

CALENDAR ITEM

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**CONSIDERATION OF A RESOLUTION OPPOSING THE NOVEMBER 4, 2008
BALLOT MEASURE (THE PORT OF SAN DIEGO MARINE FREIGHT
PRESERVATION AND BAY FRONT REDEVELOPMENT INITIATIVE) THAT
ATTEMPTS TO ILLEGALLY AMEND THE PORT OF SAN DIEGO'S MASTER PLAN,
TENTH AVENUE MARINE TERMINAL, CITY OF SAN DIEGO, SAN DIEGO COUNTY**

INTRODUCTION

A private development company, San Diego Community Solutions, LLC, has obtained the requisite number of signatures to qualify the deceptively named Port of San Diego Marine Freight Preservation and Bay Front Redevelopment Initiative (Initiative) (Exhibit B) for the local San Diego County November 2008 ballot. This Initiative involves the Tenth Avenue Marine Terminal, located on State-owned tide and submerged lands held and managed in trust by the San Diego Unified Port District (Port District).

BACKGROUND

The Tenth Avenue Marine Terminal consists of approximately 100 acres located on San Diego Bay tidelands, which were granted in trust to the Port District pursuant to Chapter 67, Statutes of 1962, First Extraordinary Session, as amended (Port Act). The Tenth Avenue Marine Terminal, located between the San Diego Convention Center and the Coronado Bridge, within the city of San Diego, is an important port facility as it is one of two marine cargo terminals in San Diego Bay. According to the Port, over the past five years, the Tenth Avenue Marine Terminal processed 12.6 million tons of maritime cargo, including fruit, cement, structural steel, fertilizer, industrial engines and other shipped products. According to the Save Our Working Waterfront group, in 2006, the economic impact of the maritime cargo activities in San Diego added \$1.6 billion to the region's economy, generated \$100 million in state and local taxes and supported 19,298 regional jobs. In addition, the Tenth Avenue Marine Terminal is one of 19 ports that is federally designated as a "Strategic Port Facility," which is actively utilized by the US Department of Defense for military cargo handling.

Despite the misleading title of the Initiative, this Initiative is not sponsored by the Port District. In fact, the Board of Port Commissioners (Board) formally and unanimously opposed this Initiative at its May 6, 2008 meeting. In addition, numerous environmental, labor, maritime industry, governmental, military and chamber of commerce groups expressed their opposition to this Initiative, including the San Diego-Imperial Counties Labor Council, the San Diego Port Tenants Association, the Pacific Merchant Shipping

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Association and the California Trade Coalition. Most recently, the staff of the California Coastal Commission expressed their concerns “that allowing the development of public and commercial recreation uses at and above the Tenth Avenue Marine Terminal would have significant, unmitigatable, adverse impact on the existing coastal-dependent port facilities at the terminal ... which are the highest priority uses for the terminal under the Coastal Act.” Additionally, five members of Congress (Representatives Susan Davis, Darrell Issa, Duncan Hunter, Brian Bilbray and Bob Filner) have expressed their opposition to the Initiative. And finally, United States Senator Dianne Feinstein recently requested an analysis from the Department of Defense on the consequences of the proposed redevelopment of the Tenth Avenue Marine Terminal contemplated by the Initiative. These opposition documents are collectively attached as Exhibit C.

There have been previous attempts to allow non-maritime uses at the Tenth Avenue Marine Terminal. In July 2004, the Board adopted a policy that the Tenth Avenue Marine Terminal could only be used for maritime cargo purposes and operations. This policy position was in response to proposals to utilize all or a part of the Tenth Avenue Marine Terminal for the site of a sports stadium and other non-maritime uses. At that time, State Lands Commissioner, Lt. Governor Cruz Bustamante, actively supported the Board’s policy position to protect maritime commerce.

On August 5, 2008, the Board, as required by law, submitted the Initiative to the County Registrar of Voters for placement on the November 2008 general election ballot. Simultaneously, the Board voted unanimously to file a lawsuit (*San Diego Unified Port District v. Seiler, Liner*, Case #37-2008-00089123-CO-WM-CTL) to prevent the County Registrar and San Diego Unified Port District Clerk from placing the Initiative on the ballot. While the Port District is clearly opposed to this Initiative, it was mandated to submit the Initiative to the Registrar of Voters pursuant to its ministerial duty under the Elections Code and pay the election costs, which are estimated at \$435,000.

The Board’s lawsuit consisted of a petition for writ of mandate and complaint for injunctive and declaratory relief. The pleadings specifically requested a temporary restraining order, a preliminary injunction, and a permanent injunction to prevent the Initiative from being placed on the November ballot. Additionally, the lawsuit asked for the Initiative to be declared void as unlawful, invalid and unenforceable.

The State Lands Commission, along with the San Diego Port Tenant’s Association and the Pacific Merchant Shipping Association, filed *amicus curiae* briefs with the court. On September 4th, the court denied the Port’s pre-election challenge. The judge concluded that he was not prejudging the merits of the challenges, but that he did not find that the Port’s arguments met the very high standard to remove an initiative from the ballot. The court’s decision does not prohibit the Port or other parties from challenging the Initiative after the November election should the Initiative pass.

