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I. Introduction

Redevelopment of existing maritime lands into modern, mixed-use projects is a modern trend in coastline development. San Francisco was once served by a thriving maritime industry but cannot, for many reasons, now sustain the classic maritime uses that once defined the harbor.[1] More and more, proposed development projects along the waterfront now feature both maritime and nonmaritime uses, depending on the nature of the project.[2] The Port of San Francisco is the front door to one of the most renowned cities in the world. The natural characteristics and ideal climate surrounding San Francisco Bay—a 1,600-square-mile estuary—provide enjoyment for the local population, as well as the tens of thousands of visitors who visit each year.[3] Accordingly, the development and use of the bay's shoreline has been a subject of intense debate and controversy for generations. Conceptions and opinions regarding development of the bay's shore are as diverse as the communities that reside around it.

A proposed development on the bay's shoreline is often complicated and polarizing, as proponents and opponents argue their respective interests and stake in the development. With stunning views, visibility, and

* J.D., University of California, Hastings College of the Law, 2014; B.A., University of California, Santa Barbara, 2009. I would like to thank Professor David Takacs for his invaluable guidance, the staff of *West-Northwest* for their hard work, and my friends and family for their unwavering support.

1. The Port of San Francisco's departure from dedicated maritime use and subsequent waterfront revitalization has been well documented. *See* MATTHEW J. RUBIN, A NEGOTIATED LANDSCAPE: PLANNING, REGULATION, AND THE TRANSFORMATION OF SAN FRANCISCO'S WATERFRONT, 1950 TO THE PRESENT 36 (2003).

2. For example, a development might call for retail shops that line a walkway towards a public space or gathering place. Or the development might propose a multi-story building with each level dedicated to a different type of use.

3. State of California Coastal Conservancy, Overview: The San Francisco Bay Area, http://scc.ca.gov/overview-the-san-francisco-bay-area.

ample public access opportunity, a well-planned development on the bay's shore can be a highly successful venture for a private entity and for the millions of Bay Area residents. However, expedited, overzealous, and aggressive development creates the risk of environmental and economic degradation for future inhabitants. As the bay is further developed, practical and meaningful access to the coast and use of its resources must be considered. This access and guaranteed use of the shore is protected by a legal doctrine, the public trust.[4]

The public trust is a dynamic legal doctrine. It generally provides that tidal and submerged lands are unique and are held, by the state, in trust for the common use by the people for specific "trust" purposes. However, as a principle crafted through common law, this description of the doctrine is deceptively simple. The doctrine is in constant flux, and is able to adapt to new trends and demands by the public. Thus, besides being an oft-discussed topic of contemporary legal discourse, implementation of the doctrine in California involves complex mixture of policy and the ever-changing common law.

In early 2012, the privately owned Golden State Warriors professional basketball team, through GSW Arena LLC ("GSW"),[5] and the City of San Francisco entered into early stages of development and planning for a proposed mixed-use development on Piers 30-32 on San Francisco's bay shore, just south of the Bay Bridge.[6] The Golden State Warriors proposed mixed-use development ("GSW development") included a multipurpose event center ("GSW arena complex") surrounded by various retail, maritime uses, and public open space on the approximately 13-acre site.[7] In April 2014, just days before this issue went to publication, the Golden State Warriors announced they will not be moving forward with their plans to build the development on Piers 30-32.[8] Instead, the Warriors management purchased a site located south of AT&T Park in Mission Bay. While there

4. While this note discusses the specifics of San Francisco Bay, the public trust is a guarantee that covers tidal and submerged of the entire country and beyond. *See* David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711 (2008).

5. GSW Arena LLC is an affiliate of Golden State Warriors, LLC, which owns and operates the Golden State Warriors National Basketball Association franchise.

6. San Francisco Planning Department, Notice of Preparation of an Environmental Impact Report and Notice of Public Scoping Meeting 1 (Dec. 5, 2012), *available at* http://sfmea.sfplanning.org/2012.0718E_NOP.pdf ("NOP").

7. *Id.*

8. John Coté, Warriors Shift Arena Plans to Mission Bay, SF GATE (Apr. 22, 2014), *available at* http://www.sfgate.com/bayarea/article/Warriors-ditch-Piers-30-32-for-Mission-Bay-arena-5418579.php#page-2.

may be opposition to this site as well, the new site is privately owned and at first look does not appear subject to the same regulations and approvals process as Pier 30-32. This note is a case study seeking to elucidate the public trust's place in guiding mixed-use developments, such as the proposed GSW development, on lands that are in fact subject to the public trust. The issues raise complex questions, beget complex answers, and often times must be contextualized within the scope of the evolving waterfront.

In the most specific sense, this note will discuss the application and implication of the public trust doctrine to the previously proposed GSW development. The note will approach the issue by providing a succinct history of California's public trust doctrine and administration thereof. It will offer an explanation of the various doctrinal incarnations of the main authorities through which any San Francisco shoreline development must receive authorization.[9] As can be seen in the various designs released for the arena, the public trust doctrine can, and should, have an important role in development on lands governed by the public trust. As evidenced by the GSW development process at Piers 30-32, the public trust doctrine has continued relevance in modern development. The changes to the GSW development since its announcement is a testament to the doctrine's ability to impact and protect against projects that might overlook or ignore the importance of San Francisco's unique coastal assets.

Section II provides a description of the key features proposed in the GSW development. Section III synthesizes the complex legal history of the public trust doctrine, which dates back to Roman times. Briefly covering the history of the doctrine in the United States, I focus on several key decisions and developments that shaped the modern doctrine regarding permissible use of trust lands. Section IV explores the expansive modern public trust doctrine in California. Section V discusses the complex system of public trust consistency determinations in California by examining the policies and precedents of the State Lands Commission ("SLC") and explaining the role of the Bay Conservation and Development Commission ("BCDC"). Section VI reviews direct legislative action, public trust consistency, and the recent legislative enactment of AB 1273, which found the mixed-use development consistent with the public trust. Finally, section VIII discusses the implications of my research and analysis for the future of the doctrine. I observe that modern administrative interpretations of the doctrine, when applied to mixed-use developments with primary nontrust components, signals a fundamental change in the rights, uses, and values protected by the classic public trust doctrine. In sum, the overall purpose of this note is

9. The main authorities are the San Francisco Port Authority (SFPA), the Bay Conservation and Development Commission (BCDC), and the California State Lands Commission (SLC).

to explain and analyze public trust doctrine with regard to its ability to shape tideland development and policy.

II. A Brief History of the Port and the Proposed Golden State Warriors Development at Piers 30-32

The San Francisco waterfront links the city to the rest of the world. Historically, land use at the port was dedicated to shipping, cargo, and other essential maritime industries. The policy and effective use of San Francisco waterfront development is a well-covered topic.[10] Beginning in the 1950s, the use of the port for shipping and cargo declined drastically as those industries became streamlined and remaining operations migrated to the Port of Oakland.[11] At present, the only viable shipping and cargo operations in San Francisco are located on the southern waterfront. After the decline of the shipping industry in the northern and eastern waterfront,[12] the redevelopment of those areas proved nearly impossible because of political and financial constraints. In recent years, coordinated efforts by local regulatory agencies and administrative bodies have resulted in comprehensive plans that provide guidance for development. The plans explicitly authorize and promote the mixed-use development of those areas no longer capable of housing traditional port operations.[13] In addition, various state agencies and bodies have authorized several mixed-use developments containing nontrust elements.[14]

The GSW development proposed to construct a multipurpose event center, public open space, maritime uses, a parking facility and visitor-serving retail uses on the approximately 13-acre Piers 30-32 site in San Francisco.[15] The GSW development had an aggressive timeline, with team officials hoping GSW arena complex could open for the 2017-2018 NBA season.[16] The venue also provided for " a year-round venue for a variety of

10. *See* Michael Wilmar, *The Public Trust Doctrine: San Francisco's Waterfront*, SPUR (1999), available at http://www.spur.org/publications/library/article/publictrustdoctrine11011999; *see also* Mike Wilmar, Teresa Rea, et al., Hard Choices at the Port of San Francisco: Can the Waterfront be Saved?, SPUR (2007), *available at* http://www.spur.org/publications/sfport.

