

**CALENDAR ITEM
C73**

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08/19/15

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R. Boggiano

S 37

J. Rader

**CONSIDER A BOUNDARY LINE AGREEMENT INVOLVING REAL PROPERTY
IN AND ADJACENT TO NEWPORT BAY AT 2808 LAFAYETTE AVENUE,
CITY OF NEWPORT BEACH, ORANGE COUNTY**

PARTIES:

2808 Lafayette Property, LLC

State of California, acting by and through the State Lands Commission

City of Newport Beach, as Trustee

PROPOSED BOUNDARY LINE AGREEMENT:

The parties to the proposed Boundary Line Agreement ("Agreement") are the State of California, acting by and through the Commission ("Commission"), the City of Newport Beach, as trustee of tide and submerged lands pursuant to Chapter 74, Statutes of 1978, as amended ("Trustee"), and 2808 Lafayette Property, LLC, a California Limited Liability Company, which is wholly owned by Mr. John M. Morehart and Ms. Lisa Cervantes-Morehart ("Morehart").

The purpose of the Agreement is to settle a boundary dispute concerning certain lands and to permanently fix the location of the boundary between privately owned uplands and publically owned sovereign lands. The Subject Property includes approximately 0.138 acre of land bounded by Lafayette Avenue on the west, the Rhine Channel on the east, 29th Street on the north, and 28th Street/Villa Way on the south. The Subject Property is shown for reference purposes on Exhibit A.

The uplands are owned in fee by Morehart and the sovereign lands are held by the Trustee subject to its statutory trust grant and the common law Public Trust Doctrine. Pursuant to the Agreement, the parties will establish and permanently fix the ordinary high water mark. In addition, Morehart will grant a public trust easement to the Commission and the Trustee. Finally, the Parties agree to specific terms related to a potential future lease by either the Trustee or Commission for the water-covered portion of lands located landward of the agreed boundary line.

CALENDAR ITEM NO. **C73** (CONT'D)

BACKGROUND:

Lower Newport Bay was formed by natural accretion of sand material carried by the Santa Ana River during flood stages over hundreds of years prior to statehood. The location of the entrance channel to Lower Newport Bay was dredged in 1919. The Santa Ana River continued to discharge into Lower Newport Bay until 1921 when the County of Orange completed the construction of a new river outlet to the Pacific Ocean in the vicinity of 57th Street in the city of Newport Beach.

In 1875, the U.S. Coast & Geodetic Survey surveyed the topography in the vicinity of the Newport Bay (Register No. 1875). In 1889, the Government Land Office surveyed a meander line of the swamp and overflowed lands in Newport Bay in order to determine which lands were suitable for sale as Swamp and Overflowed Lands.

On May 16, 1892, the upland portion of the Subject Property was sold as 420.85 acres of Swamp and Overflowed land (Swamp and Overflowed Location 3089, Lot 4, Section 33, T6S, R10W), with no minerals reserved, to James McFadden pursuant to Title 8 of the Political Code. The Subject Property was also part of the Swamp Land List 106 dated July 22, 1902, and granted to California from the U.S. Government.

In 1907, the Lancaster's Addition subdivision was created by the recordation of a subdivision map. The waterward edge of the lots is where the U.S. Army Corps of Engineers subsequently located the bulkhead lines.

In 1912, the U.S. Army Corps of Engineers surveyed Newport Bay for harbor and navigation purposes. On July 27, 1916, an Act of the U.S. Congress secured the establishment of the harbor lines in Lower Newport Bay. The harbor lines were subsequently revised on May 2, 1936, following the completion of improvements to Lower Newport Bay by the U.S. Government.

The Rhine Channel was dredged sometime between 1915 and 1923 and today is maintained by the Trustee in what appears to be the same configuration as when it was originally dredged. In 2011, the Trustee conducted maintenance dredging in the Rhine Channel using tidelands trust monies to remove contaminated sediment that had accumulated as part of the historical fishing operations along the Rhine Channel.

