

MEMORANDUM OF LAW

DATE: July 15, 1994

TO: Naval Training Center Reuse Planning Committee

FROM: City Attorney

SUBJECT: Tideland Restrictions

INTRODUCTION

As a first step toward aiding the Reuse Planning Committee in developing a comprehensive land use plan for the reuse of the Naval Training Center ("NTC") property, Rick Engineering will be preparing an opportunities and constraints analysis and report. That report will analyze various physical and legal conditions impacting the property and project how those impacts will shape the planning process.

The City Attorney has been asked to analyze whether any of the NTC property is impressed with tideland trust restrictions imposing a constraint to development. This memorandum addresses that single issue.

1. PROTECTION OF TIDELANDS IN CALIFORNIA  
A. COMMON LAW PUBLIC TRUST DOCTRINE

The public trust doctrine developed in the common law as a way of protecting the public's right to use navigable waters and the lands underlying them for the purposes of navigation, commerce and fisheries. *People v. California Fish Co.*, 166 Cal. 576 (1913). These uses have been interpreted to also include such activities as fishing, hunting, bathing, swimming, boating, anchoring, and general recreational uses. *Bohn v. Albertson*, 107 Cal. App. 2d 738 (1951).

At common law, the public trust doctrine applied to navigable tidelands and submerged lands. Tidelands are "those lands lying between the lines of ordinary high and ordinary low tide, covered and uncovered successively by the ebb and flow thereof." *Marks v. Whitney*, 6 Cal. 3d 251 (1971).

The tidelands public trust doctrine is a creature of United States and California constitutional law and the status of affected property is fixed upon acquisition of sovereign title in the tideland property. *City of Los Angeles v. Venice Peninsula Properties*, 205 Cal. 3d 1522 (1988). Thus, California acquired title to the tidelands by virtue of its sovereign status when

admitted to the Union in 1850. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).

#### B. CONSTITUTIONAL PROTECTION OF TIDELANDS

The California Constitution contains provisions providing protection similar to the common law public trust doctrine with respect to protecting the public's access to and use of navigable waters. These sections were intended to prevent the lands adjacent to and under the navigable waters from being conveyed to private ownership in such a way as to interfere with the public rights. The sections provide:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, by inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction of this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

Cal. Const. art. X, Section 4.

All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay or inlet used for purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations . . . .

Cal. Const. art. X, Section 3.

Article X, Section 4 has been viewed as a constitutional statement of the common law public trust doctrine. See, *County of Orange v. Heim*, 30 Cal. App. 3d 694 (1973). With its concern for access to the waters, however, the section is not identical to the common law public trust doctrine. Article X, Section 3, with its restriction on sales of tidelands, is more restrictive than the common law doctrine.

2. 1911 CONVEYANCE OF SAN DIEGO BAY TIDELANDS PROPERTY

## FROM THE STATE TO THE CITY.

In the year 1911, pursuant to Stats. 1911, ch. 700, p. 1357, the State of California granted and conveyed to The City of San Diego all of the lands situated on the City of San Diego side of San Diego Bay lying and being between the line of mean high tide and the pierhead line in the bay.

Attached to this memorandum is a plat identifying the various deeds of conveyance subsequently conveyed from the City to the United States to make up what is now NTC. The NTC property conveyed by the State to the City as part of the aforementioned 1911 conveyance is contained within those areas covered in Deed Nos. 2, 3 and 4. The property in the area covered in Deed No. 1 was always above the mean high tide line and thus was never impressed with any tidelands trust restrictions.

Generally, absent special legislative findings indicating a clear intent to terminate the trust, when tidelands are conveyed by the Legislature to a local governmental body, the land remains subject to the public trust. *People v. California Fish Co.*, 166 Cal. 576 (1913). The tidelands which were conveyed by the State to the City in 1911 were conveyed with the express understanding that their distinctive and exceptional features existed for the benefit of the State as a whole, and that the citizens of California had a statewide, collective pursuit to cultivate and preserve these lands. The City, therefore, held the land subject only to the general objectives of the trust: to promote navigation, commerce and fishing.

