

**CALENDAR ITEM
C47**

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CONSIDER A LAND EXCHANGE AGREEMENT BETWEEN THE STATE OF CALIFORNIA, ACTING BY AND THROUGH THE STATE LANDS COMMISSION, AND THE CITY OF SAN DIEGO, BOTH AS A TRUSTEE AND A MUNICIPALITY, OF CERTAIN LANDS IN MISSION BAY, CITY OF SAN DIEGO, SAN DIEGO COUNTY

PARTIES:

City of San Diego, as municipality

City of San Diego, as trustee

State Lands Commission

PROPOSED LAND EXCHANGE AGREEMENT:

The parties to the proposed Land Exchange Agreement (Agreement) are the State of California ("State"), acting by and through the California State Lands Commission ("Commission"), the City of San Diego ("City"), both as trustee pursuant to, *inter alia*, Chapter 142 of the Statutes of 1945, as amended by Chapter 1455, Statutes of 1955, and as a municipality. The Agreement will effectuate a land exchange, terminating the State's sovereign public trust interests in a certain filled parcel ("Trust Termination Parcel") and conveying the Trust Termination Parcel to the City in exchange for acquiring three unfilled parcels and impressing those parcels with the Public Trust ("Public Trust Parcels"). The location of the Public Trust and Trust Termination Parcels are depicted on Exhibit A.

As part of the Agreement, the State will receive the Public Trust Parcels which will take on the legal character of sovereign tide and submerged lands and be impressed with the common law Public Trust for fisheries, navigation, commerce and other recognized Public Trust purposes. The Public Trust Parcels will then be leased back to the City for

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management until such time as the City's statutory trust grant can be amended to include the Public Trust Parcels.

Specifically, the terms of the proposed Agreement provide that:

1. The City, as trustee, will quitclaim its interest in the Trust Termination Parcel to the Commission.
2. The City, as municipality, will quitclaim its interest in the Public Trust Parcels to the Commission.
3. The Commission will then quitclaim its interests, free of any public trust interest, in the Trust Termination Parcels to the City, as municipality.
4. The Commission will then enter into a 49-year lease with the City for the management of the Public Trust Parcel or until such time as the City's statutory trust grant can be amended to include the Public Trust Parcel and exclude the Trust Termination Parcels.

BACKGROUND:

The Subject Property includes four parcels of land located near Mission Bay, just south of Nimitz Boulevard/I-8 Freeway in San Diego, San Diego County. The Trust Termination Parcel, which is improved with the Barnes Tennis Center or the Youth Tennis Center, consists of approximately 12.9 acres. The three Public Trust Parcels, commonly known as Famosa Slough, consist of approximately 31.4 acres.

The Trust Termination Parcel and the Public Trust Parcels were once tidal lands in Mission Bay within the approximately 47,323 acres of the former Presidio of San Diego, founded July 16, 1769. One of the conditions of the Treaty of Guadalupe Hidalgo that terminated the Mexican-American War of 1846-1848 was that the United States honor pre-existing real property ownership. Art. VIII, 9 Stat. 929. In order to uphold the treaty obligations, the United States Congress, by the Act of March 3, 1851, created the federal Board of Land Commissioners to determine validity of claims to title. Those individuals or entities that could prove title, received a federal patent confirming ownership. The former Presidio of San Diego was patented by the Board of Land Commissioners as the Pueblo of San Diego on April 4, 1876, Patent #576.

The boundary between sovereign tide and submerged lands and privately owned uplands was initially litigated in the mid-1930's and culminated with the San Diego Superior Court permanently fixing the boundary in 1941. See *People v. Arnold* (1941) San Diego Superior Court Case #84864. Prior to the final judgment, the parties agreed to specific shifts in the location of the boundary and those compromises were reflected in the final judgment. The Department of State Parks, predecessor to the Department of Parks and Recreation, represented the State of California's interest as the case was

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initiated prior to the formation of the Commission in 1938 and because, by legislation, the Department of State Parks was the entity responsible for the state's interest in Mission Bay. See Chapter 811, Statutes of 1929, supplanting Chapter 54, Statutes of 1923; Chapter 93, Statutes of 1939, page 1163, repealed by Chapter 215, Statutes of 1969.

