

**CALENDAR ITEM
C48**

A 78

12/14/06
G10-08
C. Fossum
J. Lucchesi

S 39

**CONSIDERATION OF A REQUEST TO REVIEW THE CONSISTENCY OF THE
TIMESHARE COMPONENT OF THE WOODFIN SUITES HOTEL PROPOSAL WITH
THE PUBLIC TRUST DOCTRINE**

INTRODUCTION:

For over twenty-five years the California State Lands Commission (Commission) and its staff have been approached with various proposals to develop timeshare projects on filled Public Trust lands along California's shores. In September 2006, the Commission staff received a request (Exhibit E) that the timeshare component of the Woodfin Suites Hotel project, proposed to be located on filled tide and submerged (Public Trust) lands granted to the San Diego Unified Port District (SDUPD or Port) on Harbor Island, city of San Diego, San Diego County, be considered by the California State Lands Commission.

The Commission has been given the responsibility to manage the Public Trust lands of the state, and to represent the state's and the public's residual interest and rights in tide and submerged lands legislatively granted in trust to local governmental entities (Public Resources Code Sections 6301 and 6216). The Port was created pursuant to Chapter 67, Statutes of 1962, 1st Ex. Session. During the last four plus decades, the Commission and the Port have worked cooperatively on a number of Public Trust projects beneficial to the state, the Port and the trust's beneficiaries, the people of California.

THE PUBLIC TRUST DOCTRINE:

On September 17, 2001, the Commission adopted a Policy Statement regarding the Public Trust Doctrine (Exhibit A). The statement was intended to provide general information and guidance to the public and local trustees/grantees regarding this area of the law. Accompanying the Policy Statement was a background paper on the Public Trust Doctrine provided by the Attorney General's Office (Exhibit B). The Attorney General's Office has often provided the Commission with its legal analysis and opinion regarding matters of the Public Trust Doctrine and its application in California. The Attorney General's Office

CALENDAR ITEM NO. 48 (CONT'D)

and Commission legal staff's advice has consistently been that the use of Public Trust lands for residential use (long term private) is inimical to the trust. Additional discussion of the Public Trust Doctrine is discussed under **LEGAL ANALYSIS**, below.

TIMESHARES/FRACTIONAL OWNERSHIPS/ETC.:

The concept of timeshares (or interval ownerships, fractional ownerships, equity ownerships, vacation ownerships, or more recently condo-hotels) has evolved and expanded in the nearly forty years since they first were sold. The Commission's first experience with timeshares was a proposal by a lessee of the trustee City of Long Beach, Wrather Corporation, which was operating the Queen Mary, to construct and sell vacation accommodations as timeshares. The Commission staff requested the advice of the Attorney General's Office regarding the consistency of timeshare projects on tide and submerged lands with the Public Trust Doctrine. The Attorney General's Office, in 1982, concluded that the project being reviewed by the Commission involving Long Beach granted lands was inconsistent with allowable uses of public trust lands (Exhibit C). The Attorney General's Office based its reasoning on analyses of 1) the rights of the public in tidelands, 2) the inconsistency of long-term private use with the trust and 3) the allowance of certain non-trust uses that are necessary and incidental to promoting legitimate trust use of tidelands. The Attorney General's Office concluded that allowing a limited group of people to have a long-term right of use of Public Trust lands would be inconsistent with the Commission's mandate to enforce and protect the public's trust rights.

In 1996, Assemblyman Curtis R. Tucker Jr., of Inglewood, requested the opinion of then Attorney General Dan Lungren on the following question: "Consistent with the public trust doctrine, may a public agency trustee of filled tidelands lease a portion of those tidelands to a private party for the construction of a timeshare resort?" The opinion of the Attorney General's Office (Exhibit D) differed from the prior advice given to the Commission. The opinion concluded that timeshares were not *per se* inconsistent, if *inter alia* "the project will provide for significant use by members of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation."

