

EXHIBIT D

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SUPERIOR COURT OF CALIFORNIA  
 COUNTY OF SAN DIEGO

**SAN DIEGO UNIFIED PORT DISTRICT, a  
 California Special District,,**  
 Petitioner and Plaintiff,  
 v.  
**DEBORAH SEILER, in her official capacity as San  
 Diego County Registrar of Voters; MARY ANN  
 LINER, in her official capacity as Clerk of the San  
 Diego Unified Port District; and DOES 1 through  
 100, inclusive,,**  
 Respondents and Defendants,

37-2008-00089123-CO-WM-CTL  
**APPLICATION TO FILE  
 AMICUS CURIAE BRIEF  
 AND AMICUS CURIAE  
 BRIEF OF THE STATE OF  
 CALIFORNIA ACTING BY  
 AND THROUGH THE STATE  
 LANDS COMMISSION**  
 Date: September 4, 2008  
 Time: 2:00 p.m.  
 Dept: 62  
 Judge: Honorable Ronald Styn

**SAN DIEGO COMMUNITY SOLUTIONS, LLC, a  
 California Limited Liability Company; and ROES 1  
 through 100, inclusive,,**  
 Real Party in Interest.

1  
2 **APPLICATION OF THE STATE OF CALIFORNIA ACTING BY AND THROUGH THE**  
3 **STATE LANDS COMMISSION TO FILE AMICUS CURIAE BRIEF.**

4 The State of California acting by and through the State Lands Commission hereby respectfully  
5 applies to this Court for leave to file the enclosed amicus curiae brief in this action. As is explained  
6 in more detail below, the amicus submits that the Legislature has delegated to San Diego Unified  
7 Port District the exclusive legislative power over matters regarding lands administered by the Port,  
8 such as the Tenth Avenue Marine Terminal. To allow legislation through initiative would disregard  
9 that exclusive delegation and interfere with the State Lands Commission's legislatively mandated  
10 oversight of the Port's operations.

11 **INTEREST OF AMICUS CURIAE STATE OF CALIFORNIA ACTING BY AND**  
12 **THROUGH THE STATE LANDS COMMISSION**

13 The issue before this Court is of major importance to the State of California acting by and  
14 through the State Lands Commission ("SLC"). The SLC is the agency of the State of California  
15 charged with monitoring State sovereign lands granted by the Legislature to cities, counties and  
16 special districts to ensure that grantees fulfill the duties and obligations specified in the grants of  
17 state-owned land. The SLC is also charged with ensuring that the State's lands are being used for  
18 water-oriented purposes consistent with the public trust for commerce, navigation, and fisheries.  
19 The SLC currently supervises over 80 Legislative grants of State-owned land. While all grants  
20 contain unique provisions regarding allowable land uses, the granted lands are all held by the  
21 municipal trustees subject to the public trust for commerce, navigation, and fisheries, and all money  
22 generated from those lands must only be spent for purposes consistent with that public trust. Thus,  
23 the actual use to be made of the lands granted by California to its municipal trustee is a matter of  
24 statewide importance and one that directly impacts the SLC's jurisdiction.

25 Here, the lands at issue have been granted to a specific entity—the San Diego Unified Port  
26 District ("Port District")—for management by a specific legislative body—the Board of  
27 Commissioners of the San Diego Unified Port District ("Port Board"). The Legislature has  
28 specifically charged the Port Board with planning the development of the Port District lands through

1 its adoption of a Port Master Plan. It is to the Port District through its Port Board that the SLC looks  
2 to ensure compliance with the terms of the legislative grant. "The Port of San Diego Marine Freight  
3 Preservation and Bayfront Redevelopment Initiative ("Initiative"), which is the subject of this  
4 litigation, would amend the Port Master Plan for the Tenth Avenue Marine Terminal ("TAMT") to  
5 allow uses inconsistent with the Port Master Plan's current provisions which provide for use of the  
6 property as a marine freight terminal and for secure naval uses.<sup>1/</sup>

7 An initiative that attempts to usurp the Port Board's planning role regarding the TAMT  
8 conflicts with the Legislature's exclusive delegation of planning power to the Port Board. Further,  
9 a Port Master Plan adopted by initiative interferes with the SLC's ability to fulfill its legislatively-  
10 mandated supervisorial function because, unlike with a Port Master Plan that is adopted by the Port  
11 Board, there is no board or governing body to which the SLC can look for accountability. Because  
12 the initiative overrides the Legislature's specific delegation of planning and management authority  
13 over Port District property to the Port Board and because it frustrates the SLC's supervisorial function  
14 over State sovereign lands, this is one of the rare instances where the people do not have the power  
15 to legislate through an initiative. That legislative power has already been given exclusively to the  
16 Port Board.

