

Dennis C. Winters

August 10, 2021

Leon J. Page
County Counsel
County of Orange
333 W. Santa Ana Blvd.,
Suite 407
Santa Ana, Ca 92701

VIA US Mail & E-Mail: leon.page@coco.ocgov.com

Re: Dana Point Harbor & Dana Point Harbor Partners

Dear Mr. Page,

I am a legal advisor to the Dana Point Boaters' Association (DPBA). I understand you have provided a legal opinion to the Board regarding the responsibilities of the County with respect to the lease of the Dana Point Harbor boaters marina to Dana Point Harbor Partners ("Partners"). DPBA would request a copy of any opinion or at least the reasoning and conclusion reached in that review.

Our own review and research leads us to the firm conclusion that the Partners recent massive increase in slip fees for boaters violates the letter and the spirit of the lease agreement entered into between the County and the Partners, especially in conjunction with the requirements of the Tidelands Grant to the County.

Partners Violation of Contract

The Partners' Master Lease with the County provides, in relevant part as to slip rates, at Section 11.9:

Said prices will be "market rate" pricing as reasonably determined by Lessee; provided, however, that in all events such prices shall be consistent with the limitations on pricing as mandated by the Tidelands Grant. In addition to the foregoing, with respect to the Slip Leases specifically, Lessee shall be required to provide advance written notice to County and all tenants and/or licensees under existing Slip Leases of any raises in the slip rental rates, which notice shall include Lessee's rationale for such raise as well as its methodology for determining the same.

Unfortunately, The Master Lease failed to define the term “market rate.” The Partners used that ambiguity to justify a wholly unreasonable rationale and methodology. They based the proposed rates on a comparison with only other Orange County slip rates, the vast bulk of which are Newport Harbor rates. As all are aware, the Newport Harbor, in the middle of one of the most affluent communities in California, has a number of relatively small marinas catering to that community’s wealthiest boat owners. The Tidelands Grant to the Dana Point Harbor area was intended to provide an alternative to that near monopoly Newport Harbor had on slip rentals in Orange County; that is, to provide a marina where the public including all boat owners, could have a place to enjoy.

Under contract law, an ambiguous term can be interpreted by use of various aids under California Civil Code §1856(c), including “Course of Conduct” and “Usage of the Trade.” Twenty years ago, the Board, on March 1, 2001, Agenda item 21 Minute Order, unanimously established a formula for determination of “market rates” for County owned marinas at Dana Point. It specifically provided that:

A. Prices shall be reasonably consistent with market prices charged by competing and/or comparable Orange County and Southern California (Santa Barbara to San Diego) marinas.

The Partners deviated from that formula for determination that had consistently been followed for 20 years. Shortly after the Board’s 2001 minute Order, the then operator of the Dana West Marina attempted to by-pass that formula by adjusting their rents using Newport Beach rates as a basis for establishing new rates. The County Public Facilities and Resources Department had rejected that proposal in a letter dated February 20, 2001, a copy is attached, finding that, because of the failure to include other comparable marinas outside of Newport Beach, “.... proposed rate increases are not justifiable as satisfying the market price consideration required by your lease, and hereby disapprove your proposed increases.” One June 19, 2001, the Board unanimously rejected the operators appeal of the PFRD determination.

The Partners are trying to do precisely what the County and the Board emphatically rejected at that time: use Newport Harbor inflated prices to overcharge Dana Point boaters. (Note, a number of the marinas in Newport Harbor used as comparisons by the Partners are owned or managed by one of the partners, Bellwether Financial, Joseph Ueberroth or related companies.)

Under the Course of Dealing and Usage of the Trade doctrine, this attempt by the Partners is a violation of the terms of the lease. *See Hind v. Oriental Products Co.* 195 Cal. 655, 667:

It is the general rule that when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage unless the contrary appears; that the usage forms a part of the contract, and that evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract.

In a quite similar case, *Southern Pacific v. Santa Fe*, 74 Cal.App.4th 1232, involving a Lease agreement for a pipeline with an ambiguous term with rent to be determined by “fair Market Value.” When the Lessor tried to use a novel formula the market rate (which the Court called “self-serving) rather than the previous rates used by previous lessors, the Court struck it down, finding that:

Indeed, where there is a fixed and established usage and custom of trade, the parties are presumed to contract pursuant thereto. Thus, courts can rely on usage and custom to imply a term where the contract itself is silent in that regard.

