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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

SAFE EMBARCADERO FOR ALL, a California
non-profit corporation,

Petitioner,

v.

STATE OF CALIFORNIA acting by and through
its STATE LANDS COMMISSION; CITY AND
COUNTY OF SAN FRANCISCO; and DOES 1
through 20;

Respondents,

SAN FRANCISCO PLANNING
DEPARTMENT; and SAN FRANCISCO
DEPARTMENT OF HOMELESSNESS AND
SUPPORTIVE HOUSING;

Real Parties In Interest.

No.

**APPLICATION FOR STAY OR FOR
TRO;
MEMORANDUM IN SUPPORT OF
STAY OR TRO**

1 **APPLICATION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on July 12, 2019 at _____, or as soon afterwards as the
4 Court may hear this matter, in Department ____ of Sacramento County Superior Court,
5 _____, petitioner will appear on an application for a stay of
6 respondent San Francisco's approval action (its Port Commission resolution 19-16 of April 23,
7 2019) for a housing project on Seawall Lot 330 in San Francisco, for which respondent State Lands
8 Commission also has responsibility, or for a temporary restraining order against that project, which
9 is the subject of this action.

10 This application for a stay or for a temporary restraining order is made under Code of Civil
11 Procedure §§ 1094.5(g), 526, and 527, on the grounds that a stay of the project will not harm the
12 public interest, and that petitioner is likely to prevail on the merits, as explained in the accompanying
13 memorandum of points and authorities in support.

14 This application for a stay or for a temporary restraining order is based on this application,
15 the memorandum in support, the declaration of Elena Idell, the declaration of Peter Prows, the
16 pleadings and papers on file in this action, and the argument on this application.

17 The parties in this action are represented by the following counsel:

18 Attorneys for the Petitioner:

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20 Peter Prows (257819)
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13 The California Attorney General's office is also expected to represent the State Lands
14 Commission.

15 On July 9, 2019, before 10am, Petitioner informed counsel for the City and for the State
16 Lands Commission of Petitioner's intent to appear ex parte on this application on July 12, 2019 at
17 the Sacramento County Superior Court.

18 Petitioner has not previously brought an application regarding this project, and no court has
19 refused in whole or in part any previous application of the same character or for the same relief.

20 Dated: July 10, 2019

21 By: _____

22 Peter Prows
23 Briscoe Ivester & Bazel LLP
24 Attorneys for Petitioner

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1 **I. INTRODUCTION**

2 San Francisco is violating a clear law it helped draft, and the Legislature passed in 2016, that
3 required San Francisco to get prior State Lands Commission approval before housing or office space
4 is built on former tidelands along San Francisco Bay. To approve such a project, the State Lands
5 Commission would have to find that it were for fair market value and in the best interest of all of
6 California. Late last month, San Francisco approved a housing and office project there, for a
7 fraction of fair market value, and is now rushing ahead to begin construction, but it has blown off the
8 Legislature’s specific requirement to obtain prior State Lands Commission approval. San Francisco
9 likely knows the State Lands Commission would not give its approval of this project, and so San
10 Francisco has simply ignored the requirement.

11 A stay or temporary restraining order should issue to stop this project.

12 **II. BACKGROUND**

13 **A. The Public Trust In Seawall Lot 330**

14 This action concerns a very special piece of property in San Francisco known as Seawall Lot
15 330, near the Embarcadero, Bay Bridge, and San Francisco Bay. Over the decades, the Legislature
16 has enacted numerous pieces of specific legislation specifically addressing Seawall Lot 330. For
17 present purposes, the Court should understand that the Legislature deemed Seawall Lot 330 to be a
18 “Designated seawall lot”. (Stats. 2007 ch. 660, section 1(j).)¹ The designated seawall lots, including
19 Seawall Lot 330, are “tidelands”. (*Id.*, section 2(b).) Upon its admission to the United States,
20 California gained title to these tidelands “in trust for the purposes of commerce, navigation, and
21 fisheries”. (*Id.*, section 2(a).) That “trust” or “[p]ublic trust” means “the common law public trust
22 for commerce, navigation, and fisheries.” (*Id.*, section 1(t).)

