Re Amendment of Port District]
]
Master Plan - Woodfin Suites]
]
Hotel . . . . .]

RESOLUTION 2006-122

WHEREAS, the San Diego Unified Port District (Port District) has an adopted Port District Master Plan which has been certified by the California Coastal Commission; and

WHEREAS, said Master Plan was prepared, adopted and certified pursuant to the Port District Act, the California Coastal Act and other applicable laws; and

WHEREAS, Marina Cortez, Inc., a tenant of the Port District, desires to redevelop its leasehold premises located at 1880 Harbor Island Drive, San Diego, and further desires to construct an Eight (8) story, maximum One Hundred Forty (140) suite hotel with supporting facilities to be known as the Woodfin Suites Hotel, said proposal also includes a project option in which up to Forty (40) of the One Hundred Forty (140) suites would be marketed and operated as timeshares; and

WHEREAS, a proposed Master Plan Amendment for the Woodfin Suites Hotel project in the City of San Diego has been prepared and processed, and includes a timeshare option to allow a limited number of timeshares for the Woodfin Suites Hotel project only; and

WHEREAS, a Final Environmental Impact Report for the Woodfin Suites Hotel and Port Master Plan Amendment Project, pursuant to the California Environmental Quality Act, State CEQA Guidelines, and Port District procedures relative to said Amendment has been prepared and certified and its contents considered, NOW, THEREFORE,

EXHIBIT #1
Resolution of Approval
PMPA #37 Woodfin Suites Timeshare/Hotel
California Coastal Commission

2006-122

BE IT RESOLVED by the Board of Port Commissioners of the San Diego Unified Port District, as follows:

That the Master Plan of the Port District is amended by incorporating therein the Master Plan Amendment, on file in the office of the Port District Clerk as Document No. 50906, pertaining to the Woodfin Suites Hotel project.

BE IT FURTHER RESOLVED that the Executive Director or his designated representative is hereby authorized and directed to transmit said Master Plan Amendment, together with all relevant factual information, the Final Environmental Impact Report, and the Coastal Act consistency analysis to the California Coastal Commission for its review, approval and certification pursuant to the California Coastal Act, and that said Amendment will take effect automatically and be deemed fully certified upon Coastal Commission approval pursuant to Public Resources Code Section 30714. This action by the Board of Port Commissioners constitutes formal adoption of the Coastal Commission's certification of the referenced Amendment.

BE IT FURTHER RESOLVED that the concept of timeshares shall only be applicable to the Woodfin Suites Hotel project, and any subsequent request for timeshare development shall require the consent of the Port District, as evidenced by resolution of the Board of Port Commissioners in each instance, of a project-specific Master Plan Amendment on a case-by-case basis.

ADOPTED this 11th day of July, 2006.

sw
7/11/06

San Diego Unified Port District
Document No. 50906
Filed SEP 22 2006
Office of the District Clerk

San Diego Unified Port District
Port Master Plan Amendment

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SAN DIEGO COAST DISTRICT

DRAFT

Woodfin Suite Hotel
Port Master Plan Amendment

Existing/Proposed Plan Text and Plan Graphics

July 2006

*Note: Text to be **deleted** shown ~~stricken~~ and text to be **added** shown underlined.*
Text in italics is for clarification only and is not part of the Plan Amendment.

EXHIBIT #2
Proposed Master Plan Amendment
PMPA #37 Woodfin Suites Timeshare/Hotel
California Coastal Commission

The 1980 Port Master Plan was certified by vote of the California Coastal Commission (CCC) on January 21, 1981. Subsequent amendments, all of which have been incorporated into this copy, are listed below:

Amendment Title	BPC Res. No.	CCC Certification Date
Coronado Tidelands	83-133	12 Apr 1984
Convention Center and Option Site Hotel	84-290	14 Mar 1985
Bay Mooring and Anchorage Management Plan	84-304	25 Apr 1985
Chula Vista Bayside Park Extension	84-379	27 Aug 1985
Crosby Street Site	86-365	27 Feb 1987
Shelter Island Roadstead	88-212	15 Nov 1988
Coronado Boatyard/The Wharf	89-383	11 Apr 1990
East Harbor Island Hotel	90-170	14 Sep 1990
Seaport Village Street Relocation	92-74	11 Jun 1992
NASSCO Ways Modification	92-118	11 Jun 1992
Solar Turbines Incorporated	92-190	13 Oct 1992
Lindbergh Field Immediate Action Program	92-406	13 Apr 1993
Driscoll Boatyard Expansion	93-033	14 May 1993
National City Marina	94-152	11 Aug 1994
Design Refinements to IAP	95-223	15 Dec 1995
San Diego Convention Center Expansion	95-389	12 Jan 1996
A-9 Cruiser Anchorage	95-266	11 Apr 1996
Convair Lagoon	96-135	12 Nov 1996
Imperial Beach Oceanfront	97-187	10 Dec 1997
--Chula Vista Industrial Business Park Expansion	97-227	10 Mar 1998
South Embarcadero Redevelopment Program I	98-136	15 Oct 1998
North Embarcadero Alliance Visionary Plan	2000-83	14 Mar 2001
Former Naval Training Center Land Transfer	2000-166	12 Jun 2001
D Street Fill Mitigation Site	2001-86	11 Sep 2001
South Embarcadero Redevelopment Program 2	2001-72	12 Dec 2001
National Distribution Center, National City	2001-99	12 Dec 2001
South Bay Boat Yard, Chula Vista	2001-190	12 Dec 2001
Glorietta Bay Redevelopment	2001-65	05 Feb 2003
America's Cup Harbor	2002-120	12 Jun 2003
Fifth Avenue Landing Spinnaker Hotel	2004-66	12 Aug 2004
Woodfin Suites Hotel	2006-XX	XX X 2006

TABLE 4
PORT MASTER PLAN
LAND AND WATER USE ALLOCATION SUMMARY

Draft

LAND USE	ACRES Existing	ACRES Proposed	WATER USE	ACRES	TOTAL ACRES	% CF TOTAL
COMMERCIAL	~~374.9~~	374.7		383.2	758.1	14%
Marine Sales and Services	18.8		Marine Services Berthing	17.7		
Airport Related Commercial	38.0					
Commercial Fishing	7.6		Commercial Fishing Berthing	19.0		
Commercial Recreation	~~306.2~~	306.0	Recreational Boat Berthing	335.4		
Sportfishing	4.3		Sportfishing Berthing	11.1		
INDUSTRIAL	1206.4			217.7	1424.1	26%
Aviation Related Industrial	152.9		Specialized Berthing	170.5		
Industrial Business Park	113.7		Terminal Berthing	47.2		
Marine Related Industrial	322.1					
Marine Terminal	149.6					
International Airport	468.1					
PUBLIC RECREATION	~~279.8~~	280.0		681.0	960.8	18%
Open Space	19.0		Open Bay/Water	681.0		
Park/Plaza	145.8					
Golf Course	97.8					
Promenade	~~17.2~~	17.4				
CONSERVATION	399.2			1058.6	1457.8	27%
Wetlands	304.9		Estuary	1058.6		
Habitat Replacement	94.3					
PUBLIC FACILITIES	222.1			394.3	616.4	12%
Harbor Services	2.7		Harbor Services	10.5		
City Pump Station	0.4		Boat Navigation Corridor	284.6		
Streets	219.0		Boat Anchorage	25.0		
			Ship Navigation Corridor	50.0		
			Ship Anchorage	24.2		
MILITARY	25.9			125.6	151.5	3%
Navy Fleet School	25.9		Navy Small Craft Berthing	6.2		
			Navy Ship Berthing	119.4		
TOTAL LAND AREA	2508.3		**TOTAL WATER AREA**	2860.4		
MASTER PLAN LAND AND WATER ACREAGE TOTAL					5368.7	100%

TABLE 8
Precise Plan Land and Water Use Allocation
HARBOR ISLAND/LINDBERGH FIELD: PLANNING DISTRICT 2

LAND USE	ACRES Existing	ACRES Proposed	WATER USE	ACRES	TOTAL ACRES	%OF TOTAL
COMMERCIAL	~~90.6~~	90.4		105.8	196.4	20%
Airport Related Commercial	38.0					
Commercial Recreation	~~52.6~~	52.4	Recreational Boat Berthing	105.8		
INDUSTRIAL	631.8			11.2	643.0	65%
Aviation Related Industrial	130.6					
Industrial Business Park	33.1		Specialized Berthing	11.2		
International Airport	468.1					
PUBLIC RECREATION	~~26.2~~	26.4		45.0	71.2	7%
Open Space	7.5		Open Bay/Water	45.0		
Park	16.4					
Promenade	~~2.3~~	2.5				
PUBLIC FACILITIES	66.8			18.0	84.8	8%
Harbor Services	1.3		Harbor Services	5.3		
Streets	65.5		Boat Navigation Corridor	12.7		
TOTAL LAND AREA	815.4		TOTAL WATER AREA	180.0		
PRECISE PLAN LAND AND WATER ACREAGE TOTAL					995.4	100%

Note: Does not include:

Leased Federal Land	22.5 acres
State Submerged Tidelands	41.3 acres
Leased Uplands	4.1 acres

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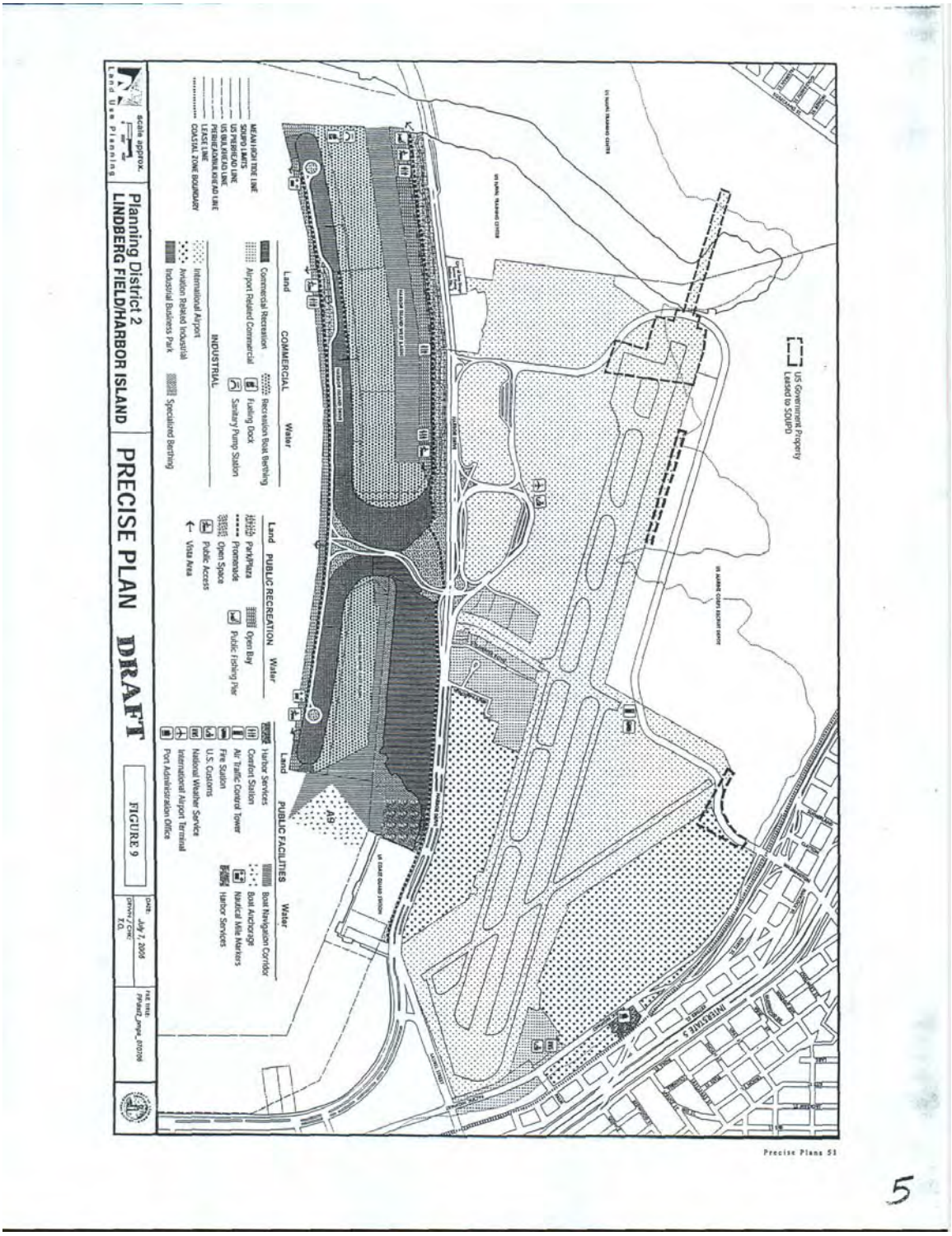
Planning District 2
LINDBERG FIELD/HARBOR ISLAND
PRECISE PLAN
DRAFT
FIGURE 9
Land Use Planning
US Government Property
Leased to SDIPD
MEAN HIGH TIDE LINE
SEAWARD LIMITS
US PIERHEAD LINE
US BULKHEAD LINE
PIERHEAD/BULKHEAD LINE
LEASE LINE
COASTAL ZONE BOUNDARY
Land
COMMERCIAL
Commercial Recreation
Airport Related Commercial
INDUSTRIAL
International Airport
Aviation Related Industrial
Industrial Business Park
Water
Recreation Boat Berthing
Fueling Dock
Sanitary Pump Station
Specialized Berthing
PUBLIC RECREATION
Park/Plaza
Promenade
Open Space
Public Access
Vista Area
Open Bay
Public Fishing Pier
PUBLIC FACILITIES
Harbor Services
Comfort Station
Air Traffic Control Tower
Fire Station
U.S. Customs
National Weather Service
International Airport Terminal
Port Administration Office
Boat Navigation Corridor
Boat Anchorage
Nautical Mile Markers
Harbor Services
INTERSTATE 5
A9
Precise Plans 51
5

Draft

The use allocation table, the Precise Plan Map, and the following text supplement the general plan guideline presented in the preceding part of this document.

Harbor Island/Lindbergh Field Planning Subareas

Planning District 2 has been divided into nine subareas to provide a more specific explanation of the intent of the Plan.

Spanish Landing Park

Spanish Landing Park, subarea 21, extends along the north bank of the Harbor Island West Basin and occupies 11.2 acres of land. Another 1.3 acres is designated for promenade in the form of a bicycle and pedestrian path. This area is completely developed except for the possibility of a fishing pier near the west end. Approximately one mile of public access to the shore is provided by this park. Historic markers located in the park commemorate Juan Rodriguez Cabrillo's discovery of San Diego Bay in 1542, and the exploratory party of Gaspar de Portola in 1769-70.

West Harbor Island

West Harbor Island, subarea 22, has been completely developed with commercial recreational uses such as hotels, restaurants, marinas, and marine related commercial business. ~~No changes to this 37.7 acre commercial recreation area are anticipated.~~

The Marina Cortez site will be completely redeveloped with an up to 140-room hotel and supporting facilities including restaurant, lounge, meeting room space, swimming pool, and parking. A new and separate marina services building will be constructed. Shoreline protection and a new public promenade shall be extended along the entire water frontage of the existing marina.

A non-residential timeshare option for a portion of hotel units may be included. No more than 40 of the 140 hotel rooms shall operate as timeshares. All timeshare units shall be designed to function in appearance and location as a normal hotel room. Timeshares may be created by sublease, consistent with tidelands trust restrictions. Timeshare intervals shall be limited to sale in increments of one week on a floating week/floating unit basis, and may include intervals of lesser duration, including split-week intervals. Use restrictions shall limit ownership to a maximum of two weeks per year. A portion of the timeshare units shall be marketed to the general public as low to moderately priced units to promote lower cost visitor serving uses. Each timeshare unit, when not occupied by a timeshare owner, shall be included as part of the overall inventory of hotel rooms to ensure that all vacant units are made available to the general public as a transient accommodation. The hotel operator shall manage timeshare units as part of the hotel inventory, and management shall include the booking of reservations through the hotel, mandatory front desk check-in and check-out, maintenance, cleaning services and unit preparation for use by guests/owners. The overall development shall incorporate improvements that substantially enhance public access, public benefits and recreational opportunities.

East Harbor Island

The east end of Harbor Island, subarea 23, has been the last subarea to complete phased development. The last project, a high quality hotel of approximately 500 rooms, is sited to be responsive to views of San Diego Bay, the airport, and the downtown San Diego skyline. Maximum building heights establish consistency with aircraft approach paths. The hotel complex includes restaurant, cocktail lounge, meeting and conference space, recreational facilities, including piers, and ancillary uses. A marina of approximately 550 slips is located adjacent to the hotel and...

6

Project List

A listing of projects and appealable classifications is shown in Table 9.

TABLE 9: PROJECT LIST HARBOR ISLAND/LINDBERGH FIELD: PLANNING DISTRICT 2	SUBAREA ↓	DEVELOPER ↓	APPEALABLE ↓	FISCAL YEAR
1. HOTEL COMPLEX: up to 500 rooms, restaurant, cocktail lounge, meeting and conference space; parking; landscape	23	T	Y	1993-94
2. PORT ADMINISTRATION BUILDING RENOVATION: Renovate building; Construct parking structure; install landscaping	29	P	N	1993-95
3. AIRPORT ACCESS ROAD: Construct	27	P	Y	1995-96
4. FUEL FACILITY: Expansion to north side of airport	25	P	N	1992-93
5. ACCESS ROADS: Revise airport internal road system	26	P	N	1993-94
6. LAUREL STREET: Widen between Harbor Drive and Pacific Highway	27	P	Y	1994-95
7. NEW AIRPORT TERMINAL: Construct facility; apron; taxiway	26	P	N	1993-95
8. ANCHORAGE FACILITY: Install perimeter marker buoys at Anchorage A-9	23	P	Y	1995-96
9. CONVAIR LAGOON: Sediment remediation	24	T	N	1996-97
10. INTERIM EMPLOYEE PARKING LOT: Construct airport employee parking lot and staging area for taxis, shuttle vans and charter buses; replace storm drain	26	P	N	2001-03
11. HOTEL: Demolition of landside structures; construct an up to 140-room hotel with timeshare units, restaurant, lounge, meeting room space, swimming pool, parking, shoreline protection, promenade, landscape improvements; construct new marina services building	22	T	Y	2006-09

P- Port District
T- Tenant
N- No
Y- Yes

(Revised ~~4/9/01~~ 7/7/06)

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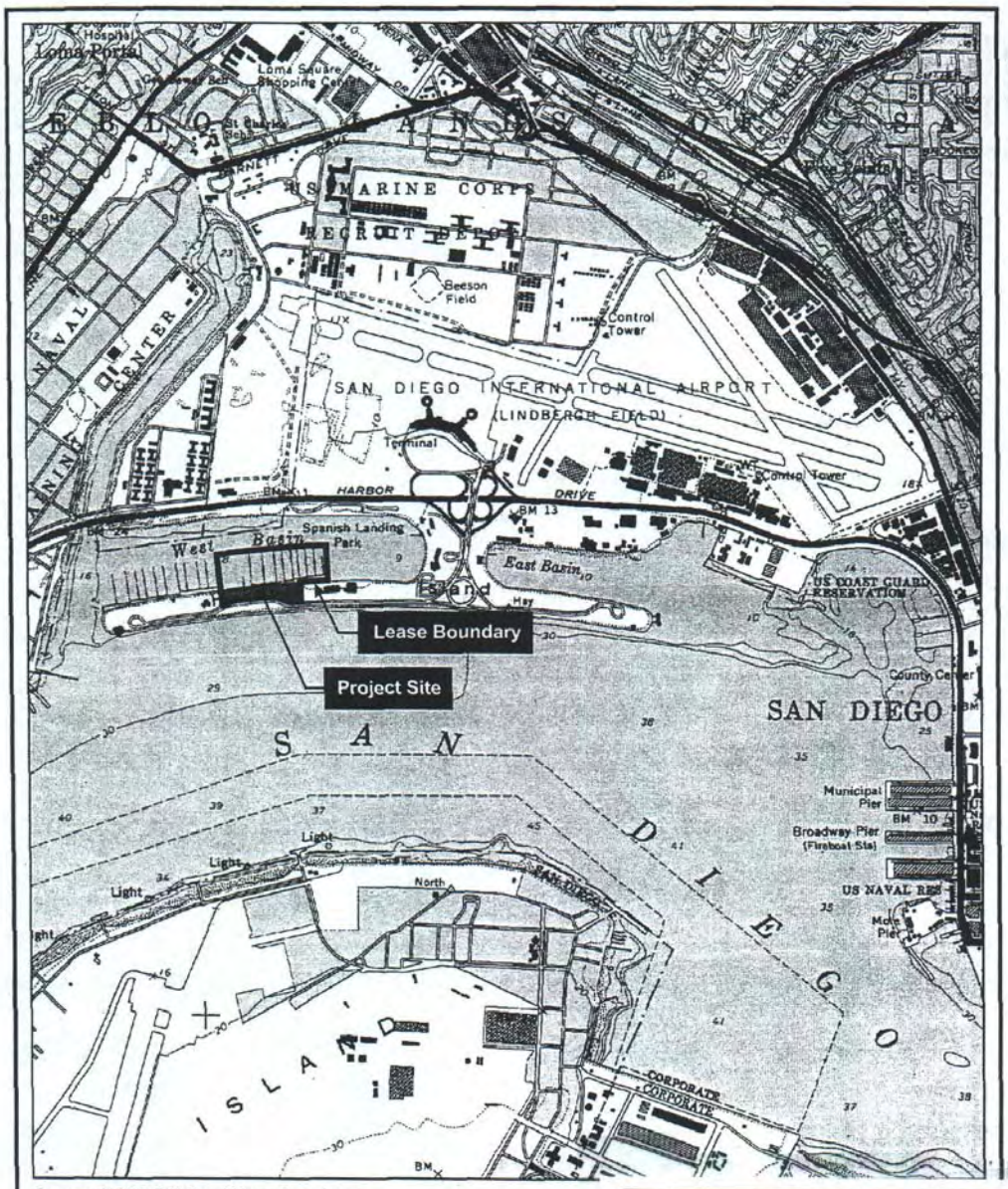


Source: USGS 7.5' Quad Map - Point Loma

Mooney · Jones & Stokes

0 1000 2000
Feet

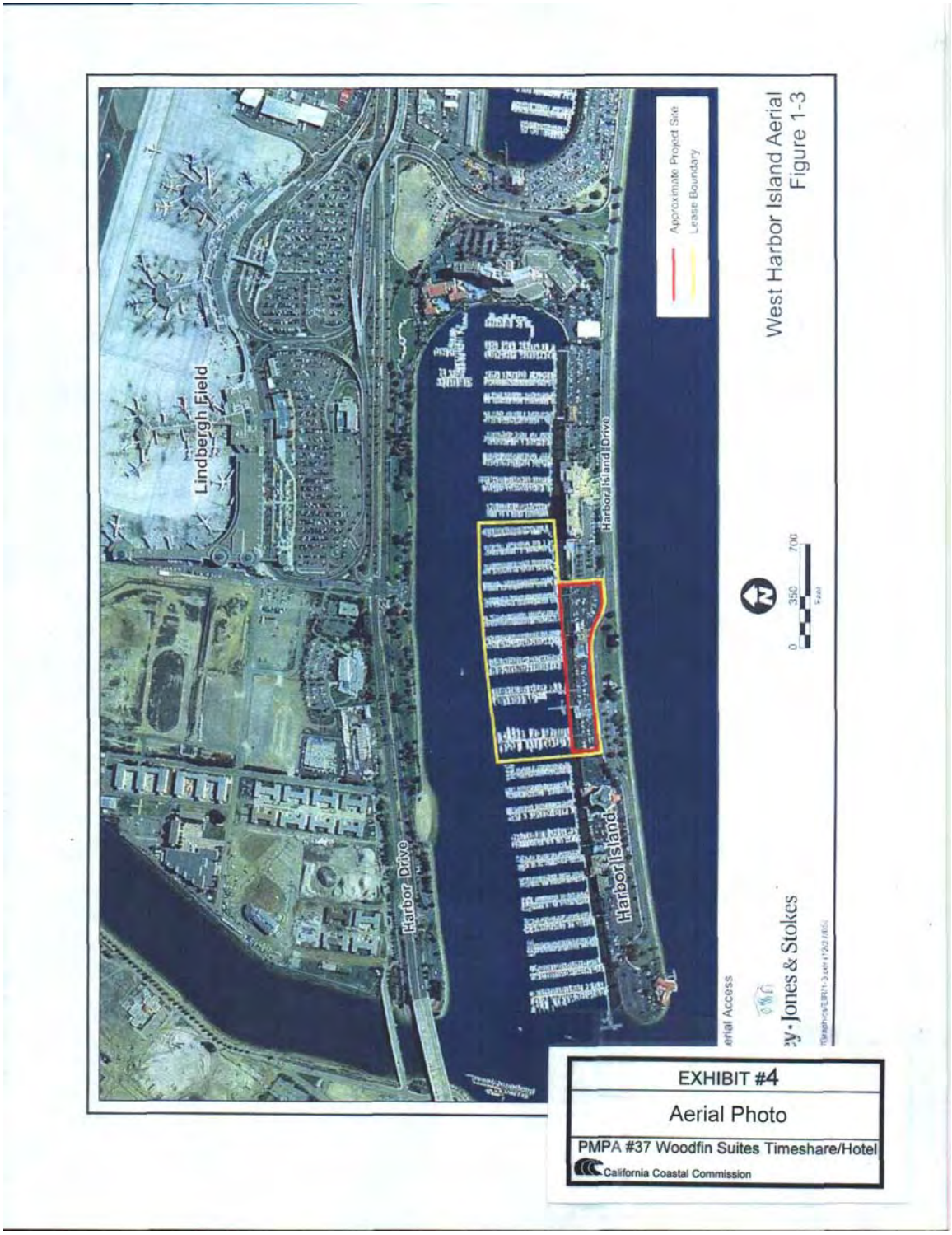
G//Projects/527/Graphics/EIR/1-2.cdr (11/28/05)

