net loss of 155 slips, from 2409 to 2254 slips."

When comparing the approved slip layout from 2020 to the current slip layout recently distributed to DP slip holders, it appears not to comply because the current slips in the new design layout now number 2196 rather than 2254, which is a net loss of 213 slips, not 155. Also, the average slip size on the new layout has increased to 33 feet, from 32 feet, primarily due to the addition of 22 berths over the length of 60 feet and the loss of 90 berths under 32 feet.

Dana Point Boaters Association also has concerns regarding the Landlord's Representation and Warranties in Section 1 (m) of the Estoppel Certificate which reads:

(m) The declarations of Thomas A. Miller set forth in that certain Declaration of Thomas A. Miller in Support of Specially Appearing Defendant Dana Point Harbor Partner, LLC's Opposition to Plaintiffs' Motion for Order to Show Cause for Issuance of Preliminary Injunction, Etc. filed October 25, 2021, in the Superior Court of California, County of Orange, Stamped 30-2021-012227940-CU-CO-CSC-ROA # 38 (the "Declaration") remain true and correct as of the date hereof. As stated in the Declaration, the written notice obligation with respect to tenants and/or licensees under existing Slip Leases in connection with raises in the slip rental rates pursuant to Section 11.9 of the Ground Lease was intended to create an open and public process for slip rental rate increases but was not intended to make such tenants and/or licensees third party beneficiaries to the Ground Lease.

Dana Point Boaters Association would like to point out to the Board of Supervisors that The DPHP submitted a copy of Mr. Miller's Declaration stating there were no third-party beneficiaries to the Master Ground Lease. That Declaration had been submitted to the Court and the Judge specifically rejected that contention, finding:

"The language which limits pricing to "market rates" necessarily confers a benefit on third-parties, seeking to rent slips in the marina. (¶27 of Complaint and Exhibit 1 thereto; See also ¶3 of Eubanks Declaration and Exhibit 1 thereto). Consequently, it appears the parties contemplated a benefit to a class of individuals which encompasses at least one Plaintiff (i.e. boat owners). (¶2 of Papageorges Declaration).

While Defendant asserts that any benefit to boat owners is incidental, they do not identify a contrary purpose for this language or a benefit conferred on the county, by the provision. The facts here appear analogous to facts within Zigas v. Superior Court (1981) 120 Cal.App.3d 927, wherein the Court noted that language "providing that there can be no increase in rental fees, over the approved rent schedule, without prior approval in writing of HUD," was "obviously



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designed to protect the tenant against arbitrary increases in rents” and “manifest[ed] an intent to make tenants direct beneficiaries, not incidental beneficiaries...” (Id. at 838-839).”

Therefore, the DPHP's inclusion of that Declaration was misleading at best.

Dana Point Boaters Association questions the reliability of the County's Landlord's Representations and Warranties referenced in 1(e) and 1 (m).

Sincerely,

A handwritten signature in blue ink that reads "Anne Eubanks".

Anne Eubanks

President