

**Open Government Commission**

Date: April 18, 2024
To: Open Government Commission
From: Samuel Harvey, Secretary

Subject: Letter from Jim McGrath raising concerns regarding compliance with the Open Government Ordinance, Public Records Act and Brown Act

At its September 2023 Regular Meeting, the Commission reviewed the attached communication from a member of the public (“Requestor”) asserting that City staff mishandled their responses to Requestor’s California Public Records Act (“CPRA”) requests, and raising various open governance concerns as a result. (See Attachment 1.)

Commission staff reviewed Requestor’s communication as well as the City’s handling of his numerous PRA requests, and prepared the attached report which concluded that staff had not identified any violations of the CPRA, Brown Act or Open Government Ordinance, and recommending that the Commission take no further action on this matter.

At its September meeting the Commission directed staff to obtain additional information regarding a particular record exchanged between City staff and the Alameda County Transportation Commission (“ACTC”), which Requestor asserted should have been provided to him. The Commission also asked staff to review the procedures which Requestor alleged violated the Brown Act

Requestor’s CPRA Concerns

The Commission Secretary has reviewed the records implicated by Requestor’s CPRA concerns and discussed the matter with relevant City staff. The Secretary has determined that the correspondence between the City and ACTC is a public record. However, the record was not responsive to any open CPRA request which Requestor had at the time.

The records in question concern a letter submitted by Requestor to ACTC, and City staff’s response to ACTC regarding that letter. (See Attachment 2.) On March 20, 2023, Requestor submitted a letter to ACTC concerning a grant application by the City related to a proposed ferry and pier project at the Berkeley Marina. ACTC contacted City staff and asked City staff to provide ACTC with responses to Requestor’s comments. On April 5, 2023, City staff sent a letter to ACTC addressing the comments in Requestor’s correspondence. City staff indicated that they did not plan to provide a copy of the letter to Requestor.

April 18, 2024

Page 2 Re: Letter from Jim McGrath raising concerns regarding compliance with the Open Government Ordinance, Public Records Act and Brown Act

The CPRA defines a “public record” as “any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” (Gov. Code § 7920.530.) Although there are numerous privileges and exemptions which may apply to a particular public record which may prevent that record from being disclosed, there do not appear to be any compelling justifications for withholding the records at issue here.

However, the CPRA does not create an obligation for the City to create a record which does not exist at the time of the request, or provide records which come into existence after the date of a request. (Cal. Gov. Code §§ 7920.530, 7922.530; *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1075.) Here, the Secretary has determined that the records at issue were not responsive to any Public Records Act request submitted by Requestor to the City after such records were created. Specifically, Requestor’s initial letter to ACTC was sent on March 20, 2023. As noted in the attached list of Requestor’s CPRA requests, none of the requests submitted after March 20, 2023 sought the correspondence at issue in this report.¹ As a result, the Secretary has concluded that City staff did not violate the CPRA in refraining from providing requestor with a copy of the City’s letter to ACTC regarding Requestor’s comments. Therefore, in the Secretary’s view, the handling of the correspondence is not a matter of compliance with the CPRA, but rather a question of best practices for engaging with members of the public.

The Secretary believes that, as Requestor suggests, some of the feedback provided by Requestor could be integrated into City training materials and presentations for Staff related to CPRA compliance. Particularly, topics such as “prompt” production of responsive records and appropriate application of relevant exemptions and privileges, which are addressed in Requestor’s correspondence with the City, are appropriate topics for training and review.

Brown Act Concerns

Requestor also raised a concern with the agenda for the July 27, 2022 meeting of the Transportation and Infrastructure Commission (“TIC”). Requestor asserts that the agenda title for the TIC’s consideration of the Complete Streets Checklist for a grant application for the ferry and pier project was deficient. The TIC’s July 27, 2022 agenda listed the item as follows:

Review the Complete Streets checklist for a One Bay Area Grant round three (OBAG3) grant application*

The Agenda notes that an asterisk (*) indicates that additional written material is included in the agenda packet. The material included in the agenda packet described the item a concerning water transportation and pier project at the Berkeley Marina. At the meeting,

¹ See Requestor’s CPRA request nos. 23-344, 23-346, 23-347.

April 18, 2024

Page 3 Re: Letter from Jim McGrath raising concerns regarding compliance with the Open Government Ordinance, Public Records Act and Brown Act

the TIC received a presentation on this item from City staff but took no action. (See Attachment 3.)

The Brown Act provides that a meeting agenda must provide “a brief general description of each item of business to be transacted or discussed at the meeting.” (Gov. Code § 54954.2(a)(1).) The description “generally need not exceed 20 words.” (Id.) Courts have not determined whether information included in an agenda packet may count toward compliance with the agenda requirement. (See *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, 208 (refraining from deciding whether agenda packet materials satisfy Brown Act agenda requirements).) As a result, the Secretary concludes that there is no clear violation of the Brown Act presented by the TIC agenda. Nonetheless, the interests of public disclosure and notification would have been more aptly served if the agenda item itself had referenced the proposed water transportation and pier project at the Berkeley Marina. Therefore, as with Requestor’s concerns regarding the CPRA, the Secretary concurs with Requestor’s assertion that additional direction and training for staff regarding proper agenda item titles would be useful.

Attachments:

1. OGC staff report (July 19, 2023); Apr. 18, 2023 letter from McGrath to OGC; staff summary of CPRA requests
2. Relevant email correspondence between City staff and ACTC
3. Agenda and Minutes for TIC July 27, 2022 meeting



Open Government Commission

Date: July 19, 2023
To: Open Government Commission
From: Samuel Harvey, Secretary
Subject: Letter from Jim McGrath raising concerns regarding compliance with the Open Government Ordinance, Public Records Act and Brown Act

1. Summary

At its May 18, 2023 meeting, the Open Government Commission received the attached communication from a member of the public (the “Requestor”) asserting that City staff have mishandled their responses to the Requestor’s Public Records Act (“PRA”) requests, and raising various open governance concerns as a result. (See Attachment 1.)

Commission staff have reviewed the Requestor’s communication as well as the City’s handling of his numerous PRA requests. Staff have not identified any violations of the PRA, Brown Act or Open Government Ordinance. Staff recommends that the Commission take no further action on this matter.

2. Analysis

Between January 5, 2023 and April 12, 2023, the Requestor submitted 11 separate public records requests to the City. Each of these requests sought records pertaining to City action and deliberation related to the marina, waterfront and proposed ferry terminal. For a number of these requests, the Requestor also submitted subsequent communications to City staff expanding or clarifying the scope of the requests. These requests were directed to the following City departments: City Clerk, City Attorney, and Parks, Recreation and Waterfront. Each City department is responsible for responding to its own PRA requests. However, the City Attorney’s Office handles PRA requests for the City Council and City Manager’s Office, as well as requests submitted to more than one City department (“multi-departmental requests”).

As of the date of this report, each of these requests has been responded to by the City and closed. (See Attachment 2.) The City has provided several hundred pages of records to the Requestor in response to these requests. In some cases, City staff directed the requestor to responsive records published on the City’s website.

Item 8
Attachment 1

The City has also withheld records or portions of records based upon the following exemptions:

1. Attorney-client privilege (Cal. Gov. Code § 7927.705, Cal. Evid. Code § 954)
2. Deliberative process privilege (Cal. Gov. Code § 7927.705, Cal. Evid. Code § 1040)
3. Privilege for preliminary notes, drafts and memoranda (Cal. Gov. Code § 7927.500)

Pursuant to the Open Government Ordinance (BMC Ch. 2.06.), the Commission is empowered to “consider ways to informally resolve . . . complaints and make recommendations to the Council regarding such complaints.” (BMC § 2.06.190.A.1.b.) Commission staff have reviewed the City’s handling and responses to the Requestor’s PRA requests. Commission staff have not identified any records which were improperly withheld from the Requestor or any violations of the PRA, Open Government Ordinance or Brown Act committed in City staff’s handling of these PRA requests. At this time, staff recommend the Commission take no further action on this matter.

Attachments:

1. Communication from Mr. McGrath
2. NextRequest summary of Public Records Act request responses

Received

APR 18 2023

City Attorney

2301 Russell Street
Berkeley, CA 94705
April 14, 2023

Sam Singer
City Attorney's Office
2180 Milvia Street
Berkeley, CA 94704


SUBJECT: City staff withholding documents in violation of the Brown Act and the Berkeley Open Government Ordinance

Dear Mr. Singer:

Enclosed are copies of a statement I read to the Parks, Recreation and Waterfront Commission and a letter I sent to the City Manager asking for the staff involved to be disciplined. I am filing this letter as a complaint under the Open Government Ordinance. I believe that the City attorney must reform its approach to responding to Public Records Requests. In this particular case, I have yet to see a single e-mail generated by City staff. Given what I have discovered from other agencies, city staff appears to be embarrassed by some of their e-mail records. But the city attorney's office has not provided substantive oversight over the process of responding to my PRA's; instead you have turned my PRA requests over to the very people who have hidden records that I have requested. This is simply unacceptable, and contributes to distrust for city government at a level where I believe you must act.

Beyond that, I believe that the City Attorney's office needs to lead a training exercise for all staff responsible for contacts with the public and with responding to PRA's. E-mails that would be kept in the ordinary course of city record keeping are public records, and become public records when they involve communication with outside agencies, and sometimes when policy direction has been given by council members or senior staff. No such e-mails have been provided pursuant to my requests. I believe that the Open Government Commission should be involved in this matter, and should consider making a recommendation to the Council about what modifications to the Open Government procedures might be needed to bring the city into compliance with the Brown and Public Records Acts.

