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 CONTRA COSTA

CITY OF SAUSALITO,

Petitioner and Plaintiff,

v.

GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT,

Respondent and Defendant.

GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT,

Real Party in Interest.

Case No. MSN17-0098

PETITIONER'S OPPOSITION TO DEMURRER

Judge: Hon. Barry P. Goode
Dept: 17
Date: April 20, 2017
Time: 8:30 a.m.

Action Filed: September 13, 2016

CEQA Case

TABLE OF CONTENTS

		Page(s)
I.	INTRODUCTION	5
II.	FACTUAL BACKGROUND	5
III.	LEGAL STANDARDS	8
IV.	ARGUMENT	8
	A. The City's Claims Are Ripe for Adjudication	8
	1. The City's CEQA And Public Trust Claims Are Ripe	9
	2. The City's Lease Claims Are Ripe	10
	3. The City's Claims Are Neither Premature Nor Moot Because Of The District's Withdrawal Of Its Request For The City's Consent	11
	B. The Complaint States A Cause of Action Under CEQA	13
	C. The Complaint States A Cause of Action Under The Public Trust Doctrine	15
V.	CONCLUSION	17

TABLE OF AUTHORITIES

Page(s)

STATE CASES

Aubry v. Tri-City Hospital Dist. (1992)
2 Cal.4th 962 8

Blank v. Kirwan (1985)
39 Cal.3d 311 8

Brousseau v. Jarrett (1977)
73 Cal.App.3d 864 8

California Tahoe Regional Planning Agency v. Day and Night Electric, Inc. of Nevada (1985)
163 Cal. App. 3d 898 ..... 12, 15, 17

Center for Biological Diversity v. FPL Group, Inc. (2008)
166 Cal. App. 4th 1349 ..... 13, 16

Citizens for East Shore Parks v. California State Lands Com. (2011)
202 Cal. App. 4th 549 16

Concerned Citizens of Costa Mesa, Inc. v. 32nd. Dist. Agric. Assoc. (1986)
42 Cal. 3d 929 ..... 13, 15

Giles v. Horn (2002)
100 Cal.App.4th 206 13

Marshall v. Gibson, Dunn & Crutcher (1995)
37 Cal.App.4th 1397 8

San Francisco Baykeeper, Inc. v. California State Lands (2015)
242 Cal. App. 4th 202 16

Selinger v. City Council (1989)
216 Cal. App. 3d 259 8

Younger v. Superior Court (1978)
21 Cal.3d 102 13

Zack's, Inc. v. City of Sausalito (2008)
165 Cal. App. 4th 1163 5

STATE STATUTES

California Code of Civil Procedure
§ 430.30(a) 8

California Evidence Code
§ 452(c) 14

California Public Resources Code
§ 21168.5 14

CEQA Guidelines
§ 15003(g) 15
§ 15004(a) 15
§ 15004(b) 15
§ 15004(b)(2)(B) 15

I. INTRODUCTION

The demurrer by the Golden Gate Bridge Highway & Transportation District (District) to the Petition for Writ of Mandate and Complaint for Declaratory Relief (Complaint) filed by the City of Sausalito (City) ignores the allegations in the Complaint and controlling law. Both demonstrate that the Complaint states legally valid causes of action that are ripe for adjudication. Contrary to the central theme of the demurrer, the City's claims are neither premature nor moot. The fact that the District withdrew its request for the City's consent under the parties' lease agreement for the District's proposed major alteration, improvement and addition to the existing ferry terminal located on lands owned by the City as trustee pursuant to the Public Trust Doctrine (Project) does not change this conclusion.

The City's claims are based upon the District's repudiation of the City's legal authority to deny or regulate *any* ferry terminal project the District proposes to "replace" the existing ferry terminal. Such repudiation violates both the lease agreement and the City's legal rights and obligations as responsible agency under California's Environmental Quality Act (CEQA) and as trustee under the Public Trust Doctrine. The City's claims for declaratory and injunctive relief that were necessitated by the District's repudiation are not only legally cognizable, the City was required to bring this action to preserve and enforce its rights. The Court should overrule the demurrer.