EXHIBIT #3

Vicinity Map

PMPA #37 Woodfin Suites Timeshare/Hotel

California Coastal Commission


West Harbor Island Aerial
Figure 1-3
Approximate Project Site
Lease Boundary
Lindbergh Field
Harbor Drive
Harbor Island
Harbor Island Drive
N
0
350
700
Jones & Stokes
EXHIBIT #4
Aerial Photo
PMPA #37 Woodfin Suites Timeshare/Hotel
California Coastal Commission

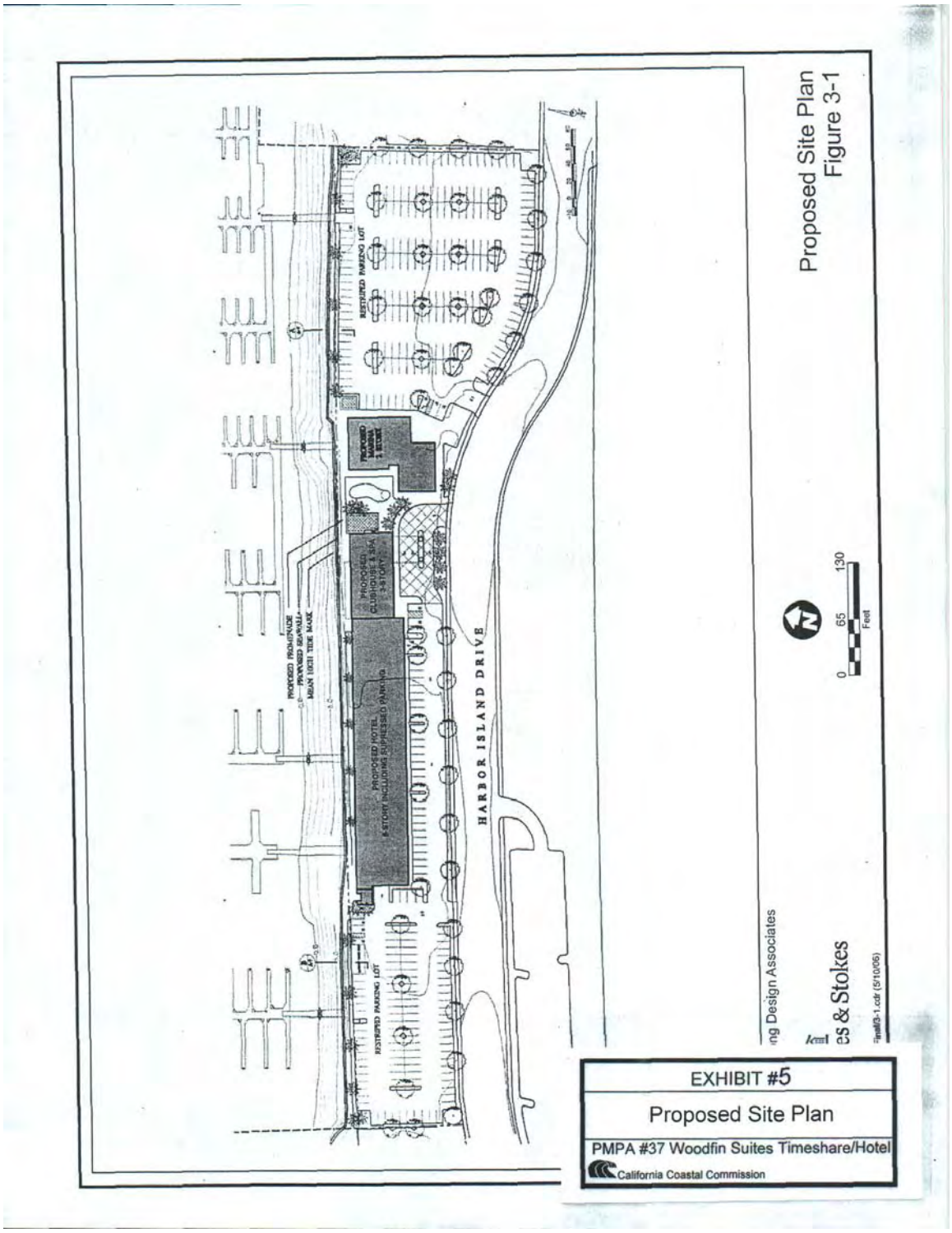
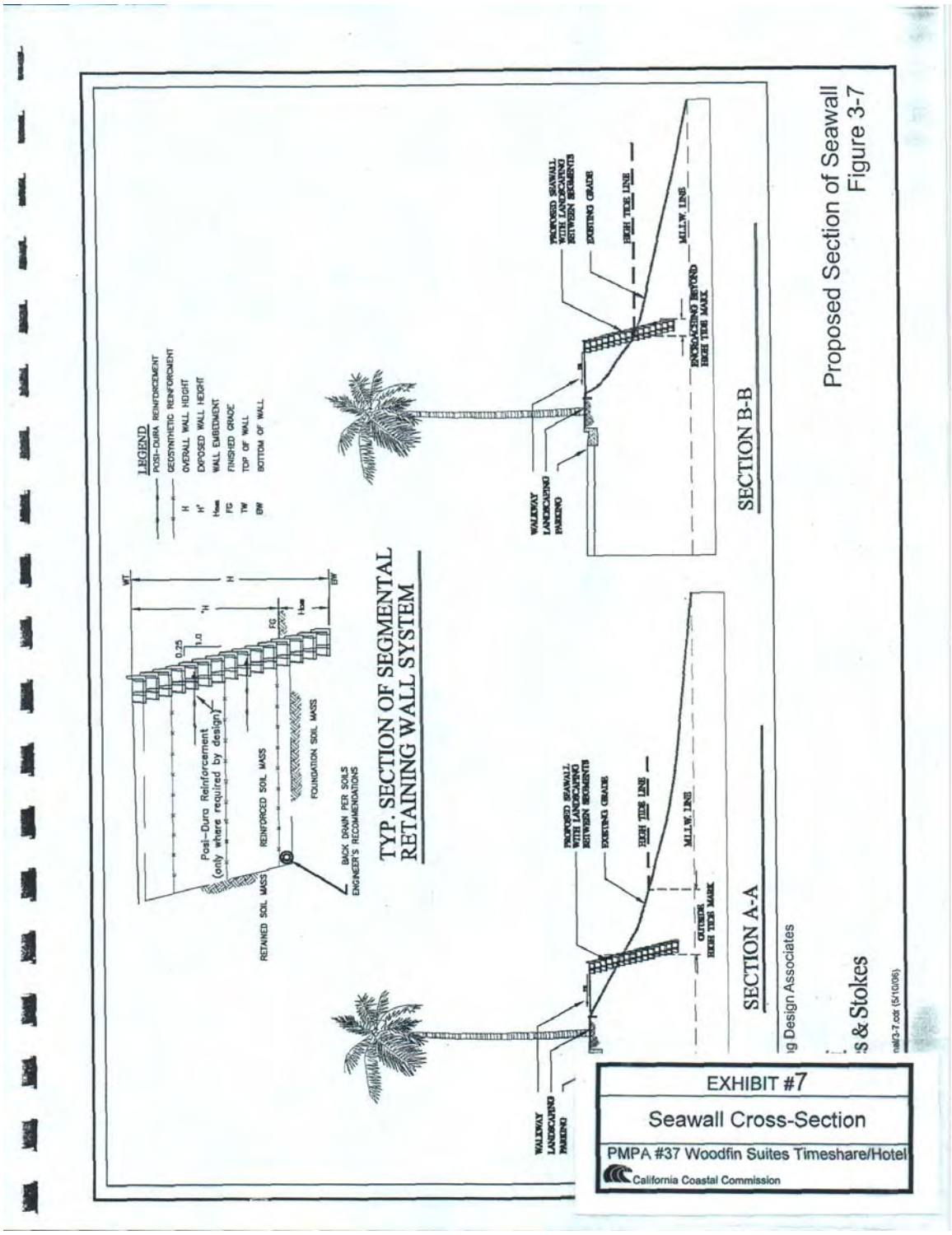

Proposed Site Plan
Figure 3-1
HARBOR ISLAND DRIVE
RESTRIPED PARKING LOT
PROPOSED CLUBHOUSE & SPA 3-STORY
PROPOSED HOTEL 8-STORY INCLUDING SUPRESSED PARKING
PROPOSED PROMENADE
MEAN HIGH TIDE MARK
0
65
130
Feet
ng Design Associates
es & Stokes
EXHIBIT #5
Proposed Site Plan
PMPA #37 Woodfin Suites Timeshare/Hotel
California Coastal Commission

EXHIBIT #6
Existing Shoreline
PMPA #37 Woodfin Suites Timeshare/Hotel
California Coastal Commission


Proposed Section of Seawall
Figure 3-7
SECTION B-B
SECTION A-A
TYP. SECTION OF SEGMENTAL
RETAINING WALL SYSTEM
LEGEND
POSI-DURA REINFORCEMENT
GEOSYNTHETIC REINFORCEMENT
H OVERALL WALL HEIGHT
H' EXPOSED WALL HEIGHT
Hem WALL EMBEDMENT
FG FINISHED GRADE
TW TOP OF WALL
BW BOTTOM OF WALL
Posi-Dura Reinforcement
(only where required by design)
RETAINED SOIL MASS
REINFORCED SOIL MASS
FOUNDATION SOIL MASS
BACK DRAIN PER SOILS
ENGINEER'S RECOMMENDATIONS
PROPOSED SEAWALL
WITH LANDSCAPING
BETWEEN SEGMENTS
EXISTING GRADE
HIGH TIDE LINE
M.L.L.W. LINE
WALKWAY
LANDSCAPING
PARKING
EXHIBIT #7
Seawall Cross-Section
PMPA #37 Woodfin Suites Timeshare/Hotel
California Coastal Commission

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Accommodation Comparison of Harbor Island Area

Hostelling International – San Diego, Downtown (HI)	$17-56
San Diego Hostel (SDH)	$25-61
Motel 6 - San Diego Airport (M6)	$61-81
Dolphin Motel (DM)	$60-95
500 West Hotel (500)	$59-129
Cabrillo Motor Lodge (CML)	$59-129
Sun Harbor Motel (SH)	$80
Pacific Inn Hotel And Suites (PIH)	$79-129
Comfort Inn at the Harbor (CIH)	$89-129
Days Inn Downtown/Convention Center (DID)	$89-250
Days Inn Harbor View (DIH)	$109-129
Super 8 Motel – San Diego/ Bayview/ Conv. Ctr. (S8)	$109-154
Quality Inn Airport (QIA)	$121
Island Palms Hotel & Marina (IP)	$129-279
Hampton Inn by Hilton San Diego Downtown (HIH)	$159
Holiday Inn San Diego Bayside (HISD)	$129-189
The Bristol (B)	$149-179
Vagabond Inn San Diego (Point Loma) (VI)	$156
Best Western Posada at the Yacht Harbor (BWP)	$143-209
The Bay Club Hotel & Marina (BCH)	$169
Holiday Inn Hotels (HOI)	$149-179
The Kona Kai (KK)	$159-339

EXHIBIT #8
Hotel Rate Comparison & Map
PMPA #37 Woodfin Suites Timeshare/Hotel
California Coastal Commission

Best Western Island Palms Hotel & Marina (BWIs)	$159-559
Humphrey's Half Moon Inn & Suites (HHM)	$169-499
Shelter Pointe Hotel And Marina (SPH)	$179-269
San Diego Yacht & Breakfast (SDYB)	$189-325
Hilton San Diego Airport/Harbor Island (HSD)	$189-349
Manchester Grand Hyatt (MGH)	$200-300
Sheraton San Diego Hotel & Marina (SHM)	$199-399
Embassy Suites San Diego Bay	$219-279
San Diego Marriott Hotel & Marina (SDMH)	$230-375
Holiday Inn On the Bay (HIB)	$259

Best Western Island Palms Hotel & Marina (BWIs)
$159-179 (nonview) $559 (view)
619-222-0561
2051 Shelter Island Dr.
San Diego, CA 92106-3194

Cabrillo Motor Lodge (CML)
$59-129
619-223-5544
1150 Rosecrans St.
San Diego, CA 92106

Humphrey's Half Moon Inn & Suites (HHM)
$169-499
619-224-3411
2303 Shelter Island Dr.
San Diego, CA 92106

The Kona Kai (KK)
$159-339
619-221-8000
1551 Shelter Island Dr.
San Diego, CA 92106

Days Inn Downtown/Convention Center (DID)
$89-250
619-239-2285
833 Ash St.
San Diego, CA 92101

Hampton Inn by Hilton San Diego Downtown (HIH)
$159
619-233-8408
1531 Pacific Hwy
San Diego, CA 92101

Holiday Inn On the Bay (HIB)
$259
619-232-3861
1355 N. Harbor Dr.
San Diego, CA 92101

Pacific Inn Hotel And Suites (PIH)
$79-129
619-232-6391
1655 Pacific Hwy
San Diego, CA 92101

Manchester Grand Hyatt (MGH)
$200-300
(619) 231-3800
1 Market Pl # 33
San Diego, CA 92101

Days Inn Harbor View (DIH)
$109-129
619 232-1077
1919 Pacific Hwy
San Diego CA 92101

Best Western Posada at the Yacht Harbor (BWP)
$143-209
619 224-3254
5005 N Harbor Dr
San Diego CA 92106

Comfort Inn at the Harbor (CIH)
$89-129
619 223-8171
5102 N Harbor Dr
San Diego CA 92106

The Bay Club Hotel & Marina (BCH)
$169
619 224-8888
2131 Shelter Island Dr
San Diego CA 92106

The Bristol (B)
$149-179
619 232-6141
1055 First Ave
San Diego CA 92101

Hilton San Diego Airport/Harbor Island (HSD)
$189-349
619 291-6700
1960 Harbor Island Dr
San Diego CA 92101

Sheraton San Diego Hotel & Marina (SHM)
$199-399
(619) 291-2900
1380 Harbor Island Dr
San Diego CA 92101

Holiday Inn San Diego Bayside (HISD)
$129-189
619-224-3621
4875 N. Harbor Drive
San Diego, CA 92106

San Diego Marriott Hotel & Marina (SDMH)
$230-375
800-721-7033
333 West Harbor Drive
San Diego, CA 92101

Super 8 Motel – San Diego/ Bayview/ Conv. Ctr. (S8)
$109-154
619-544-0164
1835 Columbia St
San Diego, CA, 92101

San Diego Hostel (SDH)
$25-61
619-232-3100
726 5th Ave
San Diego, CA 92101

Hostelling International – San Diego, Downtown (HI)
$17-56
(619) 525-1531
521 Market St.
San Diego, CA 92101

San Diego Yacht & Breakfast (SDYB)
$189-325
(619) 294-7901
1880 Harbor Island Drive Ofc, San Diego, CA 92101

Motel 6 - San Diego Airport (M6)
$61-81
(619) 232-8931
2353 Pacific Hwy
San Diego, CA 92101

Embassy Suites San Diego Bay
$219-279
(619) 239-2400
601 Pacific Hwy
San Diego, CA 92101

Holiday Inn Hotels (HOI)
$149-179
(619) 239-6171
1617 1st Avenue
San Diego, CA 92101

500 West Hotel (500)
$59-129
(619) 234-5252
500 W Broadway
San Diego, CA 92101

Dolphin Motel (DM)
$60-95
(619) 226-1717
2912 Garrison Street
San Diego, CA 92106

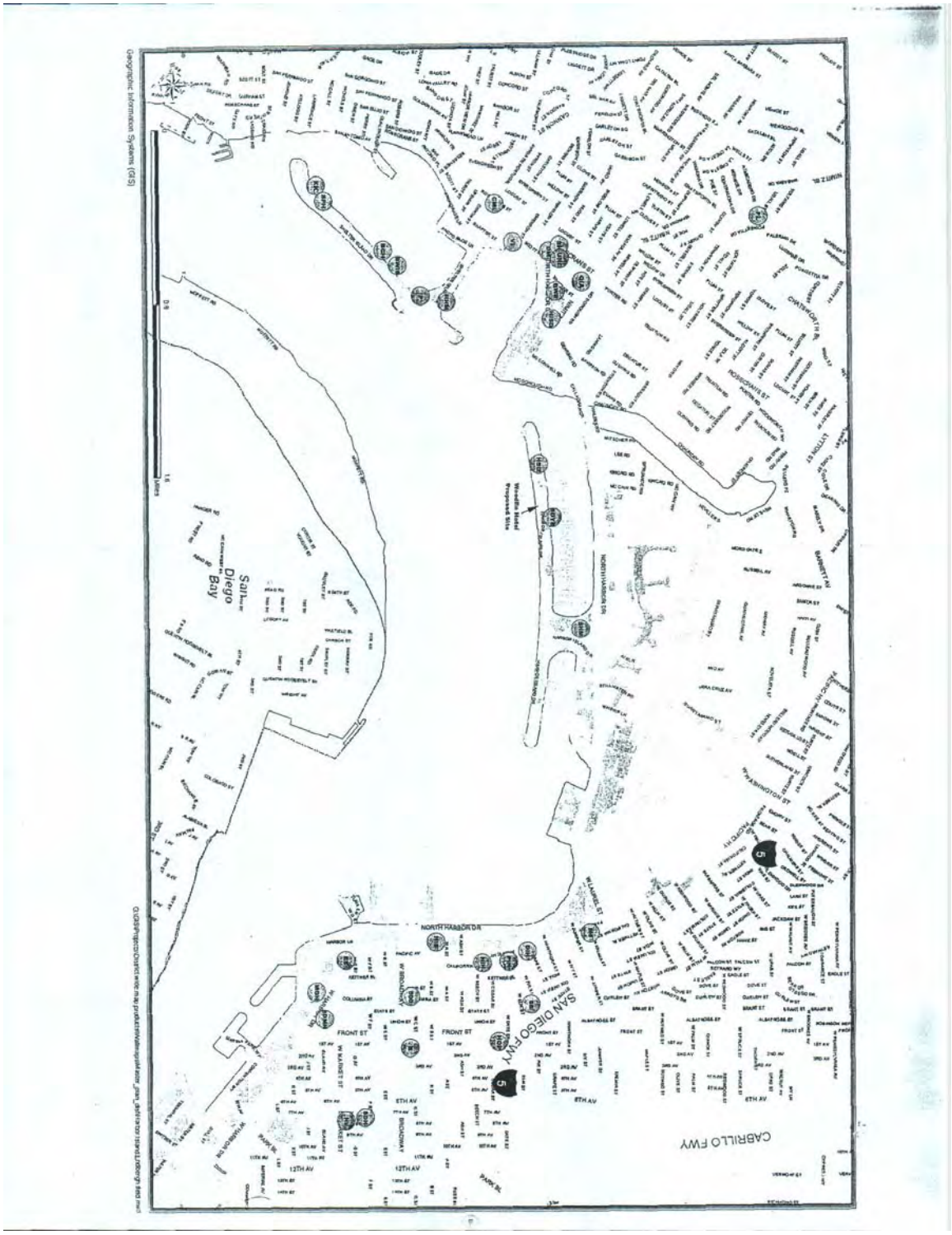
Vagabond Inn San Diego (Point Loma) (VI)
$156
(800) 522-1555
1325 Scott St
San Diego, CA 92106

Quality Inn Airport (QIA)
$121
(619) 224-3655
2901 Nimitz Blvd.
San Diego, CA 92106-9849

Shelter Pointe Hotel And Marina (SPH)
$179-269
(619) 221-8000
1551 Shelter Island Drive
San Diego, CA 92106

Sun Harbor Motel (SH)
$80
1510 Rosecrans Street
San Diego, CA 92106
(619) 222-4683

Island Palms Hotel & Marina (IP)
$129-279
(619) 222-0561
2051 Shelter Island Dr.
San Diego, CA 92106


San Diego Bay
NORTH HARBOR DR
SAN DIEGO FWY
CABRILLO FWY
FRONT ST
8TH AV
12TH AV

Ragatz Associates

DEC 2 9 2006
CALIFORNIA
COASTAL COMMISSION

May 30, 2006

Mr. Mark Rousseau
Woodfin Suites Hotels, LLC
122671 High Bluff Drive, Suite 300
San Diego, CA 92130

Dear Mark:

Pursuant to your recent inquiry, the purpose of this letter is to comment on the usage and expenditure patterns of resort timeshare owners while vacationing at their timeshare resorts. The following information is taken from *Resort Timeshare Consumers: Who They Are, Why They Buy: 2006 Edition*, as prepared by Ragatz Associates for the American Resort Development Association. The study will be formally published within the next few weeks. It represents the 12th such study conducted by Ragatz Associates since 1978.

The study was based on a survey mailed to 10,000 randomly selected resort timeshare owners who own their interval in the United States, and have had such ownership for over one year. The survey was conducted earlier this year. A total of 1,547 owners responded for a response rate of 15.5 percent. This provides a 95 percent confidence interval of ±2.5 percent.

Results relevant to your questions include:

I. Consumer Demographics
   a. 84.3 percent married households
   b. only 24.9 percent have children under 18 living at home
   c. median age of 56, with 9.3 percent under 40, 50.5 percent in the 40s and 50s, and 40.2 percent in the 60s and over
   d. median income of $81,000, with 18.1 percent under $50,000, 50.3 percent between $50,000 and $100,000, and 31.6 percent over $100,000
   e. 80.3 percent satisfaction rate

II. Usage Patterns
   a. 90.5 percent of owned time was occupied during the 12 months prior to the survey by the owners or others

767 Willamette Street • Suite 307 • Eugene, OR 9740

EXHIBIT #9
Timeshare Owner Demographic
PMPA #37 Woodfin Suites Timeshare/Hotel
California Coastal Commission

b. usage patterns included:
   i. 35.8 percent personal use by the owners
   ii. 47.4 percent by exchangers
   iii. 4.4 percent rented out
   iv. 2.9 percent given away at no charge
   v. 9.5 percent unused

Obviously the 90.5 percent occupancy rate is considerably higher than the vast majority of resort hotels on a year-round basis. The advantage of having 54.7 used by exchangers, renters and others is that it brings new tourists to the host community.

c. The remainder of this letter is taken directly from the survey. The material should nicely describe answers to additional questions concerning usage and expenditure patterns.

d. Owning a timeshare significantly increases the frequency and duration of visits to the resort area where the timeshare is located:
   - During the five years prior to purchasing their timeshares, they visited the resort area where the timeshare is located an average of 1.3 times. Since purchasing, they have visited an average of 0.6 times for every year they have owned the timeshare, or an average of 3.0 times over five years. Thus, frequency of visitation to the area increases by an average of 131 percent.
   - Prior to becoming timeshare owners, they report that stays in the area averaged 4.0 nights duration. Since buying their timeshares, the average duration has jumped to 4.5 nights, a 13 percent increase. Because they already have paid for the accommodations, the marginal cost of taking a longer vacation is reduced. Furthermore, timeshare units typically are more comfortable than the average rental accommodations, making them more inviting for longer stays. And access is guaranteed, so there is no need to reduce the length of stay.
   - As a result of visiting more often and staying longer, total nights spent in the resort area increased considerably from an average of 5.2 during the five years prior to purchasing the timeshare to 13.5 nights per five years after purchasing, an increase of 160 percent. This has substantial benefits for the resort area in terms of total visitation and stabilizing repeat visitation.

