

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
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SAN DIEGO, CA 92108-4421
(619) 767-2370



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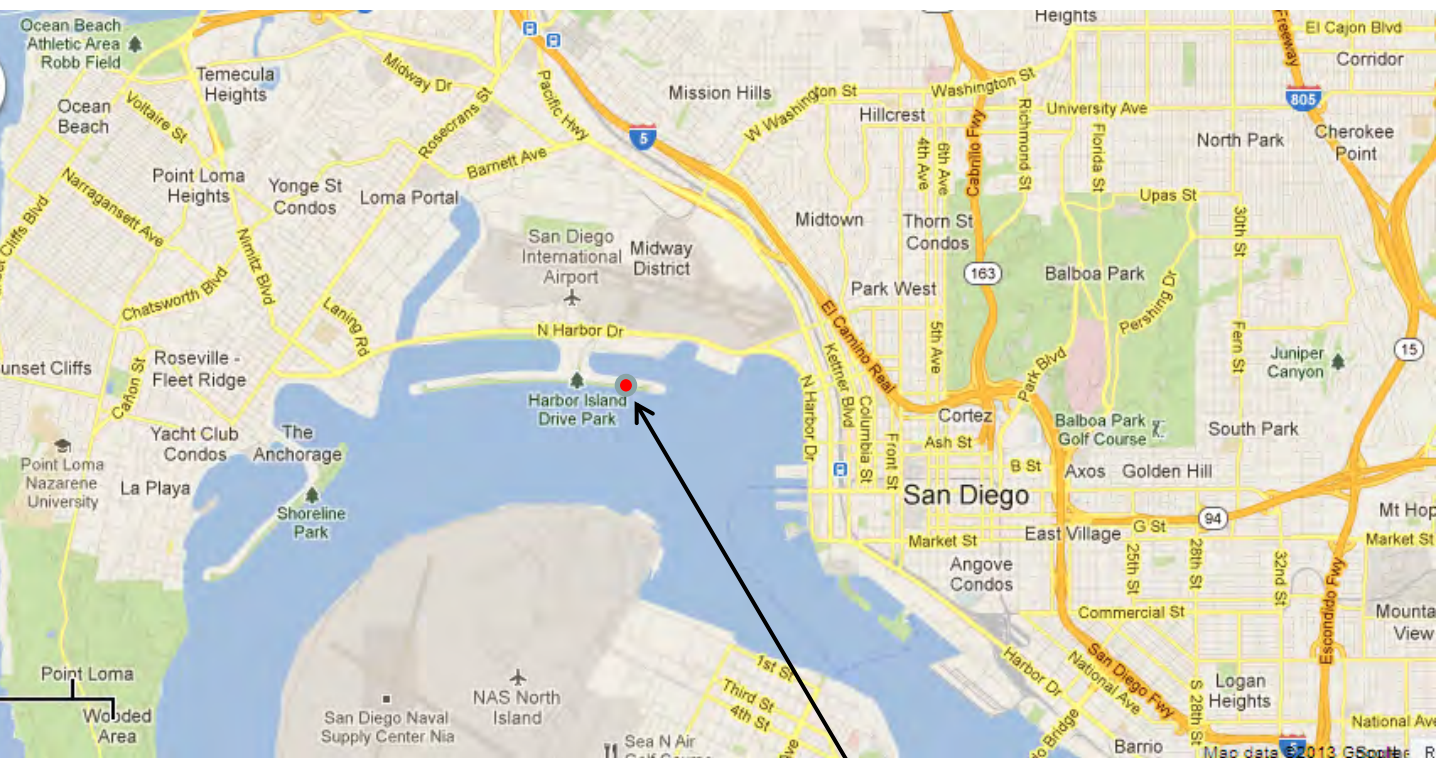
PMP-6-PSD-003-2 (EAST HARBOR ISLAND)

MAY 8, 2017

EXHIBITS

Table of Contents

- Exhibit 1 – Vicinity Map
- Exhibit 2 – Possible Hotel Locations
- Exhibit 3 – Sunroad Hotel Site Plan
- Exhibit 4 – Draft PMPA Text, Map and Project List
- Exhibit 5 – Resolution No. 2014-53 Approving PMP Amendment
- Exhibit 6 – CCC Comment Letter
- Exhibit 7 – Writ of Mandate for Case No. 37-2015-00034288-CU-WM-CTL
- Exhibit 8 – Resolution No. 2016-139 Selecting Sunroad as Final Proposer for Elbow Site
- Exhibit 9 – Port Letter
- Exhibit 10 – BPC Policy No. 775 Lower Cost Visitor and Recreational Facilities



Subject Site

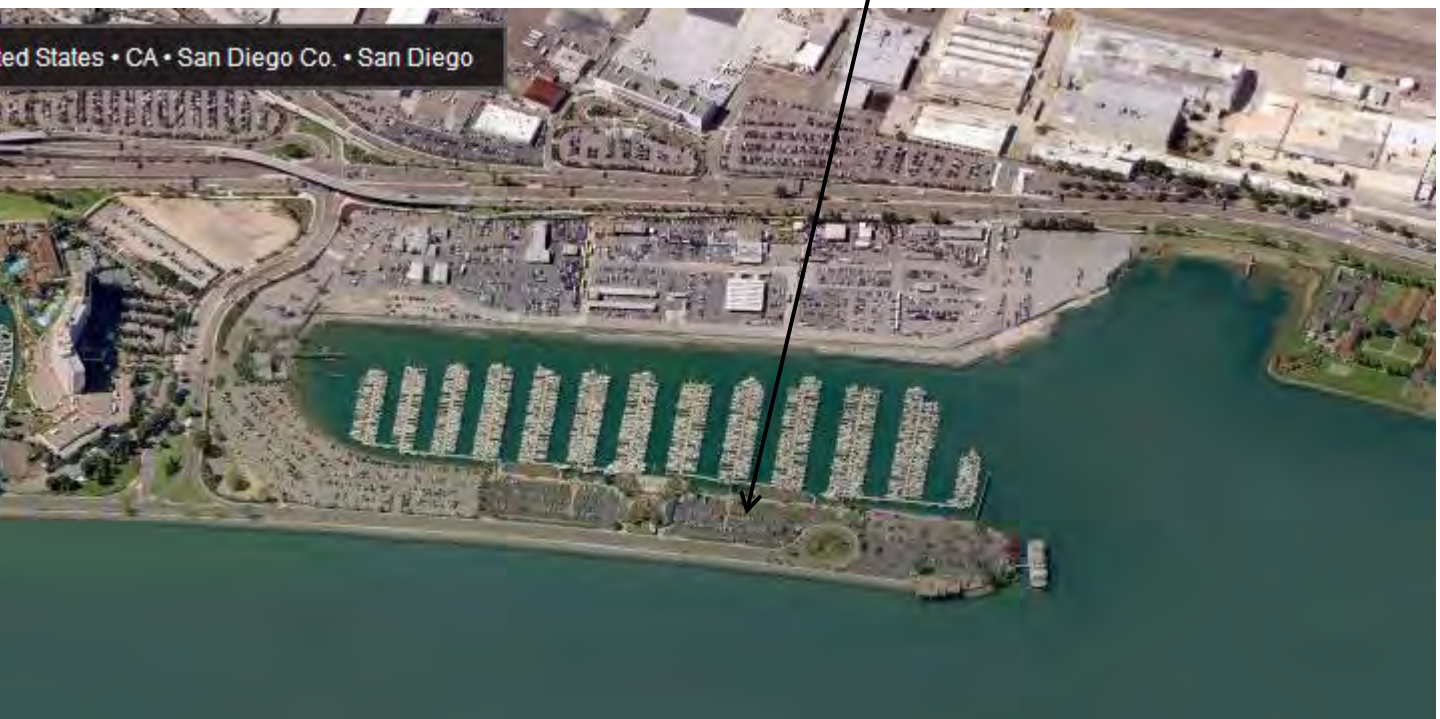


EXHIBIT NO. 1

Vicinity Map



PMPA #PMP-6-PSD-14-0003-2

California Coastal Commission

Potential Hotel Locations



EXHIBIT NO. 2

Possible Hotel Locations

PMPA #PMP-6-PSD-14-0003-2

California Coastal Commission



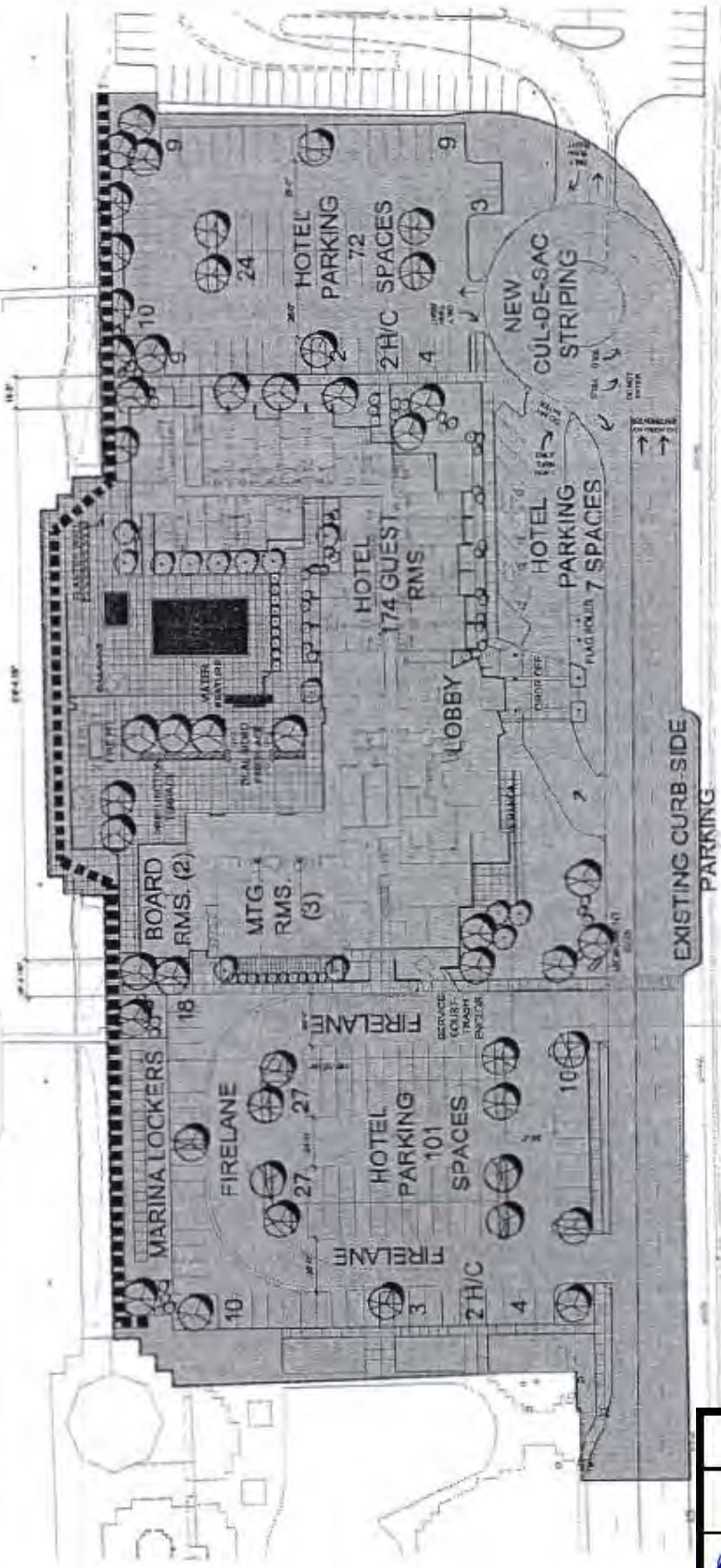
Location of Proposed 175-Room Hotel and Possible Location for Up To Two Additional Hotels