Very truly yours,


Jim McGrath

Attachment

2301 Russell Street
Berkeley, CA 94705
April 13, 2023

Dee Williams-Ridley
2180 Milvia Street
Berkeley, CA 94704

SUBJECT: City staff withholding documents in violation of the Brown Act and the Berkeley Open Government Ordinance

Dear Ms. Williams-Ridley:

Enclosed is a statement I read to the Parks, Recreation and Waterfront Commission last night. It includes the factual background of an effort by city staff to withhold documents from my review. I believe that effort is a serious violation of both the Brown Act and the Berkeley Open Government Ordinance. I ask that you open an investigation into this matter, and take the appropriate disciplinary action reprimanding all of those involved. Since many city staff acquiesced in this effort, I also ask that you review the implementation of the Open Records Act to determine whether more specific guidance is necessary. I also urge you to immediately undertake a training effort for all staff that have contact with the public so that they know what their legal responsibilities for sharing information entail.

As you well know, Berkeley faces controversial proposals, most recently for re-design of the Hopkins Corridor. For that project, there is concern among stakeholders that city staff work was neither balanced nor complete in their staff work. I am sure it will not reassure those who have lost faith with city staff efforts and oversight to find another effort where the city staff have actively suppressed documents on a controversial project.

The Brown Act is clear about the public's right to documents in matters where they have concerns. Section 54950 of the Brown Act states:

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. **The people insist on remaining informed** so that they may retain control over the instruments they have created.

The City's own Open Government Act contains implementing language, with this clear policy statement in Section 2.06.010 of the Municipal Code:

Democracy in our representative form of government requires that the public have an opportunity to understand the government's activities and to communicate its concerns to its elected and appointed representatives, and that those representatives have an adequate opportunity to consider those concerns and then act effectively and in a timely manner.

It is not just the single incident of denying me access to the city response letter that raises these concerns; I have tried for over three months to obtain the documents that I need to "understand the government's proposed activities at the marina so that I may communicate with my elected and appointed representatives. But the city has turned my PRA requests over to the very people who have hidden the response letter, where they have been slow walked. This is simply unacceptable, and contributes to distrust for city government at a level where I believe you must act.

Very truly yours,

Jim McGrath

Attachment

Comments to Parks, Recreation and Waterfront Commission

As someone who lobbied for funding for this effort, I have reached the conclusion that this planning effort is corrupt. City staff have systematically bypassed this commission, and have taken steps to **prevent** stakeholders from accessing the information they need to provide you and the council with meaningful comments. I could give multiple examples of how this Commission has been bypassed, and the struggles I have had to get information, despite filing multiple Public Records requests. But I will use just the most egregious example to make my point.

On December 7, 2021, city staff presented the results of their studies of a ferry terminal in Berkeley marina. That report made these commitments as next steps:

- "...these studies ... will be published on the City's website in January 2022..."
- The staff and WETA would discuss design, and "...will come to the Council to discuss design within 60 days."
- "conduct a robust and transparent public engagement process."

In response to PRA records dating back to December of 2022, and the promise made on December 7, 2021, I finally got a copy of the Ferry Facility Feasibility Study, dated November 12, 2021. It is unchanged since that date, and there was no legitimate reason to hold that study secret. The staff did not come back to the Council to discuss design, but instead began to solicit funding for a final design of the ferry terminal, starting with the Alameda County Transportation Authority. After a series of inquiries by e-mail, on June 30, 2022, Farid Javandel submitted an application for an MTC Federal OBAG 3 Grant for design of the ferry terminal that had not yet been approved. There was no robust and transparent public engagement—there was no public engagement at all. The application materials did not include the 1986 Waterfront Master Plan, the governing document, but instead cited the West Berkeley Transportation Element of 1993, adopted at a time when a ferry terminal was under consideration for the foot of Gilman Street. ACTA informed city staff that they would have to also submit the Complete Streets checklist for the project. Rather than consult this Commission, which is charged with reviewing matters pertaining to the waterfront, the city sent the matter to the newly created Transportation Commission. On July 27, the new Commission met—with Commissioners that had just been appointed—to discuss what was noticed as "Review the Complete Streets checklist for a One Bay Area Grant round three (OBAG3) grant application." Nothing in the meeting notice revealed that the subject grant was for the design of accessways, and environmental studies for a proposed ferry terminal.

The standard for notice under the Brown Act, described by the Attorney General, "is to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body." The notice provided failed to meet this standard. The only way to find out the actual project that was under consideration was to download the whole packet, not consult the meeting notice. The city did not revise the notice, it continued and submitted the matter to ACTA. On July 31, I sent a letter to ACTA objecting to the notice and noting that the application also did not meet the requirements of the grant announcement. I didn't have a copy of the application, which had not provided ACTA with the correct land use plan policies, or I would have included that mistake in my letter. I copied city staff on that letter.

After further e-mails with ACTA staff, the city submitted a response to my letter dated August 29, 2022, signed by Scott Ferris and Liam Garland. No copy was provided to me. ACTA staff sent several e-mails to the city, asking them if they intended to send me a copy, which finally resulted in this response:

“We don’t have plans to share our City Response letter with Jim McGrath.”

That e-mail was copied to senior Berkeley staff. None of them saw the inconsistencies between this approach and the requirements of the Brown Act, or their promise to conduct a robust and transparent public engagement process. Until this e-mail was sent, perhaps the city could have argued that any shortcomings in process or content were inadvertent, or de minimus. But with this statement, and the quiescence of senior city staff, the city’s willingness to avoid the intent of the Brown Act was laid bare.

Tomorrow I will file a complaint about this dereliction of responsibility with the Open Government Commission and the City Manager. I believe that everyone involved in withholding information should be reprimanded, and that mandatory training on the requirements of the Brown Act must be instituted immediately for all city staff that are responsible for communication with the public and other agencies.

The planning activities of local government depend on process to reach a plan that is acceptable to the citizens and stakeholders of a city. But if the process cannot be trusted, the outcome cannot be trusted. If the city resorts to treating stakeholders as enemies, it will ensure that they are enemies, and that their number will grow.

To be sure, that is not the only problem with the City’s application for a grant from ACTA. The source of funds for the OBAG grants is the Federal Highway Administration, which triggers Section 4(f) of the Federal Highway Act of 1966. Now codified in 49 U.S.C 138, that section prohibits a “take” of park and open space land unless there are no practicable alternatives. Since Berkeley marina is designated as a shoreline park priority use area by BCDC that protection and the associated procedures are triggered.

The grant was turned down, and probably would have been turned down even without my letter. Among the substantive problems for applying for this grant is that there is no approved plan, final EIR, or budget for a ferry terminal. Nor was there any consideration of Section 4(f). The overall cost for the terminal is over \$110 million, and the only clearly identified funding is \$30 million of WETA funding in a 2016 business plan prepared by WETA. In the face of the plunge in ridership, WETA has delayed updating that business plan. Yet city staff sought \$7.7 million in grants and promised a 40% match. That matching funding was not identified in the adopted city budget, and would cover work that was to be funded by WETA in the existing MOU. Of course, talking about the budget for such funds in public would have let stakeholders know what the city was up to.

Unfortunately, this is all too common in Berkeley. Rather than face hard decisions about what to do with the marina, and the \$120 million in deferred maintenance problems, political attention shifts to the next shiny object down the road—a commuter ferry terminal. A project which the city staff now acknowledges will not generate any revenue.

Many years ago I learned never to put anything into a letter or e-mail that I was not willing to see on the front page of the Los Angeles Times. That lesson seems to have escaped Berkeley staff, who were willing to make false, even slanderous accusations about my motives, and admit that they were trying to limit my receiving information about this grant proposal. I’ve got a pretty thick skin, and I think it is

actually pretty funny. But what is not funny is the city's promising a robust and transparent public engagement process—and then violating the Brown Act to keep secrets.

