SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
ARTHUR J. FRIEDMAN, Cal. Bar No. 160867
ALEXANDER L. MERRITT, Cal. Bar No. 277864
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
Telephone: 415.434.9100
Facsimile: 415.434.3947
Email: afriedman@sheppardmullin.com
amerritt@sheppardmullin.com

CITY OF SAUSALITO
MARY ANNE WAGNER, Cal. Bar No. 167214
City Attorney
City Hall
420 Litho Street
Sausalito, California 94965
Telephone: 415-289-4103
Email: mwagner@ci.sausalito.ca.us

Attorneys for Petitioner and Plaintiff
City Of Sausalito

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

CITY OF SAUSALITO, Petitioner and Plaintiff v. GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT, Respondent and Defendant	Case No. **VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF** **[Code of Civil Procedure §§ 1060, 1085; 1094.5; Civil Code § 670; California Environmental Quality Act (Public Resources Code § 21001.1, 21002.1 (b), (d), 21069. 21168.5, 21168.9; CEQA Guidelines §§ 15096 (a), (e), (f), 15162, 15381).]**
GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT, Real Party In Interest	

INTRODUCTION

1. The City of Sausalito ("City" or "Petitioner") brings this action against the Golden Gate Bridge, Highway and Transportation District (the "District") in order to enforce the City's legal rights and the District's corresponding legal obligations pursuant to California's Environmental Quality Act ("CEQA"), the public trust doctrine, and that certain lease Agreement between the City as lessor and the District as tenant governing the District's use and operation of the Sausalito Ferry Terminal located on public tides and submerged lands owned by the City, subject to the public trust.

This action arises from the District's proposal to nearly triple the size of the existing ferry terminal in the City (the "Project") as part of its "one-size fits all" program to implement standardized improvements to its three San Francisco Bay ferry terminals located in San Francisco, Larkspur and the City, respectively. But the size, physical and environmental conditions at the City's waterfront bear no resemblance to the District's much larger facilities in San Francisco and Larkspur. Moreover, the parties' lease Agreement provides that the District first must obtain the City's written consent for the Project because it constitutes "major alterations," "improvements" and/or "additions" within the meaning of the lease Agreement, which consent must not be unreasonably withheld. Because of this and other discretionary approvals the Project requires from the City, the City is a "responsible agency" for the Project under CEQA, imposing a duty on the City to consider whether Project changes, changed circumstances or new information since the District's adoption of a Mitigated Negative Declaration ("MND") for the Project in 2012 trigger CEQA's requirements for supplemental environmental review.

The District participated in the City's public processes for reviewing the District's proposed Project, which the District has modified at least three times since 2012, to determine whether to grant consent under the lease Agreement. However, in response to the City's recent notice to the District that in compliance with the City's legal duty as responsible agency, the City had retained an environmental consultant to assess whether any of CEQA's factors requiring

supplemental environmental review had occurred, the District, in a stunning reversal of course, withdrew its request for the City's consent for the Project under the lease Agreement and declared that the District is not required to obtain the City's consent to its Project under the lease Agreement. The District further proclaimed that the City has ***no legal authority to limit or control the size*** of the District's Project, located in the heart of City's historic waterfront on lands entrusted to the City for protection of the public trust. The District further asserted that because it "withdrew" its request for the City's consent under the lease Agreement, the City is "no longer" a responsible agency under CEQA and therefore must immediately "halt any environmental review process."

The District's recent action is unlawful, and if left unchallenged would insulate the District's proposed three-fold expansion of the ferry terminal – increasing over-water coverage by approximately 70% -- from any evaluation regarding: (1) its "reasonableness" pursuant to the parties' lease Agreement; (2) its consistency with the public trust; and (3) the potential need for additional environmental review to supplement the District's MND adopted in 2012. The City therefore was compelled to bring this action to enforce and defend its sovereign authority, as well as its legal rights and responsibilities as responsible agency under CEQA, trustee under the public trust doctrine and lessor under the parties' lease Agreement. The City's enforcement of these rights serves important public interests as it will ensure that the ultimate Project complies with the law, and appropriately balances the equally important policy objectives of improved regional transit, environmental protection and the preservation and protection of the City's historic waterfront held in public trust.

PARTIES

2. Petitioner and Plaintiff, the City of Sausalito, is a municipal corporation and general law city located in Marin County in the State of California. The City is the trustee of certain tide and submerged lands, filled and unfilled, within the City limits by grants from the State of California under uncodified statutes of 1953, chapter 534, page 1795 and statutes of 1957, chapter 791, page 2002, the latter of which is set forth in its entirety in the appendix to the opinion in *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal. App. 4th 1163. The City also is the lessor in

that certain "Lease of Public Tides and Submerged Lands" agreement with the District as Tenant executed as of December 1, 1995 (the "Agreement").

3. Respondent, Real Party in Interest and Defendant the Golden Gate Bridge, Highway and Transportation District is a local agency formed pursuant to enabling State legislation enacted in 1923 by, and consisting of, six counties: Sonoma, Mendocino, Marin, Napa, Del Norte and the City and County of San Francisco. The District is governed by a board of directors (the "Board") consisting of representatives from each of the six counties. The District is both the Project proponent and lead agency for environmental review of the Project under CEQA, and therefore is named in this action both as respondent and real party in interest, as well as defendant, for purposes of the claims asserted herein.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the matters alleged in this action pursuant to Code of Civil Procedure sections 1060, 1085, 1094.5, and Public Resources Code sections 21168, 21168.5 and 21168.9.