EXHIBIT NO. 2

Possible Hotel Locations

PMPA #PMP-6-PSD-14-0003-2

California Coastal Commission



Proposed Hotel Site Plan

(2009)

EXHIBIT NO. 3

Sunroad Hotel Site Plan

PMPA #PMP-6-PSD-14-0003-2
 California Coastal Commission

***San Diego Unified Port District
Port Master Plan Amendment***



DRAFT

***East Harbor Island Subarea
Port Master Plan Amendment***

***Existing/Proposed Plan Text
and Plan Graphics***

March 2014

Approved by Board of Port Commissioners on 3/4/14

Revised 7/24/15

*Note: Text to be **deleted** shown ~~stricken~~ and text to be **added** shown underlined.*

EXHIBIT NO. 4

PMPA Text, Map & Project List



PMPA #PMP-6-PSD-14-0003-2
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
Old Police Headquarters	2006-29	10 Aug 2006
National City Aquatic Center	2006-162	15 Feb 2007
Broadway Pier Cruise Ship Terminal	2009-37	03 Feb 2009
Chula Vista Bayfront Master Plan	2010-79	09 Aug 2012
San Diego Marriott Improvements	2011-179	15 Nov 2012
East Harbor Island Subarea	2014-XX	XX XX 2014

**TABLE 4
PORT MASTER PLAN
LAND AND WATER USE ALLOCATION SUMMARY**

<u>LAND USE</u>	<u>ACRES</u>		<u>WATER USE</u>	<u>ACRES</u>		<u>TOTAL ACRES</u>		<u>% OF TOTAL</u>	
	Existing	Revised		Existing	Revised	Existing	Revised	Existing	Revised
COMMERCIAL	373.5	<u>374.2</u>	COMMERCIAL	383.0		756.5	<u>757.2</u>	14%	
Marine Sales and Services	18.8		Marine Services Berthing	17.7					
Airport Related Commercial	38.0								
Commercial Fishing	8.3		Commercial Fishing Berthing	18.8					
Commercial Recreation	304.4	<u>304.8</u>	Recreational Boat Berthing	335.4					
Sportfishing	4.3		Sportfishing Berthing	11.1					
INDUSTRIAL	1206.4		INDUSTRIAL	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	280.5	<u>279.9</u>	PUBLIC RECREATION	681.0		961.5	<u>960.9</u>	18%	
Open Space	49.0	<u>17.6</u>	Open Bay/Water	681.0					
Park/Plaza	146.4								
Golf Course	97.8								
Promenade	47.3	<u>18.1</u>							
CONSERVATION	399.2		CONSERVATION	1058.6		1457.8		27%	
Wetlands	304.9		Estuary	1058.6					
Habitat Replacement	94.3								
PUBLIC FACILITIES	222.9	<u>222.8</u>	PUBLIC FACILITIES	394.3		647.2	<u>617.1</u>	12%	
Harbor Services	2.7		Harbor Services	10.5					
City Pump Station	0.4		Boat Navigation Corridor	284.6					
Streets	219.8	<u>219.7</u>	Boat Anchorage	25.0					
			Ship Navigation Corridor	50.0					
			Ship Anchorage	24.2					
MILITARY	25.9		MILITARY	125.6		151.5		3%	
Navy Fleet School	25.9		Navy Small Craft Berthing	6.2					
			Navy Ship Berthing	119.4					
TOTAL LAND AREA	2508.4		TOTAL WATER AREA	2860.3					
MASTER PLAN LAND AND WATER ACREAGE TOTAL						5368.6		100%	

Draft

Development of ~~unleased~~ parcels on Harbor Island is expected to be completed with the construction of the hotels on the east basin. Along Harbor Drive, from the Navy Estuary to the Coast Guard facility, planning concepts focus on providing a sense of entry into downtown San Diego for travelers coming via Lindbergh Field and Point Loma, with activities and landscape features that strengthen the image of San Diego as a pleasant place to visit. Considerable attention must be paid to improvements in the general appearance of existing industrial uses and the planned expansion of these uses. Public park, pedestrian promenade and open space are reserved on the bayside and in the circulation gateway of Harbor Island. Coastal access along San Diego Bay is enhanced by a shoreline park with leisure facilities, including restroom, and a 1.3 mile bayside public pathway.

Individual public access plans will be prepared concurrent with the coastal development permit application for each hotel development on Harbor Island and implementation of such will be a special condition of the hotel's coastal development permit for the development or redevelopment project(s). The public access plans will include information on signage, amenities, and public information to inform and invite the public to and around Harbor Island and downtown San Diego.

All hotel developments on Harbor Island shall provide or participate in shuttle service to and from the airport. All development shall provide information regarding other transit opportunities. The District's bayside shuttle system will be expanded to serve Harbor Island. The bayside shuttle system is intended to serve visitors as part of an integrated waterfront access and parking program that the Port District will develop in coordination with the City of San Diego and San Diego Metropolitan Transit System. All hotel developments or redevelopments on Harbor Island shall participate on a fair share basis in the cost

of the District's implementation of its transportation system. The fair share will be determined by the District according to the nature, size and scope of the proposed development or redevelopment and the District's transportation system in operation at the time an application for a coastal development permit is submitted. Participation in a shuttle program will be required as a special condition of the coastal development permit.

A parking management plan will be prepared for each hotel development on Harbor Island as the hotels are developed or redeveloped to maximize public access and recreational opportunities. The tenant shall submit their parking management plan for review and written approval of the District prior to the issuance of the respective coastal development permit for any hotel development or redevelopment on Harbor Island. All required parking must be accommodated on-site and address all development on the hotel project site and may include shared or joint-use parking. In addition, to facilitate public recreational waterfront access opportunities, each of the proposed hotels is required to provide public parking. The 175-room hotel will provide a minimum of 5 public parking spaces, and the remaining one or two hotels will provide a cumulative total of at least 10 public parking spaces, for a total of 15 public parking spaces on the hotel project sites. Signage for the public parking spaces will be visible from the public roadway.

As a special condition of the coastal development permit for any hotel development or redevelopment that adds hotel rooms to Harbor Island, the hotel developer or redeveloper will develop or designate its fair-share of on-site or off-site lower cost visitor accommodations or pay an in-lieu fee based on a study conducted by the District.

Land and Water Use Allocations

The Harbor Island/Lindbergh Field Planning District contains an approximate

total of 996 acres, consisting of about 816 acres of tidelands and 180 acres of submerged tidelands. **Table 8** summarizes the land and water use allocations proposed in the Precise Plan. As in the Shelter Island Planning District, a significant portion of the area is already developed and is under long term lease commitment. ~~The east end of the Harbor Island peninsula is vacant and thus offers development potential uncomplicated by the presence of structures or lease interest.~~ A balanced allocation of use activities is provided within the major use categories of commercial, industrial, public recreation, and public facilities.

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 (**Figure 10**) 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.

East Harbor Island

The east end of Harbor Island, subarea 23, ~~has been~~ is the last subarea to complete phased development and is designated for Commercial Recreation uses. ~~The last project, a~~ Future development in this subarea includes up to three hotels with a combined total of no more than high quality hotel of approximately 500 rooms. ~~The hotels would be located on the marina parcel or west of the marina parcel (former airport employee parking lot); no hotels would be sited on the restaurant parcel on the easternmost end of the island. These hotels is will be~~ sited to be responsive to views of San Diego Bay, the airport, and the downtown San Diego skyline. Maximum building heights will be establish consistently with adopted aircraft approach paths and Federal Aviation Administration (FAA) regulations. The hotel ~~Hotels complex may includes typical supporting facilities and ancillary uses such as swimming pools, spas, commercial retail shops, restaurants, cocktail lounges, meeting and conference space, and recreational facilities, including piers, and ancillary uses.~~ A marina of approximately 550 slips is located adjacent to the hotels and occupies most of the basin.

The eastern end of the peninsula is anchored by restaurants in two structures, which are uniquely sited on the water's edge.

The existing promenade along the southern side of Harbor Island Drive will be extended to the eastern portion of the East Harbor Island subarea and along Harbor Island East Basin. The extended promenade will be located to provide views of the San Diego Bay, the downtown San Diego skyline, and the

Harbor Island East Basin. It will be located immediately adjacent to the shoreline except at the southeast end of the peninsula where it moves inland briefly due to an existing restaurant structure. At such time when the cumulative redevelopment of the restaurant structures exceeds demolition or relocation of more than 50% of the major structural components including exterior walls, floor and roof structure, and foundation (excluding maintenance and repairs), the promenade will be relocated adjacent to the shoreline.

