MINUTE ITEM

6/30/77
SA

23. CONSIDERATION OF THE EFFECT OF PROPOSED CONSTRUCTION OF A PARCEL OF TIDELAND, COVERED BY THE PUBLIC TRUST, NEAR INVERNESS, TOMALES BAY, MARIN COUNTY - W 21412.

During consideration of Calendar Item 23 attached, Mr. James F. Trout, Manager, Land Operations, summarized this transaction and made a slide presentation.

For the record, Mr. N. Gregory Taylor, Assistant Attorney General, noted that the applicant, Mr. Robert M. Cassel, had been turned down by the Marin County Planning Commission on his application to build his home. Mr. Taylor also noted that Mr. Cassel is planning to appeal the decision to the Board of Supervisors of Marin County, who have asked this Commission to take a position on this matter before they make a decision. At this time Chairman Kenneth Cory asked why should the Commission act on this matter before the local agency takes a position on this issue.

In addition, Commission-alternate Sid McCausland stated that as a member of the Wildlife Conservation Board and as part of the Public Works Board he has never seen a development plan for the waterfront of Tomales Bay. He stated that he would like to know where the area is going before the Commission is forced to make a permit-by-permit decision on whether construction is appropriate.

Mr. Felix M. Warburg, Planning Consultant, representing Mr. Cassel, appeared in support of the item.

Ms. Susanna Jacob, Chairman of the Environmental Action Committee, and also representing the Inverness Association, the Marin Conservation League, and the Tomales Bay Association appeared in opposition to this item. Ms. Jacob's written statement is on file in the office of the State Lands Commission.

Commissioner Mervyn M. Dymally moved that the item be deferred until the staff can properly brief the Commissioners or propose a comprehensive plan for development or non-development of this area. This motion was seconded and approved by a vote of 3-0.

In addition, Mr. McCausland suggested that the staff invite a representative from the San Francisco Bay Conservation and Development Commission to share with this Commission their exercise of the public trust within their jurisdiction. Mr. McCausland also suggested that when this matter is brought back to the Commission, the staff offers them the alternative of a comprehensive definition of the public trust in the area.

A 9
S 2

Attachment:
Calendar Item 23 (11 pages)

CALENDAR ITEM

23

6/77
W 21412
SA
(AG)

CONSIDERATION OF THE EFFECT OF PROPOSED CONSTRUCTION ON A PARCEL OF TIDELAND, COVERED BY THE PUBLIC TRUST, NEAR INVERNESS, TOMALES BAY, MARIN COUNTY.

Fee title to the beds of all the waterways of the State below the Ordinary High Water Mark (except those previously validly granted to private parties by the Spanish or Mexican governments prior to the date of statehood) passed from the federal government to the State of California at the time of statehood (September 9, 1850) by virtue of California's sovereignty, to be held by the State in trust for the benefit of the public. Under a series of statutes, the Legislature authorized the sale of tidelands by patent. (Sales of submerged lands below mean low tide were not authorized by these statutes. To the extent submerged lands were described in the State Patents, there was no valid conveyance, and the State remains the owner, holding title in trust for the public purposes of commerce, navigation, and fisheries.)

Valid State patents of true tidelands between the mean high and low tide lines did not divest the public of its rights in the tidelands. The buyer of land under these statutes received title to the soil subject to the public rights of navigation, and in subordination to the right of the State to take possession and use and improve those lands for such purpose as the State deems necessary, subject to payment of just compensation for the taking of possession of improvements made in good faith. The grantee may exercise his title so long as he does not construct or maintain a purpresture or nuisance and so long as the state has not exercised its trust; his title is subject to the State's retained trust duties. People v. California Fish Co., 166 Cal. 576 (1913); Newcomb v. Newport Beach, 7 Cal. 2d 793 (1936).

The public tidelands trust easement is traditionally defined in terms of navigation, commerce, and fisheries, but the public uses to which tidelands are subject are sufficiently flexible to encompass changing needs. In administering the trust, the State is not burdened with an outmoded classification favoring one mode of utilization over another. There is growing recognition that one of the most important uses of the tidelands--a use encompassed within the tidelands trust--is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life and which favorably affect the scenery and climate of the area. See Marks v. Whitney, 6 Cal. 3d 251 (1971).