5. Venue is proper in this Court pursuant to Code of Civil Procedure section 392 because the Project is proposed for construction in Marin County. Venue also is proper in this Court pursuant to Code of Civil Procedure section 395(a), because the District resides in Marin County and Marin County is the place of performance for the parties' Agreement.

6. Petitioner has complied with the requirements of Public Resources Code section 21167.5 by serving a written notice of Petitioner's intention to commence this action on Respondent on September 13, 2016.

7. Petitioner is complying with the requirements of Public Resources Code section 21167.6(b) by concurrently filing and serving a notice that Petitioner is electing to prepare the record of proceedings.

8. Petitioner is sending a copy of this Petition to the California Attorney General concurrently with filing, thereby complying with the requirements of Public Resources Code section 21167.7.

9. Petitioner has performed any and all conditions precedent to filing this action and has exhausted any and all available administrative remedies to the extent required by law.

10. Petitioner has no plain, speedy or adequate remedy in the course of ordinary law unless this Court grants the requested writ of mandate and declaratory relief to require Respondent to comply with CEQA's mandates, the public trust doctrine and the express requirements of the parties' lease Agreement.

STATEMENT OF FACTS

A. The Parties' Lease Agreement

11. The District operates the Golden Gate Ferry which provides two commute passenger ferry routes across the San Francisco Bay that connect Marin County and San Francisco from terminals located in Larkspur and Sausalito, respectively.

12. The District began its ferry service between Sausalito and San Francisco on August 15, 1970 pursuant to a lease agreement with a prior lessor. The District commenced its ferry service from Larkspur in 1976.

13. On December 1, 1995, the City as lessor, and trustee of the public tides and submerged lands at issue (the "Premises") executed the lease Agreement with the District as tenant, granting to the District permitted uses of the Premises as defined in the Agreement for a 50-year term. The Agreement includes the following relevant provisions:

- Section 1.1 describes the leased Premises as real property located in the City of Sausalito, held by the City subject to the public trust, consisting of tide and submerged lands, filled and unfilled. Section 1.2 explains that the property located within the Premises includes the:

-- Float – the District-owned dock at which District ferry vessels and other vessels embark or disembark passengers;

-- Ramp [also referred to as the gangway] – the District-owned structure connecting the float to the approach pier;

-- Approach Pier – the District-owned structure connecting the ramp to the arrival/departure pier;

-- Arrival/Departure Pier – the District-owned structure connecting the approach pier to the shore; and

-- Bulkhead – the seawall that lies within and adjacent to the leased Premises.

- Under Section 3.1, permitted uses include "[a]ctivities customarily incident or convenient to operation of the District's ferry service, including the approved improvements set forth in Section 5.4 of the Lease." Section 5.4, subsection (e) confirms the City's approval of the District's plans at time the Lease was executed to replace the existing float with a new float the same length as the existing float but twenty feet wider with the capability of docking a vessel on either side. The Agreement thus makes it clear that the size of the District's ferry terminal, and any future changes and improvements to it, were materially important matters to the City in executing the Agreement. The City pre-approved these specific improvements proposed by the District at the time the parties executed the Agreement, while expressly conditioning any future improvements proposed by the District on the City's prior written consent, as set forth under Section 5.4, subsection (a).

- Section 5.4, subsection (a) provides that: "[t]enant shall not, without Lessor's prior written consent, make any [1] major alterations, [2] improvements, [3] additions, or [4] utility installations in, on or about the Premises, provided however that Lessor's consent shall not be unreasonably withheld, conditioned or delayed." This provision states further that "Major Alterations," one of the four independent triggers to the City's right of consent, mean "any alteration the cost of which is estimated to exceed $50,000, but shall not include repairs or replacements in, on, or about the Premises." Section 5.4, subsection (b) sets forth the procedures the District must follow to obtain the City's consent. The District must present the City with a request for consent that includes the District's proposed "detailed plans." The City in response is required to promptly act on the District's request, and it must notify the District of its decision within forty-five (45) days of the District's request. Failure to respond during that time is deemed to be City consent, subject to the District's compliance with all applicable law.

- Section 3.2 states in relevant part: "[District] shall, at [District's] expense, comply promptly with all applicable and legally binding statutes, ordinances, rules, regulations, orders,

covenants and restrictions of record, and requirements in effect during the term or any part of the term hereof, regulating the use by [District] of the Premises....."

B. The District's Initial Proposed Project and CEQA Review

14. In 2009, the District retained the engineering firm of Moffatt & Nichol to develop plans and perform related environmental analysis for improvements to the District's ferry terminals located in San Francisco, Larkspur and Sausalito.

15. On May 3, 2011, the District presented the Sausalito City Council with its "conceptual designs" regarding its proposed "Ferry Terminal Improvements."

