

MINUTE ITEM

This Calendar Item No. 14
 was approved as Minute Item
 No. 14 by the State Lands
 Commission by a vote of 3
 to 0 at its 9/28/83
 meeting.

CALENDAR ITEM

F. 1914 - 1

9/22/83
 W 20396
 A. Scott
 Rump
 Eagan
 SLL 110

SETTLEMENT OF LITIGATION
 REGARDING EXISTENCE OF
 TIDELANDS TRUST EASEMENT OVER
 PROPERTY IN THE VICINITY OF BRICKYARD COVE,
 RICHMOND, CALIFORNIA

A dispute has arisen between the State and the record owners of certain tide and submerged lands in the vicinity of Brickyard Cove, Richmond, that were originally deeded by the Board of Tide Land Commissioners. The dispute concerns the existence of the tidelands trust easement over those lands that were water-covered as of February 22, 1980, the date of the California Supreme Court's decision in City of Berkeley v. Superior Court (1980) 26 Cal. 3d 515. That decision held that lands deeded by the Board of Tide Land Commissioners (BTLC) were subject to an implied reservation of the public trust easement for commerce, navigation, fisheries, recreation, and related uses. There were exceptions to the application of the Court's ruling, however. The primary exception was for lands that, as of February 22, 1980, were filled and no longer subject to tidal action. The rationale for not making the Court's decision fully retroactive was that property owners might have relied on earlier appellate decisions that held that Board lots were free of the trust. The Court also recognized that there might be other types of situations where, because of reliance on the earlier erroneous decisions, the trust should no longer be recognized, but left identification of those situations to future litigation. The private claimants here assert that they come within this latter class of cases. The facts are as follows:

In 1965, the private claimants commenced obtaining the necessary local approvals for a marina and related commercial and residential development in Brickyard Cove, and began filling for the project. The residences and portions of the commercial buildings were to be supported on piles over water and were scheduled to be approved and built in several phases. In 1966, the San Francisco Bay Conservation and Development Commission (BCDC) granted an exemption under the AcAteer-Petris Act's grandfather clause for those portions of the project that lay within the Corps of Engineers' bulkhead line, citing planning, financing, and construction

(Added 9/27/83)

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CALENDAR PAGE	203
MINUTE PAGE	2185

that had comenced prior to the September 17, 1965 date for the inception of BCDC jurisdiction. Some 75 lots that were to be located waterward of the bulkhead line were not exempted by BCDC.

Between 1965 and February 1980, when the Berkeley decision was rendered, final subdivision map approval was obtained for the first tract, lots were sold, and houses were constructed on all but a few of these lots. Further, "Sandpiper Spit", the fill that was to provide access to lots of the second tract, was completed and tentative map approval obtained for the lots of this tract. Finally, considerable dredging, filling, and improvements were made in furtherance of the project. As of this date, there are two phases of the project that do not yet have the necessary subdivision approvals: a tract of some 20 lots jutting north into the harbor area protected by Sandpiper Spit ("Egret Island"), and a larger tract of some 75 lots that lies south of the spit and waterward of the bulkhead line ("Cormorant Island").

The private claimants contend that, under the general Berkeley exception, the trust does not extend over any of the area that is the subject of the subdivision plans that they first started implementing in 1965. The Commission staff disagrees, contending that the trust exists over all lands that were water-covered as of February 22, 1980, and that the State can, if it chooses, prevent further residential development in all or any portion of this area. The private claimants have filed a quiet title action against the State.

In settlement of the dispute, the parties have proposed an agreement that, in summary, will:

- (1) establish the existence of the trust over all areas that were wet as of February 22, 1980;
- (2) allow planned commercial development to proceed along the shore, so long as a stated percentage of floorspace is used for trust purposes;
- (3) permit completion of development on the finally-approved lots along Sandpiper Spit, with an agreement that the State will refrain from exercising the trust for a period of 49 years;
- (4) prevent residential development of the remainder of claimants' property, including the approximately 100 lots for which final map approval has not yet been obtained (Egret and Cormorant Islands);

(Added 9/27/83)

CALENDAR ITEM NO. 14 (CONTD)

- (5) obtain a grant of full fee title to the State of the most waterward portion of the private parties' Board lots and a portion of Brooks Island;
- (6) accord the State a share in the proceeds from any sale or lease of more landward portions of the Board lots; and
- (7) require the private claimants to pay \$250,000 into a fund for the enhancement of public trust uses in the vicinity of Brickyard Cove.