11. Rubin, *supra* note 1, at 227-230.

12. This area spans from Fisherman's Wharf to China Basin.

13. *See* discussion of the BCDC SFWSAP in Section V, *infra*.

14. *See* discussion of the James R. Herman International Cruise Terminal in Section VI, infra, and the Ferry Building Complex and Giants Ballpark at China basin in Section V.B.2, *infra*.

15. NOP, *supra* note 6, at 1.

16. *Id*.

other uses, including concerts, cultural events, family shows, conferences and conventions."[17] The piers are currently in disrepair, and any development on the location required substantial repair and structural upgrades to the pier.[18] Thus, the piers actually restricted public access and enjoyment of the Bay.

As part of the development, GSW also proposed to construct a mixed-use development on the approximate 2.3-acre Seawall Lot 330,[19] located directly across the Embarcadero from Piers 30-32.[20] This component was essentially a financial inducement for the developers, who were required to privately finance all development. Seawall Lot 330 was to be developed with a variety of mixed uses, including residential, hotel and retail uses.[21] Collectively, the Piers 30-32 improvement and redevelopment, together with the mixed-use development on Seawall Lot 330, comprised the one billion dollar proposed project.[22]

Given the prominent waterfront location, the GSW development generated significant attention and substantial controversy. The proposed height, streamlined approval process, increased traffic, questionable financial model, lack of public information, and ambitious development schedule were the main sources of contention.[23] While supporters maintained that the project enjoyed support, the developers and City at times seemed unsympathetic to the possibility that the project would face resistance or delays. As co-executive Peter Gruber proclaimed at the initial press conference on May 22, 2012, "We will play here in 2017, take that as a promise that we will fulfill. It will be a world-class entertainment venue, we're all in."[24] However, given the complex approval process and increasing

17. I*d*.

18. I*d*.

19. While the legal issues surrounding development at Seawall lot 330 are important and related to the Pier 30-32 development, they are outside the scope of this paper.

20. NOP, *supra* note 6, at 1.

21. I*d*.

22. I*d*.

23. For example, while the Warriors have maintained that the project is completely privately financed, however, the City will have to reimburse the team for the $120 million in required substructure improvements to the deteriorating piers, at a rate of 13% interest. S*ee* Tim Redmond, The (Bad) Warriors Deal, By the Numbers, SAN FRANCISCO BAY GUARDIAN ONLINE (Jan. 17, 2013, 2:34 PM), http://www.sfbg.com/politics/2013/01/17/bad-warriors-deal-numbers.

24. Tommy Byrne, W*arriors* E*xcited* A*bout* M*ove to* S*an* F*rancisco in* 2017, NEWS92FM.COM (May 22, 2012), http://news92fm.com/249733/warriors-excited-about-move-to-san-francisco-in-2017.

costs of building on the piers, team officials acknowledged in 2014 that the project would be postponed for at least one year.[25] Similarly, San Francisco Mayor Ed Lee called the project a "legacy project," and gave the project his absolute support.[26] Notably, the Golden State Warriors chose the architectural firm Snohetta, as their lead design team for the project.[27] The selection of Snohetta is calculated. The firm has successfully designed several prominent public waterfront facilities.[28]

Piers 30-32 were originally intended for maritime cargo use and were the "first with up to date freight handling services consisting of traveling cranes, telphers and shiptowers."[29] A distinctive bulkhead building with two towers linked the piers, and in 1926 the piers were lengthened to accommodate even larger ships.[30] In 1952, the piers were joined by a connecting wharf to accommodate large vehicles and trucks.[31] The historic cargo sheds were destroyed in 1984, and have since fallen into a state of disrepair.[32]

As mentioned, without substantial, expensive subsurface structure renovation, the piers are unusable for most purposes. While the piers remains capable of development for maritime uses, the significant costs associated with the substructure has stalled development in the past. For example, in 2008, after obtaining legislative approval to create a mixed-use development centered around a two berth cruise ship terminal at Piers 30-

25. Phillip Matier and Andrew Ross, *Golden State Warriors Call Time-out on* S.F. A*rena P*r*oject*, SF GATE (Feb. 2, 2014), http://www.sfgate.com/bayarea/matier-ross/article/Golden-State-Warriors-call-time-out-on-S-F-arena-5197047.php. S*ee* Port of San Francisco, Golden State Warriors Project Schedule for CAC (Feb. 2, 2014), http://sfport.com/modules/showdocument.aspx?documentid=7278 ("GSW Schedule").

26. John Coté and Heather Knight, E*d L*e*e W*o*rking on H*i*s L*e*gacy*: R*e*turn of W*a*rriors*, SF GATE, http://www.sfgate.com/warriors/article/Ed-Lee-working-on-his-legacy-return-of-Warriors-3589129.php.

27. Golden State Warriors, Warriors Select Snøhetta And AECOM As Architecture Team To Build New Sport & Entertainment Complex On SF Waterfront (Aug. 26, 2012), http://www.nba.com/warriors/news/golden-state-warriors-select-snohetta-and-aecom-architecture-team-build-new-arena-sf-waterfront.

28. S*ee* http://www.snoarc.no/#/projects/. Snohetta's design team has designed several prominent waterfront locations, such as the Oslo Opera House.

29. Piers 30-32 Restoration and Event Venue Project: State Lands Commission Presentation 3 (Oct. 5, 2012), available at http://sfport.com/modules/showdocument.aspx?documentid=5307 ("Piers 30-32 SLC Presentation").

30. City & County of San Francisco, Piers 30-32 Project: History, http://www.sfgov3.org/index.aspx?page=3991.

31. I*d*.

32. I*d*.

32, the developer abandoned the lease after discovering higher than projected substructure costs to improve the site.[33] Next, in 2012, a deal was proposed between the City and the America's Cup Event Authority was proposed to overhaul the piers to house the racing teams for the 2012-2013 America's Cup regatta.[34] In exchange spending at least $55 million, the Event Authority would have received development rights to the piers as well as title to seawall lot 330 for future development.[35] However, the Authority, facing financial risks and tight construction deadlines, backed out of the deal, and decided that the teams would be based at Pier 80.[36] Thus, the GSW project followed a series of unsuccessful ventures to restore the site and reconnect the people of San Francisco to the waterfront.