Tomales Bay (which was the area in question in Marks v. Whitney) is a relatively undeveloped area of the California coast. Concern has been expressed by the Marin County Board of Supervisors and by many interested persons over whether the area should be developed or instead preserved in its present state.

Marin County is currently developing a plan for the Inverness Area of Tomales Bay.

The staff has been in contact with the Department of Fish and Game and the Coastal Commission and will work with those agencies and the County of Marin in the development of the county's plan.

At its May 1977 meeting, this Commission was advised by its staff that, pending development of a comprehensive policy for administration of public trust lands in Tomales Bay and the location of the limits of the area subject to that trust, the staff proposed to bring projects before the Commission for consideration on an individual basis. Projects proposed for Commission approval on this basis would be those on patented tidelands which both meet the Commission's own standards for use of tide and submerged lands and those for which an environmental assessment indicates no signif cant environmental effects.

The State Lands Division has been contacted by Robert M. Cassel, who has requested approval for the construction of a single family residence on the parcel of filled patented tidelands described in Exhibit "A" to the proposed resolution. Mr. Cassel has an option to purchase this parcel. He contends that his proposed project is consistent with the public trust and the surrounding neighborhood.

Mr. Cassel has already applied to the County of Marin for a Tidelands Permit (T-77-16) and in connection therewith a Negative Declaration was approved by that county on February 18, 1977. However, both the Environmental Protection Committee and the Planning Commission of Marin County have denied Mr. Cassel's Tidelands Permit application (on March 3 and March 28, 1977, respectively). Mr. Cassel has appealed the denial to the Board of Supervisors.

The minutes of the Environmental Planning Commission (EPC) for March 3, 1977 reveal that it denied the permit "because the committee could not make Required Findings b-2, b-6, b-7, and 3. The main concern of the people opposing this permit was the construction of a single-family dwelling within public tidelands, as defined under the Marks v. Whitney decision. They felt that this structure was not consistent with the public rights associated with this tidelands property. The applicant was unwilling to relocate the structure behind the maximum easterly building limit line as determined by the Department of Public Works."

The Required Findings referred to are imposed by section 22.77 of the Marin County Code which forbids approval of an application for a tidelands permit unless BPC finds that the project proposed would not unduly and unnecessarily:

"(b) . . .

(2) inhibit areas to publicly owned tidelands;

. . .

(6) interfere with, or detract from, the line of sight of the public toward the water, particularly or natural features of visual prominence;

(7) conflict with the scenic beauty of the shoreline due to height, bulk, form, color, materials, illumination, or the extent and design of parking facilities. . ."

Provision 6(e) requires that BPC find that the proposed project will not adversely affect any existing public rights on the property.

The Planning Commission denied Mr. Cassel's appeal because it lacked information (including specific drawings indicating an exact location of the house (height, colors, etc.)) necessary to the making of findings (b) (6) and (7) and (5) (relating to possible destruction of aquatic habitats). The Planning Commission also stated that finding 6(e) could not be made because "it is clear to the Commission that the current siting of the house would fall under lands covered by Marks/Whitney."

State Lands Division staff also has a copy of a letter from a Permit Analyst for the North Central Coast Regional Commission to the Director of Environmental Services for Marin County expressing concern over potential visual effects of Mr. Cassel's proposal, public access to tidelands, the effect of installation of a septic system upon water quality in Tomales Bay and the need for Mr. Cassel to accept full liability for any earthquake damage that may occur to his structure if built. Mr. Cassel has not yet obtained a permit from the Coastal Commission. (The policy of the Coastal Commission is to entertain permit applications only after approval has been granted by local agencies.)

The questions to be resolved by the Lands Commission include:

- What are the appropriate uses for public tidelands trust lands in Tomales Bay?
- To what extent should the Lands Commission involve itself in planning of future uses of public trust lands in Tomales Bay?
- Should the Commission at this time approve the construction of a single family residence on the parcel requested by Mr. Cassel?