II. FACTUAL BACKGROUND

The City holds certain tide and submerged lands in trust for the public, pursuant to grants from the State of California under uncodified statutes of 1953 and 1957. (Complaint, ¶ 2; *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal. App. 4th 1163, 1178.) Subject to this public trust, on December 1, 1995, the City as lessor and the District as lessee executed a lease agreement ("Lease"), pursuant to which the District operates its ferry terminal in the City and provides ferry service between the City and San Francisco. (*Id.*, ¶¶ 11–13.) Under Section 5.4 of the Lease, the District must obtain the City's consent regarding major alterations, improvements, or additions to the ferry terminal. (*Id.*, ¶ 13, at 6:15–26.)

On May 3, 2011, the District presented the City with its "conceptual designs" regarding its proposed "Ferry Terminal Improvements." (Complaint, ¶ 15.)

On December 14, 2012, the District in its dual capacity as lead agency under CEQA and Project sponsor adopted a Mitigated Negative Declaration (MND) and approved the Project. (Complaint, ¶ 17.) The MND states that the Project would increase "over water coverage" of the existing terminal by seventy-one percent, from 8,000 square feet to 13,650 square feet (*Id.*, ¶ 16 at 7:21–23) and would include both temporary and permanent structures that would require an amendment of the Lease. (*Id.*, ¶ 16 at 7:18–2.) On January 29, 2014, the District submitted a permit application for the Project to the San Francisco Bay Conservation and Development Commission (BCDC). (*Id.*, ¶ 18.) The City objected to the District's permit application because the District had failed to obtain the City's consent for the Project as required under the Lease. (*Id.*, ¶ 19.) BCDC declined to act on the Project until the Lease issue was resolved. The District agreed, however, to submit the Project for the City's review. (*Id.*, ¶ 20.)

On March 24, 2015, the District submitted revised plans for the Project to the City. (Complaint, ¶ 21.) Following joint public hearings before the City's Planning Commission (PC) and Historic Landmarks Board (HLB), the PC/HLB recommended that the City Council deny consent for the Project. (*Id.*, ¶ 22.) On May 5, 2015, the City Council denied consent for the Project on multiple grounds, including concerns regarding the remaining adequacy of the Project's CEQA review. (*Id.*, ¶¶ 23, 24.)

On March 2, 2016, the District submitted further revised plans for the Project to the City. (Complaint, ¶ 25.) In response, the City retained three consultants to fully evaluate the District's revised proposal. (*Id.*, ¶¶ 28, 29, 31.) First, it retained the engineering firm, COWI North America (COWI), to peer review the District's plans. (*Id.*, ¶ 29.) In response to requests from COWI, the District provided information showing that certain statements in the MND about the Project's design were inaccurate, and that ferry ridership had substantially changed since the District published the MND. (*Id.*, ¶¶ 29, 30.) Second, the City retained the planning and design firm Environmental Vision, which concluded from its peer review that several of the District's visual simulations for the Project which had been on display for the public's benefit in the City

were inaccurate by as much as 25 percent. (*Id.*, ¶ 28.) Third, the City retained LSA Associates to analyze whether supplemental environmental review was required under CEQA. (*Id.*, ¶ 31.)

On August 18, 2016, the District submitted supplemental revised plans to the City and requested the City to make its consent decision within 45 days. (Complaint, ¶ 32.) The District's modified proposal still would substantially increase the size of the existing ferry terminal three-fold and over-water coverage by approximately 70 percent. (*Id.*, ¶ 1.) On August 22, 2016, the City informed the District of concerns regarding the continuing adequacy of environmental review and requested a two-week extension of the review period to October 14, 2016, to allow LSA to complete its CEQA analysis. (*Id.*, ¶¶ 33, 39.)

