

**MORRO BAY STUDY SESSION  
HARBOR TIDELANDS TRUST LEASE SITES**

**March 25, 2013**

# Overview

- The Public Trust Doctrine
- History of Morro Bay Tidelands Trust
- Harbor Management Policy
- Lease Sites
- Brown Act Issues

# **The Public Trust Doctrine**

Protecting tide and submerged lands and  
navigable waterways for the benefit of the  
People of California

# Origins of the Public Trust Doctrine

- Roman Civil Law
  - The air, the rivers, the sea and the seashore were incapable of private ownership; they were dedicated to the use of the public.
    - *Institutes of Justinian* – 534 CE
- English Common Law
  - The sovereign held the tide and submerged lands, not in a proprietary capacity, but as trustee of a public trust for the benefit of the people of the realm.
    - *Magna Charta* - 1215

# Origins of the Public Trust Doctrine in the US

- The precept that tide and submerged lands are unique and that the ruler of the people holds them in trust for the people was transplanted to the new world and when the United States broke free of the English sovereign, those former colonies became sovereign states.
  - Post-American Revolution
    - *Martin v. Waddell* (1842)
  - Equal Footing Doctrine
    - *Pollard's Lessee v. Hagan* (1845)

# The Public Trust Doctrine

## Limitations on State Powers

- *Illinois Central Railroad Co. v. Illinois* (1892)
- The Supreme Court said that a state's title to its tide and submerged lands is different from that to the lands it holds for sale.
- The state's title to its tide and submerged lands is a title held in trust for the people of the state so that those citizens may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing free from obstruction or interference from private parties.

# The California Constitution

1879

Article X, Section 3 – State prohibited from selling certain  
tidelands

Article X, Section 4 – Public right of access to waterways  
guaranteed

1910

Article 1, Section 25 – Public Right to Fish

# To What Uses May Public Trust Lands Be Put?

- Traditionally Public Trust uses were limited to:
  - Water-related Commerce
  - Navigation
  - Fishing

# The Public Trust Doctrine

- Facilities for the Promotion of Trust Uses
- Examples of these Public Trust consistent uses include:
  - Harbors
  - Ports
  - Marinas
  - Piers
  - Wharves

# The Public Trust Doctrine

- As a common law doctrine, which is continuously evolving, the courts have found that other water-oriented uses that benefit the public are also consistent with the trust:
  - Open Space
  - Ecological Preservation
  - Scientific Study
  - Water-dependent or water-oriented recreation
    - *Marks v. Whitney* (1971) 6 Cal.3d 251

Uses that directly promote, support, or accommodate Public Trust uses and public access.

- Commercial facilities:
  - Warehouses
    - *Oakland v. Williams* (1929) 206 Cal. 315
  - Container cargo storage
  - Convention and Trade Facilities
    - *Haggarty v. Oakland* (1953) 161 CalApp.2d 407
- Facilities to serve waterfront visitors:
  - Hotels
  - Restaurants
  - Parking lots
    - *Martin v. Smith* (1960) 184 Cal.App.2d 571

# Uses Inconsistent with the Public Trust

- Uses that are generally not permitted on Public Trust lands are those that:
  - Are not water-dependant or water-related
  - Do not serve a statewide public purpose
  - Can be located on non-waterfront property
  - Examples:
    - Residential
    - General Commercial
    - Non-visitor Serving Retail
    - Public Schools, Hospitals, etc.
      - *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199

# History of Morro Bay Tidelands Trust

- In 1942-44, the federal government constructed a revetment along the Morro Bay waterfront and filled most of the area now known as the commercial strip along the Embarcadero.