The promenade will provide pedestrian access around East Harbor Island and will connect the hotel developments, marina, and restaurants to the rest of Harbor Island. For each development or redevelopment on the western half of East Harbor Island, completion of the public bayside promenade along that development or redevelopment site will be required by the Port. On each hotel project site, the shoreline promenade will be a minimum of 10-foot wide and that respective portion must be fully completed prior to the completion of any new structure requiring the issuance of a final Certificate of Occupancy on that hotel project site. The promenade will include connections across the hotel project sites to the public sidewalk adjacent to the north side of Harbor Island Drive.

At such time as the current leases for the western half of the subarea terminate or are amended or concurrent with the development of the 175-room hotel, whichever occurs first, a provision for the construction of a temporarily aligned 10-foot wide shoreline promenade, which may include a fence and will include coastal access signage, indicating that the promenade is open and accessible to the public will be required. The temporary promenade will be installed by the developer of the adjacent marina and up to 175-room hotel, as a special condition of that hotel's coastal development permit, if a hotel development has not been selected for the one or two hotels with up

to 325 remaining hotel rooms on the western half of the subarea. If a temporarily aligned 10-foot wide shoreline promenade is installed on the western half of the subarea, it will be required to be replaced with a permanent 10-foot wide shoreline promenade, as a special condition of the coastal development permit(s) for the one or two hotels with up to 325 rooms, prior to issuance of a coastal development permit for that hotel site.

At the Sunroad Resort Marina, the 10-foot wide promenade will be continued on the shoreline side of the marina office and west locker buildings when the cumulative redevelopment of the marina office and west locker buildings exceeds demolition of more than 50% of the exterior walls and substantial structural components.

Any hotel project on the Sunroad Resort Marina leasehold that is developed before the aforementioned cumulative marina office and west locker buildings redevelopment shall provide public access along the bayside length of the marina leasehold. Within the marina's existing swimming pool enclosure and bayward of the west locker building, the walkway may be reduced to a minimum 5-foot wide shoreline public promenade which will be open for public use prior to the issuance of a final Certificate of Occupancy for that hotel project.

When the promenade is located within a private leasehold or on a Port development site, improvements and the promenade will be sited to allow uninterrupted pedestrian flow. Benches and viewing decks adjacent to the promenade will be sited to provide multiple viewing opportunities in a manner that does not obstruct pedestrian flow. Public access and other path-finding signage, as well as signage identifying that the promenade is open to the public, will be placed at strategic locations throughout East Harbor Island to guide guests and visitors to and from public use areas, restaurants, and other facilities.

Public access corridors that provide views will be located between hotel structures to allow visual and physical access and connectivity to the Harbor Island East Basin, San Diego Bay, and Harbor Island Drive. These public accessways will be kept free of obstructions. Public accessways may include public activation amenities such as benches, lighting, signage, parking, and landscaping and these amenities shall not be considered obstructions. In order to preserve views and encourage public access, building envelopes will not exceed seventy percent (70%) of each project site. Public activation amenities shall not be considered part of the building envelope.

All public access improvements (i.e., promenade, accessways, public art, signage, seating) on each respective hotel site shall be completed and open to the public at the time that each respective hotel begins occupancy. The one or two hotels with a combined total of up to 325 rooms shall provide activating uses, such as food service (e.g., restaurant(s), walk-up café, coffee shop, cocktail lounge), outdoor seating and dining areas, and retail shops open to the public, which will be integrated into the hotel(s), proportionate to the type and extent of development or redevelopment.

As the East Harbor Island subarea is developed or redeveloped, Harbor Island Drive may be resized and realigned to optimize use of East Harbor Island. This may allow for increased and enhanced public enjoyment of the bay. The promenade and new public access features (e.g., benches) will provide enhanced open space and public access opportunities within the East Harbor Island subarea.

If the District issues a Request for Proposals (RFP) to develop the one or two hotels (up to 325 rooms) on the southwesternmost area of Subarea 23 before the District has completed a lower cost visitor accommodations study, the RFP shall specify that no less than 25% of

the hotel rooms will be midscale or economy, as defined by Smith Travel Research. The developer of the midscale or economy hotel rooms shall be required to include amenities that lower the cost of stay. Examples of amenities that could lower the cost of stay may include the provision of kitchenettes, refrigerators and/or microwaves in guest rooms, it could also include provision of complimentary services such as Wi-Fi, continental breakfast and/or parking. If a hotel is developed at a midscale or economy product, it need not pay the in-lieu fee identified earlier in this precise plan.

A public promenade parallels the active ship channel of the bay and ensures pedestrian and bicycle coastal access. Landscaped open space on Harbor Island Drive is retained with the street design of an upgraded and modified "T" intersection. Utility capacity is expanded to meet increased service needs

TABLE 8
Precise Plan Land and Water Use Allocation

HARBOR ISLAND/LINDBERGH FIELD: PLANNING DISTRICT 2

LAND USE	ACRES		WATER USE	ACRES	TOTAL ACRES		%OF TOTAL
	Existing	Revised			Existing	Revised	
COMMERCIAL	90.6	<u>91.3</u>	COMMERCIAL	105.8	496.4	<u>197.1</u>	20%
Airport Related Commercial	38.0						
Commercial Recreation	52.6	<u>53.3</u>	Recreational Boat Berthing	105.8			
INDUSTRIAL	631.8		INDUSTRIAL	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	<u>25.6</u>	PUBLIC RECREATION	45.0	71.2	<u>70.6</u>	7%
Open Space	7.5	<u>6.1</u>	Open Bay/Water	45.0			
Park	16.4						
Promenade	2.3	<u>3.1</u>					
PUBLIC FACILITIES	66.8	<u>66.7</u>	PUBLIC FACILITIES	18.0	84.8	<u>84.7</u>	8%
Harbor Services	1.3		Harbor Services	5.3			
Streets	65.5	<u>65.4</u>	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

Revised acreage includes:

East Harbor Island Subarea PMPA – CCC on XXXX XX, 2013

Revised: 06-20-13

Draft



PRECISE PLAN

DATE:	June 2014
DRWN / CHK:	T.O. - A.B.

FILE TITLE:
PPdist2_pmpa_DRAFT_HH
hotel plan

Project List

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

TABLE 9: PROJECT LIST					APPEALABLE ↓	FISCAL YEAR
HARBOR ISLAND/LINDBERGH FIELD: PLANNING DISTRICT 2					DEVELOPER ↓	
					SUBAREA ↓	
1.	HOTEL(S)-COMPLEX: on western half of Subarea 23: up to two hotels 500 with a combined total of no more than 325 rooms, food service (e.g., restaurant(s), walk-up café, coffee shop, cocktail lounge), meeting and conference space; parking; landscaping; bayside public promenade	23	T	Y		1993-94 2017-2020
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.	<u>HOTEL: up to 175 rooms adjacent to marina, including limited meeting space; surface parking; landscaping; bayside public promenade; realignment of traffic circle and roadway</u>	<u>23</u>	<u>I</u>	<u>Y</u>		<u>2014-2016</u>
P- Port District T- Tenant		N- No Y- Yes				

Draft

RESOLUTION 2014-53

**RESOLUTION APPROVING PORT MASTER PLAN
AMENDMENT AND DIRECTING FILING WITH THE
CALIFORNIA COASTAL COMMISSION FOR
CERTIFICATION**

WHEREAS, the San Diego Unified Port District (District) is a public corporation created by the Legislature in 1962 pursuant to Harbors and Navigation Code Appendix I (Port Act); and

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

WHEREAS, Sunroad Marina Partners, LP (Sunroad) currently has a 50-year lease with the District for a 600-slip marina at 955 Harbor Island Drive, in the City of San Diego, on east Harbor Island (Existing Leasehold) that will expire in 2037; and

WHEREAS, on June 14, 2011, the Board of Port Commissioners (Board) granted an option to lease agreement with Sunroad for a new 55-year lease located on the Existing Leasehold site for development of a 175-room, four-story limited service hotel with ancillary meeting and fitness space, common areas, an exterior pool, and surface parking (Sunroad Hotel Project) and the Sunroad Hotel Project would remove 111 parking spaces, an existing locker building and some parking, with the existing marina offices to remain; and

WHEREAS, the existing certified Port Master Plan allows for commercial recreational use at the Sunroad Hotel Project site and allows for a hotel of up to 500 rooms on the westernmost parcel of East Harbor Island (located west of the Sunroad Hotel Project site), which is currently used for temporary rental car parking and was formerly used by the San Diego International Airport for employee parking; and

WHEREAS, a Port Master Plan amendment is required for the Sunroad Hotel Project to be developed; and

WHEREAS, the proposed Port Master Plan amendment (Port Master Plan Amendment) includes, among other things, revisions to the precise plan text and maps, land use acreage tables, and project list for Planning District 2 and more specifically, the proposed Port Master Plan Amendment revises the precise plan text to (a) allow for development of two or three hotels on East Harbor Island, including the Sunroad Hotel Project, with a combined total of not more than 500



rooms, rather than a single 500-room hotel, (b) include the proposed road and traffic circle realignment, (c) revise the Project List to add the Sunroad Hotel Project and the other up to two hotels, and (d) revise land use acreage table to reflect proposed changes to the commercial recreation, promenade, open space (traffic circle), and street land use designations; and

WHEREAS, proposed Port Master Plan Amendment has been prepared and processed in accordance with the Port Act, Coastal Act and other applicable laws; and

WHEREAS, the Sunroad Hotel Project and proposed Port Master Plan Amendment are collectively referred to as the "Project"; and

WHEREAS, Sunroad is the applicant for the Sunroad Hotel Project; and

WHEREAS, a Revised Final Environmental Impact Report pursuant to the California Environmental Quality Act (CEQA), CEQA Guidelines, and District procedures relative to the Project, has been prepared and certified and its contents considered.