Item 8 Attachment 1

Id	Created At	Request Text	Point of Contact	Request Date	Status	URL	Visibility	Closed Date	Closure Reasons	Departments	Requester Name	Requester Email
23-034	01/11/2023 11:44:46 AM	All records related to the Berkeley Marina Area Specific Plan (BMASP), and Large-Scale Ferry Feasibility study.	rmiller@berkeleyca.gov	01/05/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-34	Published	07/12/2023 08:55:46 AM	Fulfilled	City Attorney; Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net
23-100	01/31/2023 01:33:56 PM	Any changes or amendments to the MOU between Berkeley and the Water Emergency Transportation Authority (WETA), originally adopted as Resolution No. 68,782-N.S.	sbunting@berkeleyca.gov	01/31/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-100	Published	02/09/2023 12:43:05 PM	Fulfilled	City Clerk	James McGrath	macmcgrath@comcast.net
23-129	02/09/2023 12:45:44 PM	Contract between Berkeley and Hargreaves Jones for preparation of the Berkeley Marina Area Specific Plan and any modifications to said contract.	sbunting@berkeleyca.gov	02/09/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-129	Published	02/09/2023 12:50:26 PM	Fulfilled	City Clerk	James McGrath	macmcgrath@comcast.net
23-141	02/14/2023 12:42:54 PM	A detailed PDF of the proposed landside modifications to University Avenue and shoreline to the north presented conceptually at community workshop on the pier, October 27, 2021, and identified as "preferred conceptual alternative", slide 32. A version showing grading, vegetation removal, and scale is what I need.	rmiller@berkeleyca.gov	02/14/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-141	Published	04/25/2023 03:35:31 PM	Fulfilled	City Attorney; Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net
23-142	02/14/2023 12:44:15 PM	These records were identified on page 3 of the report for the Council Worksession of December 7, 2021 on "Large Scale Ferry Feasibility Study" 1. Wind and Wave Analysis to ensure safe and energy-efficient ferry berthing 2. Analysis of dredging locations and depths 3. Transportation Demand Management (TDM) review 4. Sea Level Rise Adaptation to ensure long term sustainability of the new pier 5. A ferry electrification feasibility	rmiller@berkeleyca.gov	02/14/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-142	Published	06/01/2023 05:11:58 PM	Fulfilled	City Attorney; Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net
23-143	02/14/2023 12:45:40 PM	These documents were discussed as work products for the Berkeley Marina Area Specific Plan in the City Council Work Session of February 11, 2021 1. Evaluation of potential new revenue opportunities and programs in the context of existing land use, zoning, and regulatory frameworks 2. A financial analysis of the operation of the Berkeley waterfront revenues and expenses, programs and services These documents were discussed as work products for the same plan in the RFP advertising for consultant services. 1. New revenue generation opportunities (element J.5) 2. Parking, existing parking, standards, project demand (element F.3)	rmiller@berkeleyca.gov	02/14/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-143	Published	03/27/2023 01:58:32 PM	Fulfilled	City Attorney; Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net
23-144	02/14/2023 12:46:48 PM	I. Deliverable documents from scope of services for contract No 10632 with GHD, ferry terminal feasibility study. All deliverables listed in the Scope of Services including: a. Ferry Facility Criteria Memorandum b. Wave Protection Assessment Technical memo c. Recreational concepts including meeting agendas, meeting minutes, and plans d. Transportation and Parking Demand Analysis including survey instrument and technical memo e. Memorandum of Potential Parking and TDM strategies f. Landside plans including meeting agendas and meeting minutes g. Programming level cost estimates h. Draft Ferry Facility Expanded Feasibility Study II. Deliverable documents from scope of services for BMASP, with Hargreaves Jones from the scope of services for that contract, 32000183.	rmiller@berkeleyca.gov	02/14/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-144	Published	06/01/2023 05:08:55 PM	Fulfilled	City Attorney; Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net
23-230	03/13/2023 10:01:28 AM	All reports associated with Contract 31900058 with Land Use Economics. This contract involves the economic assets at the waterfront. Contract was approved December 6, 2018.	knesbit@berkeleyca.gov	03/10/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-230	Published	04/17/2023 12:52:15 PM	Fulfilled	City Attorney	James McGrath	macmcgrath@comcast.net
23-344	04/11/2023 10:30:09 AM	MOU between Berkeley and WETA for shared parking in the Marina. Identified on page 240 of the FY 2014 and FY 2015 Adopted Budget as an accomplishment. I want a copy of the MOU and the Council resolution approving it.	sbunting@berkeleyca.gov	04/11/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-344	Published	04/19/2023 01:19:56 PM	No responsive records	City Clerk	James McGrath	macmcgrath@comcast.net
23-346	04/11/2023 04:51:05 PM	...all records of ridership and parking usage for the two small scale ferry operations carried out by PropSF and Tidelines since their inception of service....copies of all revenue received by the city, and expenses incurred by the city, for those two operations. ...surveys of parking use...	knesbit@berkeleyca.gov	04/07/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-346	Published	07/13/2023 10:15:32 AM	Fulfilled	City Attorney	James McGrath	macmcgrath@comcast.net
23-347	04/12/2023 02:59:12 PM	study of parking supply, demand, and management strategies in the Berkeley Waterfront in 2018 cited in Feasibility Study, Ferry Facility at Berkeley Municipal Pier in Nelson Nygaard appendix.	wwilliams@berkeleyca.gov	04/12/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-347	Published	04/28/2023 10:12:51 AM	Fulfilled	Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net

From: [Jacki Taylor](#)
To: [Miller, Roger](#)
Subject: RE: Berkeley
Date: Thursday, April 6, 2023 10:54:25 AM

Hi Roger,
Yes, receiving it today works fine.
Thanks,
Jacki

Alameda County Transportation Commission
Agency phone: 510-208-7400
Direct line: 510-208-7413
Website: www.alamedactc.org

From: Miller, Roger <RMiller@cityofberkeley.info>
Sent: Thursday, April 6, 2023 10:52 AM
To: Jacki Taylor <JTaylor@alamedactc.org>
Subject: Re: Berkeley

Hi Jacki,
It's getting signed in the next hour and I'll be able to send it over. Does that work?

--Roger

On Apr 6, 2023, at 11:40 AM, Jacki Taylor <JTaylor@alamedactc.org> wrote:

Hi Roger,
Just checking on the status. Any updates?
Thanks,
Jacki
Alameda County Transportation Commission
Agency phone: 510-208-7400
Direct line: 510-208-7413
Website: www.alamedactc.org

From: Miller, Roger <RMiller@cityofberkeley.info>
Sent: Tuesday, April 4, 2023 9:25 PM
To: Jacki Taylor <JTaylor@alamedactc.org>
Subject: Berkeley

Hi Jacki,
We are hoping to get the letter back from the City Manager and send it over to you on Wednesday (hopefully).

--Roger

From: Jacki Taylor <JTaylor@alamedactc.org>
Sent: Tuesday, March 28, 2023 7:43 PM
To: Miller, Roger <RMiller@cityofberkeley.info>
Cc: John Nguyen <JNguyen@alamedactc.org>; Javandel, Farid <FJavandel@cityofberkeley.info>; Vivek Bhat <VBhat@alamedactc.org>

Subject: Re: Berkeley marina and Berkeley grant proposals
Hi Roger,
Tomorrow/Wednesday at 9am works fine. Talk to you then.
Thank you,
Jacki

Sent from my iPhone

On Mar 28, 2023, at 3:49 PM, Miller, Roger <RMiller@cityofberkeley.info> wrote:

Hi Jacki,
I am available today up until 6pm at 415
On Wednesday, I'm available all day. If not today, would 9am be ok on Wed?
--Roger

From: Jacki Taylor <JTaylor@alamedactc.org>
Sent: Tuesday, March 28, 2023 3:42 PM
To: Miller, Roger <RMiller@cityofberkeley.info>
Cc: John Nguyen <JNguyen@alamedactc.org>; Javandel, Farid <FJavandel@cityofberkeley.info>; Vivek Bhat <VBhat@alamedactc.org>
Subject: RE: Berkeley marina and Berkeley grant proposals

Hi Roger,
We'd prefer to touch base about this ASAP, but don't need to meet as a group. Are you available for a short call tomorrow? I can be available any time at my office line below - just let me know when would be a good time for you to call.

Thank you,
Jacki
Alameda County Transportation Commission
Agency phone: 510-208-7400
Direct line: **510-208-7413**
Website: www.alamedactc.org

From: Miller, Roger <RMiller@cityofberkeley.info>
Sent: Tuesday, March 28, 2023 1:36 PM
To: Vivek Bhat <VBhat@alamedactc.org>; Javandel, Farid <FJavandel@cityofberkeley.info>
Cc: Jacki Taylor <JTaylor@alamedactc.org>; John Nguyen <JNguyen@alamedactc.org>
Subject: RE: Berkeley marina and Berkeley grant proposals
Hi Vivek,
Thanks for reaching out.
Our new project manager, Liza McNulty, is currently out of the office,

returning on April 7, 2023.

Would it be possible to meet after her return?

If not, I can have the Berkeley team meet sooner.

I can try and make today at 4pm work, but will need a little bit of time.

Just let me know.

Thx.

Roger

From: Vivek Bhat <VBhat@alamedactc.org>

Sent: Tuesday, March 28, 2023 8:37 AM

To: Javandel, Farid <FJavandel@cityofberkeley.info>; Miller, Roger <RMiller@cityofberkeley.info>

Cc: Jacki Taylor <JTaylor@alamedactc.org>; John Nguyen <JNguyen@alamedactc.org>

Subject: FW: Berkeley marina and Berkeley grant proposals

WARNING: This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

Good Morning Farid and Roger – Can you please let me know a convenient time to discuss this issue.

From our end, 4:00 pm today works best.

Thanks,

Vivek Bhat, P.E.

Alameda County Transportation Commission
1111 Broadway, Suite 800, Oakland, CA 94607

Phone: 510.208.7430 direct dial | 510.208.7400 main line

Email: vbhat@alamedactc.org Website: www.alamedactc.org

Facebook: www.facebook.com/AlamedaCTC Twitter: [@AlamedaCTC](https://twitter.com/AlamedaCTC)

From: Angie Ayers <aayers@alamedactc.org>

Sent: Monday, March 20, 2023 11:53 AM

To: Jacki Taylor <JTaylor@alamedactc.org>

Cc: Vivek Bhat <VBhat@alamedactc.org>; Vanessa Lee <VLee@alamedactc.org>; Seung Hyun Cho <scho@alamedactc.org>; Patricia Reavey <preavey@alamedactc.org>; Neal Parish <nparish@fennemorelaw.com>

Subject: FW: Berkeley marina and Berkeley grant proposals

Hi Jacki,

Please see the attached letter from Mr. McGrath.

