

**MINUTE ITEM**

This Calendar Item No. C88 was approved as  
Minute Item No. 88 by the California State Lands  
Commission by a vote of 3 to 0 at its  
9-17-01 meeting.

**Minute Item  
88**

09/17/01

**CALIFORNIA STATE LANDS COMMISSION  
(PARTY)**

Regular Item 88. Commissioners listened to a staff presentation by Jan Stevens of the Attorney General's Office regarding consideration of new public trust policy. Commission listened to public testimony.

Item approved as presented.

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CONSIDER ADOPTION OF POLICY STATEMENT RELATING TO  
THE PUBLIC TRUST DOCTRINE

At its last meeting, the Commission requested information and guidance on the Public Trust Doctrine and the role the Commission plays in administering the Public Trust. The Commission was particularly concerned about what uses of Public Trust lands are permissible and what uses of these lands are impermissible under the Public Trust Doctrine. The Commission also directed staff to prepare an informative statement that it could adopt that would help Public Trust lands grantees, lease applicants and the public understand how the Public Trust Doctrine applies to granted and state-owned Public Trust lands.

In response, staff submits to the Commission three different resources on the Public Trust, all of which focus on the uses to which Public Trust lands may be put -- as this was the Commissioners' principal concern. The first (Exhibit A) is a policy paper setting forth a statement for administration of Public Trust lands. This has been drafted for adoption by the Commission as a reference paper on uses of Public Trust lands. The second (Exhibit B) is a paper prepared by the Attorney General's Office discussing Public Trust law, with particular emphasis on what the courts have found to be proper trust uses in the past and what can be gleaned from case law regarding proposals for new and different uses for Public Trust lands. Third, Jan Stevens, a retired Assistant Attorney General and writer, lecturer and recognized expert on the Public Trust Doctrine, will provide a brief oral presentation and will respond to questions from the Commissioners.

To briefly summarize, tide and submerged lands and the beds of lakes, streams and other navigable waterways are held in trust by the State for the benefit of the people of California and are to be used to promote the public's interest in water dependent or oriented activities including but not limited to commerce, navigation, fisheries, environmental preservation and recreation. The Commission is the steward of the State's Public Trust lands. It has administrative jurisdiction over Public Trust lands that have been retained by the State, and it has oversight authority over trust lands granted by the Legislature to local governments. The Commission acts pursuant to legislative direction and the Public Trust Doctrine to protect the public's interest in its trust lands.

Among the Commission's duties in protecting the public's interest in these lands is

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ensuring that the uses to which these lands are put are compatible with the Public Trust Doctrine.

The Public Trust as a common law doctrine that is not static but is continuously evolving. There are traditional uses, such as harbors and marinas, that are accepted trust uses. There are uses, such as private residences, that are just as clearly inappropriate. There are uses, such as oil production operations and pipeline rights of way that may not at first appear appropriate, but the courts have determined may be acceptable uses if determined to be compatible with trust needs. There are few categorical rules beyond the courts' admonitions and the Legislature's mandates to the Commission and to local government grantees, and these mandated provisions are sometimes amorphous.

These materials and presentation are intended to assist the Commission in exercising its discretion as each specific factual situation arises. The Commission's adoption of a general policy statement will provide assistance to potential Public Trust land users and grantees of trust lands.

In implementing the Commission's decision, staff will investigate and provide information to the Commission concerning the other factors for the Commission to consider on a project by project basis. The Commission will harmonize the Public Trust Doctrine with other legal requirements. These include the Coastal Act, the California Environmental Quality Act, etc. In determining whether a proposed use is consistent with the Public Trust Doctrine and in the best interest of the state, the Commission will also consider the views of various public groups, business and other relevant sectors of California society.

**EXHIBITS**

- A. Public Trust Doctrine Policy Paper
- B. Public Trust Legal Principles

**RECOMMENDATIONS**

IT IS RECOMMENDED THAT THE COMMISSION:

1. ADOPT THE GUIDANCE POLICY STATEMENT ON THE PUBLIC TRUST DOCTRINE ATTACHED AS EXHIBIT A.
2. DIRECT STAFF TO ASSIST AND COOPERATE WITH LOCAL TRUSTEES, WHICH MANAGE TRUST LANDS PURSUANT TO LEGISLATIVE GRANTS, TO ASSURE THE LOCAL TRUSTEES COMPLIANCE WITH THE GRANTING STATUTES AND THE PUBLIC TRUST DOCTRINE.

