

**MINUTE ITEM**

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

**Minute Item  
48**

12/14/04  
G10-08  
C. Fossum  
J. Lucchesi

**CALIFORNIA STATE LANDS COMMISSION**

**Regular Item 48:** Commissioners were asked to review the consistency of the timeshare component of the Woodfin Suites Hotel proposal with the public trust doctrine. After listening to staff reports and comments from the public, the Commission voted to approved the staff report as presented by 2 ayes and 1 abstention. (Chairman Westly left prior to voting on Item 48 and Commissioner Bustamante left after the vote.)

**The item was approved as presented by a 2-1 vote.**

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**CALENDAR ITEM**

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12/14/06

G10-08

C. Fossum

J. Lucchesi

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

**INTRODUCTION:**

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

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

**THE PUBLIC TRUST DOCTRINE:**

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

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

**TIMESHARES/FRACTIONAL OWNERSHIPS/ETC.:**

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

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

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

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

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

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

**WOODFIN SUITES HOTEL/TIMESHARE PROPOSAL:**

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

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

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

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

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

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

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

**LEGAL ANALYSIS:**

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

Inconsistency with the Public Trust Doctrine

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Inconsistency with the 1996 Attorney General's Opinion

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

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

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

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

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

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

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

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

**OTHER PERTINENT INFORMATION:**

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

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

**EXHIBITS:**

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

**RECOMMENDED ACTION**

IT IS RECOMMENDED THAT:

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

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

EXHIBIT A

**PUBLIC TRUST POLICY**

For

The California State Lands Commission

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

**Public Trust Doctrine**

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

- I. Lands under the ocean and under navigable streams are owned by the public and held in trust for the people by government. These are referred to as public trust lands, and include filled lands formerly under water. Public trust lands cannot be bought and sold like other state-owned lands. Only in rare cases may the public trust be terminated, and only where consistent with the purposes and needs of the trust.
- II. Uses of trust lands, whether granted to a local agency or administered by the State directly, are generally limited to those that are water dependent or related, and include commerce, fisheries, and navigation, environmental preservation and recreation. Public trust uses include, among others, ports, marinas, docks and wharves, buoys, hunting, commercial and sport fishing, bathing, swimming, and boating. Public trust lands may also be kept in their natural state for habitat, wildlife refuges, scientific study, or open space. Ancillary or incidental uses, that is, uses that directly promote trust uses, are directly supportive and necessary for trust uses, or that accommodate the public's enjoyment of trust lands, are also permitted. Examples include facilities to serve visitors, such as hotels and restaurants, shops, parking lots, and restrooms. Other examples are commercial facilities that must be located on or directly adjacent to the water, such as warehouses, container cargo storage, and facilities for the

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.

## 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.<sup>1</sup> 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 13<sup>th</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup>Institutes of Justinian 2.1.1.

<sup>2</sup>*Las Siete Partidas* 3.28.6 (S. Scott trans. & ed. 1932).

<sup>3</sup>*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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

## **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

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<sup>4</sup>*Martin v. Waddell* (1842) 41 U.S. (16 Pet.) 367, 410.

<sup>5</sup>*Pollard's Lessee v. Hagen* (1845) 44 U.S. (3 How.) 212, 228-29.

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

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

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."<sup>9</sup>

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

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

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

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

than exclusively private purposes. The Legislature cannot commit trust lands irretrievably to private development because it would be abdicating the public trust.<sup>10</sup> 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

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<sup>10</sup>*Illinois Central Railroad v. Illinois, supra*, at 452-53.

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

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

### **III. The Leasing of Tidelands**

A few principles established by the courts are instructive in analyzing under the public trust doctrine the leasing of public trust lands for particular uses. For example, it was settled long ago that tidelands granted in trust to local entities may be leased and improved if the leases and improvements promote uses authorized by the statutory trust grant and the public trust. Leases for the construction of wharves and warehouses and for railroad uses, i.e., structures that directly promote port development, were approved early in the 20<sup>th</sup> century.<sup>11</sup> 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.<sup>12</sup> Visitor-serving

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<sup>11</sup>*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.

<sup>12</sup>*Haggerty v. City of Oakland* (1958) 161 Cal.App.2d 407, 413-414.

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

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.<sup>14</sup>

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

<sup>14</sup>*National Audubon Society v. Superior Court*, *supra*, at p. 434.

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

Installations not directly connected with water-related commerce are appropriate trust uses when they must be located on, over or adjacent to water to accommodate or foster commercial enterprises. Examples include oil production facilities, freeway bridges and nuclear power plants.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> Therefore, uses that do not accommodate, promote, foster or enhance the statewide public's need for essential commercial services or their enjoyment tidelands are not appropriate uses for public trust lands. These would include commercial installations that could as easily be sited on uplands and strictly local or "neighborhood-serving" uses that

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

<sup>16</sup>*Carstens v. California Coastal Com., supra*, at p. 289.

