



July 26, 2022

VIA ELECTRONIC MAIL AND U.S. MAIL

Email: bucheb@co.monterey.ca.us

Brent Buche, General Manager
Monterey County Water Resources Agency
1441 Shilling Place, North Building
Salinas, CA 93901

Re: Dock Renewal Fees For Nacimiento Lake

Dear Mr. Buche:

This office represents the Nacimiento Regional Water Management Advisory Committee (“NRWMAC”) in connection with, among other things, the imposition of dock renewal fees at Nacimiento Lake under Ordinance 4065. NRWMAC previously sent correspondence to Monterey County Water Resources Agency (“Agency”) on May 2, 2022 contesting renewal fees imposed by the Agency under the Ordinance. This communication responds to your letter dated June 6, 2022, which does not adequately explain or justify the dock fees imposed against docks that are not floating or have not floated for a license year.

As you know, NRWMAC disputes the Agency’s interpretation of the Ordinance and position “that the renewal of the license may be deferred, only when the MCWRA is provided evidence that the dock is removed from the Reservoir and is not planned to be floated or refloated during the licensing year.” The Agency’s application of fees in this manner ignores the very language of Ordinance 4065.

Ordinance 4065 expressly states:

SECTION 4. INITIAL AND RENEWAL LICENSES

(a) A dock license must be obtained from the Agency for each dock initially proposed to be constructed or placed within the highwater mark at Lake Nacimiento, in anticipation of floating such dock in the waters of Lake Nacimiento, before such dock is so constructed or placed. Such license shall be required, even though, at the time the dock is placed or constructed within the highwater mark, the lake bed is dry or partially dry. The license so issued shall expire on March 31 of the calendar year following the year in which the license is issued.

(b) Following the initial year of issuance, each dock license must be renewed on or before April 1 each licensing year during which the dock is left, reinstalled, or refloated on or in the waters of Lake Nacimiento. The renewal license shall expire on March 31 of the succeeding year. **If a previously registered dock has been removed from the water or left high and dry and is not refloated until after April 1, the renewal of the license may be deferred, provided that the dock shall not be refloated until after issuance of the renewal license. Renewal is not required during any year in which the dock remains out of the water for the entire licensing year.** (Emphasis added.)

As shown, any reference of “highwater mark at Lake Nacimiento” applies to the initial fee only required of licensees, regardless of whether “the lake bed is dry or partially dry” as provided for in subsection (a).

In sharp contrast, there is no such conditioning language in subsection (b) that applies to renewal licenses “[f]ollowing the initial year of issuance.” Nothing in subsection (b) requires a renewal fee even if “the lake bed is dry or partially dry,” as expressly required for initial licenses.

In fact the opposite is true. After an operator obtains an initial license, a renewed license is “not required during any year in which the dock remains out of the water for the entire licensing year.” That is, for operators with docks that did not float for any given year, the renewal fee is not required at all. Similarly, with respect to deferrals of fees, the Ordinance allows operators to defer renewing a license where “a previously registered dock...has been left high and dry and is not refloated until after April 1”. Accordingly, if a dock has been left “high and dry,” the public may defer renewal fees until such time the dock floats – when the “issuance of [a] renewal license” is necessitated.

In your June 6, 2022 letter, you state that the Reservoir has “fluctuating water surface elevations” and that “[a] dock ‘high and dry’ can quickly become one that is floating once the rainy season begins in October and continues into March.” “Therefore, regardless of floating at the time of renewal, any dock left in or on the Reservoir below the highwater mark could be floating, as designed, and is subject to completing the annual renewal license requirement.” These presumptions do not justify the Agency’s attempt to expand its authority under Ordinance 4605. The Agency cannot predict future water levels, such that it mandates fees that are allegedly based on yet-to-come rain needed to float docks. In essence, the Agency seeks to impose renewal fees to operators by virtue of a dock being at Nacimiento Lake – whether the dock floats in a given license year or not. This is in conflict with the Ordinance. *See Dep’t of Water Res. Cases*, 69 Cal. App. 5th 265, 277 (2021) (“We give the words of a statute their ordinary and usual meaning and construe them in the context of the statute as a whole... ‘Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.’ [Citations]”).

The Agency's imposition of renewal fees under Ordinance 4605 is unlawful and arbitrary. The Ordinance nowhere addresses or considers possible "fluctuations" of water and/or docks that may "quickly float" as a basis to impose fees – on docks that were not used or did not float due to dry conditions. That a dock could float at some point in time in the future (and subsequently fall within the highwater mark) is irrelevant. The Agency's imposition of fees is at direct odds with the language of Section 4, subsection (b).

Pursuant to both the plain language of Section 4, and fundamental concerns of fairness, the Agency's imposition of fees against operators whose docks are not floating and/or are out of water must be reversed. The Agency must conform with and enforce Ordinance 4065 as intended. Your statement that "[i]t can be concluded that any dispute over fees for non-floating docks in the Reservoir is limited to the comments by NRWMA and a small percentage of licensees" has no bearing on the Agency's unauthorized acts that remain ongoing against the public.¹

In addition, the Grant of Easement (12250) provided to the Monterey County Flood Control and Water Conservation District ("County") authorizes the County to engage in "Flooding" only, "so that the waters stored and to be stored by the Nacimiento Dam and reservoir shall be free to inundate the above-described land." The Easement does not authorize the County or Agency to exercise control over the dry land under the water or to come onto the property to enforce docking fees or seize docks. Docks that are stored on dry land is not on the County's property, and thus the Agency cannot enforce the Ordinance or impose fees as it seeks. The Agency's exercise of jurisdiction against docks that are "out of water" exceeds the scope of the easement. *McBride v. Smith*, 18 Cal. App. 5th 1160, 1174 (2018) ("[a]n easement 'represents a limited privilege to use the land of another...but does not create an interest in the land itself.' [Citation.]" "An easement involves primarily the privilege of doing a certain act on, or to the detriment of, another's property...[and] gives a nonpossessory and restricted right to a specific use or activity upon another's property..." *Blackmore v. Powell*, 150 Cal.App.4th 1593, 1598 (2007).

Further, the Agency's entry of the Nacimiento Lake property for the purpose of enforcing the fees and/or seizing docks also constitutes trespass. *Wilson v. Interlake Steel Co.*, 32 Cal.3d 229, 233 (1982). Other legal claims exist to dispute the Agency's improper enforcement of Ordinance 4605 including but not limited to inverse condemnation. All of these issues and considerations demonstrate that the Agency's reading and application of Section 4, subsection (b) cannot stand.

¹ Likewise, the Agency's purported claims that "Licensees generally accept the current practice of the MCWRA dock program that renewal licenses are required for all docks that reside within the Reservoir up to the highwater mark" and/or with respect to purported "annual compliance rate[s]" of "over 400 licensees in the dock program" are not relevant.

Brent Buche
July 26, 2022
Page 4

Based on the foregoing, NWRMAC respectfully requests that the Agency immediately change its implementation of rules regarding dock renewal fees that are not floating. The fees are either exempt or deferrable under the plain language of Ordinance 4605. Furthermore, insofar as the Agency has already imposed renewal fees, and some have been paid in contravention of the Ordinance, such fees should be refunded to the dock operators.

Very truly yours,

ALESHIRE & WYNDER, LLP



Wayne Lemieux
Of Counsel