23 California granted the designated seawall lots to San Francisco, acting through the Port of
24 San Francisco, in 1969. (*Id.*, section 2(b).) California, acting through its State Lands Commission,
25 nevertheless retains “absolute” power and “oversight authority” to “control, regulate, and utilize”
26 “tidelands” (like Seawall Lot 330) that are subject to that public trust. (Public Resources Code §
27

28 ¹ For the Court’s convenience, a courtesy copy of this statute, of which petitioner requests judicial notice, is attached as **Exhibit 1** to the Declaration of Peter Prows.

1 6009, paras. (b) & (c).) “The purposes and uses of tidelands ... is a statewide concern.” (*Id.* para.
2 (e).)

3 The designated seawall lots, including Seawall Lot 330, presently “are leased on an interim
4 basis for commuter parking or are vacant land”. (Stats 2007 ch. 660, section 2(i).) The Legislature
5 has deemed those uses—commuter parking or vacant land—to be the only public-trust uses Seawall
6 Lot 330 will support. (*See id.*, section 2(l) “the designated seawall lots are not necessary for public
7 trust ... purposes, with the exceptions described in subdivision (i) of this section”).)

8 The State Lands Commission has long determined that housing is not a public-trust use.
9 “[P]rivate residences ... are just clearly inappropriate.” (Prows Decl., **Exhibit 2** at 2 (State Lands
10 Commission 2001 public-trust policy). “Uses ... that are not trust use related” include “residential
11 ... and office uses.” (*Id.* at Exhibit A at 2.) This is because “[p]rojects must have a connection to
12 *water-related* activities that provide benefits to the public statewide, which is the hallmark of the
13 public trust doctrine.” (*Id.* at Exhibit A at 9, emphasis added.) Because housing is not water-related,
14 it is not a public-trust use. Were the rule otherwise, San Francisco Bay and California’s ocean
15 would long ago have been filled in for houses and condos.

16 **B. The 2016 Legislation Requiring State Lands Commission Approval For**
17 **Non-Trust Uses Of Seawall Lot 330**

18 In 2016, the Legislature passed another law (AB 2797) directed at the designated seawall
19 lots, this time authorizing San Francisco to lease the property for non-trust uses—*but only if* very
20 specific conditions were met. (Stats. 2016 ch. 529, section 7 (amending Section 4 of Chapter 660 of
21 the Statutes of 2007).²) This new statute prescribed that “the port may enter into a nontrust lease [of
22 the designated seawall lots] *subject to the requirements of this section*”. (*Id.*, para. (b), emphasis
23 added.) The main requirements of that section were that San Francisco had to get “prior” approval
24 from the State Lands Commission, which itself had to find that the lease was “for fair market value”
25 and was “otherwise in the best interest of the state”:

26 (e) A nontrust lease shall be for fair market value and on terms
27 consistent with prudent land management practices as determined by

28 ² For the Court’s convenience, a courtesy copy of this statute, of which petitioner requests judicial
notice, is attached as **Exhibit 3** to the Declaration of Peter Prows.

1 the port and subject to approval by the [State Lands Commission] as
2 provided in paragraph (1)

3 (1) Prior to executing a nontrust lease, the port shall submit the
4 proposed lease to the [State Lands Commission] for its consideration,
5 and the [State Lands Commission] shall grant its approval or
6 disapproval in writing within 90 days of receipt of the lease and
7 supporting documentation, including documentation related to value.
8 In approving a nontrust lease, the [State Lands Commission] shall find
9 that the lease meets all of the following:

10 (A) Is for fair market value.

11 [...]

12 (C) Is otherwise in the best interest of the state.

13 (*Id.*, para. (e).) “Lease” is defined broadly to include “any ... agreement granting to any person any
14 right to use, occupy, or improve real property under the jurisdiction of the port.” (Stats. 2007 ch.
15 660, section 1(n).)

16 The Port of San Francisco claims credit for drafting this 2016 law.³ The Port admits that
17 “State Lands Commission approval of a lease or sale” of Seawall Lot 330 is now required. (Prows
18 Decl., **Exhibit 4** at 19 (Port of San Francisco, Executive Director, “Informational Presentation on
19 Potential Next Steps Regarding Piers 30-32 and Seawall Lot 330” (February 22, 2019)).)