16. In September 2012, the District published its Initial Study/Mitigated Negative Declaration ("MND") for the Project pursuant to CEQA. Relevant and notable findings in that analysis include the following:

- The MND's Project Description explains that the proposed improvements would (1) increase the size of the existing float from 110' long x 42' wide to 150' long and 53' wide; (2) increase the size of the existing gangway from 70' long x 5.9' wide to 90' long and 21' feet wide; and (3) increase the size of the existing access pier from 96.5' long x 8.5' wide to 96' long x 25' wide. (MND, p. 1-6). Additionally, the Project would require the use for approximately 6 months of an approximately 6,500 square foot area for a temporary terminal that would be located outside the leased Premises. (*Id.*, p. 1-9.) The Project when constructed also would include certain permanent structures located outside the leased Premises. The MND thus states that "the District would seek a lease amendment to include all proposed structures." (*Ibid.*)

- The MND explains that the proposed Project would increase "over-water coverage" of the existing ferry terminal by seventy-one (71) percent, from 8,000 square feet to 13,650 square feet. (MND, p. 1-12.)

- The MND states that the Project's "Objectives/Purpose and Need" are: (1) improved accessibility; (2) emergency preparedness; (3) sustainability goals; (4) increased operational efficiency; and (5) future flexibility. (MND, pp. 1-4-1-5.) Operational efficiency is described as resulting from standardized boarding procedures and equipment that would reduce staff training time, and would give the District the ability to move staff between the three Golden

Gate Ferry terminals located in San Francisco, Larkspur and Sausalito seamlessly as needed. (*Id.*, p. 1-5.) There is no reference to any objective, purpose or need to expand the size of the terminal to accommodate, encourage or facilitate projected passenger growth. Instead, the MND states that the capacity of the terminal would be unaffected, the operation of the ferry terminal would be similar to existing conditions, and that the Project does not "facilitate nor support" the establishment or expansion of service. (MND, pp. 1-5, 1-6, 2-52-2-53.)

17. On December 14, 2012, the Board adopted the MND for the then-proposed Project.

18. On January 29, 2014, the District submitted a permit application for the then-proposed Project to the San Francisco Bay Conservation and Development Commission ("BCDC"). BCDC requested additional information from the District throughout the balance of that year.

19. On December 4, 2014, BCDC considered the District's pending permit application during its public hearing. The City's Mayor and City Council members testified in opposition to the District's application based in part on the District's failure to obtain the City's written consent for the then-proposed Project as required under Section 5.4, subsection (a) of the parties' lease Agreement. The City reiterated this position on February 4, 2015 in a letter to BCDC.

20. On or about February 4, 2015, the District agreed subject to its unilateral "reservation of rights" to participate in the City's process for review of the proposed Project, which involved joint public hearings before the City's Planning Commission ("PC") and Historic Landmark Board ("HLB"), whose recommendations would then be provided to the City Council for its review and decision during a public hearing.

C. The District's March 2015 Modified Project

21. On March 24, 2015, the District submitted to the City revised plans for the Project and requested pursuant to Section 5.4, subsection (a) of the Agreement that the City decide within 45 days from the District's request whether it will grant consent. The revised plans reduced the width of the proposed gangway from the District's original proposal from 21' to 18.3' and the width of the proposed access pier from 25' to 21.'

22. The City's PC and HLB jointly considered the District's revised Project plans during public hearings on April 1, 15 and 29, 2015. The PC/HLB recommended that the City Council deny consent under the lease Agreement based on the following findings:

- The planning for the waterside and landslide improvements should be in tandem;
- The overall size of the project is too large and should be reduced;
- The Project is not compatible with the City's historic district;
- The proposed belvederes add unnecessarily to the size of the project;
- The proposed belvederes negatively impact the Sausalito Yacht Club and Inn Above Tides;
- Improvements that are part of the Project are located outside the boundaries of the leased area; and
- New facts and circumstances are present which could have significant environmental impacts that were not addressed in the Mitigated Negative Declaration adopted by the District.

23. The City Council then considered the District's proposed Project during its public hearing on May 5, 2015. While the District previously informed the City in written materials that the Project was designed to accommodate a projected 4% annual increase in passengers through 2029, the District's General Manager testified that evening before the City Council that the District's passenger growth projections "don't affect the fundamental size of the float or gangway." He further testified that the proposed dimensions of the float and gangway are "dictated by the geometry of the Americans with Disabilities Act…" and that "[i]f there was no growth, or if there's a doubling, it wouldn't affect the fundamental size of the float and the gangway." He added: "[t]oday's operational needs, as well as accessibility standards, indicate that these dimensions are appropriate."

24. At the conclusion of the public hearing, the City Council denied consent to the then-proposed Project. The City Council's Resolution denying consent adopted each of the findings of the PC/HLC. The Resolution further stated that the City cannot yet determine whether the Project has been adequately analyzed pursuant to CEQA's requirements in light of evidence of

changed circumstances, including significant increases in passenger and bike counts. Moreover, new information recently provided by the District suggests that the Project is both intended to, and in fact will increase passenger use. The City provided the District with formal written notice of its determination on May 6, 2015, within the 45-day review period.

D. The District's March 2016 Modified Project

25. On March 2, 2016, the District submitted to the City further revised plans for the Project. These further revised plans reduced the length of the proposed float and the width of the proposed gangway. The proposed Project still, however, would increase the size of the existing float from 110' long x 42' wide to 145' long x 53' wide, and the size of the existing gangway from 70' long x 5'9 wide to 90' long x 16' wide – nearly tripling the width of the existing gangway. The District submitted a letter to the City on March 2, 2016 accompanying these further revised plans stating in part that while the Project has been downsized in many ways, "[o]ne exception is the size of the float, which is mandated by ADA requirements, particularly those related to providing slopes that are readily accessible....The District cannot and will not build a facility that is not readily accessible by individuals with disabilities."