The GSW development underwent three significant design changes from its initial proposal, with the latest version released in November 2013. As I will discuss throughout this note, the changes to the complex, billion-dollar development were largely attributable to the public trust requirements for the location. The GSW development involved four main components, the multipurpose GSW arena complex, maritime related facilities, retail space, and dedicated open space on the pier.[37] The proposed multilevel GSW arena complex covered 695,000 square feet of the space with a maximum capacity of 18,064 seats.[38] The GSW arena complex would have hosted 205 events annually, including Warriors home games.[39] The arena complex was situated on the back of the piers, approximately 600 feet away from the Embarcadero waterfront promenade. Additionally, the arena complex was placed at an angle, maximizing bay view corridor preservation.

According to the Port, the multipurpose GSW arena complex was the "core non-maritime" element of the project, and the "iconic, Bay-oriented architecture of the venue would help define the San Francisco waterfront and attract the public to the site."[40] Further, "public access elements would

33. *Id.* at 7.

34. Rachel Gordon, *America's Cup Organizers Drop Overhaul of Piers*, S.F. CHRON. (Feb. 28, 2012), *available at* http://www.sfgate.com/bayarea/article/America-s-Cup-organizers-drop-overhaul-of-piers-3365728.php#page-1.

35. *Id.*

36. *Id.*

37. City and County of San Francisco, Piers 30-32 Project Fact Sheet, *available at* http://sfgov3.org/Modules/ShowDocument.aspx?documentID=6247.

38. *Id.*

39. *Id.*

40. Port of San Francisco, Informational Presentation Regarding the Piers 30-32 Revitalization Act Related to the Proposed Multi-Purpose Venue at Piers 30-32 10,

be incorporated directly into the structure itself, including a public ramp encircling the venue and a viewing area near the top of the structure, which would provide unique views and a new way for the public to experience the Bay."[41] The design team also created unique sightlines from inside the venue that provided a view of the bay bridge from several seating sections. When this unique feature was first described, the design team announced that the views from inside were included in order to create the "sense of being on the water and oriented towards the Bay," similar to the outdoor experience at nearby AT&T Park.[42]

The GSW development also featured several maritime related components. The development included a new fireboat station for the San Francisco Fire Department, a deep draft berth for tertiary cruise berthing when other Port cruise berths are booked or not available for use,[43] and water taxi and ferry facilities. Additionally, the development included about 60% open space, including perimeter public access on Piers 30-32. Finally, the proposed development included a 200,000 square foot retail component, both within the multi-purpose venue and along the Embarcadero.[44] While it is clear that the proposed project was designed with consciousness of the public trust doctrine, the inherent limitations facing indoor venues, such as an NBA arena, presented a significant obstacle for the project. However, as I will discuss throughout this paper, the evolution of the public trust doctrine might allow authorization for such a project.

III. A Brief Legal History of the Public Trust Doctrine

Before considering whether the GSW development is legally consistent with the public trust, it is important to understand the development of the public trust doctrine. In his 1970 book D*efending the* E*nvironment*, renowned public trust scholar Professor Joseph Sax explained, "Certain interests—like the air and the sea—have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership . . . they should be made freely available to the entire citizenry without regard to economic status."[45] Further, Sax argued that it is a "principle purpose of government to promote the interests of the general

available at http://www.sfport.com/modules/showdocument.aspx?documentid=5640 ("Staff Report").

41. I*d*.

42. I*d*.

43. I*d*. at 9.

44. I*d*.

45. JOSEPH L. SAX, DEFENDING THE ENVIRONMENT, A STRATEGY FOR CITIZEN ACTION 165 (1971).

public rather than to redistribute public goods from broad public uses to restricted private benefit."[46] These principles find support in classic Roman law, English common law, and subsequent American jurisprudence.[47]

A. The Roman and English Public Trust Formulations

The concept of tideland ownership and administrative responsibility of tidelands has undergone significant transition throughout the historical course of the public trust doctrine. It is widely accepted that the public trust doctrine finds its origin in ancient Roman law. The Roman doctrine focused on the ideas of natural law and commonality. The Institutes of Justinian proclaim "[T]he following things are by natural law common all—the air, running water, the sea, and consequently the *sea-shore*."[48] The Institutes explain that the public use right of the seashore encompasses of the shoreline for retreat and other maritime uses.[49]

The next historical stopping point for the doctrine is the English common law.[50] In the Dark Ages, "public ownership of waterways and tidal areas frequently gave way to ownership by local powers and feudatories."[51] However, over time, the notion of a public right to tideland resurfaced. As Parliament gained power, and statutory law developed, royal grants of seashore were prohibited, and it was declared that such lands could not be alienated from the Crown.[52] While the "ownership" remained with the crown, there was an observed public right in the shoreland. It was observed that "the free and unrestricted use of the sea-shore is of national importance, and no encouragement ought to be given to claims which have a tendency materially to interfere with the national welfare."[53]

46. *Id.*

47. *See*, e.g., Arnold v. Mundy, 6 N.J.L. 1 (1821). However, some legal commentators have expressed concern about overly expansive historical interpretations. *See* James L. Huffman, *Speaking of Inconvenient Truths: A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1 (2007).

48. THE INSTITUTES OF JUSTINIAN 2.1.1 (T. Cooper trans. 3d ed. 1852) (emphasis added).

49. *Id.*

50. William Drayton, Jr., *Comment, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 764 (1970).

51. *Id.*

52. *Note: California's Tideland Trust: Shoring It Up*, 22 HASTINGS L.J. 759, 762 (1971).

53. R. HALL, ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM 104 (2d ed. 1875).

B. The Public Trust Comes to America

More than one hundred years ago, the United States Supreme Court handed down two decisions that establish the role of the state sovereign in public trust administration.[54] First, in *Martin v. Lessee of Waddell*,[55] the Court explained,

> [w]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.[56]

Fifty years later, in *Illinois Central Railroad Company v. Illinois*,[57] the Court delivered the core opinion in American public trust jurisprudence. The Court was presented with an egregious set of facts. In 1869, the Illinois legislature granted, with little reservation, all right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan to the Illinois Central Railroad.[58] The Court considered "whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago . . . [or] whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State."[59] The court ultimately held that, unlike other public lands for sale, the state holds title in tidelands "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 therein freed from the obstruction or interference of private parties."[60] Most importantly, Justice Field explained, "The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands . . . ."[61] The Court explained that such grants "[did] not substantially

54. While there are several important decisions and developments in early American jurisprudence, I begin with the cases that establish the public trust as a state doctrine.

55. Martin v. Lessee of Waddell, 41 U.S. 367 (U.S. 1842).

56. *Id.* at 410.

57. Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387 (1892).

58. *Id.* at 439.

59. *Id.* at 452.

60. *Id.*

61. *Id.*

impair the public interest in the lands and waters remaining," and "[were] chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State."[62] However, the Court warned that a grant that would "sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake" was "not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public."[63] Thus, the Court's holdings establish and acknowledge the authority and limitations of trust administration by the state. It is from these roots that the modern public trust has developed.

IV. The California Public Trust Doctrine

California was admitted to the Union in 1850 on an equal footing with the original sates in all respects.[64] Thus, California obtained the ownership of its tidelands and submerged lands and those lands remained subject to the common law public trust for navigation, fishing, and commerce. According to the Act admitting California to the Union, "[a]ll the navigable waters within state shall be common highways and forever free, as well to inhabitants of such State as to citizens of the United States, without any tax, impost or duty therefor."[65] Initially, state officials prioritized economic development, and state policy encouraged disposal of tidelands for private interests rather than management for public use.[66] However, in 1879, Article XV, sections 2 and 3 were added to the California Constitution in response to widespread abuses in the disposition of tidelands.[67] The added provisions prohibited the sale of tidelands within two miles of an incorporated city to private persons.[68]

Traditionally, the courts interpreted the common law public trust doctrine as limited to commerce, navigation, and fishing.[69] However, as California developed, the courts have been rather expansive in their interpretation of the doctrine, and have held that the doctrine protects the

62. *Id.*

63. *Id.* at 453.