20 **C. Seawall Lot 330 Is Very Valuable**

21 “Seawall Lot 330 is a valuable piece of property”, as San Francisco admits. (*Id.* at 19.) It
22 has been proposed for development by a cruise company, the 34th America’s Cup, and the Golden
23 State Warriors. (*Id.* at 18.) San Francisco notes that older appraisals of Seawall Lot 330 valued it at
24 between \$30 and \$33 million dollars, but that the “current market” value “would exceed the prior
25 appraisals”. (*Id.* at 20.) San Francisco estimated that Seawall Lot 330 was worth “approximately \$2
26 million” in potential annual tax revenue. (*Id.*)

27 Petitioner also had Seawall Lot 330 appraised. Its appraiser valued the property at \$95
28 million, with an annual rental value of between \$3 million and \$6.6 million. (Prows Decl., **Exhibit 5**
at 4-6.)

³ <https://sfport.com/sites/default/files/Commission/Documents/Commission%20Meeting%20Staff%20Reports/2016%20Commission%20Meeting%20Items/SEP27/Item%2010C%20Legislation%20Strategy%20Staff%20Report%20Final.pdf> at page 6.

1 **D. San Francisco Approves A Low-Rent Homeless Shelter For Seawall Lot 330 Without**
2 **State Lands Commission Approval**

3 On April 23, 2019, over petitioner’s objections, the Port of San Francisco approved a 200-
4 bed homeless shelter, with office space and other amenities, to be built on Seawall Lot 330, with a 2-
5 year renewable lease (the “Project”).⁴ San Francisco’s lawyer assured the Port Commissioners at the
6 hearing that “State Lands Commission approval will come prior to execution” of the lease.⁵ The
7 effective rent, after accounting for rent credits, would be approximately \$240,000 to \$360,000 per
8 year. (Verified Petition For Writ Of Mandamus (filed July 10, 2019), ¶ 29.)

9 On petitioner’s appeal to San Francisco’s Board of Supervisors, heard on June 25, the City
10 took the position that it did not need State Lands Commission approval for *any* lease of Seawall Lot
11 330, including for the Project. (Prows Decl., **Exhibit 6** at 22.) The Board rejected petitioner’s
12 appeal.

13 San Francisco has not gotten State Lands Commission approval of the Project.⁶ San
14 Francisco has announced that it intends to begin construction this month, and it appears to have
15 begun construction already. (Idell Decl. ¶¶ 7-8, Ex. 1 (July 9 photograph of construction signage on
16 site).)

17 **III. AUTHORITY TO ISSUE A STAY OR TRO**

18 CCP § 1094.5(g) allows the Court to stay administrative decisions, upon an “application”,
19 and sets a low standard: the stay must not be “against the public interest”. This low standard – not
20 against the public interest – does not require consideration of success on the merits or a balance of
21 the hardships (though those factors can certainly be relevant). (California Practice Guide:
22 Administrative Law, Ch. 19-B § 19:75.) The public interest would be served by staying San
23 Francisco’s approval of this Project because allowing it to proceed without complying with the
24

25 _____
26 ⁴ The minutes from that meeting are available here:
<https://sfport.com/sites/default/files/Commission/Documents/M04232019.pdf>.

27 ⁵ *Id.* at 73.

28 ⁶ The Project was not on the State Lands Commission’s June 28 hearing agenda. *See*
https://www.slc.ca.gov/wp-content/uploads/2019/07/06-28-2019_Voting-Record.htm.

1 Legislature’s specific direction for Seawall Lot 330—including State Lands Commission approval
2 upon specific findings for the benefit of the entire State—would cause statewide harm.

3 Stays can be applied for ex parte when there is “urgency”. (California Practice Guide:
4 Administrative Law, Ch. 19-C § 19:201.) Here, San Francisco has announced that it intends to begin
5 construction this month, and it appears to have begun construction already. (Idell Decl. ¶¶ 7-8, Ex. 1
6 (photograph of construction signage on site).) San Francisco finally approved the project just two
7 weeks ago; petitioner has wasted no time getting this action and application on file.

8 The Court also has authority under CCP §§ 526 and 527 to issue a temporary restraining
9 order prohibiting further work on the Project. A TRO may be appropriate in cases, as here, in
10 mandate proceedings brought under CCP § 1085.⁷ The first count in the petition is brought under
11 CCP § 1085, and it arises from the failure of respondents to comply with the specific statutory
12 requirement to obtain State Lands Commission approval, upon specified findings, before leasing
13 Seawall Lot 330 for non-public-trust purposes such as this Project.