The City brought several quiet title actions in the Orange County Superior Court against upland parcels of land in Lower Newport Bay in the 1920s, including *City of Newport Beach v. Newport Bay Dredging Company, et al.* (Case No. 23685). The cases were decided after the dredging and filling of Newport Bay were

CALENDAR ITEM NO. **C73** (CONT'D)

completed and set the boundary line between the uplands and tidelands at the bulkhead line. The state was not a party to these quiet title actions. However, pursuant to the Statutes of 1929, Chapter 142, the California Legislature confirmed the court decrees establishing the ordinary high tide line for the various upland properties against which the City brought actions.

In 1982, the Legislature added section 7552.5 to the Public Resources Code, which provides that areas patented as swamp and overflowed that become inundated with water as a result of dredging are impressed with a navigational easement. There is a bona fide dispute between the Commission and Morehart as to whether or not the 1982 statute can create a navigational easement over lands that were dredged prior to 1923.

The Subject Property appears to be one of the only properties in Lower Newport Bay where a bulkhead was not constructed at the bulkhead line. Instead of a bulkhead, there was a large pier that extended from the onshore structure to the bulkhead line. Over the decades, it appears that the shape of the pier was modified. The pier collapsed about a decade ago and Morehart is in the process of removing the rubble and rebuilding the pier. The California Coastal Commission first questioned the extent the state's sovereign interest in the parcel when it issued Morehart the Coastal Development Permit to rebuild the pier.

LEGAL REQUIREMENTS:

Pursuant to Public Resources Code section 6357, the Commission is authorized to establish by agreement the ordinary high water mark of the swamp, overflowed, marsh, tide, or submerged lands of this state, whenever it is deemed expedient or necessary. Under common law, the Commission may enter into a boundary line agreement to permanently fix the boundary between sovereign and private land only after reasonable attempts have been made to locate the boundary line and the proposed line is based on those attempts. (*City of Long Beach v. Mansell* (1970) 3 Cal. 3d 462, 480.)

ANALYSIS AND STAFF RECOMMENDATION:

In the interest of settlement, the Commission and Morehart have both worked diligently, by reviewing various maps, surveys, reports, and court cases, including *City of Newport Beach v. Newport Bay Dredging Company, et al.* (Case No. 23685), in an effort to ascertain the location of the ordinary high water mark prior to the dredging and filling at the Subject Property. The Parties disagree as to what survey represents the best evidence of the last natural location of the ordinary high water mark at the Subject Property and as to the evidentiary value of each survey. Commission staff believes that the waterward property line of the Lancaster's Addition subdivision is the best evidence of where the ordinary high water mark was prior to dredging of the channel. In 1964, the Commission

CALENDAR ITEM NO. **C73** (CONT'D)

entered into Boundary Line Agreement 54 one block from the Subject Property, utilizing this same boundary line. Therefore, the proposed Agreement is consistent with other boundary lines fixed in the area. Further, the bulkhead line has been used repeatedly by the court to establish boundaries within Newport Bay.

Commission staff analyzed all the evidence available concerning the site in question, including the title history, title reports, historic use reports, surveys, survey instructions, maps, historic photographs, applicable case law, prior court cases and boundary line agreements, and other useful information in order to determine the best evidence of the location of the boundary between sovereign lands and privately-owned uplands. Since litigation of this matter would likely be extremely protracted and costly with highly uncertain results, the Parties to the Agreement consider it expedient, necessary, and in the best interests of the Trustee and state to resolve this dispute through the proposed Agreement and thereby avoid the substantial costs and uncertainties of litigation.

Commission staff and staff of 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.

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 6357, to enter into boundary line agreements.
2. The City of Newport Beach is the state's trustee of the legislatively granted sovereign tide and submerged lands pursuant to, *inter alia*, Chapter 74 of the Statutes of 1978, as amended by Chapter 728, Statutes of 1994, Chapter 317, Statutes of 1997, Chapter 745, Statutes 2001, and Chapter 361, Statutes of 2004, as amended.
3. The staff recommends that the Commission find that this activity is exempt from the requirements of the California Environmental Quality Act (CEQA) as a statutorily exempt project. The project is exempt because it involves settlement of title and boundary problems.

