SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAFE EMBARCADERO FOR ALL, a California non-profit corporation, Petitioner, **v.** **STATE OF CALIFORNIA, acting by and through its STATE LANDS COMMISSION; CITY AND COUNTY OF SAN FRANCISCO; and DOES 1 through 20,** Respondents. **SAN FRANCISCO PLANNING DEPARTMENT; and SAN FRANCISCO DEPARTMENT OF HOMELESSNESS AND SUPPORTIVE HOUSING,** Real Parties in Interest.	No. CPF-19-516841 **ORDER DENYING PETITIONER'S MOTION FOR PEREMPTORY WRIT OF MANDAMUS**

INTRODUCTION

Petitioner Safe Embarcadero for All seeks a peremptory writ of mandamus directing the San Francisco Port Commission to set aside its April 23, 2019 decision approving a Memorandum of Understanding (MOU) with the San Francisco Department of Homelessness and Supportive Housing. The Memorandum of Understanding authorizes a temporary lease of property to construct and operate a Navigation Center (the Embarcadero Navigation Center or the Project) that will ultimately provide beds, food and social services for 200 homeless people. The Project is currently being constructed on a portion of Seawall Lot 330, which is bounded by The Embarcadero, Beale and Bryant Streets south of the Bay Bridge in San Francisco. It is slated to open after the completion of construction later this year.

Petitioner previously sought an injunction against continued construction of the Project and a stay of the Port Commission's decision. This Court denied those requests. Petitioner has now dismissed all but one of its claims, and seeks issuance of a peremptory writ of administrative mandate on the basis of its single remaining claim. For the following reasons, petitioner's motion is denied.

FACTUAL BACKGROUND

On April 24, 2019, the San Francisco Port Commission and the San Francisco Department of Homelessness and Supportive Housing (HSH) entered into a detailed Memorandum of Understanding (MOU) authorizing a lease of the Seawall Lot 330 property for the temporary operation of a Navigation Center. The MOU recites that in April 2016, the City enacted Ordinance No. 57-16, declaring a shelter crisis in the City and County of San Francisco, citing a 2017 count administered by HSH that counted nearly 7,500 people experiencing homelessness in San Francisco on a single night. On April 4, 2019, Mayor London N. Breed signed legislation approved by the Board of Supervisors affirming that the shelter crisis still exists in San Francisco, amending the San Francisco Administrative Code and Planning Code to streamline contracting for and siting of homeless shelters, and amending the San Francisco Building Code to adopt

standards and create an alternative approval procedure for constructing homeless shelters. (MOU, Recitals A-C.)

Against this backdrop, the Port Commission approved the MOU authorizing a lease of the property in question, which was then being used as a parking lot, for a temporary Navigation Center that is ultimately slated to house 200 homeless people. The MOU contemplates the erection of demountable tensile structures to serve as housing and a demountable canopy structure to provide supportive office space and community/dining space. All structures will be anchored to the parking lot surface. (MOU § 13.) The Project will also include additional temporary structures containing toilets and showers and shipping containers for client storage. (*Id.*) Once construction is complete, the Navigation Center will commence operations with a bed capacity not to exceed 130 beds for the first three months; 165 beds during months 4-6; and at the maximum capacity of 200 beds from month 7 on. (MOU § 11.1.)

The lease is for a maximum term of 56 months, including 48 months of operation, time for construction prior to operation, and time to restore the site at the end of the term. (MOU § 5.) The Navigation Center will be operated for an initial term of 24 months (two years). (MOU § 6.1).[1] That initial two-year term may be extended by HSH for an additional two years if HSH demonstrates to the Port Commission, and the Port finds, (A) that over the first two-year period, there has been a decrease in the number of homeless people in the designated outreach zone, which extends south to China Basin, north to the Ferry Building, and west to Yerba Buena; (B) that the City has provided dedicated beat officers within the safety zone around the property, which includes the Rincon Hill and South Beach neighborhoods, and HSH has provided dedicated cleaning services in the area; (C) that HSH has provided quarterly reports to the Port that include information on publicly available crime statistics and other community impact measures in the safety zone, program utilization and outcomes, and cleaning efforts; and (D) that HSH and its Navigation Center operator have complied with the required good neighbor policy.

