JOHN BRISCOE (053223)
PETER PROWS (257819)
ELENA IDELL (325923)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
Tel (415) 402-2700
Fax (415) 398-5630
pprows@briscoelaw.net

Attorneys for Petitioner
SAFE EMBARCADERO FOR ALL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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. CPF-19-516841

REPLY IN SUPPORT OF STAY OR INJUNCTION

Date: September 23, 2019
Department: 302
Time: 1:30pm

Accompanying Papers:
Declaration of Judy Lin

Table Of Contents

Table of Authorities

Cases

Statutes

I. THE COURT LACKS DISCRETION TO DENY AN INJUNCTION TO PROTECT THE PUBLIC TRUST

San Francisco does not dispute the key facts or offer a serious defense on the merits. The real question is: is it better to stop the City now, before 200 people move in, or later, after this illegal shelter is opened? The Court should stop this illegal project now, before it is complete, before the City incurs additional costs, and before the public is further harmed.

At the last hearing, the Court had questions about irreparable harm. The Legislature has conclusively answered those questions for the public trust here. The public trust doctrine is dated to ancient Roman law, and it protects the public's right to use tidelands for water-related purposes. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434.) The Legislature's judgment about how public-trust lands are to be used for the benefit of the public is "absolute". (*Marks v. Whitney* (1971) 6 Cal.3d 251, 260.) The courts may not second-guess the Legislature's judgment about public use of public-trust lands: "[t]he court *may not* bar members of the public from lawfully asserting or exercising public trust rights". (*Id.* at 261, emphasis added.)

If San Francisco is violating the public trust, this Court lacks discretion, under *Marks v. Whitney*, to deny an injunction. Petitioner made this point in its opening brief (at 17:19-21), and San Francisco does not dispute it. San Francisco is violating the public trust and should be enjoined.

It is undisputed that Seawall Lot 330 is subject to the public trust. It is also undisputed that San Francisco's current project is not a public-trust use. San Francisco wants to close off what was a public-trust space, used by the general public for public-trust purposes,[1] for the private benefit of a relatively small number of people. The Legislature's absolute judgment, in SB 815 and AB 2797, is that nontrust uses of Seawall Lot 330 must get prior State Lands Commission approval, upon important findings. (See Section II.A below.) There is no dispute San Francisco did not get that approval. San Francisco's low-rent project likely never could get that approval. San Francisco broke public trust law. This public trust violation ought to end this case.

---

[1] Parking is a public trust use here because it enables the public to make recreational and navigational use of tidelands and nearby San Francisco Bay. (Stats. 2007 ch. 660, § 2(l); *see* Prows Decl. Ex. 2, Ex. A at 1-2 (State Lands Commission determination that "uses that directly promote trust uses … include … parking").)

By blocking public use of public-trust property, San Francisco's public-trust violation is akin to a public nuisance—a crime. (*See* Penal Code § 370 (creating any "obstruction" to public use of public property is a public nuisance).) Irreparable harm need not be shown to enjoin public nuisances. (*People v. Adco Advertisers* (1973) 35 Cal.App.3d 507, 511.) Any member of the public has standing to sue to enjoin public-trust violations, in the public interest. (*National Audubon Society*, *supra*, 33 Cal.3d at 431 n.11.) If this Court concludes San Francisco is likely violating public-trust law, it should promptly stop this project.

Stopping this project would be in the public interest. San Francisco does not dispute that violent crime has spiked in the immediate area since this center was announced, or that crime went up around other similar shelters after they opened. San Francisco is depriving the public of millions of dollars that should be reinvested in other public-trust projects. San Francisco does not even need this project any more, as the Mayor has agreed to President Trump's plan to "sweep" the homeless off the streets and put them in federal facilities. San Francisco cannot be trusted to keep the public safe or act in the public interest.

This motion should be granted. No bond should be required.

II. PETITIONER IS HIGHLY LIKELY TO PREVAIL ON THE MERITS

A. Fourth Count—San Francisco Failed To Obtain Prior State Lands Commission Approval

The State Lands Commission does not defend San Francisco or dispute Petitioner's interpretation of the law or facts here. There is no "common understanding of state law" (Opp. at 7:5) between San Francisco and the State Lands Commission here.