Authority: Public Resources Code section 21080.11 and California Code of Regulations, Title 14, section 15282, subdivision (f).

CALENDAR ITEM NO. **C73** (CONT'D)

4. Morehart and the California Coastal Commission are in litigation (Case No. 30-2013-00647282-CU-WM-CJC) relating to special conditions in Coastal Development Permit (CDP) #5-11-178. One of the issues in the litigation is a requirement to irrevocably dedicate, construct, and maintain a public easement across the proposed bulkhead. The Superior Court has stayed the litigation to give the Commission and Morehart an opportunity to reach an agreement as to the location of sovereign land at the Subject Property.
5. The Agreement will terminate if Morehart does not receive all necessary approvals to allow the dredging of the area covered by the public trust easement within two years, unless the Commission and the Trustee agree to extend the deadline.

EXHIBIT:

- A. Location and Site Map

RECOMMENDED ACTION:

It is recommended that the Commission:

CEQA FINDING:

Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, Title 14, section 15061 as a statutorily exempt project pursuant to Public Resources Code section 21080.11 and California Code of Regulations, section 15282, subdivision (f), settlement of title and boundary problems.

AUTHORIZATION:

1. Approve and authorize the execution, acknowledgment, and recordation of the Boundary Line Agreement and associated deeds and acceptances on behalf of the Commission, in substantially the form of the copy of such agreement on file with the Commission.
2. 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 Boundary Line Agreement; and to appear on behalf of the Commission in any legal proceedings relating to this matter.

NO SCALE

SITE

EAST LINE OF BLOCK 425
OF LANCASTER'S ADDITION

APN 047-023-06
LOTS 5 & 6 OF BLOCK
425 OF LANCASTER'S
ADDITION

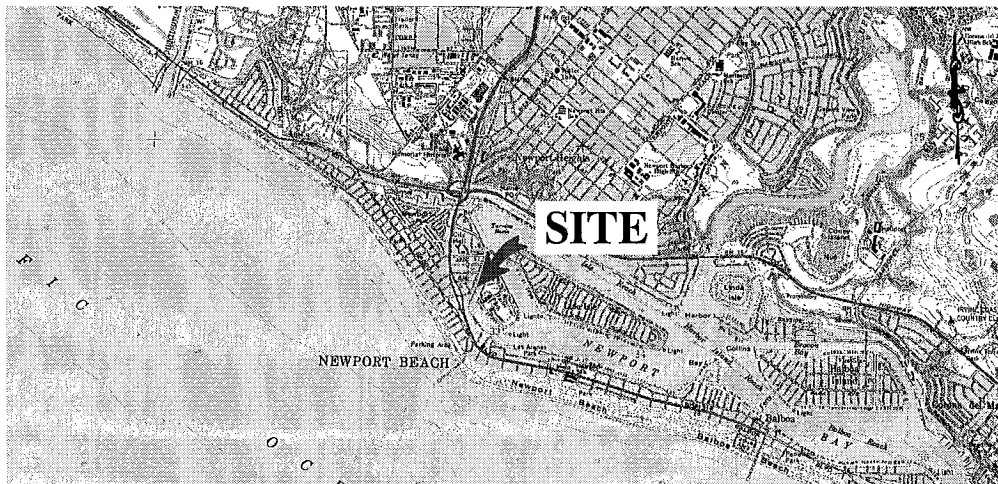
PROPOSED PUBLIC
TRUST EASEMENT

PROPOSED BLA LINE
RHINE CHANNEL

2808 LAFAYETTE ROAD, NEWPORT BEACH

NO SCALE

LOCATION



MAP SOURCE: USGS QUAD

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

Exhibit A

G09-02.11
2808 LAYFAYETTE
PROPERTY, LLC
APN 047-023-06
BOUNDARY LINE
AGREEMENT
ORANGE COUNTY



DJF 08/17/15