Thanks,

Angie

Angie Ayers, Associate Administrative Analyst
Alameda County Transportation Commission
1111 Broadway, Suite 800, Oakland, CA 94607

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From: James McGrath <macmcgrath@comcast.net>

Sent: Monday, March 20, 2023 11:35 AM

To: Angie Ayers <aayers@alamedactc.org>

Cc: Ferris, Scott <SFerris@cityofberkeley.info>; Garland, Liam <LGarland@cityofberkeley.info>; Javandel, Farid <FJavandel@cityofberkeley.info>; Miller, Roger <RMiller@cityofberkeley.info>; Claudia Kawczynska <claudia94710@gmail.com>

Subject: Berkeley marina and Berkeley grant proposals

Thank you for your responses, including this mornings, which are quite complete. Please provide the attached letter to all of those who will be reviewing any future grants for Berkeley, including any decision making bodies and boards. It corrects a number of errors that I have found in the city's application.

Jim McGrath

From: [Miller, Roger](#)
To: [Jacki Taylor](#)
Cc: [Ferris, Scott](#); [Erickson, Christina](#); [Lam, Nelson](#); [McNulty, Liza](#); [Michael Gougherty](#); [Kevin Connolly](#)
Subject: City of Berkeley Response Letter to ACTC McGrath letter to ACTC dated 3-20-2023
Date: Thursday, April 6, 2023 12:25:41 PM
Attachments: [COB Response Letter for ACTC.pdf](#)

Hi Jacki,

Attached is the City Response letter to ACTC regarding the McGrath letter to ACTC dated March 20, 2023.

Roger



Office of the City Manager

April 5, 2023

Angie Ayers
Alameda County Transportation Authority (ACTC)
1111 Broadway, Suite 800
Oakland, CA 94607

Re: City of Berkeley Response to J McGrath Letter to ACTC dated March 20, 2023 re:
Berkeley Water Transportation Ferry and Pier Project – Environmental and
Design phases

Dear Grants Committee:

On March 20, 2023, we received a copy of a letter from Mr. Jim McGrath addressed to the ACTC Grants Committee that made several confusing statements. In this letter, we provide a City Response that clarifies these items.

Summary of Comment #1 from McGrath Letter of 03-20-2023:

The letter states:

I very much appreciate your response and the documents that you sent me pursuant to my Public Records Act request. I have not been able to get these documents from the City of Berkeley."

City Response: Over the past three months, Mr. McGrath has submitted several Public Records Act requests for documents related to the City of Berkeley's Water Transportation Ferry and Pier Transportation project, as well as a separate planning project entitled The Berkeley Marina Area Specific Plan Project (BMASP). To-date, the City has provided Mr. McGrath with over fifty documents and weblinks that are responsive to his PRA requests, and will continue to provide records upon request. Some of his requests are in the form of questions and criticisms about the projects, e.g., asking for or pointing out the need for various analyses that the City has not yet performed. For example, Mr. McGrath has requested that the City perform a detailed environmental analysis of the proposed Water Transportation Ferry and Pier Project **before** we seek funding to perform the environmental analysis of the project (e.g., the CEQA Environmental Impact Report). For another request, Mr. McGrath requested a detailed grading plan of the parking and roadway related to the proposed Water Transportation Ferry and Pier project that the City would not even create until the final stages of design. Since the inception of the two projects, the City has regularly uploaded project-related documents to the City's project websites as soon as they are completed. The two project websites can be found at the following URL locations:

- **City of Berkeley Water Transportation Ferry and Pier Project**
<https://berkeleyca.gov/your-government/our-work/capital-projects/berkeley-municipal-Water-Transportation-Ferry-and-Pier-project>
- **Berkeley Marina Area Specific Plan (BMAASP) Project (renamed to Waterfront Specific Plan on state public tidelands)**
<https://berkeleyca.gov/your-government/our-work/capital-projects/waterfront-specific-plan>

Summary of Comment #2 from McGrath Letter of 03-20-2023:

The letter states:

As I noted in my previous letter, the City's notice for the OBAG 3 grant was not properly noticed since the meeting notice did not include a description of the project, which was to design a new project at the marina.

The letter also states:

This matter did not go to the Parks, Recreation, and Waterfront Commission, which is the Commission in the city of Berkeley charged with advising the City Council after reviewing "...policies, projects, programs, planning efforts, activities, and funding..." at the waterfront."

City Response:

Per the state's Brown Act requirements for the publication of the agenda for a legislative body (e.g., a City commission), the agenda and packet materials for this OBAG3 grant application were published on the City's Transportation and Infrastructure Commission website on the City's web platform on Friday, July 22, 2022 at least five days in advance of the TIC Commission meeting of July 27, 2022, and will remain on the website as long as the City maintains the website (see website at: <https://berkeleyca.gov/sites/default/files/legislative-body-meeting-attachments/Transportation%20and%20Infrastructure%20Commission%20Agenda%20Packet%202022-07-27.pdf>).

The TIC Commission meeting agenda contains just one item as shown below:

B. DISCUSSION/ACTION ITEMS

1. Review the Complete Streets checklist for a One Bay Area Grant round three (OBAG3) grant application.* The asterisk indicates written material for the item was included in the agenda packet. On the very next page of the agenda, the Complete Streets Checklist for the "**Water Transportation Ferry and Pier Project**" is attached to the agenda packet and was fully available to the public five days in advance of the meeting. The Brown Act does not require a public agency to send personal invitations about commission agendas to specific private citizens.

For many years, the Bicycle Advisory Committee (BPAC) review of ACTC grant projects in Berkeley has been performed by the City of Berkeley's Transportation Commission. Starting in 2021, the City Council initiated a re-organization of several City commissions for consolidation purposes. On June 14, 2022, Council adopted [Resolution No. 70,410-N.S.](#) that established a

City of Berkeley Response Letter to J McGrath letter to ACTC dated March 20, 2023
Page 3

new Transportation and Infrastructure (TIC) Commission and new [Commission web page](#). Note that Section 3.E.25 of the resolution states that "*The Commission shall serve as the **Bicycle and Pedestrian Advisory Committee** for the City of Berkeley and shall review grant-funded projects as required for compliance with the Alameda County Transportation Commission requirements.*"

It is important to note that the Berkeley Water Transportation Ferry and Pier Project has been discussed numerous times at the City's Parks, Recreation, and Waterfront Commission since 2018. Contrary to the comment in the letter, there is no legal requirement for the PRW Commission to review the Water Transportation Ferry and Pier Project. The PRW Commission does not have the authority to direct the work of City staff or approve grant applications, project designs, bid specifications, nor any other work products that are produced in the course of standard City business. Rather, their function is to hold public meetings to discuss issues and policies regarding parks, recreation, and the waterfront that are important to the community and to advise Council. We often bring projects to the commission to receive their feedback, and will continue to bring the Ferry and Pier Project to them as the project develops.

Summary of Comment #3 from McGrath Letter of 03-20-2023:

The letter states:

The City claims [regarding]... the Water Transportation/Ferry Project that ...the project team received wide support for the proposed new ferry service..." and that only ...a small number of Berkeley residents ...have raised concerns about the project because of the perceived potential impacts on recreational users..." This is not correct. There have been three separate petitions objecting to the City's planning approach, collecting far more signatures than the city's "survey" of support. One of those petitions has collected 922 signatures to date. Moreover, the city's questionnaire that it frequently cites as evidence of support, conflated support for the Berkeley pier, a beloved recreational facility, with a new ferry terminal. From the structure of that question, it is impossible to distinguish support for restoring the pier from support for a ferry terminal. I am a member of Save the Berkeley Pier; our group strongly supports restoration of the pier as a no-cost recreational facility, but does not support, on the current record, a ferry terminal.

City Response:

Over the two-year project to develop a Preferred concept for the Water Transportation Ferry and Pier Project (2019-2021), the City conducted a comprehensive community process to better understand community needs and to reduce any impacts on current activities at the Berkeley Waterfront. The process involved three large community meetings, four focus group meetings, two City Council presentations, two WETA Board presentations, two community questionnaires, and numerous discussions at public meetings of the City's Parks and Waterfront Commission. Outreach for these forums was publicized in the local newspaper (The Berkeleyside), the City's Community Events webpage, and via email announcements to the Marina stakeholders, recreation groups, and the City's Measure T1 bond program mailing list. We received over 1,500 written comments, questionnaire responses, and in-person and virtual participation in this community process. A history of the public process and the

City of Berkeley Response Letter to J McGrath letter to ACTC dated March 20, 2023
Page 4

Preferred Concept was presented to the Berkeley City Council on December 7, 2021¹ and the WETA Board in March 2022, where councilmember and boardmember feedback was extremely supportive. The project webpage has a Frequently-Asked Questions section that provides responses to some misunderstandings that have emerged among participants.

On May 31, 2022, the City Council adopted Resolution No. 70,399-N.S. that authorized the City Manager to submit an OBAG3 grant application to the ACTC CIP 2024 grant program for the Water Transportation Ferry and Pier Project.² This item was published as part of the Council agenda packet on the City's website twelve days in advance of the Council meeting in compliance with Council-adopted procedures.

On December 13, 2022, the Berkeley City Council adopted Resolution No. 70,629-N.S.³ that authorizes the City Manager to process five project applications to the State Coastal Conservancy in order to receive \$15 million in FY2021 state surplus funds (approved unanimously, 9-0-0). One of the five approved projects allocates \$2.9 million to perform the CEQA and NEPA environmental review of the Berkeley Water Transportation and Pier Project.