14 The standard for a TRO is the same as that for a preliminary injunction. (*Laam v. McLaren*
15 (1915) 28 Cal.App. 632, 635.) The purpose of a preliminary injunction, like a TRO, “is the
16 preservation of the status quo until a final determination of the merits of the action.” (*Continental*
17 *Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) “[T]he question whether a preliminary injunction
18 should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail
19 on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial
20 of interim injunctive relief.” (*White v. Davis* (2003) 30 Cal.4th 528, 554.) “[T]he greater the
21 plaintiff’s showing on one [factor], the less must be shown on the other.” (*Butt v. State of California*
22 (1992) 4 Cal.4th 668, 678.)⁸

23 Here, petitioner is highly likely to prevail on the merits. The Legislature enacted a specific
24 statute in 2016, AB 2797, requiring prior State Lands Commission approval of projects like this
25

26 ⁷ <https://www.saccourt.ca.gov/civil/docs/writ-procedural-guide.pdf> at page 5.

27 ⁸ Other phrases that have appeared in the case law, such as the inadequacy of other remedies,
28 irreparable harm, or the effect on the public interest, “are simply different ways of describing the
‘interim harm’ factor.” (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 n.5.)

1 Project, but San Francisco has disregarded that requirement and proceeded with the Project without
2 State Lands Commission approval.

3 The balance of hardships tips in favor of a TRO. San Francisco’s violation of the
4 Legislature’s specific direction for Seawall Lot 330 will cause statewide harm that outweighs
5 whatever local San Francisco interests or sympathies that might be invoked. The Legislature has
6 spoken on the public interest here and has deemed the public interest served by prior approval by the
7 State Lands Commission upon *its* finding of fair-market-value and the statewide best interest; San
8 Francisco’s disobedience of the Legislature’s command is against the public interest. San Francisco
9 should be enjoined from proceeding on this Project so that the status quo can be preserved while this
10 case gets heard on its merits.

11 **IV. PETITIONER IS HIGHLY LIKELY TO PREVAIL ON THE MERITS**

12
13 Petitioner’s first count is for ordinary mandamus and its second count is for administrative
14 mandamus; both allege that the law was violated when San Francisco leased Seawall Lot 330 for a
15 homeless shelter and office space—non-trust uses—without State Lands Commission approval.
16 This violation of the law is clear. The Legislature in 2016 passed a statute specifically dealing with
17 the designated seawall lots in San Francisco, including Seawall Lot 330. (Stats. 2016 ch. 529.) That
18 statute requires San Francisco to get “prior” State Lands Commission approval whenever San
19 Francisco wants to “lease” Seawall Lot 330 for any “nontrust” use.

20 There is a “lease” here. “Lease” is defined broadly to include any person’s right to “use,
21 occupy, or improve” the property. (Stats. 2007 ch. 660, section 1(n).) San Francisco has approved a
22 homeless shelter and office space for the property, and has begun construction. (See Section II.D,
23 above.) Those uses and improvements, which are intended to facilitate the occupancy of the
24 homeless at the site, is a lease.

25 This lease is for a “nontrust” use. The State Lands Commission has determined that housing
26 and office space are nontrust uses. (See Section II.A, above.) Trust uses have to be water-related,
27 and housing and office space are not water-related. (*Id.*) The Legislature has determined that the
28

1 only trust uses possible for Seawall Lot 330 are parking or vacant land. (*Id.*) But San Francisco has
2 now leased Seawall Lot 330 for housing and office space. This is a nontrust lease.

3 San Francisco did not get “prior” State Lands Commission approval for this nontrust lease of
4 Seawall Lot 330, as the 2016 law (AB 2797) specifically required. (See Section II.D, above.)

5 San Francisco, as the grantee of Seawall Lot and as the agency that approved this Project, has
6 responsibility for this violation. The State Lands Commission, which retains “absolute” power and
7 “oversight authority” to “control, regulate, and utilize” “tidelands” (like Seawall Lot 330) (Public
8 Resources Code § 6009, paras. (b) & (c)), also has responsibility for this violation. Petitioner is
9 highly likely to prevail on either or both of the first two counts in its petition for writ relief against
10 both San Francisco and the State Lands Commission to stop this Project unless and until the
11 Legislature’s specific requirements from the 2016 statute are complied with.