San Francisco does not dispute that, here, it has leased Seawall Lot 330 for nontrust uses without prior State Lands Commission approval.[2] San Francisco also does not dispute that it helped draft the 2016 law, AB 2797, Petitioner invokes, and that the City and its lawyers previously told the City's decision-makers that this law requires State Lands Commission approval of this Project. (Application at 10:1-2 (Port admission about SLC approval), 10:19-21 (City attorney's admission

[2] San Francisco asserts that Petitioner mischaracterizes the project by noting it builds "housing and office" space. (Opp. at 6:2-4.) But San Francisco's Planning Department told the Board of Supervisors that the project provides "shelter" and "office space". (Prows Decl., Ex. 6 at 2.)

about need for SLC approval in response to questioning by Port Commissioners).) Since then, San Francisco and the City Attorney have done an about-face to assert that State Lands Commission approval is not necessary after all. San Francisco's brief does not acknowledge, much less explain, its flip-flop. Instead, San Francisco now disputes that the law actually means what it says.

San Francisco's new position is that State Lands Commission approval is not required for "short-term" leases. (Opp. at 6:7-8.) Nonsense. Nowhere does the law exempt short-term leases from the approval requirement. The law actually expressly includes them. As Petitioner explained in its opening brief, another word for "short-term" is "temporary", which does appear in the law: in the definition of "lease". (Stats. 2007 ch. 660 § 1(n) ("lease" includes "temporary easement").) By their nature, all leases are temporary. (*See* Civil Code § 718 (generally limiting tidelands leases to no more than 66 years).) The law requires prior State Lands Commission approval for all nontrust leases, temporary as they all will be. State Lands Commission approval was required for the nontrust lease here.

San Francisco cites the 1968 Burton Act and its 1969 "Transfer Agreement" as authority to "enter into non-trust leases as long as the leases yield maximum profits", without any requirement of State Lands Commission approval. (Opp. at 6:11-12.) San Francisco's position appears to be that the State-Lands-approval requirement of the new laws means nothing: that it can enter into nontrust leases either with the State-Lands-Commission approval required by SB 815 and AB 2797, if San Francisco feels like it, or without that approval, if it doesn't. San Francisco is wrong.

In support, San Francisco cites section 3 of the Burton Act. (Opp. at 6:13.) But that section supports Petitioner, not San Francisco. That section prohibits San Francisco from administering the granted lands, including Seawall Lot 330, in ways "prohibited by the laws of the State of California". (Emery Decl., Ex. D at 2545-2546.) Section 18 of that Act also reserved to the Legislature the right to "amend, modify, or revoke" the grant. (*Id.* at 2550.) The Transfer Agreement, section XII, likewise prescribed that, if the Legislature ever amended the Burton Act, "this agreement will be deemed amended or revoked thereby in accordance with the action of the Legislature." (Emery Decl., Ex. E at 720.) The Burton Act and Transfer Agreement, in other words, were made subject to future amendments. SB 815 and AB 2797 amended the Burton Act to require

prior State Lands Commission approval of any nontrust lease. Prior State Lands Commission approval was required for the nontrust lease here.

San Francisco states that "Section 5 of SB 815 specifies that nothing in SB 815 limits the Port's existing authority." (Opp. at 6:14-15.) But that is not what Section 5 of SB 815 says. Section 5 of SB 815 continues to make San Francisco' nontrust leasing authority "subject to any applicable limitations of state law":

> Nothing in this act shall be construed as limiting the port's existing authority to use or lease the designated seawall lots under the Burton Act, *subject to any applicable limitations of state law.*

(Stats 2007 ch. 660 § 5, emphasis added.) Both Section 4(c)(1) of SB 815 and Section 7 of AB 2797 (which replaced Section 4 of SB 815) subject nontrust leases of the designated seawall lots, including Seawall Lot 330, to the state-law limitation that prior State Lands Commission approval is now required.[3] They do not prohibit San Francisco from entering into nontrust leases; they just add a new condition. The law is clear and unambiguous about this newly applicable limitation of state law. San Francisco violated the law when it leased Seawall Lot 330 for nontrust uses without prior State Lands Commission approval.