It is important to note that these figures reflect only owner use of the timeshare. As discussed previously, owner use represents only 35.8 percent of the available time out of a 90.5 percent usage factor, which equals 39.6 percent of total use. The remaining 60.4 percent of use is by guests who exchange in, rent, or are allowed to use the unit by the owners. Thus, the boost in tourism received by the community is not limited to simply the increase in usage by the timeshare owners.

STATE OF CALIFORNIA — ARNOLD SCHWARZENEGGER, Governor

CALIFORNIA STATE LANDS COMMISSION

CRUZ M. BUSTAMANTE, *Lieutenant Governor*
STEVE WESTLY, *Controller*
MICHAEL C. GENEST, *Director of Finance*

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(916) 574-1800 *Fax* **(916) 574-1810**
California Relay Service TDD Phone 1-800-735-2929
Voice Phone 1-800-735-2922

December 28, 2006

e-Mail; [illegible]

Mr. Peter Douglas
Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Subject: Timeshare Projects on Public Trust Lands

Dear Peter:

As you are aware, the California State Lands Commission (Commission) has jurisdiction and management authority over all ungranted tidelands, submerged lands, and the beds of navigable rivers, sloughs, lakes, etc. The Commission has certain residual and review authority for tide and submerged lands legislatively granted in trust to local jurisdictions (*e.g.* Public Resources Code §6301 and §6306). All tide and submerged lands, granted or ungranted, as well as navigable waterways, are impressed with the common law Public Trust.

For several decades the issue of whether timeshares are an appropriate use of public trust lands has been discussed by staff of the Commission and proponents of these developments. No timeshare projects have ever been built in California on public trust lands.

Recently the San Diego Unified Port District approved a hotel project with an option for timeshare units as a proposed Port Master Plan Amendment. We are informed that the proposed amendment has been submitted to the Coastal Commission for its review regarding consistency with the Coastal Act. On December 14, 2006, the California State Lands Commission, in response to the Port's action and a request by a citizen's group, held a public hearing to consider the consistency of the timeshare component of the Woodfin Suites Hotel proposal with the Public Trust Doctrine. By a vote of 2-0, with one abstention, the Commission found that the timeshare component of the Woodfin Suites Hotel Project is inconsistent with the Public Trust Doctrine and the trust under which the San Diego Unified Port District holds title to the public trust lands involved. Furthermore, the Commission directed staff to convey staff's analysis to the California Coastal Commission. Pursuant to the Commission's direction and Public Resources Code Section 30416, please find attached staff's analysis as set forth in

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EXHIBIT #10
State Lands Commission Staff Report
PMPA #37 Woodfin Suites Timeshare/Hotel
California Coastal Commission

Mr. Peter Douglas
December 28, 2006
Page 2

Calendar Item Number 48. The staff report with exhibits can also be found on the Commission's website at http://www.slc.ca.gov – then clicking **Commission Meeting Voting Records**, December 14, 2006, agenda item 48.

If you have any questions, you may contact me at (916) 574-1800.

Sincerely,

Paul D Thayer

PAUL D. THAYER
Executive Officer

Enclosure

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MINUTE ITEM
This Calendar Item No. C48 was approved as Minute Item No. 48 by the California State Lands Commission by a vote of 2 to 1 at its 12-14-06 meeting.

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48

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12/14/06
G10-08
C. Fossum
J. Lucchesi

CONSIDERATION OF A REQUEST TO REVIEW THE CONSISTENCY OF THE TIMESHARE COMPONENT OF THE WOODFIN SUITES HOTEL PROPOSAL WITH THE PUBLIC TRUST DOCTRINE

INTRODUCTION:

For over twenty-five years the California State Lands Commission (Commission) and its staff have been approached with various proposals to develop timeshare projects on filled Public Trust lands along California's shores. In September 2006, the Commission staff received a request (Exhibit E) that the timeshare component of the Woodfin Suites Hotel project, proposed to be located on filled tide and submerged (Public Trust) lands granted to the San Diego Unified Port District (SDUPD or Port) on Harbor Island, city of San Diego, San Diego County, be considered by the California State Lands Commission.

The Commission has been given the responsibility to manage the Public Trust lands of the state, and to represent the state's and the public's residual interest and rights in tide and submerged lands legislatively granted in trust to local governmental entities (Public Resources Code Sections 6301 and 6216). The Port was created pursuant to Chapter 67, Statutes of 1962, 1st Ex. Session. During the last four plus decades, the Commission and the Port have worked cooperatively on a number of Public Trust projects beneficial to the state, the Port and the trust's beneficiaries, the people of California.

THE PUBLIC TRUST DOCTRINE:

On September 17, 2001, the Commission adopted a Policy Statement regarding the Public Trust Doctrine (Exhibit A). The statement was intended to provide general information and guidance to the public and local trustees/grantees regarding this area of the law. Accompanying the Policy Statement was a background paper on the Public Trust Doctrine provided by the Attorney General's Office (Exhibit B). The Attorney General's Office has often provided the Commission with its legal analysis and opinion regarding matters of the Public Trust Doctrine and its application in California. The Attorney General's Office

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and Commission legal staff's advice has consistently been that the use of Public Trust lands for residential use (long term private) is inimical to the trust. Additional discussion of the Public Trust Doctrine is discussed under **LEGAL ANALYSIS**, below.

TIMESHARES/FRACTIONAL OWNERSHIPS/ETC.:

The concept of timeshares (or interval ownerships, fractional ownerships, equity ownerships, vacation ownerships, or more recently condo-hotels) has evolved and expanded in the nearly forty years since they first were sold. The Commission's first experience with timeshares was a proposal by a lessee of the trustee City of Long Beach, Wrather Corporation, which was operating the Queen Mary, to construct and sell vacation accommodations as timeshares. The Commission staff requested the advice of the Attorney General's Office regarding the consistency of timeshare projects on tide and submerged lands with the Public Trust Doctrine. The Attorney General's Office, in 1982, concluded that the project being reviewed by the Commission involving Long Beach granted lands was inconsistent with allowable uses of public trust lands (Exhibit C). The Attorney General's Office based its reasoning on analyses of 1) the rights of the public in tidelands, 2) the inconsistency of long-term private use with the trust and 3) the allowance of certain non-trust uses that are necessary and incidental to promoting legitimate trust use of tidelands. The Attorney General's Office concluded that allowing a limited group of people to have a long-term right of use of Public Trust lands would be inconsistent with the Commission's mandate to enforce and protect the public's trust rights.

In 1996, Assemblyman Curtis R. Tucker Jr., of Inglewood, requested the opinion of then Attorney General Dan Lungren on the following question: "Consistent with the public trust doctrine, may a public agency trustee of filled tidelands lease a portion of those tidelands to a private party for the construction of a timeshare resort?" The opinion of the Attorney General's Office (Exhibit D) differed from the prior advice given to the Commission. The opinion concluded that timeshares were not *per se* inconsistent, if *inter alia* "the project will provide for significant use by members of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation."

Upon further analysis of the nature of timeshares, Commission staff has taken the position that a timeshare development is an inappropriate use of filled sovereign tide and submerged lands, as it is not a water-dependent use, nor does it enhance or facilitate the general public's enjoyment of trust lands, nor is a timeshare development necessary or incidental to accomplish or promote such

uses. A project that cannot meet one or more of these criteria is not an acceptable use of Public Trust lands.

As pointed out in the Commission's Public Trust Policy statement and the Attorney General's discussion of the Public Trust Doctrine, the doctrine serves as a means to both promote appropriate uses of the public's property such as hotels, which "accommodate the public's enjoyment of trust lands" and serves as a limitation on use and the power of government, thereby "preserving the public's right to use public trust lands for the purposes they are uniquely suited". The advice of the Attorney General's Office, provided to the Commission in 2001, cites decisions of the United States Supreme Court in 1892 and the California Supreme Court in 1983 and describes the public's ownership of tidelands as "... a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing free from obstruction or interference from private parties. In other words, the public trust is an affirmation of the duty of the state to protect the people's common heritage of tide and submerged lands for their common use." While uses of commerce, navigation and fisheries have expanded to other public trust uses since the 19th century, the essence of the duty to protect the public's rights for their common use remains constant.

It is important to note that while timeshare developments have been around for decades and from time to time have changed their methods of operations, these developments have been located almost exclusively on private property; only a handful have been approved in the California Coastal Zone and none has been constructed, or even approved, on Public Trust lands in California, despite the suggested possibility in the 1996 opinion. Furthermore, while hotels, restaurants and other visitor-serving support facilities incidental to public access and use may exist in federal, state and local parks, and on Public Trust lands, timeshare developments do not.

WOODFIN SUITES HOTEL/TIMESHARE PROPOSAL:

The proposed Woodfin Suites Hotel project involves the redevelopment of the existing Marina Cortez leasehold located on a 3.79-acre site on Harbor Island, near Lindbergh Field in the city of San Diego. The specific project components described by the developer include demolition of all existing structures on the filled portion of the tidelands lease and construction of an eight-story, maximum 140-suite hotel with supporting facilities over partially suppressed parking, a new and separate two-story marina services building, a 6' wide public promenade on top of a seawall, surface parking and landscaping. The Woodfin proposal also

CALENDAR ITEM NO. **48** (CONT'D)

includes a project option in which 40 of the 140 hotel suites would be marketed and operated as timeshares.

According to the Woodfin project proponents (Exhibits F and G), the timeshare units would be conveyed to users pursuant to subleases. Since the SDUPD is trustee of the filled tidelands and can only lease lands for up to 66 years, no fee simple interest would be conveyed to a timeshare participant. All timeshares would be marketed to the general public both in and outside of California. All units, including the timeshare units, would be maintained as hotel units open to the general public when not used as a timeshare. The facility management would include mandatory front desk check in/check out services, maintenance and cleaning services. Finally, the timeshare use period by any party would be limited to a minimum interval period of up to one week and not more than 29 consecutive days or 90 total days per calendar year. Woodfin proponents have represented that the timeshare use periods are flexible. The Port's Master Plan amendment, discussed below, limits selling of ownership of units to two one-week intervals per year, but does not restrict trade in and use of intervals from other timeshare units for longer periods.

Commission staff has over the last year had a number of discussions and meetings and communicated by letter with developers and the Port regarding several proposals for timeshares, including the Woodfin proposal, and a hotel-condo project on filled Public Trust lands in the Port. In those meetings and by letter, the Commission staff has consistently expressed its conclusion that timeshares and hotel-condominiums do not provide a sufficient public benefit and are a use inconsistent with the land use limitations of the Public Trust. In addition, Commission staff testified before the Port's Board of Harbor Commissioners (Board) in April of this year expressing the staff's position opposing timeshares. The Board referred the issue to a subcommittee that returned with a recommendation to use the proposed project as a test case, with the rationale that since neither the State Lands Commission, Coastal Commission, Legislature, nor Courts had formally disapproved such a project, this was an opportunity to resolve the legal issue. The Commission staff by letter again objected to the Port's proposed adoption of a process that would consider timeshare (equity share units) projects on Public Trust lands.

Notwithstanding Commission staff's position, on June 6, 2006, the Board of Harbor Commissioners adopted a Statement of Intent that the Port would entertain the limited use of equity share units on tidelands on a case-by-case basis provided that certain conditions are satisfied prior to any formal action by

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the Board, including, but not limited to, that "the number of timeshare units proposed does not exceed 40% of the units in the overall project" and "the proposed project meets the conditions described in the 1996 State Attorney General's opinion on timeshares." It is worth noting that at the Board's June 6, 2006 meeting, in a response to an inquiry from the Board's Chairman, the Port Attorney stated that he agreed with the Commission staff's position regarding timeshares, as the Commission's staff's analysis appeared to be well reasoned, legally sound and persuasive.

On July 11, 2006, the Board adopted Resolution 2006-121 certifying the Final Environmental Impact Report for the Woodfin Suites Hotel project, which included the alternative of a timeshare component. In addition, the Board adopted Resolution 2006-122 amending the Port District's Master Plan pertaining to the Woodfin Suites Hotel project, with the option of timeshares to be applicable only to the Woodfin Suites Hotel project and any subsequent request for timeshare development to require the consent of the Port District. Commission staff again objected to the certification of the Final EIR and the Port Master Plan Amendment. In November 2006, the SDUPD submitted the Woodfin Suites project to the California Coastal Commission for its review as a port Master Plan amendment.

LEGAL ANALYSIS:

The project area involves filled sovereign tide and submerged lands, which were initially legislatively granted to the city of San Diego pursuant to Chapter 700, Statutes of 1911, and subsequently transferred to the San Diego Unified Port District pursuant to Chapter 67, Statutes of 1962, 1st Ex. Session, as amended.

Inconsistency with the Public Trust Doctrine

In addressing what constitutes an appropriate use to which Public Trust lands may be dedicated, California courts have made it clear that water dependent uses related to commerce, navigation, fisheries, and other water-related uses or activities, such as public access, recreation, and ecological preservation for scientific study and wildlife habitat (Marks v. Whitney (1971) 6 Cal.3rd 151), as well as those uses that are necessary and incidental to accomplish or promote those uses (Haggerty v. City of Oakland (1958) 161 C.A.2d 404), are consistent with the land use requirement of the trust. Ancillary visitor serving facilities, such as restaurants and hotels, have also received judicial approval because they enhance and facilitate the public's enjoyment of trust lands, by providing public accommodation (Martin v. Smith (1960) 184 Cal. App. 2d 571).

CALENDAR ITEM NO. **48** (CONT'D)

Because the Woodfin project proposal references and utilizes some of the criteria outlined in the 1996 Attorney General's opinion, staff has also included the following legal analysis of the 1996 opinion.

A timeshare development is not a use consistent with the Public Trust Doctrine, as interpreted by the judicial decisions described above, and is an inappropriate use of filled sovereign tide and submerged lands because it significantly impairs the public's right to these trust lands which have been historically set apart for the benefit of the statewide public. In contrast, timeshare accommodations are only available to a small segment of the population who can afford the tens of thousands of dollars for the initial purchase and who would own personal rights to the rooms and thereby prevent other use of these public lands.

While there has been an increase in timeshare owners and a greater opportunity for an "exchange of time" since the inception of the timeshare concept, a timeshare unit remains available only to a limited and distinct class of people, not to the general public. A timeshare by its very nature is inherently more restrictive of access to the general public than a hotel. Further, the opportunities to trade occupancy rights have increased since the Attorney General's 1996 opinion was written, decreasing the vacancy rate and making timeshares even less available to the general public today. Availability to the public due to vacancy rates was one of the factors cited by the 1996 Attorney General's opinion as justifying possible limited use of timeshares. A timeshare development is not a water dependent use, nor does it enhance or facilitate the general public's enjoyment of trust lands, nor is a timeshare development necessary and incidental to accomplish or promote such uses.

Staff believes that the 1996 opinion makes certain assumptions and confuses concepts of project development mitigation on private lands with protections inherent in lands subject to the Public Trust. The 1996 opinion states that "the consistency of any timeshare resort with public trust purposes must be determined in light of the totality of the circumstances, paying particular attention to (1) whether the state through its local trustee, has given up its right of control over the trust property [citations], (2) whether the use substantially impairs the public's interest in the remaining lands and waters [citations], and (3) whether the use produces a public benefit which furthers and promotes trust purposes [citations]." This three-prong test is then applied to the conceptual framework that serves as the rationale for the 1996 opinion. The cases cited for the above analysis, with one exception, which deals with oil and gas leasing, do not involve leases of public trust land.

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1) The 1996 opinion concludes that the local trustee's dedication of a particular use for 66 years will neither "abandon the public right" nor impair the ability of succeeding legislative bodies to protect trust values, because at the end of the 66 year term the property returns "back to the control of the local agency which holds the property in trust." While 66 years is not a permanent dedication to a particular use, 66 years is a significant amount of time to impair the general public's right to enjoy its trust lands, while allowing a distinct class of people the right to access the trust lands. The Legislature has provided a mechanism for local trustees of tidelands to have leases reviewed and approved by the Commission (Public Resources Code Section 6701, et seq.). This is the process by which the Commission was reviewing the Wrather proposal on granted public trust lands in Long Beach. The Commission has adopted a maximum term of 49 years on its own authority to lease property, even to other public agencies.

2) The second test applied by the 1996 opinion was impairment of the public's rights. The opinion states, "such analysis is beyond the scope of the opinion" and is a fact specific inquiry, but postulates that "public access to the shoreline could be enhanced through the development of walkways, access paths, and marina-like facilities, thus increasing and improving opportunities for boating, fishing, swimming, hiking and other recreational uses." While the second test refers to the "public's rights being impaired," the opinion nonetheless emphasizes this idea in its conditional precipitant conclusion that timeshare projects are not *per se* incompatible with the Public Trust Doctrine "if the project will provide for significant use by members of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation."

Public access along the waterfront, however, is already guaranteed by the Coastal Act and the California Constitution (Article X, section 4). Article X, section 3 and Article X, section 4 were adopted by the People of California in 1879 to restrict privatization of tidelands and insure public access to California's waterways. The Public Trust Doctrine also protects the public's right to access and use trust lands (Marks v. Whitney, *supra*). Allowing a timeshare development on trust lands provides no benefit to the public beyond that which already is guaranteed by existing laws - in fact it impairs it. The test should not be whether some proffered mitigation justifies public rights being impaired for up to 66 years, but whether the existing Public Trust and Constitutional rights are being protected. Providing trust-consistent amenities, such as public access,

does not make a non-trust use, such as a timeshare development, a trust-consistent use.

3) The final criterion in the 1996 opinion was whether its "exemplar resort would produce a public benefit which furthers and promotes public trust purposes." Not all commercial activities promote the public's use of the shoreline. The opinion, however, assumes that timeshares promote rather than restrict the public's opportunity to use the trust property. The opinion also misstates the legal test that uses that are "necessarily incidental" to promotion or accommodation of a legitimate public trust use are consistent with the trust by incorrectly assuming that timeshares are the equivalent of a hotel in a public park when they are not. The concept of allowing a wealthy group of individuals or families to tie-up the right to occupy prime visitor serving public property for scores of years into the future is antithetical to public rights protected by the Public Trust Doctrine.

The 1996 opinion to Assemblyman Tucker sought to differentiate its conclusions from the 1982 legal advice regarding a proposal before the Commission. The differences cited were that statistically, in the industry, more timeshare owners were exchanging their intervals with other timeshare owners in 1995 than in 1978, stays were generally limited to 7 days rather than 30 days and therefore the earlier concerns about the low vacancy rate and hence availability to the general public were supplanted by more timeshare owners using the facilities. The conclusion reached was that this moved "the concept of a timeshare development much closer to that of a hotel." Staff's conclusion is that "closer" is not an adequate standard to measure public rights to public lands. Additionally, having a multiplicity of private owners (potentially thousands for a single facility) with private property rights on public lands for in excess of half a century has the potential for an unduly burdensome complexity of business dealings for the State or its trustee landlord. The potential benefits of such an arrangement flow to the developers/sellers of the units and not to the public.

Staff agrees that more timeshare-owning individuals and families would have access to the resort contemplated by the 1996 opinion than in 1982. However, staff does not agree that more of the general public would have access, or that the rationale justifies allowing a limited class of people that can afford the tens of thousands of dollars for the initial purchase to own and tie-up even a limited right of occupancy to Public Trust lands for up to 66 years. Staff sees no benefit to the general public in the concept and believes that all of the supposed additional public benefits cited in the 1996 opinion are equally available in a hotel

development. More timeshare use of properties means less access for the general public.

Finally, after following the industry for nearly three decades, staff believes that a primary rationale that leads to the promotion of timeshare developments is the desire of private developers to reduce their economic risk and maximize their financial return – by getting willing buyers to purchase the right to occupy a timeshare unit for many decades into the future. This method of private financing can work well for developers in a tight financial market, when a large enough class of well-to-do buyers can be found that are willing to lay down many thousands of dollars for their future vacation plans or as an investment. However, as pointed out in the Commission's "Public Trust Policy" statement and the accompanying document "The Public Trust Doctrine," prepared for the Commission by the Attorney General's Office, a water-related benefit to the statewide public, not private financial attractiveness is the *sine quo non* of trust consistency.

Inconsistency with the 1996 Attorney General's Opinion
Staff also believes that the timeshare component of the Woodfin project is inconsistent with the 1996 opinion. The 1996 opinion, contrary to the prior 1982 advice, concluded that a timeshare development was not *per se* inconsistent, "if the project will provide for significant use by members of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation."

As to the first prong of the opinion's conclusion, in justifying that a timeshare project would provide for significant use by members of the general public, the opinion estimated, based on then current statistics, that 18 percent of the units in a timeshare resort would be available for rental to the general public at any given time. Of this percentage, according to the 1996 opinion, only 5.6 percent are rented to the public and 12.4 percent go unused. These estimates are not reflective of current industry data. According to the Woodfin project proponent's consultant, Ragatz Associates, only 4.4 percent of the units are currently rented to the general public, while 9.5 percent go unused. Similarly, 35.8 percent are used by their owners, while 47.4 percent are used by persons owning other timeshares through exchanges. A number of conclusions may be drawn from these statistics. First, the percentage of rental units currently available to the general public is only 13.9 percent, 4.1 percent less than what the 1996 opinion contemplated. Second, the timeshare industry has changed in that the number of units available to the public is not translating into actual use by the public

because only 4.4 percent of the units are actually rented by the general public. Third, over 83 percent of timeshare developments are occupied by persons owning timeshares, a limited, distinct class of people; together with un-rented units, 92.6% are not rented to the public.

The ultimate conclusion to be drawn is that the timeshare element of the Woodfin project would not provide for significant use by members of the general public because modern usage trends point to more timeshare use by those persons owning timeshares and less use by the general public, resulting in fewer opportunities for the general public to use trust property.

The second prong of the opinion's conclusion assumes that the timeshare development would afford improved access to the waterfront by the general public, thus furthering trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation. According to the Woodfin proposal, the project would include a 140-unit hotel, with a project option in which 40 of the 140 hotel suites would be marketed and operated as timeshares. In addition, the Woodfin proposal includes a replacement of the marina services building, a seawall and 6' public promenade along the shoreline frontage of the marina and the development of approximately 401 on-site parking spaces. According to the Woodfin proponents, these project components, in addition to the hotel component, provide for improved public access to the shoreline and water-oriented recreation. However, these public benefits are equally available in a traditional hotel development. As stated previously, public access along the waterfront is already guaranteed by the Coastal Act, the California Constitution and the Public Trust Doctrine. These additional project components do not provide increased opportunities for public access to the shoreline and water-oriented recreation above and beyond what is already guaranteed by law.

Finally, a water-related benefit to the statewide public is the ultimate determinate of trust consistency, as opposed to private financial benefits. According to the minutes from the July 11, 2006 Board meeting, however, Woodfin proponents represented that, while including the timeshare component would make the project more financially lucrative, the Woodfin project could be developed as a traditional hotel without the timeshare component.

In conclusion, Commission staff believes that a project located on Public Trust lands, which would include a timeshare or a hotel-condo component, is inconsistent with the Public Trust Doctrine because such a use significantly

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impairs the public's right to these trust lands that have been historically set apart for the benefit of the statewide public.

OTHER PERTINENT INFORMATION:

1. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines [Title 14, California Code of Regulations, section 15060(c)(3)], the staff has determined that the Commission's consideration and adoption of the finding is not subject to the provisions of the CEQA because it is not a "project" as defined by the CEQA and the State CEQA Guidelines.

   Authority: Public Resources Code section 21065 and Title 14, California Code of Regulations, sections 15060 (c)(3) and 15378.

EXHIBITS:

A. Public Trust Policy Statement
B. The Public Trust Doctrine
C. 1982 Attorney General Opinion
D. 1996 Attorney General Opinion
E. Correspondence from San Diego Coastkeeper
F. Correspondence from Woodfin Suites Hotel, LLC (March 14, 2006 and March 22, 2006)
G. Woodfin's Timeshare Analysis (Appendix J to Draft EIR)
H. Location and Site Map

RECOMMENDED ACTION
IT IS RECOMMENDED THAT:

1. FIND THAT THE COMMISSION'S CONSIDERATION AND ADOPTION OF THE FINDING IS NOT SUBJECT TO THE REQUIREMENTS OF THE CEQA PURSUANT TO TITLE 14, CALIFORNIA CODE OF REGULATIONS 15060(c)(3) BECAUSE THE ACTIVITY IS NOT A PROJECT AS DEFINED BY PUBLIC RESOURCES CODE SECTION 21065 AND TITLE 14, CALIFORNIA CODE OF REGULATIONS 15378.
2. THE COMMISSION FIND THAT THE TIMESHARE COMPONENT OF THE WOODFIN SUITES HOTEL PROJECT IS INCONSISTENT WITH THE PUBLIC TRUST DOCTRINE AND THE TRUST UNDER WHICH THE SAN DIEGO UNIFIED PORT DISTRICT HOLDS TITLE TO THE PUBLIC TRUST LAND INVOLVED.