As Grantee of tidelands property, the City acquired this property as trustee ("Trustee") under an express statutory trust in addition to the common law public trust. The relevant portions of the legislation reads as follows:

Whereas, since the admission of California into the Union, all tidelands along the navigable waters of this state and all lands lying beneath the navigable waters of the state have been and now are held in trust by the state for the benefit of all the inhabitants thereof for the purposes of navigation, commerce and fishing. . . .

. . . The City of San Diego shall have and there is hereby granted to it the right to make upon said premises all improvements,

betterments and structures of every kind and character, proper, needful and useful for the development of commerce, navigation and fishing, including the construction of all wharves, docks, piers, slips, and the construction and operation of a municipal belt line railroad in connection with said dock system.

Stats. 1911, ch. 700, p. 1357, as amended.

In *City of Long Beach v. Morse*, 31 Cal. 2d 254 (1947), the California Supreme Court articulated the limits of a Trustee's authority with respect to granted tidelands. The Court held that pursuant to a statutory trust grant of tidelands, the express provisions of the granting statute fix the uses which a tidelands Trustee may make of the granted tidelands and the income from these lands. The Court reasoned that a tidelands Trustee holds the lands in trust for all the people of the State and is restricted in the use of tidelands and their income to those purposes specified in the trust grant on the granted lands, purposes which are beneficial to the State as a whole.

Likewise, the California Attorney General has issued a number of legal opinions which have concluded that the Trustee is limited by the granting statute (the trust instrument) as to the uses authorized by the trustor (Legislature) (e.g., 34 Op. Att'y Gen. 89 (1959)). Thus, the Trustee may only use tidelands and tidelands trust funds for trust purposes set forth in the granting statute and may not authorize their use for other purposes. For this reason and because the 1911 statute did not authorize the use of the NTC property for national defense purposes, it was necessary for the Legislature, as administrator of the trust, to take action to modify the trust instrument before the City could convey the NTC tidelands property to the United States.

### 3. STATE AND LOCAL LEGISLATIVE ACTIONS AUTHORIZING THE CONVEYANCE OF NTC TIDELAND PROPERTY FROM THE CITY TO THE UNITED STATES.

#### A. 1916 CONVEYANCE (DEED NO. 3)

In 1913 the State Legislature authorized cities to convey tidelands and submerged lands to the United States "for public purposes of the United States" subject to approval by a majority vote of the electorate. Stats. 1913, ch. 250, p. 437.

In 1916 the City's electorate voted in favor of the following proposition:

Shall The City of San Diego grant to the United States for public purposes

five hundred acres of tidelands described in Document No. 103721, on file in the office of the City Clerk of said City, commonly referred to as Dutch Flats, and situated within the boundaries of said City?

The proposition was placed on the ballot by Council Resolution No. 22038, adopted November 6, 1916, which resolution authorized the transfer of the property to the United States "for public purposes of the United States."

This State and local authorization allowed for the conveyance of the 55.6 acres of tidelands described on the Attachment as being conveyed by Deed No. 3. This was the first parcel of tidelands at NTC transferred to the United States by a handwritten deed dated December 1, 1916. Deed No. 3 specifies that the property is granted "forever, for public purposes of the United States." The Deed No. 3 property was granted without monetary consideration.

B. 1919 CONVEYANCE (DEED NO. 2)

By Senate Concurrent Resolution No. 25 (May 4, 1917) the State Legislature authorized the City to convey about 500 acres of tidelands to the United States free of public trusts.F

The power of the Legislature to extinguish the trust is discussed below in section 4 of this memorandum.

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State Legislature in 1919 approved a City Charter amendment which created a City Harbor Commission to which general jurisdiction of the San Diego Bay tidelands was delegated. The Charter amendment was thereafter approved by the City voters. The Harbor Commission, on October 8, 1919, authorized and directed the Mayor and the City Clerk to grant certain tidelands to the United States of America. The resolution included a provision as follows:

The property above described is to be used exclusively by the United States Navy Department as a site for a naval training station.

By Resolution No. 24911, adopted by the Council on October 9, 1919, the Council authorized the conveyance of the tidelands to the United States specifying that the property "is to be used exclusively by the United States Navy Department as a site for a Naval Training Station."

By Resolution No. 25028, the City Council adopted a resolution submitting the question of "ratifying a certain deed granting to the United States of America tide lands in the bay of San Diego for the exclusive use of the United States Navy

Department as a site for a naval training station." The matter was, in fact, placed before the voters in November 1919 as follows:

Shall the indenture of deed . . .  
conveying tidelands to the United  
States . . . exclusive use of the  
United States Navy Department as a  
site for a naval training station be  
ratified . . . .