That San Francisco's Waterfront Land Use Plan authorizes interim leases (Opp. at 6:20-21) is nice to know, but that fact does not exempt this nontrust lease from the requirement of SB 815 and AB 2797 to obtain prior State Lands Commission approval. The Waterfront Land Use Plan acknowledges that State Lands Commission approval is required before the seawall lots are put to any residential use. (Emery Decl., Ex. B at 61 (for housing on other seawall lots, "[p]rior to approval of construction of housing on those sites, the … State Lands Commission … adopted special findings").) The Legislature may have "expressly approve[d] San Francisco's authority to enter into interim leases" (Opp. at 6:25-26)—but *only if* the State Lands Commission *also* approves, which it has not here.

San Francisco violated the law by entering into a nontrust lease of Seawall Lot 330 without State Lands Commission approval. The nontrust lease of Seawall Lot 330 here violated the law.

---

[3] Petitioner has made all of these arguments to San Francisco before. San Francisco's brief does not address them.

B. Fifth And Seventh Counts—San Francisco Failed To Undergo Required Design Review

San Francisco does not dispute that developments larger than 1/2 acre in this waterfront area that require building permits must undergo prior design review. San Francisco also does not dispute that this project is larger than 1/2 acre and requires a building permit, but that it did not undergo prior design review. San Francisco's only answer to Petitioner's argument that the Planning Code required prior design review is to point to some other nearby project (the "Teatro Zinzanni"), which San Francisco asserts—without evidence—did not undergo design review. (Opp. at 7:11-20.) So what? That other project is not relevant or at issue here.[4] At issue is whether prior design review was required here.

This Project required prior design review because it is development on more than 1/2 acre on waterfront property. (Opening Brief at 17:1-15.) If the City wanted to limit design review of waterfront projects to longer-term projects, it could have written that into its Planning Code. But it didn't. San Francisco violated the law when it ignored its own design-review requirement here.

Petitioner is highly likely to prevail on the merits of these counts.

C. Sixth Count—This Nontrust Lease Is Not For Fair Market Value

San Francisco defends the pittance it is charging in rent for this Project by pointing to revenues received for parking. (Opp. at 8:4-5.) But parking is a trust use; housing and office space for this Project are not. (See Section I above.) San Francisco has no answer to the argument (Opening Brief at 16:14-18) that revenues received for a trust use are not substantial evidence of the fair-market value of a nontrust use. San Francisco's failure to charge fair-market rent for this lease likely explains why the State Lands Commission has not approved this Project, because State Lands would not be able to make the required fair-market-rent finding. (*See* Stats 2016 ch. 529 § 7(e)(1)(A).)

[4] The design-review requirements of the Teatro Zinzanni project are also not comparable to this one. Teatro Zinzanni, which was located where the cruise terminal is now (Piers 27/29), is in Special Use District 1, and is covered by substantively different design-review requirements of the Planning Code (section 240.1(d)) than Seawall Lot 330, which is in Special Use District 3 (governed by Planning Code section 240.3(d)) .

Fair market value is to be based on "all the uses and purposes for which the property is reasonably adaptable and available." (CCP § 1263.320(a).) Before the Mayor fixated on this Project, San Francisco had estimated the value to the City of a nontrust lease of Seawall Lot 330 to be at least $2 million per year. (Opening Brief at 10:10-11.) In November, San Francisco plans to put out a request for development proposals for Seawall Lot 330,[5] the building of which would presumably be delayed until after this challenged Project is over. In the meantime, San Francisco is not getting fair-market value for the public for this nontrust use.

Petitioner is highly likely to prevail on its claim that San Francisco is not charging fair-market rent for this nontrust use.

III. THE PUBLIC WILL SUFFER IRREPARABLE HARM

A. No Discretion To Deny Injunction

If the Court agrees San Francisco is violating public-trust law, it lacks discretion to deny an injunction and need not consider irreparable harm. (See Section I above.) Even so, each day that Seawall Lot 330 is closed off from public use in violation of the public-trust laws the Legislature specifically directed at this property causes irreparable harm to the People of California, who forever lose that chance to enjoy proper public-trust uses of *their* property.

San Francisco is causing irreparable harm in multiple other ways as well, as shown below.