[1] The operational term of the Embarcadero Navigation Center was reduced from four years to two years with a two-year option term as a result of input the City received from organizations, local businesses, and individuals in the community.

(MOU § 6.1 & Exs. E-1, E-2.) However, the Port shall have the right to terminate the MOU at any time, including during the initial two years, upon 180 days' prior written notice if the property is needed in connection with a Port project or program. (MOU §§ 6.3, 7.)

The good neighbor policy that must be included in HSH's contract or grant agreement with the Navigation Center's operator will require the operator, among other things, to work with neighbors and city agencies to ensure that neighborhood concerns about the facility are heard and addressed; to minimize the impact on the neighborhood of guests entering, exiting, or waiting for services; to actively discourage and address excessive noise and loitering in the area; and to take measures to ensure that the safety and cleanliness of the area is maintained and that driveways and sidewalks in the area are not blocked. (*Id.*, Ex. B-1.)

In approving the MOU, the Port Commission found that the Port will receive fair market value for the use of the site. (MOU, Recital G.) Specifically, HSH is required to pay quarterly a base rent of $36,860.61 per month ($442,327.32 per year) during the construction period and the first 12 months of operation, increasing to $39,660.15 per month ($475,921.80 per year) during the last year of operation (assuming the two-year option is exercised). (MOU § 9.1.) HSH shall receive a rent deduction for the actual cost of infrastructure improvements that will remain on the site beyond the term of the MOU, principally for the installation of utilities such as sewer, electrical, and water, in a maximum amount of $364,550. (MOU § 9.2.) The MOU contains an exhibit showing how the rent was calculated on the basis of the current and projected revenue from the existing parking lot. (MOU, Ex. C-1.) In denying petitioner's application for a preliminary injunction, the Court expressly found that the Port Commission's determination that the lease is for fair market value is supported by substantial evidence in the record. (Oct. 1, 2019 Order at 17-18.)

PROCEDURAL BACKGROUND

Petitioner commenced this action on July 10, 2019, in Sacramento. After the Sacramento County Superior Court found that the sole proper venue for this case is San Francisco and the Third District Court of Appeal summarily denied petitioner's petition for writ of mandate seeking review of that decision, the action was transferred to this Court. On September 9, 2019, this

Court denied petitioner's application for a temporary restraining order, finding that petitioner had failed to carry its burden to show that its members or the public would suffer irreparable harm before the matter could be heard on notice. On October 1, 2019, this Court denied petitioner's request for a preliminary injunction, finding that petitioner had not shown that the Navigation Center poses a threat of irreparable harm, and that the balance of harms weighs heavily in favor of the public interest in providing housing and other assistance to homeless people. The Court also found, however, that petitioner had established a reasonable likelihood of prevailing on one of its claims, which is the sole issue remaining for resolution. On the basis of further briefing and argument, the Court now concludes that petitioner's claim fails on its merits.

I. THE PETITION IS NOT PREMATURE.

As a threshold matter, the City argues that the petition is premature because Petitioner has not ordered and lodged the entire administrative record, as is typically required of a party seeking administrative mandate. On the circumstances presented here, in which Petitioner has dismissed all but one of its claims and that remaining claim presents a question of law on undisputed facts, the Court disagrees.

Code of Civil Procedure section 1094.5 does not invariably require a party seeking a writ of mandate to prepare and file the entire administrative record. Rather, it provides, "*All or part* of the record of proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court." (Code Civ. Proc. § 1094.5(a) (emphasis added).) Thus, the petitioner and the respondent may each submit relevant portions of the administrative record sufficient to give the trial court an adequate basis for ruling on the issues before it. (See *Anderson v. City of La Mesa* (1981) 118 Cal.App.3d 657, 660 [rejecting city's "unmeritorious[]" contention that trial court improperly granted relief because petitioner "did not submit to the court the full record of the administrative hearing before the City Council," where both parties attached to their pleadings portions of the administrative record as permitted by § 1094.5(a) and the city's answer admitted most of the significant facts].)