17 **FACTUAL CIRCUMSTANCES**

18 The SLC hereby adopts the discussion of the Initiative and surrounding factual circumstances  
19 outlined at pages 5 through 9 of the Port District's Memorandum of Points and Authorities in Support  
20 of Petition for Writ of Mandate and Complaint for Declaratory and Injunctive relief filed in this  
21 action.

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28 1. The legality of the amendments made by the Initiative to the Port Master Plan is not addressed further in this brief.

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**ARGUMENT**

**I.**

**IF ENACTED THE INITIATIVE WOULD INTERFERE WITH THE SLC'S EXERCISE OF CALIFORNIA'S RETAINED INTEREST IN ITS SOVEREIGN LANDS AND SLC'S RESPONSIBILITY TO COMPEL COMPLIANCE BY GRANTEES WITH THE TERMS OF LEGISLATIVE GRANTS AND THE PUBLIC TRUST.**

Upon admission to the United States, and as an incident of its sovereignty, California received title to the tidelands, submerged lands, and beds of navigable lakes and rivers within its borders to be held subject to the public trust for commerce, navigation, fisheries and other recognized uses. (*Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10, 15-16; *People v. California Fish Co.* (1913) 166 Cal. 567, 584.) Lands held subject to the public trust are of a unique character, different from that of lands held by California in a proprietary capacity. (*Illinois Central R.R. Co. v. Illinois* (1892) 146 U.S. 387, 452-453.) With its roots in Roman Law, the public trust doctrine establishes that California holds its "sovereign lands" in trust for public purposes, traditionally delineated in terms of commerce, navigation and fisheries but more recently found to be broader, including the right to hunt, bathe or swim, and the right to preserve these lands in their natural state. (*City of Berkeley v. Superior Court* (1980 ) 26 Cal.3d 515, 521.) California's power to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute. (*Marks v. Whitney* (1971) 6 Cal.3d 251, 262 citing *California Fish, supra* at 597.)

The lands that would be affected by the Initiative are tidelands and submerged lands that have been granted to the Port District by the California Legislature subject to the public trust. (Harb. & Nav. Code, Appendix I, § 1 et seq.<sup>24</sup>) However, the State's grant of these lands to the Port District did not end California's supervision and control of these lands. California still remains the ultimate trustee of the granted lands. (*Illinois Central, supra* at pp. 453-454.) California retains the power to require that moneys generated from public trust lands be spent only for public trust purposes, and to even revoke, alter or amend the granting statute. (*People ex rel S.F. Bay etc. Com* (1968) 69

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2. All citations will be to the applicable section of Appendix I of the Harbors and Navigation Code unless otherwise noted.

1 Cal. 2d 533, 549; *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 208-209; *City of Coronado*  
2 *v. San Diego Unified Port District* (1964) 227 Cal.App.2d. 455, 473-474.) The Court of Appeal has  
3 described California's continuing role as follows:

4           Upon grant to a municipality subject to the public trust, and accompanied by a delegation  
5           of the right to improve the harbor and exercise control over harbor facilities, the lands are  
6           not placed entirely beyond the supervision of the state, but it may, and indeed has a duty  
7           to, continue to protect the public interests.

8           (*City of Coronado, supra* at p. 474.)

9           The effect of a legislative grant is, therefore, to create a trust in which the grantee is the trustee,  
10          and California the settlor-beneficiary. The consequence of this relationship is that the proper use of  
11          tidelands is a statewide affair, subject to judicial regulation to prevent, or remedy, a breach of the  
12          terms of the trust or other applicable statutory provision. (*Mallon, supra* at p. 209.) California, as  
13          settlor-beneficiary, acting through proper officers and agencies, has the power to invoke judicial  
14          intervention to compel performance of specific grant/trust provisions, to enjoin a breach thereof, or  
15          to compel a grantee to redress a breach. (e.g. *State of California ex rel. State Lands Com. v. County*  
16          *of Orange* (1982) 134 Cal App.3d 20 [SLC action against Orange County to halt spending of money  
17          generated from public trust lands for purely municipal purposes].)

18          The SLC, consisting of the Lieutenant Governor, Controller, and the Director of the Department  
19          of Finance, has been delegated by the Legislature California's retained trustee and supervisory rights  
20          in granted lands, including those granted to the Port District. (Pub. Res. Code, § 6301 ["All  
21          jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which  
22          grants have been or may be made is vested in the commission."]; §6306(c) [grantees required to  
23          submit detailed accounting of trust revenues to SLC each year]; *Graf v. San Diego Unified Port Dist.*  
24          (1992) 7 Cal.App.4th 1224, 1231 fn. 9 [SLC exercises oversight authority over Port District's  
25          administration of public trust lands granted to it].) Specific to the Port District, the SLC is also given  
26          the responsibility to ensure that the lands conveyed have been improved as required in the grant or  
27          the lands will revert to California. (Harb. & Nav. Code, Appendix L, § 87(j).)