Provision is also made for valuation of the Sandpiper Spit lots and improvements should the State choose to exercise the trust so as to preclude or materially interfere with use of the lots for residential purposes. The agreement would be submitted to the superior court in proposed settlement of the litigation and, if accepted by the court, would become binding on the parties.

Commission staff and the Office of the Attorney General recognize that residential use is not a trust use and that in many and perhaps most cases it is a use that would be deemed inconsistent with public trust needs. This situation, however, given the long history of development of this particular project and the general language of exception contained in the Berkeley case, is unique. As far as staff is aware there are no other similar situations existing with regard to BTLC lots. It is limited to BTLC lots and to a peculiar set of facts that arose prior to the overturning of prior law in the Berkeley case. In view of the uncertain result of contested litigation concerning the applicability of the Berkeley exception, and the substantial benefit to the public trust that would be gained by the proposed settlement, it is the view of both Commission staff and the Attorney General's Office that the proposed settlement is in the best interests of the public and should be approved by the Commission.

EXHIBITS: A. Location Plat.

IT IS RECOMMENDED THAT THE COMMISSION:

1. AUTHORIZE EXECUTION BY THE EXECUTIVE OFFICER OF THE LITIGATION AND TITLE DISPUTE SETTLEMENT AND COMPROMISE AGREEMENT REGARDING LANDS IN BRICKYARD COVE IN THE CITY OF RICHMOND, CALIFORNIA, A COPY OF WHICH IS ON FILE IN THE OFFICES OF THE COMMISSION.

(Added 9/27/83)