The measure passed and was the basis for the conveyance in 1919 of the approximately 76 acres of property described on the attachment as being the subject of Deed No. 2. Deed No. 2 contains a provision that the premises are granted "for the exclusive use of the United States Navy Department as a site for a naval training station." Deed No. 2 is dated October 9, 1919, and was granted without monetary consideration.

C. 1933 CONVEYANCE (DEED NO. 4)

In 1929, the State Legislature passed Stats. 1929, ch. 808, which authorized the grant of any tidelands to the United States for public or governmental purposes, and confirmed all previous grants to the United States.

At an election held on November 4, 1930, the City electorate authorized fee transfer pursuant to the following ballot language:

Shall The City of San Diego  
grant to the United States of America  
certain tide lands on the north side  
of San Diego Bay between the bulkhead  
line as established by the United  
States War Department in February,  
1912, and the pierhead line, as the  
same has been or may hereafter be  
established by the United States, and  
between the prolongation of the  
northwesterly line of Bean Street and  
the prolongation of the  
northeasterly line of Lowell Street,  
in exchange for certain portions of  
the tide lands now occupied by the  
Marine Corps Base, lying between the  
easterly boundary thereof and the  
prolongation of the northwesterly  
line of Bean Street?

On February 16, 1931, the Board of Harbor Commissioners adopted a resolution authorizing the Mayor and the City Clerk to convey certain tidelands to the United States of America

reflecting that the conveyance was pursuant to the above described act of the State Legislature authorizing the conveyance "for public or governmental (including military or naval) purposes."

By Resolution No. 55903 the City Council, on February 16, 1931, authorized the Mayor and City Clerk to execute a deed conveying certain tidelands to the United States. This resolution also reflected that the conveyance was made pursuant to the authorization of the State Legislature authorizing such grants to the United States "for public or governmental (including military or naval) purposes."

In June 1933, the United States Congress enacted House Resolution ("H.R.") 1767 authorizing the Secretary of the Navy to accept certain City tidelands, and to transfer to the City in exchange, certain other lands previously contained within the Marine Corps base. H.R. 1767 specified that the property to be conveyed to the Navy consists of "lands being desired by the Navy Department for national defense and for use in connection with existing naval activities."

The actual conveyance, which occurred in 1933, is depicted on the attachment as the subject of Deed No. 4. Deed No. 4 is a deed dated August 3, 1933, from The City of San Diego to the United States of America of approximately 95 acres. Deed No. 4 involves other parcels outside of the NTC area as well and was part of an exchange of properties with the United States. The deed indicates that the property is granted "forever for national defense and the uses and purposes of the United States." The portion of the property in the NTC area was described as encompassing approximately 95 acres between the "bulkhead line" as established in February 1912 and the "pierhead line" which was established as of February 1912. The deed also, however, referred to the property conveyed as extending to wherever the "pierhead line" was subsequently established. The Navy thereafter placed considerable fill material which resulted in the addition of another 130.5 acres to the conveyance, and a new "combined pierhead and bulkhead line."

#### 4. POWER OF THE STATE LEGISLATURE TO EXTINGUISH THE TIDELANDS TRUST WHEN CONVEYING PROPERTY

Generally, when tidelands are conveyed by the Legislature to a local governmental body, the land remains subject to the public trust. However, the courts have long recognized that as administrator of the trust it is within the prerogative of the Legislature to extinguish or terminate the tidelands trust as to a particular portion of affected property if the Legislature determines that such an action would not impair trust purposes and would promote the overall interest of the beneficiaries of

the trust (the people of the state of California). See, *People v. California Fish Co.*, 166 Cal. 576 (1913); *Atwood v. Hammond*, 4 Cal. 2d 31, 41 (1935); *City of Long Beach v. Mansell*, 3 Cal. 3d 462 (1970). For instance, it was noted by the court in *California Fish Co.*, 166 Cal. at 595, that the majority of what is now San Francisco's downtown business district is situated on fill that was once impressed with tidelands trust restrictions. However, the Legislature extinguished the trust, thus permitting the conveyance of that land to private parties for development.