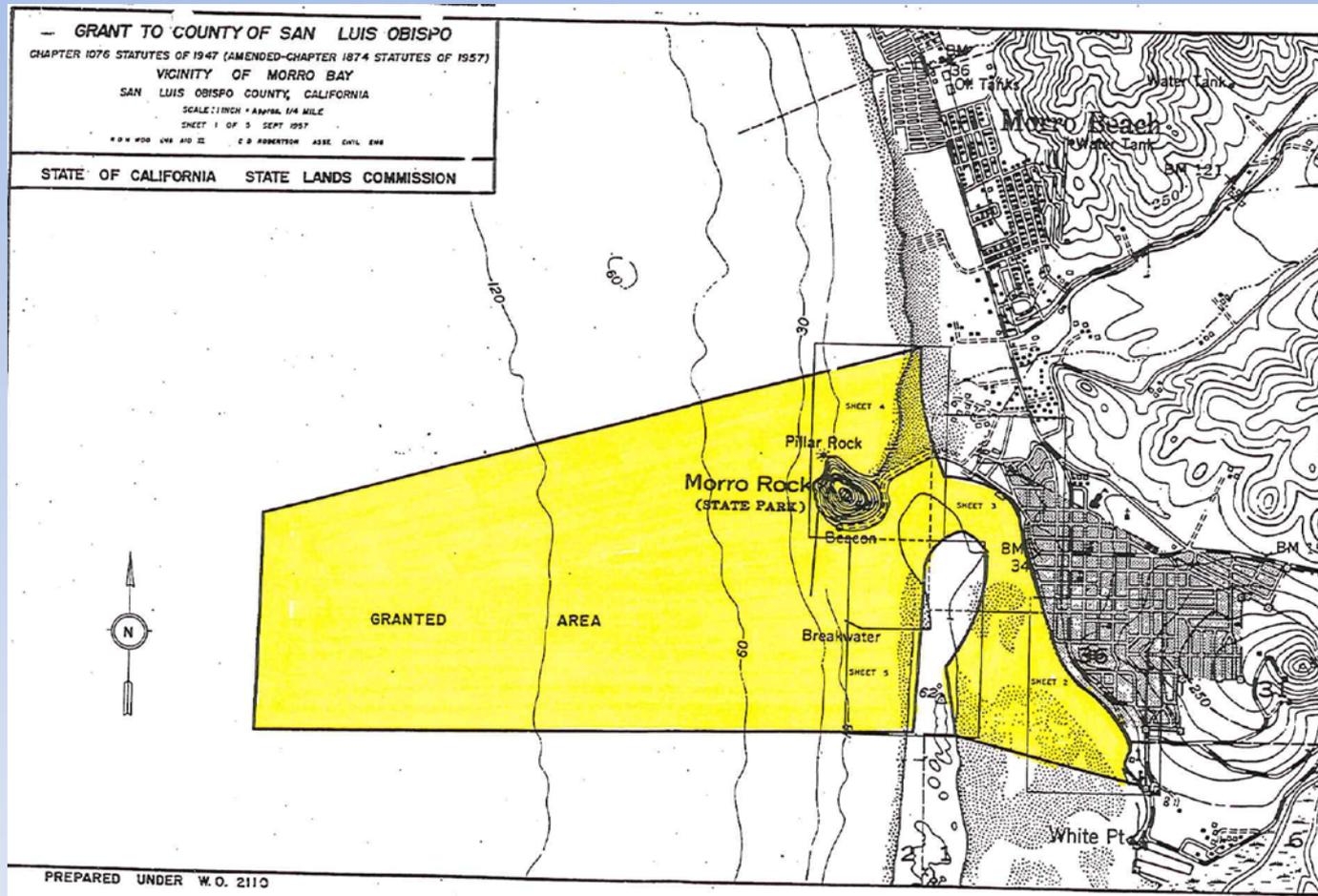
# Ownership

- The State of California claimed ownership of the newly created land.
- After many years of dispute with private property owners, most title issues were settled in the 1950s-1960s by designating those lands west of Embarcadero Road as public trust lands owned by the State, and those lands east of Embarcadero Road as privately owned.

# Ownership

- The State of California granted those public trust lands in Morro Bay to the County of San Luis Obispo.
- The City of Morro Bay assumed trusteeship of the granted lands upon incorporation in 1964-1965.

# Map of Granted Tideland



# Terms of Tidelands Grant

- The tidelands grant in Morro Bay is in perpetuity, provided the City conforms to the terms of the legislative grant.
- The granted lands must be used for commerce, fisheries, navigation, recreational purposes, parklands, public access, public parking and environmental protection or enhancement.