Upon further analysis of the nature of timeshares, Commission staff has taken the position that a timeshare development is an inappropriate use of filled sovereign tide and submerged lands, as it is not a water-dependent use, nor does it enhance or facilitate the general public's enjoyment of trust lands, nor is a timeshare development necessary or incidental to accomplish or promote such

CALENDAR ITEM NO. 48 (CONT'D)

uses. A project that cannot meet one or more of these criteria is not an acceptable use of Public Trust lands.

As pointed out in the Commission's Public Trust Policy statement and the Attorney General's discussion of the Public Trust Doctrine, the doctrine serves as a means to both promote appropriate uses of the public's property such as hotels, which "accommodate the public's enjoyment of trust lands" and serves as a limitation on use and the power of government, thereby "preserving the public's right to use public trust lands for the purposes they are uniquely suited". The advice of the Attorney General's Office, provided to the Commission in 2001, cites decisions of the United States Supreme Court in 1892 and the California Supreme Court in 1983 and describes the public's ownership of tidelands as "... a title held in trust for the people of the State that they 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. 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." While uses of commerce, navigation and fisheries have expanded to other public trust uses since the 19th century, the essence of the duty to protect the public's rights for their common use remains constant.

It is important to note that while timeshare developments have been around for decades and from time to time have changed their methods of operations, these developments have been located almost exclusively on private property; only a handful have been approved in the California Coastal Zone and none has been constructed, or even approved, on Public Trust lands in California, despite the suggested possibility in the 1996 opinion. Furthermore, while hotels, restaurants and other visitor-serving support facilities incidental to public access and use may exist in federal, state and local parks, and on Public Trust lands, timeshare developments do not.

WOODFIN SUITES HOTEL/TIMESHARE PROPOSAL:

The proposed Woodfin Suites Hotel project involves the redevelopment of the existing Marina Cortez leasehold located on a 3.79-acre site on Harbor Island, near Lindbergh Field in the city of San Diego. The specific project components described by the developer include demolition of all existing structures on the filled portion of the tidelands lease and construction of an eight-story, maximum 140-suite hotel with supporting facilities over partially suppressed parking, a new and separate two-story marina services building, a 6' wide public promenade on top of a seawall, surface parking and landscaping. The Woodfin proposal also

CALENDAR PAGE
MINUTE PAGE

CALENDAR ITEM NO. 48 (CONT'D)

includes a project option in which 40 of the 140 hotel suites would be marketed and operated as timeshares.

According to the Woodfin project proponents (Exhibits F and G), the timeshare units would be conveyed to users pursuant to subleases. Since the SDUPD is trustee of the filled tidelands and can only lease lands for up to 66 years, no fee simple interest would be conveyed to a timeshare participant. All timeshares would be marketed to the general public both in and outside of California. All units, including the timeshare units, would be maintained as hotel units open to the general public when not used as a timeshare. The facility management would include mandatory front desk check in/check out services, maintenance and cleaning services. Finally, the timeshare use period by any party would be limited to a minimum interval period of up to one week and not more than 29 consecutive days or 90 total days per calendar year. Woodfin proponents have represented that the timeshare use periods are flexible. The Port's Master Plan amendment, discussed below, limits selling of ownership of units to two one-week intervals per year, but does not restrict trade in and use of intervals from other timeshare units for longer periods.

Commission staff has over the last year had a number of discussions and meetings and communicated by letter with developers and the Port regarding several proposals for timeshares, including the Woodfin proposal, and a hotel-condo project on filled Public Trust lands in the Port. In those meetings and by letter, the Commission staff has consistently expressed its conclusion that timeshares and hotel-condominiums do not provide a sufficient public benefit and are a use inconsistent with the land use limitations of the Public Trust. In addition, Commission staff testified before the Port's Board of Harbor Commissioners (Board) in April of this year expressing the staff's position opposing timeshares. The Board referred the issue to a subcommittee that returned with a recommendation to use the proposed project as a test case, with the rationale that since neither the State Lands Commission, Coastal Commission, Legislature, nor Courts had formally disapproved such a project, this was an opportunity to resolve the legal issue. The Commission staff by letter again objected to the Port's proposed adoption of a process that would consider timeshare (equity share units) projects on Public Trust lands.