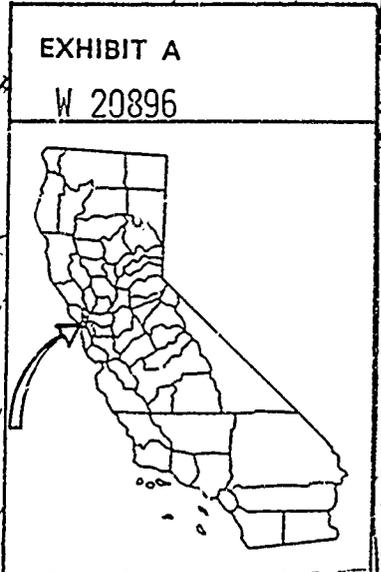
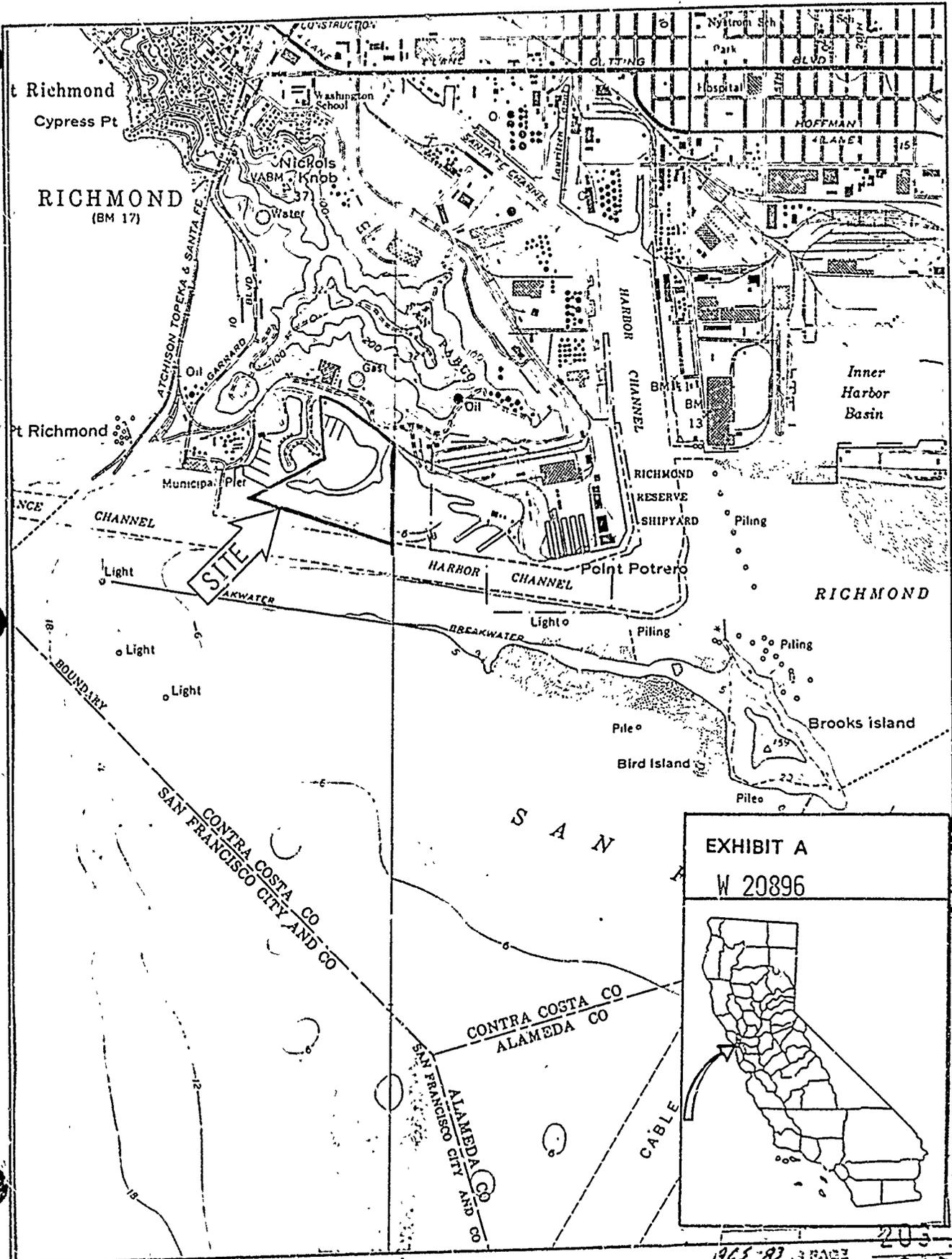
CALENDAR PAGE	203.2
MINUTE PAGE	2187

CALENDAR ITEM NO. 14 (CONT'D)

2. FIND THAT THE AGREEMENT IS IN THE BEST INTERESTS OF THE STATE AND THE PUBLIC AND IN FURTHERANCE OF THE PUBLIC TRUST PURPOSES OF COMMERCE, NAVIGATION, AND FISHING; THAT IT WILL NOT SUBSTANTIALLY INTERFERE WITH THESE TRUST PURPOSES, BUT RATHER WILL ENHANCE THE PUBLIC RIGHTS AND UTILIZATION OF THE WATERWAYS INVOLVED IN THIS SETTLEMENT.
3. AUTHORIZE THE EXECUTIVE OFFICER AND THE ATTORNEY GENERAL'S OFFICE TO TAKE SUCH OTHER ACTION, INCLUDING LITIGATION, AS MAY BE NECESSARY TO EFFECTUATE SAID AGREEMENT.
4. FIND THAT THIS TRANSACTION IS IN SETTLEMENT OF TITLE AND BOUNDARY PROBLEMS AND IS THEREBY EXEMPT FROM CEQA.

(Added 9/27/83)

CALENDAR PAGE	203.3
NOTE PAGE	2188



1965-83 PAGE 203-4
MINUTE PAGE 2189