# Terms of Tidelands Grant

- Residential use of these public lands is specifically prohibited.
- The City may lease out these lands to private businesses for a period up to 50 years and all revenues from such leases must be expended within the area of the granted lands for the purposes of the public trust.
- Much of the granted lands were leased to established businesses in the 1960s on long-term leases that provided low rental rates in exchange for tenant investment in the business on the sites or settlement of previous land ownership or county lease disputes.

# Harbor Department

- In 1985, the City created the Harbor Department to focus property management efforts in the Tidelands and to assure the State that Tidelands revenues were properly accounted for.
- The Harbor Department is operated through a City enterprise fund known as the Harbor Fund. Similar to the Water and Wastewater enterprise funds, all Harbor services are funded with either users fees or property management income (no tax revenues).

# Harbor Department

- Also in 1985, the City Council reorganized the Harbor Commission into the current Harbor Advisory Board and took lease management issues out of the Board's purview to streamline City responsiveness and improve lease management
- The Harbor Department routinely handles five to ten lease "questions" a week.

# Lease Management Policy

- Over the years, the City has changed its leasing practices and policies to better protect the public interest by adopting modern lease formats and standards for fair market rent and periodic rental adjustments.
- In 2005, the City Council adopted the Harbor Lease Management Policy

# General Policies

- The City will manage the Tidelands leases to provide and support harbor facilities and enhancement.
- The City shall appropriately account for Tidelands revenues and expenses in compliance the State law and the Tidelands grant.
- The Harbor Department will actively work with and attempt to enhance marine dependent or marine related uses in compliance with the adopted City Plans and Policies, and the City's goals of maintaining a small commercial fishing harbor and working waterfront.

# General Policies

- The City shall be governed in its management of the Tidelands properties by the granting statutes as interpreted and managed by the State Lands Commission.
- The Harbor Department will manage leases in a way that will strive to support Tidelands visitor serving lease businesses to increase revenues consistent with adopted City Plans and Policies, and coordinated with City planning and land use policies.

# Specific Policies For Contract Administration

- The City has developed a Master Lease format based on modern leasing practices and similar formats used by other public agencies.
- All lease agreements must be in the approved Master Lease format. The City may use a license agreement for temporary, interim or non-exclusive use of property when appropriate.

# Specific Policies for Uses

- **Approved Uses:** Uses on the lease sites shall be in conformance with the Tidelands Trust and the City Conditional Use Permit for the site.
- Proposed new uses for lease sites must be in conformance with planning, zoning and land use policies.
- Lessees proposing or considering new uses for a site will be referred to the Planning Division for review and approval.

# Negotiation Policy

- Negotiations are to commence and remain at the staff level.
- The City Manager is to serve as the initial level of negotiation appeal, with the City Attorney participating when legal issues arise.
- Differences of opinion are to be resolved at the staff level, *prior* to any City Council consideration of the lease.

# Negotiation Policy

- In the event certain lease issues remain unresolved, the lessee may submit a written document to the City Council outlining the outstanding lease issues.
- Upon City receipt, the item to be placed on the City Council agenda.
- It is the policy of the City Council to receive under advisement any written or verbal report at that time, but not to comment on or negotiate in public.

# Negotiation Policy

- City staff will not negotiate with prospective tenants due to limited staff time and the potential impact on the “sale” price of a lease. Prospective buyers of leasehold interest are buying the existing lease agreement only.

# Negotiation Policy

- All lease sites eventually need to be reconstructed or significantly remodeled.
- Reconstruction is necessary to bring improvements up to modern building codes, design criteria, and market conditions.
- The City acknowledges that tenants will need to renegotiate leases to new longer terms to amortize and collateralize their investment on the public property.

# Negotiation Policies

- Lease negotiation should commence in a reconstruction/redevelopment situation when the tenant has received Planning Commission and/or City Council approval of a Concept Plan for a Conditional Use Permit to redevelop the site.
- The project will therefore be at a stage when the CUP can be attached to a new lease and the tenant can be required to construct improvements in compliance with the CUP in a given period of time.
- The appropriate term for the new lease will be determined by the size of the lease site and the level of private investment proposed for the public property.