64. Pollard v. Hagan, 44 U.S. 212, 222 (1845).

65. Act of Sept. 9, 1850, 9 Stat. 453, §3, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=009/llsl009.db&recNum=480.

66. SELVIN, THE TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW, 1789-1920 226 (Garland Publishing, Inc., 1987).

67. Berkeley v. Superior Court, 26 Cal. 3d 515, 523 (1980).

68. *Id.*

69. Marks v. Whitney, 6 Cal. 3d 251, 259 (1971).

right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.[70]

In *Marks v. Whitney*, the California Supreme Court considered a claim of complete private ownership of tidelands.[71] The court, concluding that the lands in question were subject to a reserved easement in the state for trust purposes, explained that the "public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs."[72] Indeed, as the California Supreme Court held in the famous *National Audobon Society v. Superior Court*,[73] "[t]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."[74] Even though these foundational cases do not involve the mixed-use development of a waterfront, they serve as underlying precedent for the judicial attitude towards use of the states' tidelands.

California has an extensive legal system that governs the public trust, tide and submerged lands in California are subject to the public trust doctrine in several ways. As the doctrine evolved through California law, "the courts have examined the obligations of private grantees and lessees of trust lands, the obligations of municipal grantees who were invested with legal title and to whom were delegated the state's duties as trustee, and the public trust obligations of the state itself."[75] Although the State Legislature has the ultimate authority over public trust issues, there are numerous sources of trust authority that can impact a proposed development and make determinations of public trust consistency. The next sections explain the several ways that the public trust doctrine regulates harbor development.

V. California Public Trust Consistency Determinations

A. The Role of the State as Direct Steward of Public Trust

In California, the state acts both as trustor and representative of the people of the state with regard to public trust lands.[76] While the legislature may delegate oversight of the public trust to various agencies, the state is

70. *Id.*

71. *Id.* at 256.

72. *Id.* at 259.

73. Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419 (1983).

74. *Id.* at 434.

75. Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 524 (1971).

76. Cal. Pub. Res. Code § 6009.1(b).

the steward of the public trust. The Legislature, "acting within the confines of the common law public trust doctrine, is the ultimate administrator of the tidelands trust and often may be the ultimate arbiter of permissible uses of land."[77] Despite this role, the legislature may, in certain limited situations, release lands completely from trust obligation. As explained in *Illinois Central*, "[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any *substantial impairment* of the public interest in the lands and waters remaining."[78] Therefore, in the event that tidelands subject to the trust are no longer necessary to promote the public trust, a legislature has the power to release those lands. However, where tidelands are capable of use for trust purposes, the legislature cannot simply take away the public trust easement without proper justification.

The state may also delegate its trustor role to local governments or authorities through municipal trust statutes, such as the Burton Act in San Francisco. The legality of such transfers has been consistently approved by the courts as conveyances subject to the public trust.[79] According to the United States Supreme Court,

In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes.[80]

The major harbors of Los Angeles, Long Beach, San Diego, Oakland, Richmond, Benicia, Eureka, and San Francisco were all conveyed to local governments through such grants.[81] Each grant specifies land use conditions for the harbor, and generally requires the land to be used for harbor improvements and traditional public trust uses.

77. California State Lands Commission, Public Trust Doctrine, *available at* http://www.slc.ca.gov/Policy_Statements/Public_Trust/Public_Trust_Doctrine.pdf ("SLC Public Trust Doctrine").

78. Illinois Central, 146 U.S. at 453 (*emphasis added*).

79. Atwood v. Hammond, 4 Cal. 2d 31, 38 (1935).

80. Illinois Central, 146 U.S. at 453-54.

81. Los Angeles, Statute of 1911 Chapter 656; Long Beach, Statute of 1911 Chapter 676; San Diego, Statute of 1911 Chapter 657; Oakland, Statute of 1911 Chapter 700; Richmond, Statute of 1913 Chapter 317; Benicia, Statute of 1964(1st Extra) Chapter 18; Eureka, Statute of 1915 Chapter 438.

In 1969, the state transferred its sovereign interest in San Francisco Harbor to the city and county of San Francisco through the Burton Act.[82] The Act governs the development and management of the San Francisco Harbor in several ways. First, Section 2 of the Act grants the San Francisco Harbor to the City and County of San Francisco, "in trust, for the purposes of commerce, navigation, and fisheries."[83] Section 3 of the Act requires that the City create a Harbor Commission, now known as the Port Commission.[84] As a result of the Burton Act, "the Port is a city agency responsible for seven and a half mile stretch of waterfront that outlines that part of the city that curves from Aquatic Park in the north to India Basin in the south."[85] Generally, the Port Commission has "complete authority . . . to use, conduct, operate, maintain, manage, regulate, improve and control the harbor of San Francisco and to do all things it deems necessary in connection with the use, conduct, operation, management, maintenance, regulation, improvement and control of [the] harbor . . . ."[86]

Several port duties are specifically mentioned by the Act in conjunction with Section 3. First, the Commission is authorized to regulate improvements and use of the harbor necessary for the promotion and accommodation of commerce and navigation.[87] The grant also calls for the construction, maintenance, and operation of public buildings, parks, recreational facilities, and other development incidental, necessary, or convenient for such uses.[88] The Commission is further encouraged to promote preservation and restoration of marine resources consistent with the primary mission of the San Francisco Harbor.[89] Finally, the Port is authorized to grant franchises for "limited periods not exceeding 66 years for wharves and other public uses and purposes."[90] Ultimately, under the Burton Act, the Port's right to enter in to any lease with a private party is limited by the trust upon which said lands are held by the State of California.[91]

82. Statute of 1968 Chapter 1333, as amended, available at http://www.sfport.com/ftp/uploadedfiles/about_us/divisions/planning_development/projects/Burton%20Act.pdf ("Burton Act").

83. *Id*. at Sec. 2.

84. *Id*. at Sec. 3.

85. Rubin, supra note 1 at 36.

86. Burton Act, supra note 82, at Sec. 3.

87. *Id*. at Sec. 3.1.

88. *Id*. at Sec. 3.4.

89. *Id*. at Sec. 3.5.

90. *Id*. at Sec. 3.6.

91. Long Beach v. Morse, 31 Cal. 2d 254, 261-62 (1947).

B. The State Lands Commission and Trust Consistency Determinations

In 1938, the legislature created the State Lands Commission as the body charged with oversight of all state sovereign lands.[92] The SLC has jurisdiction over all sovereign state lands, including the state's tide and submerged lands extending from the shoreline out to three miles offshore.[93] The SLC also plays an important oversight role in relation to granted lands, such as the San Francisco Harbor. A recently added section of the California Public Resources Code provides a declarative state of the relationship between the SLC, municipal grantees, and the public trust. The legislature declared, "Tidelands and submerged lands granted by the legislature to local entities remain subject to the public trust, and remain subject to the oversight authority of the state by and through the State Lands Commission." Further, "All jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been made or may be made is vested in the commission."[94] Thus, with respect to granted lands, such as the San Francisco Harbor, the SLC monitors the lands and, when necessary, will issue trust consistency determinations or member voted resolutions "to ensure compliance with the terms of the statutory grants and the Public Trust."[95]

As the general oversight commission, the SLC often plays a large role in waterfront project approval. The SLC's involvement in waterfront development along the San Francisco Waterfront has significantly increased in recent years, as major, nontraditional, and mixed-use project proposals dominate the harbor.[96] This trend is likely due to financial concerns from developers and lenders seeking certainty that a city approved project lease would be honored if the state exercised its sovereign right to revoke the Burton Act and retake title to the Port.[97] When the SLC responds, it can declare a project consistent with the public trust in a number of different ways. Although these determinations are not binding legal precedent, they are extremely useful to analyze whether a proposed project like the GSW development at Piers 30-32 complies with the public trust.