B. Increase In Crime

San Francisco does not dispute that violent crime has spiked in the declared "safety zone" around Seawall Lot 330 since this project was announced, or that crime went up in the neighborhood around another similar project after it opened. (Opening Brief, Section II.E.) As Petitioner explained, the crime data it relied on came from the City's own website (data.sfgov.org); it is a party admission, not inadmissible hearsay. San Francisco can speculate about the reasons why crime has gone up in conjunction with these kinds of centers (Opp. at 9:10-18), but the only actual evidence before the Court is that they are associated with making the neighborhood more dangerous, not less. Putting the public in greater danger of real crime is irreparable harm.

---

[5] See November 2019 agenda for Port of San Francisco: https://sfport.com/sites/default/files/Commission/Documents/A08132019R.pdf

San Francisco is cavalier about putting the public in danger. It admits crime spiked around the Division Circle Navigation Center, but then "stabilized" a few months later. (Opp. at 9:13.) San Francisco's position seems to be that *months* of significantly increased crime in a neighborhood is no big deal. To the victims, it surely is.

San Francisco actually has a policy of accommodating persons in these shelters who commit assaults. The City's model rules for these centers ban people who commit violence against staff, while violence against other guests or the public results in at most a 3-month ban—but then *only* if the violence is committed within 200 feet of the center.[6] The entrance to the Watermark building, where Mr. Vincent's alleged assault was captured on video (Opening Brief at 12) is a bit more than 200 feet from the proposed entrance to the center at Seawall Lot 330. Under its policy, the City would allow the attacker, if he resided at this center, to continue living there and menacing neighbors.

C. Lost Revenue For Public Trust Investments

San Francisco's low-rent nontrust Project is depriving the public of millions of dollars the Legislature wanted raised to invest in other public-trust purposes. The Legislature wanted San Francisco to charge fair-market value for nontrust uses of Seawall Lot 330 so that this money could be reinvested for other public-trust purposes, to "improve access to the waterfront for visitors and residents". (2007 Stats. Ch. 660 § 2(u).) San Francisco should be getting at least $2 million per year from any nontrust use of this property (see Section II.C above), which it would then have to reinvest into public-trust purposes. But San Francisco is getting just a small fraction of that for this project. (Opening Brief at 10:21-22.) The public's interest in the public trust irreparably loses.

San Francisco complains about the alleged increased construction costs of an injunction. (Opp. at 9:19.) San Francisco and its contractor assumed this risk when they entered into their deal knowing full well this litigation was coming. San Francisco's knowing risk should not be held against Petitioner.

---

[6] *See* "Sample Navigation Center Community Rules", *available at* https://sfport.com/sites/default/files/Planning/ESNCAG%20Meeting%20Notes_08.28.19.pdf.

San Francisco's cost claims also lack credibility. San Francisco does not provide the construction contract, showing what a delay might actually cost. All San Francisco offers is the say-so of a project manager about what the increased costs "could" be—not what they actually *would* be. (Emery Decl., Ex. H ¶ 13 (delay "could require the City to pay"; "could result in city liability"; "could also result in an increase in cost"; "contractor could charge").) Presumably the City has other construction projects around the City to which it could productively redirect its contractor's efforts.

Even if San Francisco's contract on its face might require it to pay for any delay, San Francisco's public trust violations render that contract void *ab initio* and ought to excuse the City from payment. In *People v. California Fish Co.*, the Supreme Court held that a contract and patent for the sale of tidelands, executed in violation of public-trust law regulating tidelands, were "not merely voidable but absolutely void", and "no subsequent action … can give validity to the void act or ratify it in any way." (*People v. California Fish Co.* (1913) 166 Cal. 576, 612.)[7] San Francisco's nontrust lease of Seawall Lot 330, in violation of tidelands law, is absolutely void, and no subsequent related contracts can be valid either. If San Francisco loses this case, it ought not to owe its contractor any money. San Francisco will not be damaged.

San Francisco may actually make a lot of money if an injunction issued. In November, it is planning to put out a request for proposals to develop Seawall Lot 330. (See Section II.C above.) The timeframe of any other project there, paying millions in real fair-market value, could be accelerated if this Project were shut down.