In 1852, the United States Army erected a dike to prevent the San Diego River from drifting south from Mission Bay, originally called False Bay, into the San Diego Bay, which likely was in the vicinity of the Trust Termination Parcel and the Public Trust Parcel. Subsequently, in the 1920's, the initial river control project was undertaken by the City. The initial river control project was a precursor to the current flood control channel that now serves as the northern boundary of the Subject Property. Although it is not precisely known when the Trust Termination Parcel was filled, based on the facts in *People v. Arnold* and other evidence, including historic photos, it likely occurred sometime between the 1930's and the 1950's.

The boundary line that was created in *People v. Arnold* is generally referred to as the Arnold Line. As a result of 150 years of manipulation of Mission Bay, the Arnold Line, which was intended to delineate sovereign tide and submerged lands from private uplands, is not consistent with the current conditions. The Trust Termination Parcel is located waterward of the Arnold Line; the Public Trust Parcels are located landward of the Arnold Line.

The dispute between the City and the Commission arose from the use of the Trust Termination Parcel. In 1992, the California Coastal Commission ("CCC") issued Coastal Development Permit ("CDP") 6-91-306 to construct a tennis facility on the Trust Termination Parcel. Special Condition #5 of CDP 6-91-306 required the City to obtain a written determination of jurisdiction from the Commission. The CDP was issued after Commission staff wrote a letter consenting to the development on the basis that a land exchange agreement similar to this proposed Agreement was being negotiated between Commission staff and City staff. Ultimately, the land exchange contemplated in the early 1990's never occurred.

Commission staff has consistently maintained that a tennis facility, such as the one located on the Trust Termination Parcel, is not a use consistent with the common law Public Trust Doctrine or the City's statutory trust grant that require that sovereign land be used, among other requirements, in such a manner as to provide a statewide public benefit and be limited to those uses that are either water-dependent or water-related. Commission staff maintains that the use of tennis courts on sovereign land is a local, not statewide, use and is neither water-dependent nor water-related. *Long Beach v. Morse* (1947) 31 Cal. 2d 254; *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199. The

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City's staff disputes that interpretation and maintains that the tennis courts are a use consistent with the common law Public Trust Doctrine and the City's statutory trust grant.

The City has recently proposed further improvements to the tennis facility located on the Trust Termination Parcel and those improvements require the issuance of a new Coastal Development Permit. In 2008, the CCC approved Coastal Development Permit #6-06-154 for the further improvements to the tennis facility conditioned upon the Commission's consent that either the use of the public trust lands for a tennis facility are consistent with the Public Trust Doctrine and the City's statutory trust (Special Condition #3) or that no state sovereign lands are included in the project. As a result of Special Condition # 3, land exchange negotiations resumed between the City and the Commission. The result of those negotiations is the proposed Agreement.

LEGAL REQUIREMENTS:

Pursuant to Public Resources Code ("PRC") section 6307, the Commission is authorized, under certain limited circumstances, to terminate the State's public trust interests and enter into a compromise title settlement and land exchange agreement. Because the City, as a trustee or as a municipality, does not have the legal authority to terminate the State's public trust interest in trust property, the Commission must take any State's title interests in the Trust Termination Parcel, which are to be subsequently exchanged for any interests in the Public Trust Parcels and, as part of the exchange, terminate the public trust interest on the Trust Termination Parcel. The Commission, in order to comply with Article X, Section 3 of the California Constitution and to approve the proposed Agreement, must make the following requisite findings pursuant to PRC section 6307:

- (1) The exchange is for one or more of the following purposes:
 - a. To improve navigation or waterways;
 - b. To aid in reclamation or flood control;
 - c. To enhance the physical configuration of the shoreline or trust land ownership;
 - d. To enhance public access to or along the water;
 - e. To enhance waterfront and nearshore development or redevelopment for public trust purposes;
 - f. To preserve, enhance, or create wetlands, riparian or littoral habitat, or open space; and/or
 - g. To resolve boundary or title disputes.
- (2) The lands or interests in lands to be acquired in the exchange will provide a significant benefit to the public trust;

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- (3) The exchange does not substantially interfere will public rights of navigation and fishing;
- (4) The monetary value of the lands or interests in lands received by the trust in exchange is equal to or greater than that of the lands or interests in land given by the trust in exchange;
- (5) The lands or interests in land given in exchange have been cut off from water access and are in fact no longer tidelands or submerged lands or navigable waterways and are relatively useless for public trust purposes;
- (6) Mineral interests are not being exchanged as part of this Agreement; and,
- (7) The exchange is in the best interest of the state.

ANALYSIS AND STAFF RECOMMENDATION:

Commission staff has reviewed the information supporting the proposed Agreement including appraisals, surveys, title reports, and other studies conducted for the proposed Agreement. Approval of this Agreement would end a long running dispute over the use of the Trust Termination Parcel and provide the City's statutory trust with land beneficial to the public trust.