92. Cal. Pub. Res. Code § 6301.

93. California State Lands Commission, Land Management Division Brochure 1, *available at* http://www.slc.ca.gov/Division_Pages/LMD/Documents/lmd_brochure.pdf.

94. Cal. Pub. Res. Code § 6301.

95. Land Management Division Brochure, *supra* note 93, at 6.

96. Mike Wilmar, Teresa Rea, et al., *supra* note 10.

97. I*d*.

In 2001, the SLC adopted a public trust policy statement to guide public trust analysis.[98] In addition, the SLC requested the Attorney General's Office to prepare a paper "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 of Public Trust Lands."[99] The SLC adopted the public trust policy statement (now called State Lands Commission Policy 88) by a 3-0 vote.[100] The paper, prepared in conjunction with the policy statement, dedicates an entire section to mixed-use developments.[101] The paper explains "mixed-use 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."[102] However, the SLC expressly warns that such developments "ought not be approved as consistent with statutory trust grants and the public trust for these reasons."[103] Further, the paper explains, "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,"[104] and that "non-trust uses on tidelands, whether considered separately or part of a mixed-use development, are not mitigable."[105] The paper notes that "mixed-use development proposals . . . frequently justify non-trust uses as 'incidental' to the entire project"[106] but advises that "each structure in a mixed-use development on tidelands must have as its primary purpose an appropriate public trust use."[107] With this legal framework and policy in mind, I will now review several public trust determinations by the SLC. As I discuss in Section VI, AB 1273 limited the ultimate role of the SLC in the GSW development if certain conditions were met. Nonetheless, it is insightful and important to review the SLC's role in past development proposals to understand modern public trust analysis.

98. State Lands Commission, Public Trust Policy Statement, *available at* http://www.slc.ca.gov/Policy_Statements/Public_Trust_Home_Page.html.

99. I*d*.

100. I*d*.

101. SLC Public Trust Doctrine, supra note 77, at 8.

102. I*d* at 9.

103. I*d*.

104. I*d*.

105. I*d*. at 11.

106. I*d*.

107. I*d*. at 12.

1. Trust Consistency Determination for Mixed-Use Developments at Pier 1, The Ferry Building, and Piers 1½, 3, and 5[108]

In 1999, 2000, and 2003, the Port of San Francisco sought to renovate three prominent locations along the Embarcadero. In response to communications with the Port, SLC issued trust consistency letters to the Port of San Francisco regarding plans for the preservation, rehabilitation, and adaptive reuse of Pier 1, the Ferry Building, and Piers 1½, 3, and 5. The projects all proposed historic restoration for the existing sites on San Francisco's central waterfront, in conjunction with mixed-use development throughout the project sites.[109] The projects called for major overhaul of the piers, historic bulkhead buildings, and the Ferry building. The projects implemented public access around the entire perimeter of the each project, and noted that access inside the pier sheds "allow[ed] members of the public to appreciate the elements, both internal and external, that contribute to the pier's classification as an (sic) historic structure."[110]

As mentioned, the projects called for mixed uses, including dedicated maritime uses, public gathering space, Port offices, public lobbies, a Bayside History Walk, maritime-related office space, and importantly, additional office space for the project developers.[111] In each project, the SLC determined that preservation for "future generations to enjoy can be a public trust activity, provided that significant public trust uses are incorporated into the project."[112] One letter cites *Marks v. Whitney* and concludes, "[The] range of uses is flexible, so as to recognize the needs of the public in these properties over time."[113] Another letter cites *Marks v. Whitney* and concludes, "The flexible range of uses would today include the preservation of these historic structures that were so much a part of the maritime history of San Francisco."[114] The reports express concern over the

108. It is important to note that two of the projects, Pier 1 and the Ferry Building, were considered before the adoption of SLC Policy 88.

109. Letter from Paul D. Thayer, Exec. Officer, California State Lands Commission, to Douglas F. Wong, Executive Director, Port of San Francisco (May 5, 1999) ("Pier 1 Letter"); Letter from Paul D. Thayer, Exec. Officer, California State Lands Commission, to Noreen Ambrose, Port General Counsel, Office of the City Attorney (Feb. 8, 2000) ("Ferry Building Letter"); Letter from Paul D. Thayer, Exec. Officer, California State Lands Commission, to Douglas F. Wong, Executive Director, Port of San Francisco (Apr. 22, 2003) ("Piers 1½, 3, and 5 Project Letter").

110. Pier 1 Letter, *supra* note 126, at 3.

111. I*d*.

112. I*d*. at 4-5.

113. Ferry Building Letter, *supra* note 109, at 5.

114. Piers 1½, 3, and 5 Letter, *supra* note 109, at 6.

office space and non-water oriented elements, even suggesting that the "proposal for maritime office space is not sufficient on its own to meet the State Lands Commission criteria for such use."[115]

Ultimately, the SLC determined that the projects were consistent with the public trust doctrine because of historic preservation.[116] For one project, the SLC mentioned, "while the planned maritime office space contributes in some measure to our conclusion that the project complies with the public trust, this office space, standing alone, would not qualify as a trust use."[117] Thus, because the SLC considered historic preservation a valid trust use, it found the projects to be consistent with the public trust. The discussions of the nontrust uses for the projects suggest that, when considering historic preservation projects, mitigation is possible for nontrust uses. However, the issue of trust mitigation was not squarely addressed by any of the reports.

2. The Trust Consistency Determination for the Giants Ballpark

In 1997, the Port requested that the SLC find that a proposed lease for a new San Francisco Giants Ballpark was consistent with the public trust.[118] The findings were made pursuant to Public Resources Code section 6702(b), which requires the SLC to determine that the lease was in accord with the statutory grant of the tidelands from the legislature. However, throughout the analysis, the SLC references common law public trust issues somewhat interchangeably with the Burton Act compliance. Therefore, these findings help explain the SLC's analytical framework for overall public trust consistency. Further, it is important to note that at the time that the Giants ballpark was determined consistent with the public trust, the amount of details about the project were far more concrete than the current GSW project specifications.

115. Pier 1 Letter, *supra* note 109, at 5.

116. I*d*. at 4, 6.

117. I*d*. at 6.

118. State Lands Commission Minute Item No.65 (8/26/97), *available at* http://archives.slc.ca.gov/Meeting_Summaries/1997_Documents/08-2697/Items/082697R65-1.pdf ("Ballpark Findings"). The Port also asked the SLC to find that the lease complied with Public Resources Code § 6702 (b). This section effectively protects the potential lessee of tidelands in the event that the statutory grant is amended, modified, or revoked. To ensure this protection, the SLC must make findings that (1) the lease was in accordance with the municipal grant (Burton Act), (2) the proceeds of the lease would be used only for statewide purposes, and (3) the lease was in the best interest of the state. Because the project is going through the legislative process, it seems as if these findings will not be made for the GSW development.