26. On March 4, 2016, the District and the City agreed in writing that the 45-day review period under the lease Agreement "will not apply to the [District's] submittal."

27. The City's PC and HLB jointly held two public meetings regarding the District's further revised plans on March 16 and 29, 2016 to address the eight point rationale for the City Council's denial of consent in May 2015. The PC/HLB each separately determined that the District's further revised plans had cured only some of the deficiencies and concerns listed in the City Council's previous denial of consent.

E. The City's Due Diligence Efforts And CEQA Review As Responsible Agency

28. In response to the District's March 2016 proposed plans, the City retained the professional planning and design firm, Environmental Vision, to peer review the District's computer-generated visual simulations of the proposed Project from eight viewpoints. On June 1, 2016, Environmental Visions reported that several of the District's simulations were inaccurate.

Two of the viewpoints depicted the scale of the gangway and float at 75% and 80% of their correct size, respectively. The District in response provided revised renderings on August 16, 2016.

29. The City also retained the engineering firm of COWI North America ("COWI") to peer review the District's revised Project plans. In response to COWI's requests for information, the District explained on June 16, 2016 that its proposed new float includes a 16-foot wide central walkway that is not mandated by ADA requirements, but rather by the District's operational desire that the width of the central walkway correspond to the District's two, 8-foot wide vessel doors. The District explained that the size of the proposed float and gangway is dictated by the District's desire to have the operational ability to disembark and embark, within 15 minutes, 920 passengers – representing the District's projected use during peak summer weekends in the year 2029.

30. On August 11, 2016, the District provided the City with actual daily ferry passenger counts from 2014 to the present, as well as monthly bike counts from 2012 to the present, showing the number of ferry passengers disembarking and embarking with bikes. This data confirmed the existence of substantially changed circumstances since the District's adoption of the MND. In 2012, monthly bike use averaged 9,200, with a high mark of 16,469 bikes in July. This figure soared in 2014 to a monthly average of 16,007 bikes, with a high mark of 29,796 in August. The District's August 11, 2016 letter further stated, contrary to the statements contained in the MND, that the Project's design is dictated in part by the District's operational desire and mission to facilitate and increase ferry ridership, drawing regionally from traffic along the Highway 101 corridor through Marin County.

31. On August 15, 2016, in order to fulfill its duties as responsible agency under CEQA, the City retained LSA Associates, Inc., an environmental consulting firm to analyze whether any Project changes, changed circumstances or new information triggered any obligations for supplemental environmental review under CEQA Guidelines section 15162.

32. On August 18, 2016, the District submitted to the City supplemental plans further modifying the proposed Project and requested that the City consent to or deny such plans within the 45-day period under the lease Agreement.

33. On August 22, 2016, the City acknowledged receipt of the District's August 18, 2016 letter, informed the District of the City's retention of LSA, and requested that the District agree to extend the 45-day review period under the lease Agreement by two weeks, to October 14, 2016, so that the City Council may make its decision with the benefit of all information it requires to fulfill its separate responsibilities as landlord under the lease Agreement and responsible agency under CEQA.

34. On September 2, 2016, the District responded in writing to the City's two-week extension request by withdrawing its Project submittal for the City's consent under the lease Agreement. The District reversed course and asserted that the proposed Project is a "replacement" and therefore not subject to the City's consent under Section 5.4, subsection (a) of the lease Agreement. The District stated further that the City previously granted its consent for the Project during the City Council's hearing on May 3, 2011 (the date that the District presented "conceptual designs" regarding its proposed "Ferry Terminal Improvements.") The District further asserted that because the Project is regional, the City has no land use authority over it, and has no legal authority to limit or control its size. The District's action compelled the City to file the present action.

FIRST CAUSE OF ACTION

(Violation of CEQA)

35. The City hereby incorporates the allegations set forth in the foregoing paragraphs.

36. Public agencies carry out their CEQA obligations in three distinct capacities: as "lead agencies," as "responsible agencies," and as "trustee agencies," the latter of which is not relevant to this action. The District is both the Project sponsor and the lead agency under CEQA. It therefore was responsible for analyzing the Project's environmental impacts and ultimately approving it. "Responsible agencies" under CEQA are those public agencies, other than the lead agency, which have responsibility for carrying out or approving a project, or which have discretionary approval power over a project for which the lead agency has prepared an EIR or negative declaration. (Pub. Res. Code § 21069; CEQA Guidelines, § 15381.) CEQA broadly defines the term "project" to include the "whole of the action, which has the potential for resulting

in physical change in the environment, directly or ultimately." (CEQA Guidelines, § 15002(d).) CEQA defines "discretionary" decisions as those requiring the "exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations. (CEQA Guidelines, § 15357.) Any public agency whose approval is both discretionary and required for any "activity" "integral to the project" constitutes a responsible agency under CEQA. (*Lexington Hills Assn. v. State of California* (1988) 200 Cal. App. 3d 415, 431.)

37. Under CEQA, the City is a responsible agency for the District's Project because it's discretionary approvals are required for activities that are integral to the Project in three independent respects.

First, because the proposed Project undeniably constitutes and involves "major alterations," or "improvements," or "additions" or utility installations in, on or about the Premises, the District must obtain the City's written consent to the Project pursuant to Section 5.4, subdivision (a) of the parties' lease Agreement. Section 5.4, subdivision (a) provides that the City's consent shall not be unreasonably withheld, conditioned or delayed. The City's consent determination under the lease Agreement clearly is a discretionary determination that involves the exercise of judgment. A lessor's exercise of that discretion is reviewed for reasonableness under California law on a case by case basis in light of numerous factors and considerations. (*Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal. 3d 488, 501.)