Staff recommends the Commission approve the proposed Agreement for several reasons. The approval of this Agreement will settle a long-standing title dispute of inconsistent public trust uses on legislatively granted public trust lands. As a result of the proposed Agreement, the Public Trust Parcels will be accepted into the trust as sovereign land, and the public access and wetland habitat located on the Public Trust Parcels will be preserved in perpetuity. The Public Trust Parcels are more suitable for public trust uses as the lands are a restored tidal urban wetland that is habitat for wildlife in addition to acting as a filter for runoff water flowing into Mission Bay, another public trust asset. The Trust Termination Parcel has been filled, is no longer in fact tidelands, submerged land or navigable waterways, is cut off from water access and is relatively useless for public trust purposes based on its use as a tennis facility.

Further, the monetary value of the Public Trust Parcels is equal to or greater than the public trust interests in the Trust Termination Parcel. Staff has reviewed appraisals (on file at the Commission's Sacramento Office), title and boundary evidence, applicable case law and other information prepared to analyze the public trust claims and monetary values of the Trust Termination Parcel and the Public Trust Parcels. Staff has reached an independent conclusion regarding the monetary values of these properties based on its analysis, including the above described information. Staff concluded that the monetary value of land or interests in the Public Trust Parcels is equal to or greater than the monetary value of the sovereign interests in the Trust Termination Parcel.

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Since litigation of this matter would likely be protracted and costly with uncertain results, the Parties to the Agreement consider it expedient, necessary, and in the best interests of the City and State to resolve this dispute through a land exchange agreement thereby avoiding the substantial costs and uncertainties of litigation.

As described in the preceding paragraphs, the facts support each of the necessary findings the Commission must make, including that this Agreement is in the best interests of the state. Commission staff and the Attorney General's Office have reviewed the proposed Agreement and believe all necessary legal elements have been met. Staff therefore recommends that the Commission approve the Agreement, in substantially the form on file at the Commission's Sacramento Office and authorize its execution and the execution and recordation of all documents necessary to implement it, including the issuance of a 49-year lease to the City.

OTHER PERTINENT INFORMATION:

1. The State, acting by and through the Commission, is authorized under Division 6 of the Public Resources Code, and specifically pursuant to section 6307 of such code, to enter into land exchange agreements.
2. Pursuant to section 6501.1 of the Public Resources Code, the Commission has the authority to lease sovereign lands for specified purposes.
3. The City of San Diego is the State's trustee of the legislatively granted sovereign tide and submerged lands pursuant to, *inter alia*, Chapter 142, Statutes of 1945 as amended by Chapter 1455, Statutes of 1955.

Land Exchange Agreement:

4. On June 12, 2008, the California Coastal Commission ("CCC") granted Permit #6-06-154 for this project under its certified regulatory program (Cal. Code Regs., tit. 14, section 15251(c)).
5. Staff has reviewed the document and determined that the conditions, as specified in Title 14, California Code of Regulations, section 15253 (b), have been met for the Commission to use the environmental analysis document certified by the CCC as a Negative Declaration equivalent in order to comply with the requirements of CEQA.

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49-Year Lease of Public Trust Parcels:

6. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines (Cal. Code Regs., tit. 14, section 15061), the staff has determined that this activity is exempt from the requirements of CEQA as a categorically exempt project. The project is exempt under Class 1, Existing Facilities; Title 14, California Code of Regulations, section 15301.

Authority: Public Resources Code section 21084 and Title 14, California Code of Regulations, section 15300.

7. This activity involves lands which have NOT been identified as possessing significant environmental values pursuant to Public Resources Code sections 6370, et seq. However, the Commission has declared that all lands are "significant" by nature of their public ownership (as opposed to "environmentally significant"). Since such declaration of significance is not based upon the requirements and criteria of Public Resources Code sections 6370, et seq., use classifications for such lands have not been designated. Therefore, the finding of the project's consistency with the use classification as required by Title 2, California Code of Regulations, section 2954 is not applicable.

EXHIBIT:

- A. Location and Site Map of Public Trust and Trust Termination Parcels

IT IS RECOMMENDED THAT THE COMMISSION:

CEQA FINDINGS:

Land Exchange Agreement:

Find that an environmental analysis document, California Coastal Commission ("CCC") permit #6-06-154, was adopted for this Project by the CCC under its certified program (Cal. Code Regs., tit. 14, section 15251(c)), and that the California State Lands Commission has reviewed and considered the information therein and concurs in the CCC's determination.