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CALENDAR ITEM NO. **48** (CONT'D)

3. THE COMMISSION DIRECT STAFF TO CONVEY STAFF'S ANALYSIS AS SET FORTH IN THIS REPORT AND THE COMMISSION'S FINDING TO THE CALIFORNIA COASTAL COMMISSION AND THE CITIES, COUNTIES AND SPECIAL DISTRICTS THAT MANAGE PUBLIC TRUST LANDS GRANTED TO THEM BY THE STATE LEGISLATURE AND FOR WHICH THE COMMISSION RETAINS OVERSIGHT AUTHORITY.

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EXHIBIT A

PUBLIC TRUST POLICY

For

The California State Lands Commission

The Legislature has given the California State Lands Commission authority over California's sovereign lands – lands under navigable waters. These are lands to which California received title upon its admission to the Union and that are held by virtue of its sovereignty. These lands are also known as public trust lands. The Commission administers public trust lands pursuant to statute and the Public Trust Doctrine – the common law principles that govern use of these lands.

Public Trust Doctrine

The Public Trust Doctrine is set forth in common law. Several of its guiding principles are that:

I. Lands under the ocean and under navigable streams are owned by the public and held in trust for the people by government. These are referred to as public trust lands, and include filled lands formerly under water. Public trust lands cannot be bought and sold like other state-owned lands. Only in rare cases may the public trust be terminated, and only where consistent with the purposes and needs of the trust.

II. Uses of trust lands, whether granted to a local agency or administered by the State directly, are generally limited to those that are water dependent or related, and include commerce, fisheries, and navigation, environmental preservation and recreation. Public trust uses include, among others, ports, marinas, docks and wharves, buoys, hunting, commercial and sport fishing, bathing, swimming, and boating. Public trust lands may also be kept in their natural state for habitat, wildlife refuges, scientific study, or open space. Ancillary or incidental uses, that is, uses that directly promote trust uses, are directly supportive and necessary for trust uses, or that accommodate the public's enjoyment of trust lands, are also permitted. Examples include facilities to serve visitors, such as hotels and restaurants, shops, parking lots, and restrooms. Other examples are commercial facilities that must be located on or directly adjacent to the water, such as warehouses, container cargo storage, and facilities for the

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development and production of oil and gas. Uses that are generally not permitted on public trust lands are those that are not trust use related, do not serve a public purpose, and can be located on non-waterfront property, such as residential and non-maritime related commercial and office uses. While trust lands cannot generally be alienated from public ownership, uses of trust lands can be carried out by public or private entities by lease from this Commission or a local agency grantee. In some cases, such as some industrial leases, the public may be excluded from public trust lands in order to accomplish a proper trust use.

III. Because public trust lands are held in trust for all citizens of California, they must be used to serve statewide, as opposed to purely local, public purposes.

Commission Authority

The Legislature has granted general authority to the Commission to manage trust lands. Unless otherwise expressly stated in the State Constitution or statutes, the public trust doctrine mandates the criteria for Commission management of trust lands. In carrying out its management responsibilities, the Commission commonly leases trust lands to private and public entities for uses consistent with the doctrine. Subject to the criteria in statutes and case law, the Commission may also exchange public trust lands for non-trust lands, lift the trust from public trust lands, enter into boundary line agreements, and otherwise generally manage trust lands. While most of the authority over public trust lands possessed by the Legislature is vested in the Commission, the Legislature, as the people's elected representatives, has not delegated the authority to modify uses permitted on public trust lands by the Public Trust Doctrine. There are times when the Legislature, exercising its retained powers, enacts laws dealing with public trust lands and uses for specified properties. This may include, in limited circumstances, allowing some non-trust uses when not in conflict with trust needs, in order to serve broader public trust purposes.

Implementation by the Commission of the Public Trust Doctrine.

The Commission implements the Public Trust Doctrine through careful consideration of its principles and the exercise of discretion within the specific context of proposed uses. Factors such as location, existing and planned surrounding facilities, and public needs may militate in

favor of a particular use in one area and against the same use in another. The Commission applies the doctrine's tenets to proposed projects with consideration given to the context of the project and the needs of a healthy California society, to meet the needs of the public, business and the environment. The Commission may also choose among competing valid trust uses. The Commission must also comply with the requirements of other applicable law, such as the California Environmental Quality Act. In administering its trust responsibilities, the Commission exercises its discretionary authority in a reasoned manner, accommodating the changing needs of the public while preserving the public's right to use public trust lands for the purposes to which they are uniquely suited.

Relationship of the Commission to Granted Lands

The Legislature has granted certain public trust lands to local governments for management. A grantee must manage trust lands consistent with its own granting statutes and the Public Trust Doctrine. The Legislature has retained for the state, by delegating to the Commission, the power to approve land exchanges, boundary line agreements, etc.

The State Lands Commission exercises oversight over all granted lands. Generally, this means the Commission carries out this responsibility by working cooperatively with grantees to assure that requirements of the legislative grants and the Public Trust Doctrine are carried out and to achieve trust uses. The Commission monitors and audits the activities of the grantees to insure that they are complying with the terms of their statutory grants and with the public trust. With a few exceptions, grantees are not required to secure approval from the Commission before embarking on development projects on their trust lands nor before expending revenues generated from activities on these lands. However, where an abuse of the Public Trust Doctrine or violation of a legislative grant occurs, the Commission can advise the grantee of the abuse or violation; if necessary, report to the Legislature, which may revoke or modify the grant; or file a lawsuit against the grantee to halt the project or expenditure.

EXHIBIT B

The Public Trust Doctrine

California State Lands Commission

I. Origins of the Public Trust

The origins of the public trust doctrine are traceable to Roman law concepts of common property. Under Roman law, the air, the rivers, the sea and the seashore were incapable of private ownership; they were dedicated to the use of the public.[1] This concept that tide and submerged lands are unique and that the state holds them in trust for the people has endured throughout the ages. In 13th century Spain, for example, public rights in navigable waterways were recognized in *Las Siete Partidas*, the laws of Spain set forth by Alfonso the Wise.[2] Under English common law, this principle evolved into the public trust doctrine pursuant to which the sovereign held the navigable waterways and submerged lands, not in a proprietary capacity, but rather "as trustee of a public trust for the benefit of the people" for uses such as commerce, navigation and fishing.[3]

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[1]Institutes of Justinian 2.1.1.

[2]Las Siete Partidas 3.28.6 (S. Scott trans. & ed. 1932).

[3]*Colberg, Inc. v. State of California ex rel. Dept. Pub. Works* (1967) 67 Cal.2d 408, 416.

After the American Revolution, each of the original states succeeded to this sovereign right and duty. Each became trustee of the tide and submerged lands within its boundaries for the common use of the people.[4] Subsequently admitted states, like California, possess the same sovereign rights over their tide and submerged lands as the original thirteen states under the equal-footing doctrine.[5] That is, title to lands under navigable waters up to the high water mark is held by the state in trust for the people. These lands are not alienable in that all of the public's interest in them cannot be extinguished.[6]

II. Purpose of the Public Trust

The United States Supreme Court issued its landmark opinion on the nature of a state's title to its tide and submerged lands nearly 110 years ago, and although courts have reviewed tidelands trust issues many times since then, the basic premise of the trust remains fundamentally unchanged. The Court said then that a state's title to its tide and submerged lands is different from that to the lands it holds for sale. "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing" free from obstruction or interference

[4] *Martin v. Waddell* (1842) 41 U.S. (16 Pet.) 367, 410.

[5] *Pollard's Lessee v. Hagen* (1845) 44 U.S. (3 How.) 212, 228-29.

[6] *People v. California Fish* Co. (1913) 166 Cal. 576, 597-99; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 524-25.

from private parties.[7] In other words, the public trust is an affirmation of the duty of the state to protect the people's common heritage of tide and submerged lands for their common use.[8]

But to what common uses may tide and submerged lands be put? Traditionally, public trust uses were limited to water-related commerce, navigation, and fishing. In more recent years, however, the California Supreme Court has said that the public trust embraces the right of the public to use the navigable waters of the state for bathing, swimming, boating, and general recreational purposes. It is sufficiently flexible to encompass changing public needs, such as the preservation of the lands in their natural state for scientific study, as open space and as wildlife habitat. The administrator of the public trust "is not burdened with an outmoded classification favoring one mode of utilization over another."[9]

The Legislature, acting within the confines of the common law public trust doctrine, is the ultimate administrator of the tidelands trust and often may be the ultimate arbiter of permissible uses of trust lands. All uses, including those specifically authorized by the Legislature, must take into account the overarching principle of the public trust doctrine that trust lands belong to the public and are to be used to promote public rather

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[7] *Illinois Central R.R. Co. v Illinois* (1892) 146 U.S. 387, 452.

[8] *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441.

[9] *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260.

than exclusively private purposes. The Legislature cannot commit trust lands irretrievably to private development because it would be abdicating the public trust.[10] Within these confines, however, the Legislature has considerable discretion.

The Legislature already may have spoken to the issue of the uses to which particular tide and submerged lands may be put when making grants of these lands in trust to local government entities. Statutory trust grants are not all the same--some authorize the construction of ports and airports, others allow only recreational uses and still others allow a broad range of uses.

A further and often complicating factor is that granted and ungranted lands already may have been developed for particular trust uses that are incompatible with other trust uses or may have become antiquated. Some tidelands have been dedicated exclusively to industrial port uses, for example, and in these areas, recreational uses, even if also authorized by the trust grant, may be incompatible. Similarly, tidelands set aside for public beaches may not be suitable for construction of a cannery, even though a cannery may be an acceptable trust use. Piers, wharves and warehouses that once served commercial navigation but no longer can serve modern container shipping may have to be removed or converted to a more productive trust use. Historic public trust uses may have been replaced by new technologies. Antiquated structures on the waterfront may be an

[10] *Illinois Central Railroad v. Illinois, supra,* at 452-53.

impediment rather than a magnet for public access and use of the waters. Public trust uses may and often do conflict with one another. The state and local tidelands grantees, as administrators of their respective public trust lands, are charged with choosing among these conflicting uses, with the Legislature as the ultimate arbiter of their choices.

For all these reasons, a list of uses or a list of cases without more may not be as useful as an analysis of public trust law applied to a specific factual situation.

III. The Leasing of Tidelands

A few principles established by the courts are instructive in analyzing under the public trust doctrine the leasing of public trust lands for particular uses. For example, it was settled long ago that tidelands granted in trust to local entities may be leased and improved if the leases and improvements promote uses authorized by the statutory trust grant and the public trust. Leases for the construction of wharves and warehouses and for railroad uses, i.e., structures that directly promote port development, were approved early in the 20th century.[11] Later, leases for structures incidental to the promotion of port commerce, such as the Port of Oakland's convention center, were held to be valid because although they did not directly support port business, they encouraged trade, shipping, and commercial associations to become familiar with the port and its assets.[12] Visitor-serving

[11] *San Pedro etc. R.R. Co. v. Hamilton* (1911) 161 Cal. 610; *Koyner v. Miner* (1916) 172 Cal. 448; *Oakland v. Larue Wharf & Warehouse Co.* (1918) 179 Cal. 207; *City of Oakland v. Williams* (1929) 206 Cal. 315.

[12] *Haggerty v. City of Oakland* (1958) 161 Cal.App.2d 407, 413-414.

facilities, such as restaurants, hotels, shops, and parking areas, were also approved as appropriate uses because as places of public accommodation, they allow broad public access to the tidelands and, therefore, enhance the public's enjoyment of these lands historically set apart for their benefit.[13]

These cases provide three guidelines for achieving compliance with the public trust when leasing tidelands for construction of permanent structures to serve a lessee's development project: (1) the structure must directly promote uses authorized by the statutory trust grant and trust law generally, (2) the structure must be incidental to the promotion of such uses, or (3) the structure must accommodate or enhance the public's enjoyment of the trust lands. Nonetheless, when considering what constitutes a trust use, it is critical to keep in mind the following counsel from the California Supreme Court: The objective of the public trust is always evolving so that a trustee is not burdened with outmoded classifications favoring the original and traditional triad of commerce, navigation and fisheries over those uses encompassing changing public needs.[14]

[13] *Id.* at p. 414; *Martin v. Smith* (1960) 184 Cal.App.2d 571, 577-78.

[14] *National Audubon Society v. Superior Court, supra,* at p. 434.

IV. Promotion of Trust Uses and Public Enjoyment of Trust Lands

Installations not directly connected with water-related commerce are appropriate trust uses when they must be located on, over or adjacent to water to accommodate or foster commercial enterprises. Examples include oil production facilities, freeway bridges and nuclear power plants.[15] Hotels, restaurants, shops and parking areas are appropriate because they accommodate or enhance the public's ability to enjoy tide and submerged lands and navigable waterways. The tidelands trust is intended to promote rather than serve as an impediment to essential commercial services benefiting the people and the ability of the people to enjoy trust lands.[16]

Nevertheless, the essential trust purposes have always been, and remain, water related, and the essential obligation of the state is to manage the tidelands in order to implement and facilitate those trust purposes for all of the people of the state.[17] Therefore, uses that do not accommodate, promote, foster or enhance the statewide public's need for essential commercial services or their enjoyment tidelands are not appropriate uses for public trust lands. These would include commercial installations that could as easily be sited on uplands and strictly local or "neighborhood-serving" uses that

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[15]See *Boone v. Kingsbury* (1928) 206 Cal.148, 183; *Colberg, Inc. v. State of California ex rel. Dept. Pub. Work, supra,* at pp. 421-22; and *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 289.

[16]*Carstens v. California Coastal Com., supra,* at p. 289.

[17]Joseph L. Sax, "The Public Trust in Stormy Western Waters," October 1997.

confer no significant benefit to Californians statewide. Examples may include hospitals, supermarkets, department stores, and local government buildings and private office buildings that serve general rather than specifically trust-related functions.

V. **Mixed-Use Developments**

Mixed-use development proposals for filled and unfilled tide and submerged lands have generally consisted of several structures, including non-trust use structures or structures where only the ground floor contains a trust use. While mixed-use developments on tidelands may provide a stable population base for the development, may draw the public to the development, or may yield the financing to pay for the trust uses to be included in the development, they ought not be approved as consistent with statutory trust grants and the public trust for these reasons. These reasons simply make the development financially attractive to a developer. Projects must have a connection to water-related activities that provide benefits to the public statewide, which is the hallmark of the public trust doctrine. Failure to achieve this goal, simply to make a development financially attractive, sacrifices public benefit for private or purely local advantage. A mixed-use development may not be compatible with the public trust, not because it may contain some non-trust elements, but because it promotes a "commercial enterprise unaffected by a public use"[18] rather than promoting, fostering, accommodating or

[18] *City of Long Beach v. Morse* (1947) 31 Cal.2d 254, 261.

enhancing a public trust use.[19] That use, however, need not be restricted to the traditional triad of commerce, navigation and fishing. It is an evolving use that is responsive to changing public needs for trust lands and for the benefits these lands provide.[20]

Moreover, commercial enterprises without a statewide public trust use may violate the terms of statutory trust grants. Typically, grants allow tidelands to be leased, but only for purposes "consistent with the trust upon which said lands are held." This term is not equivalent to "not required for trust uses" or "not interfering with trust uses." Since leases of tidelands must be consistent with statutory trust grant purposes, leases which expressly contemplate the promotion of non-trust uses rather than trust uses would not comply with the terms of the trust grants.

[19] *Haggerty v. City of Oakland, supra,* at pp. 413-14.

[20] *National Audubon Society v. Superior Court, supra,* at p. 434.

For these reasons, non-trust uses on tidelands, whether considered separately or part of a mixed-use development, are not mitigable. That is, unlike some environmental contexts where developments with harmful impacts may be approved so long as the impacts are appropriately mitigated by the developer, in the tidelands trust context, mitigation of a non-trust use has never been recognized by the courts. To the contrary, the California Supreme Court has said that just as the state is prohibited from selling its tidelands, it is similarly prohibited from freeing tidelands from the trust and dedicating them to other uses while they remain useable for or susceptible of being used for water-related activities.[21]

VI. Incidental Non-Trust Use

All structures built on tide and submerged lands should have as their main purpose the furtherance of a public trust use. Any structure designed or used primarily for a non-trust purpose would be suspect. Mixed-use development proposals, however, frequently justify non-trust uses as "incidental" to the entire project. The only published case in California in which a non-trust use of tidelands has been allowed focused on the fact that the real or main purpose of the *structure* was a public trust use and that the non-trust use would be incidental to the main purpose of the structure.[22] In this context, the court noted that because the real or main purpose of the structure was to promote public trust uses,

[21] *Atwood v. Hammond* (1935) 4 Cal.2d 31, 42-43.

[22] *Haggerty v. City of Oakland, supra,* at p. 413.

non-trust groups could also use the facility, but the non-trust uses must remain *incidental* to the main purpose of the structure.[23] This is the state of the law, and it is supported by good policy reasons as well. If the test for whether a non-trust use is incidental to the main purpose of a development were not applied on a structure-by-structure basis, pressure for more dense coastal development may increase as developers seek to maximize the square feet of allowable non-trust uses. Disputes may arise as to how to calculate the square footage attributable to the proper trust uses versus non-trust uses, with open waterways and parking garages likely being the dominant trust uses and structures being devoted to non-trust uses.

It is beyond contention that the state cannot grant tidelands free of the trust merely because the grant serves some public purpose, such as increasing tax revenues or because the grantee might put the property to a commercial use.[24] The same reasoning applies to putting tidelands to enduring non-trust uses by building structures on them. Accordingly, the only enduring non-trust uses that may be made of tidelands without specific legislative authorization are those incidental to the main trust purpose applied on a structure-by-structure basis. Each structure in a mixed-use development on tidelands must have as its primary purpose an appropriate public trust use. If its real or main purpose is a trust use, portions of the structure not needed for trust purposes may be

[23] *Ibid.*

[24] *National Audubon Society v. Superior Court, supra,* at p. 440.

leased temporarily to non-trust tenants, provided that the non-trust use is incidental to the main purpose of the structure.

VII. The Role of the Legislature

The Legislature is the representative of all the people and, subject to judicial review, is the ultimate arbiter of uses to which public trust lands may be put. The Legislature may create, alter, amend, modify, or revoke a trust grant so that the tidelands are administered in a manner most suitable to the needs of the people of the state.[25] The Legislature has the power to authorize the non-trust use of tidelands. It has done so rarely, and then on a case-specific basis.[26] Many of its actions have been a recognition of incidental non-trust uses or of a use that must be located on the tidelands. When these legislative actions have been challenged in court, the courts, understandably, have been very deferential, upholding the actions and the findings supporting them.[27]

The Legislature has provided a statutory framework for the leasing of tidelands for non-trust uses by the cities of Long Beach and San Francisco grounded on findings that the tidelands are *not required for* (San Francisco) or *not required for* and *will not*

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[25] *City of Coronado v. San Diego Unified Port District* (1964) 227 Cal.App.2d 455, 474.

[26] For example, in Chapter 728, Statutes of 1994, the Legislature authorized tidelands in Newport Beach to continue to be put to non-trust uses for a limited term after it was determined that the tidelands had been erroneously characterized and treated as uplands by the city due to incorrect placement of the tidelands boundary.

[27] See, e.g., *Boone v. Kingsbury, supra,* at p. 183 and *City of Coronado v. San Diego Unified Port District, supra,* at pp. 474-75; but see *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 206-07, 212.

interfere with (Long Beach) the uses and purposes of the granting statute.[28] Where, as in these two statutes, the Legislature has authorized in general terms the use of tidelands for non-trust purposes, the statutes' provisions must be interpreted so as to be consistent with the paramount rights of commerce, navigation, fishery, recreation and environmental protection. This means that the tidelands may be devoted to purposes unrelated to the common law public trust to the extent that these purposes are incidental to and accommodate projects that must be located on, over or adjacent to the tidelands. These non-trust uses are not unlimited, for there are limits on the Legislature's authority to free tidelands from trust use restrictions.[29]

To ensure that the exercise of the Long Beach and San Francisco statutes is consistent with the common law public trust, the tidelands to be leased for non-trust uses must have been filled and reclaimed and no longer be tidelands or submerged lands and must be leased for a limited term. The space occupied by the non-trust use, whether measured by the percentage of the land area or the percentage of the structure, should be relatively small. Finally, any structure with a non-trust use should be compatible with the overall project. Findings such as these are necessary because legislative authorizations to devote substantial portions of tidelands to long-term non-trust uses have generally been

[28]Ch. 1560, Stats. 1959; Ch. 422, Stats. 1975. These statutes also provide for, *inter alia*, the lease revenues to be used to further trust uses and purposes.

[29]*Illinois Central R.R. Co. v. Illinois, supra,* at pp. 452-54.

considered by the courts as tantamount to alienation.[30]

In several out-of-state cases, specific, express legislative authorizations of incidental leasing of publicly-financed office building space to private tenants solely for the purpose of producing revenue have been subject to close judicial scrutiny, although they did not involve tidelands trust use restrictions.[31] One case involved construction of an international trade center at Baltimore's Inner Harbor with public financing where legislation expressly permitted *portions* of the structure to be leased to private tenants for the production of income. Another was a condemnation case where the statute authorizing the New York Port Authority to acquire a site on which to build the World Trade Center was challenged on the basis that it allowed *portions* of the new structure to be used for no other purpose than the raising of revenue. In both cases, opponents of the projects argued that a publicly financed office building should not be permitted to have *any* private commercial tenants even though the respective legislatures had expressly allowed incidental private use of each building. The state courts in both Maryland and New York held that so long as the primary purpose of the office building was for maritime purposes connected with the port, legislation authorizing the leasing to private

[30] *Atwood v. Hammond, supra,* at p. 42; see also *Illinois Central R.R. Co. v. Illinois, supra,* at pp. 454-53.

[31] *Lerch v. Maryland Port Authority* (1965) 240 Md. 438; *Courtesy Sandwich Shop, Inc. v. Port of New York Authority* (1963) 12 N.Y.2d 379.

tenants was valid.[32] Although both cases involve challenges to financing and condemnation statutes and do not involve the public trust, they are instructive because they demonstrate the importance to the courts, even in the context of public financing and condemnation, that when a portion of a structure is to be leased for the purpose of raising revenues to offset expenses, this incidental non-public leasing must have been legislatively authorized.

VIII. Exchanges of Lands

Situations where a local government or a private party acquires a right to use former trust property free of trust restrictions are rare.[33] In order for such a right to be valid, the Legislature must have intended to grant the right free of the trust and the grant must serve the purpose of the trust. Public Resources Code section 6307 is an example of the rare situation where abandonment of the public trust is consistent with the purposes of the trust. Section 6307 authorizes the Commission to exchange lands of equal value, whether filled or unfilled, whenever it finds that it is "in the best interests of the state, for the improvement of navigation, aid in reclamation, for flood control protection, or to enhance the configuration of the shoreline for the improvement of the water and upland, on navigable rivers, sloughs, streams, lakes, bays, estuaries, inlets, or straits, and that it will not substantially interfere with the right of navigation and fishing in the waters

[32] *Ibid.*

[33] *National Audubon Society v. Superior Court, supra,* at p. 440.

involved. The lands exchanged may be improved, filled and reclaimed by the grantee, and upon adoption by the Commission of a resolution finding that such lands (1) have been improved, filled, and reclaimed, and (2) have thereby been excluded from the public channels and are no longer available or useful or susceptible of being used for navigation and fishing, and (3) are no longer in fact tidelands and submerged lands, the lands are thereupon free from the public trust. The grantee may thereafter make any use of the lands, free of trust restrictions.

In order for such an exchange of lands to take place, the Commission must find that the lands to be exchanged are no longer available or useful or susceptible of being used for navigation and fishing, taking into consideration whether adjacent lands remaining subject to the trust are sufficient for public access and future trust needs; that non-trust use of the lands to be freed of the public trust will not interfere with the public's use of adjacent trust lands; and that the lands that will be received by the state in the exchange not only are of equal, or greater, monetary value but also have value to the tidelands trust, since they will take on the status of public trust lands after the exchange. Only then can the Commission find that the transaction is in the best interests of the state, that the exchange of lands will promote the public trust and that it will not result in any substantial interference with the public interest in the lands and waters remaining.