It appears to the staff that one factor which was significant to the Marin County agencies' decisions was their view that, in absence of any contrary indication from the Lands Commission, the construction of a single family residence is contrary to the public trust. Thus, one option available to the Commission is to decide whether the project proposed does not unreasonably interfere with the public trust, leaving to Marin County resolution of questions concerning plans, septic systems, etc.

-4-

An advantage to making this determination is that it would enable Marin County to make its decision with respect to Mr. Cassel's tidelands permit application (appeal now pending before the Board of Supervisors) with full knowledge of the Lands Commission's view of public trust requirements.

Staff feels that such a determination may be made for the Cassel parcel as it is one of a unique group---only a few parcels exist in the Inverness Area of Tomales Bay in an undeveloped state isolated between developed parcels. (There is substantial private development on tidelands in the immediate area. Adjacent to the north is the Golden Hinde Boatel and to the south a private residence. Both structures lie in areas encumbered by the public trust easement. The subject parcel is zoned for residential use.)

Staff has therefore discussed with Mr. Cassel the following terms and conditions which the staff feels should be prerequisites to a determination by the Lands Commission that the Cassel project does not unreasonably interfere with the trust. Mr. Cassel has accepted these restrictions and the following procedure.

1. The Commission will formally exercise the public trust over the entire area described in Exhibit A of the proposed resolution (hereinafter referred to as the subject property).

A. That portion of the subject property described in resolution Exhibit B will be reserved for open space and access by the public to tidelands and to Tomales Bay except as noted in C below.

B. With respect to that portion of the subject property described in resolution Exhibit C and based upon the fact that the subject property is located between parcels upon which structures have already been constructed, the Commission will find that the construction of one one-story single family residence of an area not to exceed 4,000 square feet (including all yards, patios, fences, garages, and other associated structures, but excluding driveways, paths and septic system, which shall not exceed the minimum square footage necessary to meet county standards and which shall be located wholly on Marin County assessor's parcel No. 112-101-06) and which otherwise conforms to all requirements which may be imposed by or pursuant to the authority of the County of Marin, does not unreasonably interfere with public trust uses of the subject property.

C. To provide for the possible future use of a portion of the subject property as a pedestrian, equestrian or non-motorized vehicle trail over a course approximately parallel to the present configuration of Sir Francis Drake Boulevard adjacent to the subject property, there would be reserved a rectangular section of the subject property up to 20 feet in width and extending in length approximately parallel to Sir Francis Drake Boulevard between the southerly and northerly limits of the subject parcel (excepting therefrom any portion that may be necessary to meet minimum county standards for septic system drainage), the exact location of which shall be determined if, as and when the County of Marin or other agency determines that the aforesaid use is appropriate; provided that (1) the waterward limit of such reserved area shall not be more at any point than 25 feet from the present edge of pavement or

Sir Francis Drake Boulevard; (2) pending such determination the owner of the subject property may make such use of so much of said area as is within the limits of assessor's parcel No. 112-101-06 as is consistent with the public trust, but he shall not construct any structure or make any improvement within the said zone except a driveway crossing said zone, or if he should make any improvement(s) he shall be deemed to consent to the removal of the same at his expense and without the payment of any compensation by the State of California for such improvements.

2. No person shall construct or develop or permit construction or development of any kind upon the area described in said Exhibit B or otherwise detract from the open space and access easements thereon and said area shall be and remain forever dedicated to open space and access uses, except as set forth in 1C above.

3. Within 90 days after the owner of the subject property completes construction of a residence thereon, he shall cause to be removed from the northern portion thereof (viz, from that portion of the subject property described as assessor's parcel No. 112-101-05) all foreign material (including, but not limited to, tires, glass, metal) and other objects constituting a nuisance. Failure to comply with this condition shall terminate the Lands Commission's permission for the construction of any structure upon any part of the property described in Exhibit A hereto.