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49 Year Lease for Public Trust Parcels:

Find that the activity is exempt from the requirements of CEQA pursuant to Title 14, California Code of Regulations, section 15061 as a categorically exempt project, Class 1, Existing Facilities; Title 14, California Code of Regulations, section 15301.

AUTHORIZATION:

1. Find that, with respect to the proposed Land Exchange Agreement, which findings shall be effective upon recordation as provided in the Agreement:
 - A. The Public Trust Parcels provide significant benefits to the public trust including the preservation of a tidal urban wetland and public access, uses consistent with the common law Public Trust Doctrine.
 - B. The exchange provided for in this Agreement does not substantially interfere with public rights of navigation and fishing, but rather will enhance the public's rights of access, fishing, and ecological preservation in the Public Trust Parcels.
 - C. The monetary value of the Public Trust Parcels to be conveyed to the State by the City is equal to or greater than the value of the Trust Termination Parcel to be quitclaimed by the State to the City.
 - D. The Trust Termination Parcel, consisting of 12.93 acres being relinquished by the State, is cut off from water access and no longer is in fact tidelands or submerged lands or navigable waterways, by virtue of being filled or reclaimed, and is relatively useless for public trust purposes.
 - E. This Agreement is in the best interests of the State by expanding the total acreage of lands protected under public trust; removing a contested use of sovereign land at no expense to the State; and enhancing protections of the Public Trust

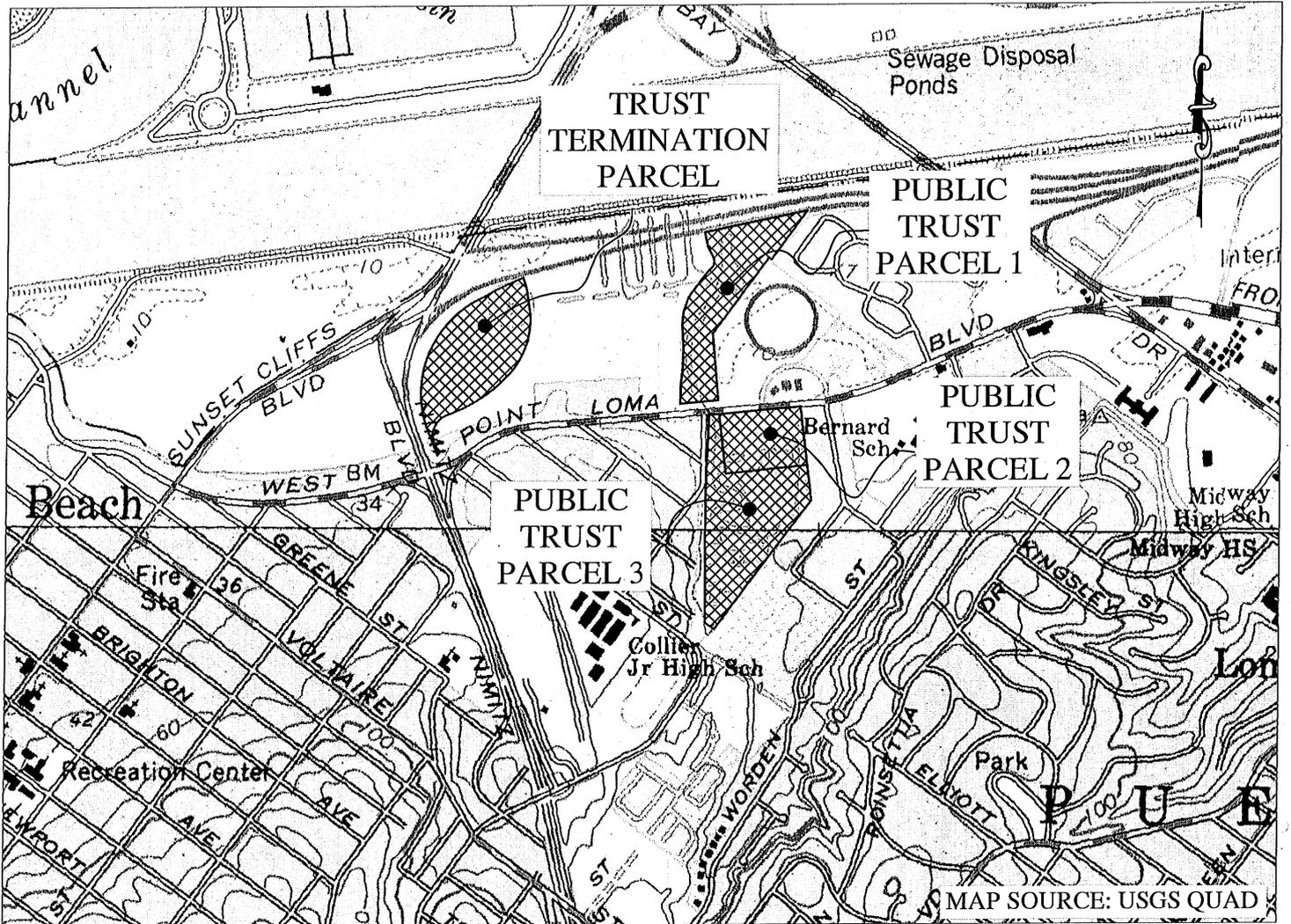
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Parcels for preserving habitat and open space and other public trust consistent uses.