From January to March, 2021, the City conducted an on-line questionnaire via survey monkey as an additional way for the community to provide feedback on the Berkeley Marina Specific Plan (BMASP) project. While the questionnaire was not a formal survey, 944 people chose to respond. One of the questions asked if people supported the "restoration of the Pier with ferry service." Out of 944 responses, only 7% did not support this, while the remaining 88% indicated support and 5% were neutral.

From 2018 through 2020, the City also conducted a comprehensive community outreach process to identify preferred projects for the City of Berkeley Measure T1 \$100M infrastructure bond program of 2016. City staff attended over 50 neighborhood community meetings. While the focus of the meetings was to hear feedback about City infrastructure needs (streets, stormdrains, parks, public buildings, etc.), staff heard from numerous participants about interest in fixing the pier and also support for new ferry service.

The McGrath letter references an on-line petition that received 922 signatures "objecting to the City's planning approach" for the Water Transportation Ferry and Pier Project. The petition is entitled "Tell Berkeley Officials Not Sell-out the Marina"⁴ by Camille Antinori and states the following:

Help us move City Council to consider a range of options that put the Marina on a "long-term sustainable path" as recommended by the PWC [Parks and Waterfront

¹ See the council report of December 7, 2021 on the Water Transportation Ferry and Pier Preferred Concept: https://berkeleyca.gov/sites/default/files/documents/2021-12-07%20Item%2002%20Large%20Scale%20Ferry%20Feasibility%20Study%E2%80%9320A%20Preferred%20Concept%20285%29_0.pdf

² See resolution at: <https://berkeleyca.gov/sites/default/files/documents/2022-05-31%20Item%2019%20Rev%20Public%20Works.pdf>.

³ See the council report of December 13, 2022: <https://berkeleyca.gov/sites/default/files/documents/2022-12-13%20Special%20Item%2002%20Grant%20Contracts%20with%20the%20State%20Coastal.pdf>

⁴ See on-line petition at <https://sign.moveon.org/petitions/tell-berkeley-officials-to-not-sell-out-the-marina>

Commission] and supported by marina user groups. These options may include ferry service, but only at a scale that is compatible with the Marina's core recreational uses, cultural significance and environmental benefits.

Since the petition language states that long-term plans for the Berkeley Marina "... may include ferry service", it is unclear whether the 922 people who signed this petition are opposed to ferry service in Berkeley or whether they object to the two-year public process for the project conducted by the City.

The petition also makes the following request:

We ask that the City stop the parallel strategy of Pier/Ferry v. overall Berkeley Marina Area Specific Plan and unite the efforts for a consistent and representative future for broader set of users beyond just ferry commuters.

We have heard this complaint from a small number of participants at several of our community meetings. We clarified the City's approach in the FAQ section of the December 7, 2021 Council report⁵ and provide further clarification here. For many decades, the City's Marina Fund that operates and maintains the Berkeley Marina has had an annual structural deficit, whereby annual revenues cannot cover annual expenses nor capital improvements of existing assets. Next year, the annual deficit will be over \$1.4 million. In 2019, after receiving several reports from City staff, the City Council authorized the BMASP project to evaluate ways to increase revenues at the Berkeley Marina. This three-year planning project is currently looking at a variety of ideas such as new food and beverage facilities, a new hotel, and other new recreational activities desired by the public. A key goal of the BMASP project is to identify new revenue-generating uses that can be implemented in a way that also preserves the unique recreational and ecological characteristics of the Berkeley Waterfront that are so highly valued by the public. The BMASP planning project does not envision a wholesale redevelopment of the existing Berkeley Marina, but rather selective appropriate redevelopment of certain existing commercial spaces to generate more revenue. The Ferry and Pier project is one of several capital projects currently underway at the Berkeley Marina. The three-year BMASP planning project will produce a programmatic Environmental Impact Report (EIR) and the Water Transportation Ferry and Pier Project will produce a project-level Environmental Impact Report (EIR). We understand that people are fearful of change, but the project-level EIR will include mitigation measures that will, to the extent possible, reduce any environmental impacts to less than significant levels.

While the petition asks several detailed and valid questions that must be addressed during the preliminary engineering and environmental review phase, it is unclear that such a petition asking these questions indicates opposition to proposed public ferry service. Local opposition to projects can have fickle dynamics and is not set in stone. For example, we recently completed a capital renovation project at the South Cove Parking Lot and Bay Trail Extension that also encountered local opposition, petitions, and non-supportive comments during public

⁵ https://berkeleyca.gov/sites/default/files/documents/2021-12-07%20Item%2002%20Large%20Scale%20Ferry%20Feasibility%20Study%E2%80%9393%20A%20Preferred%20Concept%20%285%29_0.pdf

meetings. Many of these comments argued that we should not build the Bay Trail or we should move it away from the shoreline in order to preserve six bayfront car parking spots for a small number of users. The project is now complete and we hear glowing reviews of the project from a wide range of users, including many people who initially opposed the project.

Finally, we point out that the Save the Berkeley Pier⁶ group described in the McGrath letter recently scheduled their first meeting on March 5, 2023 per the website in the footnote below and has approximately six members.

Summary of Comment #4 from McGrath Letter of 03-20-2023:

The letter states:

Issues raised in the public comments process so far go well beyond the question of recreational impacts, although the impact of 1830 riders competing for 250 spaces is certainly an issue.

City Response: The letter states that 1,830 riders will compete for 250 spaces. This is not correct. The WETA Business Plan of 2022⁷ for Berkeley Ferry service projects says in the first projected year of service (2026), ridership is projected to be 1,910 "boardings", which are known as single trips, which equates to approximately 955 unduplicated passengers per day as opposed to the 1,830 double-counted riders stated in the letter. The letter does not consider that many ferry passengers may get to the Marina by public transportation (bus) or by increasingly popular alternative transportation, such as ride-share vehicles, bicycles, electric bikes and scooters, family drop-off modes, and potential new shuttle service. WETA and the City have agreed to cap the parking dedicated for ferry passengers to 250 spots at the lot that contains over 320 spots; the 250 spots comprise only 17% of the total parking at the Berkeley Marina, and would be designated for ferry users only during weekdays, which have much lower demand for recreational parking. The City recognizes environmental impacts associated with parking and traffic at the Berkeley Marina must be evaluated during the environmental review, and, to the extent possible, mitigations would be developed to reduce any potential impacts to recreational users to less than significant levels.

The letter also states that: "... Berkeley and WETA propose a design for a new ferry terminal that would involve substantial dredging and fill, and a recreational pier of only 540 feet in length, potentially disturbed by the dredging, fill, and ongoing ferry traffic."

The project will involve initial dredging and infrequent maintenance dredging only within the existing "federal channel" in Bay waters, which is a U.S. Army Corps of Engineers-designated area that has been dredged previously, which reduces environmental impacts and streamlines the permitting process. The only "fill" created by the project involves two boarding floats for ferry service.

⁶ Save the Berkeley Pier group: See meeting announcement on the SF Boardsailing Association website: <https://www.sfba.org/index.php/news/event-calendar/eventdetail/54/-/save-the-berkeley-pier>

⁷ WETA Berkeley Ferry Business Plan here: <https://weta-sanfranciscobayferry.com/sites/weta/files/weta-public/currentprojects/Item%20A%20-%20Berkeley%20Ferry%20Service%20Business%20Plan.pdf>

The statement that the pier will only be 540 feet in length is not correct, despite attending our numerous public presentations and reviewing project documents on the project website. The proposed project involves the replacement of the existing deteriorated pier structure with the following three main elements:

- the first 580 feet will be for public access to two proposed ferry floats and will also be accessible to the public for general recreation;
- at the 580 foot mark, a new 400 ft curved breakwater will be installed perpendicular to the pier (the sword handle) to provide wind and wave protection for the ferries. This project element would also be accessible to the public for general recreation;
- from that point onward, the new pier will be extended another 500 feet westward for general public recreation, totaling 1,480 total feet of pier for public recreation. (For comparison, the current pier was 3,000 feet in length).

Summary of Comment #5 from McGrath Letter of 03-20-2023:

The letter states "... Instead of providing the existing plan, the city cites a 1993 Transportation element.

City Response: It is curious that the letter mentions only the **West Berkeley Plan of 1993 – Transportation Element** and not the nine other City and regional plans that describe the need for potential ferry service between Berkeley and San Francisco, including the Alameda County Community-based Transportation Plan (CBTP) of 2020, the BCDC Bay Plan, the Eastshore State Park General Plan, the City of Berkeley General Plan and Climate Action Plan, etc. See **Attachment A** below for a full list of these plans, the links to the plans, and the specific page numbers.

The letter is correct in that the **West Berkeley Plan of 1993** mentions Gilman St. as the location of proposed ferry service, but the Plan also states that "...The Metropolitan Transportation Commission – in a region wide study of potential ferry routes – recommended that ferry service be established from West Berkeley to San Francisco. The specific site at Gilman St. was provided in the study because of the presence of Caltrans-owned parking lots, and because proximity to the Golden Gate Fields Racetrack would encourage "reverse commuter" ridership to the horse races. While the racetrack near Gilman St. is no longer the large draw it was in previous decades, the MTC study correctly identifies the overall need for ferry service between the underserved area of West Berkeley and San Francisco.

The letter states that the Berkeley marina is "... a designated park under BCDC's Bay Plan", and that the land use plan of October 7, 1986 should be the basis for this project.