4. The action taken by the Lands Commission in this matter shall not be construed to affect the powers of any other agency including but not limited to those of the California Coastal Zone Commission.

5. Prior to the commencement of construction upon the subject property the owner thereof shall acknowledge the existence of the public trust over said property and accept the restrictions placed by the Lands Commission upon use thereof in a form acceptable to the Executive Officer. Failure to give said consent and acknowledgment shall automatically terminate the authorization for construction set out herein.

If at some future date the Commission determines that use of the area upon which the subject improvement will have been made in compliance with the Commission's findings then unreasonably interferes with the public trust, in order to take possession of those improvements the State will pay the reasonable market value thereof at that time. See Public Resources Code section 6312.

IT IS RECOMMENDED THAT THE COMMISSION FORMALLY EXERCISE THE PUBLIC TRUST FOR THE PURPOSES AND UPON THE CONDITIONS SET FORTH IN THE RESOLUTION ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF OVER THE PROPERTY DESCRIBED IN EXHIBIT A THEREOF.

Attachments: Resolution,
A, B, & C. Land Descriptions.

EXHIBITS: Resolution
A, B, & C. Land Descriptions.
I & II Site Maps.

RESOLUTION

Calendar Item No. 23, for the exercise of the public trust in an area of Tomales Bay, Marin County, duly coming on for public hearing before the State Lands Commission of the State of California, at its regular public meeting at 10:00 a.m. on June 30, 1977, in the State Capitol, Sacramento, California; and all persons requesting an opportunity to be heard and to present evidence having been fully heard; and upon due deliberation; and after the Commission having fully considered the said Calendar Item and all matters referred to therein, the testimony and evidence of all persons requesting to be heard, the statements of the staff of the State Lands Division, and of the office of the Attorney General; and all evidence having been filed with the Commission; and the Commission having further fully considered matters of common knowledge to which judicial notice may be taken; and the Commission being fully advised, NOW FINDS:

WHEREAS, that certain real property in the County of Marin, State of California, more particularly described in Exhibit "A" attached hereto and by reference made a part hereof, constitutes a part of the tidelands and submerged lands of Tomales Bay, and is subject to the trust for the benefit of the public for the purposes of commerce, navigation, and fisheries, and other purposes as defined in the case of Marks v. Whitney, 6 Cal.3d 251 (1971); and

WHEREAS, for the purposes of enhancing the public trust in Tomales Bay, Marin County, it is proper to formally exercise said trust over the property described in Exhibit "A" hereto upon the terms and conditions hereinafter set forth; and

WHEREAS, that certain real property described in Exhibit "A" hereto is unique in that it is located between two parcels upon which there are buildings already constructed and the construction of one one-story single family residence upon said property and in compliance with the terms and conditions hereinafter set forth will not unreasonably interfere with public trust uses of the subject property;

WHEREAS, the permission granted by this Resolution for construction of the aforesaid residence shall not operate as a precedent of any kind allowing, permitting, or approving any future or further development, construction, or similar use of potential tidelands.

NOW THEREFORE, upon motion duly made, seconded and unanimously approved, the State Lands Commission hereby RESOLVES:

1. The said public trust is hereby formally exercised over that certain real property described in Exhibit "A" hereto (sometimes referred to hereinafter as the subject property) upon the following terms and conditions:

A. That portion of the subject property described in Exhibit "B" hereto, and incorporated herein by this reference, shall be and is reserved for open space and access by the public to tidelands and to Tomales Bay except as noted in C below.

B. The State Lands Commission has no objection to the construction of one one-story single family residence (for said use) of an area not to exceed 4,000 square feet (including all yards, patios, fences, garages, and other associated structures, but excluding driveways, paths, and septic system, which shall not exceed the minimum square footage necessary to meet Marin County standards) if said residence and associated development shall be located wholly within the area described in Exhibit "C" hereto and conforms in all respects to all requirements which may be imposed by or pursuant to the authority of the County of Marin and/or any other public agency.