The Dana Point marinas have been using the same, county approved methodology for 20 years to determine slip rates. See attached detailed breakdown used by the marinas in previous years showing the rates from San Diego to Santa Barbara. Slip holders relied on this fair and reasonable methodology in purchasing their boats and placing them in the marina. The Partners’ unilateral decision to use a self-serving formula the County and the Board of Supervisors had previously flatly rejected is not “reasonable” under the terms of the lease. A 25% to 95% increase, all at one time, is on its face arbitrary and capricious.

While the Partners likely would try to argue the lease gives them *carte blanche* to use any formula they like, under California law, that is incorrect. See *Cal. Lettuce Growers v. Union Sugar Co.*, 45 Cal. 2d 474, 484:

In any event, where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing .

There was nothing “good faith” or “fair” about the Partners’ decision to abandon the long precedent of comparing all Southern California marinas to determine slip rates, and instead choose a self-serving methodology to gouge the slip holders. The question the County needs to answer is, how can a methodology the County determined was fundamentally unfair 20 years ago now suddenly be considered fair and good faith now?

Tidelands Responsibility

The County continues to have the responsibility, as lessor of the Dana Point marina, to enforce the terms of the lease, including protecting the rights of the Third Party Beneficiaries of the lease, boater owners who have slips in the marina, or would like to one day have a slip.

The County also has responsibilities under the Tidelands Grant to assure that the public has fair and reasonable access to the facilities the County owns on the Tidelands Grant. *See San Francisco Baykeeper, Inc. v. California State Lands Commission*, 242 Cal. App. 4th 202 :

Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

In the case of *National Audubon Society v. Superior Court*, 33 Cal.3d 419 437,438 (1983), the California Supreme Court, (quoting the U.S. Supreme Court in *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387), ruled:

A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, ... than it can abdicate its police powers in the administration of government and the preservation of the peace.

Therefore, the County cannot abdicate its responsibility to continue to protect the public's right to use public property for public purposes. It must enforce the requirement that the Partners maintain reasonable methodology, in line with previous precedent.

Present Status

If your office has any authority that is contrary to what we have presented here, we would like to review it.

Supervisor Bartlett has urged all stakeholders to confer and reach a reasonable result. The DPBA reached out to the Partners for such a conference and the Partners absolutely refuse to discuss the proposed changes. Indeed, any slip holder who has gone to the Partners' office to try to discuss this is told: "(The Partners) can do whatever they want and there is nothing you can do about it." Without outside pressure, the Partners cavalier attitude and sense of entitlement will continue. We have been in contact with the State Lands Commission, State Senator Bates, as well as media sources regarding this, and will continue to pursue it.

While the DPBA has zero desire to get involved in litigation against the Partners and the County to enforce the boaters rights as Third Party Beneficiaries of the Master Lease, others in the harbor are planning to pursue such rights if there is no movement to reign in the Partners' overreaching.

We request that a resolution be placed on the agenda of the next Board of Supervisors meeting to require the Partners answer why the slip increase should not be declared excessive and not in compliance with the Master Lease.

It needs to be made clear to the Partners that they need to start acting in good faith and modify the unreasonable, arbitrary and self-serving increases in slip fees at Dana Point Harbor.

Very Truly Yours

Dennis C. Winters

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cc: Supervisor Andrew Do
Supervisor Lisa Bartlett
Supervisor Katrina Foley
Supervisor Doug Chaffee
Supervisor Donald Wagner
California State Lands Commission
Lt. Governor Eleni Kounalakis
Controller Betty T. Yee
Finance Director Keely Bosler
Senator Patricia Bates



COUNTY OF ORANGE

PUBLIC FACILITIES & RESOURCES DEPARTMENT

Vicki L. Wilson, Director
300 N. Flower Street
Santa Ana, CA

P.O. Box 404
Santa Ana, CA 92702-404

Telephone: (714) 834-230
Fax: (714) 834-518

February 20, 2001

HA78H-24-20, 22
Dana Point Harbor

Mr. Bob Beauchamp
TBW Company
Dana West Marina
24500 Dana Point Harbor Drive
Dana Point, Ca. 92629

RE: Proposed Slip Rental Rate Increases

Dear Mr. Beauchamp,

I have reviewed the slip rate increases you have proposed for Dana West Marina.