# Lease Renewal

- The City will use the following standards for determining whether it should negotiate a new lease with a tenant:
  - A. The tenant has a good history of performance and lease compliance and the improvements on the site are well maintained. Example standards for determining “good history” of lessee performance are:
    1. The tenant’s record with respect to the prompt and accurate payment of rent due the City;
    2. The tenant’s record of compliance with existing lease conditions;
    3. The appropriateness of the proposed tenant business with respect to the total mix of uses and services available to the public and with respect to the long-term planning goals of the City;
    4. The tenant’s financial and personal investment in tenant business and the leasehold improvements;
    5. The contribution to the surrounding business community made by the tenant’s business;
    6. The quality of direct services to the public provided by the tenant and its business;
    7. The value received by the public in goods or services.
    8. The total financial return to City from the leasehold;
    9. Other pertinent considerations as may be appropriate as determined by the City Council.

# Different Zones

- The City recognizes that there are three distinct zoning areas on the waterfront that require different considerations in lease renewals issues.

# South of Tidelands Park

- Tidelands Park south water area only leases.
- In this area, the City leases only the water areas as the upland property and access to the water areas is owned and controlled by private parties.
- The City will encourage continuation/enhancement of marine dependent uses such as boats slips and boat repair facilities where feasible.
- This area is not suitable for large redevelopment projects and in most cases the City will negotiate a new 10 to 30 year lease extension with existing tenants when they meet the above criteria.

# Beach to Tidelands Park

- In this area, the City controls land and water areas.
- Tenants are encouraged to propose redevelopments of lease sites to improve public benefits on these sites, enhance the Embarcadero business environment, and renegotiate leases to modern terms.
- To provide tenants motivation not to let long-term leases run to the very end of their terms, the City will generally not renew leases with existing tenants in this area if they allow their leases to run to a term of less than five years remaining.

# North of Beach Street

- This area is designated with zoning to preserve commercial fishing/marine dependent uses.
- Existing restaurants or retail uses are grandfathered in.
- The City encourages proposals that enhance commercial fishing uses or marine dependent uses.

# Fair Market Rent

- State Law requires that fair market rent be charged for use of the granted tidelands.
- Fair market rental is determined through the use of an independent appraiser to appraise the fair market value of the property.
- The City sets a minimum annual rent equal to 8% of the appraised value of the land, or
- The lease rent is structured to provide for a minimum annual rent or a percentage of gross sales rent which ever is higher.

# Fair Market Rent

- The City may allow both temporary reductions in minimum rent to offset tenants period of reduced revenues during construction and reduction in the standard retail percentage of gross during the first years of a new Lease.

# Maintenance of Improvements

- Improvements on the lease site must be properly maintained and are in a safe and secure condition.
- The lease sites are inspected every five years.
- Deficiencies noted in the lease site inspection reports must be repaired or cured by the tenants.

# Percentage of Gross Sales Audits

- Where tenants are subject to percentage of gross sales rent, the City will contract to have the business accounting records examined for lease compliance at least every five years.
- City will require tenants to comply with or cure any deficiencies noted in the accounting records examinations.

# Lease Assignment/Sale

- All City leases require City Council approval of the sale or assignment of a lease agreement.
- If the proposed assignment or sale includes a change in use of the site, then the change in use will be reviewed by the Public Services Department for conformance with planning and zoning regulations.