C. To provide for the possibility of future use of a portion of the subject property as a pedestrian, equestrian or non-motorized vehicle trail over a course approximately parallel to the present configuration of Sir Francis Drake Boulevard adjacent to the subject property, there is reserved a rectangular section of the subject property up to 20 feet in width and extending in length approximately parallel to Sir Francis Drake Boulevard between the southerly and northerly limits of the subject parcel (excepting therefrom any portion that may be necessary to meet minimum county standards for septic system drainage), the exact location of which shall be determined if, as and when the County of Marin or other agency determines that the aforesaid use is appropriate; provided that (1) the waterward limit of such reserved area shall not be more, at any point, than 25 [illegible] from the present edge of pavement of Sir Francis Drake Boulevard; (2) pending such determination the owner of the subject property may make such use of so much of said area as is within the limits of assessor's parcel 112-101-05 as is consistent with the public trust but he shall not construct any structure or make any improvement within the said zone except a driveway crossing said zone, or if he should make any improvement(s) he shall be deemed to consent to the removal of the same at his expense and without the payment of any compensation by the State of California for such improvements.

D. No person shall construct or develop or permit construction or development of any kind upon the area described in Exhibit "B" hereto or otherwise detract from the open space and access easements thereon and said area shall be and remain dedicated to open space and access uses, except as set forth in 1C above.

E. Within 90 days after the owner of the subject property completes construction of a residence thereon he shall cause to be removed from the northern portion thereof (viz, from that portion of the subject property described as assessor's parcel no. 112-101-05) all foreign material (including but not limited to tires, glass, metal) and other objects constituting a nuisance. Failure to comply with this condition shall terminate the Lands Commission's permission for the construction of any structure upon any part of the property described in Exhibit "A" hereto.

2. The action taken by the Lands Commission in this matter shall not be construed to affect the powers of any other agency including but not limited to those of the California Coastal Zone Commission.

3. Prior to the commencement of construction upon the subject property the owner thereof shall acknowledge the existence of the public trust over said property and accept the restrictions placed by the Lands Commission upon use thereof in a form acceptable to the Executive Officer. Failure to give said consent and acknowledgment shall automatically terminate the authorization for construction set out herein.

4. If at some future date the Commission determines that use of the area upon which the subject improvement will have been made in compliance with this Resolution then unreasonably interferes with the public trust, in order to take possession of those improvements the State will pay the reasonable market value thereof at that time. (See Pub. Resources Code Sec. 6312.)

5. The jurisdiction of the Commission is continuing, and nothing herein contained shall in any manner limit, prohibit or restrict the Commission on its own motion, or upon the request of lawful owners of any underlying fee interest, or other parties, and after further public hearings, from amending or revoking this resolution in the future; from establishing different criteria of trust exercise; from taking possession of improvements on the subject property pursuant to law; from requiring permits or licences or charges for activities, improvements or other use whatever of the subject property; or from taking any action whatever as may later be deemed necessary of appropriate in the interest of the public and consistent with the public's property rights.

6. It is the intent of the Commission to fully and completely carry out its responsibilities as guardian of the public titles, while recognizing the reasonable requirements of any parties who may be the lawful owners of an underlying fee interest, to the extent such requirements do not substantially interfere with the public rights.

7. An Environmental Impact Report is not required for the action taken by this resolution as said action is within one or more of the categorical exemptions adopted pursuant to Public Resources Code section 21085 as set out in 14 Cal. Admin. Code, division 6, chapter 3, article 8, section 15100, et seq., including but not limited to section 15103, 15107, 15108 and 15113 and/or in 2 Cal. Admin. Code section 2907 (classes 3, 7, 8, and 13).

8. That a copy of this Resolution be recorded in the office of the Marin County Recorder and the formal consent and acknowledgment of the owner of the subject property be secured.

Attachments: Exhibits A, B, C.