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# Exhibit A

## PUBLIC TRUST POLICY

For

The California State Lands Commission

The Legislature has given the California State Lands Commission authority over California's sovereign lands – lands under navigable waters. These are lands to which California received title upon its admission to the Union and that are held by virtue of its sovereignty. These lands are also known as public trust lands. The Commission administers public trust lands pursuant to statute and the Public Trust Doctrine – the common law principles that govern use of these lands.

### **Public Trust Doctrine**

The Public Trust Doctrine is set forth in common law. Several of its guiding principles are that:

- I. Lands under the ocean and under navigable streams are owned by the public and held in trust for the people by government. These are referred to as public trust lands, and include filled lands formerly under water. Public trust lands cannot be bought and sold like other state-owned lands. Only in rare cases may the public trust be terminated, and only where consistent with the purposes and needs of the trust.
  
- II. Uses of trust lands, whether granted to a local agency or administered by the State directly, are generally limited to those that are water dependent or related, and include commerce, fisheries, and navigation, environmental preservation and recreation. Public trust uses include, among others, ports, marinas, docks and wharves, buoys, hunting, commercial and sport fishing, bathing, swimming, and boating. Public trust lands may also be kept in their natural state for habitat, wildlife refuges, scientific study, or open space. Ancillary or incidental uses, that is, uses that directly promote trust uses, are directly supportive and necessary for trust

uses, or that accommodate the public's enjoyment of trust lands, are also permitted. Examples include facilities to serve visitors, such as hotels and restaurants, shops, parking lots, and restrooms. Other examples are commercial facilities that must be located on or directly adjacent to the water, such as warehouses, container cargo storage, and facilities for the development and production of oil and gas. Uses that are generally not permitted on public trust lands are those that are not trust use related, do not serve a public purpose, and can be located on non-waterfront property, such as residential and non-maritime related commercial and office uses. While trust lands cannot generally be alienated from public ownership, uses of trust lands can be carried out by public or private entities by lease from this Commission or a local agency grantee. In some cases, such as some industrial leases, the public may be excluded from public trust lands in order to accomplish a proper trust use.

III. Because public trust lands are held in trust for all citizens of California, they must be used to serve statewide, as opposed to purely local, public purposes.

**Commission Authority**

The Legislature has granted general authority to the Commission to manage trust lands. Unless otherwise expressly stated in the State Constitution or statutes, the public trust doctrine mandates the criteria for Commission management of trust lands. In carrying out its management responsibilities, the Commission commonly leases trust lands to private and public entities for uses consistent with the doctrine. Subject to the criteria in statutes and case law, the Commission may also exchange public trust lands for non-trust lands, lift the trust from public trust lands, enter into boundary line agreements, and otherwise generally manage trust lands. While most of the authority over public trust lands possessed by the Legislature is vested in the Commission, the Legislature, as the people's elected representatives, has not delegated the authority to modify uses permitted on public trust lands by the Public Trust Doctrine. There are times when the Legislature, exercising its retained powers, enacts laws dealing with public trust lands and uses for specified properties. This may include, in limited circumstances, allowing some non-trust uses when not in conflict with trust needs, in order to serve broader public trust purposes.

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**Implementation by the Commission of the Public Trust Doctrine.**

The Commission implements the Public Trust Doctrine through careful consideration of its principles and the exercise of discretion within the specific context of proposed uses. Factors such as location, existing and planned surrounding facilities, and public needs may militate in favor of a particular use in one area and against the same use in another. The Commission applies the doctrine's tenets to proposed projects with consideration given to the context of the project and the needs of a healthy California society, to meet the needs of the public and the environment. The Commission may also choose among competing valid trust uses. The Commission must also comply with the requirements of other applicable law, such as the California Environmental Quality Act. In administering its trust responsibilities, the Commission exercises its discretionary authority in a reasoned manner, accommodating the changing needs of the public while preserving the public's right to use public trust lands for the purposes to which they are uniquely suited.

**Relationship of the Commission to Granted Lands**

The Legislature has granted certain public trust lands to local governments for management. A grantee must manage trust lands consistent with its own granting statutes and the Public Trust Doctrine. The Legislature has retained for the state, by delegating to the Commission, the power to approve land exchanges, boundary line agreements, etc.