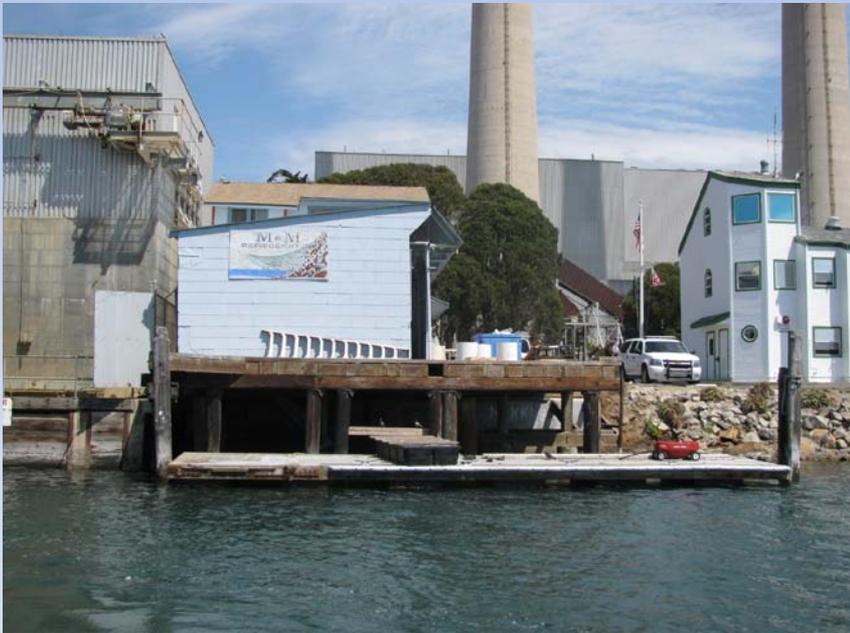
# Sublease Approval

- All leases require City approval of sublease agreements.
- Tenant must submit a properly executed copy of the City standard Consent to Sublease form and a copy of the Sublease Agreement.

# Closed Session

- Following receipt of this input from the lessee, the City Council will exercise its authority under California Government Code Section 54956.8, to meet in Closed Session to give instructions to the City's negotiator(s) regarding negotiations for lease of real property (public tidelands).

# Lease Sites 144/144W



# Lease Sites 138-139



# Lease Site 137



# Lease Sites 134-136



# Lease Sites 132W-133W



# Lease Sites 129W-131W



# Lease Sites 124-128/124W-128W



# Lease Sites 124-128/124W-128W



# Lease Site 113W



# Lease Sites 122-123/122W-123W



# Lease Sites 110W-112W



# Lease Sites 107W-108W



# Lease Sites 105.1W/105.2



# Lease Sites 102/102W



# Lease Sites 96/96W



# Lease Sites 93-95/93W-95W



# Lease Sites 93-95/93W-95W



# Lease Sites 91-92/91W-92W



# Lease Sites 90/90W



# Lease Sites 89/89W



# Lease Sites 87-88/87W-88W



# Lease Sites 86/86W



# Lease Sites 82-85/82W-85W



# Lease Sites 78-81/78W-81W



# Lease Sites 78-81/78W-81W



# Lease Sites 75-77/75W-77W



# Lease Sites 71-74/71W-74W



# A1-4 Mooring



# Lease Sites 69-70/69W-70W



# Lease Sites 68/68W



# Lease Sites 67/67W



# Lease Sites 65-66/65W-66W



# Lease Sites 63-64/63W-64W



# Lease Sites 62/62W



# Lease Sites 57-61/57W-61W



# Mooring A1-3



# Lease Sites 53-56/53W-56W



# Lease Sites 52/52W



# Lease Sites 50-51/50W-51W



# Lease Sites 49/49W



# Lease Site 37W



# Lease Sites 35W-36W



# Lease Site 34W



# Lease Sites 30W-33W



# Lease Site 27W



# Brown Act Issues

- The purpose of the Brown Act is to facilitate public participation in local government decision-making and curb misuse of the democratic process by legislating in secret.
- The Brown Act guarantees the public's right to attend and participate in meetings.

# Brown Act Issues

- The Brown Act includes exceptions to its open meeting requirement where there is a need for confidential candor, debate, and information gathering. One exception is for real estate negotiations:

“[A] legislative body of a local agency may hold a closed session with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the local agency to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease. (Gov. Code, § 54956.8.)”

# Brown Act Issues

- Recently , the California Attorney General issued an opinion on the scope of the real-estate-negotiations. The opinion narrowly construes the exception, favoring the public's right to access information over the bargaining position of local government.

# Brown Act Issues

- The opinion concludes that the real-estate-negotiations exception authorizes only the following in closed session: (1) the amount of consideration that the local agency is willing to pay or accept in exchange for the real property rights; (2) the form, matter, and timing of how that consideration will be paid; and (3) items that are essential to arriving at the authorized price and payment terms, such that their public disclosure would be tantamount to revealing the information that the exception permits to be kept confidential.

# Recent Examples

- Morro Bay Marina
- Caldwell/Leage
- Martony