Notwithstanding Commission staff's position, on June 6, 2006, the Board of Harbor Commissioners adopted a Statement of Intent that the Port would entertain the limited use of equity share units on tidelands on a case-by-case basis provided that certain conditions are satisfied prior to any formal action by

CALENDAR ITEM NO. 48 (CONT'D)

the Board, including, but not limited to, that “the number of timeshare units proposed does not exceed 40% of the units in the overall project” and “the proposed project meets the conditions described in the 1996 State Attorney General’s opinion on timeshares.” It is worth noting that at the Board’s June 6, 2006 meeting, in a response to an inquiry from the Board’s Chairman, the Port Attorney stated that he agreed with the Commission staff’s position regarding timeshares, as the Commission’s staff’s analysis appeared to be well reasoned, legally sound and persuasive.

On July 11, 2006, the Board adopted Resolution 2006-121 certifying the Final Environmental Impact Report for the Woodfin Suites Hotel project, which included the alternative of a timeshare component. In addition, the Board adopted Resolution 2006-122 amending the Port District’s Master Plan pertaining to the Woodfin Suites Hotel project, with the option of timeshares to be applicable only to the Woodfin Suites Hotel project and any subsequent request for timeshare development to require the consent of the Port District. Commission staff again objected to the certification of the Final EIR and the Port Master Plan Amendment. In November 2006, the SDUPD submitted the Woodfin Suites project to the California Coastal Commission for its review as a port Master Plan amendment.

LEGAL ANALYSIS:

The project area involves filled sovereign tide and submerged lands, which were initially legislatively granted to the city of San Diego pursuant to Chapter 700, Statutes of 1911, and subsequently transferred to the San Diego Unified Port District pursuant to Chapter 67, Statutes of 1962, 1st Ex. Session, as amended.

Inconsistency with the Public Trust Doctrine

In addressing what constitutes an appropriate use to which Public Trust lands may be dedicated, California courts have made it clear that water dependent uses related to commerce, navigation, fisheries, and other water-related uses or activities, such as public access, recreation, and ecological preservation for scientific study and wildlife habitat (Marks v. Whitney (1971) 6 Cal.3rd 151), as well as those uses that are necessary and incidental to accomplish or promote those uses (Haggerty v. City of Oakland (1958) 161 C.A.2d 404), are consistent with the land use requirement of the trust. Ancillary visitor serving facilities, such as restaurants and hotels, have also received judicial approval because they enhance and facilitate the public’s enjoyment of trust lands, by providing public accommodation (Martin v. Smith (1960) 184 Cal. App. 2d 571).

CALENDAR ITEM NO. 48 (CONT'D)

Because the Woodfin project proposal references and utilizes some of the criteria outlined in the 1996 Attorney General's opinion, staff has also included the following legal analysis of the 1996 opinion.

A timeshare development is not a use consistent with the Public Trust Doctrine, as interpreted by the judicial decisions described above, and is an inappropriate use of filled sovereign tide and submerged lands because it significantly impairs the public's right to these trust lands which have been historically set apart for the benefit of the statewide public. In contrast, timeshare accommodations are only available to a small segment of the population who can afford the tens of thousands of dollars for the initial purchase and who would own personal rights to the rooms and thereby prevent other use of these public lands.

While there has been an increase in timeshare owners and a greater opportunity for an "exchange of time" since the inception of the timeshare concept, a timeshare unit remains available only to a limited and distinct class of people, not to the general public. A timeshare by its very nature is inherently more restrictive of access to the general public than a hotel. Further, the opportunities to trade occupancy rights have increased since the Attorney General's 1996 opinion was written, decreasing the vacancy rate and making timeshares even less available to the general public today. Availability to the public due to vacancy rates was one of the factors cited by the 1996 Attorney General's opinion as justifying possible limited use of timeshares. A timeshare development is not a water dependent use, nor does it enhance or facilitate the general public's enjoyment of trust lands, nor is a timeshare development necessary and incidental to accomplish or promote such uses.