The State Lands Commission exercises oversight over all granted lands. Generally, this means the Commission carries out this responsibility by working cooperatively with grantees to assure that requirements of the legislative grants and the Public Trust Doctrine are carried out and to achieve trust uses. The Commission monitors and audits the activities of the grantees to insure that they are complying with the terms of their statutory grants and with the public trust. With a few exceptions, grantees are not required to secure approval from the Commission before embarking on development projects on their trust lands nor before expending revenues generated from activities on these lands. However, where an abuse of the Public Trust Doctrine or violation of a legislative grant occurs, the Commission can advise the grantee of the abuse or

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violation; if necessary, report to the Legislature, which may revoke or modify the grant; or file a lawsuit against the grantee to halt the project or expenditure.

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# Exhibit B

## The Public Trust Doctrine

### I. Origins of the Public Trust

The origins of the public trust doctrine are traceable to Roman law concepts of common property. Under Roman law, the air, the rivers, the sea and the seashore were incapable of private ownership; they were dedicated to the use of the public.<sup>1</sup> This concept that tide and submerged lands are unique and that the state holds them in trust for the people has endured throughout the ages. In 13<sup>th</sup> century Spain, for example, public rights in navigable waterways were recognized in *Las Siete Partidas*, the laws of Spain set forth by Alfonso the Wise.<sup>2</sup> Under English common law, this principle evolved into the public trust doctrine pursuant to which the sovereign held the navigable waterways and submerged lands, not in a proprietary capacity, but rather "as trustee of a public trust for the benefit of the people" for uses such as commerce, navigation and fishing.<sup>3</sup>

After the American Revolution, each of the original states succeeded to this

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<sup>1</sup>Institutes of Justinian 2.1.1.

<sup>2</sup>*Las Siete Partidas* 3.28.6 (S. Scott trans. & ed. 1932).

<sup>3</sup>*Colberg, Inc. v. State of California ex rel. Dept. Pub. Works* (1967) 67 Cal.2d 408, 416.

sovereign right and duty. Each became trustee of the tide and submerged lands within its boundaries for the common use of the people.<sup>4</sup> Subsequently admitted states, like California, possess the same sovereign rights over their tide and submerged lands as the original thirteen states under the equal-footing doctrine.<sup>5</sup> That is, title to lands under navigable waters up to the high water mark is held by the state in trust for the people. These lands are not alienable in that all of the public's interest in them cannot be extinguished.<sup>6</sup>

## II. Purpose of the Public Trust

The United States Supreme Court issued its landmark opinion on the nature of a state's title to its tide and submerged lands nearly 110 years ago, and although courts have reviewed tidelands trust issues many times since then, the basic premise of the trust remains fundamentally unchanged. The Court said then that a state's title to its tide and submerged lands is different from that to the lands it holds for sale. "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on

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<sup>4</sup>*Martin v. Waddell* (1842) 41 U.S. (16 Pet.) 367, 410.

<sup>5</sup>*Pollard's Lessee v. Hagen* (1845) 44 U.S. (3 How.) 212, 228-29.

<sup>6</sup>*People v. California Fish Co.* (1913) 166 Cal. 576, 597-99; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 524-25.

commerce over them, and have liberty of fishing” free from obstruction or interference from private parties.<sup>7</sup> In other words, the public trust is an affirmation of the duty of the state to protect the people’s common heritage of tide and submerged lands for their common use.<sup>8</sup>

But to what common uses may tide and submerged lands be put? Traditionally, public trust uses were limited to water-related commerce, navigation, and fishing. In more recent years, however, the California Supreme Court has said that the public trust embraces the right of the public to use the navigable waters of the state for bathing, swimming, boating, and general recreational purposes. It is sufficiently flexible to encompass changing public needs, such as the preservation of the lands in their natural state for scientific study, as open space and as wildlife habitat. The administrator of the public trust “is not burdened with an outmoded classification favoring one mode of utilization over another.”<sup>9</sup>

The Legislature, acting within the confines of the common law public trust

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<sup>7</sup>*Illinois Central R.R. Co. v Illinois* (1892) 146 U.S. 387, 452.

<sup>8</sup>*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441.

<sup>9</sup>*Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260.