The District responded in writing on September 2, 2016 by:

- withdrawing its request for the City's consent to the Project under the Lease;
- declaring that because the District is "replacing" the existing ferry terminal, it does not require the City's consent for the Project under the Lease;
- declaring that if the City's consent for the Project is required under the Lease, the City previously provided that consent on May 3, 2011;
- repudiating the City's ability to regulate the size or operation of the Project by declaring that the City has no land use authority to regulate the Project; and
- rejecting the City's position that it is a responsible agency under CEQA.

(Complaint, ¶¶ 34, 39.)

The City therefore filed the Complaint on September 13, 2016, which seeks declaratory and injunctive relief in response to the District's repudiation of the City's rights under the Lease, CEQA and the Public Trust Doctrine. Thereafter, the District continued moving forward with Project. On November 18, 2016, the District's Board of Directors approved a contract amendment and $3,354,000 budget increase with its design, environmental, and engineering consultant for the Project. (Request for Judicial Notice ("RJN"), Ex. A [meeting agenda], Ex. B, p. 9 [engineering staff report], and Ex. C [summary of meeting actions]. The District Board approved these additional expenditures to enable the District's consultant to "complete the remaining work" at the Sausalito facility, including preparing additional environmental studies, obtaining all required

permits, finalizing designs, and preparing bid documents for construction contracts. (RJN, Ex. B, p. 9.) In addition, the District's counsel reported to the Board that it has advised District staff "in connection with CEQA addendum approval process" for the Project. (*Id.*, Ex. D, p. 2.)

III. LEGAL STANDARDS

In reviewing the sufficiency of a complaint against a demurrer, the court must give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) It must also accept as true all material facts properly pleaded (*id.*), and any facts that may be implied or inferred from those expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

The defendant must show that the challenged causes of action are defective on their face. (Code Civ. Proc., § 430.30(a).) A demurrer tests the legal, not factual, sufficiency of a complaint. If a complaint contains allegations of the facts essential to state a cause of action, regardless of mistaken theory or imperfections of form, the court must overrule the demurrer. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 870.) Likewise, the court must overrule the demurrer "when the plaintiff has stated a cause of action under any possible legal theory." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) "It is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Ibid.*)

IV. ARGUMENT

A. The City's Claims Are Ripe for Adjudication

The District argues the Court should sustain its demurrer because the City's claims are not ripe for adjudication. Not so. "A controversy is ripe when it has reached, but not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*Selinger v. City Council* (1989) 216 Cal.App.3d 259, 272 [citing *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22].) Courts should resolve disputes "if the consequence of a deferred decision will be lingering uncertainty in the law, especially where there is widespread public interest in the answer to a particular legal question." (*Ibid.* [citing *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170].)

1. The City's CEQA And Public Trust Claims Are Ripe

The City's first and second causes of action for violation of CEQA and the Public Trust Doctrine and the fifth cause of action for declaratory relief that the City is a responsible agency under CEQA are ripe for adjudication because the Complaint alleges the District repudiated the City's land use authority to regulate the size or operation of the Project, in violation of the City's state law rights and obligations under CEQA and the Public Trust Doctrine. (Complaint, ¶¶ 1, 34, 39–41 [CEQA]; 47 [Public Trust], 48–52 [Lease], 54–56 [Lease], 59–60 [CEQA].) The District's September 2, 2016 letter stated in relevant part:

> This Project is a regional project, and the State Legislature has clearly stated that the City has no land use authority over it. **The City's only basis to consider the Project is due to the terms of the 1995 Lease.** By means of that Lease, it appears that the City is attempting to control the size and operations of this regional transportation facility.

(District's RJN, Ex. A, p. 5 [emphasis added].) The District's action and determinations are legally incorrect and constitute a repudiation of the City's rights and obligations under CEQA and the Public Trust Doctrine for two reasons.