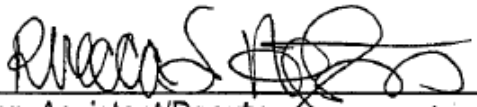
NOW, THEREFORE, BE IT RESOLVED by the Board of Port Commissioners of the San Diego Unified Port District, as follows:

That the Port Master Plan Amendment pertaining to the Sunroad Hotel Project, on file in the office of the District Clerk as Document No. 61419 is approved, that the Executive Director or his designated representative is hereby authorized and directed to transmit said Port Master Plan Amendment, together with all relevant factual information, the certified Revised Final Environmental Impact Report, and the Coastal Act consistency analysis to the California Coastal Commission for its review, approval and certification pursuant to Public Resources Code Section 30714 and that the Executive Director or his designated representative is hereby authorized to amend the Port Master Plan application prior to the California Coastal Commission's certification; provided, however, that the Port Master Plan Amendment, as certified by the California Coastal Commission, shall be presented to the Board of Port Commissioner's for its final approval at a subsequent date.

BE IT FURTHER RESOLVED, consistent with Public Resources Code Sections 30714 and 30716, and California Code of Regulations Title 14, Section 13632(e), the Port Master Plan Amendment shall not be effective until: (a) the California Coastal Commission certifies the Port Master Plan Amendment; (b) the Board adopts the Port Master Plan Amendment as certified by the California Coastal Commission; and (c) the California Coastal Commission has received notice of such Board action and accepts the same as consistent with its certification.

BE IT FURTHER RESOLVED, that the Port Master Plan Amendment shall not be effective unless and until an indemnity agreement, as approved by the Executive Director or his designated representative, is entered into by Sunroad and the District, which provides for Sunroad to indemnify the District for all attorneys' fees, costs and other expenses incurred by the District in the event of any third party legal challenge to the Final Environmental Impact Report or the Master Plan Amendment.

APPROVED AS TO FORM AND LEGALITY:
PORT ATTORNEY


By: ~~Assistant~~ Deputy

PASSED AND ADOPTED by the Board of Port Commissioners of the San Diego Unified Port District, this 4th day of March, 2014, by the following vote:


AYES: Bonelli, Malcolm, Merrifield, Moore, Nelson, and Valderrama

NAYS: None.

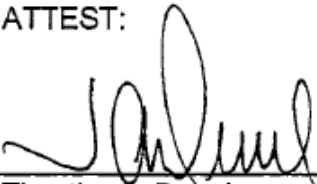
EXCUSED: None.

ABSENT: None.

ABSTAIN: Castellanos.


Robert E. Nelson, Chairman
Board of Port Commissioners

ATTEST:


Timothy A. Deuel
District Clerk

(Seal)

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4421
(619) 767-2370



March 10, 2015

Lesley Nishihira
Manager, Land Use Planning
Port of San Diego
3165 Pacific Highway
San Diego, CA 92112-0488

Subject: Comments on the Draft San Diego Unified Port District Lower Cost Overnight Accommodations Study

Dear Ms. Nishihira:

Commission staff appreciates the opportunity to review and provide comment on the Draft San Diego Unified Port District Lower Cost Overnight Accommodations Study dated December 2014. While we will offer more detailed comments as the Port's work continues, we offer the following initial comments regarding the draft study which was undertaken by the San Diego Unified Port District (District) to establish a baseline of existing lower cost overnight accommodations within the District and to create the framework for a future policy addressing the provision of lower cost overnight accommodations within Port tidelands. Additional and more thorough review will be provided as we work with you and other Port representatives to develop the appropriate policies to be incorporated into a Port master plan amendment.

As an overriding comment, we are concerned that there is no clear directive in the draft study that the Port will provide lower cost overnight accommodations within the District. One of the guiding principles proposed for establishing a policy framework, on Page 60, is that the combined percentage of lower and moderate cost overnight accommodations shall not be less than 10% of the total hotel submarket. This target seems especially low and will not assure that land area will be set aside for provision of a lower cost overnight option within Port tidelands. Coastal Act Section 30213 protects and provides for lower cost visitor serving facilities and this mandate is even more compelling when looking at public tidelands. Thus, we believe the study should provide a goal specifically related to providing lower cost accommodations that is distinguishable from the goal for moderate cost accommodations and include analysis of how this goal is consistent with the Public Trust Doctrine and the Coastal Act.

In addition, the study's short term goal to provide 225 new lower cost accommodations (relocation of 125 existing hostel units in the downtown area onto Port lands, 50 new hostel units at a yet-to-be-determined site, 50 new campsites at a yet-to-be-determined site) appears to be low, particularly given the study's finding that the only existing lower cost overnight accommodations within the District are 237 RV sites in Chula Vista. This goal translates to a total of 462 lower price accommodations out of 12,360 total

EXHIBIT NO. 6

CCC Comment Letter

RMPA #PMP-6-PSD-14-0003-2
California Coastal Commission

accommodations on Port lands, or 3.7% with only 1.4% being actual rooms (hostel rooms) and 78% consisting of existing hostel units or RV sites rather than new inventory. Furthermore, the study's long term goals, on Page 49, do not provide any discussion of the provision of new lower cost accommodations and instead focus on new and expanded public amenities such as the bayfront shuttle system. Again, the lack of any clear long term goal for the provision of new lower cost overnight accommodations appears to be inconsistent with what we believed to be the purpose of the study. The study briefly discusses the market and demand for new hotel development, but it is not clear if any analysis was conducted to determine the existing and future demand for new lower cost overnight accommodations within Port tidelands. If not, we believe it should be included in the final study and the short and long term goals should be reevaluated based on the findings. As a part of this reevaluation, a variety of lower cost accommodations discussed in the study, including hostels, tent camping, RV camping, cabins, and yurts, should be considered for inclusion in the District's short and long term goals for providing new lower cost overnight accommodations within the Port District.

On Page 4, another key finding of the study is that: "Fees collected through the program would be allocated toward new lower cost overnight accommodations projects and shuttle support at a 90/10 ratio." In addition, on Page 48, the study states: "Once the near-term goal has been met, the fees could be directed toward other public amenities that serve the overnight visitor. These may include rent subsidies or property improvement grants to District tenants wishing to upgrade existing lower cost facilities. Other ideas may include water taxis and other facilities that offer a no or low cost benefit to the visitor." Finally, on Page 49, the study states: "Once the initial demand is met and new overnight accommodations have been constructed, it may be reasonable to consider providing other public amenities that are designed to provide access to the waterfront, beyond lower cost overnight accommodations and the bayfront shuttle system. This may include water taxi services and/or waterfront enhancements such as wayfinding and signage and passive and active programs intended to attract visitors to the waterfront and provide them a no or low cost recreational opportunity." It is important to note that previous Commission actions have, for the most part, required that in-lieu fees collected in conjunction with impacts to lower cost overnight accommodations be utilized for the development of new lower cost overnight accommodations – not for public access and recreation amenities. Generally, the Commission has addressed mitigation for impacts to lower cost overnight accommodations separate from, and in addition to, other types of impacts to public access and recreation.

The use of in-lieu fees for an expanded shuttle service, water taxi service, signage, and other amenities does not address the impact of future high cost hotel development in-lieu of lower cost accommodations and the mitigation that is appropriate to offset those impacts. As discussed at our January 12, 2015 meeting, public access and recreation amenities that provide for and minimize impacts to coastal access should be required and funded separately. The one element that may warrant further deliberation is the possible use of mitigation monies for maintaining existing lower cost overnight accommodations as part of the Port's inventory. If the Port wishes to retain this concept, further documentation on the identification of selected units and how the mitigation monies will be used to secure and maintain lower cost rates will be needed.

On Page 59, the tiered system for project selection does not reflect the goal of first providing, at a minimum, 225 units of lower cost overnight accommodations. It appears that the Board could use discretion to fund any of these types of projects at any time during the process. In addition, Tier 2 (new lower or moderate cost hotel suite products providing a lower cost of stay to the visitor) and Tier 3 (rehabilitation of existing lower or moderate overnight accommodations) were not discussed in adequate detail in the study. Please provide additional information about these options. Finally, as discussed above, Tier 4 (water taxi service throughout the Bay) and Tier 5 (waterfront access public amenity such as seating areas, walkways, signage, etc.) should be discussed separately.

The study proposes to use PKF Consulting's (PKF) classification of "upper-priced" and "lower-priced" accommodations to determine the appropriate Average Daily Rate (ADR) range for lower, moderate, and higher cost hotel accommodations. However, the study does not provide a detailed explanation of PKF's methodology for classifying upper- and lower-priced accommodations. Although the current PKF rate categories are similar to those used in previous Commission actions, relying on a private consultant's determination of rate categories rather than publicly available data sources, without clear information about how the determination is made, is problematic. This issue could potentially be addressed by limiting future increases in the rate categories (e.g., limiting the increase as compared to the consumer price index), or by capping the rates (e.g., capping the lower cost category at some percentage of the statewide average room rate). In any event, we need greater understanding of the methodology that has been used to create these classifications.

On Page 44, the study states that the cost of land included in Hosteling International's 2014 estimate should not be factored into the cost estimate for the construction of new hostel facilities since the District can only lease Port lands: "Land cost will be removed from the \$54,120 figure in the current study because land cost would change depending on location and is not appropriate for District property, which is leased and not purchased. For purposes of this study, \$42,120 will be used to estimate cost of each hostel bed in the Port jurisdiction." Based on our conversations with Port staff, even though Port lands will be leased instead of purchased, there will still be a cost associated with the lease of Port lands for a future hostel or other lower cost overnight accommodations. Therefore, unless the District intends to fully subsidize leasing costs, any costs associated with the lease of Port lands should be estimated and included in the cost to construct new lower cost accommodations in order to more accurately determine the cost of mitigation. In addition, any in-lieu fee should be reassessed and updated on a regular basis to reflect the current cost of constructing new lower cost overnight accommodations.

On Page 42, the study describes that the current occupancy for the existing 153-bed hostel in downtown San Diego is 61% but it is expected to increase as a result of a recent remodel of the facility. The study states that "HI representatives are predicting a demand for an additional 50 hostel beds in the downtown San Diego market in the future" – which would result in a total of 203 beds in the downtown area. However, the study only recommends relocation of 125 of these existing 153 beds and 50 new hostel beds for a total of 175 total hostel beds (125 new hostel beds in a relocated Downtown facility and 50 additional hostel beds on a yet-to-be-determined site) instead of the 203 projected.