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doctrine, is the ultimate administrator of the tidelands trust and often may be the ultimate arbiter of permissible uses of trust lands. All uses, including those specifically authorized by the Legislature, must take into account the overarching principle of the public trust doctrine that trust lands belong to the public and are to be used to promote public rather than exclusively private purposes. The Legislature cannot commit trust lands irretrievably to private development because it would be abdicating the public trust.<sup>10</sup> Within these confines, however, the Legislature has considerable discretion.

The Legislature already may have spoken to the issue of the uses to which particular tide and submerged lands may be put when making grants of these lands in trust to local government entities. Statutory trust grants are not all the same—some authorize the construction of ports and airports, others allow only recreational uses and still others allow a broad range of uses.

A further and often complicating factor is that granted and ungranted lands already may have been developed for particular trust uses that are incompatible with other trust uses or may have become antiquated. Some tidelands have been dedicated exclusively to industrial port uses, for example, and in these areas, recreational uses, even if also

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<sup>10</sup>*Illinois Central Railroad v. Illinois, supra*, at 452-53.

authorized by the trust grant, may be incompatible. Similarly, tidelands set aside for public beaches may not be suitable for construction of a cannery, even though a cannery may be an acceptable trust use. Piers, wharves and warehouses that once served commercial navigation but no longer can serve modern container shipping may have to be removed or converted to a more productive trust use. Historic public trust uses may have been replaced by new technologies. Antiquated structures on the waterfront may be an impediment rather than a magnet for public access and use of the waters. Public trust uses may and often do conflict with one another. The state and local tidelands grantees, as administrators of their respective public trust lands, are charged with choosing among these conflicting uses, with the Legislature as the ultimate arbiter of their choices.

For all these reasons, a list of uses or a list of cases without more may not be as useful as an analysis of public trust law applied to a specific factual situation.

### III. The Leasing of Tidelands

A few principles established by the courts are instructive in analyzing under the public trust doctrine the leasing of public trust lands for particular uses. For example, it was settled long ago that tidelands granted in trust to local entities may be leased and improved if the leases and improvements promote uses authorized by the statutory trust grant and the public trust. Leases for the construction of wharves and warehouses and for

and uses, i.e., structures that directly promote port development, were approved early in the 20<sup>th</sup> century.<sup>11</sup> Later, leases for structures incidental to the promotion of port commerce, such as the Port of Oakland's convention center, were held to be valid because although they did not directly support port business, they encouraged trade, shipping, and commercial associations to become familiar with the port and its assets.<sup>12</sup> Visitor-serving facilities, such as restaurants, hotels, shops, and parking areas, were also approved as appropriate uses because as places of public accommodation, they allow broad public access to the tidelands and, therefore, enhance the public's enjoyment of these lands specifically set apart for their benefit.<sup>13</sup>

These cases provide three guidelines for achieving compliance with the public trust when leasing tidelands for construction of permanent structures to serve a lessee's development project: (1) the structure must directly promote uses authorized by the public trust grant and trust law generally, (2) the structure must be incidental to the

<sup>11</sup>*San Pedro etc. R.R. Co. v. Hamilton* (1911) 161 Cal. 610; *Koyner v. Miner* (1916) 172 Cal. 48; *Oakland v. Larue Wharf & Warehouse Co.* (1918) 179 Cal. 207; *City of Oakland v. ...* (1929) 206 Cal. 315.

<sup>12</sup>*Haggerty v. City of Oakland* (1958) 161 Cal.App.2d 407, 413-414.

<sup>13</sup>*Id.* at p. 414; *Martin v. Smith* (1960) 184 Cal.App.2d 571, 577-78.

promotion of such uses, or (3) the structure must accommodate or enhance the public's enjoyment of the trust lands. Nonetheless, when considering what constitutes a trust use, it is critical to keep in mind the following counsel from the California Supreme Court: The objective of the public trust is always evolving so that a trustee is not burdened with outmoded classifications favoring the original and traditional triad of commerce, navigation and fisheries over those uses encompassing changing public needs.<sup>14</sup>

#### IV. Promotion of Trust Uses and Public Enjoyment of Trust Lands

Installations not directly connected with water-related commerce are appropriate trust uses when they must be located on, over or adjacent to water to accommodate or foster commercial enterprises. Examples include oil production facilities, freeway bridges and nuclear power plants.<sup>15</sup> Hotels, restaurants, shops and parking areas are appropriate because they accommodate or enhance the public's ability to enjoy tide and submerged lands and navigable waterways. The tidelands trust is intended to promote rather than serve as an impediment to essential commercial services benefitting the people

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<sup>14</sup>*National Audubon Society v. Superior Court*, *supra*, at p. 434.