<sup>17</sup>Joseph L. Sax, "The Public Trust in Stormy Western Waters," October 1997.

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

#### V. Mixed-Use Developments

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

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

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

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.

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<sup>19</sup>*Haggerty v. City of Oakland, supra*, at pp. 413-14.

<sup>20</sup>*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.<sup>21</sup>

#### 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.<sup>22</sup> In this context, the court noted that because the real or main purpose of the structure was to promote public trust uses,

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

<sup>22</sup>*Haggerty v. City of Oakland, supra*, at p. 413.

non-trust groups could also use the facility, but the non-trust uses must remain *incidental* to the main purpose of the structure.<sup>23</sup> 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.<sup>24</sup> 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

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<sup>23</sup>*Ibid.*

<sup>24</sup>*National Audubon Society v. Superior Court, supra*, at p. 440.

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

## VII. The Role of the Legislature

The Legislature is the representative of all the people and, subject to judicial review, is the ultimate arbiter of uses to which public trust lands may be put. The Legislature may create, alter, amend, modify, or revoke a trust grant so that the tidelands are administered in a manner most suitable to the needs of the people of the state.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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

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

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

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

*interfere with* (Long Beach) the uses and purposes of the granting statute.<sup>28</sup> 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.<sup>29</sup>

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

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

<sup>29</sup>*Illinois Central R.R. Co. v. Illinois, supra*, at pp. 452-54.

considered by the courts as tantamount to alienation.<sup>30</sup>

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.<sup>31</sup> 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

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<sup>30</sup>*Atwood v. Hammond, supra*, at p. 42; see also *Illinois Central R.R. Co. v. Illinois, supra*, at pp. 454-53.

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

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

### **VIII. Exchanges of Lands**

Situations where a local government or a private party acquires a right to use former trust property free of trust restrictions are rare.<sup>33</sup> 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

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<sup>32</sup>*Ibid.*

<sup>33</sup>*National Audubon Society v. Superior Court, supra*, at p. 440.

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

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

State of California

Department of Justice

## Memorandum

To : N. GREGORY TAYLOR  
Assistant Attorney General  
Los Angeles

Date : December 1, 1982

File No.:

From : Office of the Attorney General  
LOS ANGELES

-- San Diego

Subject: TIMOTHY R. PATTERSON, Deputy Attorney General

TIMESHARE PROJECTS ON TIDELANDS

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

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

I. TIMESHARING DEFINED

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

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

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

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

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

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

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

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

### A. The Public Nature of Permitted Uses of Tidelands

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

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

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

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

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

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

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

B. Residential Use of Trust Land Is Improper

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

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

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

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

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

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

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

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

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the described lands have in fact been developed with permanent sites for mobilehomes which can no longer be considered public guest housing facilities.

"(c) Private residential use of these lands is in conflict with the Legislature's intent as declared in the legislative grants.

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

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

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

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

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

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

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

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

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

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

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

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

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

### III. THE NATURE OF TIMESHARING: PUBLIC OR PRIVATE?

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

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

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

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

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

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

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

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

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

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

Timeshare as commercial use and not residential

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

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

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

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

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

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

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

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

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

1. Improve the environmental quality of the existing shoreline consistent with adjacent developments;
2. Promote public access to the coast providing enhanced aesthetic appeal and waterfront promenades;
3. Maintain and strengthen the unique mix of commercial and water-oriented recreational activities; and
4. Protect the property and investments from shoreline erosion;