EXHIBIT C

State of California — Department of Justice

Memorandum

To : N. GREGORY TAYLOR
Assistant Attorney General
Los Angeles

Date : December 1, 1982
File No.:

From : Office of the Attorney General
LOS ANGELES
-- San Diego

Subject: TIMOTHY R. PATTERSON, Deputy Attorney General

TIMESHARE PROJECTS ON TIDELANDS

The State Lands Commission presently faces the legal question of whether a timeshare project is a proper use of tidelands subject to the public trust. The source of this issue is a major development proposed by Wrather Port Properties, Ltd., in the Long Beach Harbor. This question, however, is not relevant only to Long Beach. The timeshare industry is burgeoning along California's coastline. Other cities and port areas, including San Diego and Ventura, already are facing the issue. The Commission's decision with respect to the Long Beach proposal will be significant statewide. Consequently, this complex matter merits careful consideration.

This memo defines timesharing, discusses some general principles of public trust law, applies those principles to timesharing, and concludes that timesharing is an improper use of trust lands.

I. TIMESHARING DEFINED

A timeshare project sells intervals of time in a resort-like development which includes private living quarters and common recreational facilities. Each purchaser of a time interval receives the right to the exclusive use of a portion of improved real property for a portion of each year over an extended period of time. The typical project sells 50 of the 52 weeks available each year in blocks or "intervals" of time consisting of one to four weeks. The right of annual use may exist in perpetuity, for life, or for a term of years. A "timeshare estate" is a right of occupancy coupled with an estate in the real property. The estate usually sold is an undivided fractional fee interest, held in perpetuity. A "timeshare use" is a contractural (lease) agreement, license or membership right of occupancy in a timeshare project which does not convey any freehold estate in the real property. (Bus. & Prof. Code § 11003.5.) Both "timeshare estate" and "timeshare use" projects usually

involve several hundred purchasers, each of whom receives the nonexclusive right to use the common areas of the projects, including recreational facilities, along with the exclusive right to occupy a type of unit (e.g. studio, one-bedroom, or two-bedroom suite) for an interval of time each year.

From this brief description, it is readily evident the concept of timesharing is, on a theoretical level, quite flexible. A project can be sold in fee or pursuant to long-term leases or licenses. Each year of the fee interest or lease can be divided into small (one week) or large (one or more months) segments. The interval of time sold can occur during the same week each year, or can consist of one of several weeks in a particular season of each year. If a person can purchase more than one interval, e.g., one week of time, the intervals may be restricted to consecutive use, or they may be sold during various seasons of each year.

The size of the timeshare project planned by Wrather in Long Beach is not defined in the proposed Second Amendment of the Queen Mary Lease; instead, Wrather would obtain tremendous discretion in this regard. Paragraph 10(a) of the proposed amendment would allow timesharing as a "Permitted Use" on the "Premises" covered by the lease as amended, with absolutely no restriction on the number of buildings and units devoted to such use. Pursuant to paragraph 10(b), if Wrather's study of the office building market fails to demonstrate the existence of qualified subtenants to occupy office space, Wrather has the option of substituting a development consisting of any of the other uses permitted under the lease, including timeshare units.

This lack of specificity in the proposed lease amendment makes analysis of the Wrather project somewhat difficult, however, Wrather has described its project in such a manner that it would consitute a "timeshare use" development under Business and Professions Code section 11003.5, wherein 725 rooms in several structures are to be made available on long-term leases for intervals of time not to exceed 30 days per year. The initial lease term proposed by Wrather was in the range of 30 to 40 years. The latest description of the project indicates the term of years is "to be determined." In general, timeshare projects typically are designed for long-term use by the purchasers of intervals of time. The number of years of use sold to each buyer usually is commensurate with the useful life of the buildings containing the living units. A term of 50-plus years in a "timeshare use" project is not uncommon.

As a lessee of tidelands granted by the State to the City of Long Beach, Wrather has no authority to sell fee interests in the form of "time-share estates" in the subject trust property. (Cal. Const., Art. X, § 10; Stats. 1935, ch. 158, § 1, p. 794.) The issue here is whether a "time-share use" project constitutes a proper use of public trust lands.

Prior to analyzing the specific characteristics of timesharing, it is necessary to consider the basic principles of public trust law which are applicable to timesharing.

II. GENERAL LEGAL PRINCIPLES RELEVANT TO TIMESHARING ON PUBLIC TRUST LANDS

A. The Public Nature of Permitted Uses of Tidelands

The key aspect of this inquiry is the fact that the public has a special legal interest in tidelands. When California was admitted to the Union in 1850, under the "Equal Footing Doctrine" it succeeded to title in the tidelands within its borders. The State obtained these lands not in its proprietary capacity but as trustee for the public. The public has enjoyed rights in the tidelands pursuant to the trusteeship of the State and its local agency delegates, such as Long Beach, from 1850 to the present. The scope of the public's rights was expressed initially as encompassing navigation, commerce and fishing, but has been expanded to include the right to hunt, bathe, swim, and to preserve the tidelands in their natural condition as ecological units for scientific study. (City of Berkeley v. Superior Court (1980) 26 Cal.3d 515, 521; Marks v. Whitney (1971) 6 Cal.3d 251, 259-260.) Legislatively-granted tidelands must be used for statewide public purposes. (Mallon v. City of Long Beach (1955) 44 Cal.2d 199, 211; People v. City of Long Beach (1959) 51 Cal.2d 859, 878 et seq.) This principle recently was noted in State of California v. County of Orange (1982) 134 Cal.App.3d 20, 28.)

The general statutory approach to the regulation of tidelands in California has been described as being in accord with historic regulatory patterns elsewhere, "utilizing the public trust concept to constrain activitiies which significantly shift public values into private uses or uses which benefit some limited group." (Sax, The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention, (1969-70) 68 Mich. L. Rev. 471, 538.) The granting statute under which Long Beach operates the public trust property in question provides in relevant part:

"(a) That none of said lands shall be used or devoted to any purposes other than public park, parkway, highway, playground, the establishment, improvement and conduct of a harbor and the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation; and said city, or its successors, shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsoever; provided, however, that nothing herein contained shall be so construed as to prevent the granting or use of easements, franchises or leases for limited periods, or rights of way in, under, over or across said tidelands or submerged lands for power, telephone, telegraph or cable lines or landings, sewage disposal conduits, wharves and other public uses and purposes consistent with the trusts upon which said lands are held, or the leasing or use of such tidelands or submerged lands for limited periods for the construction, maintenance, and operation of nonprofit benevolent and charitable institutions organized and conducted for the promotion of the moral and social welfare of seamen, naval officers and enlisted men, and other persons engaged in and about harbor and commerce, fishery, and navigation." (Stats. 1935, ch. 158, § 1, p. 794.) (Emphasis added.)

In 1964, the Legislature made an additional statutory finding concerning the use of oil revenue. The City of Long Beach was authorized to use such revenue for the fulfillment of the trust uses and purposes enumerated in the city's prior granting statutes, and including the following:

"(c) The construction . . . of bulkheads, piers, earthfills, streets, roadways, bridges, bridge approaches, buildings, structures, recreational facilities, landscaping, parking lots, and other improvements on or adjacent to the Long Beach tidelands or on or adjacent to the Alamitos Beach Park Lands for the benefit and use of said tidelands or the Alamitos Beach Park Lands." (Stats. 1965, First Ex. Sess. 1964, ch. 138, § 6, p. 446.)

It is important to note the restriction of the uses to those associated with the benefit of the public.

Although timesharing has not been analyzed by the courts to date as to whether it constitutes a proper use of tidelands, residential uses have been considered.

B. Residential Use of Trust Land Is Improper

Given the public purpose to which trust lands must be devoted, the State Lands Commission has opposed efforts to devote tidelands to residential uses. In 1974, in the case of San Diego Unified Port District v. Coronado Towers, Inc. (no published opinion), the Commission argued that private high-rise residences, leased for a period of 75 years, violated the public trust doctrine. A major premise of the argument was that lands granted by the Legislature to local governments are held in trust for all the people of the State. Although the Court of Appeal found the lease to be invalid, the Lands Commission, the Bay Conservation and Development Commission and the California Coastal Zone Conservation Commission petitioned for a hearing in the California Supreme Court because the Court of Appeal had approved of long-term residential uses as a proper public trust purpose. The State Supreme Court responded by decertifying the publication of the Court of Appeal decision. By striking the publication of the opinion, the Supreme Court prevented the opinion from achieving any precedential value in future legal proceedings. This action can be construed as an indication of the California Supreme Court's agreement with the State's argument that long-term residential uses of tidelands threatens the preservation of such lands as a unique resource essential for the welfare of all the people of California. Once private residences are allowed on tidelands, the property becomes virtually the same as any upland subdivision. The public is severely restricted and the property loses its special character as public land.

The placement of high-rise buildings designed as permanent residences for a select few people cannot be said to benefit the public at large. They are at best a purely local use which does not stimulate or foster navigation or commerce. In Colberg, Inc. v. State of California (1967) 67 Cal.2d 408, 417-419, the California Supreme Court upheld the authority of the State to construct two low level freeway bridges over the Stockton deep-water channel. The court strongly reiterated that activities are for trust purposes ". . . when they are done 'for purposes of

commerce, navigation, and fisheries for the benefit of all the people of the state.' . . ." (Emphasis added.) It also stated that "courts have construed the purposes of the trust with liberality to the end of benefiting all the people of the state." (Colberg, supra, at p. 417.) Neither Colberg nor any other decision sanctions the virtually irreversible devotion of tidelands to private use by permanent apartment house dwellers, without compliance with the strict criteria for terminating the public trust set out in City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 485-486. Termination of the public trust over the land in question in Long Beach has not been proposed by Wrather.

More recent judicial support for the prohibition of residential structures on trust land is found in the recent discussion of the public trust doctrine by Justice Clark in the dissenting opinions of City of Berkeley v. Superior Court, supra, 26 Cal.3d at p. 538 and State of California v. Superior Court (Lyon) (1981) 29 Cal.3d 210, 235. In the City of Berkeley dissent, it was noted:

> " . . . cases have indicated that reclamation for general purpose county and municipal buildings and governmental housing projects does not further trust purposes. [citations] The main effect of the rulings is that under the trust tidelands may be filled and used for commercial and recreational purposes but not residential purposes." (City of Berkeley, supra, at p. 538.)

In Lyon, Justice Clark opined that there are numerous permissible uses of tidelands within the broad terms of the public trust doctrine for navigation, commerce, fishing and other recognized trust purposes, but that there are certain uses of land which the public trust does not encompass, including residential, agricultural and general governmental. (Lyon, supra, at p. 235.)

The Legislature also has indicated its opposition to residences on tidelands. In a statute designed to resolve a controversy over the long-term residential use of portions of Mission Bay in San Diego by mobilehome tenants, the Legislature made the following relevant findings and determinations:

> "(b) The described lands were intended by the Legislature to be used for public recreation and public recreational support facilities which uses could encompass transient-type guest housing. However,

the described lands have in fact been developed with permanent sites for mobilehomes which can no longer be considered public guest housing facilities.
"(c) Private residential use of these lands is in conflict with the Legislature's intent as declared in the legislative grants.

"(d) Many members of the public have made De Anza Point their residence for many years and have come to look upon the lands . . . as their home despite their month-to-month contractual tenancy." (Stats. 1981, ch. 1008, § 1, No. 7 Deering's Adv. Legis. Service, p. 39.)

The legislative grant of the Mission Bay tidelands to the City of San Diego, upon which the Legislature made the above-quoted findings in 1981, is very similar to the Long Beach granting statute for the tidelands currently in question. The Mission Bay grant states in pertinent part:"

"(a) That said lands shall be used by said city and by its successors solely for the purpose of establishing, improving and conducting a harbor for small boats and for the construction, maintenance and operation thereon of wharves, structures and appliances necessary or convenient for the protection or accomodation of commerce, navigation and fisheries and for the establishment and maintenance of parks, playgrounds, bathhouses, recreation piers and facilities necessary or convenient for the inhabitants of said city; for educational, commercial, and recreational purposes, including the necessary streets, highways and other facilities convenient thereto; and said city or its successors shall not at any time grant, convey, give or alien said lands or any part thereof to any individual, firm or corporation for any purpose whatsoever; provided, that said city or its successors may grant franchises thereon for limited periods, but in no event exceeding 50 years, for wharves and other public uses and purposes and may lease said lands or any part thereof for limited periods, but in no event exceeding 50 years, for purposes consistent with the trust upon which said lands are held by the State of California and with the requirements of commerce, navigation or fisheries.

"(b) That said harbors and tidelands shall be improved by said city and shall always remain public harbors and public tidelands for all purposes of

commerce, navigation and fisheries, and the State of California shall have at all times the right to use without charge all wharves, docks, piers and other improvements constructed on said lands or any part thereof for any vessel or other watercraft or railroad owned or operated by the State of California." (Stats. 1955, ch. 1455, § 1, pp. 2660-2661.)

The Mission Bay grant allows uses which accommodate commerce, navigation and fisheries and which provide parks, playgrounds, and other recreational facilities for the citizens of San Diego. It further provides that the tidelands shall always remain public harbors and public tidelands. The Legislature's finding last year that such lands were intended for public recreational use and could not be used for private residences is significant to this analysis. Whether timesharing is so akin to residential uses as to constitute an impermissible trust use will be considered below.

C. Uses of Tidelands Which Are Necessarily Incidental to Statewide Trust Purposes May Be Valid In Certain Circumstances

If a non-trust use is inextricably connected with the implementation of a proper public trust purpose and that trust purpose is directly subserved by the inclusion of the non-trust use on tidelands, there is precedent for allowing the non-trust use. Houseboats provide a good example. In 1965, the Attorney General rendered an informal opinion to Senator Holmdahl that leases on the legislatively-granted tidelands of Emeryville providing for long-term housing for owners of yachts and pleasure boats were of questionable statewide general interest under the public trust doctrine. (IL 65-99, May 25, 1965.) In a 1971 opinion to Senator Schrade, live-aboard boats capable of navigation were not considered to be of statewide or regional benefit, although a relatively small number might be justified on the basis that they afforded a degree of security to the remaining boats from trespass or vandalism. (IL 71-234, Dec. 20, 1971.)

The State Lands Commission currently operates pursuant to a policy position that residential houseboats are not a proper use of trust lands. However, the Commission recently determined that the City of Berkeley properly could lease four percent (4%) of the berths at a municipal marina for anchoring cruising vessels used primarily as residences. The justification for this typically prohibited use of tidelands was that it added

security to the operation of the marina during nighttime hours. The restrictions placed on these "houseboats" are remarkable in their severity. The vessels are required to leave their berths for at least six hours every 90 days. Thus, they must be clearly navigable vessels and not just a floating residential neighborhood. All berths are rented on a month-to-month basis and are charged á higher rate than the vessels not designated as live-aboards.

This discussion of houseboats illustrates that a nontrust use must be necessarily incidental to the accomplishment of a trust use of statewide public benefit listed in a local government's granting statute in order to be proper. This approach by the State Lands Commission is supported by case law.

The most topical decision is Haggarty v. City of Oakland (1959) 161 Cal.App.2d 407, 413-414. The issue was whether the construction and maintenance of a convention and banquet hall constituted a proper port purpose. In holding that the hall was a proper use of the port, the court of appeal reasoned that the hall would give trade, shipping and commercial associations a place to hold conventions and exhibitions in Oakland's port area. Such activities would promote commerce at the port. In addition, said the court, the convention hall would provide a place for the tenants of the port to "meet, exchange ideas, exhibit their products and have the functions which are necessarily incidental to such meetings."

The court was aware that the use of the facility was not limited to commercial associations but could be rented by other groups not connected with the port. But that was not deemed to detract from the real purpose of the project -- to promote the functions of the port. Reasoning by analogy, the court noted that hotels and restaurants in public parks generally have been recognized as ancillary to the complete enjoyment by the public of property set apart for public benefit.

III. THE NATURE OF TIMESHARING: PUBLIC OR PRIVATE?

A. After Sell-Out, A Timeshare Project Becomes A Private Resort

Classifying timesharing as a permissible public trust use or an impermissible private use is not a simple task; timesharing projects can exhibit elements of both private and public uses of land.

On a spectrum of public availability, i.e., of devoting trust lands to a statewide public purpose, a timeshare project lies somewhere between a wholly private residential project such as a condominium, and a completely public facility, such as a hotel. From the standpoint of sheer numbers of uses, a timeshare project is not as private and exclusive of the public as is a private residential condominium development, because several hundred (or thousand) buyers may be involved. For example, a high-rise condominium with 100 units would allow only 100 individuals or families to make use of the premises. Dividing each year of the useful life of the project into "intervals of time" can increase dramatically the number of original purchasers. The same 100-unit building, if sold as a timeshare project consisting of 50 one-week intervals, would be available on a one-time purchase basis to 100 units X 50 weeks = 5,000 individuals or families. If the intervals of time were sold in two-week or four-week blocks the number of purchasers would be reduced to 2,500 or 1,250 individuals or families, respectively.

However, it is critically important not to become lost in a "numbers game" when analyzing timesharing under the public trust doctrine. As discussed above in Part II of this memo, it is the entire public sector of this state which enjoys a legal interest in the tidelands. The City of Long Beach, as a legislative grantee of the trust, must preserve the jus publicum, or public ownership rights, of the trust property in question. The various grants to the City of Long Beach do not specify residential use as a permitted use. If a timeshare project is deemed to be more like a private residential use than a use of statewide public benefit, it cannot be found to be a proper trust use.

Wrather and the City of Long Beach have put forth the argument that timesharing is nothing more than a hotel with a long-term reservation system built into the commencement of the project. Indeed, paragraph 10 of the proposed Second Amendment to the Queen Mary Lease describes one of the permitted uses as "Hotel rooms or accommodations to be developed as part of a timeshare project . . . ." In a legal sense, a "timeshare use" project is quite different from a hotel operation.

Persons who purchase time in a timeshare use project enter into long-term leases with the owner of the property - in this case with Wrather - which is a lessee of the City of Long Beach. These persons obtain a non-freehold estate in the property, in the nature of a lease. (See Cal-Am Corp. v. Dept. of Real Estate (1980) 104 Cal.App.3d

453, 457.) In contrast, lodgers in a hotel do not achieve the legal status of lessees; rather, they are mere licensees having only a personal contractual relation with the hotel proprietor to use the property for a specified purpose, i.e., lodging. They acquire no interest whatsoever in the real property involved. Hotel guests cannot enjoin the termination of their occupancy. (Sloan v. Court Hotel (1945) 72 Cal.App.2d 308.) It follows, then that a hotel guest whose advance reservation is secured by a deposit, may recover damages for the loss of his room, but he cannot require the hotel to make his room available for years in advance. The typical lessee can enforce his exclusive right of possession against the whole world, including the property owner. (Kaiser v. Reid (1947) 30 Cal.2d 610, 619.) There is no reason to conclude a timeshare lessee could not enforce his exclusive right of possession against the whole world, including his lessor, for the entire term of the lease.

The critical point overlooked by the argument that timesharing is just a long-term hotel reservation is that timeshare projects, despite the exchange programs to be discussed below, are designed to be used for an extended number of years by the group of initial buyers. Once a project is sold out, it becomes a private resort, completely unavailable to the public unless the original buyers choose not to make use of their time intervals or exchange their time in their "home resort" with someone who owns "time" in a timeshare resort elsewhere. In short, a distinct class of people with exclusive rights of use is created. In the instant project, this class easily could be quite limited in number. The proposed project calls for 725 units in which a person or entity may reserve use rights for periods not exceeding 30 days per year. (Grantee's Report On Application of Wrather Port Properties, Ltd., p. 3.) Thus, the 725 units available per year may all be sold in one month time intervals, creating a class of buyers of 725 units x 12 months = 8,700 individuals or families. Although sheer numbers aren't the critical factor in the overall analysis of timesharing, it is interesting how this sum pales in comparison with the number of persons or families who could rent a hotel room in a 725-unit hotel in just one year, even if they each stayed three nights: [365 days/3 days = 122 days] x 725 rooms = 88,450 users per year. The two sums differ by a factor of ten, just for a single year. The multi-year lease envisioned for the Wrather project (now undefined but probably at least 30 years), surely will increase this difference in the number of potential persons who will be able to make use of the property.

B. Exchange and Rental Programs Can Increase Public Availability, But Such Programs Are Entirely Optional

Theoretically, the number of persons who may avail themselves of the amenities of a timeshare resort, including the exclusive use rights, can increase through exchange programs and rentals to the general public of units not occupied by their owners in any given year. The increase, however, probably will be insignificant.

An offshoot of the timeshare industry has been the creation of "exchange" programs which allow the holder of a timeshare interest to trade his week or other interval of time in project A (his "home resort") for a week in project B somewhere else in the world. An additional fee is assessed for participation in such programs. It is important to recognize at the outset that the persons who can participate also constitute a limited group, i.e., the owners of timeshare interests elsewhere. A member of the general public cannot participate in an exchange program. In a 1978 study of 1,500 timeshare buyers performed by Richard Ragatz, a timeshare market researcher formerly associated with the University of Oregon, 21 percent traded their interval through a major exchange program. Twenty-three percent traded in a 1980 study of 10,000 buyers. However, the trend seems to be toward less participation in exchange programs. Carl Burlingame, editor and publisher of Resort Timesharing Today, recently stated there is far from 100 percent renewal of exchange membership rights.

Renting out unused rooms to the general public is another possible means of increasing the public nature of a timeshare resort. But prior studies indicate this phenomenon is quite limited in occurrence. In the 1978 Ragatz study, only 5.8 percent of the timeshare owners rented out their time. In the 1980 Ragatz study of 10,000 timeshare owners, 10.1 percent rented their time. A 150-unit timeshare resort in Hilton Head, North Carolina has a vacancy factor of only 10 percent. Whether the entire 10 percent is actually rented to the public is not known. The more desirable projects in terms of location and amenities will have low vacancy factors and correspondingly low rental rates, because the original buyers will want to return year after year, according to discussions with industry representatives such as Carl Burlingame. The application of this principle to the Long Beach area and the Wrather project, which is defined only in general terms at present,

is completely speculative. Wrather recently estimated approximately 15 percent of the 725 units would be included in its proposed public rental program, although it has provided no statistical support for its estimate. (Letter from Richard S. Stevens to Einar C. Petersen, September 16, 1982, p. 3.)

In August, Wrather stated it anticipates "substantially full occupancy year-round." (Letter from Kenneth K. Williams to Einar C. Peterson, Aug. 6, 1982, p. 3.) Full occupancy by the original timeshare lessees would mean no public use of the subject property through a rental program. The decision whether to rent out an interval of time will, of course, be made by the timeshare lessees, not Wrather.

C. The Relationship Between Timeshare Projects, Hotels and Residences

Although timeshare projects and hotels both constitute resort-like facilities, a timeshare project is quite different from a hotel because it is not available to the public at large. Several cities and the California Coastal Commission have shown concern for this phenomenon, although not because of the public trust doctrine. The City of Laguna Beach has become so concerned with the depletion of moderately-priced overnight accommodations due to the conversion of existing hotels and motels to timeshare projects that it has imposed a moratorium on further conversions and new construction of timeshare projects. In the City of San Buenaventura, the desire of city planners to keep the harbor area open to the public has been addressed by requiring a 221-unit timeshare project to retain 50 percent of its units as hotel rooms during the first 10 years after the project opens. During the first five years, for each hotel or motel unit opened elsewhere in the Ventura harbor, one additional unit in the timeshare project may be sold on a timeshare basis. During the second five years, units not previously permitted to be dedicated to timeshare use may be so dedicated if, after the sale of such units, at least 50 percent of all hotel and motel units in the Ventura harbor area are available on a conventional rental basis. This project will be located on publicly-owned land which is not subject to the public trust. The city plans to require similar conditions for other timeshare projects proposed in the harbor area.

The Coastal Commission likewise is concerned with the decrease in the visitor-serving capabilities of property converted from motel use to timeshare use. On the other hand, the Coastal Commission generally is not opposed to the conversion of apartments or condominiums to timeshare resorts, because in such instances, the number of available lessees or owners is increased by a timeshare project. As for new timeshare projects, the Coastal Commission supports them as long as they are not proposed in areas planned for motel or hotel accommodations. The Coastal Commission has not adopted a formal position regarding the propriety of timesharing on public trust lands. (Memo. coastal staff to Coastal Commission, "Timeshare Conversion of Hotels and Motels: SB 1195," December 15, 1981.)