<sup>15</sup>See *Boone v. Kingsbury* (1928) 206 Cal.148, 183; *Colberg, Inc. v. State of California ex rel. Dept. Pub. Work*, *supra*, at pp. 421-22; and *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 289.

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and the ability of the people to enjoy trust lands.<sup>16</sup>

Nevertheless, the essential trust purposes have always been, and remain, water related, and the essential obligation of the state is to manage the tidelands in order to implement and facilitate those trust purposes for all of the people of the state.<sup>17</sup>

Therefore, uses that do not accommodate, promote, foster or enhance the statewide

's need for essential commercial services or their enjoyment of the tidelands are not appropriate uses for public trust lands. These would include commercial installations that could as easily be sited on uplands and strictly local or "neighborhood-serving" uses that confer no significant benefit to Californians statewide. Examples may include hospitals, supermarkets, department stores, and local government buildings and private office buildings that serve general rather than specifically trust-related functions.

#### V. Mixed-Use Developments

Mixed-use development proposals for filled and unfilled tide and submerged lands have generally consisted of several structures, including non-trust use structures or structures where only the ground floor contains a trust use. While mixed-use

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<sup>16</sup>*Carstens v. California Coastal Com.*, *supra*, at p. 289.

<sup>17</sup>Joseph L. Sax, "The Public Trust in Stormy Western Waters," October 1997.

developments on tidelands may provide a stable population base for the development, may draw the public to the development, or may yield the financing to pay for the trust uses to be included in the development, they ought not be approved as consistent with statutory trust grants and the public trust for these reasons. These reasons simply make the development financially attractive to a developer. Projects must have a connection to water-related activities that provide benefits to the public statewide, which is the hallmark of the public trust doctrine. Their failure to achieve this goal simply to make a development financially attractive sacrifices public benefit for private or purely local advantage. A mixed-use development may not be compatible with the public trust, not because it may contain some non-trust elements, but because it promotes a "commercial enterprise unaffected by a public use"<sup>18</sup> rather than promoting, fostering, accommodating or enhancing a public trust use.<sup>19</sup> That use, however, need not be restricted to the traditional triad of commerce, navigation and fishing. It is an evolving use that is responsive to changing public needs for trust lands and for the benefits these lands provide.<sup>20</sup>

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<sup>18</sup>*City of Long Beach v. Morse* (1947) 31 Cal.2d 254, 261.

<sup>19</sup>*Haggerty v. City of Oakland, supra*, at pp. 413-14.

<sup>20</sup>*National Audubon Society v. Superior Court, supra*, at p. 434.

Moreover, commercial enterprises without a statewide public trust use may violate the terms of statutory trust grants. Typically, grants allow tidelands to be leased, but only for purposes "consistent with the trust upon which said lands are held." This term is not equivalent to "not required for trust uses" or "not interfering with trust uses." Since leases of tidelands must be consistent with statutory trust grant purposes, leases which expressly contemplate the promotion of non-trust uses rather than trust uses would not comply with the terms of the trust grants.

For these reasons, non-trust uses on tidelands, whether considered separately or part of a mixed-use development, are not mitigable. That is, unlike some environmental contexts where developments with harmful impacts may be approved so long as the impacts are appropriately mitigated by the developer, in the tidelands trust context, mitigation of a non-trust use has never been recognized by the courts. To the contrary, the California Supreme Court has said that just as the state is prohibited from selling its tidelands, it is similarly prohibited from freeing tidelands from the trust and dedicating them to other uses while they remain useable for or susceptible of being used for water-related activities.<sup>21</sup>

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<sup>21</sup>*Atwood v. Hammond* (1935) 4 Cal.2d 31, 42-43.