Staff believes that the 1996 opinion makes certain assumptions and confuses concepts of project development mitigation on private lands with protections inherent in lands subject to the Public Trust. The 1996 opinion states that "the consistency of any timeshare resort with public trust purposes must be determined in light of the totality of the circumstances, paying particular attention to (1) whether the state through its local trustee, has given up its right of control over the trust property [citations], (2) whether the use substantially impairs the public's interest in the remaining lands and waters [citations], and (3) whether the use produces a public benefit which furthers and promotes trust purposes [citations]." This three-prong test is then applied to the conceptual framework that serves as the rationale for the 1996 opinion. The cases cited for the above analysis, with one exception, which deals with oil and gas leasing, do not involve leases of public trust land.

CALENDAR ITEM NO. 48 (CONT'D)

1) The 1996 opinion concludes that the local trustee's dedication of a particular use for 66 years will neither "abandon the public right" nor impair the ability of succeeding legislative bodies to protect trust values, because at the end of the 66 year term the property returns "back to the control of the local agency which holds the property in trust." While 66 years is not a permanent dedication to a particular use, 66 years is a significant amount of time to impair the general public's right to enjoy its trust lands, while allowing a distinct class of people the right to access the trust lands. The Legislature has provided a mechanism for local trustees of tidelands to have leases reviewed and approved by the Commission (Public Resources Code Section 6701, et seq.). This is the process by which the Commission was reviewing the Wrather proposal on granted public trust lands in Long Beach. The Commission has adopted a maximum term of 49 years on its own authority to lease property, even to other public agencies.

2) The second test applied by the 1996 opinion was impairment of the public's rights. The opinion states, "such analysis is beyond the scope of the opinion" and is a fact specific inquiry, but postulates that "public access to the shoreline could be enhanced through the development of walkways, access paths, and marina-like facilities, thus increasing and improving opportunities for boating, fishing, swimming, hiking and other recreational uses." While the second test refers to the "public's rights being impaired," the opinion nonetheless emphasizes this idea in its conditional precipitant conclusion that timeshare projects are not *per se* incompatible with the Public Trust Doctrine "if the project will provide for significant use by members of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation."

Public access along the waterfront, however, is already guaranteed by the Coastal Act and the California Constitution (Article X, section 4). Article X, section 3 and Article X, section 4 were adopted by the People of California in 1879 to restrict privatization of tidelands and insure public access to California's waterways. The Public Trust Doctrine also protects the public's right to access and use trust lands (Marks v. Whitney, *supra*). Allowing a timeshare development on trust lands provides no benefit to the public beyond that which already is guaranteed by existing laws - in fact it impairs it. The test should not be whether some proffered mitigation justifies public rights being impaired for up to 66 years, but whether the existing Public Trust and Constitutional rights are being protected. Providing trust-consistent amenities, such as public access,

CALENDAR ITEM NO. 48 (CONT'D)

does not make a non-trust use, such as a timeshare development, a trust-consistent use.

3) The final criterion in the 1996 opinion was whether its “exemplar resort would produce a public benefit which furthers and promotes public trust purposes.” Not all commercial activities promote the public’s use of the shoreline. The opinion, however, assumes that timeshares promote rather than restrict the public’s opportunity to use the trust property. The opinion also misstates the legal test that uses that are “necessarily incidental” to promotion or accommodation of a legitimate public trust use are consistent with the trust by incorrectly assuming that timeshares are the equivalent of a hotel in a public park when they are not. The concept of allowing a wealthy group of individuals or families to tie-up the right to occupy prime visitor serving public property for scores of years into the future is antithetical to public rights protected by the Public Trust Doctrine.