First, the City's legal authority relative to the Project is not limited to the Lease, but additionally derives from state law under CEQA and the Public Trust Doctrine. The City has discretionary approval authority over the Project in three independent ways: (1) the City must provide written consent for the Project because it constitutes a major alteration, improvement and/or addition; (2) the Project will include both permanent and temporary structures located outside of the current leased premises, which will require a Lease amendment; and (3) the City maintains discretionary approval authority over the Project as trustee under the Public Trust Doctrine. The City is a responsible agency under CEQA based on each of these three, independent discretionary approvals over the Project. (Complaint, ¶¶ 37, 43–47, 49–52, 59–60.)

Second, the City's legal authority relative to the Project is not limited to mere "consideration" of the Project as the District's September 2 letter falsely contends, but also includes the discretionary authority under CEQA and the Public Trust Doctrine to regulate the size and operation of the Project to mitigate potential environmental and public trust impacts. (Complaint, ¶¶ 38–41, 44–47, 59–60.) The demurrer reiterates the District's repudiation of the

City's legal rights by stating "[i]f and when the District elects to proceed with the ferry landing replacement project, the City will have the opportunity to *review and potentially object* to the project that the District pursues." (Dem., p. 10 [emphasis added].) This description of the City's rights is plainly incorrect and well illustrates the ripeness of this dispute.

The facts thus have "sufficiently congealed" with respect to the City's first, second and fifth causes of action under CEQA and the Public Trust Doctrine to permit an intelligent and useful decision to be made. As to the first and fifth causes of action, there is a genuine and material dispute: did the District violate CEQA by repudiating the City's status as a responsible agency, and therefore impeded the City's ability to consider whether supplemental environmental review is required and to impose conditions on the size or operation of the Project if necessary to mitigate potentially significant environmental impacts? (Complaint, ¶¶ 1, 14–16, 22, 24, 28–34, 36–41, 58–60, Prayer, ¶¶ 1, 5.) Likewise, the second cause of action requests the Court to resolve another present and significant dispute: did the District violate the Public Trust Doctrine by repudiating the City's legal authority to regulate the size or operation of the Project, and therefore impeded the City's ability, as trustee, to consider the Project's public trust impacts and to impose conditions on the size or operation of the Project to preserve the public trust? (Complaint, ¶¶ 1, 2, 34, 43–47.)

2. The City's Lease Claims Are Ripe

The third and fourth causes of action pertaining to the Lease are also ripe for adjudication. The third cause of action seeks declaratory relief to resolve an important and continuing dispute between the parties regarding the proper interpretation of the District's obligation to obtain prior written consent from the City under Section 5.4, subdivision (a) of the Lease. Section 5.4(a) of the Lease requires the District to obtain the City's prior written consent for any "major alterations," "improvements" or "additions." It also defines "major alterations" to mean any alteration estimated to cost in excess of $50,000, but shall not include repairs or replacements. (Complaint, ¶ 49.) The District contends the Lease does not require the City's consent for any project it ultimately proposes because it is "replacing" the existing terminal. (Complaint., ¶ 50.) The City disagrees and contends that the District must obtain the City's prior written consent for the Project

because it is a major alteration, addition, and/or improvement. (*Id.*, ¶¶ 51–52.) This dispute too is ripe for adjudication and permits the Court to make an intelligent and useful decision.

The same is true with the fourth cause of action, which seeks a declaration that the District did not obtain the City's consent for the Project in accordance with Section 5.4(a) of the Lease when the City reviewed the District's conceptual designs. (Complaint, ¶ 54.) The City contends such review did not constitute consent for the Project under the Lease because the District did not comply with the detailed procedural requirements for seeking such consent (e.g., providing the City with detailed plans and formally requesting the City's consent determination.) (*Id.*, ¶¶ 55–56.) This dispute is also a continuing controversy the Court should and is well able to resolve.

3. The City's Claims Are Neither Premature Nor Moot Because Of The District's Withdrawal Of Its Request For The City's Consent

The District argues that the City's claims are premature and moot because the District withdrew its request for the City's consent for the Project. (Dem., pp. 1, 9–10, 14.) This argument lacks merit for two reasons.