City Response: On page 128 of the BCDC Bay Plan (adopted 1969, amended 2006), the Berkeley Waterfront (Marina) is referenced with the following text:

Berkeley Waterfront - Cesar Chavez Park - Preserve marina, beach, small boat launch, windsurfing access, fishing pier, interpretive center and multi-use trails. Possible ferry terminal. Allow if compatible with park and marina use; serve with bus public transit to reduce traffic and parking needs. Provide signage regarding fish consumption advisories for anglers. Link: <https://www.bcdc.ca.gov/pdf/bayplan/bayplan.pdf>.

The BCDC Bay Plan also has general conditions for Recreation Policies in the San Francisco Bay. On page 73: Item 9 contains the following text pertaining to ferries:

Ferry terminals may be allowed in waterfront park priority use areas and marinas and near fishing piers and launching lanes, provided the development and operations of the ferry facilities do not interfere with current or future park and recreational uses, and navigational safety can be assured. Terminal configuration and operation should not disrupt continuous shoreline access. Facilities provided for park and marina patrons, such as parking, should not be usurped by ferry patrons. Shared parking arrangements should be provided to minimize the amount of shoreline area needed for parking.

According to a plain reading of the BCDC text, ferry terminals can be allowed at the Berkeley Waterfront Park (Marina) if compatible with park and marina use. In developing the preferred concept for the Berkeley Water Transportation and Pier Project, great effort was made to modify the concept numerous times in order to minimize impacts to "park and marina use".

For example, the project evaluated two different methods of ferry parking, the "dispersed" concept and the "clustered" concept. The preferred concept shows that the clustered concept at a single parking lot near the Berkeley Pier would have a far less disruptive impact on parking throughout the Berkeley Waterfront as reflected by community feedback.

The existing parking lot near the existing pier has 320 spaces, of which 250 will be designated for ferry users. The Berkeley Marina currently has over 1,500 parking spaces, many of which go un-used through various parts of the week. At present, the 320 spot parking lot has been closed for over five years due to vandalism and illegal encampments and the closure of the former restaurant. This closure has had little impact on the majority of the public at the Berkeley Marina. With the use of new transportation demand management techniques and other project mitigation measures, along with new trends in alternative transportation to the Marina, the City is confident that the environmental impacts associated with parking and traffic from proposed ferry users at the Berkeley Marina will be less than significant with any necessary mitigation measures. It should be noted that the California Environmental Quality Act (CEQA) does not require that a project sponsor determine the totality of environmental impacts of a project **prior** to conducting an environmental review of impacts.

The letter states that the "... land use plan of 1986 should be the governing document for this project, but this is an inaccurate statement. According to the text in the Waterfront Specific Plan and the Waterfront Plan Amendment to the Berkeley Master Plan, both of October 7, 1986, the location governed by the two documents is specifically on privately-owned tidelands as follows:

The Berkeley Waterfront ... for this Specific Plan [and Waterfront Plan Amendment] consists of approximately 170 acres of privately held land and adjacent water areas

bounded by the Interstate I-80 freeway on the east, the Berkeley Marina on the west, and the city limits of Albany and Emeryville on the north and south.⁸

As the map in the Waterfront Plan Amendment clearly shows, Marina Blvd is the western boundary of the formerly privately-owned tidelands of the Berkeley Waterfront (now comprising Eastshore State Park) (Attachment 2).⁹ As a result, the Berkeley Marina and Cesar Chavez Park are not located within the boundaries described by the two land use documents of 1986 and are not governed by the two land use documents.

At present, the following planning documents have City jurisdiction over public tidelands: The North Waterfront Park Land Use Plan of 1977 governs Cesar Chavez Park, and the City's Use Permit No. 5567 for the Marina Master Development Plan of 1964 that covers the land and water at the Berkeley Marina. At present, neither of these two documents, nor any other City documents have jurisdiction over the Berkeley Pier; rather, the pier is simply a City-owned structure located on City property (state public tidelands) (as provided by the grant of state tidelands of 1913, as amended through 1962). The Waterfront Plan Amendment has many laudable goals that reflect Berkeley's desire to preserve the Waterfront area for recreation and open space, but the Plan does not have the authority to prohibit public ferry service at the Berkeley Pier location.

The Berkeley Marina itself currently contains a range of permitted land uses, including recreation, boating, restaurants, hotel, other buildings, and even an industrial boat repair yard (called the Marine Center), along with two miles of asphalt public roads, pathways, and other public amenities. The addition of ferry service to the Berkeley Pier (originally constructed as an automobile causeway), along with the allocation of 250 out of 1,500 parking spaces (17% of the total) during low-recreation-demand weekdays would be a compatible addition to the Marina that would complement existing and future uses, and bring additional visitors to access the waters of the San Francisco Bay, which could help improve the financial and public safety situation at the Berkeley Marina.

Summary of Comment #6 from McGrath Letter of 03-20-2023:

The letter states that:

... the land use plan of 1986 ... establishes a requirement for a public vote before development can interfere with open space. That provision was adopted by initiative, and provides:

That no ...public open space ...owned or controlled or leased by the City of Berkeley or agency thereof, shall be used for any other purpose than public parks and open space, without The Berkeley City Council first having submitted

⁸ Resolution No. 53,484-N.S., 2nd WHEREAS clause in WATERFRONT PLAN AMENDMENT TO THE BERKELEY MASTER PLAN); and Resolution No.53,485-N.S., 2nd WHEREAS clause, and page 9 of Exhibit A to the Resolution) in WATERFRONT SPECIFIC PLAN.

⁹ Note: In 2000, all of the privately-owned tidelands were acquired by the state to become Eastshore State Park. The Eastshore State Park General Plan now supercedes the Waterfront Specific Plan and the Waterfront Amendment to the General Plan of October 7, 1986, except at the Stables area at the racetrack).

such use to the citizens for approval by a majority of registered Berkeley voters voting at the next general election.

First, the land use plan of 1986 does not have jurisdiction over the Berkeley Marina nor the Berkeley Pier. Second, the letter says that the Waterfront Plan Amendment of 1986 contains a public vote requirement. This is not correct. The text cited in the letter regarding a public vote cannot be found in the Waterfront Plan Amendment nor the Waterfront Specific Plan of 1986. The text is actually from the City's Public Parks and Open Space Preservation Ordinance (BMC Chapter 6.42) which was approved by Berkeley voters as ballot Measure L in the 1986 general election. This City ordinance requires that no public park or public open space in Berkeley shall be used for any other purpose than public parks and open space, without approval by voters at a general election. "Public Parks" are defined as City parks, public school playgrounds or lands held in trust by a public entity, which have been formally dedicated to permanent recreational use by the City of Berkeley, and funded for recreational use by City of Berkeley public funds." "Public open space" is defined as "all City of Berkeley parks, public school playgrounds, and vacant public land, whether dedicated formally to park use or being used de facto as open space with recreation use or potential use on or after January 1, 1985."

There are three formally designated parks at the Berkeley Marina: Cesar Chavez, Shorebird, and Horseshoe. The letter claims that the entire Berkeley Marina is a park because the BCDC Bay Plan defines the marina as a "waterfront park". However, the City's Public Parks and Open Space Preservation Ordinance is not required to use land use designations from another regulatory agency (e.g., BCDC). The Berkeley Marina contains an industrial boatyard, a hotel, three restaurants, and over 1,000 boats. It is hard to see how an industrial boatyard or hotel should be classified as a park or open space, and so a plain reading of the ordinance indicates that it would apply only to the existing formally designated parks at the Marina, and land used as open space with recreation use or potential use on or after January 1, 1985. This logic also applies to the Berkeley Pier and the adjacent multi-purpose parking lot. The Pier was originally constructed for autos and ferries in 1926 and then operated later as a fishing pier. The adjacent multi-purpose parking lot was constructed in 1970 to be a shared resource that served restaurant visitors and the general public.

The letter appears to be conflating definitions of parks from multiple documents. It is correct that the BCDC Bay Plan designates the entire Berkeley Marina area and Waterfront as a "waterfront park", but the language in the City's Public Parks and Open Space Preservation Ordinance (Measure L) does not adopt BCDC's definitions.

The letter appears to be conflating definitions of parks from multiple documents. It is correct that the BCDC Bay Plan designates the entire Berkeley Marina area and Waterfront as a "waterfront park", but the language in the City's Public Parks and Open Space Preservation Ordinance (Measure L) does adopt BCDC's definitions.

One final point. Although not mentioned in Mr. McGrath's letter, the City's zoning ordinance defines the Marina as "Unclassified", which does not prohibit any specific "use", but rather sets up an approval process for any proposed new use by three approval entities: the Zoning Adjustment Board, the Planning Commission, and the City Council.

Summary of Comment #7 from McGrath Letter of 03-20-2023:

The letter states that the current MOU between the City and WETA for the Water Transportation and Pier Project "... establishes that WETA, which is funded by Regional Measure 3, is responsible for funding design and environmental review."

City Response: The text in the letter is a paraphrasing of Section 12 in the MOU, and is partly accurate, but not entirely. Section 12 in the current MOU¹⁰ contains the following text: ...

Subject to applicable laws and the Parties' ability to secure adequate funding, WETA will pay all costs associated with Project elements associated with public ferry service, including CEQA (and, if applicable, NEPA) compliance, resource agency permitting, and design costs, City will pay all costs associated with public access aspects of the Project. For aspects of the Project that are required for both types of elements, WETA and City will implement a reasonable cost-sharing method. The City and WETA will each contribute staff resources to support the Design Phase.

The main point of Section 12 was a general approach whereby WETA would cover ferry-related and the City would cover public recreation-related aspects of the project. The intention was never for WETA to be responsible for funding the entire design and environmental review of the total project as implied by Mr. McGrath's letter.