- F. This Agreement shall release any and all public trust claims from the Trust Termination Parcel that is being conveyed by the State to the City and shall impress the public trust onto the Public Trust Parcels that are being received by the State from the City.
 - G. The exchange provided for in this Agreement is to enhance public access to and along the water and to preserve, enhance and create wetlands, riparian or littoral habitat and open space.
 - H. It is the intent of this Agreement, that to the extent that there are mineral rights present in the Subject Property, those rights shall be transferred with the corresponding surface estate.
2. Find that the lands to be conveyed to the State of California, acting by and through the Commission, are to be accepted as public trust lands for the benefit of the people of the State of California, to be held by the State of California for public trust purposes.
 3. Approve and authorize the execution, acknowledgment, and recordation of the Land Exchange Agreement and associated deeds and acceptances and leases on behalf of the Commission, in substantially the form of the copy of such agreement on file with the Commission.
 4. Approve and authorize the issuance of a 49-year General Lease - Public Agency Use for the Public Trust Parcels to the City of San Diego, as Trustee, as provided for in the Agreement.
 5. Authorize and direct the staff of the Commission and/or the California Attorney General to take all necessary or appropriate action on behalf of the California State Lands Commission, including the execution, acknowledgment, acceptance, and recordation of all documents as may be necessary or convenient to carry out the Land Exchange Agreement; and to appear on behalf of the Commission in any legal proceedings relating to the subject matter of the Agreement.

NO SCALE

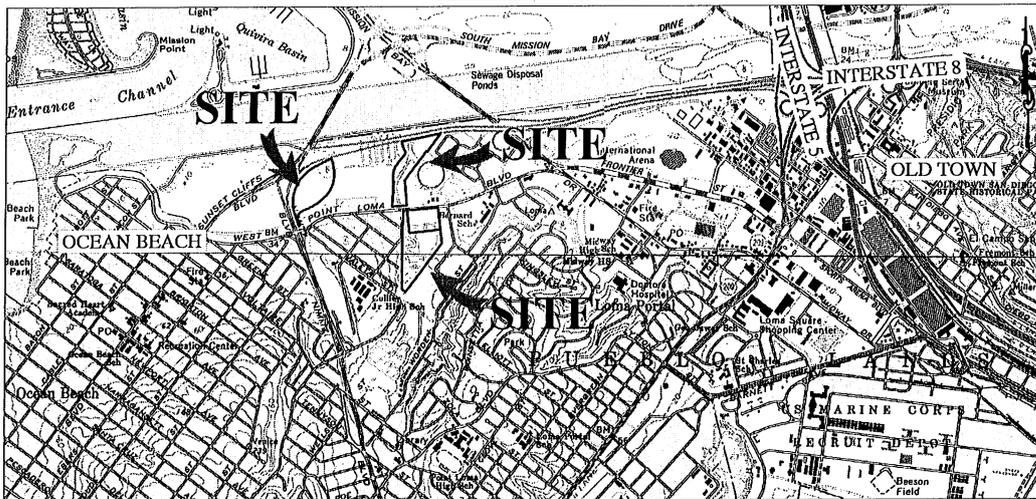
SITE



SUBJECT PROPERTY
MISSION BAY EXCHANGE AGREEMENT

NO SCALE

LOCATION



MAP SOURCE: USGS QUAD

Exhibit A

W 26347
 TITLE SETTLEMENT
 CITY OF
 SAN DIEGO
 SAN DIEGO COUNTY



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.