Please correct and/or explain this discrepancy. Also, the study should include a detailed discussion of how HI representatives predicted hostel demand for the downtown San Diego market, including the timeframe that was used, whether Port lands were included in the area that was considered, and any other data or evidence to support this projection. At this point in time, it may be somewhat premature to be identifying an exact number of hostel units that should be planned for on Port lands if thorough analysis on the demand for such units has not been completed. On Page 43, the study states: “However because there is no precise way to project demand, it is reasonable to assume a more conservative growth in hostel development within the Port jurisdiction over the near term.” In the absence of more information and justification, this assumption is not supportable and the study should include further consideration and analysis of the short and long term demand for hostel rooms, taking into account the projected population growth, the anticipated increase in tourism, and the increase in projected demand for a new hostel facility located in downtown San Diego on Port property – closer to the water than the existing facility.

In general, we appreciate that suite hotels may serve as a part of the effort to address the need for more affordable accommodations because they are typically less costly or are more reasonably priced for larger groups and families; however, they are not considered lower cost overnight accommodations. We agree that a mix of overnight accommodations types and rate levels should be provided within the Port to serve the public; however, the focus of this study should be the provision of new lower cost overnight accommodations, including hostels, camping, cabins/yurts, and lower cost hotels. Perhaps the final study could address the District’s goals for the provision of new moderate cost overnight accommodations separately as a new section. Thus, the study’s proposal on Page 47 to allow the District to reclassify hotels into the “lower” or “moderate” rate category if they provide suite-style amenities is not supportable. Furthermore, on Page 47, the study states that “some suite product is marketed to business travelers or designed as luxury suites, which would not qualify.” This statement is supported by the fact that all of the existing suite style hotels within the Port are moderate or high cost hotels that would not be considered a lower priced overnight accommodation.

In past actions, the Commission has taken into consideration the affordability of suite hotel rooms that accommodate large families who would otherwise need to reserve two standard rooms. The Commission’s action for a new hotel development at Liberty Station (ref. to CDP #6-13-0407) involving a reduction of the in-lieu fee is referenced in the study; however, it is important to note that this is only one of many Commission actions and the subject hotel development has yet to be built so it remains to be seen whether the actual rates charged by the hotel operator will be consistent with those projected by the developer. In the case of the Legoland Hotel (ref. to City of Carlsbad LCP 1-09B), the in-lieu fee was not applied because the applicant proposed that all 250 rooms within the hotel would accommodate at least 5-7 people, and even though the projected rate was \$220 per night, the cost of the room would be reduced to within the moderate cost range when packaged with admission to Legoland. However, the significant discrepancy between the projected and actual room rates for this hotel – approximately \$329-369 for a standard room, \$405.67-\$469 for a premium room, and \$505.67-\$569 for a suite room – demonstrates the challenges associated with determining

when elimination or reduction of an in-lieu fee is appropriate. It is important to note that the District will face the same challenges, especially since Port lands are situated along the highly desirable waterfront adjacent to downtown San Diego. Thus, when determining the appropriate rate category, the District should not solely rely upon projected hotel rates but should also take into consideration actual rates of comparable hotels within the immediate vicinity. In addition, the reduction of in-lieu fees should not be considered or permitted without clear criteria and evidence of how suites will be designed and maintained as truly affordable accommodations.

Additionally, it is unclear whether the proposed menu of options to reduce the in-lieu fee on Page 53 would actually result in lower cost accommodations. In staff's research, many hotels within San Diego County at a variety of different price points provide amenities such as the ones proposed (complimentary breakfast or free Wi-Fi) as part of the daily rate. Thus, these amenities are often included with the price of the room, especially for hotels that are already low or moderate cost, and are not necessarily associated with whether a hotel is low, moderate, or high cost. Therefore, detailed criteria for any reduction of the in-lieu fee should be carefully outlined and justified to ensure a reduction in the fee is warranted.

Given the finite amount of land available to develop or redevelop new lower cost overnight accommodations and the Port's role as the manager of this land, it is unclear why it would be premature to identify sites that are appropriate for such development. The proposed recommendation to identify general siting criteria and encourage development on sites that meet those criteria will likely result in undue delays to the development of lower cost accommodations. We encourage a revision to the study at this time to include recommendations regarding specific sites that would be potential sites for lower cost accommodations.

Thank you again for the opportunity to provide review and comment on the draft study. If you have any questions or require further clarification, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read 'KBm', with a stylized, flowing script.

Kanani Brown
Coastal Program Analyst III

Cc (copies sent via email):

Sherilyn Sarb (CCC)
Deborah Lee (CCC)
Madeline Cavalieri (CCC)
Tinya Hoang (CCC)
Penny Maus (Port)

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO – CENTRAL COURTHOUSE**

SAN DIEGO UNIFIED PORT DISTRICT, a
California public corporation

Petitioner and Plaintiff,

v.

The CALIFORNIA COASTAL COMMISSION,
a public agency, and DOES 1 through 50,
inclusive,

Defendants and Respondents.

SUNROAD MARINA PARTNERS, LP, a
California Limited Partnership, DBA
SUNROAD ENTERPRISES; and DOES 50
through 60, inclusive,

Real Parties in Interest.

Case No.:37-2015-00034288-CU-WM-CTL

Assigned for all purposes to the
Honorable Ronald L. Styn

**[PROPOSED] PEREMPTORY
WRIT OF MANDATE**

Petition and Complaint filed:
October 9, 2015

IMAGED FILE

TO RESPONDENT CALIFORNIA COASTAL COMMISSION:

WHEREAS, judgment having been entered in this proceeding in favor of Petitioner San Diego Unified Port District ordering that a peremptory writ of mandate be issued from this court remanding Port Master Plan Amendment No. PMP-6-PSD-14-003-2 (East Harbor Island Subarea) to Respondent California Coastal Commission,



1 **YOU ARE HEREBY COMMANDED** within 90 days from the date that a copy of
2 this writ is served on you to take the following actions:

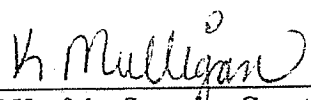
3 1. Vacate your August 13, 2015 action to deny certification of Port Master Plan
4 Amendment No. PMP-6-PSD-14-003-2 (East Harbor Island Subarea) and any other actions
5 taken by the California Coastal Commission memorializing or in furtherance of such action;

6 2. Notice and conduct a new public hearing in accordance with applicable
7 regulations and the California Coastal Act during the May 2017 California Coastal
8 Commission meeting scheduled to be held in San Diego and, following the hearing, take
9 action on the Port Master Plan Amendment No. PMP-6-PSD-14-003-2 (East Harbor Island
10 Subarea) application, without consideration of a requirement to provide overnight
11 accommodations at a rate of \$106/night, or any other specific rate, as a means of establishing
12 "lower cost overnight accommodations."

13 3. Nothing in this writ shall limit or control the discretion legally vested in you.

14 **YOU ARE FURTHER COMMANDED** to make and file a return to this peremptory
15 writ on or before June 15, 2017. This court retained jurisdiction over the matter until such
16 time as the court has determined that the California Coastal Commission has complied with
17 this writ by taking the mandated actions in accordance with the Coastal Act.

18 DATED: March 20, 2017

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20 CLERK of the Superior Court
(SEAL)

21 K. MULLIGAN



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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1230 Rosecrans Avenue, Suite 110, Manhattan Beach, CA 90266.

PEREMPTORY WRIT OF MANDATE

SEE ATTACHED SERVICE LIST

☒ **VIA OVERNIGHT DELIVERY.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address(es) stated above. I placed the envelope or package for collection and overnight delivery at a regularly utilized drop box of the overnight delivery carrier.

☐ **VIA U.S.MAIL.** I enclosed the above described documents in a sealed envelope or package addressed to the person(s) listed above or on the attached; caused such envelope with postage thereon fully prepared to be placed in the United States mail at Los Angeles, California.

I am readily familiar with the Jenkins & Hugin, LLP's practice of collection and processing correspondence for outgoing mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon prepaid at Manhattan Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **STATE.** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 21st day of March, 2017, at Manhattan Beach, California.

Wendy Hoffman
WENDY HOFFMAN

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SERVICE LIST

San Diego Unified Port District v. California Coastal Commission, et al.
Case No. 37-2015-00034288-CU-WM-CTL

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Attorneys for Real Parties in Interest,
Sunroad Marina Partners, LP, a California
Limited Partnership, DBA Sunroad Enterprises

RECEIVED
JUN 22 2015
JANUARY 10 2015
JUN 22 2015

RESOLUTION 2016-139

RESOLUTION (A) SELECTING OLIVERMCMILLAN, INC. AS THE FINAL PROPOSER FOR THE EAST BASIN INDUSTRIAL SUBAREA (APPROXIMATELY 35 ACRES OF LAND AND 13 ACRES OF WATER) AND DIRECTING STAFF TO ENTER INTO AN EXCLUSIVE NEGOTIATING AGREEMENT FOR REDEVELOPMENT OF THE EAST BASIN INDUSTRIAL SUBAREA, WITH CONDITIONS; AND (B) SELECTING SUNROAD ENTERPRISES AS THE FINAL PROPOSER FOR THE ELBOW SITE (APPROXIMATELY 9 ACRES) AND DIRECTING STAFF TO ENTER INTO AN EXCLUSIVE NEGOTIATING AGREEMENT FOR REDEVELOPMENT OF THE ELBOW SITE, WITH CONDITIONS

WHEREAS, the San Diego Unified Port District (District) is a public corporation created by the legislature in 1962 pursuant to Harbors and Navigation Code Appendix 1, (Port Act); and

WHEREAS, Section 87(b) of the Port Act grants authority to the District to lease the tidelands or submerged lands, or parts thereof, for limited periods, not exceeding 66 years, for purposes consistent with the trusts upon which those lands are held, by the State of California; and

WHEREAS, on July 14, 2015, the Board of Port Commissioners (Board) directed staff to issue a request for Statements of Interest, Qualifications and Vision (SOIQV) for the redevelopment of the East Basin Industrial Subarea of Harbor Island, which consists of approximately 35 acres of land and 13 acres of water, across from the San Diego International Airport's (Airport) former commuter terminal (East Basin Industrial Subarea); and

WHEREAS, on October 6, 2015, the Board directed staff to also include a nine-acre land parcel adjacent to the East Basin Industrial Subarea (Elbow Site) collectively increasing the solicitation opportunity to a contiguous 57-acre site; and