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## VI. Incidental Non-Trust Use

All structures built on tide and submerged lands should have as their main purpose the furtherance of a public trust use. Any structure designed or used primarily for a non-trust purpose would be suspect. Mixed-use development proposals, however, frequently justify non-trust uses as "incidental" to the entire project. The only published case in California in which a non-trust use of tidelands has been allowed focused on the fact that the real or main purpose of the *structure* was a public trust use and that the non-trust use would be incidental to the main purpose of the structure.<sup>22</sup> In this context, the court noted that because the real or main purpose of the structure was to promote public trust uses, non-trust groups could also use the facility, but the non-trust uses must remain *incidental* to the main purpose of the structure.<sup>23</sup> This is the state of the law, and it is supported by good policy reasons as well. If the test for whether a non-trust use is incidental to the main purpose of a development were not applied on a structure by structure basis, pressure for more dense coastal development may increase as developers seek to maximize the square feet of allowable non-trust uses. Disputes may arise as to how to

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<sup>22</sup>*Haggerty v. City of Oakland, supra*, at p. 413.

<sup>23</sup>*Ibid.*

calculate the square footage attributable to the proper trust uses versus non-trust uses, with open waterways and parking garages likely being the dominant trust uses and structures being devoted to non-trust uses.

It is beyond contention that the state cannot grant tidelands free of the trust merely because the grant serves some public purpose, such as increasing tax revenues or because the grantee might put the property to a commercial use.<sup>24</sup> The same reasoning applies to putting tidelands to enduring non-trust uses by building structures on them. Accordingly, the only enduring non-trust uses that may be made of tidelands without specific legislative authorization are those incidental to the main trust purpose applied on a structure by structure basis. Each structure in a mixed-use development on tidelands must have as its primary purpose an appropriate public trust use. If its real or main purpose is a trust use, portions of the structure not needed for trust purposes may be leased temporarily to non-trust tenants, provided that the non-trust use is incidental to the main purpose of the structure.

## VII. The Role of the Legislature

The Legislature is the representative of all the people and, subject to judicial

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<sup>24</sup>*National Audubon Society v. Superior Court, supra*, at p. 440.

review, is the ultimate arbiter of uses to which public trust lands may be put. The Legislature may create, alter, amend, modify, or revoke a trust grant so that the tidelands are administered in a manner most suitable to the needs of the people of the state.<sup>25</sup> The Legislature has the power to authorize the non-trust use of tidelands. It has done so rarely, and then on a case-specific basis.<sup>26</sup> Many of its actions have been a recognition of incidental non-trust uses or of a use that must be located on the tidelands. When these legislative actions have been challenged in court, the courts, understandably, have been very deferential, upholding the actions and the findings supporting them.<sup>27</sup>

The Legislature has provided a statutory framework for the leasing of tidelands for non-trust uses by the cities of Long Beach and San Francisco grounded on findings that the tidelands are *not required for* (San Francisco) or *not required for and will not*

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<sup>25</sup>*City of Coronado v. San Diego Unified Port District* (1964) 227 Cal.App.2d 455, 474.

<sup>26</sup>For example, in Chapter 728, Statutes of 1994, the Legislature authorized tidelands in Newport Beach to continue to be put to non-trust uses for a limited term after it was determined that the tidelands had been erroneously characterized and treated as uplands by the city due to incorrect placement of the tidelands boundary.

<sup>27</sup>See, e.g., *Boone v. Kingsbury*, *supra*, at p. 183 and *City of Coronado v. San Diego Unified Port District*, *supra*, at pp. 474-75; but see *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 206-07, 212.

<sup>28</sup>Ch. 1560, Stats. 1959; Ch. 422, Stats. 1975. These statutes also provide for, *inter alia*,

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*interfere with* (Long Beach) the uses and purposes of the granting statute.<sup>28</sup> Where, as in these two statutes, the Legislature has authorized in general terms the use of tidelands for non-trust purposes, the statutes' provisions must be interpreted so as to be consistent with the paramount rights of commerce, navigation, fishery, recreation and environmental protection. This means that the tidelands may be devoted to purposes unrelated to the common law public trust to the extent that these purposes are incidental to and accommodate projects that must be located on, over or adjacent to the tidelands. These non-trust uses are not unlimited, for there are limits on the Legislature's authority to free tidelands from trust use restrictions.<sup>29</sup>

To ensure that the exercise of the Long Beach and San Francisco statutes is consistent with the common law public trust, the tidelands to be leased for non-trust uses must have been filled and reclaimed and no longer be tidelands or submerged lands and must be leased for a limited term. The space occupied by the non-trust use, whether measured by the percentage of the land area or the percentage of the structure, should be relatively small. Finally, any structure with a non-trust use should be compatible with the

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the lease revenues to be used to further trust uses and purposes.