First, the District merely *asserts* that at the time the Complaint was filed, "there was no project of any kind for the City to review – a fact that remains true to this day." (Dem., p. 9.) Not so. As the Complaint alleges, the District attempted to circumvent CEQA's requirements, and therefore declaratory and injunctive relief is necessary to prevent the District from proceeding with the Project contrary to law. (Complaint, ¶ 41, 47, 52, 56; 60, Prayer, ¶¶ 1–6.) The District's September 2 letter stated only that the District was withdrawing its request for the City's consent for the existing Project. It did not state the District had abandoned or intended to further revise the Project. (District, RJN, Ex. A, p. 5.) Moreover, after the City filed the Complaint, the District's Board has approved contract amendments and budget increases for the District's Project consultants to proceed with the Project through obtaining construction bids. (City's RJN, Exs. A–D.)

Second, contrary to the District's argument, the possibility that the District might further revise the Project's design does not render the City's claims premature or moot. To the contrary, the District has repudiated the City's legal authority to regulate the size or operation of *any* ferry

terminal project the District proposes. The District erroneously contends the City's authority to regulate any ferry terminal project derives solely from the Lease and that the City has no approval or regulatory authority under the Lease because any project the District proposes will "replace" the existing ferry terminal. (Complaint, ¶¶ 1, 34, 39–41 [CEQA]; 47 [Public Trust], 48–52 [Lease], 54–56 [Lease], 59–60 [CEQA].)

California Tahoe Regional Planning Agency v. Day and Night Electric, Inc. of Nevada (1985) 163 Cal. App. 3d 898, 902–904 ("*CTRPA*") demonstrates the City's claims are ripe for adjudication. There, the court held that a regional agency was not estopped or barred by privity or laches from enforcing its land use enforcement against a property owner who constructed a building expansion in reliance on a city permit following the city's repudiation of the regional agency's land use authority. The court held that: "[i]f an insurgency could effectively hamstring the superior governmental agency in an intergovernmental relationship the parochial temptation to defy the law would be measurably increased. There is no authority for such anarchy." (*Id.* at 905.) The court determined that the property owner could not reasonably rely on the city's repudiation of the regional agency's authority because the regional agency's authority derived from state law. The court explained that the property owner is charged with knowledge of state law, and acts in violation of that law at its peril. (*Id.*, fn. 2.) The court further rejected the property owner's defense of laches because the regional agency "promptly" filed a lawsuit seeking to quell the city's insurrection. (*Id.* at 905, fn. 1.) *CTRPA* demonstrates the City's Complaint seeking declaratory and injunctive relief is both legally cognizable and timely.

In fact, if the City had not acted to resolve these issues, it would have risked waiving its rights and could even face claims from third parties under CEQA and the Public Trust Doctrine. (*See e.g., Concerned Citizens of Costa Mesa, Inc. v. 32nd. Dist. Agric. Assoc., (1986) 42 Cal. 3d 929,* 939 [affirming timeliness of CEQA claims against agency for non-compliance with CEQA's mandates because "it is up to the agency, not the public, to ensure compliance with [CEQA] in the first instance."]; *Center for Biological Diversity v. FPL Group, Inc.* (2008) 166 Cal. App. 4th 1349, 1367 ("*CBD*") [public may seek judicial compulsion against trustee that cannot or will not enforce a valid cause of action against a third person].)

B. The Complaint States A Cause of Action Under CEQA

The City is a responsible agency under CEQA because the Project requires discretionary approvals from the City in the form of consent under the Lease, a Lease amendment for permanent and temporary structures for the Project, and approval under the Public Trust Doctrine. (Complaint, ¶ 37; Pub. Res. Code § 21069.) The City therefore was required to consider the environmental effects of the Project and determine whether supplemental environmental review was required. (Complaint, ¶ 38; CEQA Guidelines §§ 15004(a); 15096(f).) The City also was required to mitigate or avoid the direct or indirect environmental effects of those parts of the Project which it decides to carry out or approve. (*Ibid.*; CEQA Guidelines, § 15096 (g)(1).)