Notwithstanding the recognized power of the Legislature to terminate the trust, courts today have generally looked unfavorably on claims that the public trust was extinguished by a conveyance of title. As the population of California has expanded over the last 60 years, putting more demands upon the limited tideland and navigable water resources of the state, the courts have concurrently evolved a stricter standard for the Legislature to extinguish the trust. In *City of Long Beach* (1970), the Court articulated a stringent three-part test to determine the circumstances in which sovereign tidelands could be freed of the public trust:

- (1) The lands in question must be found by the Legislature to be valueless for trust purposes.
- (2) Those lands must be dedicated to some "highly beneficial" public purpose.
- (3) The property over which the trust is to be extinguished must represent "a residual product of the larger program-'a relatively small parcel'" in order for the termination to be upheld.

3 Cal. 3d at 481-86.

#### A. TERMINATION OF THE TRUST ON CERTAIN PROPERTY AT NTC

In 1929, the Legislature passed Stats. 1929, ch. 642, which amended Section 4 of the 1911 statute. As previously mentioned, the 1911 Statute authorized the original conveyance from the State to the City of that property in which later became the subject of Deed Nos. 2 and 3, and part of Deed No. 4.

Section 1 of the 1929 Legislation declared that all lands which lay shoreward from the bulkhead line had ceased to be tidelands, and were free from all trusts and restrictions by the Act of 1911. Section 2 of the 1929 Legislation declared that all land lying bayward from the bulkhead line can be used or leased by The City of San Diego or its successor in interest provided however, that during such use, lease, rental or other holding,



such holding shall not "interfere with the use of said tidelands, or any part thereof, for navigation, commerce, and the fisheries, or in any way be inconsistent with the trust under which said tidelands are held by the State of California."

It is our opinion that by virtue of the plain meaning of the language in the 1929 legislation, the property which was the subject of conveyances in Deed Nos. 2 and 3 is no longer impressed with tidelands trust restrictions.F

Because the 1929 Legislation clearly amended the statutory trust and extinguished it from the property covered by Deed No. 2, we find it unnecessary for purposes of our analysis to examine the legally problematic attempt of the Legislature to extinguish the trust from that same property on May 4, 1917 by Senate Concurrent Resolution No. 25.

We acknowledge

that in hindsight it is possible for someone to criticize the actions of the Legislature in 1929 as failing to make the findings seemingly required by modern case law to extinguish the trust. However, taking into consideration the relative abundance of tidelands in the state in 1929, the relatively undeveloped nature of coastal communities at that time and the lack of specificity in the case law in 1929 with respect to extinguishment of the trust, it is our considered opinion that the Legislature in 1929 fairly comported with all legal requirements to implement that which they plainly intended to do; which was to extinguish the trust upon property covered by Deed Nos. 2 and 3.

#### CONCLUSION

Based upon our analysis and research to date, it is our view that all the property described in Deed Nos. 2 and 3 have been removed from the tidelands trust. However, all the land which lies bayward of the bulkhead line at NTC is property that remains impressed with tidelands trust restrictions. This includes all the property described in the attachment as being covered by Deed No. 4. This amounts to approximately 225 of the 500 overall acres which constitute NTC.

The property covered by Deed No. 4 must be used consistent with the statutory trust (Stats. 1929, ch. 808) which limits uses to "public or governmental purposes." Additionally, the Deed No. 4 property must be used consistent with the constitutional restrictions contained in Article X, Section 3 and Section 4. Thus, absent new Legislation to extinguish the trust in whole or in part upon property covered by Deed No. 4, that portion of the land at NTC cannot be sold to any private person, partnership or corporation, must remain accessible to the public and must be planned for any use in furtherance of commerce, navigation and

fishing which has been recognized by the courts as consistent with tidelands trust restrictions. Such uses include oil and gas development in state owned offshore water; construction of bridges over navigable waters; construction of airports; commercial transportation facilities; industry--where its output is in aid and furtherance of commerce and navigation and its production of a public benefit; recreational boating--including dock and marina facilities; recreational and commercial fishing; swimming; water skiing; beach combing and other general recreational activities and environmental preservation.

Please call me if you need further clarification of our analysis or if you have additional questions.

JOHN W. WITT, City Attorney

By

Richard A. Duvernay

Deputy City Attorney

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Attachment

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