WHEREAS, the SOIQV was issued on October 26, 2015 and sought development ideas to reimagine the 44 acres of land and 13 acres of water overlooking East Harbor Island and the San Diego Bay; and

WHEREAS, on December 29, 2015, staff received six submittals and on April 14, 2016, staff recommended to the Board to advance only OliverMcMillan,



Inc. (OM) and Sunroad Enterprises (Sunroad) to a second and final round to refine their vision to concept level, demonstrate their vision aligns with the Board's Integrated Planning Vision (which consists of the Integrated Planning Framework Report accepted by the Board in November 2015 and Integrated Planning Assessment Report, Vision Statement and Guiding Principles accepted by the Board in August 2014), and provide preliminary price and terms (including proposed percentages that would be paid upon a future sale or assignment of the leasehold); and

WHEREAS, OM and Sunroad were encouraged to work with, or set aside land for the District to work with Topgolf International, Inc. (Topgolf) as a potential activating use on East Harbor Island; and

WHEREAS, on May 5, 2016, based upon the Board's direction to proceed with OM and Sunroad, staff issued a Supplemental Information Request (Supplement); and

WHEREAS, OM and Sunroad submitted responses to the Supplement by June 6, 2016; and

WHEREAS, staff evaluated comprehensively the responses to the Supplement along with each respondent's initial submittal to the SOIQV (collectively, proposed vision); and

WHEREAS, after reviewing and analyzing the proposed visions of OM and Sunroad, OM proposed the highest investment to the tidelands, while creating a site that best aligns with the Integrated Planning Vision with the creation of a distinctive, attractive and appropriately scaled waterfront destination that will increase public access and recreation from both land and water perspectives, as well as achieve planning principles of honoring the water, guaranteeing the public realm and comprehensive goals for completing the Green Necklace; and

WHEREAS, OM's proposed vision achieved the best balance of increased revenue and increased public access for the site by creating an urban village at its core; and

WHEREAS, staff recommended that the Board select OM as the final proposer and direct staff to negotiate an Exclusive Negotiating Agreement with OM for the 57-acre redevelopment site on East Harbor Island, as the final step to conclude the competitive solicitation process.

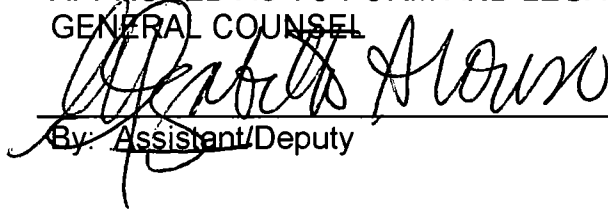
WHEREAS, in the SOIQV, the District reserves the right to negotiate with any, all, or none of the proposers and to award a lease to one or more proposers; and

WHEREAS, the Board has the discretion to accept, modify or reject staff's recommendation.

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

1. That OliverMcMillan, Inc. is hereby selected as the final proposer for the East Basin Industrial Subarea (approximately 35 acres of land and 13 acres of water); and
2. That staff is hereby directed to enter into an Exclusive Negotiating Agreement with OliverMcMillan, Inc. for the redevelopment of the East Basin Industrial Subarea; and
3. That Sunroad Enterprises is hereby selected as the final proposer for the Elbow Site (approximately 9 acres); and
4. That staff is hereby directed to enter into an Exclusive Negotiating Agreement with Sunroad Enterprises for a 325 room hotel on the Elbow Site that does not require a Port Master Plan Amendment; and
5. That OliverMcMillan, Inc. and Sunroad Enterprises shall honor the Integrated Planning Vision and incorporate it in their revised concepts; and
6. That OliverMcMillan, Inc. and Sunroad Enterprises shall collaborate on continuity of the design of the entire East Harbor Island site and if needed, share the costs of public infrastructure and shared amenities; and
7. Staff will return to the Board to have a policy discussion regarding the inclusion of the District Administration office building.

APPROVED AS TO FORM AND LEGALITY:
GENERAL COUNSEL


By: Assistant Deputy

PASSED AND ADOPTED by the Board of Port Commissioners of the San Diego Unified Port District, this 8th day of September 2016, by the following vote:

AYES: Malcolm, Merrifield, Moore, Nelson, and Valderrama.

NAYS: Bonelli.

EXCUSED: None.

ABSENT: None.

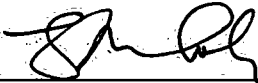
ABSTAIN: None.

RECUSED: Castellanos



Marshall Merrifield, Chairman
Board of Port Commissioners

ATTEST:



Timothy A. Deuel
District Clerk

for

(Seal)



SAN DIEGO UNIFIED PORT DISTRICT

OFFICE OF THE GENERAL COUNSEL

August 7, 2015

FOR INCLUSION IN STAFF REPORT; ITEM TH 22d

VIA EMAIL

Chair Kinsey and Honorable Commissioners
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Deborah Lee
California Coastal Commission
San Diego Area
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108-4402

Re: San Diego Unified Port District Port Master Plan Amendment – No. PMP-6-PSD-14-0003-2 (East Harbor Island Subarea)

Dear Chair Kinsey, Honorable Commissioners and Ms. Lee:

We are writing in response to the Staff Recommendation, dated July 30, 2015, regarding the San Diego Unified Port District (“Port”) Port Master Plan Amendment – No. PMP-6-PSD-14-0003-2 (East Harbor Island Subarea) (“PMPA”), which the California Coastal Commission (“Commission”) is scheduled to consider at its August 13, 2015 meeting. The PMPA would modify an existing allowance for a 500-room hotel in a manner that would allow for the development of up to three hotels with a combined total of up to 500 rooms.¹ One of the three hotels is a 175-room hotel proposed by Sunroad Marina Partners, LP. The Port has worked cooperatively with Commission Staff in an effort to develop lower cost overnight accommodations provisions in the PMPA that are legally supportable and consistent with Coastal Act policies.

Nevertheless, Commission Staff is recommending denial of the PMPA unless the Port replaces these provisions with substitute language contained in the Staff Recommendation. For the reasons set forth in this letter, the Port believes the PMPA as proposed by the Port is consistent with the lower cost overnight accommodations policies of the Coastal Act and Coastal Commission precedent. Furthermore, it would be legally impermissible to incorporate Staff’s recommended language, as it would require the Port to regulate development in a manner that would violate Section 30213 of the Coastal Act and the Fifth Amendment to the United States Constitution. Moreover, the State Lands Commission (“SLC”) is charged with implementing and enforcing the public trust doctrine, and as such, the Commission should defer to its

¹ The existing Port Master Plan allows for the development of a single hotel of up to 500 rooms in generally the same location.

EXHIBIT NO. 9

Letter from the Port



PMPA No. PMP-6-PSD-14-0003-2
California Coastal Commission

determination of whether the PMPA is consistent with the public trust doctrine. Significantly, the public trust doctrine does not require the development of lower cost overnight accommodations.

I. The PMPA Merely Reconceptualizes The Already Approved Port Master Plan, Which Allows For The Development Of 500 Hotel Rooms On East Harbor Island.

It is of significant importance to note at the outset that the PMPA is not proposing the development of 500 new hotel rooms. Rather, the existing Port Master Plan – approved by the Coastal Commission in 1990 – expressly allows for the development of up to a 500 room hotel. The PMPA merely would allow the development of these previously approved 500 hotel rooms to occur within up to three low-rise hotels instead of one high-rise hotel. Importantly, the existing Port Master Plan does not require any payment of an in-lieu fee, or development of offsite or onsite lower cost overnight accommodations for the 500-room hotel. Given that there is no change in use, general area of development or number of hotel rooms and there is no current requirement for a land reservation for lower cost overnight accommodations in the subarea, there is even less basis for Commission Staff’s unprecedented recommendations.

II. The PMPA’s Lower Cost Overnight Accommodations Provisions Are Consistent With Past Commission Approvals And Legal Principles.

The Port, through its PMPA, proposes language to address the issue of lower cost overnight accommodations, which is substantially identical to language the Coastal Commission adopted last year in connection with its certification of the San Diego Convention Center and Hilton Hotel expansion PMPA.² Specifically, the language provides:

As a special condition of the coastal development permit for any hotel development or redevelopment that adds hotel rooms to Harbor Island, the hotel developer or redeveloper will develop or designate its fair-share of on-site or off-site lower cost visitor accommodations or pay an in-lieu fee based on a study conducted by the District.

In 2013, Commission Staff also supported essentially the same requirement in connection with the Port’s approval of a CDP for the Shelter Island Kona Kai Hotel. Through language submitted for this proposed PMPA, which was previously approved by the Commission as detailed above, the Port is in the process of developing the analysis and substantiating evidence³ legally required to support the imposition of defensible exactions on hotel development to facilitate the creation of lower cost overnight accommodations in accordance with Coastal Act

² The revised findings adopted by the Commission for the San Diego Convention Center and Hilton Hotel Expansion PMPA at the February 2014 meeting provided: “The revised PMPA also includes language requiring that as a special condition of the Coastal Development Permit for the hotel expansion, the impacts to low-cost overnight accommodations be mitigated by developing or designating a fair-share of on-site or off-site lower cost visitor accommodations or payment of an in-lieu based on a study conducted by the Port District.” (San Diego Convention Center and Hilton Hotel Expansion, Revised Findings, p. 3.)

³ The Port’s effort is an extensive four-phase study: Phase 1, establishing the foundation for lower cost overnight accommodations is complete. Phase 2, establishment of an appropriate percent of lower cost overnight accommodations, is in progress and a draft report has been prepared. The additional two phases should be complete in the next 18 to 24 months with a complete report (all four phases) issued soon thereafter.

Section 30213.⁴ Moreover, in response to concerns raised by Commission Staff, on July 24, 2015, the Port submitted additional language for the PMPA that would facilitate the development of lower cost overnight accommodations in the form of product type for the subarea. The proposed language would ensure that the Port would limit the product types to economy or midscale with certain extra amenities that would reduce the cost of stay and save guests money for 25% of the 500 rooms prior to the completion of the Port's lower cost visitor accommodations study. Additionally, the developers of the proposed 375 remaining rooms would either develop their fair share of onsite or offsite lower cost overnight accommodations or pay an in-lieu fee.