In Long Beach it is the opinion of the City Attorney that there will be a sufficient inventory of hotel rooms even if a 725-unit timeshare project is approved at the Wrather site. (Letter from Einar Petersen to N. Gregory Taylor, September 27, 1982.) However, the data in the City Attorney's letter indicates there are 850 existing hotel rooms, with an additional 542 rooms to be provided by the Hyatt Regency, which is under construction. Thus, the total number of rooms which will be available in the immediate future is 1,392. This is less than half of the approximately 3,000 hotel rooms required to accommodate the conventions contemplated for the already-complete Convention and Entertainment Center. Moreover, it is possible that not all of these 1,392 rooms will be available to convention delegates, as opposed to other types of persons who use hotels. For example, it has been estimated by Mr. McJunkin that only 200 of the 542 rooms under construction at the Hyatt Regency may be availabe for convention-related hotel accomodations. The remaining 2,400 hotel rooms cited by the City Attorney as being available for conventioneers using the Convention Center consist of four projects, all of which are still in the planning stages, including 1,300 rooms in the Wrather project. Thus, in considering the practical necessity of timesharing in the Long Beach harbor area, the current shortage of hotel space needed for convention-going visitors should be considered. For purposes of this analysis, the more critical point is that even if there will be a sufficient inventory of hotel rooms available for convention use at some point several years from now, any of the Long Beach tidelands devoted to timeshare use at any time will thereafter be unavailable for other uses during the useful lives of the structures involved.

Although timesharing is different from a hotel operation, an argument can be made that it provides a vacation service to a different economic segment of the public at large, and thereby augments the public's current ability to make use of the tidelands through the use of hotels. Timesharing often is advertised as "tomorrow's vacations at today's prices." Middle-income persons who may be unable to afford the projected high costs of hotel rooms several years hence are said to be able to finance an interval of time and lock themselves into the original purchase price. Timeshare intervals of one week appear to be selling in the range of $6,000 to $8,000. Such purchases often can be financed through lending institutions. Economic questions usually are subject to debate, and this pro-timesharing argument is no exception. The original outlay of several thousand dollars (including the interest charges if partially financed), are not the only costs associated with timeshare ownership. Much like a condominium project's monthly homeowners fee, virtually all timeshare projects assess a yearly maintenance fee from each interval purchaser. A 15-unit project in La Jolla is charging $150 to $200 per year. The yearly fee for a two-bedroom unit at the 150-unit project in North Carolina discussed above is $175 to $200. The fees are due each year even if the owner does not make use of his time interval. Added to this may be the costs associated with the optional exchange programs. Wrather proposes to charge an annual exchange membership fee of $40, plus $40 each time an owner actually exchanges his interval.

When all of these expenses are viewed together, the cost of timesharing can be considered quite substantial.

A timeshare project is similar to a hotel in that it is designed to serve as a vacation site. But the restrictive effect of a timeshare project on continued public use of any parcel of tideland property appears to make a timeshare project more like a private residence for purposes of public trust law. A private residence is not an improper trust use because it provides housing, but rather because it severely limits the subsequent availability of the property for public use. A timeshare project creates a similar, though less severe, result.

Long Beach's granting statute, quoted at length in Part II(A) above, requires that the property be devoted to public purposes such as public parks, highways, playgrounds, and wharves, docks, piers and similar structures necessary or convenient for the promotion and accommodation of

commerce and navigation. (Stats. 1935, ch. 158, § 1, p. 794.) The granting statute to the City of San Diego for Mission Bay, quoted in Part II(B) above, is very similar in terms of the uses allowed. When the De Anza Cove portion of the Mission Bay tidelands came to be used for residential mobile home purposes, the Legislature declared such use in conflict with the public recreational use intended by the legislative grants which conveyed the tidelands to San Diego. (Stats. 1981, ch. 1008, § 1, supra.)

From this action of the Legislature, it is clear that the public nature of the property was found to be thwarted by the private use taking place. This action was consistent with a recent declaration of a basic tenet of California public trust law by the California Supreme Court, which holds that "statutes conveying tidelands should be interpreted if reasonably possible to avoid a destruction of the public use. . . ." (City of Los Angeles v. Venice Peninsula Properties (1982) 31 Cal.3d 288, 298, citing People v. California Fish Co. (1913) 166 Cal. 576, 597.)

Interpreting the Long Beach grant to allow for timesharing infringes upon the public use of the subject land. After the initial set of long-term leases are executed with the original purchasers, timeshare projects become essentially private enclaves to which public access is limited severely, being dependent entirely upon the possible rentals of rooms by timeshare owners who may choose not to make use of their time intervals in a particular year, or the possible use of an exchange network, which really isn't public. In order for the Lands Commission to make a finding that the proposed lease amendment allowing timesharing is in the best interests of the State, as required by Public Resources Code section 6702(b)(3), it must consider whether the proposed timeshare use of the tidelands is, among other things, consistent with Commission policies for administering lands within its jurisdiction and "conducive to public access." (2 Cal. Admin. Code § 2802(d).) In light of the above discussion about the exclusive, non-public nature of timeshare projects there appears to be legal objections to the Commission to making such a finding.

D. Timesharing Does Not Qualify As A Necessarily Incidental Use Of Trust Land

If it is assumed, pursuant to the above analysis, that timesharing in and of itself is an improper trust use, it remains necessary to consider whether timesharing can be approved in some form as an incidental use of trust land. The examples of residential houseboats and the convention and banquet hall discussed briefly in Part II(C) of this memo exhibit a common characteristic: they are closely connected with ongoing functions of the ports in question. The marina in Berkeley was serving as an integral part of the port's navigational function. Allowing a very small percentage of the vessels in the marina to operate as residential live-aboard boats was deemed supportive of the marina operation by providing as a security mechanism. The meeting hall in Oakland was considered by the court of appeal to support the commercial maritime operations of the port by giving trade, shipping and commercial associations a place to meet. The use of the facility by other groups not connected with the port was not deemed to detract from the "real purpose or validity of the project." (Haggerty, supra, 161 Cal.App.2d 407, 413.)

In the Wrather project, on the other hand, there is no connection between the timeshare project and port activities in the Long Beach harbor area.

CONCLUSION

The State Lands Commission is obligated to protect tide and submerged lands subject to the public trust from non-trust uses. Because timesharing is structured to provide a resort-like environment for a limited number of people for a long period of time, it can be considered inimical to the public nature of the public trust doctrine. Public trust law is not immutable; it changes to accommodate newly found public needs. This is reflected in Marks v. Whitney (1971) 6 Cal.3d 251, 259-260, where the preservation of tidelands in their natural state was recognized as a proper trust use. But changing public trust law to allow a use which in the long-term is not public is not the function of the State Lands Commission. The Commission's mandate is to enforce the existing body of public trust law to its fullest extent on behalf of the

public. In order to be as protective of the public trust as possible, the State Lands Commission at this juncture should disapprove timesharing as a proper trust use.

Tim Patterson

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Deputy Attorney General

TRP:sol

EXHIBIT D

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

DANIEL E. LUNGREN
Attorney General

OPINION	:	
	:	No. 95-901
of	:	
	:	July 8, 1996
DANIEL E. LUNGREN Attorney General	:	
	:	
GREGORY L. GONOT Deputy Attorney General	:	
	:	

THE HONORABLE CURTIS R. TUCKER, JR., MEMBER OF THE CALIFORNIA STATE ASSEMBLY, has requested an opinion on the following question:

Consistent with the public trust doctrine, may a public agency trustee of filled tidelands lease a portion of those tidelands to a private party for the construction of a timeshare resort?

CONCLUSION

Consistent with the public trust doctrine, a public agency trustee of filled tidelands may lease a portion of those tidelands to a private party for the construction of a timeshare resort if the project will provide for significant use by members of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation.

ANALYSIS

The question presented for resolution is whether the development of timeshare resorts in former tidelands[1] that were legally filled by a public agency and which are now held in trust by the agency pursuant to a statutory grant from the state would be consistent with the "public trust doctrine" under which the property is held. We conclude that the construction and operation of a timeshare resort may be found to be consistent with the public trust doctrine.

We assume for purposes of this opinion that the statutory grant of the tidelands to the public agency[2] and the local and regional land use designations[3] for the property and surrounding trust lands would allow for the construction of a variety of visitor-oriented recreational and commercial uses. We assume that any proposed timeshare resort would be consistent with the land use designations for the particular site, and would be compatible with the uses on the surrounding trust lands.[4]

A. TIMESHARE RESORTS GENERALLY

A "timeshare project" may be defined as "a development in which the purchaser receives the right in perpetuity, for life, or for a term of years, to the recurrent, exclusive use or occupancy of a lot, parcel, unit, or segment of real property, annually or on some other periodic basis, for a period of time that has been allotted from the use or occupancy periods into which the project has been divided." (7 Miller & Starr, Cal. Real Estate (2d 1990) § 20:8, p. 18.) A timeshare "interval" is the recurring block of time during which each purchaser has the exclusive right to use and occupy a unit within the development, although not necessarily the same unit each time. "It has been noted that by offering for sale temporal units of occupancy, the timeshare developer can substantially lower the purchase price of resort housing and at the same time increase overall profit, while, conversely, by purchasing only that portion of the resort property he will actually

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[1] "Tidelands" have been defined as "those lands lying between the lines of mean high and low tide (*City of Long Beach* v. *Mansell* (1970) 3 Cal.3d 462, 478, fn. 13), covered and uncovered successively by the ebb and flow thereof (*People* v. *Kerber* (1908) 152 Cal. 731, 733)." (*Marks* v. *Whitney* (1971) 6 Cal.3d 251, 258.)

[2] The Legislature is the ultimate administrator of public trust lands and may prescribe such terms and priorities as it deems appropriate. (*County of Orange* v. *Heim* (1973) 30 Cal.App.3d 694, 707.)

[3] Statutory land use controls affecting shoreline property on a regional and statewide basis include Government Code sections 66620-66647 [San Francisco Bay Conservation and Development Commission] and Public Resources Code sections 30000-30829 [California Coastal Commission].

[4] We note that the resort would be subject to existing environmental protection requirements, such as those contained in the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.), including where appropriate the preparation of an environmental impact report.

use, the buyer lowers his purchase and maintenance expenses, and is no longer required to rent his unit to others to defray ownership expenses." (Am.Jur.2d, New Topic Service, "Real Estate Time-Sharing," § 1.)

First developed in Europe, the timeshare concept was introduced to the United States in the early 1970's when domestic resort developers were having difficulty selling their properties due to an economic recession. (Dubord, *Timesharing Condominiums: Property's Fourth Dimension* (1980) 32 Me.L.Rev. 181; Gunnar, *Regulation of Resort Time-Sharing* (1977) 57 Ore.L.Rev. 32.) Since then, the numbers of timeshare projects and timeshare owners have grown rapidly, from 240 projects and less than 100,000 households owning timeshares in 1978 to more than 1500 projects and over 1.6 million household owners in 1995. (Am. Resort Dev. Assn., Timeshare Purchasers: Who They Are, Why They Buy (1995) p. vi.) Perhaps because of its origins in the marketing of distressed property and the hard-sell tactics of its early promoters, the timeshare industry has had to contend with a somewhat dubious reputation. However, with larger, well-known developers entering the market and providing quality vacation facilities, the timeshare resort industry is now enjoying a renaissance and its product is playing an increasingly important role among the alternatives available to the vacationing public. (Razzi, *Timeshares Grow Up* (Oct. 1995) Kiplinger Personal Finance Magazine, at p. 67.)

Timeshare unit owners typically have the freedom to stay in a unit for a week, split the use into three- and four-day segments, rent out the unit, or exchange use of the unit with another timeshare owner (normally through a national or international timeshare exchange company). Alternatively, units can be rented by timeshare management companies on a nightly basis to members of the general public on a first come basis if the unit is not timely reserved by the owner. Each of these contemplated occupancy lengths constitutes "transient occupancy."[3] Frequently, timeshare units are flexibly designed so they may be temporarily split into two units, with one unit functioning as a hotel room and the other unit functioning as a self-contained apartment complete with kitchen facilities. One study has found that on a typical day, 12.4 percent of all available use intervals go unused by timeshare owners and that another 5.6 percent of the units are rented to the public. (Am. Resort Dev. Assn., Timeshare Purchasers: Who They Are, Why They Buy, *supra*, p. 33.) It thus may be estimated that 18 percent of the units in a timeshare resort are available for rental to the general public at any given time.

[3] Transient occupancy is generally defined by statute as being less than 30 days. (See Health & Saf. Code, § 37912, subd. (k); Rev. & Tax. Code, §§ 7280-7281.)

B. THE PUBLIC TRUST DOCTRINE

The origin and purposes of the public trust doctrine in California were briefly summarized by the Supreme Court in *National Audubon Society* v. *Superior Court* (1983) 33 Cal.3d 419, 433-434:

> "'By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea.' (Institutes of Justinian 2.1.1.) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people."' (*Colberg, Inc.* v. *State of California* ex rel. *Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 416.) The State of California acquired title as trustee to such lands and waterways upon its admission to the union [citation]; from the earliest days [citation] its judicial decisions have recognized and enforced the trust obligation.
>
> ". . . . . .
>
> "The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. As we observed in *Marks* v. *Whitney*, *supra*, 6 Cal.3d 251, '[p]ublic trust easements [were] traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.' (P. 259.) We went on, however, to hold that the traditional triad of uses – navigation, commerce and fishing – did not limit the public interest in the trust res. In language of special importance to the present setting, we stated that '[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another.' [Citation.]" (Fns. omitted.)

The powers and duties of a trustee of public trust lands were addressed by the United States Supreme Court in *Illinois Central Railroad* v. *Illinois* (1892) 146 U.S. 387, still regarded as the seminal case on the scope of the public trust doctrine.[5] In *Illinois*

[5] (See *National Audubon Society* v. *Superior Court*, *supra*, 33 Cal.3d at 437; *City of Berkeley* v. *Superior Court* (1980) 26 Cal.3d 515, 521.)

Central the court held that the State of Illinois could not grant a major portion of the Chicago waterfront to a railroad company, stating in part:

> ". . . It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust, devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. . . . The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State." (*Id.*, at pp. 453-454.)

The court concluded:

> ". . . The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining." (*Id.*, at pp. 455-456.)

A key principle upon which the court relied in reaching its conclusion was the need to protect the ability of future legislatures to make sound decisions regarding trust property: "[E]ach [legislature] should be able, at all times, to do whatever the varying circumstances and present exigencies attending the subject may require . . . ." (*Id.*, at p. 459.) More specifically:

> ". . . The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day." (*Id.*, at p. 460.)

The principles of *Illinois Central* were applied to California tidelands in *People* v. *California Fish Co.* (1913) 166 Cal. 576, where the state sought to quiet its title to certain submerged and tidal lands sold under general statutes authorizing the sale of proprietary lands of the state. The court took note of article XV, section 2 [now article X, section 4] of the Constitution which provided:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof."

The court stated:

> ". . . the defendants, as against the State of California, do not hold the entire title and interest in the tide lands, but that their respective estates in such land, if any they have, are each subject to the easement and servitude of the public for purposes of navigation and for commerce by

means of navigation, and to the public right of free access to the navigable waters over the frontage, whenever it is necessary for such public purpose." (*Id.*, at p. 589.)[7]

The court later elaborated upon its reasoning:

> "[T]he buyer of land under these statutes received the title to the soil, the *jus privatum*, subject to the public right of navigation, and in subordination to the right of the state to take possession and use and improve it for that purpose, as it may deem necessary. In this way the public right will be preserved and the private right of the purchaser will be given as full effect as the public interests will permit. The purchaser will not obtain the absolute ownership, unless the public authorities, by erecting a sea-wall or otherwise improving the premises for navigation, exclude his land or part thereof from the public use and it becomes unnecessary for access or approaches thereto, as in the case of the San Francisco water lots. The public servitude would then be removed from such excluded land." (*Id.*, at p. 596.)

The next major case in the development of the public trust doctrine in California was *Boone* v. *Kingsbury* (1928) 206 Cal. 148. There the question was whether private parties could be granted permits allowing them to prospect for oil and other mineral deposits on tidal and submerged lands held in trust by the state; the parties would lease the lands on a royalty basis. The court first pointed out that gasoline production was of vital importance to commerce and that courts should not hamper the state and national policy favoring the development of oil and gas resources except for the most practical and substantial reasons. The court observed that the permit was in the form of a lease and that "[i]n no sense does the state part with title to its tide-lands." (*Id.*, at p. 182.)[8]

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[7] The court also determined that the same conclusion would follow from a consideration of the statutes under which the tidelands were sold. While authorizing the sale of tidelands, the statutes were concerned with the reclamation of land suitable for agriculture, and their "apparent neglect and failure even to mention the paramount interests of navigation shows that there was no intention to deal with that subject or to affect the public easement for that purpose." (*Id.*, at p. 592.)

[8] None of the lands fell within the terms of article XV, section 3 [now article X, section 3] of the Constitution, which at that time provided:

> "All the tide lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay or inlet, used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations."

Article X, section 3, is identical to its predecessor except that it adds the following proviso:

Additionally, the licensed activity would be "restricted to as small a portion of the surface area as may be reasonably required for mining and removing [the mineral] deposits." (*Ibid.*) The court noted that "[i]n this respect the instant case is widely different from *Illinois Cent. R.R. Co.* v. *People of the State of Illinois*," where "the state undertook to grant into exclusive private ownership 1,000 acres of the submerged beds of Lake Michigan, constituting a large acreage of the city of Chicago's waterfront, freed of any public easement." (*Id.*, at pp. 182-183.) Applying the test from *Illinois Central*, the court found that "there was nothing in the drilling and operation of oil wells conducted in the manner provided by the statute that would substantially impair the paramount public interest in the lands and water remaining. . . ." (*Id.*, at p. 183.) Nor did the grants "impair the power of succeeding legislatures to regulate, protect, improve or develop the public rights of navigation and fishing." (*Ibid.*) Citing *Ward* v. *Mulford* (1867) 32 Cal. 365, the court noted that "[t]he trust in which tide and submerged lands are held does not prevent the state from reclaiming tide and submerged lands from the sea where it can be done without prejudice to the public right of navigation and applying them to other purposes and skills." (*Id.*, at p. 189.) The court observed that "when great public interest may be subserved by the alienation of parcels of tide and submerged land the state's determination of the question in favor of alienation will not be disturbed by the courts." (*Id.*, at p. 192.)

More recently, in *Colberg, Inc.* v. *State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, the court examined the claims of shipyard owners that the erection of a low-level freeway bridge across the upper Stockton channel, a navigable waterway, would curtail access to their shipyards. The court responded:

> "The nature and extent of the trust under which the state holds its navigable waterways has never been defined with precision, but it has been stated generally that acts of the state with regard to its navigable waters are within trust purposes when they are done 'for purposes of commerce, navigation, and fisheries for the benefit of all the people of the state.' [Citations.]" (*Id.*, at p. 417.)

The court cited *Boone* v. *Kingsbury*, among other cases, for the proposition that "[t]he courts have construed the purposes of the trust with liberality to the end of benefiting all the people of the state." (*Id.*, at pp. 417-418.) The court found that the state was acting within the scope of trust purposes: "The state, as trustee for the benefit of the people, has the power to deal with its navigable waters in any manner consistent with the

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". . . provided, however, that any such tidelands, reserved to the State solely for street purposes, which the Legislature finds and declares are not used for navigation purposes and are not necessary for such purposes may be sold to any town, city, county, city and county, municipal corporations, private persons, partnerships or corporations subject to such conditions as the Legislature determines are necessary to be imposed in connection with any such sales in order to protect the public interest."

improvement of commercial intercourse, whether navigational or otherwise." (*Id.*, at p. 419.) The fact that access to navigable waters would be impaired to some degree by the bridge did not mean that the public trust servitude was being ignored. As the court explained:

> "The limitation of the [public trust] servitude to cases involving a strict navigational purpose stems from a time when the sole use of navigable waterways for purposes of commerce was that of surface water transport. [Citation.] That time is no longer with us. The demands of modern commerce, the concentration of population in urban centers fronting on navigable waterways, the achievements of science in devising new methods of commercial intercourse -- all of these factors require that the state, in determining the means by which the general welfare is best to be served through the utilization of navigable waters held in trust for the public, should not be burdened with an outmoded classification favoring one mode of utilization over another." (*Id.*, at pp. 421-422.)

In *Marks* v. *Whitney*, *supra*, 6 Cal.3d 251, a quiet title action between private parties, the plaintiff asserted ownership of certain tidelands and the right to fill and develop them. The defendant, owner of upland property adjoining the tidelands, countered that plaintiff's title was burdened with a public trust easement. In resolving the issue, the court described the public trust easements as follows:

> "Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. [Citations.]" (*Id.*, at p. 259.)

Citing *Colberg*, it stated:

> "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another." (*Ibid.*)

It went on to state:

> "There is a growing public recognition that one of the most important public uses of the tidelands -- a use encompassed within the tidelands trust -- is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study as open space, and as

environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands." (*Id.* at pp. 259-260.)

The plaintiff was deemed to be in the same position as was the defendant in *People* v. *California Fish Co.*, that is,

> ". . . he owns 'the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and controller of these public uses and the public trust thereof, to enter upon and possess the same for the preservation and advancement of the public uses and to make such changes and improvements as may be deemed advisable for these purposes.'" (*Id.*, at p. 261.)

Noting that "[w]e are not here presented with any action by the state . . . modifying, terminating, altering or relinquishing the jus publicum [public right] in these tidelands" (*id.*, at p. 260), the court held that members of the public may lawfully assert or exercise public trust rights on privately owned tidelands. (*Id.*, at p. 261.)

Finally, in *National Audubon Society* v. *Superior Court*, *supra*, 33 Cal.3d 419, the public trust doctrine was invoked by the plaintiffs in seeking to protect the recreational and ecological values of Mono Lake, a navigable waterway. The court reviewed each of the cases discussed above and determined that the state had a duty under the public trust doctrine "to protect the people's common heritage of streams, lakes, marshlands and tidelands . . . ." and that the state could "surrender[] that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." In arriving at its conclusion, the court relied on various principles from its earlier decisions, among them that "the traditional triad of uses -- navigation, commerce and fishing -- did not limit the public interest in the trust res" (*id.*, at p. 434); that "the public trust doctrine does not prevent the state from choosing between trust uses" (*id.*, at p. 440); and that "'trust uses' relate to uses and activities in the vicinity of the lake, stream, or tidal reach at issue." (*Ibid.*)

C. LEASING OF TIDELANDS TRUST PROPERTY

The state, as trustee, may commit the administration of public trust lands to a local public agency. (*City of Long Beach* v. *Lisenby* (1917) 175 Cal. 575, 579; *Graf* v. *San Diego Unified Port Dist.* (1992) 7 Cal.App.4th 1224, 1229.) The local agency grantee may in turn lease the trust lands to private parties for purposes consistent with the trust. (*San Pedro etc. R.R. Co.* v. *Hamilton* (1911) 161 Cal. 610, 619.) The state or its grantee may lease portions of tide and submerged lands for strictly private purposes consistent with

the trust and, by so doing, preclude public use of those leased lands. (61 Ops.Cal.Atty.Gen. 56, 59-61 (1978).)

It is settled that a lease does not constitute a grant or sale within the meaning of section 3 of article X (formerly, article XV) of the Constitution. (*City of Long Beach* v. *Vickers* (1961) 55 Cal.2d 153, 161.) In *San Pedro etc. R.R. Co.* v. *Hamilton, supra*, 161 Cal. at 620-621, the court explained:

> ". . . The purpose of the constitutional provision was not to blight commercial enterprise, but to foster it. It is designed to foster it by preventing the alienation into private ownership of the fee of such lands, whereby all might be acquired and held in private ownership to the destruction of the public use. But it did not mean to abort commerce in embryo or to strangle it in its infancy by putting a ban upon the activities of private commercial enterprises. . . . To hold that the state or that municipalities acting as its mandataries, may not lease, with proper restrictions of time and proper regard to public and *quasi* public use, lands such as these, so that private enterprise and capital may build up the commerce of our seaport cities, is to declare that all such commerce must await the slow and frequently incompetent initiative of the municipalities themselves -- municipalities which frequently are unwilling to incur the expense and risk which would be accepted under reasonable terms by private citizens. . . . In the case of sale the title and control over the land are gone. In the case of leases all proper restrictions may be cast about the use. An entry by the lessor may be had for breach of covenant: possession of the land with its improvements after the term of years returns to the municipality and state, and in the meantime the interests of navigation and commerce are not impaired, but are in the highest degree stimulated and fostered. The lease in this instance is typical. Vast expenditures were made which the lessor would never have made, and to a portion of land -- a mere fragment of all of the like water-front lands -- access is given to a transcontinental railroad for all purposes of inland and marine commerce, while at the expiration of the term of the lease the possession of the lands returns to the state. What policy more beneficial to the state itself than this it would not be easy to point out."