Second, the MND states that the Project would require the use for approximately 6 months of an approximately 6,500 square foot area for a temporary terminal that would be located outside the leased Premises, and that it would include certain permanent structures also located outside the leased Premises. The MND thus concludes that "the District would seek a lease amendment to include all proposed structures." (MND, p. 1-9.) Here too, the City has discretionary approval authority regarding the lease amendment required for the Project. The City therefore clearly is a responsible agency under CEQA for this separate and independent reason.

Finally, as discussed below (*infra* at ¶¶ 43-47) and incorporated herein, the City maintains discretionary approval authority over the Project under the public trust doctrine in its capacity as trustee for the public trust governing uses for the Premises at issue.

Applying what courts have described as the "functional test" for distinguishing ministerial from discretionary decisions, each of the foregoing City-required approvals are discretionary because the City may deny or approve the Project subject to conditions on the basis of environmental or any other concerns. Alternatively, it is equally true that the District may not legally compel the City to provide any of the foregoing approvals. Moreover, California law clearly provides that "where there are doubts whether a project [approval] is ministerial or discretionary, they should be resolved in favor of the latter characterization." (*Friends of Juana Briones Houses v. City of Palo Alto (*2010) 190 Cal. App. 4th 286, 301-302.)

38. CEQA mandates that the City as responsible agency consider the environmental effects of the Project as shown in the MND prior to reaching its discretionary decisions on the Project. (Pub. Res. Code § 21002.1(d); CEQA Guidelines, § 15096(f).) Additional environmental review is required only where substantial Project changes or changed circumstances under which the Project is undertaken subsequent to the District's adoption of the MND require major revisions to the MND. Additional environmental review also is required where new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time of the District's adoption of the MND shows, among other things, that the Project will have one or more significant effects not discussed in the MND. (Pub. Res. Code § 21166; CEQA Guidelines, § 15162.) An addendum to the MND may be prepared if none of the conditions described in Section 15162 have occurred. (CEQA Guidelines, § 15164(b).) A responsible agency's determination regarding whether supplemental environmental review is warranted must be supported by substantial evidence. (*American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal. App. 4th 1062, 1083.)

39. In compliance with the City's obligations as responsible agency for the Project under CEQA, the City retained LSA Associates, Inc. to analyze whether any changes to the proposed Project, changed circumstances or new information triggered any obligations for supplemental environmental review under CEQA Guidelines section 15162. On August 22, 2016, the City requested that the District agree to extend the 45-day review period under the lease Agreement by two weeks, to October 14, 2016, so that the City may complete its obligations under CEQA prior to deciding whether to grant the required discretionary approvals for the Project. However, on September 2, 2016, the District rejected the City's request, repudiated the City's right of consent under the lease Agreement and rejected the City's position that it is a responsible agency under CEQA. The District asserted in its letter to the City that in its opinion, there is no basis for supplemental environmental review of the Project. The District further asserted that: "[a]s the District is seeking no discretionary action by the City the City is "no longer" a responsible agency under the terms of CEQA and should "halt any environmental review process."

40. The District's actions are unlawful in at least two respects. First, the District's opinion as lead agency that there is no basis for supplemental environmental review under CEQA Guidelines section 15162 is irrelevant as a matter of law. Under CEQA, the City as responsible agency is legally required to independently consider the environmental effects of the Project as shown in the MND prior to reaching its subsequent discretionary decisions on the Project. (Pub. Res. Code § 21002.1(d); CEQA Guidelines, § 15096(f).) Second, the District does not have the legal authority to unilaterally revoke the City's responsible agency status under CEQA. The District may not circumvent CEQA's requirements nor impede the City's legal obligations as responsible agency by simply "withdrawing" its request for the City's consent under the lease Agreement. The City remains a responsible agency for the Project as a matter of law – rather than the District's choosing – because the District remains legally required to obtain the City's consent for the Project pursuant to the parties' lease Agreement, and further requires the City's discretionary approval of a lease amendment and public trust approval in order to implement the Project.

41. The District's actions are arbitrary, capricious and violate CEQA. The District has failed to proceed in the manner required by law, as it has violated its clear and present duty to allow the City to complete its duties as responsible agency under CEQA. A writ of mandate is necessary to compel the District to comply with CEQA's mandates. Additionally, a temporary and permanent injunction should issue, precluding the District from proceeding with the Project, including without limitation, from seeking any further approvals from any other agency, pending compliance with CEQA's mandates as set forth herein.

SECOND CAUSE OF ACTION

(Violation of the Public Trust Doctrine)

42. The City hereby incorporates the allegations set forth in the foregoing paragraphs.

43. In 1850, when California was admitted to the Union, it acquired ownership of all tidelands and the beds of inland navigable waters within its borders. (*Zacks, supra*, 165 Cal. App. 4th at 1175; Civ. Code § 670.) "Such tidelands and submerged lands 'belong to the state in its sovereign character and are held in trust for the public purpose of navigation and fisheries.'" (*Ibid.*) The trust powers of the state '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 favorable to its wishes." (*Id.* at 1177.) With respect to the tidelands and submerged lands at issue here, the Legislature delegated the state's trust power to the City by means of the uncodified 1957 statute. That statute provides that the City is granted all of the right, title, and interest of the State of California, held by virtue of its sovereignty, in all of tidelands and submerged lands of the San Francisco Bay, whether filled or unfilled, situated and lying within the boundaries of the incorporated area of the City, to be forever held by the City and its successors in interest in trust for certain specified uses and purposes.