III. Commission Staff's Proposed Lower Cost Overnight Accommodations Language Is Contrary to Governing Law And Exceeds The Authority Of The Commission.

In stark departure from precedent and without any expressed rational basis, the Commission Staff Recommendation concludes the above-referenced Port proposed PMPA provisions are inconsistent with Coastal Act Section 30213. In apparent support of this position, the Staff Recommendation states that "reliance on [the language from the San Diego Convention Center and Hilton Hotel Expansion PMPA] has not resulted in the actual provision of additional lower cost overnight accommodations within the Port," without acknowledging that this PMPA was adopted only last year, a CDP has not been issued for the hotel, the PMPA and CEQA review is subject to pending litigation and no hotel development has yet occurred. The Staff Recommendation also cites to concerns that the in-lieu fee approach – previously repeatedly supported by the Coastal Commission – has not resulted in the development of lower cost overnight accommodations within the Port; again, without acknowledging that this challenge is not unique to the Port. Indeed, the Coastal Commission is in the middle of a series of public workshops regarding ways to modify its lower cost overnight accommodations policies, providing further evidence that its current uncoded policy may not be based upon a legally required nexus analysis.⁵

Commission Staff instead recommends substitute provisions that are not legally supportable, including requiring that the PMPA:

- (i) reserve land within the East Harbor Island subarea (Subarea 23) for lower cost overnight accommodations, even though no nexus study has concluded that this geographic limitation is supportable and where such a reservation could result in a regulatory taking;
- (ii) reserve a minimum of 125 (or 25%) of the 500 hotel rooms for lower cost overnight accommodations, which would result in a limitation of 375 market-rate

⁴ Arguably, Section 30213 does not require the development of overnight accommodations. It does not mention "overnight accommodations." Conversely, it specifies that "lower cost visitor and recreational facilities shall be protected, encouraged and where feasible, provided." Moreover, developments of recreational opportunities are preferred under Section 30213 over other lower cost visitor facilities. The proposed PMPA provides for public recreational facilities in the form of a promenade and other amenities.

⁵ Conversely, pursuant to the legal requirement that the mitigation must have a nexus to an impact and be roughly proportional to said impact, the Port has recently completed a draft nexus study for its policy, which will be distributed to Commission Staff prior to the Commission hearing on the proposed PMPA.

rooms, and could result in an impermissible regulation of room rates and an ultimate required set aside in excess of 25%⁶; and

- (iii) impose a 25% set aside for onsite or offsite lower cost overnight accommodations (unless an in-lieu fee is paid) for the 375 market rate rooms, even though this exaction amount has never been supported through a nexus study and may be inconsistent with the study to be adopted by the Port, which focusses on the San Diego region.

The Staff Recommendation's legal deficiencies are discussed further below.

a. Reservation of Land is Not Based on Nexus Study.

The Staff Recommendation requires that the Port reserve land within the East Harbor Island subarea (Subarea 23) for lower cost overnight accommodations. The Staff Recommendation, however, cites to no evidence or nexus analysis that the potential impacts to lower cost visitor accommodations can only be mitigated within East Harbor Island, that the costs to the Port associated with the reservation of land in this subarea are roughly proportional to the asserted impacts, or any precedent as support for this restriction. To require such a land reservation, a nexus study would have to have been prepared and so concluded – yet there is no such study, let alone evidence for such a determination. (See Nolan v. Cal. Coastal Com. (1987) 483 U.S. 825, 833 (governmental entity can only “take” a property interest if the permit condition bears an essential nexus and rough proportionality to adverse impacts caused by the proposed project); Dollan v. City of Tigard (1994) 512 U.S. 374 (agency must establish a “nexus” between the condition requiring a property interest or payment and the effects of the project that the property interest or payment is mitigating).)

In contrast to the apparent unsupported Staff position, the Port is undertaking an extensive nexus study that will establish a supportable set aside and/or in-lieu fee for lower cost overnight accommodations and identify potential areas within the Port's jurisdiction where the development of such accommodations may be located or in-lieu fees applied. (See Footnote 3, above.)

Moreover, the Port has engaged in conversations with a hostel company and they have informed the District that a hostel would likely fail at the site because it is not supported by public transit or amenities such as restaurants.

b. Reservation of Land is Not Required Under Public Trust Doctrine.

The Staff Recommendation attempts to “establish” a nexus between the PMPA and reservation of land within Subarea 23 through a specious argument that any hotel development inconsistent with the public trust doctrine, the Commission has the authority to ensure a PMPA is consistent with the public trust doctrine as an extension of Section 30210 of the Coastal Act, and that a PMPA is inconsistent with the public trust doctrine unless land for lower cost overnight accommodations is reserved within that subarea. The Coastal Commission's authority to determine consistency with Section 30210, however, does not vest it with authority to determine the extent to which a particular use is consistent with the public trust doctrine, which Staff impermissibly attempts to do here. Indeed, the SLC solely is charged with the paramount responsibility for ensuring development allowed or conducted by public trust grantees – like the

⁶ In other words, if 500 market rate rooms were developed, a 25% onsite lower cost overnight accommodations requirement would be 125 rooms. For 375 market-rate rooms, this would equate to 94 lower cost overnight rooms.

Port – is done in a manner consistent with the public trust doctrine. (See SLC, “Policy Statement Relating to the Public Trust Doctrine” (Public Trust Policy) page 3 (Attachment A).)

Importantly, the public trust doctrine does not require the development of lower cost overnight accommodations. Rather the public trust doctrine and the Port Act, for that matter which was codified to carry out the public trust doctrine, allow for the development of market-rate hotels and motels without the condition of development of lower cost overnight accommodations. Commission Staff cites and quotes to the SLC adopted “Public Trust Policy” (see Attachment A). However, it does so in a vacuum and out of context. That document clearly states that “ancillary or incidental uses, that is, uses that directly promote trust uses, are directly supportive and necessary 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.” (Public Trust Policy, page 1 (emphasis added).) With respect to leasing of tidelands in particular, the State Land's Commission Policy Statement instructively notes uses upheld by California courts as appropriate, stating that “Visitor-serving uses, 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 specifically set apart for their benefit.” (Public Trust Policy, page 6, (emphasis added).)

Additionally, the SLC issued a white paper on the public trust doctrine (see attachment B). That white paper states:

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 public 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. [(Page 7, emphasis added).]

The white paper continues by enumerating the uses that are not allowed on public trust lands. They include “commercial installations that could as easily be sited on uplands and strictly local or ‘neighborhood-serving’ uses that confer no significant benefit to Californians statewide. Examples include hospitals, supermarkets, department stores and local government buildings and private office buildings that serve general rather than specifically trust-related functions.” (Pages 7-8.) Nowhere are hotels mentioned as a prohibited use. Accordingly, pursuant to the SLC – the state agency charged with implementation of the public trust doctrine – hotels are an allowable public trust use.

Neither the SLC's Public Trust Policy nor its white paper requires the development of lower cost overnight accommodations. The Staff Recommendation cites to Carstens v. California Coastal Commission ((1986) 182 Cal.App.3d 277, 289) in support of its position that the Commission may prioritize the public trust use of public access in the nature of lower cost overnight accommodations over the public trust use of commerce in the nature of hotel development. However, Carstens does not stand for that principle. To the contrary, Carstens holds that, in carrying out the public trust doctrine, the Commission may consider commerce, appropriately value it and not rigidly subjugate it to public access uses.

It is undisputed that hotels are acceptable and important public trust uses. Commission Staff's conclusion to the contrary has no basis in law or practice.

c. Reservation of Land May Result in Regulatory Taking.

Commission Staff's requirement that specific land be reserved for lower cost overnight accommodations is likely a regulatory taking. Commission Staff's language would require the PMPA to limit land owned by the Port within the East Harbor Island Subarea to only one permissible use – lower cost overnight accommodations, the development of which largely is outside the control of the Port and which may or may not ever occur. Should the development of lower cost overnight accommodations on this property never occur, the Port, as the land owner, effectively would be deprived of all economically beneficial use and value of the property which not only would be unfair, but potentially an impermissible regulatory taking. (See Nectow v. Cambridge (1928) 277 U.S. 183, 187 (A person's property rights exist regardless of the regulatory restrictions that subsequently burden those rights); Hansen Brothers Enterprises, Inc. v. Board of Supervisors (1996) 12 Cal.4th 533, 552 (A governmental dictate that interferes with continued use is unconstitutional).) That the Staff Recommendation would allow the Port to relocate this land reservation to another property, upon approval of yet another PMPA, does not remove this legal deficiency, but rather shifts its application to another area.

d. Reservation of 125 Rooms as Lower Cost Overnight Accommodations May Impermissibly Regulate Room Rates and Exceeds a 25% Set Aside.

The Staff Recommendation requires that the PMPA reserve a minimum of 25% of the proposed 500 hotel rooms (125 rooms) as lower cost overnight accommodations pending the results of the Port's study. The PMPA proposes up to three hotels of up to 500 rooms total – the 175-room Sunroad hotel and one or two other hotels on adjacent property totaling up to 325 rooms. By requiring a *minimum* of 125 rooms to be set aside as lower cost overnight accommodations, the Staff Recommendation has the potential to impermissibly regulate room rates and exceed its own recommendation for a 25% set aside.

Under Coastal Act Section 30213, the Commission shall not “require that overnight room rentals be fixed at an amount certain for any privately owned and operated hotel, motel, or similar visitor-serving facility located on either public or private lands . . .” To accomplish the development contemplated by the PMPA of three hotels providing up to 500 hotel rooms and meet the Staff Recommendation to provide 125 of those rooms as lower cost overnight accommodations would require that those rooms be located within the three hotels. This, in turn, would require the Port to set room rental rates for those 125 rooms, which it is not permitted to do under Section 30213.