The 1996 opinion to Assemblyman Tucker sought to differentiate its conclusions from the 1982 legal advice regarding a proposal before the Commission. The differences cited were that statistically, in the industry, more timeshare owners were exchanging their intervals with other timeshare owners in 1995 than in 1978, stays were generally limited to 7 days rather than 30 days and therefore the earlier concerns about the low vacancy rate and hence availability to the general public were supplanted by more timeshare owners using the facilities. The conclusion reached was that this moved “the concept of a timeshare development much closer to that of a hotel.” Staff’s conclusion is that “closer” is not an adequate standard to measure public rights to public lands. Additionally, having a multiplicity of private owners (potentially thousands for a single facility) with private property rights on public lands for in excess of half a century has the potential for an unduly burdensome complexity of business dealings for the State or its trustee landlord. The potential benefits of such an arrangement flow to the developers/sellers of the units and not to the public.

Staff agrees that more timeshare-owning individuals and families would have access to the resort contemplated by the 1996 opinion than in 1982. However, staff does not agree that more of the general public would have access, or that the rationale justifies allowing a limited class of people that can afford the tens of thousands of dollars for the initial purchase to own and tie-up even a limited right of occupancy to Public Trust lands for up to 66 years. Staff sees no benefit to the general public in the concept and believes that all of the supposed additional public benefits cited in the 1996 opinion are equally available in a hotel

CALENDAR ITEM NO. 48 (CONT'D)

development. More timeshare use of properties means less access for the general public.

Finally, after following the industry for nearly three decades, staff believes that a primary rationale that leads to the promotion of timeshare developments is the desire of private developers to reduce their economic risk and maximize their financial return – by getting willing buyers to purchase the right to occupy a timeshare unit for many decades into the future. This method of private financing can work well for developers in a tight financial market, when a large enough class of well-to-do buyers can be found that are willing to lay down many thousands of dollars for their future vacation plans or as an investment. However, as pointed out in the Commission’s “Public Trust Policy” statement and the accompanying document “The Public Trust Doctrine,” prepared for the Commission by the Attorney General’s Office, a water-related benefit to the statewide public, not private financial attractiveness is the *sine quo non* of trust consistency.

Inconsistency with the 1996 Attorney General’s Opinion

Staff also believes that the timeshare component of the Woodfin project is inconsistent with the 1996 opinion. The 1996 opinion, contrary to the prior 1982 advice, concluded that a timeshare development was not *per se* inconsistent, “if the project will provide for significant use by members of the general public and further trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation.”

As to the first prong of the opinion’s conclusion, in justifying that a timeshare project would provide for significant use by members of the general public, the opinion estimated, based on then current statistics, that 18 percent of the units in a timeshare resort would be available for rental to the general public at any given time. Of this percentage, according to the 1996 opinion, only 5.6 percent are rented to the public and 12.4 percent go unused. These estimates are not reflective of current industry data. According to the Woodfin project proponent’s consultant, Ragatz Associates, only 4.4 percent of the units are currently rented to the general public, while 9.5 percent go unused. Similarly, 35.8 percent are used by their owners, while 47.4 percent are used by persons owning other timeshares through exchanges. A number of conclusions may be drawn from these statistics. First, the percentage of rental units currently available to the general public is only 13.9 percent, 4.1 percent less than what the 1996 opinion contemplated. Second, the timeshare industry has changed in that the number of units available to the public is not translating into actual use by the public

CALENDAR ITEM NO. 48 (CONT'D)

because only 4.4 percent of the units are actually rented by the general public. Third, over 83 percent of timeshare developments are occupied by persons owning timeshares, a limited, distinct class of people; together with un-rented units, 92.6% are not rented to the public.

The ultimate conclusion to be drawn is that the timeshare element of the Woodfin project would not provide for significant use by members of the general public because modern usage trends point to more timeshare use by those persons owning timeshares and less use by the general public, resulting in fewer opportunities for the general public to use trust property.