Second, the total cost of the Berkeley Ferry-Pier project, including the ferries, the waterside elements, and the landside elements, is approximately \$121 million. This amount represents over one-third of the total amount of RM3 funding (\$300 million) allocated for numerous water transportation projects over the next 25 years as described in WETA's Strategic Plan of 2016. Given this constraint, the Berkeley project will clearly need non-RM3 sources of funding.

Third, Section 12 from the MOU does not specify the sources of funding, whereas Section 6 of the MOU ("Partnering") addresses funding as follows: "... Federal, state, regional or local funding may become available during the term of this MOU. WETA and the City commit to collaborate and coordinate to pursue funding for the Project." In 2021, after completing the Planning phase using local funds from both agencies, RM3 funding was not available due to litigation. Therefore, City and WETA staff agreed to jointly seek grant funding for the next phases of the project (environmental and design) from the next available public transportation funding source; this resulted in a grant submittal to the ACTC competitive funding cycle. In addition, the City was able to allocate \$2.9 million in state surplus funds towards the project (as well as City and WETA staff costs) as matching funds, which will help ACTC leverage the CIP 2024 grant cycle funding to complete the next phase of the Berkeley Water Transportation Ferry and Pier Project, which is listed as Priority Project ID Number 91 in the **10-Year Priority Projects and Programs for the 2020 Countywide Transportation Plan (CTP)**. WETA will be developing a 5-Year Plan for RM3 expenditures to be presented to the WETA Board in

¹⁰ WETA MOU: <https://berkeleyca.gov/sites/default/files/documents/2019-03-12%20Item%2009%20Memorandum%20of%20Understanding.pdf>

June of 2023 as well as the Metropolitan Transportation Commission (MTC) that will budget RM3 funds towards the project.

For the next phases of the project, the roles of City and WETA have not yet been determined. The MOU will be updated to cover the next phases of the project (environmental and design) and the roles of the City and WETA. The City and WETA will continue to collaborate to seek other sources of funding to complete the project, as we have with this current ACTC grant application.

Summary of Comment #8 from McGrath Letter of 03-20-2023:

The letter states that:

... any investment in a full design of a controversial ferry terminal, funded by public money, is at risk of being wasted if that controversial project fails to navigate Federal and State environmental review processes, regulatory permits through multiple agencies, and a city election.

City Response: The City and WETA have many years of experience in delivering projects that require complex permitting and environmental review by the various aquatic agencies that have jurisdiction over the land, shoreline, and waters of the San Francisco Bay. In addition, this project will be similar to several recent ferry projects implemented by WETA that have completed successful environmental review processes, such as the Downtown SF Ferry Terminal Expansion, Richmond Ferry Terminal, and South San Francisco Ferry Terminal. During the environmental review by a qualified firm, all permitting agency and community comments will be addressed and any required mitigations will be identified to reduce or eliminate any environmental impacts that could potentially rise to the level of significant impact.

The City's current Ferry-Pier Project Manager, Liza McNulty, recently completed the highly complex rebuild of Berkeley Tuolumne Camp at a cost of \$59 million that involved multiple years of permitting and environmental review through federal, state, and local agencies, among several other complex projects. We are confident that a comprehensive environmental review and design process with extensive community input can be completed that will guide the development of a public ferry and public recreation pier renovation project that will have a positive impact for the Berkeley Waterfront/Marina area as well as the entire Bay Area.

We have a valid project with the full support of the Berkeley City Council, the WETA Board, and state and local representatives. Additionally, there have been numerous support letters from community businesses and organizations. We are aware that Mr. McGrath has been an outspoken opponent of public ferry service at the Berkeley Waterfront for many years. We wish to point out that the concerns in his recent letter to ACTC are narrowly defined by a limited number of existing recreational users at the Berkeley Waterfront and do not consider the multiple public benefits of the project such as equity considerations and expanded access to jobs, alternative transportation, and emergency response.

City of Berkeley Response Letter to J McGrath letter to ACTC dated March 20, 2023
Page 13

Sincerely,



Dee-Ridley-Williams
City Manager

Cc: LaTanya Bellow, Deputy City Manager
Scott Ferris, Director, Parks, Recreation, and Waterfront Department
Christina Erickson, Deputy Director, Parks, Recreation, and Waterfront
Department
Liza McNulty, Capitals Project Manager, Parks, Recreation, and Waterfront
Department

Attachment 1: List of local and regional plans that call for Berkeley ferry service:

- * **The SF BCDC Bay Plan of 1969 (amended 2006)** – (See page 128 for possible ferry terminal at the Berkeley Waterfront (aka the Berkeley Marina) as follows: **Berkeley Waterfront - Cesar Chavez Park** - Preserve marina, beach, small boat launch, windsurfing access, fishing pier, interpretive center and multi-use trails. Possible ferry terminal. Allow if compatible with park and marina use; serve with bus public transit to reduce traffic and parking needs. Provide signage regarding fish consumption advisories for anglers.
* Link: <https://www.bcdc.ca.gov/pdf/bayplan/bayplan.pdf>
- * **The WETA Strategic Plan of 2016** identified a network of 16 ideal locations for expanded ferry service throughout the Bay Area region, including Berkeley, to help provide alternative transportation for passengers and emergency response.
Link: <https://weta.sanfranciscobayferry.com/sites/default/files/weta/strategicplan/WETAStrategicPlanFinal.pdf>
- * **The WETA Berkeley Ferry Project website** is at the following link and contains similar details:
* Link: <https://weta.sanfranciscobayferry.com/current-projects/berkeley-ferry>
- * **The WETA Berkeley Ferry Service Business Plan of 2022** showed an increase in demand (from earlier estimates) for a new weekday average at 2,110 trips by the year 2040.
* Link: <https://weta.sanfranciscobayferry.com/sites/weta/files/weta-public/currentprojects/Item%20A%20-%20Berkeley%20Ferry%20Service%20Business%20Plan.pdf>
- * **The Alameda County Community-based Transportation Plan (CBTP) of 2020** showed a need for more transit in West Berkeley (p. 3-4) and the Berkeley Ferry service (p. 7-13).
* Link: https://www.alamedactc.org/wp-content/uploads/2021/02/Final_2020CBTP.pdf
- * **The Eastshore State Park General Plan: CIRC-16: Explore options for accommodating water-based transit service such as water taxi or ferry service to the park project (p. III-43).**
* Link: https://www.parks.ca.gov/pages/21299/files/eastshore_sp_gp_final.pdf
- * **The West Berkeley Plan – Transportation Element** of 1993 calls for new ferry service because Berkeley was the location with the greatest potential for ferry commuting of any new site in the Bay Area. (p. 160).
* Link: https://berkeleyca.gov/sites/default/files/2022-03/12_14_1993%3B%20CLK%20-%20Resolution%3B%20City%20Council%3B%2057301%3B%20West%20Berkeley%20Area%20Plan%3B.pdf
- * **The City of Berkeley's Climate Action Plan** of 2009 identifies public transit as a more sustainable form of transportation (Chapter 3, p. 19, 46), and sets a goal to expand under-used modes of transportation, such as ferry service at the Berkeley Marina that would connect to San Francisco and other locations.
* Link: <https://berkeleyca.gov/sites/default/files/2022-01/Berkeley-Climate-Action-Plan.pdf>
- * **The City of Berkeley General Plan Transportation Element** of December 2001, Policy T-9 – Ferry Service (p. T-5)

* Link: [Transportation \(berkeleyca.gov\)](https://www.berkeleyca.gov/transportation)

* The **City of Berkeley Water Transportation Ferry and Pier Project website** is at the following link and provides up-to-date information on the history of the project, community meetings and community feedback, technical feasibility documents and plans, and project schedule:

* [https://berkeleyca.gov/your-government/our-work/capital-projects/berkeley-municipal-Water Transportation Ferry and Pier-project](https://berkeleyca.gov/your-government/our-work/capital-projects/berkeley-municipal-Water-Transportation-Ferry-and-Pier-project)

* **Plan Bay Area 2050 – 4-Transportation** – (page 79) - Ferries present another option for shoring up transbay capacity in the near term at a smaller scale. **Plan Bay Area 2050** invests in new ferry service and increases in frequency to existing service to complement investments in regional transit. Such investments include new ferry service to **Berkeley**, Redwood City, Treasure Island, Mission Bay, Martinez, Hercules and Pittsburg, alongside frequency boosts across the Golden Gate and WETA systems.