To avoid this impermissible result, the 125 rooms/units would need to be provided as a standalone development that meets the requirements of lower cost overnight accommodations, such as through a hostel or campgrounds. While these rooms/units would satisfy the 25% set aside included in the Staff Recommendation, Staff's language also still would require that the remaining 375 rooms be subject to the 25% set aside or an in lieu fee. While the Port does not believe the Commission has supported the 25% set aside requirement with the required nexus analysis in the first instance, it certainly has not established a nexus or any precedent for the type of “double-dipping” set aside that would result from the Staff Recommendation. Furthermore, if a 25% set aside were legal, which it is not, it would equate to an additional 94 rooms for the 375 market-rate rooms that could be developed under Staff's Recommendation. Alternatively, if 500 market rooms were developed, 125 additional rooms would be lower costs accommodations to equate to a 25% set aside for a total of 625 rooms.

e. Imposition of a 25% Set Aside for Lower Cost Overnight Accommodations is Not Based on Nexus Study and Could Conflict with Port's Study.

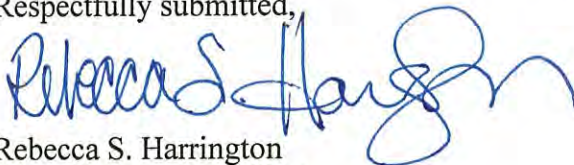
The Staff Recommendation would require that the PMPA impose as a condition of approval for all hotel development that the developer “develop or designate its fair share (minimum of twenty-five percent of total rooms proposed) of on-site lower cost overnight accommodations” or pay an in-lieu fee in accordance with the study to be adopted by the Port. While the Commission may have “established” precedent of applying a 25% set aside for lower cost overnight accommodations in its permitting decisions, to the Port’s knowledge the Commission has never undertaken a formal nexus study (or any properly conducted study for that matter) to establish whether this amount of set aside is roughly proportional to the impacts created by hotel development within the coastal zone in general or for specific areas as required by law.⁷ Indeed, the preliminary results from the draft Port study indicate a different percentage for its specific geography may be appropriate.⁸ Accordingly, the Coastal Commission may not require the Port to impose a requirement that fails to satisfy constitutional muster.

Under the Nolan/Dollan line of cases cited above, the Port may only “take” a property interest if the permit condition bears an essential nexus and rough proportionality to adverse impacts caused by the proposed project. Acceptance of the Staff Recommendation would require the Port to take a property interest – by requiring a 25% lower cost overnight accommodation set aside – absent any nexus study whatsoever statewide or particular to the lands subject to the Port’s jurisdiction. Moreover, Commission Staff’s language does not make allowance for the results of the Port’s nexus study, which may establish a different set aside amount or employ a different methodology entirely and which is specific to Port owned lands.

* * *

In light of the foregoing, the Port respectfully requests that the Coastal Commission reject the Staff Recommendation to deny the PMPA and instead certify the PMPA as submitted.

Respectfully submitted,



Rebecca S. Harrington
Deputy General Counsel

cc: Sherilyn Sarb
Kanani Brown
Thomas A. Russell
Randa Coniglio
Lesley Nishihira
Penny Maus
Uri Feldman

⁷ It should be noted that the Commission has on multiple occasions departed from imposing a 25% set aside on hotel projects, which calls into question whether this requirement truly is rooted in established Commission precedent. (See, e.g., Revised Findings 6-13-0407 (McMillin-NTC, LLC).)

⁸ A copy of the Port’s draft nexus study will be given to Commission Staff prior to the hearing on the PMPA.

ATTACHMENT 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

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.

ATTACHMENT 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

¹Institutes 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 from private parties.⁷ In other words, the public trust is an affirmation of the duty of the

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.

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

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 than exclusively private purposes. The Legislature cannot commit trust lands irretrievably to

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

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

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 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

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

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 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

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.

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

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

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.

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 confer no significant benefit to Californians statewide. Examples may include hospitals, supermarkets, department stores, and local government buildings and private office

¹⁵See *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.

buildings that serve general rather than specifically trust-related functions.

V. Mixed-Use Developments

¹⁷Joseph L. Sax, A The Public Trust in Stormy Western Waters, @ October 1997.

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 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

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

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

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.

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, non-trust groups could also use the facility, but the non-trust uses must remain *incidental* to the

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

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

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

²³*Ibid.*

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 interfere*

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

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

²⁶For 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.

²⁷See, 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.

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 considered by the

²⁸Ch. 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.

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 tenants was valid.³² Although both cases involve challenges to financing and condemnation statutes and do not involve the public

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.

³²*Ibid.*

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 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

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

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.



(3)

BPC Policy No. 775

SUBJECT: GUIDELINES FOR THE PROTECTION, ENCOURAGEMENT AND, WHERE FEASIBLE, PROVISION OF LOWER COST VISITOR AND RECREATIONAL FACILITIES

PURPOSE: To establish a policy for the protection, encouragement and, where feasible, provision of lower cost visitor and recreational facilities within the jurisdiction of the San Diego Unified Port District (District).

BACKGROUND: The California Legislature has declared the purposes and uses of tidelands and submerged lands matters of statewide concern and has, through the San Diego Unified Port District Act (Port Act), established the District and the boundaries thereto. In enacting the Port Act, the Legislature proclaimed the District a trustee for the people of the State of California. As trustee of the tidelands and submerged waters, the District is vested with the authority to hold and manage the tidelands and submerged lands in and around San Diego Bay "for the development, operation, maintenance, control, regulation, and management of the harbor of San Diego . . . and for the promotion of commerce, navigation, fisheries, and recreation therein." The California Legislature also granted the District broad police powers to make and enforce all necessary rules and regulations governing the use of tidelands and submerged water and balance the needs of commerce, navigation, fisheries and recreation thereon.

Accordingly, the District has the express authority to manage the tidelands and submerged waters in accordance with the Port Act and the Public Trust doctrine and that authority, includes without limitation, the ability regulate, acquire, construct, erect, maintain or operate within the District all improvements or facilities necessary for the promotion and accommodation of commerce, navigation, fisheries and recreation upon the lands and waters under the control and management of the Board of Port Commissioners (Board). The Port Act also requires the District to approve a Port Master Plan, which sets forth the public trust land and water uses within the District.

Consistent with common law, the District has the affirmative duty to take the public trust into account and to protect public trust uses whenever feasible. However, in doing so, the District has the authority to choose between different public trust uses and balance the needs of the people of California.

Additionally, the District is within the California Coastal Zone and, hence, is subject to the California Coastal Act (Coastal Act). Consistent with the Port Act and the Coastal Act, the District has a certified Port Master Plan, which sets forth goals, policies, and objectives, as well as land and water uses within the District. The Coastal Act does not dictate the exact policies or uses that must be in the Port Master Plan. Rather, the Coastal Act grants the District the flexibility and autonomy to impose a variety of different policies and uses to further the Coastal Act. One of the policies codified in Chapter 3 of the Coastal Act, is

EXHIBIT NO. 10

BPC Policy No. 775



PMPA # PMP-6-PSD-14-0003-2
California Coastal Commission

Section 30213, which states: "Lower cost visitor and recreational facilities shall be protected, encouraged and, where feasible, provided. Developments providing recreational opportunities are preferred." Under the Coastal Act, the District has the ability to decide among numerous policies and possibilities on how it will advance the goals set forth in Section 30213. However, pursuant to Section 30213, the California Coastal Commission (Coastal Commission) may not dictate room rates as a condition of approval of a development or require the establishment of lower-cost room rates as a policy in the Port Master Plan. This Policy is intended to further the goals of Section 30213.

Because the District does not impose taxes, leasehold revenues collected by the District are used to provide public benefits, including lower cost visitor and recreational facilities. For example, as of the date of this Policy, the District and its tenants have developed and maintain an estimated 22 parks, six playgrounds, six fire rings, seven swim beaches, 22 miles of promenade, five fishing piers, four public viewing piers and platforms, three boat launch ramps, free mooring and docking, shuttle services, bikeways and numerous public art displays. The revenues also are used to provide public infrastructure, such as streets, sidewalks, public restrooms, and landscaping. Therefore, it is important for the District to balance providing such facilities with revenue generating efforts.

POLICY STATEMENT: The District acknowledges that the importance of lower cost visitor and recreational facilities and recognizes that such facilities, depending on their nature, are consistent with the Port Act and the Public Trust Doctrine. Pursuant to the authority granted to the District by the Port Act, as more particularly described herein, it is the policy of the District to:

Protect, encourage and, where feasible, provide for lower cost visitor and recreational facilities to enhance the public's enjoyment of the San Diego Bay. The protection, encouragement and provision, where feasible, of lower cost visitor and recreational facilities should be examined on a project-by-project basis taking into account, without limitation, the Port Master Plan, the type and nature of the project and project site, whether a nexus exists that justifies the project's protection or provision of the facilities, the project's fair share for protecting or providing the facilities, as well as whether the protection or provision of the facilities can be accomplished in a successful manner within a reasonable period of time considering economic, environmental, social, legal and technological factors.

There are many types of lower cost visitor and recreational facilities that may be consistent with this Board Policy, as well as other laws, such as Section 30213 of the Coastal Act. Some of the facilities that would advance this Policy are listed on Exhibit 1. Exhibit 1 is intended to illustrate different types of lower cost visitor and recreational facilities, but not every project will necessarily protect or provide such facilities, and a mix of the same may be provided. Additionally, some facilities not listed on Exhibit 1 may still be considered lower cost visitor and recreational facilities in satisfaction of this Policy.

Exhibit 1

Examples of Lower Cost Visitor and Recreational Facilities

Lower cost visitor and recreational facilities may include, but are not limited to, the following:

- Public recreational opportunities such as active and passive parks, open space, gardens, promenades, walkways and bikeways/bike paths.
- Wayfinding signage, seating, bicycle racks and other enhancements to public access areas.
- Free or lower-cost public events or tours.
- Public art, museums or exhibits.
- Public viewing areas or piers.
- Free or lower cost transportation, including shuttles, van pools, water taxis and bicycle racks.
- Public fishing piers or floating docks.
- Low cost or free moorings or boat slips.
- Dock and dine piers.
- Parking facilities/spaces that are free or lower cost.
- Kitchenettes, free Wi-Fi, free or reduced cost breakfast, and free parking at hotels or motels.
- Hostels, motels, hotels, campgrounds, yurts, RV parks, or tent campsites; provided, however, the District shall not regulate the amount for overnight stay at such facilities through a Coastal Development Permit or the Port Master Plan and therefore, the District needs to further evaluate on how this type of accommodation could be provided.