The private commercial activity which may take place on leased tidelands was given further definition in *Martin* v. *Smith* (1960) 184 Cal.App.2d 571. There certain tidelands were leased by the State Lands Commission to a private corporation for "lawful commercial purposes, the construction, maintenance and use of a yacht harbor and structures and facilities connected thereto." Shortly thereafter, the Legislature granted tide and submerged lands, which included the leased property, to the City of Sausalito. The grant was made subject to the existing lease and provided that the city could lease the

granted lands for up to 50 years "for purposes consistent with the trust upon which said lands are held by the State of California and with the requirements of commerce and navigation at said harbor, and collect and retain rents from such leases. . . ." (*Id.*, at p. 574.) With the city's approval the lessee then entered into a sublease for the construction of "a first-class restaurant with a cocktail lounge, and, thereafter, small shops and other improvements," including a motel. (*Id.*, at p. 577.) The court found that the term "commercial purposes" in the original lease contemplated the conduct of business on the leased property in addition to harbor uses. The court stated that "such purposes are consistent with the trust upon which said lands were conveyed to the city, and with the requirements of commerce and navigation of [said] harbor." (*Id.*, at p. 578.) Concluding its analysis, the court invoked Supreme Court precedent:

> ". . . The term 'commercial purposes' in the master lease must be interpreted in view of the holding in *San Pedro etc. R.R. Co.* v. *Hamilton* (1911) 161 Cal. 610: 'The purpose of the constitutional provision [Const., art. XV, § 3, dealing with tidelands] was not to blight commercial enterprise, but to foster it.' (P. 620.)" (*Ibid.*)

D. CONSISTENCY WITH TRUST PURPOSES

With the foregoing case law in mind, we turn to a consideration of whether timeshare resorts are *per se* inconsistent with the public trust use of filled tidelands property. In order to analyze the issue of the compatibility of timeshare resorts with the public trust doctrine and the use of filled tidelands, we consider an exemplar timeshare resort[9] with features frequently found at contemporary timeshare style developments: a vacation-oriented development in which purchasers receive the right to occupy one of the units within the development for one week each year. Absent termination of the public trust, public trust land may not be sold. (*City of Long Beach* v. *Mansell* (1970) 3 Cal.3d 462, 482.) We therefore assume the timeshare resort would occupy public trust land pursuant to a ground lease.[10] Consequently, an owner's[11] right to occupy a unit would

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[9] This opinion addresses a broad question of law and is not intended to supplant the land use review, analysis and permitting functions of governmental authorities and public agency trustees.

[10] Civil Code section 718 allows tidelands to be leased for a maximum of 66 years, while some specific statutory grants permit leases for a lesser period of time, for example, 50 years.

[11] No fee simple interest would be conveyed to an owner because of the reversion upon expiration of the ground lease. The timeshare would be considered an interest in real property in the nature of a lease. (*Cal-Am Corp.* v. *Department of Real Estate* (1980) 104 Cal.App.3d 453, 457.) Its sale would be subject to regulation as a "time-share estate" which is defined as "a right of occupancy in a time-share project coupled with an estate in real property." (Bus. & Prof. Code, § 11003.5.) A "timeshare project" is regulated as a subdivision. (Bus. & Prof. Code, §§ 11000, 11004.5; Cal. Code Regs., tit. 10, § 2810 et seq.)

terminate with the ground lease, at which time the property and all improvements thereon would revert to the public agency. The exemplar resort would physically resemble a typical vacation-hotel resort, and include such amenities as kitchen facilities in each unit, housekeeping, swimming pools, concierge service and a lobby area for check-ins by both owners and renters. We also assume the resort would afford improved access to the shoreline for use by the general public.

The consistency of any timeshare resort with public trust purposes must be determined in light of the totality of the circumstances, paying particular attention to (1) whether the state, through its local trustee, has given up its right of control over the trust property (e.g., *Illinois Central Railroad* v. *Illinois*, *supra*, 146 U.S. 387; *Boone* v. *Kingsbury*, *supra*, 206 Cal. 148; *Marks* v. *Whitney*, *supra*, 6 Cal.3d 251; *San Pedro etc. R.R. Co.* v. *Hamilton*, *supra*, 161 Cal. 610), (2) whether the use substantially impairs the public's interest in the remaining lands and waters (e.g., *Illinois Central Railroad* v. *Illinois*, *supra*, 146 U.S. 387; *People* v. *California Fish Co.*, *supra*, 166 Cal. 576), and (3) whether the use produces a public benefit which furthers and promotes trust purposes (e.g., *National Audubon Society* v. *Superior Court*, *supra*, 33 Cal.3d 419; *Boone* v. *Kingsbury*, *supra*, 206 Cal. 148; *Colberg, Inc.* v. *State of California ex rel. Dept. Pub. Wks.*, *supra*, 67 Cal.2d 408).

Applying the foregoing criteria to the factual setting of our exemplar resort, we first note that the land in question would be leased, not sold in fee. Upon expiration of the ground lease, all interest in the improvements would revert back to the local agency which holds the property in trust. No abandonment of the public right would occur and succeeding legislative bodies would retain the ability to protect trust values. Second, public access to the shoreline could be enhanced through the development of walkways, access paths, and marina-like facilities, thus increasing and improving opportunities for boating, fishing, swimming, hiking and other recreational uses. Impairment of the public interest in the trust lands is a fact specific inquiry which requires an understanding of how much tideland property would be committed to the timeshare resort relative to adjacent public trust land. Such an analysis is beyond the scope of this opinion, but is a factor that must be assessed by the public agency trustee. (See *Illinois Central Railroad* v. *Illinois*, *supra*, 146 U.S. at 453-454; *National Audubon Society* v. *Superior Court*, *supra*, 33 Cal. 3d at 438; *Boone* v. *Kingsbury*, *supra*, 206 Cal. at 189.)

We now address the third criterion, that is, whether our exemplar resort would produce a public benefit which furthers and promotes trust purposes. As a commercial activity, timeshare resorts promote the public's use of the shoreline by providing transient lodging accommodations, facilities, and services on a portion of the agency's trust property.[12] Again, depending on project specifics, visitation of existing public trust property, by both owners and the general public, may be improved or

[12] It is observed that tourism is a mainstay of the California economy.

enhanced by access paths to the shoreline, and related public facilities (e.g., benches, water fountains, restrooms). As such, the use of the property as a timeshare resort may be considered incidental and ancillary to the promotion of trust purposes. (See *City and County of S.F.* v. *Linares* (1940) 16 Cal.2d 441, 445 ["'the creation of hotels, restaurants, museums, art-galleries, zoological and botanical gardens, conservatories, and the like in public parks is common, and . . . their establishment has been generally recognized as ancillary to the complete enjoyment by the public of the property set apart for their benefit'"].) This is not the case of, for example, an automobile repair shop which would have no inherent connection with shoreline uses and would manifestly fail the public benefit element of the totality of circumstances test. (See *National Audubon Society* v. *Superior Court*, *supra*, 33 Cal.3d at 440.)

We recognize that the preservation of open space is also a trust use. (*Marks* v. *Whitney*, *supra*, 6 Cal.3d at 259-260.) To the extent that a timeshare resort or any other type of lodging facility is built upon public trust lands, a loss of open space will occur. However, as noted in *National Audubon Society* v. *Superior Court*, *supra*, 33 Cal.3d at 439, footnote 21: "*Colberg* demonstrates the power of the state [and any local government grantee], as administrator of the public trust, to prefer one trust use over another." A public agency trustee might determine that a timeshare resort would promote greater recreational use of the property by more persons, including members of the general public, than would a nature preserve or other form of open space. Whether a particular portion of filled tidelands should be used for open space, for a seaside resort, or for some other commercial or recreational use would be a matter to be determined by the public agency in accordance with the grant from the state.[13] Public agency trustees may administer trust property in a "sufficiently flexible [manner] to encompass changing public needs" (*Marks* v. *Whitney*, *supra*, 6 Cal.3d at 259), subject to the administration and control of the State Lands Commission (Pub. Resources Code, §§ 6301, 6306).

Finally, it is to be noted that in 1982, we provided informal advice regarding whether timeshare developments could be found consistent with the public trust doctrine. We determined that such developments constituted long term residential uses which did not benefit the public at large, and therefore could not be found consistent with the public trust doctrine. We acknowledged that hotels were an appropriate use of public trust property but considered timeshare units to be more like private residences than hotel rooms because of their limited availability to the general public. Among the factors we cited in support of our conclusion were: (1) the much greater number of persons who may use an individual hotel room on an annual basis compared to the number who may use

[13] A wide range of uses has been permitted under grants from the state. (See Cal. Lands Com., Rep. On The Use, Development, And Administration Of Granted Tidelands And Submerged Lands (1976) pp. 12-18; see also, *Haggerty* v. *City of Oakland* (1958) 161 Cal.App.2d 407 [construction of a convention and banquet hall for use by trade, shipping, and commercial organizations on filled tide and submerged lands that had been granted in trust to the city found consistent with the terms of the grant].)

a timeshare unit; (2) statistics showing that in 1978, only 21 percent of timeshare owners traded their time interval through a major exchange program and that the trend seemed to be toward less participation in exchange programs; and (3) a relatively low vacancy factor for timeshare resorts which diminished the availability of units for public rental. However, the situation with respect to today's timeshare development, as described above, is much different.

An analysis of "residential use" requires consideration of two relevant concepts: duration and exclusivity of ownership. Timeshare resorts blur the lines of these concepts in several respects. First, timeshare owners today do not own a particular unit within the development and are now generally limited to a one-week stay rather than the full 30 days on which our earlier analysis was predicated. Moreover, the one-week use may be split into three- and four-day segments, and the unit itself may be divided so that two separate parties may use it at the same time. The shorter intervals and the flexible arrangements for use of the units mean that the usual timeshare resort is now accessible to a great many more individuals than in 1982 and move the concept of a timeshare development much closer to that of a hotel.

Second, timeshare owners' exchange privileges are in much greater use today, and the trend has been in a strongly upward direction since the late 1980's. In a 1995 survey conducted by the same research organization whose data was relied upon in our 1982 analysis, it was found that 81 percent of timeshare owners have traded their time interval through a major exchange program. (Am. Resort Dev. Assn., Timeshare Purchasers: Who They Are, Why They Buy, *supra*, p. 40.) Thus the average duration of stay in a timeshare unit coupled with an active exchange program renders the use of timeshare resorts by interval owners more like hotels and vacation resorts than a "residential use."

We recognize that a resort's exchange program is limited to timeshare interval owners, not the general public. With respect to the rental of the units to the public, while it remains true that vacancy rates are relatively low at timeshare resorts compared to hotels, these rates are computed *after* unit rentals to the public are taken into account. As indicated above, approximately 18 percent of the units in a modern timeshare resort are available for rental to the general public at any given time. This represents a substantial portion of the timeshare resort and, again when coupled with the high rate of exchange use and shorter intervals, means that timeshare resorts are functionally more akin to hotels and other places of public accommodation than they are to private residential enclaves. Moreover, commentators have stated that while becoming more "hotel-like," timeshare resorts provide benefits to the vacationing public that hotels cannot generally match. With their exchange privileges to provide variety, their flexible living arrangements, and their enhanced on-site recreational opportunities, modern timeshare resorts are much more conducive to the "mini-vacations" which have become increasingly popular with and important to dual income earners and families with children. Accordingly, timeshare

resorts have come to play a major role in serving the vacation needs of the American public. Under these circumstances, we can no longer conclude that timeshare resorts are generally more akin to long term residential uses than to hotels and other places of public accommodation and hence fail to afford sufficient public benefit to permit placement on public trust lands.[14]

Given the foregoing considerations, we conclude that timeshare resort projects are not *per se* incompatible with the public trust doctrine and that a local government trustee may, consistent with the public trust doctrine, lease a portion of filled tidelands to a private party for the construction of a timeshare resort if the project will provide for significant use by members of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation.

* * * * *

[14] While the evolution of the timeshare industry provides a strong basis for revising our 1982 conclusion, we stress that each project must be considered separately. Factors relevant to the public benefit equation could include, but are not limited to, the purchase price of the timeshare interval, the ability to exchange the intervals, the estimated vacancy rate, and the project's availability for use by the general public.

EXHIBIT E

SAN DIEGO COASTKEEPER®

September 29, 2006

Mr. Paul Thayer
Executive Officer
State Lands Commission
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825-8202
VIA FACSIMILE: (916) 574-1810
E-Mail: thayerp@slc.ca.gov

Re: Request for 'Condotel' Staff Report & Agenda Item

Dear Mr. Thayer:

I am writing on behalf of San Diego Coastkeeper, a non-profit environmental organization dedicated to protecting the region's bays, beaches, watersheds and ocean. Coastkeeper is looking forward to the Commission's upcoming meeting in San Diego on October 12.

We would like to request that an informational item on condotels be added to your agenda. Condotels, or condo-hotels are timeshare arrangements that allow private ownership on a portion of public hotel space. The issue of condotels is a timely one for San Diego, and one in which the Commission has already been involved. Representatives of the Commission made comment on a proposal before the Unified Port District in June of this year. The Woodfin project is widely regarded as a test case for private ownership on state tidelands.

Condotels are also receiving attention at other state agencies. In August, the California Coastal Commission held a workshop on condotels, including a panel of experts. Discussion of the effect of this type of development on tidelands access and consistency with public trust land designation is imperative, as more projects appear on the horizon. As a tourist destination, San Diego is an ideal location to hold a meeting on this subject.

Coastkeeper requests that time be allocated on the October agenda for discussion of this important issue. It would be helpful if a staff report on the subject was also included.

Thank you for the opportunity to bring this issue to your attention. I look forward to speaking before the Commission in October.

Sincerely,

Gabriel Solmer

Gabriel Solmer
Staff Attorney

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EXHIBIT F

Woodfin Suites
HOTELS

March 14, 2006

Curtis Fossum, Esq.
Senior Staff Counsel
California State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, California 95825-8202

Re: Environmental Impact Report for the Woodfin Suite Hotel and San Diego Port District Master Plan Amendment - Timeshare Option

Dear Mr. Fossum:

On behalf of Woodfin Suite Hotels, LLC and its Partner, Marina Cortez, Inc., a current San Diego Unified Port District lessee and owner of Marina Cortez, located on Harbor Island in San Diego Bay, we are providing to you, as the legal representative of the California State Lands Commission ("***CSLC***"), additional information on our project. As you have been informed in previous correspondence, we are working with the San Diego Unified Port District ("***the Port***") to complete the EIR process for the redevelopment of Marina Cortez into a new mixed-use project ("***the Project***"). The Timeshare Option, as presented, is the Project which we desire to develop, since we believe that it benefits all parties involved. The timeshare units would be conveyed as a sublease, without a fee simple interest and no one party would dominate the usage of any timeshare; therefore neither the state nor the Port would give up its right of control over the trust property with the Timeshare Option.

The Project, from all perspectives, is predominantly a hotel, and as such will be operated as would any full service hotel. It will be compatible with the surrounding Harbor Island and Airport area and will provide a net gain of 140 new, cost efficient visitor serving units. The facilities would include a restaurant and bar; meeting and banquet rooms and retail space for both public use and hotel and timeshare guests. It will improve water dependent/related and recreational activities with a marina services facility and a public promenade, all of which will serve California citizens statewide. The hotel will operate with a full Woodfin management team and will make any unused timeshare inventory available for usage by the public in the same manner as any of the other standard hotel inventory in order to maximize rental to the general public when units are not occupied by timeshare owners or members. The inclusion of a timeshare component will provide variation in visitor-serving accommodations that will accommodate a wider audience of visitors, thereby strengthening the visitor-serving uses in this coastal area. Therefore, the Timeshare Option will not in any way impair the public's interest in the remaining lands and waters under CSLC's jurisdiction.

Only 40 of the 140 suites would be marketed and operated as timeshare. Consistent with timeshare studies and the 1996 Attorney General's Opinion, we anticipate that approximately 18% of the 40 timeshare units (approximately 7 units) will be unused by timeshare owners at any given time and therefore could be available for rental to the general public. The timeshares would be conveyed to users pursuant to a sublease. No fee simple interest would be conveyed to a timeshare participant. No one party would dominate usage of any timeshare, especially when utilizing a floating

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week / floating unit basis for sales. All timeshares would be marketed to the general public statewide. Prior to the filing of the final Condominium Map, a deed restriction would be recorded clearly stating the use restrictions, including: (1) all units, including the timeshare units, will be managed by the Hotel operator as an integrated visitor serving facility, open to the general public; (2) Woodfin will manage the timeshare units as part of the Hotel, and management will include mandatory front desk check-in and check-out, maintenance, cleaning services and preparing the units for use by guests/timeshare users; (3) the keys will be electronic and created upon each new occupancy; and (4) the timeshare use period by any party, no matter how many timeshare periods have been purchased, shall be for the minimum interval periods of up to one week and not more than 29 consecutive days or 90 total days per calendar year.

Although limited to less than 30% of the total Project, the Timeshare Component is the factor which allows the Project to remain economically viable in a world where construction costs, both labor and materials, are escalating far in excess of the increases in hotel room rates. Given the cost constraints of hotel development in today's economic environment, many hotel developers and operators are incorporating a timeshare component or the condo hotel concept into their overall development and financing plan.

Timeshare is a visitor serving use and is not residential by nature. Timeshare owners will not own a particular unit and will be limited to the time of stay, which may vary from one week to several days and the unit may be shared by separate parties. As a form of prepaid vacation time for single people, dual income earners, and families with children, the timeshare unit will participate in an active exchange program so that the unit may be used by many more people than just the original timeshare purchaser. In addition to the exchange component, the Timeshare Option will involve marketing to the general public statewide and will provide a cost efficient way for Californians to enjoy their vacations along the Coast. Therefore, the Timeshare Option, as a commercial use, will produce a public benefit which furthers and promotes trust purposes. We strongly believe that ten years after the 1996 Attorney General Opinion we can now reach agreement that timeshare, as a commercial use, will provide for significant use by varying income levels of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation.

Thank you for your timely consideration of this matter.

Sincerely,

Mark Rousseau
Senior Vice President

MSR/bac

Woodfin Suites
HOTELS

March 22, 2006

Mr. Paul Thayer
Executive Officer
California State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, California 95825-8202

Re: Meeting March 15th, 2006 – Timeshare Component of Woodfin - Marina Cortez Project

Dear Mr. Thayer:

Sam Hardage and I would like to thank you and your staff and the Attorney General's office for so generously sharing your time with us on March 15th. The meeting was very productive, and we hope it will assist the State Lands Commission (SLC) in providing guidance to the Port of San Diego with respect to the modest timeshare component we propose in connection with our hotel project. We appreciate and agree with the requirement discussed that the timeshare component of the Project, viewed in the totality of the project proposed, must produce public benefits that further and promote public trust purposes. Our project has been developed specifically with that in mind, and will provide enhanced public access to Harbor Island and, with the timeshare component, variation in visitor-serving accommodations that will serve a wider audience of visitors, thereby strengthening overall the visitor-serving uses in this coastal area.

The SLC's adopted Public Trust Policy, explains that, "The Commission applies the doctrine's tenets to proposed projects with consideration given to the context of the project and the needs of a healthy California society, to meet the needs of the public, business and the environment." Our project, as presented to you, squarely meets that criteria. In addition to redeveloping the Marina Cortez property and providing additional significant public access and public service benefits, the Project, from all perspectives, will be predominantly a hotel, and as such will be operated as would any full service hotel. Neither the State nor the Port will give up the right of control over the trust property, including the timeshare component.

We acknowledge you and your staff's concern regarding the timeshare use period we indicated of not more than 29 consecutive days or 90 total days per calendar year. The time periods which we presented were simply based upon precedent from previous California Coastal Commission ("*CCC*") timeshare approvals, but we reiterate that we are certainly open to the placement of reasonable constraints on the proposed usage periods controlled by one owner. The final restrictions on ownership usage will be decided based upon

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guidance from both your agency and CCC, in conjunction with the San Diego Unified Port District.

We strongly believe that ten years after the 1996 Attorney General Opinion we can now reach agreement that timeshare, as a commercial use, will provide for significant use by varying income levels of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation. Our project, including the timeshare component, produces those significant public benefits and thus furthers and promotes trust purposes. We welcome you and your staff's further input in that regard, and again thank you for taking the time to meet with us.

Thank you for your timely consideration of this matter.

Sincerely,

Mark Rousseau
President, Real Estate

MR/bac

cc: Samuel A. Hardage, Woodfin Suite Hotels
Curtis Fossum, Esq., California State Lands Commission
Michael Valentine, California State Lands Commission
Jennifer Lucchessi, California State Lands Commission
Nancy Saggese, Esq., Office of the Attorney General – State of California
Steve Kaufmann, Esq.,
Donna Andrews, Creative Environmental Solutions

EXHIBIT G

Appendix J
Applicant's Timeshare Analysis

ENVIRONMENTAL IMPACT REPORT FOR THE WOODFIN SUITE HOTEL AND PORT MASTER PLAN (PMP) AMENDMENT PROJECT

Executive Summary

This report presents an analysis which addresses the specific comments/concerns provided in the response letters received from the California State Lands Commission (SLC) and California Coastal Commission (CCC) regarding the proposed Timeshare Option in the Woodfin Suite Hotel ("Proposed Project"). The comments/concerns had one central theme, which was whether the Timeshare Option was appropriate as a public trust use and if it complied with the Public Trust Doctrine, as interpreted by the 1996 Attorney General (AG) Opinion.

As outlined in the analysis herein, the Timeshare Option in the Proposed Project is an appropriate trust land use because the components of the timeshare meet the criteria as discussed in the AG's opinion. First, the timeshare would be conveyed as a sublease without a fee simple interest, and no one party will dominate the usage of all timeshare units. Therefore, neither the State nor the San Diego Port District will give up its right of control over the trust property with the Timeshare Option. Second, the hotel will have 140 rooms, of which the timeshare will only be 40, and the hotel project will only be on about .55 acres of the 3.79 acres of filled tidelands, with the remaining property utilized for the marina and related services. The hotel/timeshare will be compatible with the surrounding areas uses. As such it will provide visitor serving uses with a restaurant and bar; and will improve water dependent/related and recreational activities with a marina services facility and a public promenade; all of which will be available to serve California citizens statewide. Therefore, the Timeshare Option will not substantially impair the public's interest in the remaining lands and waters.

Lastly, the AG opinion concluded that timeshare was not residential, but commercial, similar to a hotel. The AG went on to note that, "residential use as requiring duration and exclusivity of ownership." The AG opinion stated that because timeshare owners do not own a particular unit and are limited to the length of stay, which may vary from one week to several days, and the unit may be shared by separate parties; thus the timeshare is available to many people and therefore does not meet the concepts of residential. The AG's opinion also used the exchange privileges as a factor in showing that the exclusivity tests for residential were not met. The AG's opinion states that, "the average duration of stay in a timeshare unit coupled with the active exchange program renders the use of timeshare resorts by interval owners more like hotels and vacation resorts than residential use..."

The Timeshare Option in the Proposed Project is even more similar to a hotel, thus a commercial use, than the facts of the exemplar resort used in the AG's analysis which discussed a timeshare resort built at grade. The Timeshare Option in the Proposed Project will not be a timeshare resort built at grade, rather there will be timeshare suites similar to the hotel suites included in the hotel tower. The AG's opinion also discusses the importance of the administration of the trust land to accommodate the changing needs of the general public. The AG states that, "commentators have stated that while becoming more "hotel-like," timeshare resorts provide

benefits to the vacationing public that hotels cannot generally match. With their exchange privileges to provide variety, their flexible living arrangements, and their enhanced on-site recreational opportunities, [modern] timeshare resorts are much more conducive to the "mini-vacations" which have become increasingly popular with and important to dual income earners and families and children. Accordingly, timeshare resorts have come to play a major role in serving the vacation needs of the American public." The AG's opinion concludes that, "Under these circumstances, we can no longer conclude that timeshare resorts are generally more akin to long term residential uses than hotels and other places of public accommodation and hence fail to afford sufficient public benefit to permit placement on public trust land."

The Timeshare Option will involve marketing to the general public statewide as part of an exchange program and will provide a cost efficient way for Californians to enjoy their vacations along the Coast. Therefore, the Timeshare Option, as a commercial use, will produce a public benefit which furthers and promotes trust purposes.

Timeshare Background

As of 2004, there were about 7.5 million households around the world who owned timeshare. They own about 10.5 million intervals, for an average of 1.4 intervals per consumer. There are about 6,000 timeshare projects on a world-wide basis, containing over 425,000 units, or about 70 units per project. Some 31 percent of the projects are in North America. It is estimated that in 2004, over $12 billion of timeshare was sold on a global basis. About $7.5 billion was sold in the U.S. In 2004 the market grew by almost 20 percent in the U.S., for a record year in total sales volume.