D. San Francisco Has Alternatives

San Francisco does not really need this Project to deal with the homeless problem (*see* Opp. at 10:1-9). San Francisco cannot fill the beds it already has. (Opening Brief at 13:1.) This week, the Mayor welcomed President Trump's plan to "sweep up California's homeless and move them

[7] San Francisco's assertion that the State Lands Commission now "could ratify the Project" (Opp. at 9:7) is wrong, under *California Fish*. San Francisco would need to recognize its approvals were void and start all over.

into government-run facilities"—starting in San Francisco.[8] If San Francisco is going along with that federal plan, it no longer needs this project.

IV. NO BOND SHOULD BE REQUIRED

Petitioner has asked, first and foremost, for a stay of San Francisco's approval of this project, under CCP § 1094.5(g). Nothing in that statute requires a bond as a precondition for a stay. No bond should be required for a stay here.

San Francisco cites authority for a bond for an injunction. (Opp. at 10:11-12.) Petitioner does not need an injunction if this Court issues a stay. Regardless, no bond should be required for an injunction either.

San Francisco has not established that it will suffer damages if an injunction is wrongfully issued. (See Section III.C above.) San Francisco's nontrust lease is void, and any contracts it entered into are unenforceable. (*Id.*) San Francisco may well make money if this project is enjoined and the property is developed into something else. (*Id.*) No bond should be required for San Francisco's non-existent damages.

Petitioner cannot afford the bond San Francisco demands. (Declaration of Judy Lin ¶¶ 3-4.) The Court should not impose a bond Petitioner cannot afford. (*See Conover v. Hall* (1974) 11 Cal.3d 842, 847 (unaffordable bonds should not be imposed).)

Due Process also prohibits imposing a bond where a petitioner is likely to prevail on the merits. The California Supreme Court held that requiring a bond in favor of a public agency, where a plaintiff was likely to prevail on the merits, violates the Constitution. (*See Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, 465 (requiring bond where responding party cannot show "probable cause" on "lack of merit" violates Due Process).) Petitioner here is highly likely to prevail on the merits. (See Section II above.) No bond should be required.

---

[8] Mark Matthews (September 10, 2019) "Trump Administration Plans Homeless Sweeps In SF", NBC Bay Area, *available at* https://www.nbcbayarea.com/news/local/Trump-Administration-Planning-Homeless-Sweeps-in-California-Report-559980431.html

V. CONCLUSION

A stay or injunction should issue against San Francisco. No bond should be required.

DATED: September 13, 2019

BRISCOE IVESTER & BAZEL LLP

By: */s/ Peter Prows*
Peter Prows
Attorneys for Petitioner
SAFE EMBARCADERO FOR ALL

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco, and my business address is 155 Sansome Street, Suite 700, San Francisco, California 94104.

On September 13, 2019, at San Francisco, California, I served the attached document(s):

REPLY IN SUPPORT OF STAY OR INJUNCTION

On the following parties:

Dennis J. Herrera
City Attorney
James M. Emery
Brian F. Crossman
Kristen Jensen
Deputy City Attorneys
1 Dr. Carlton B. Goodlett Place
City Hall, Suite 234
San Francisco, CA 94102-5408
Telephone: (415) 554-4690
Fax: (415) 554-4757
Email: Jim.Emery@sfcityatty.org
Brian.Crossman@sfcityatty.org
Kristen.Jensen@sfcityatty.org

Jessica Tucker-Mohl
Elise K. Stokes
Matthew T. Struhar
Office of the Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7807
Email: Jessica.Tuckermohl@doj.ca.gov
Elise.Stokes@doj.ca.gov
Matthew.Struhar@doj.ca.gov

Shari Beth Posner
Office of the Attorney General
1515 Clay Street, Suite 2100
Oakland, CA 94612
Telephone: (510) 622-2121
Email: Shari.Posner@doj.ca.gov

Andrew Kershen
State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, CA 95825
Telephone: (916) 574-1900
Email: Andrew.Kershen@slc.ca.gov

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** On the date written above, I e-mailed the documents to the persons on the service list at the e-mail addresses listed above. I did not receive, within a reasonable time after transmission, any electronic message or other indication that transmission was unsuccessful.

☒ **BY FIRST CLASS MAIL:** On the date written above, I deposited with the United States Postal Service a true copy of the attached document in a sealed envelope, with postage fully prepaid, addressed as shown on the service list. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing contained in this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on September 13, 2019, at San Francisco, California.

Arlene Won