44. "While the public trust doctrine has evolved primarily around the rights of the public with respect to tidelands and navigable waters, the doctrine is not so limited…The range of public trust use is broad, encompassing not just navigation, commerce and fishing, but also the public right to hunt, bathe or swim." (*San Francisco Baykeeper, Inc. v. California State Lands* (2015) 242 Cal. App. 4th 202, 233.) "Recreation and environmental preservation are also

permissible public trust uses." (*Citizens for East Bay Shore Parks v. California State Lands Com.* (2011) 202 Cal. App. 4th 549, 571.) Here, the trust granted to the City in 1957 expressly provides that the specified allowable uses include "construction, maintenance and operation thereon of public buildings and public parks and playgrounds, and for public recreational purposes...."

45. The state or trustee has an "affirmative duty to take the public trust into account in the planning and allocation of [trust] resources, and to protect public trust uses whenever feasible." (*San Francisco Baykeeper*, *supra*, at pp. 233-234.) "There is no set 'procedural matrix' for determining state compliance with the public trust doctrine....However, 'any action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full consideration of the state's public interest in the matter...." (*Ibid.*) Moreover, "such actions should not be taken in some fragmentary and publicly invisible way. Only with such safeguards can there be any assurance that the public interest will get adequate public attention." (*Ibid.*, citing *Zack's*, *supra*, at pp. 1188-1189.)

46. California courts have held that evaluating project impacts within a regulatory scheme like CEQA is sufficient 'consideration' for public trust purposes. (*Citizens for East Shore*, *supra*, at p. 576.) Here, however, while the MND explains that the Project would increase "over-water coverage" of the existing ferry terminal by seventy-one (71) percent, from 8,000 square feet to 13,650 square feet (MND, p. 1-12), the MND provides no impact analysis relevant to public trust uses, nor any analysis regarding project alternatives or the feasibility of mitigation measures that might reduce or minimize adverse impacts on the City's public trust.

47. The District's actions in unilaterally declaring that the City has no land use authority over the Project, and no ability to control the size of the Project, impede, materially interfere and violate the City's rights and duties as trustee under the public trust doctrine. The District's actions, among other things, have precluded the City from completing its "affirmative duty to take the public trust into account in the planning and allocation of [trust] resources, and to protect public trust uses whenever feasible," through further CEQA analysis or other format of its choosing. The District has failed to proceed in the manner required by law as it has a duty pursuant to the public trust doctrine and the parties' lease Agreement, which itself states that all

uses are subject to the public trust, to neither impede nor interfere with the City's rights and duties as trustee under the public trust doctrine to consider the Project's impacts on the public trust, and to deny or condition approval on feasible alternatives or mitigation measures as necessary to preserve and protect the public trust. A writ of mandate is necessary to compel the District to comply with the foregoing legal mandates. Additionally, a temporary and permanent injunction should issue, precluding the District from proceeding with the Project, including without limitation, from seeking any further approvals from any other agency, pending compliance with the legal requirements of the public trust as alleged herein.

THIRD CAUSE OF ACTION

(Declaratory Relief)

48. The City hereby incorporates the allegations set forth in the foregoing paragraphs.

49. Section 5.4, subdivision (a) of the lease Agreement provides as follows:

> Tenant shall not, without Lessor's prior written consent, make any major alternations, improvements, additions, or utility installations in, on or about the Premises, provided however, that Lessor's consent shall not be unreasonably withheld, conditioned or delayed. "Major Alterations" mean any alteration the cost of which is estimated to exceed $50,000, but shall not include repairs or replacements, in, on, or about the Premises. As used in this section 5.4, "cost" shall mean the costs and expense incurred by the Tenant as a result of employing or contracting with others to do the work and any cost and expense to the Tenant in labor and materials expended making the alteration, improvement, addition, or utility installation by use of its own employees and materials.

50. A genuine and justiciable controversy now exists between the City and the District in that the District contends that the Project is a "replacement" and therefore the District has no obligation under the lease Agreement to obtain the City's prior written consent for the Project.

51. The City disputes the District's interpretation and alleges as follows:

a. The District's interpretation does not withstand scrutiny applying California's well settled rules regarding the interpretation of contracts. The Court in *Ticor Ins. Co. v. Rancho Santa Fe Assn.*, (1986) 177 Cal. App. 3d 726, 730 summarized these legal principles as follows:

> The fundamental canon of interpreting written instruments is the ascertainment of the intent of the parties. (Civ. Code, § 1636 [citations]) As a rule, the language of

> an instrument must govern its interpretation if the language is clear and explicit. (Civ. Code § 1638; [citations]). A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach.' [citations] If possible, the court should give effect to every provision. (Civ. Code § 1641; [citations]). An interpretation which renders part of the instrument to be surplusage should be avoided. [citations].
>
> When an instrument is susceptible to two interpretations, the court should give the construction that will make the instrument lawful, operative, definite, reasonable and capable of being carried into effect and avoid an interpretation which will make the instrument extraordinary, harsh, unjust, inequitable or which would result in an absurdity. [citations].

b. The District's interpretation of Section 5.4 subsection (a) of the lease Agreement fails under the foregoing legal principles.