The District's withdrawal of the Project from the City on September 2 to halt the City's pending CEQA review, coupled with its repudiation of the City's legal status as a responsible agency and authority to regulate the size or operation of the Project, violated CEQA by preventing the City from completing its duties as a responsible agency. (Complaint, ¶¶ 39–41; District RJN, Ex. A, p. 5. [September 2 letter determining in part: "the City has no land use authority over [the Project], and "the City is no longer a responsible agency under the terms of CEQA and should halt any environmental review process."].) The District's action additionally violated CEQA by foreclosing alternatives or mitigation measures the City might otherwise impose on the Project in fulfilling its duties as responsible agency. (CEQA Guideline § 15004(b)(2)(B) ["....[public] agencies shall not....take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project."].) The District concedes that the September 2 letter constituted an "official act" of the District. (District RJN, p. 2.) The City therefore properly brings this cause of action pursuant to Public Resources Code section 21168.5, which authorizes claims to attack, annul or void "determinations, findings or decisions" in violation of CEQA's requirements. (Pub. Res. Code § 21168.5.)

The demurrer argues the City has no cognizable claim against the District for violation of CEQA because the September 2 letter did nothing more than share the District's opinion as lead agency that there is no basis for supplemental environmental review under CEQA. (Dem., p. 12.)

Again, not so. The District's argument is refuted by the allegations in the Complaint, the content of the September 2 letter, and the District's admission in its demurrer.

First, the Complaint alleges the District "repudiated," "rejected," and purported to "unilaterally revoke" the City's position and legal authority as a responsible agency for the Project under CEQA. (Complaint, ¶¶ 39–40, 58.) On demurrer, the Court must accept these allegations as true.

Second, the District's September 2 letter shows the District did not merely "express an opinion" regarding the need for supplemental environmental review. Instead, the District acted by withdrawing its request for the City's consent for the Project and asserting that (1) "the City has no land use authority over [the Project]"; (2) "the City's only basis to consider the Project is due to the terms of the Lease;" and therefore, by withdrawing its request for the City's consent; (3) "the City is no longer a responsible agency under the terms of CEQA and should halt any environmental review process." (District's RJN, Ex. A, p. 5.)

Third, the District concedes its September 2 letter was not merely an expression of Mr. Mulligan's opinion, but rather an "official act" of the District. (District's RJN, Ex. A, p. 2.)

Next, the District argues that the Complaint does not allege that the District did anything to impair the City's CEQA obligations. (Dem., p. 12.) This argument disregards relevant allegations in the Complaint and controlling law. The Complaint alleges that the City is a responsible agency under CEQA based on the Project's need for *multiple* discretionary approvals from the City. (Complaint, ¶ 37.) It also alleges that in response to the City's notice to the District that it required two additional weeks to determine whether the Project requires supplemental environmental review, the District withdrew its request for the City's consent for the Project and repudiated the City's status and legal authority as a responsible agency under CEQA. (*Id.*, ¶¶ 1, 34, 39–41, 58–60.) The District also repudiated the City's legal authority to regulate either the size or operation of the Project. (*Id.*, ¶¶ 1, 34, 39–41.) The Complaint alleges these actions and determinations by the District necessarily impeded the City's ability to complete its legal duties as a responsible agency. (*Id.*, ¶¶ 40–41, 60; Prayer, ¶¶ 1, 5, 6.) Such allegations are sufficient to state a valid cause of action against the District under CEQA.

The District's contention that the City has not stated a cognizable claim because the City may still conduct further environmental analysis of the Project is without merit. The District's actions in repudiating the City's authority render such further environmental analysis an idle act. "The purpose of CEQA is "not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." (CEQA Guidelines, § 15003(g).) The District's repudiation of the City's legal authority to regulate the size or operation of the Project clearly violates CEQA's mandates. (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agric. Assoc.*, (1986) 42 Cal. 3d 929, 936 ["CEQA compels an interactive process of assessment of environmental impacts and responsive project modification which must be genuine…a project must be open for public discussion and subject to agency modification during the CEQA process."].)