28          In the exercise of its supervisory role, the SLC's staff is in frequent contact with the municipal  
trustees, including the Port Board and its staff. The use of funds generated by granted lands is

1 monitored by the SLC and discussed with the municipal trustee. Allowable uses on the lands granted  
2 are monitored by the SLC and planned amendments to the municipal trustee's planning documents,  
3 such as the Port Master Plan here, are examined by the SLC staff for their consistency with the grant  
4 and the public trust. This day-to-day relationship between the SLC and its municipal trustees would  
5 be destroyed if initiatives could amend the municipal trustee's planning documents. The Legislature's  
6 mandate that uses made of public trust lands be for statewide and public trust consistent purposes  
7 would be imperiled by the possibility of locally enacted plans designed to further only local, rather  
8 than statewide, interests. And the SLC's statutory oversight role over the uses of state sovereign lands  
9 would be hindered if not utterly frustrated.

## 10 II.

11 **BECAUSE THE LEGISLATURE HAS SPECIFICALLY DELEGATED**  
12 **LEGISLATIVE POWER OVER A MATTER OF STATEWIDE SIGNIFICANCE**  
13 **TO THE PORT BOARD, THE INITIATIVE POWER CANNOT BE USED TO**  
14 **AMEND THE PORT MASTER PLAN.**

15 Consistent with the public trust under which it hold the lands conveyed to the Port District,  
16 California granted the lands that would be effected by the Initiative to the Port District (including  
17 those previously conveyed to individual towns within the District) for the purposes outlined in section  
18 87 of the Port District's organic statute. Section 87(a) begins:

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

22 The statewide nature of the grant to the Port District is repeated elsewhere in the granting statute. (§  
23 2 [policy of the State of California to develop the State's harbors and ports, this necessity exists in  
24 San Diego County]; § 79 [because the provisions of the grant are a matter of statewide concern, they  
25 prevail over any inconsistent provisions in any municipal charter].)

26 In furtherance of the statewide nature of both the public trust under which the lands granted to  
27 the Port District are held and the development of those lands as a port and harbor, the Legislature has  
28 specifically delegated to the Port Board the power to legislate over the area granted. (§ 16 [district  
governed by "board of commissioners"]; § 19 ["the board shall draft a master plan for harbor and port  
improvements and for the use" of all district lands]; § 21 ["the board may pass all necessary

1 ordinances and resolutions for the regulation of the district]; § 55 [the board shall . . . make and  
2 enforce all necessary rules and regulations governing the use and control of all navigable waters and  
3 tidelands and submerged lands . . . within the territorial limits of the district.”].) Such a specific  
4 delegation of all power to legislate regarding the lands, uses, and affairs of the Port District leaves no  
5 room for the conflicting legislation offered by the Initiative.

6 While all doubts are normally resolved in favor of the initiative process (*Save Stanislaus Area*  
7 *Farm Economy v. Board of Supervisors* (1993) 13 Cal. App.4th 141, 150), this presumption is  
8 rebuttable upon a showing that the Legislature intended to delegate exclusive legislative power to a  
9 specific local governing body in an area of statewide concern. (*COST v. Superior Court* (1988) 45  
10 Cal.3d 491, 500; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776.) In *COST*, the California  
11 Supreme Court invalidated an initiative that would have prohibited a city council from imposing new  
12 development fees for the development of the Orange County toll roads without first submitting the  
13 matter to the electorate. The Court noted that the statute giving rise to the new fee expressly  
14 delegated the authority to impose the fee to “the *board of supervisors* of the County of Orange and  
15 the *city council* of any city in that county.” (*COST, supra* at p. 501 quoting Gov. Code, § 66484.3,  
16 emphasis added.) The Court found that the use of the specific terms, instead of generic terms like  
17 “governing body,” gave rise to the strong inference that the Legislature intended to preclude the  
18 exercise by the electorate of the initiative authority in the area delegated by the statute in question.  
19 (*Id.* at pp. 504-505.)

20 Here, the Port District’s organic statute is replete with references to the Port Board as the entity  
21 that possesses all legislative power within the geographic area encompassed by the district, including  
22 the legislatively granted lands that are subject to the public trust. It is to the Port District acting  
23 through the Port Board that the Legislature has granted the lands that encompass the Port District.  
24 Those lands are subject to the public trust, are a matter of statewide significance, and are to be  
25 developed for a port or harbor that serves statewide purposes. According to the terms of the  
26 legislative grant, it is the Port Board, and only the Port Board, that may adopt or amend the Port  
27 Master Plan for the TAMT. (§ 19.) It is to the Port Board that the SLC looks to ensure that the Port  
28 District’s property is developed for purposes consistent with the grant and the public trust. The

1 initiative power possessed by the people simply does not extend to amendments to the Port District's  
2 Port Master Plan.