The ground lease authorized a transfer of Port lands to the China Basin Ballpark Company LLC for the purposes of constructing an "open-air, waterfront ballpark of 42,000 seats for approximately 81 regular season baseball games . . . ."[119] The project also called for construction of developed open spaces for patrons and the general public, plazas, and a PortWalk that would link with other public access locations, all to be open year round.[120] The lease further permitted the development of a 136,000 square foot building to be used for Giants offices, broadcasting and media facilities, a 10,000 square foot communications center for rent by the community, and a children's learning center.[121]

The SLC found that the ballpark project would "be an important visitor-serving facility integrated into and encouraging public trust activities along [the] section of the San Francisco shoreline" and "complement[] the overall use of the waterfront from the Ferry Building to China Basin, and [be] compatible with the public trust and the Burton Act."[122] Like many trust determinations, the SLC noted that the use of the waterfront south of the Bay Bridge has evolved from maritime industrial use towards public recreation, assembly, commercial recreation, and water-oriented retail.[123] The SLC noted that "people-oriented" uses comprised a growing portion of trust uses on the waterfront north of China Basin.[124] Most importantly, the SLC determined:

> The ballpark has been designed to maximize views of the Bay, South Beach Marina, the City skyline, and the Bay Bridge. The outfield wall and the scoreboard are low to preserve sightlines to the water for all fans. The identity of the ballpark will be tied to its location on the water.[125]

Finally, the SLC noted that the Port contemplates that a proposed facility for ferries would serve as an impetus for ferry service in that part of the city.[126]

119. I*d*. at 2.

120. I*d*. at 3.

121. I*d*.

122. I*d*. at 4.

123. This area is known as the Southern Waterfront, and stretches from Pier 35 to China Basin. Most industrial maritime locations are now concentrated in the Southern Waterfront.

124. Ballpark Findings, *supra* note 118, at 4.

125. I*d*.

126. I*d*. at 5.

3. The Impact of Prior SLC Determinations on the GSW Development[127]

While historic preservation projects were deemed consistent with the public trust, the SLC afforded the Port "much greater flexibility to incorporate non-trust uses such as general office or non-trust retail into its historic preservation projects than is allowed in new construction on trust property."[128] The plans for the GSW development did not call for historic preservation, and are thus readily distinguishable from the prior projects. It is clear that the prior project proposals all had historic restoration as the primary purpose use for each site. The SLC's determination appears to be based entirely on the finding that restoration is an appropriate public trust use, and that the nontrust office sites were incidental to that use. If the GSW development was subject to the same requirement, a lack of historic preservation purposes should pose a problem for trust consistency. The GSW development did not include the historic preservation of Piers 30-32 structures, which were dismantled long ago, and the SLC's permission of non-trust uses within historic preservation projects would not apply. However, SLC's willingness to allow a form of trust mitigation that suggests that a consistency determination would not be made on a use by use basis, but instead for the project as a whole.

Similarly, there is an argument that the GSW arena complex should not be compared to the Giants ballpark with regard to trust consistency. While both projects are sports centers, comparing the venues' water relatedness is inappropriate. Professional basketball is played indoors, in an enclosed area with bright lights illuminating the court regardless of whether the game is played at day or night. In contrast, professional baseball is generally played outdoors,[129] which allows nearly all spectators in attendance to view the surrounding San Francisco Bay from AT&T Park, where the San Francisco Giants play home games. The Giants' ballpark was authorized because of the connection between spectators at the stadium and the surrounding San Francisco Bay. Acknowledging this glaring difference between the projects, the Port explained "though the indoor experience would differ somewhat from the outdoor experience at the ballpark, the sense of being on the water and oriented toward the Bay would

127. While the proposed AB 1273 eliminates the possibility for the SLC to speak directly on the trust consistency of the project, this section discusses the theoretical analysis, applying the GSW project to past projects.

128. Mike Wilmar, Teresa Rea, et al., *supra* note 10.

129. While there are several stadiums that use domes or retractable roofs, it is accurate to say that professional baseball is always capable of being played outdoors.

be similar."[130] The Port argues, "The iconic, Bay-oriented architecture of the venue would help define the San Francisco waterfront and attract the public to the site."[131] While the GSW arena complex is objectively different in it's ability to incorporate the waterfront, it seems that the developers made substantial efforts. As discussed below, whether these efforts would satisfy the SLC is unresolved.

C. The BCDC's Special Area Plan: Express Authorization of Waterfront Mixed Use Development

Two comprehensive waterfront plans currently serve to guide development on the harbor: the Bay Conservation and Development Commission's (BCDC) San Francisco Waterfront Special Area Plan (SFWSAP) and the Port of San Francisco's Waterfront Land Use Plan. As recent amendments to both plans have made them nearly identical, I have chosen to devote the discussion to the BCDC's SFWSAP. The BCDC is a regulatory agency, created by the Legislature in 1965 in response to growing concern over the fill and rapid encroachment in San Francisco Bay.[132] The McAteer-Petris Act established the BCDC as a temporary state agency charged with preparing a long-term use plan for the bay and regulating development in and around the Bay while the plan was being prepared.[133] In 1969, the Act was amended to make BCDC a permanent agency and to incorporate the policies of the San Francisco Bay Plan into state law. According to the Act, BCDC can only authorize a project that involves fill if "public benefits from fill clearly exceed public detriment from the loss of the water areas and should be limited to water-oriented uses . . . or minor fill for improving shoreline appearance or public access to the bay."[134] Further, the Act mandates that "fill in the bay and certain waterways . . . for any purpose should be authorized only when no alternative upland location is available

130. Staff Report, *supra* note 40, at 10.

131. I*d*.

132. S*ee* Tim Eichenberg et al., *Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*, 3 GOLDEN GATE U. ENVTL. L.J. 243 (2010) (discussing the history of the BCDC and the San Francisco Bay).

133. S*ee* BCDC, History of the San Francisco Bay Conservation and Development Commission, http://www.bcdc.ca.gov/history.shtml.

134. Cal. Gov. Code § 66605(A) (The Act lists water-oriented uses as "ports, water-related industry, airports, bridges, wildlife refuges, water-oriented recreation, and public assembly, water intake and discharge lines for desalinization plants and power generating plants requiring large amounts of water for cooling purposes."); S*ee also* BCDC, San Francisco Bay Plan 88, available at http://www.bcdc.ca.gov/laws_plans/plans/sfbay_plan.shtml ("Bay Plan").

for such purpose."[135] To effectuate the purposes of the Act, "the commission may grant a permit subject to reasonable terms and conditions including the uses of land or structures, intensity of uses, construction methods and methods for dredging or placing of fill." While the Act does not refer to the public trust, trust concerns are addressed throughout BCDC's planning guidelines for the Bay, the San Francisco Bay Plan.[136] The plan explains,

> When the Commission takes any action affecting lands subject to the public trust, it should assure that the action is consistent with the public trust needs for the area and, in case of lands subject to legislative grants, should also assure that the terms of the grant are satisfied and the project is in furtherance of statewide purposes.[137]