(i) The District relies solely on the term "replacement" in isolation and without consideration of either the language of Section 5.4 subsection (a) in its entirety or the lease Agreement as whole. The term "replacement" solely modifies the definition of "Major Alterations" under Section 5.4, subsection (a). Thus, even accepting the District's assertion that the Project constitutes a "replacement," at most this means that the City's right of consent is not triggered because it constitutes "Major Alterations" as defined under the lease Agreement. Section 5.4 subsection (a), however, provides three separate and additional triggers for the City's right to consent: "improvements, additions or utility installations," none of which are limited or modified by any exclusion for "replacements."

(ii) The City's consent is required because the Project constitutes "improvements" and/or "additions" within the plain meaning of Section 5.4 subsection (a).

Improvements: "In common parlance, an improvement to real property is something that enhances the property's value or desirability." (*People v. Acosta* (2014) 226 Cal. App. 4th 108, 121.) Here, the District repeatedly represented to the City that the Project would enhance the value, desirability and functionality of the Ferry Terminal and leased Premises. Moreover, in the MND and as well as numerous presentations and written submissions to the City, the District referred and described the Project as the Ferry Terminal Improvements project. Thus, by its own description, the proposed Project requires the City's consent.

Additions: Courts often turn to dictionary definitions to determine the plain, unambiguous, and common meaning of terms. (*U.S. Wealth and Tax Advisory Services, Inc.* (2008) 526 F.3d 528, 530 (9th Cir. 2008). Merriam-Webster's Dictionary defines "addition" as "the act or process of joining something to something else: the act or process of adding something." (www.merriam-webster.com/dictionary/addition). Here, the District's proposed improvements will be joined with and added to City-owned portions of the leased Premises. The District's proposed improvements also would add approximately 70% of over water coverage on the lease Premises. In both respects, among others, the Project involves additions that trigger the City's right of consent.

(iii) The term "replacement" in Section 5.4 subsection (a), when properly read in context with the language of Section 5.4 subsection (a) as whole, reveals that the term "replacement" can only mean "like for like" exchange, and therefore it does not apply to the Project, which does not "replace" the existing terminal, but instead substantially expands its size by approximately 70%. According to the District's unsupportable interpretation, the Project is not subject to the City's consent regardless of how much it improves or adds to the size of the existing Ferry Terminal so long as the "improvements" and "additions" are part of a "replacement." This interpretation, however, renders the terms "improvements" and "additions" mere surplusage in violation of fundamental principles of contract interpretation. The District's interpretation additionally results in an absurdity in that the District is required to obtain the City's consent to minor modifications, additions or improvements costing as low as $50,000, but it has no obligation to obtain the City's consent for massive improvements and additions costing tens of millions of dollars as part of a "replacement."

(iv) The District's interpretation also means the City has no ability to control the size of the Ferry Terminal so long as the District expands, improves and/or adds to the Ferry Terminal as part of a purported "replacement." That interpretation would effectively deliver full control over the Premises held in public trust to the District, which violates the terms of the City's public trust grant, the public trust doctrine, and therefore also is prohibited by Section 1.1 and

other provisions of the lease Agreement which expressly provides that all uses are subject to the public trust. The City's interpretation, however, renders the Agreement lawful and enforceable.

52. The City requests a declaratory judgment that: (1) the District must obtain the City's written consent in order to proceed with additional permitting and construction for the proposed Project pursuant to Section 5.4 subsection (a) of the Agreement because the Project constitutes a "Major Alteration," and it is not a "replacement" within the meaning of that provision in that it substantially improves, adds and increases the size of the existing Ferry Terminal; (2) Alternatively, and/or additionally, the District must obtain the City's written consent in order to proceed with additional permitting and construction for the Project pursuant to Section 5.4 subsection (a) because the Project constitutes "improvements" and/or "additions" within the meaning of Section 5.4, subsection (a) of the lease Agreement; and (3) Alternatively, if the Court concludes that the District has no obligation to obtain the City's consent to the proposed Project because it is a "replacement," and not a "major alteration," "improvement" or "addition," within the meaning of Section 5.4 subsection (a), the term "replacement" must be severed pursuant to Section 18.8 of the lease Agreement because it is *ultra vires*, ceding full control of the public trust to the District in violation of the City's trust grant and the public trust doctrine.

FOURTH CAUSE OF ACTION

(Declaratory Relief)

53. The City hereby incorporates the allegations set forth in the foregoing paragraphs.

54. A genuine and justiciable controversy now exists between the City and the District in that the District alleges that the Sausalito City Council provided consent to the Project pursuant to Section 5.4 subsection (a) of the lease Agreement on May 3, 2011 (at which time the District presented conceptual designs for a proposed Project that has subsequently been modified in material respects.)