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PUBLIC TRUST LANDS AND THE LOCAL INITIATIVE

The Initiative attempts to illegally amend the Port District's Master Plan to allow for non-maritime uses at the Tenth Avenue Marine Terminal. The Initiative requires that within 60 days of the passage of the Initiative, the Port District must enter into an "Exclusive Negotiating Agreement" with a private development partner. The Initiative states that it would establish maritime freight as the "priority" use on the site while simultaneously allowing for a redevelopment of the Tenth Avenue Marine Terminal to create new recreational and visitor-serving facilities. The Initiative language is not specific about the uses generally described as recreational and visitor-serving; however, the Initiative does suggest a concept of "double-decking" the Tenth Avenue Marine Terminal, which involves building a deck 40 feet above the terminal. The lower deck of this project would ostensibly be maintained for maritime uses, while the top deck would be used for non-water dependent uses including hotels, a sports stadium/arena complex, restaurants, specialty retail shopping establishments and other amenities. The top deck construction would involve development of approximately 96-acres of "air rights "

As stated previously, the California State Legislature granted, in trust, its sovereign tide and submerged lands within San Diego Bay to the San Diego Unified Port District pursuant to the Port Act. Specifically, Section 87(a) of the Port Act begins:

"The tide and submerged lands conveyed to the district by any city included in the district shall be held by the district and its successors in trust and may be used for purposes in which there is a general statewide purpose."

While the day-to-day management of these public trust lands were granted to the Port District, the State, through the State Lands Commission, retains trustee and oversight authority over the Port District's administration of these lands, pursuant to Public Resources Code Sections 6301, *et seq.*

California courts have ruled that such grants of sovereign property are to be held in trust by the local trustee on behalf of the people of the State. The terms and conditions of these statutory trusts are subject to modification only by the State Legislature. The usual granting language utilized by the Legislature has the effect of conveying the State's legal fee title to the described tide and submerged lands in trust subject to certain conditions and limitations. The grantee, (i.e. the Port District) is a legal trustee, both as to the lands themselves and as to the proceeds derived therefrom. *City of Long Beach v. Morse* (1947) 31 Cal. 2d 254, 257. The trust is for the benefit of all of the people of the entire State. *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209. The effect of the legislative grant is, therefore, to create a trust in which the grantee local government is the trustee, the State is the trustor, and the people of the State are the beneficiaries of the trust. The legal consequence of this relationship is that the proper use of the tidelands and tideland revenues is a statewide affair. *Mallon* at 209.

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The State Legislature, pursuant to the Port Act, has designated the Board of Port Commissioners as the policy-making body with exclusive and sole responsibility for managing these lands and determining what land uses are appropriate for the Tenth Avenue Marine Terminal, as well as the remainder of the state-owned land granted to the Port District. The land use decisions that the Board makes concerning these public trust lands is a statewide affair and cannot be affected by the local initiative process.

Further, an issue as important as the attempt by this particular Initiative to illegally amend the Port's Master Plan, is the general legal precedent setting issue involving the ability of local voters to direct or veto state policy and statutory provisions regarding management of public trust lands. There is an inherent conflict of interest in allowing a limited group of local citizens to use a local initiative to decide and direct the management of assets held in trust for the benefit of the statewide public. Such authority would allow local voters to shut down legitimate public trust activities being conducted on public trust lands throughout the State. For instance, the import and export of billions of dollars of cargo at the Port of Los Angeles, which is the busiest port in the country and the 5th busiest port in the world, could be commandeered by a relatively small amount of local voters.

In addition, allowing the local initiative to be used to direct the management of public trust lands would subvert the Commission's exercise of California's retained interest in its sovereign lands that have been granted, in trust, to local governments by interfering with the Commission's responsibility to compel compliance by its trustees with the terms of their legislative grants and the common law Public Trust Doctrine. Commission staff monitors, on a daily basis, the use of both public trust funds and lands by the State's trustees. For example, Commission staff reviews planning documents, such as Port Master Plans, to determine consistency with the common law Public Trust Doctrine and the terms of a particular statutory trust. The relationship between the Commission and its trustees would be destroyed if local initiatives could amend such planning documents. Further, the Commission would be unable to exercise its oversight role over the uses of State sovereign public trust lands in an efficient and effective manner because there would be no board or governing body that the Commission could look to for accountability.

CONCLUSION AND RECOMMENDATION

In conclusion, the Port District's authority involving the management of public trust lands cannot be affected by local initiative because the Port District acts pursuant to authority that the State Legislature delegated exclusively to the Board to implement state policy on matters of statewide concern. Commission staff believes the Port of San Diego Marine Freight Preservation and Bay Front Redevelopment Initiative presents a clear case of an attempt by local voters to interfere with matters of a statewide, if not national and international, concern, as well as a matter involving state property. As such, staff recommends that the Commission adopt the attached Resolution opposing the Initiative.

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EXHIBITS:

- A. Resolution Opposing the November 4, 2008 Ballot Measure that Attempts to Illegally Amend the Port of San Diego's Master Plan (the Port of San Diego Marine Freight Preservation and Bay Front Redevelopment Initiative)
- B. Copy of the Port of San Diego Marine Freight Preservation and Bay Front Redevelopment Initiative
- C. Copies of various letters/press releases expressing opposition to and concerns about the Initiative
- D. Copy of the State Lands Commission *amicus curiae* brief filed on August 26, 2008

RECOMMENDED ACTION

IT IS RECOMMENDED THAT:

1. FIND THAT THESE ACTIVITIES ARE EXEMPT FROM THE REQUIREMENTS OF CEQA PURSUANT TO 14 CAL CODE REGS. 15060(c)(3) BECAUSE THESE ACTIVITIES ARE NOT PROJECTS AS DEFINED BY PUBLIC RESOURCES CODE SECTION 21065 AND 14 CAL CODE REGS. 15378.
2. THE COMMISSION ADOPT THE RESOLUTION OPPOSING THE NOVEMBER 4, 2008 BALLOT MEASURE (THE PORT OF SAN DIEGO MARINE FREIGHT PRESERVATION AND BAY FRONT REDEVELOPMENT INITIATIVE) THAT ATTEMPTS TO ILLEGALLY AMEND THE PORT OF SAN DIEGO'S MASTER PLAN.