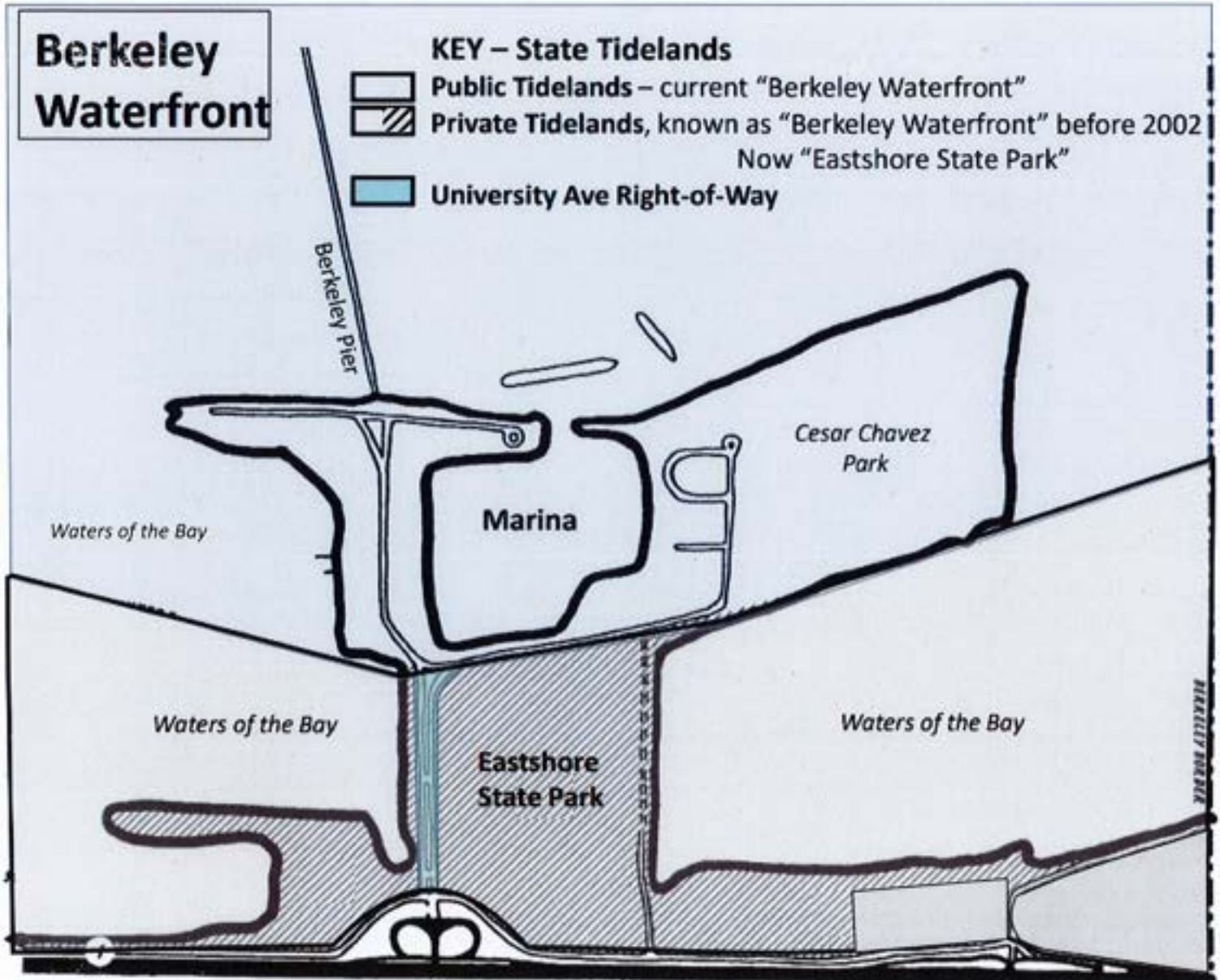
*
[https://www.planbayarea.org/sites/default/files/documents/Plan Bay Area 2050 Transportation October 2021.pdf](https://www.planbayarea.org/sites/default/files/documents/Plan_Bay_Area_2050_Transportation_October_2021.pdf)

* **The 10-Year Priority Projects and Programs for the 2020 Countywide Transportation Plan CTP**, Project ID 91.

* https://www.alamedactc.org/wp-content/uploads/2021/05/Final_2020CTP_Projects-2.pdf

Attachment 2:

- Map of privately-owned tidelands covered by the Waterfront Plan Amendment and the Waterfront Specific Plan of 1986 (in grey)
- See public tidelands (in blue)



From: [Jacki Taylor](#)
To: [Miller, Roger](#)
Subject: RE: ACTC letter
Date: Monday, April 10, 2023 3:59:55 PM

WARNING: This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

Hi Roger,

Thanks for the confirmation.

Best,

Jacki

Alameda County Transportation Commission

Agency phone: 510-208-7400

Direct line: 510-208-7413

Website: www.alamedactc.org

From: Miller, Roger <RMiller@cityofberkeley.info>

Sent: Monday, April 10, 2023 3:41 PM

To: Jacki Taylor <JTaylor@alamedactc.org>

Subject: ACTC letter

Hi Jacki,

I left a message on your voicemail earlier today, and just re-confirming here that the City will not send out a cc: of the ACTC City Response letter, per City practice.

Give me a call if you need to touch base.

Thanks,

Roger



**TRANSPORTATION and INFRASTRUCTURE COMMISSION
SPECIAL MEETING
AGENDA**

Wednesday, July 27th, 2022, 7:00 pm

Mission: Advises Council on transportation and public works infrastructure policies, facilities, and services

PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH ZOOM VIDEOCONFERENCE AND TELECONFERENCE.

Pursuant to Government Code Section 54953(e) and the state declared emergency, this meeting of the City of Berkeley Transportation and Infrastructure Commission will be conducted exclusively through teleconference and Zoom videoconference. The COVID-19 state of emergency continues to directly impact the ability of the members to meet safely in person and presents imminent risks to the health of attendees. Therefore, no physical meeting location will be available.

To access the meeting remotely from a PC, Mac, iPad, iPhone, or Android device, please use this URL to join: <https://us02web.zoom.us/j/85332533768>

Webinar ID: **853 3253 3768**

If you do not wish for your name to appear on the screen, then use the drop-down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon by rolling over the bottom of the screen. To join by phone: *Dial 1-669-900-9128 and enter Meeting ID: 860 4009 5447*. If you wish to comment during the public comment portion of the agenda, Press *9 and wait to be recognized by the Chair. Note: Your phone number will appear on the videoconference screen.

A. PRELIMINARY BUSINESS

1. Call to order (staff)
2. Roll call
3. Designate a TIC member to chair the meeting
4. Public comment on items not on the agenda
5. Update on administration and staff

B. DISCUSSION/ACTION ITEMS

* Written material included in packet

** Written material to be delivered at meeting

The public may speak at the beginning of any item.

1. Review the Complete Streets checklist for a One Bay Area Grant round three (OBAG3) grant application*

Presentation and discussion

Beth Thomas, Principal Planner

Farid Javandel, Deputy Director of Public Works

Transportation and Infrastructure Commission
Special Meeting Agenda
Wednesday, July 27th, 2022


C. ADJOURNMENT 9:30 pm

Agenda Posted: July 22nd, 2022

The next meeting of the Transportation and Infrastructure Commission is scheduled for Thursday, September 15th, 2022.

A complete agenda packet is available for public review at the Main Branch Library and at the Transportation Division front desk.

ADA Disclaimer

 *This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD) at least three business days before the meeting date. Please refrain from wearing scented products to this meeting.*

SB 343 Disclaimer

Any writings or documents provided to a majority of the commission regarding any item on this agenda will be made available for public inspection at the Public Works Transportation Division offices located at 1947 Center Street, 4th Floor.

Communications Disclaimer

*Communications to Berkeley boards, commissions or committees are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the secretary of the relevant board, commission or committee. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the secretary to the relevant board, commission or committee for further information.*

Commission Secretary: Farid Javandel, Deputy Director of Public Works
1947 Center St., 4th Floor, Berkeley, CA, 94704
Telephone (510) 981-7061 / Fax: (510) 981-7060 / TDD: (510) 981-6903
Email: Fjavandel@cityofberkeley.info



**TRANSPORTATION and INFRASTRUCTURE COMMISSION
SPECIAL MEETING
DRAFT MINUTES**

Wednesday, July 27th, 2022, 7:00 pm

A. PRELIMINARY BUSINESS

1. Call to order

Meeting called to order by Commission Secretary Farid Javandel at 7:02 pm

2. Roll call

Commissioners Present: Barnali Ghosh, Sam Greenberg, Liza Lutzker,
Ray Yep

Commissioners Absent: Karen Parolek

Staff Present: Farid Javandel, Beth Thomas, Roger Miller,
Nelson Lam, Alisha Gard

3. Designate a TIC member to chair the meeting

Action: It was Moved / Seconded (Yep / Greenberg) to designate Barnali Ghosh as chair for the special meeting.

Ayes: Ghosh, Greenberg, Lutzker, Yep

Noes: None

Abstain: None

Absent: Parolek

Motion carried 4-0-0-1

4. Public comment on items not on the agenda

Speakers: Susan Schwartz, Jim McGrath, Kelly Hammargren

B. DISCUSSION/ACTION ITEMS

1. Review the Complete Streets checklist for a One Bay Area Grant round three (OBAG3) grant application

Nelson Lam, Supervising Civil Engineer for City of Berkeley Parks, Recreation, & Waterfront, provided a presentation on a grant application for water transportation and a pier project at the Berkeley Marina. The Metropolitan Transportation Commission has identified this location as a “mobility hub” and Equity Priority Community. The preferred concept plan calls for transportation enhancements to connect the Berkeley marina with the surrounding area. Proposed landside improvements include: a ferry terminal to support electric ferry vessels; dual-purpose pier with recreation and ferry access; integrated breakwater with recreation deck; recreation pier; AC Transit bus stop; restroom plaza; ride-share / shuttle parking; Bay Trail extension; a multipurpose pathway; a pier plaza with bike share and bike lockers; a parking lot for 250 cars. Nelson Lam predicts that more marina projects are on the way.

Public comment: 3 No action.

C. ADJOURNMENT

Action: It was Moved / Seconded (Lutzker / Yep) to adjourn the meeting at 8:20 pm.

Motion carried 4-0-0-1

Transportation and Infrastructure Commission
Special Meeting Agenda
Wednesday, July 27th, 2022

Commission Secretary: Farid Javandel, Deputy Director of Public Works
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