The second prong of the opinion's conclusion assumes that the timeshare development would afford improved access to the waterfront by the general public, thus furthering trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation. According to the Woodfin proposal, the project would include a 140-unit hotel, with a project option in which 40 of the 140 hotel suites would be marketed and operated as timeshares. In addition, the Woodfin proposal includes a replacement of the marina services building, a seawall and 6' public promenade along the shoreline frontage of the marina and the development of approximately 401 on-site parking spaces. According to the Woodfin proponents, these project components, in addition to the hotel component, provide for improved public access to the shoreline and water-oriented recreation. However, these public benefits are equally available in a traditional hotel development. As stated previously, public access along the waterfront is already guaranteed by the Coastal Act, the California Constitution and the Public Trust Doctrine. These additional project components do not provide increased opportunities for public access to the shoreline and water-oriented recreation above and beyond what is already guaranteed by law.

Finally, a water-related benefit to the statewide public is the ultimate determinate of trust consistency, as opposed to private financial benefits. According to the minutes from the July 11, 2006 Board meeting, however, Woodfin proponents represented that, while including the timeshare component would make the project more financially lucrative, the Woodfin project could be developed as a traditional hotel without the timeshare component.

In conclusion, Commission staff believes that a project located on Public Trust lands, which would include a timeshare or a hotel-condo component, is inconsistent with the Public Trust Doctrine because such a use significantly

CALENDAR ITEM NO. 48 (CONT'D)

impairs the public's right to these trust lands that have been historically set apart for the benefit of the statewide public.

OTHER PERTINENT INFORMATION:

1. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines [Title 14, California Code of Regulations, section 15060(c)(3)], the staff has determined that the Commission's consideration and adoption of the finding is not subject to the provisions of the CEQA because it is not a "project" as defined by the CEQA and the State CEQA Guidelines.

Authority: Public Resources Code section 21065 and Title 14, California Code of Regulations, sections 15060 (c)(3) and 15378.

EXHIBITS:

- A. Public Trust Policy Statement
- B. The Public Trust Doctrine
- C. 1982 Attorney General Opinion
- D. 1996 Attorney General Opinion
- E. Correspondence from San Diego Coastkeeper
- F. Correspondence from Woodfin Suites Hotel, LLC (March 14, 2006 and March 22, 2006)
- G. Woodfin's Timeshare Analysis (Appendix J to Draft EIR)
- H. Location and Site Map

RECOMMENDED ACTION

IT IS RECOMMENDED THAT:

1. FIND THAT THE COMMISSION'S CONSIDERATION AND ADOPTION OF THE FINDING IS NOT SUBJECT TO THE REQUIREMENTS OF THE CEQA PURSUANT TO TITLE 14, CALIFORNIA CODE OF REGULATIONS 15060(c)(3) BECAUSE THE ACTIVITY IS NOT A PROJECT AS DEFINED BY PUBLIC RESOURCES CODE SECTION 21065 AND TITLE 14, CALIFORNIA CODE OF REGULATIONS 15378.
2. THE COMMISSION FIND THAT THE TIMESHARE COMPONENT OF THE WOODFIN SUITES HOTEL PROJECT IS INCONSISTENT WITH THE PUBLIC TRUST DOCTRINE AND THE TRUST UNDER WHICH THE SAN DIEGO UNIFIED PORT DISTRICT HOLDS TITLE TO THE PUBLIC TRUST LAND INVOLVED.

CALENDAR ITEM NO. 48 (CONT'D)

3. THE COMMISSION DIRECT STAFF TO CONVEY STAFF'S ANALYSIS AS SET FORTH IN THIS REPORT AND THE COMMISSION'S FINDING TO THE CALIFORNIA COASTAL COMMISSION AND THE CITIES, COUNTIES AND SPECIAL DISTRICTS THAT MANAGE PUBLIC TRUST LANDS GRANTED TO THEM BY THE STATE LEGISLATURE AND FOR WHICH THE COMMISSION RETAINS OVERSIGHT AUTHORITY.