<sup>29</sup>*Illinois Central R.R. Co. v. Illinois, supra*, at pp. 452-54.

overall project. Findings such as these are necessary because legislative authorizations to devote substantial portions of tidelands to long-term non-trust uses have generally been considered by the courts as tantamount to alienation.<sup>30</sup>

In several out-of-state cases, specific, express legislative authorizations of incidental leasing of publicly-financed office building space to private tenants solely for the purpose of producing revenue have been subject to close judicial scrutiny, although they did not involve tidelands trust use restrictions.<sup>31</sup> One case involved construction of an international trade center at Baltimore's Inner Harbor with public financing where legislation expressly permitted *portions* of the structure to be leased to private tenants for the production of income. Another was a condemnation case where the statute authorizing the New York Port Authority to acquire a site on which to build the World Trade Center was challenged on the basis that it allowed *portions* of the new structure to be used for no other purpose than the raising of revenue. In both cases, opponents of the projects argued that a publicly financed office building should not be permitted to have

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<sup>30</sup>*Atwood v. Hammond, supra*, at p. 42; see also *Illinois Central R.R. Co. v. Illinois, supra*, at pp. 454-53.

<sup>31</sup>*Lerch v. Maryland Port Authority* (1965) 240 Md. 438; *Courtesy Sandwich Shop, Inc. v. Port of New York Authority* (1963) 12 N.Y.2d 379.

any private commercial tenants even though the respective legislatures had expressly allowed incidental private use of each building. The state courts in both Maryland and New York held that so long as the primary purpose of the office building was for maritime purposes connected with the port, legislation authorizing the leasing to private tenants was valid.<sup>32</sup> Although both cases involve challenges to financing and condemnation statutes and do not involve the public trust, they are instructive because they demonstrate the importance to the courts, even in the context of public financing and condemnation, that when a portion of a structure is to be leased for the purpose of raising revenues to offset expenses, this incidental non-public leasing must have been legislatively authorized.

#### VIII. Exchanges of Lands

Situations where a local government or a private party acquires a right to use former trust property free of trust restrictions are rare.<sup>33</sup> In order for such a right to be valid, the Legislature must have intended to grant the right free of the trust and the grant must serve the purpose of the trust. Public Resources Code section 6307 is an example of

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<sup>32</sup>*Ibid.*

<sup>33</sup>*National Audubon Society v. Superior Court, supra*, at p. 440.

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the rare situation where abandonment of the public trust is consistent with the purposes of the trust. Section 6307 authorizes the Commission to exchange lands of equal value, whether filled or unfilled, whenever it finds that it is "in the best interests of the state, for the improvement of navigation, aid in reclamation, for flood control protection, or to enhance the configuration of the shoreline for the improvement of the water and upland, on navigable rivers, sloughs, streams, lakes, bays, estuaries, inlets, or straits, and that it will not substantially interfere with the right of navigation and fishing in the waters involved." The lands exchanged may be improved, filled and reclaimed by the grantee, and upon adoption by the Commission of a resolution finding that such lands (1) have been improved, filled, and reclaimed, and (2) have thereby been excluded from the public channels and are no longer available or useful or susceptible of being used for navigation and fishing, and (3) are no longer in fact tidelands and submerged lands, the lands are thereupon free from the public trust. The grantee may thereafter make any use of the lands, free of trust restrictions.

In order for such an exchange of lands to take place, the Commission must find that the lands to be exchanged are no longer available or useful or susceptible of being used for navigation and fishing, taking into consideration whether adjacent lands remaining subject to the trust are sufficient for public access and future trust needs; that non-trust use of the lands to be freed of the public trust will not interfere with the public's

use of adjacent trust lands; and that the lands that will be received by the state in the exchange not only are of equal, or greater, monetary value but also have value to the tidelands trust, since they will take on the status of public trust lands after the exchange. Only then can the Commission find that the transaction is in the best interests of the state, that the exchange of lands will promote the public trust and that it will not result in any substantial interference with the public interest in the lands and waters remaining.

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