3 **III.**

4 **THE PUBLIC'S RIGHT TO INITIATIVE DOES NOT EXTEND TO**  
5 **AMENDMENTS OF THE PORT'S MASTER PLAN.**

6 Section 33, added to the existing granting act by Chapter 673 of the Statutes of 1963, provides  
7 that "[t]he provisions of the Election Code of the State of California . . . governing the initiative and  
8 the referendum in districts shall apply insofar as such provisions of the Election Code are not in  
9 conflict with this act." However, section 51, amended to its present form also in 1963, clarifies  
10 section 33's reference to the initiative and referendum. Section 51, dealing with Port District revenue  
11 bonds, states that the Port Board may directly provide for the issuance of such bonds unless the  
12 ordinance authorizing the bonds is the subject of a referendum. Pursuant to the language of section  
13 33, the public's right to initiative and referendum is limited by the legislative power already delegated  
14 by the Legislature to the Port's Board. And, pursuant to section 51, that power only applies to allow  
15 referenda that concern the issuance by the Port Board of revenue bonds.

16 In determining the meaning of a statute, courts look primarily to the statute's language, purpose,  
17 legislative history and administrative construction. (*People v. Woodhead* (1987) 43 Cal.3d 1002,  
18 1007-1008.) And, where possible, the various parts of a statutory enactment must be harmonized  
19 by considering the particular clause or section in the context of the statutory framework as a whole.  
20 (*Moyer v. Workmen's Compensation Appeals Board* (1973) 10 Cal.3d 222, 230-231.) A distorted  
21 interpretation of section 33 as applying the initiative power broadly over all aspects of the Port  
22 Board's legislative functions would be to find that section 33 amended by implication all of the  
23 granting statute's sections specifying "board of commissioners" to instead read a more generic term  
24 such as "local authority." (*COST, supra* at pp. 504-505.) But when it scrutinized the Port District's  
25 grant in 1963 and added section 33, the Legislature did not make the amendments necessary to delete  
26 the original exclusive delegation of legislative power to the "Port Board." The failure of the  
27 legislature to change the law in a particular aspect when the subject is generally before it and changes  
28 in other respects are made is indicative of an intent to leave the law as is in the aspects not amended.



1 (*People v. Barrera* (1999) 70 Cal.App.4th 541, 551.) Thus, the proper interpretation, the one in line  
2 with the principles of statutory interpretation enunciated by the California Supreme Court and Courts  
3 of Appeal, would be to find that the addition of sections 33 and 51 to the granting act in 1963, done  
4 without any change to the sections delegating exclusive legislative power to the Port Board, were only  
5 to provide a specific right of referendum over the issuance by the Port Board of revenue bonds (§ 51)  
6 and a process by which referenda elections are to be conducted. (§ 33.) Thus, by enacting sections  
7 33 and 51, the Legislature did not grant a broad right to legislate through initiative over land uses on  
8 the Port District's Property.<sup>3/</sup>

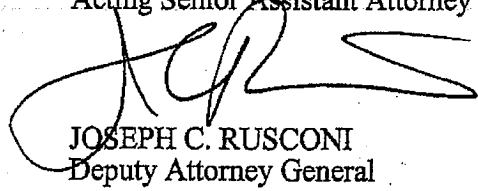
9 **CONCLUSION**

10 For the reasons cited herein, the power of initiative does not exist to amend the Port  
11 Master Plan.

12 Dated: August 26, 2008

13 Respectfully submitted,

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3. The SLC concurs with the legislative history analysis in support of this interpretation presented by the Port District at page 19 of its Points and Authorities.

## PROOF OF SERVICE

Case Name: **San Diego Unified Port District v Deborah Seiler et al**  
No.:

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 1515 Clay Street, 20th Floor, Oakland, California 94612-1413. On August 26, 2008, I served the following document(s):

### **APPLICATION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA ACTING BY AND THROUGH THE STATE LANDS COMMISSION**

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (B) **By Messenger Service:** I caused each such envelope to be delivered by a courier employed by Professional Messenger, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.
- (C) **By Overnight Mail:** I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- (D) **By Facsimile:** I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.

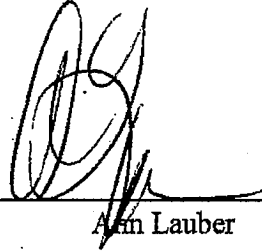
**TYPE OF SERVICE**

**ADDRESSEE**

D

see attached list

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on August 26, 2008 at Oakland, California.



Arin Lauber

1 *SAN DIEGO UNIFIED PORT DISTRICT vs .DEBORAH SEILER*  
Case No. 37-2008-00089123-CO-WM-CTL

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