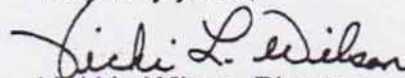
As you know, the County approved substantial slip rate increases (13 to 22%) for your marina last year; those increases brought your current rates in line with the rates charged by the Dana Point Harbor east basin marina.

Clause 16 of the General Conditions of your lease (Control of Hours, Procedures and Prices) states that pricing shall be "fair and reasonable" based upon a number of considerations, including "the market prices charged by other competing and/or comparable businesses". I find it unusual that the "Southern California" market rate survey you submitted to support your new request was limited to marinas in Newport Harbor and omitted the east basin marina that adjoins yours, or any other reasonably nearby comparable marinas (e.g., Oceanside). As a consequence, I conclude that your proposed rate increases are not justifiable as satisfying the market price consideration required by your lease, and hereby disapprove your proposed increases.

We are currently reviewing the County's current slip rate policy. In light of the new operating agreement for the east basin marina recently approved by the Board of Supervisors, we plan to seek Board review of that policy.

If you have any questions, please call Bob Hamilton of my staff at (714) 834-6666.

Very truly yours,


Vicki L. Wilson, Director

cc: Bob Hamilton, Interim Manager, PFRD/Harbors, Beaches and Parks
Barry Permenter, PFRD/Real Property