EXHIBIT "A"

W 21412

A parcel of land in protracted Section 16, T3N, R2W, MDM, Marin County, California, said parcel being a portion of Tideland Survey No. 170, and more particularly described as follows:

BEGINNING at a point on the northeasterly line of the county road, (Sir Francis Drake Boulevard), said point being distant S 41° 46' E, 122 feet, N 60° 29' E, 30.70 feet, S 17° 16' E, 247.36 feet, S 50° 52' E, 191.03 feet and S 35° 24' E, 91.34 feet from the point of beginning of the description contained in Agreement between O. L. Shafter Estate Company, a corporation, and Julia Shafter Hamilton dated February 2, 1906 and recorded February 6, 1906 in Book 99 of Deeds at page 3, Marin County records; thence from said point of beginning along said northeasterly line of the county road, S 33° 24' E, 168.16 feet and S 15° 37' E, 34.77 feet; thence leaving said line N 42° 48' E, 295 feet, more or less, to the eastern line of the abovementioned Tide Land Survey No. 170; thence northwesterly along said eastern line to a point which bears N 44° 45' E, from the point of beginning; thence S 44° 45' W, 300 feet, more or less, to the point of beginning.

END OF DESCRIPTION

Prepared [signature] Checked [signature]

Reviewed [signature] Date 6/15/77

EXHIBIT "B"

W 21412

A parcel of land in protracted Section 16, T3N, R9W, MDM, Marin County, California, said parcel being a portion of Tideland Survey No. 170, and more particularly described as follows:

BEGINNING at a point on the northeasterly line of the county road, (Sir Francis Drake Boulevard), said point being distant S 41° 46' E, 122 feet, N 60° 29' E, 30.70 feet, S 17° 16' E, 247.36 feet, S 50° 52' E, 191.03 feet and S 35° 24' E, 91.34 feet from the point of beginning of the description contained in agreement between O. L. Shafter Estate Company, a corporation, and Julia Shafter Hamilton dated February 2, 1906 and recorded February 6, 1906 in Book 99 of Deeds at page 5, Marin County records; thence from said point of beginning along said northeasterly line of the county road, S 35° 24' E, 96.26 feet, thence leaving said line N 42° 48' E, 192 feet, more or less, to the top of the bank on the westerly side of Tomales Bay, thence southeasterly along said bank to a point which bears S 35° 24' E, 168.16 feet, S 15° 37' E, 34.77 feet and N 42° 48' E, 223 feet, more or less, from the point of beginning, thence N 42° 48' E, 72 feet more or less to the eastern line of the abovementioned Tide Land Survey No. 170, thence northwesterly along said eastern line to a point which bears N 44° 45' E, from the point of beginning; thence S 44° 45' W, 300 feet, more or less, to the point of beginning.

END OF DESCRIPTION

Prepared [signature] Checked M L Shafter

Reviewed [signature] Date June 20, 1977 A.D.

EXHIBIT "C"

W 21412

A parcel of land in protracted Section 16, T3N, R9W, MDM, Marin County, California, said parcel being a portion of Tideland Survey No. 170, and more particularly described as follows:

COMMENCING at a point on the northeasterly line of the county road, (Sir Francis Drake Boulevard), said point being distant S 41° 46' E, 122 feet, N 60° 29' E, 30.70 feet, S 17° 16' E, 247.36 feet, S 50° 52' E, 191.03 feet and S 35° 24' E, 91.34 feet from the point of beginning of the description contained in Agreement between O. L. Shafter Estate Company, a corporation, and Julia Shafter Hamilton dated February 2, 1906 and recorded February 6, 1906 in Book 90 of Deeds at page 5, Marin County records; thence from said point of commencement along said northeasterly line of the county road, S 35° 24' E, 96.26 feet to the POINT OF BEGINNING, thence continuing along said northeasterly line S 35° 24' E, 71.9 feet and S 15° 37' E, 34.77 feet; thence leaving said line N 42° 48' E, 223 feet, more or less to the top of the bank on the westerly side of Tomales Bay, thence northwesterly along said top of bank to a point which bears N 42° 48' E, from the point of beginning, thence S 42° 48' W, 192 feet, more or less, to the point of beginning.

Prepared H. J. Kunnecke Checked M. L. [illegible]

Reviewed [illegible] Date June 2, 1977