In the U.S., size-of-industry figures include approximately 2,000 projects with 150,000 units, 3.5 million owners, and 5.2 million weeks owned. In California, almost 400,000 households now own timeshare, or almost twice as many as in any other state in the country. There are over 125 timeshare projects in the state. It is estimated that almost $300 million of timeshares was sold just in southern California in 2004. In San Diego, about one of every 10 households own timeshare. This represents one of the highest such ratios for any metropolitan area in the world. A timeshare unit owner can have a pre-paid vacation for a week, split the use into three and four-day segments, rent out the unit to the general public or exchange use of the unit. Approximately 40 percent of the timeshare units owned are exchanged on an annual basis, allowing the owner to utilize (vacation) at a location other than the property where the timeshare was originally purchased.

Consumers purchase an interval/week in a fixed-or-floating time use plan and in a fixed-or-floating unit. In a floating-time use plan, the owner can vary the use of the week each year. If purchased in a floating-unit plan, the owner is able to use all comparable size units in the development. In a floating time / floating unit development associated with a hotel, such as the Proposed Project, the timeshare is positioned in the marketplace as a vacation product rather than a real estate product. The primary purchase motivations are: (1) saving money on future vacations; (2) the external exchange opportunity; (3) having a vacation unit with cooking/refrigeration facilities, thus saving costs on meals; (4) being able to occupy a larger

space than a hotel room, thus being good for families; and (5) being "forced" to take a vacation every year because the accommodations are already paid for.

Timeshare Option

The Proposed Project consists of the construction of an approximately 165,000 square foot structure, which includes an approximately 152,500 square foot eight-story hotel, including an approximately 12,500 square foot clubhouse with a spa and restaurant. The first story of the hotel would consist of approximately 19,000 square feet of subterranean parking.

The maximum 140-suite hotel would be approximately 95 feet high and consist of a mix of one and two bedroom suites. The applicant proposes a commercial timeshare for a portion of the hotel units as part of the proposed hotel project. Only 40 of the 140 suites would be marketed and operated as timeshare. The timeshares would be conveyed to the users pursuant to a sublease. No fee simple interest would be conveyed to a timeshare participant. Since the intention is to sell this project as floating time / floating unit, no one party would dominate usage of any single timeshare unit. All timeshares would be marketed to the general public statewide.

The timeshare option would require a PMP Amendment equal to that required for the Proposed Project. The Timeshare Option consists of all of the components of the Proposed Project, including the seawall with promenade. Therefore, the timeshare option, similar to the Proposed Project, would have no significant impacts to land use, water use, and coastal access.

The Timeshare Option, if included, would present the first timeshare venture within the Port District's tidelands. As such, the use of timeshares within trust land such as the Port's Tidelands has not been established. Following is the analysis required to demonstrate that the timeshare use would remain a commercial use and would conform to the applicable use of public trust land. Therefore, allowing the inclusion of timeshare option would not conflict with existing land use policies or result in significant impacts.

Timeshare Option conformance with the California State Lands Commission

Whether the Timeshare Option conflicts/does not conflict with the goals, objectives, policies or implementation of the Public Trust Doctrine?

California State Lands Commission (CLS) Public Trust Doctrine Policy Statement

The California State Lands Commission (SLC) directed staff on April 24, 2001 to prepare a guidance document it could adopt to help Public Trust lands grantees, lease applicants and the general public in their understanding of how the Public Trust Doctrine applies to granted and state-owned Public Trust lands. On September 17, 2001, the SLC adopted by a vote 3-0 a Policy Statement relating to the administration of Public Trust lands and the Attorney General 1996 Opinion on Public Trust Law and what the courts have determined as proper trust uses.

The Policy Statement states that, "The tide and submerged lands and the beds of lakes, streams and other navigable waterways are held in trust by the State for the benefit of the people of California and are to be used to promote the public's interest in water dependent or oriented activities including, but not limited to commerce, navigation, fisheries, environmental preservation and recreation. The Commission is the steward of the State's Public Trust Lands. It has administrative jurisdiction over the Public Trust lands that have been retained by the State, and it has oversight authority over trust lands granted by the Legislature to local governments. The Commission acts pursuant to legislative direction and the Public Trust Doctrine to protect the public's interest in its trust lands. Among the Commission's duties in protecting the public interest in these lands is ensuring that the uses to which these lands are put are compatible with the Public Trust Doctrine. The Public Trust is a common law doctrine that is not static but is continuously evolving."

Visitor-Serving Use as Appropriate Public Trust Land Uses

The Public Trust Policy Statement identified the following three (3) guiding principles as required by the Public Trust Doctrine:

"(1) Public trust lands cannot be bought and sold like other state-owned lands; (2) Uses of public trust lands are generally limited to those that are water dependent or related, and include commerce, fisheries, and navigation, environmental preservation and recreation. Public trust uses include, among others, ports, marinas, docks, and wharves, buoys, hunting, commercial and sport fishing, bathing, swimming, and boating. Ancillary or incidental uses which directly promote trust uses are directly supportive and necessary for trust uses, or that accommodate the public's enjoyment of trust land are also permitted. Visitor serving facilities such as hotels, restaurants, shops, parking lots and restrooms were given as examples; and (3) Public trust lands must be used to serve all California citizens statewide.

The Public Trust Doctrine states more specifically that, "visitor-serving facilities, such as restaurants, hotels, shops, and parking areas [are] approved as appropriate uses because as places of public accommodations, they allow broad public access to the tidelands and, therefore, enhance the public's enjoyment of these lands historically set apart for [the public's] benefit."

The Proposed Project Timeshare Option does not conflict with the goals, objectives, policies or implementation of the Public Trust Doctrine and conforms to the following three (3) guiding principles as required by the Public Trust Doctrine:

1. Public trust land cannot be bought and sold like other state-owned lands

   The Proposed Project consists of 140 suites hotel, of which 40 suites will be timeshare. The hotel will be part of a ground lease with the San Diego Port District. The timeshares would be conveyed to users pursuant to a sublease. No fee simple interest would be conveyed to a timeshare participant. No one party would dominate usage of any timeshare unit. The public trust land for the Proposed Project will not be bought and sold like other state-owned lands and therefore complies with the Public Trust Doctrine.

2. Permitted uses of public trust lands are water dependent or related and are ancillary or incidental uses which directly promote trust uses, are directly supportive and necessary for trust uses, or that accommodate the public's enjoyment of trust land.

   The Proposed Project consists of a 140 suites hotel/timeshare, clubhouse, spa, restaurant and bar; marina services building which increases and improves opportunities for boating fishing, swimming, and other recreational uses; a public promenade on top of a seawall that would extend along the entire waterfront of the project site which will connect to the restaurant for general public use; and a parking structure. All of these Proposed Project uses are either water dependent or related and directly promote and support public trust uses or that accommodates the public's enjoyment of trust land and are therefore in conformance with the Public Trust Doctrine.

3. Public trust lands must be used to serve all California citizens statewide.

   The Proposed Project will be marketed to serve all California citizens and therefore complies with the Public Trust Doctrine.

Timeshare Option Conformance with the 1996 Attorney General (AG's) Opinion

In 1996, the Office of the Attorney General was officially requested by the Honorable Curtis R. Tucker, Jr., member of the California State Assembly to resolve whether a timeshare resort is consistent with the Public Trust Doctrine. After an exhaustive analysis of case law on this matter, the AG's interpretation of the case law states that, "the consistency of any timeshare resort purposes must be determined in light of the totality of the circumstances, paying particular attention to (1) whether the state, through its local trustee, has given up its right of control over the trust property; (2) whether the use substantially impairs the public interest in the remaining lands and waters; and (3) whether the use produces a public benefit which furthers and promotes trust purposes."

The Attorney General's Office concluded in its 1996 opinion that "timeshare resort projects are not per se incompatible with the public trust doctrine and that a local government trustee may, consistent with the public trust doctrine, lease a portion of filled tideland to a private party for the construction of a timeshare resort if the project will provide for significant use by members of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation."

Following is the analysis of the 1996 Attorney General opinion criteria applied to the factual situation of the Proposed Project.

1. Whether the State, through the Port District, would give up its right of control over the trust property?

The timeshares would be conveyed to users pursuant to a sublease. No fee simple interest would be conveyed to a timeshare participant. No one party would dominate usage of any timeshare. All timeshares would be marketed to the general public statewide.

There would be no abandonment of the public right and the Port District would retain the ability to protect public values, thus complying with the Public Trust Doctrine.

2. *Whether the proposed use substantially impairs the public's interest in the remaining lands and waters?*

The Proposed Project is intended to redevelop and beautify the entire Marina Cortez leasehold and benefit the surrounding Harbor Island area. The project would increase public access to the Bay front and provide a public promenade for use by the general public [statewide]. In addition, the project would protect the shoreline from further erosion. The proposed project would be designated with a contemporary "San Diego" style architecture using articulation, color variations, balconies, and upgraded landscaping to blend the structure into the existing environment and visually abate mass. The overall objective is to give the property the appearance of an upscale waterfront resort.

The Proposed Project is located within the West Harbor Island Sub area (22) of Planning District 2, which covers a 37.7 acre portion of Harbor Island, south of the San Diego International Airport at the northern extremity of San Diego Bay. Harbor Island is actually not an island but a thin strip of filled tideland formed in an east-west direction in the shape of two adjacent peninsulas. The project site is located on West Harbor Island, the western of the two peninsulas, which houses a series of marinas similar in layout to that located on the project site. Harbor Island Drive runs the length of Harbor Island and provides access to the project site from the south. In addition to recreational marinas and supporting facilities, Harbor Island contains several hotels, public parkland and a public recreational promenade. The existing site consists of 19.30 acres of submerged tidelands and 3.79 acres of filled tidelands, which are currently fully developed with an operating marina.

Percentage of Timeshare component relative to adjacent public trust land

The Woodfin Suite Hotel and Port Master Plan (PMP) Amendment Project involves the demolition of all existing structures on the 3.79-acre tideland property, and the redevelopment of the Hotel and Marina buildings, related services, and parking. Of the total filled tidelands site, the hotel / timeshare tower and facilities will encompass approximately 0.55 acres. The timeshare component of the hotel development is 29 percent of the hotel suites (only 40 of the 140 suite hotel).

The timeshare suites will be incorporated into the hotel tower above ground level and therefore would not impair the public's interest in the public trust land.

Enhancements of public access to shoreline

An approximately 1,120 linear seawall would be built along the entire length of the marina on top of which a public promenade will be provided. The seawall and promenade would extend along the entire northern limit of tideland within the property. The south side of the promenade would be landscaped. The seawall adjacent to the promenade will increase physical and visual public access to the shoreline. The promenade would be a continuous public promenade along the shoreline. No alterations to submerged tidelands are proposed as part of the Proposed Project, and access to the project site from submerged tidelands would remain the same as existing conditions. The restaurant would be accessible directly from the promenade and open to the public. Development along the promenade would be landscaped to visually enhance the adjacent development, creating an inviting promenade for public use and enjoyment.

Three access points would be provided to the Proposed Project from Harbor Island Drive, including one for the eastern parking lot, one for the western parking lot, and one for the hotel. The access to the hotel would include a drop off area capable of serving shuttles, taxis and personal vehicles.

To accommodate guests without vehicles the hotel will provide a free shuttle service between Harbor Island and Lindbergh Airport as well as places of interest within five miles of the proposed hotel. In addition, the hotel would provide a taxi or pick-up service for guests who do not wish to use the available shuttle service.

The seawall and promenade will enhance the general public's access to the shoreline and restaurant and bar, thus improving opportunities for recreational uses consistent with the Public Trust Doctrine.

Marina-like facilities

A new approximately 11,200 square foot two-story marina services building would be constructed to the east of the hotel, clubhouse, and hotel pool, west of the eastern parking lot, and adjacent to the northern limit of the tideland. The height of the marina services building would not exceed 25 feet. The marina services building would contain operations rooms for the marina, women's and men's changing facilities and restrooms, yacht sales office and club room, an exercise room, and a deli on the first floor. In addition, the building would feature an outdoor patio and boat display areas adjacent to the eastern parking lot. The second floor would consist of offices to support marina sales and services. No portion of the existing marina within the submerged tidelands would be altered as part of the proposed project.

There will be marina-like facilities, thus increasing and improving opportunities for boating, fishing, swimming, and other recreational uses consistent with trust land uses.

Parking

Public access will be further enhanced with the available parking to the hotel guests and the general public

A total of 401 on-site parking spaces would be provided. Three distinct parking areas are proposed as follows: (1) The eastern parking lot adjacent to the marina services building would provide 205 parking spaces; (2) The western parking lot, which extends along the frontage of the hotel and to the west, would provide 137 spaces; and (3) The subterranean parking area beneath the hotel would provide 59 parking spaces. The surface and subsurface parking lots would be managed and valet parking would be available to hotel guests. Street parking on the south side of the Harbor with a three-hour limit is also available in the project area.

The Proposed Project will enhance public access to the shoreline, increase and improve opportunities for water dependent or related activities and other recreational uses without substantially impairing the public's interest in the trust land and therefore comply with the Public Trust Doctrine.

3. Whether the proposed use produces a public benefit which furthers and promotes trust purposes?

Timeshare as commercial use and not residential

The AG's opinion concluded that timeshare was not residential, rather commercial similar to a hotel and not residential. The AG went on to note that, "residential use as requiring duration and exclusivity of ownership." The AG's opinion stated that because timeshare owners do not own a particular unit and are limited to the time of stay, which may vary from one week to several days and the unit may be shared by separate parties; the timeshare is available to many people and therefore does not meet the concepts of residential. The AG's opinion also used the exchange privileges as a factor in showing that the exclusivity tests for residential was not met. The AG opinion states that, "the average duration of stay in a timeshare unit coupled with the active exchange program renders the use of timeshare resorts by interval owners more like hotels and vacation resorts than residential use..."

The Timeshare Option in the Proposed Project is even more similar to a hotel, thus a commercial use, than the facts of the exemplar resort used in the AG's analysis which discussed a timeshare resort built at grade. The Timeshare Option in the Proposed Project will not be a timeshare resort built at grade, rather there will be timeshare suites similar to the hotel suites included in the hotel tower.

The AG's opinion also discusses the importance of the administration of the trust land to accommodate the changing needs of the general public. The AG states that, "commentators have stated that while becoming more "hotel-like," timeshares resorts provide benefits to the vacationing public that hotels cannot generally match. With their exchange privileges to provide variety, their flexible living arrangements, and their enhanced on-site recreational opportunities, [modern] timeshare resorts are much more conducive to the "mini-vacations" which have become increasingly popular with and important to dual income earners and families and children. Accordingly, timeshare resorts have come to play a major role in serving the vacation

needs of the American public." The AG opinion concludes that, "Under there circumstances, we can no longer conclude that timeshare resorts are generally more akin to long term residential uses than hotels and other places of public accommodation and hence fail to afford sufficient public benefit to permit placement on public trust land."

The Timeshare Option will involve marketing to the general public statewide as part of an exchange program and will provide a cost efficient way for Californians to enjoy their vacations along the Coast.

Therefore, the Timeshare Option, as a commercial use, will produce a public benefit which furthers and promotes trust purposes.

San Diego Port District's Role in the Determination of Timeshare Option as Greater Use

The AG's opinion notes that the public agency trustee can make a determination that the Timeshare Option in the Proposed Project will promote greater recreational use than another type of public trust land use. The AG's opinion states that, "a public agency trustee might determine that a timeshare resort would promote greater recreational use of the property by more persons, including members of the general public, [than would another type of public trust use]…Whether a particular portion of filled tidelands should be used for open space, for seaside resort, or for some other commercial or recreational use would be a matter to be determined by the public agency in accordance with the grant from the state…Public agency trustees may administer trust property in a sufficiently flexible [manner] to encompass changing public needs, subject to the administration and control of the State Lands Commission."

The Port has articulated the following objectives of the proposed Woodfin Suite Hotel and PMP Amendment Project which would produce a public benefit which furthers and promotes the trust purposes as follows:

1. Improve the environmental quality of the existing shoreline consistent with adjacent developments;

2. Promote public access to the coast providing enhanced aesthetic appeal and waterfront promenades;

3. Maintain and strengthen the unique mix of commercial and water-oriented recreational activities; and

4. Protect the property and investments from shoreline erosion;

Timeshare Option Represents a 21st Century Commercial Use to Promote Public Use of Shoreline

The timeshare industry has evolved to capture those families with children who cannot necessarily afford to stay at a traditional hotel for their entire vacation stay. The timeshare

allows families to take advantage of a pre-paid vacation by planning ahead and enjoying a similar type of vacation repeatedly. The AG's opinion recognized this in 1996 and it is even more the case ten years later in 2006.

The AG opined that, "as a commercial activity, timeshare resorts promotes the public use of the shoreline by providing transient lodging accommodation, facilities, and services on a portion of the agency's trust property...It is observed that tourism is a mainstay of the California economy...As such, the use of the property as a timeshare resort may be considered incidental and ancillary to the promotion of trust purposes...the timeshare option is presented in response to an identified change in the tourism and commercial accommodation markets. High-end timeshare units have become desirable to many tourists, particularly those who return to the same destinations in their vacations."

Woodfin Suite Hotel Timeshare Option as Enhancement of Public Access to Shoreline

Construction of an approximately 165,000 square foot structure, which includes an approximately 133,000 square foot eight-story hotel, and an approximately 12,500 square foot clubhouse including a spa and restaurant. The first story of the hotel would consist of approximately 19,000 square feet of subterranean parking.

The maximum 140-suite hotel would be approximately 95 feet high and consist of a mix of one and two bedroom suites. Only 40 of the 140 suites would be marketed and operated as timeshare. The timeshares would be conveyed to users pursuant to a sublease. No fee simple interest would be conveyed to a timeshare participant. No one party would dominate usage of any timeshare as noted above. All timeshares would be marketed to the general public statewide.

The clubhouse would be approximately 12,500 total square feet, including a 3,650 square feet of spa facilities for hotel guests on the third floor. The first floor of the clubhouse consists of approximately 5,075 square feet of hotel operations rooms such as front desk including a 1,100 square-foot restaurant and bar, and the lobby. The first floor of the hotel consists of 59 subsurface parking spaces. The clubhouse and spa would be situated at the eastern end of the proposed hotel, where features such as the Port Cochere, patio and swimming pool would also be located. Restaurant and bar facilities would be open to hotel guests and the general public and directly accessible from the proposed promenade.

Timeshare Option Conformance with the California Coastal Commission

Whether the operation of timeshare units for the proposed project will create potential impacts to public access and recreation?

The proposed project would not result in significant impact to public access and recreational facilities

Coastal Access Enhancement

The California Coastal Act Sections 30210-20214 sets out the requirements for the provision of public access to the coast, implementing Section 4 of Article X of the California Constitution. The PMP includes goals and policies established to satisfy the California Coastal Act requirements for public access to the coast within the Port District's jurisdiction. The PMP also defines four access categories (Class I-IV) to enable development of physical access ways. The project site and surrounding area are within the Class III access category, which involves leased, developed shoreline areas upon which private or public investment has constructed commercial recreation facilities including hotels, marinas, and yacht clubs.

An assessment of the project's conformance with the PMP and the California Coastal Act regarding coastal access including vehicular access, pedestrian access, and public parking, transit and bicycle access, is provided in Section 4.1 Land Use, Water Use, and Coastal Access. The Proposed Project has been designed to enhance public access to this portion of the coast, to be consistent with the Class I access category, by providing a promenade on top of the proposed seawall that would extend along the entire approximately 1,120 foot waterfront of the project site.

Visitor and Recreation Serving Enhancements

Dianna Lilly stated that, "Section 30213 of the Coastal Act protects existing and requires new lower-cost visitor and recreational facilities be provided. Therefore, new hotel/motel development within Port tidelands should provide a range of rooms and room prices in order to serve all income levels [this is great argument for timeshare because it makes vacation at hotel affordable to varying income levels] The EIR should include a survey of existing low, mid-range, and higher costs hotels and time-share units in the Harbor Island/Shelter Island/North Embarcadero areas, address type and cost of existing facilities and include this same analysis for the existing hotel on the subject site. Because a broader range of the general public is served by provision of lower cost retail, restaurant uses, and affordable hotels, there is a greater demand for such facilities, particularly close to the water's edge. Thus, the EIR should assess whether lower cost visitor accommodations and other lower cost visitor and public recreational facilities are adequately provided for in the project area.")

Whether timeshare conflict with allowable uses on state tidelands?

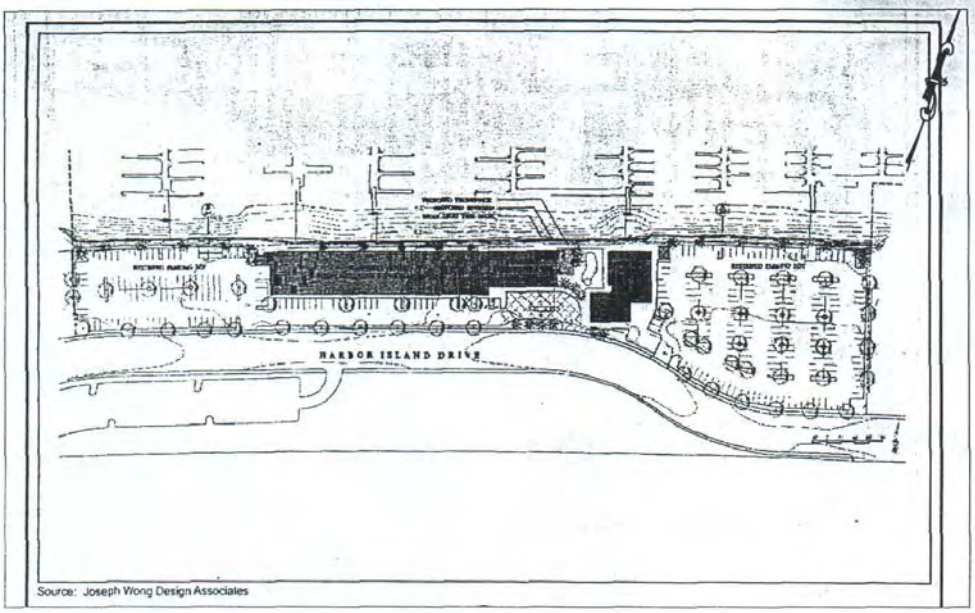
The timeshare option would require a PMP Amendment equal to that required for the proposed alternative. The timeshare option consists of all of the components of the Proposed Project, including the seawall with promenade. The project would not result in significant impacts to land use, water use or coastal access. Because the project is not specifically anticipated by the PMP, the project includes a PMP Amendment and does not conflict with the use designations, policies, or goals set forth in the PMP. Therefore, the project would not result in any significant conflicts with the PMP.

The project would also not conflict with the ALUCP or with the Coastal Act, as the project entails PMP Amendment approval by the Coastal Commission before granting a Coastal Development Permit for project work. The project would not obstruct land or water use in the vicinity of the site, and would improve coastal access by constructing a promenade along the

entire north side of project site. Inclusion of a timeshare option would have no additional impacts to land use, water use, or coastal access. Therefore, the inclusion of the timeshare would not conflict with the existing allowable uses on state tidelands.

NO SCALE

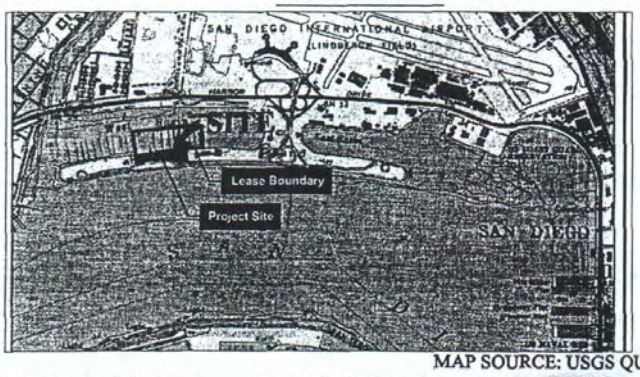
SITE



Source: Joseph Wong Design Associates

NO SCALE

LOCATION



MAP SOURCE: USGS QUAD

This Exhibit is solely for purposes of generally defining the lease premises, is based on unverified information provided by the Lessee or other parties and is not intended to be, nor shall it be construed as, a waiver or limitation of any State interest in the subject or any other property.

Exhibit H

G 10-08
Woodfin Suites Hotel/
Timeshare Proposal
Harbor Island
City of San Diego
County of San Diego

MJP 10/06/06