Slip Rate Comparison SoCal vs. Dana Point East

LOC	MARINA	21'	25'	30'	35'	40'	45'	50'	55'	60'	65-85'	Avg Price
		AMT	AMT	AMT	AMT	AMT	AMT	AMT	AMT	AMT	AMT	Per LF
NB	BAYSHORE MARINA	\$476	\$549	\$662	\$964	\$1,247				\$2,876	\$52.72 FT	\$38.02
NB	BAYSIDE VILLAGE	\$500	\$500	\$750	\$750	\$1,280	\$1,280	\$1,750				\$27.68
NB	LIDO YACHT	\$394	\$519	\$623	\$840	\$960	\$1,193	\$1,388		\$1,740	\$31.00 FT	\$26.32
SD	CABRILLO ISLE		\$486	\$538	\$690	\$852	\$1,000	\$1,153	\$1,479	\$1,597	\$32.94 FT	\$24.93
SD	SHELTER POINT/KONA KAI	\$368	\$438	\$525	\$613	\$800	\$900	\$1,100	\$1,265	\$1,560	\$30.00 FT	\$22.69
MDR	DOLPHIN MARINA	\$248	\$367	\$489	\$605	\$794	\$958	\$1,242	\$1,375	\$1,500	\$25.00 FT	\$21.76
MDR	PANAY WAY	\$248	\$367	\$489	\$605	\$794	\$958	\$1,242	\$1,375	\$1,500	\$25.00 FT	\$21.76
MDR	HOLIDAY MARINA	\$248	\$367	\$489	\$605	\$794	\$958	\$1,242	\$1,375	\$1,500	\$25.00 FT	\$21.76
NB x	BALBOA YACHT		\$450	\$540	\$630	\$760	\$855	\$1,150	\$1,265	\$1,380	\$23.00 FT	\$21.14
SD x	SHELTER COVE		\$406	\$488	\$569	\$660	\$788	\$975	\$1,238	\$1,350	\$28.50 FT	\$20.93
HB	HUNTINGTON HARBOR	\$288	\$300	\$450	\$630	\$800	\$900	\$1,000	\$1,100	\$1,500	\$25.00 FT	\$20.39
DP xx	DANA POINT EAST	\$268	\$347	\$503	\$622	\$727	\$834	\$960	\$1,039	\$1,257	\$21.20 FT	\$18.74
V x	ANACAPA ISLE		\$337	\$439	\$564	\$696	\$818	\$943		\$1,203	\$22.64 FT	\$18.71
DP xx	DANA POINT WEST	\$295	\$347	\$503	\$622	\$727	\$834	\$960	\$1,039		\$21.15 FT	\$18.46
HB xx	SUNSET AQUATIC		\$377	\$476	\$624	\$782	\$900	\$936			\$18.84 FT	\$18.38
RB	PORT ROYAL		\$302	\$418	\$561	\$622	\$843	\$937	\$1,030	\$1,124	\$18.73 FT	\$17.48
SD	GLORIETTA BAY	\$279	\$332	\$458	\$558	\$638	\$717	\$882	\$970	\$1,058	\$21.43 FT	\$17.30
SD	HARBOR ISLAND WEST		\$385	\$488	\$578	\$680	\$765	\$875	\$963	\$1,080	\$18.00 FT	\$17.28
LB x	SHORELINE	\$164	\$257	\$472	\$585	\$689	\$689	\$788	\$930	\$1,014	\$23.75 FT	\$17.05
HB	PETER'S LANDING			\$388	\$438	\$620	\$698	\$925	\$1,018	\$1,110	\$18.50 FT	\$16.92
SD	HALF MOON		\$400	\$480	\$560	\$680	\$765	\$900				\$16.82
SP xx	CABRILLO MARINA		\$271	\$356	\$497	\$568	\$720	\$801	\$952	\$1,058	\$21.18 FT	\$16.53
V xx	VENTURA ISLE		\$301	\$393	\$504	\$622	\$731	\$844	\$958	\$1,074	\$18.66 FT	\$16.50
LB x	ALAMITOS BAY	\$164	\$257	\$370	\$472	\$585	\$689	\$788	\$930	\$1,014	\$21.46 FT	\$15.90
V xx	CHANNEL ISLANDS MARINA		\$316	\$400	\$517	\$639	\$744	\$896	\$1,042	\$1,157		\$15.82
V	VINTAGE MARINA		\$301	\$362	\$506	\$619	\$698	\$813			16.16 FT	\$15.07
SD	CHULA VISTA		\$313	\$390	\$455	\$560	\$698	\$775	\$853	\$930	\$16.50 FT	\$15.00
V xx	VENTURA WEST	\$252	\$309	\$369	\$449	\$534	\$624	\$720	\$821	\$927	\$17.50 FT	\$14.56
SD	MARINA VILLAGE		\$281	\$353	\$455	\$580	\$664	\$775				\$13.81
LB	MP BOAT SLIPS		\$249	\$329	\$424	\$484	\$599	\$725	\$798	\$870	\$14.50 FT	\$13.43
V	VENTURA HARBOR VILLAGE			\$386	\$386	\$452	\$521		\$674	\$748	\$14.50 FT	\$12.57
RB xx	KING HARBOR		\$314									\$12.56
SD	DRISCOLL MISSION BAY		\$263	\$330	\$385	\$440	\$540	\$600	\$715	\$780	\$13.00 FT	\$12.14
SD x	OCEANSIDE		\$270	\$324	\$378	\$432	\$486	\$540	\$594	\$648	\$10.80 FT	\$10.80
LB	CERRITO BAHIA	\$180	\$225	\$300	\$350							\$9.50
SOCAL AVERAGE		\$291	\$348	\$451	\$559	\$701	\$793	\$954	\$1,032	\$1,243	\$22.30	
PERCENTAGE DIFFERENCE		(7.9%)	(0.3%)	11.5%	11.3%	3.7%	5.2%	0.6%	0.7%	1.1%	(4.9%)	
SOCAL MEDIAN		\$268	\$332	\$454	\$563	\$680	\$765	\$925	\$1,018	\$1,124	\$21.20	
PERCENTAGE DIFFERENCE		0.0%	4.5%	10.8%	10.5%	6.9%	9.0%	3.8%	2.1%	11.8%	0.0%	
X = PUBLIC OWNED AND OPERATED XX = PUBLIC OWNED AND PRIVATELY OPERATED												

Blue - LA County
 Orange - Orange County
 Yellow - San Diego County
 Amt's rounded to nearest dollar

12/2/10 REVISED