12 Petitioner is also likely to prevail on its fourth count, which alleges that the Project is not for
13 fair market value. San Francisco made its own finding that the Project is for fair market value, but
14 no substantial evidence supported that finding. San Francisco admitted that, were the property to be
15 put to a nontrust use, the City ought to be receiving at least \$2 million per year in return. (See
16 Section II.C above.)⁹ Petitioner’s appraiser concluded that the fair market rental value of the
17 property is between \$3 million and \$6.6 million per year. (*Id.*) Yet the effective rent in the lease for
18 the Project here would be approximately only \$240,000 to \$360,000 per year. (*Id.*) That is not
19 anything close to fair market value.

20 That the Project is not really for fair market value perhaps explains why San Francisco has
21 not gone to the State Lands Commission for its approval. The State Lands Commission is not likely
22 to be able to make its own finding, required by the 2016 legislation, that this nontrust lease is for fair
23 market value. Faced with likely rejection by the State Lands Commission, San Francisco opted
24 simply to ignore it.

25
26 _____
27 ⁹ San Francisco based its finding about fair market value on the revenue it was receiving from
28 parking on the site. (Prows Decl., Ex. 6 at 22-23.) Parking is a trust use; housing is not. There is no
requirement that San Francisco receive fair market value for a trust use. The revenue San Francisco
has received from a trust use is not substantial evidence to support the fair market value of a non-
trust use.

1 Petitioner is also likely to prevail on the third count in the petition, which alleges that the
2 Project was required by San Francisco’s Planning Code to undergo design review, but that no design
3 review was done. As San Francisco admitted, the Planning Code requires design review for any
4 “development” on Port property of more than 1/2 acre. (Prows Decl., Ex. 6 at 17.) The Project here
5 is more than 1/2 acre. (*See id.* at 2 (“The Project would occupy approximately 46,255 square feet”).)
6 “Development” includes any project that requires a building permit. (*See* San Francisco Planning
7 Code section 102 (defining “Development Application” to mean any project that requires a “building
8 permit”).) This Project requires both a building permit and a variance. (*See* Prows Decl., Ex. 6 at 14
9 (“The proposed project would be required to procure a building permit”).) Because San Francisco
10 violated its own laws about required design review, petitioner is likely to prevail on its third count.

11 Petitioner is highly likely to prevail on the merits on at least the first four counts in the
12 petition.

13 **V. THE BALANCE OF HARMS FAVORS A STAY OR TRO**

14 For nontrust leases like this of Seawall Lot 330, the Legislature tasked the State Lands
15 Commission with determining whether the lease is “in the best interest of the state”. (Stats. 2016 ch.
16 529, section 7, para. (e)(1)(C).) The Legislature effectively made it San Francisco’s burden to
17 convince the State Lands Commission that any nontrust lease of this site was in the best interest of
18 California. By not even trying to take this nontrust lease to the State Lands Commission, San
19 Francisco has not met its burden. The State Lands Commission has not found that this nontrust lease
20 is in the best interest of the state. Unless and until San Francisco meets its burden of convincing the
21 State Lands Commission to make that required determination, the Court should assume that this
22 Project is *not* in the best interest of California.

23 San Francisco will likely try to play for sympathy by invoking its efforts to remediate the
24 plight of the homeless. Petitioner supports appropriate efforts to help the homeless; at the Board of
25 Supervisors, petitioner suggested that San Francisco could build the same mega homeless shelter
26 right in front of City Hall without any of the very specific legal requirements the Legislature has
27 applied to Seawall Lot 330. But sympathy for the homeless does not excuse compliance with the
28 specific mandates established by the Legislature for this special property. San Francisco helped

1 draft those requirements (see Section II.B), and so it should not be heard now to complain about the
2 burden of complying with requirements it helped draft.

3 Because complying with the law here is not a legitimate hardship, and the State will be
4 harmed if the specific laws are violated that govern the use of this seawall lot for the benefit of the
5 whole State, the balance of harms favors granting this application.

6 **VI. CONCLUSION**

7
8 This application should be granted. The City's approval of the Project should be stayed or a
9 temporary restraining order should issue. Because this action is being brought in the public interest
10 to ensure compliance with clear State law, no bond should be required.

11
12 DATED: July 10, 2019

BRISCOE IVESTER & BAZEL LLP

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14
15 By: _____
16 Peter Prows
17 Attorneys for Petitioner
18 SAFE EMBARCADERO FOR ALL
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