The BCDC has also recognized the unique circumstances facing development along the San Francisco waterfront. Originating in 1975 and continually updated since, the BCDC has a special area plan dedicated to the San Francisco waterfront development. The SFWSAP "applies the requirements of the McAteer-Petris Act and the provisions of the San Francisco Bay Plan to the San Francisco waterfront in greater detail and should be read in conjunction with both the McAteer-Petris Act and the Bay Plan."[138] Several of the SFWSAP's purposes and provisions are directly relevant to the issues at Piers 30-32. Indeed, one purpose of the SFWSAP is to "reunite the City with the Northeastern Waterfront by establishing policies to realize the waterfront's potential as a focal point for recreation, as well as civic and commercial activities for the enjoyment of San Franciscans and all Bay Area residents."[139]

In rather plain language, the SFWSAP "facilitates non-maritime, maritime, commercial and recreational shoreline development along the San Francisco waterfront."[140] While this statement may seem incompatible with the public trust, BCDC explains that the SFWSAP will facilitate the rebirth of the San Francisco waterfront "with a vibrant mix of uses, which highlights its historic maritime character, oriented to the spectacular Bay."[141] While BCDC's regulations generally prohibit any non-maritime development that could be otherwise situation upland, the amendments to the SFWSAP (especially the area of the GSW development) allow such development. The

135. Cal. Gov. Code § 66605(B).

136. Bay Plan, *supra* note 134, at 94.

137. I*d*.

138. BCDC, San Francisco Waterfront Special Area Plan 1, *available at* http://www.bcdc.ca.gov/pdf/sfwsap/SFWSAP_Final.pdf ("SFWSAP").

139. I*d*. at 2.

140. I*d*. at 3.

141. I*d*.

SFWSAP justifies nonmaritime uses, explaining that the strict restrictions did not allow sufficient developer interest necessary to revitalize the area.[142] Thus, according to the SFWSAP,

First, the plan would allow the Port to develop piers not designated for removal for any use consistent with the Public Trust Doctrine and the Port's legislative trust grant, without regard to whether the use was water-oriented or could be achieved on an alternative upland location.[143]

...

> Because the Public Trust Doctrine and the Port's legislative trust grant (Burton Act) recognize the need to protect valuable public aquatic resources, the expansion of allowable uses on redeveloped piers to allow public trust uses would not invite inappropriate use of Bay resources.[144]

This language raises several important points regarding BCDC's public trust approach. First, the plan suggests there are uses consistent with the public trust doctrine that are not water-oriented and could be located on an upland location. However, the guidelines in the plan create effective limits on the types of uses that are allowed, even if the use need not necessarily be located on the water.

Under the SFWSAP, there are guidelines for uses on piers not designated for removal, such as Piers 30-32. The plan provides:

> within the boundaries of the existing pier footprint, an existing pier may be repaired or wholly reconstructed for a use consistent with the Public Trust Doctrine and the Port's legislative trust grant without triggering the McAteer-Petris Act Section 66605(a) water-oriented use criterion, and Section 66605(b) no alternative upland location criterion.[145]

Thus, for development on Piers 30-32, the SFWSAP requires that "the proposed project . . . be designed so as to take advantage of its nearness to the Bay, and . . . provide opportunities for enjoyment of the Bay in such ways as viewing, boating and fishing."[146] Even more limiting is the requirement that a project on Piers 30-32 must "improve . . . the public qualities of the Open Water Basin by providing more and better views of the Bay and

142. *Id.* at 20.

143. *Id.* at 19.

144. *Id.* at 20.

145. *Id.* at 23.

146. *Id.*

provides extraordinary public access benefits, all of which could not otherwise be achieved without the additional pile supported fill."[147]

The SFWSAP also provides explicit guidelines for redevelopment projects on Piers 30-32.[148] The public access requirements were of concern to the proposed GSW arena complex. BCDC requires that all projects "have significant view corridors to the Bay from points on the pier which by their location have more of a relationship to the water than to the project."[149] Further, "public open spaces within the interior of large piers that do not provide physical or visual proximity to the Bay should not be included in the determination of maximum feasible public access to be provided on the pier."[150] Given the restrictions of a basketball arena, these requirements would have made development of an indoor basketball arena on the waterfront difficult. While the recently enacted legislation essentially eliminated BCDC's authority to make a public trust consistency determination for the GSW development, the above mentioned limitations on Piers 30-32 allow BCDC to protect the public's rights in the waterfront.

The BCDC plays a unique role in the waterfront development process. It can shape developments by requiring maximum public access and design features that promote trust uses. Their role in the proposed project is important because it displays the dramatic impact the public doctrine can have on innovation and development. BCDC could have used its public access and design feature requirements to require the GSW development to accomplish the unprecedented: exterior views from the inside of a basketball arena. If the Warriors accomplished this feat, the project could have revolutionized future arena design.

VI. Direct Legislative Action, Public Trust Consistency, and AB 1273

The legislature may expressly find a project consistent with the public trust and directly authorize the project. Generally, such legislation will make the authorization conditional on the satisfaction of specific criteria. A legislative determination is the final word on trust consistency, and subsequent trust consistency determinations by other agencies are not required.

On September 27, 2013, Governor Jerry Brown approved AB 1273, authorizing the State Lands Commission to approve the proposed mixed-

147. I*d*. at 25.

148. I*d*. at 36.

149. I*d*.

150. I*d*. at 34.

use GSW development.[151] AB 1273 substantially amended AB 1389, Chapter 489 of the Statutes of 2001, which authorized the San Francisco Port Commission to approve a cruise ship terminal development, other maritime facilities, and commercial office space on the same site as the proposed GSW mixed-use development.[152] The primary purpose of AB 1389 was to construct a mixed-use facility for the primary purposes of 1) promoting waterborne transportation at the port by constructing the James R. Herman International Cruise Terminal at Piers 30-32 and 2) to further public use and enjoyment of the tidelands at this location by providing boat berths, public access, and substantial ground floor commercial uses.[153] Acknowledging the project's potential public trust inconsistencies, the legislature found "[t]he inclusion of upper level general office space at Piers 30-32 is proposed because it provides a needed incentive for private investment. To the extent the office space is not occupied by trust tenants, *it is not a trust use*, notwithstanding its importance as a financial inducement."[154] Despite the inclusion of the nontrust use office space in the project, the legislature exercised its retained power and authorized the project.[155] The Legislature justified the project because of the "unique circumstances existing at Pier 30-32" and "the considerable statewide public benefit and promotion of maritime transportation that will be brought about by the construction of a new passenger cruise ship terminal, improvements to berthing facilities for waterborne transit, a lagoon, improved public access and commercial public trust uses on this site."[156] The authorization of the mixed-use development, including nonmaritime general office space, was expressly subject to the requirement that the development include a modern two-berth cruise ship terminal.[157]

State Assembly Member Phil Ting introduced AB 1273 on February 24, 2013, at the behest of Mayor Ed Lee and the City of San Francisco. Like AB 1389, the legislation conditionally authorized the GSW development's

151. AB 1273, Chapter 381, Statutes of 2013, *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1273&search_keyword= ("AB 1273").

152. I*d*.

153. AB 1389, Chapter 489, Statutes of 2001. The land subject to AB 1389 is the same as the site for the GSW project. AB 1389 also freed Seawall Lot 330 from the public trust after finding that it was cut off from the water, and no longer capable of being used for trust purposes. The availability of Seawall Lot 330 for development is a financial inducement for the projects.