55. The City disputes this contention and alleges as follows:

a. At no time prior to May 3, 2011 did the District either submit to the City proposed "detailed plans" nor request that the City consent or deny the then-proposed Project

within 45 days as required under Section 5.4 subsection (b) of the lease Agreement, and as the District later did on March 24, 2015 and August 18, 2016, respectively.

b. By the District's own admissions, the District did not provide the City with detailed plans on or before May 3, 2011, but rather presented only its "conceptual designs."

c. Any alleged "consent" to the Project provided by the City on May 3, 2011 was nullified and superseded by the District's subsequent substantial modifications to the Project in 2015 and 2016, and subsequent submissions to the City of detailed plans and requests for the City's consent on March 24, 2015 and August 18, 2016, respectively. Moreover, no alleged prior City consent could serve to waive the City's subsequent consent rights under Section 5.4 subsection (a) because under Section 14.1 of the lease Agreement: "[e]ither party's consent to or approval of any act by the other party requiring such consent or approval shall not be deemed to waive or render unnecessary the consenting party's consent to or approval of any subsequent act by the other party."

56. The City requests a declaratory judgment that it did not provide consent to the District' s Project pursuant to Section 5.4 subsection (a) of the lease Agreement on May 3, 2011. Alternatively, pursuant to Section 14.1 of the lease Agreement, any such consent the City provided on May 3, 2011 "shall not be deemed to waive or render unnecessary the [City's] consent to or approval of any subsequent act by the [District]."

FIFTH CAUSE OF ACTION

(Declaratory Relief)

57. The City hereby incorporates the allegations set forth in the foregoing paragraphs.

58. A genuine and justiciable controversy now exists between the City and the District in that the District alleges that the City is not a responsible agency for the Project under CEQA.

59. The City disputes this contention and alleges that City is a responsible agency for the District's Project because, as alleged herein above, the City's discretionary approvals are required for activities that are integral to the Project in three independent respects. First, the District requires the City's discretionary consent to the Project pursuant to Section 5.4 subsection (a) of the lease Agreement. Second, the Project requires the City's discretionary approval of a

lease amendment to allow for the temporary ferry terminal and for permanent components of the Project that will be located outside of the leased Premises. Finally, the District requires the City's discretionary approvals in connection with the City's affirmative duties as trustee under the public trust doctrine.

60. The City requests a declaratory judgement that it is a responsible agency for the Project under CEQA, and that the District as lead agency may not interfere nor impede the City from performing its duties as responsible agency.

PRAYER FOR RELIEF

WHEREFORE, the City prays for Judgment against the District as follows:

1. As to the First Cause of Action: for a writ of mandate confirming the City's status as responsible agency for the Project under CEQA and directing the District to comply with CEQA's mandates, and to cease and desist from interference with the City's performance of its duties under CEQA as responsible agency for the Project.

2. As to the Second Cause of Action: for a writ of mandate confirming that the City has the right and affirmative duty under the public trust doctrine to consider the Project's consistency with and potential adverse effects to the public trust, as well as the feasibility of alternatives and mitigation measures to mitigate any such adverse effects, and may in turn approve, deny or condition approval on modifications to the Project pursuant to its rights and duties under the public trust doctrine.

3. As to the Third Cause of Action: for a declaratory judgment that: (1) the District must obtain the City's written consent in order to proceed with additional permitting and construction for the Project pursuant to Section 5.4 subsection (a) of the Agreement because the Project constitutes a "major alteration," and it is not a "replacement" within the meaning of that provision in that it substantially improves, adds and increases the size of the existing Ferry Terminal; (2) Alternatively, and/or additionally, the District must obtain the City's written consent in order to proceed with additional permitting and construction for the Project pursuant to Section

5.4 subsection (a) because the Project constitutes "improvements" and/or "additions" within the meaning of Section 5.4, subsection (a); and (3) Alternatively, if the Court concludes that the District has no obligation to obtain the City's consent to the Project because it is a "replacement," and not a "major alteration," "improvement" or "addition" within the meaning of Section 5.4 subsection (a), the term "replacement" must be severed pursuant to Section 18.8 of the lease Agreement because it is *ultra vires*, ceding full control of the public trust to the District in violation of the City's trust grant and the public trust doctrine.

4. As to the Fourth Cause of Action: a declaratory judgment that the City did not provide consent to the District' s Project pursuant to Section 5.4 subsection (a) of the lease Agreement on May 3, 2011. Alternatively, pursuant to Section 14.1 of the lease Agreement, any such consent the City provided on May 3, 2011 "shall not be deemed to waive or render unnecessary the [City's] consent to or approval of any subsequent act by the [District]."

5. As to the Fifth Cause of Action; a declaratory judgement that the City is a responsible agency for the Project under CEQA, and that the District as lead agency must comply with CEQA's mandates and cease and desist from further interference with the City performance of its duties as a responsible agency.

6. For a stay, and preliminary and permanent injunction restraining the District and its agents, employees, officers, and representatives from undertaking any activity to apply for, seek or obtain additional permits or approvals for the Project from any agency, and further staying and enjoining efforts to implement the Project in any way pending full compliance with the requirements of CEQA, the public trust doctrine and the parties' lease Agreement.

7. For costs of the suit;

8. For attorneys' fees as authorized by Code of Civil Procedure section 1021.5, Section 15.1 of the lease Agreement and other provisions of law.

9. For such other relief as the Court deems just and proper.

Dated: September 13, 2016

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By: _____

Arthur J. Friedman
Attorneys for Petitioner and Plaintiff
THE CITY OF SAUSALITO

VERIFICATION

I, Adam Politzer, declare as follows:

I am the City Manager for the City of Sausalito.

I have read the foregoing **VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF** and I know the contents thereof. I am informed and believe that the matters stated therein are true and, on that ground, I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 12 day of September, 2016, in Sausalito, California.

Adam Politzer