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

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

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

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

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

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

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

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

#### **Timeshare Option Conformance with the California Coastal Commission**

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

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

#### Coastal Access Enhancement

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

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

#### Visitor and Recreation Serving Enhancements

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

#### *Whether timeshare conflict with allowable uses on state tidelands?*

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

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

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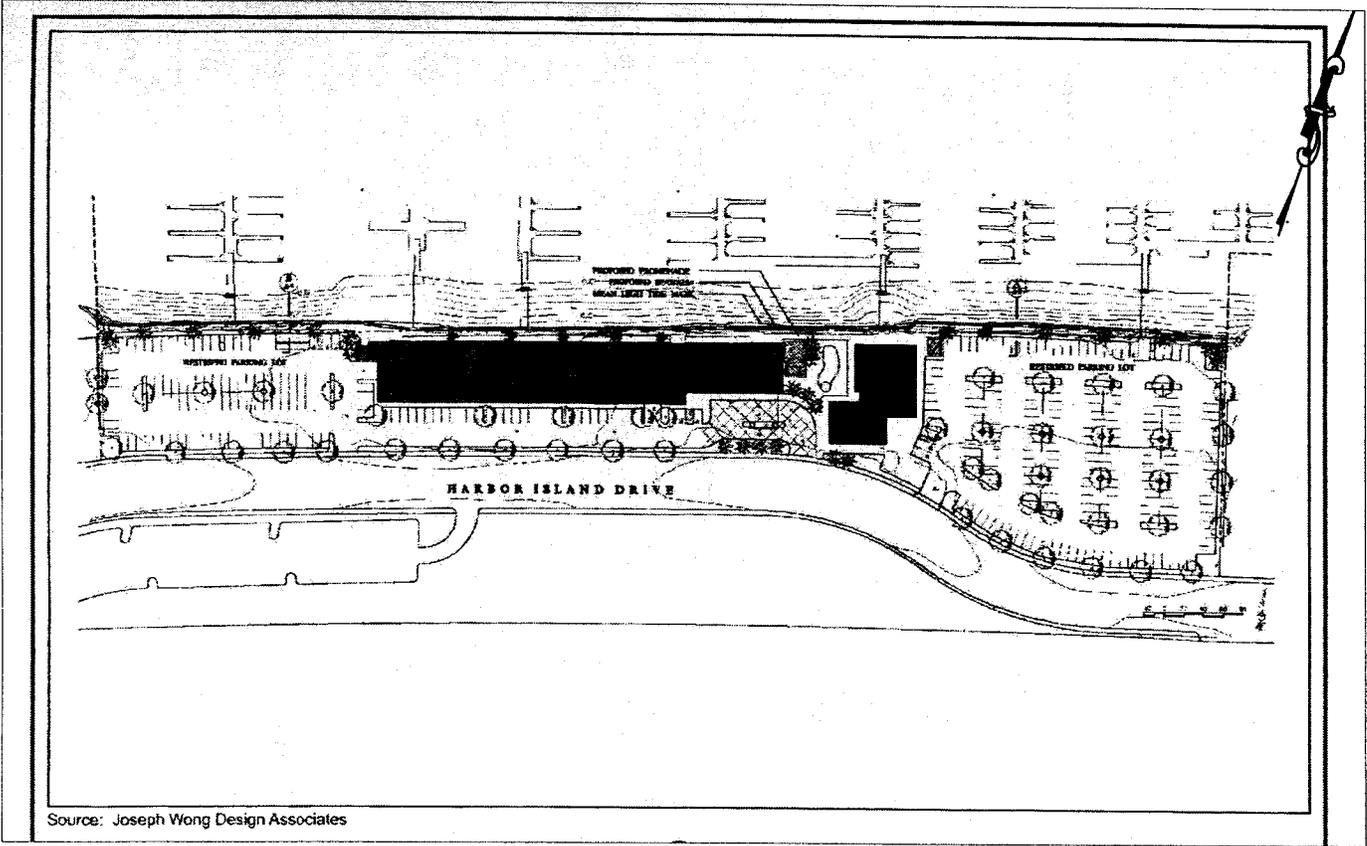
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entire north side of project site. Inclusion of a timeshare option would have no additional impacts to land use, water use, or coastal access. Therefore, the inclusion of the timeshare would not conflict with the existing allowable uses on state tidelands.

NO SCALE

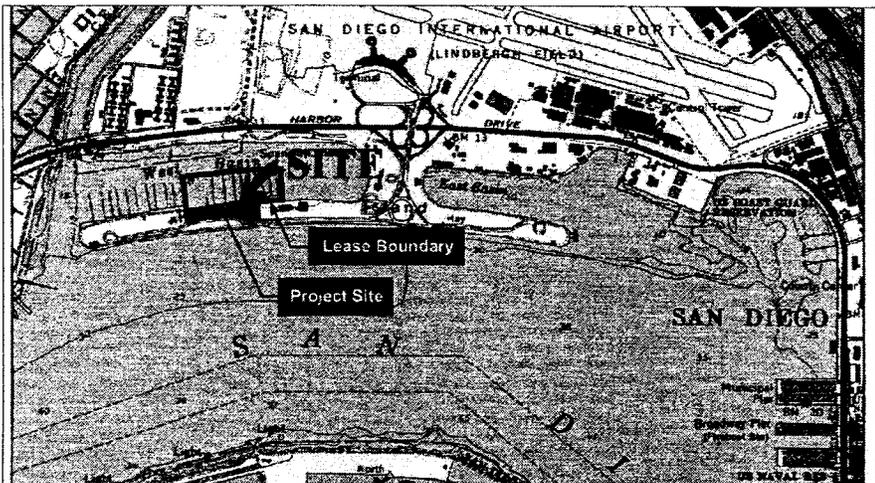
# SITE



Source: Joseph Wong Design Associates

NO SCALE

# LOCATION



MAP SOURCE: USGS QUAD

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

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## Exhibit H

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Woodfin Suites Hotel/  
Timeshare Proposal  
Harbor Island  
City of San Diego  
County of San Diego



MJF 10/06/06