154. I*d*. (*emphasis added*).

155. I*d*.

156. I*d*.

157. I*d*.

approval if certain conditions are met. In effect, AB 1273 is a finding of trust consistency, conditioned on whether the SLC finds that the conditions are satisfied. AB 1273 is essentially a preemptory piece of legislation. Staff members at both BCDC and SLC recommended the City of San Francisco and the Warriors representatives to seek a legislative trust determination before moving forward with the project.[158] The legislation declares,

> The inclusion of significant public access improvements, maritime facilities, and venue supporting or trust retail uses, together with a new multipurpose venue for events that bring people from around the state to the waterfront to use and enjoy the public trust assets of San Francisco, enhances and promotes trust purposes at Pier 30-32.[159]

The power and influence of the public trust are evident in the legislation's detailed and demanding conditions. It is clear that the final legislation is the product of much debate, negotiation, and ultimately compromise between opponents and proponent of the GSW's development.[160] Section 6 of AB 1273 provides the conditions that, if met, will ensure the project satisfies the public trust doctrine. The fulfillment of these conditions is to be determined by the SLC at a properly noticed public meeting. The SLC was to make the public trust determination findings pursuant to AB 1273 sometime in February or March 2015.[161] Based on the first two years of development, the project was likely to undergo significant changes before the SLC made its final determinations. If the SLC found that the individual public trust requirements of AB 1273 were met, it was likely to find the mixed-use development consistent with the public trust.

Under AB 1273, the SLC was required to find that the mixed-use development was designed to encourage public trust activities and enhance public use of trust assets.[162] This general requirement seems to ensure that the overall scope of the development was compliant with general public trust requirements. Next, the SLC must have found that "the mixed-use development is designed to provide multiple significant views of the Bay Bridge and the San Francisco Bay from a variety of elevations and vantage points."[163] Specifically, AB 1273 required the development to include "significant views of the Bay Bridge and the San Francisco Bay from the interior concourses of the multipurpose venue and views of the Bay Bridge

158. AB 1273 Presentation, *supra* note 160, at 4.

159. AB 1273, *supra* note 151, at §5(i).

160. S*ee* Port of San Francisco, AB 1273 Piers 30-32 Revitalization Act 25-26, http://sfport.com/Modules/ShowDocument.aspx?documentID=6379. ("AB 1273 Presentation").

161. GSW Schedule, *supra* note 25.

162. AB 1273, *supra* note 151, at §6(a)(1).

163. I*d.* at §6(a)(2).

from certain seating areas within the multipurpose venue."[164] The most recent design renderings of the arena illustrated that the architects conceptualized the arena with this requirement in mind. While the exterior views likely would not have come close to duplicating ATT Park's water-relatedness, the requirement that an indoor basketball arena have exterior views demonstrates the impact of the public trust doctrine.

Next, the SLC was required to find "that the mixed-use development is designed to achieve and enhance maximum feasible public access . . . ."[165] This requirement is one of several that indicate that BCDC had a continued role in the project's prospective trust consistency. As discussed earlier, the SFWSAP guidelines for Piers 30-32 warns that public open spaces within the piers that do not provide physical or visual proximity to the Bay are irrelevant to the maximum feasible public access determination.[166] Thus, this section could have been satisfied if the multipurpose venue provided substantial visual proximity to the Bay as required.

AB 1273 also required the GSW development to include a significant maritime program including a potential city fire station and berthing facilities for city fire boats, facilities for berthing deep draft vessels or cruise ships, facilities that enable direct public access to the water by human-powered vessels or water-oriented recreational uses, and water-transit docking or berthing facilities.[167] Further, AB 1273 also imposed limits on nontrust retail uses as well as non-maritime office space on Piers 30-32.[168] Finally, AB 1273 required that the SLC find "[i]n consideration of the conditions described . . . and any other relevant information considered by the State Lands Commission, the mixed-use development project at Pier 30-32 is otherwise consistent with the public trust."[169] It is not clear whether this apparent catch all section in the legislation would have allowed SLC to find the development inconsistent with the public trust despite meeting all the AB 1273 requirements.

VII. AB 1273, SLC's Public Trust Findings, and Future Mixed-Use Developments

As one commentator suggests, "justifying the inclusion of non-maritime uses in a project in order to support maritime ones [is] a complex game related to satisfying the public trust issues in proposals for

164. I*d*.

165. I*d*. at §6(a)(3).

166. S*ee* Section V.C., supra.

167. AB 1273, supra note 151, at §§6(a)(6)(A)-(D).

168. I*d*. at §§6(a)(7)-(8).

169. I*d*. at §6(a)(16).

development."[170] This survey has shown that the legal and regulatory framework for public trust consistency is complex and unresolved. Trust determinations can come from a wide range of authorities and are thus difficult to predict. This is due, in large part, to the dynamic nature of the public trust doctrine. As I have explored, the doctrine is capable of adaptation: it can be invoked to protect ever changing public needs. A consistent framework is necessary because uncertainty in the developmental process will result in frustrated attempts to improve the waterfront.

There are colorable arguments that, even with the changes in size and orientation, the proposed GSW development, specifically the GSW arena complex, did not conform to the current public trust doctrine. The primary purpose of the development was a 17,000-19,000 square foot enclosed indoor arena that will host basketball games, concerts, and other events. While nontrust uses are authorized as long as they are incidental to a trust consistent use, here, the primary purpose of the GSW development was not a traditional trust use. Therefore, opponents of the development would argue that the inclusion of trust uses to support the GSW Arena does not bring the project into compliance because those uses are ancillary to the nontrust primary use, and not the other way around.

With AB 1273, the legislature took a broad, expansive view of the doctrine. As a result, the legislature has effectively broadened the scope of trust consistency in order to adapt to the unique situation on the San Francisco Bay. If the GSW development was ultimately determined to be consistent with the public trust doctrine, it would have signaled a step towards allowing major nontrust uses on lands subject to the doctrine. A trust consistency determination for the project would have to rely on a project-wide concept of the public trust instead of requiring trust consistency for each separate component of the project. While this expansive view has been seen with projects on San Francisco's waterfront before, the GSW development was different because it had, as its primary purpose, a use that was inconsistent with the traditional public trust doctrine. As designed, the arena complex did not substantially relate to the waterfront like the Giants ballpark. And unlike the renovations to Ferry Building Complex buildings, the structure did not include any historic preservation elements that could offset nontrust uses. If such a project is deemed consistent with the doctrine, it would significantly expand the realm of possible waterfront uses.

If this type of mixed-use project is deemed consistent with the public trust, it could shape the future of waterfront development and redevelopment of spaces deemed no longer "necessary" for classic trust uses, like navigation, fishing, or maritime commerce. The relaxation of public trust requirements could improve access to waterfront areas formerly

170. Rubin, *supra* note 1, at 223 fn.18.

closed to public access. At the same time, the relaxation of trust requirements will require closer scrutiny of any nontrust project that is proposed on the waterfront. As Professor Sax argued, "The indices of a trust problem do not lie merely in the fact that public property is being reallocated to a different use or even that some element of subsidy is involved, but rather in the absence of substantial evidence that some compensating public benefit is being achieved thereby."[171] It should be the role of developers, regulatory agencies, and ultimately, the state, to prevent abuse of this expansion. The ultimate goal of the doctrine must be kept in mind: ensuring meaningful public access and use of the state's unique and precious tidelands.

171. Joseph L. Sax, *supra* note 45, at 165.