In sum, the City properly brings this action now in response to the District's repudiation of the City's rights under CEQA in contravention of state law to enforce and preserve these rights. (*CTRPA, supra,* 163 Cal.App.3d at 902–904, fns. 1 and 2). Prompt resolution of this CEQA dispute additionally furthers CEQA's requirement that public agencies consider the environmental consequences of proposed projects "as early as is feasible in the planning process to enable environmental considerations to influence project program and design and design." (CEQA Guidelines, § 15004(b).)

C. The Complaint Also States A Cause of Action Under The Public Trust Doctrine

Without citation to legal authority, the District's demurrer argues that interference with a trustee's duties under the Public Trust Doctrine is not a cognizable cause of action "in the absence of some action by the District to change the use of public trust lands." (Dem., p. 13.) This unsubstantiated argument misstates both the nature of the City's Public Trust Doctrine cause of action and relevant California law. Before granting a discretionary approval that may impact public trust uses, "[t]he 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, Inc. v. California State Lands* (2015) 242 Cal.App.4th 202,

234.) Contrary to the District's assertion, this obligation exists even where the trustee is merely considering a discretionary approval regarding an existing public trust use. (*Citizens for East Shore Parks v. California State Lands Com.*, (2011) 202 Cal.App.4th 549, 578 (*Citizens.*) Where no change is being made to a public trust use, the trustee may satisfy its duty to consider the potential public trust impacts/mitigations associated with a discretionary approval as part of, and in conjunction with environmental analysis performed under CEQA. (*Ibid.*, citing *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) In such cases, like here, involving competing public trust uses and interests, the trustee is uniquely qualified to assess and balance those interests. (*CBD, supra,* 166 Cal.App.4th at 1369, 1371.)

In *Citizens*, the Court affirmed the denial of claims brought against a public trustee under CEQA and the Public Trust Doctrine arising from the trustee's approval of a lease allowing a petroleum company to continue operating a marine terminal because the trustee adequately analyzed potential public trust impacts of the lease renewal as part of its CEQA review. (*Citizens, supra*, 202 Cal.App.4th at 578.) Here, however, the District's repudiation of the City's legal authority impedes the City's ability to perform the legally required public trust impacts analysis performed by the trustee in *Citizens*. (Complaint, ¶ 47.) The District's violation of these "procedural requirements" supports a cause of action under the Public Trust Doctrine. (*Citizens, supra*, 202 Cal.App.4th at 573.)

In addition, the Public Trust Doctrine authorizes the City as trustee to bring a claim against any third party to protect the trust from potential harm. (*CBD, supra,* 166 Cal.App.4th at 1367.) That is exactly this case. Here, the District's actions threaten to harm the public trust by impeding the City's ability as trustee to analyze the potential public trust impacts of the Project, balance competing public trust uses, and impose appropriate mitigations or conditions on the size or operation of the Project in order to preserve public trust uses. (Complaint, ¶ 47.) For example, according to the District, it may construct a "replacement" ferry terminal of whatever size it desires, even if it completely occupies the City's historic waterfront, and the City is powerless to respond. The District's repudiation of the City's legal authority thus presents an immediate and substantial threat to the public trust. Not only is the City legally authorized to bring this claim, it

has an affirmative duty to promptly do so to protect the public trust and preserve its rights. (*CTRPA, supra,* 163 Cal. App. 3d at 902–904, fns. 1–2.)

V. CONCLUSION

For all of these reasons, the City respectfully submits that the Court should overrule the demurrer. Alternatively, in the event the Court finds any deficiency in the Complaint, the City respectfully requests leave to amend.

Dated: April 5, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
ARTHUR J. FRIEDMAN

Attorneys for Petitioner and Plaintiff
CITY OF SAUSALITO

Dated: April 5, 2017

By MARY WAGNER
MARY ANNE WAGNER

City Attorney