"A partial record of an administrative proceeding is sufficient for the purposes of section 1094.5, subdivision (a) if it provides the reviewing court a basis for the affirmance or reversal of the order or decision, and establishes where in the proceedings the administrative body proceeded in excess of its jurisdiction, or denied a fair hearing or abused its discretion. This partial record must accurately represent the administrative proceedings, provide the reviewing court an understanding of what occurred below, and enable that court to provide an independent judicial review of the administrative decision." (*Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 355.) While it is true that the City has not filed an answer to the petition, Petitioner is no longer challenging the sufficiency of the evidence to support the City's decision, and the handful of key facts on which its remaining claim turns are undisputed. The extensive partial excerpts from the record it has filed, which include a transcript of the proceedings before the Port Commission, provide the Court with a sufficient basis on which to decide the claim before it.

II. STATUTORY BACKGROUND

Petitioner contends that by approving the MOU, the City violated state law and thereby committed a prejudicial abuse of discretion. It contends that under uncodified legislation originally enacted in 2007,[2] the City may lease Seawall Lot 330 for nontrust purposes only if, prior to executing the lease, the Port submits the proposed lease to the State Lands Commission for its consideration, and the Commission approves the lease in writing based on findings that the lease is for fair market value, is consistent with the terms of the public trust and the Burton Act trust, other than their restrictions on uses, and is otherwise in the best interest of the state. Petitioner contends that because the City concededly did not obtain prior written approval of the State Lands Commission before entering into the MOU, the Port's decision approving the MOU must be set aside. Both the City and the State Lands Commission disagree and take issue with petitioner's construction of the pertinent statutes, albeit on slightly different grounds.

[2] The Court's October 1, 2019 Order denying petitioner's motion for a preliminary injunction repeated petitioner's assertion that the pertinent restriction was first enacted in 2016. That assertion was in error; as explained below, it was first enacted in 2007, and was re-enacted with minor changes in 2016.

The resolution of the parties' dispute requires the Court to construe several uncodified pieces of legislation enacted over several decades that are frankly somewhat opaque and seemingly inconsistent in their terms and application. For ease of reference and discussion, the Court will first summarize the key provisions of the applicable legislation, in order of its enactment, and then turn to the parties' arguments regarding its application to the Project.

A. **The Burton Act**

This dispute finds its roots in the public trust doctrine as it has been been applied over time to the San Francisco waterfront. One court recently summarized the historical background:

> California acquired title to tide and submerged lands within its borders when it became a state in 1850. State ownership of these lands was "subject to the public trust" for commerce, navigation, fisheries, and other recognized uses. [¶] In the late 1870's, a new seawall was constructed on the waterside of an existing seawall originally built along the San Francisco waterfront, and the area between the two walls was filled. The filled land . . . retained the title of tide and submerged lands owned by the state in its sovereign capacity, subject to the public trust.

(*Defend Our Waterfront v. State Lands Commission* (2015) 240 Cal.App.4th 570, 576 [footnote omitted].) The "public trust" has traditionally been defined in terms of "navigation, commerce and fisheries," including "the 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." (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259.)

In 1968, the Legislature enacted the Burton Act, authorizing the grant of certain sovereign lands to the City, subject to the public trust and subject to the terms and conditions in the grant. (Stats. 1968, ch. 1333, § 2.) The grant, which was documented in a transfer agreement the following year (Prows Decl., Ex. 13), authorized the State to transfer those properties to the City and County of San Francisco, through its Harbor Commission. (Stats. 1968, ch. 1333, § 3.) The Legislature specifically directed that the lands be under the "administration and control" of the Port, which was to have "complete authority . . . to use, conduct, operate, maintain, manage, regulate, improve and control" the lands granted. (Stats. 1968, ch. 1333, §§ 3, 12.) Seawall Lot 330 was among the designated seawall lots that the State conveyed to the City in 1969 in trust for those specified port and waterfront purposes. (Stats. 2007, ch. 660, §§ 1(j),(t), 2(b).)

The Port's powers under the Burton Act included the ability to lease the granted lands for limited periods of up to 66 years and to collect rents for those leases, with the requirement that those leases be for purposes consistent with the public trust and the Burton Act. (Stats. 1968, ch. 1333, § 3, subd. (6).) However, if the Port determined that any portion of the granted lands was not required for these purposes, it was authorized to lease them "for the purposes of such development and use as the [San Francisco harbor] commission finds will yield maximum profits to be used by the commission in the furtherance of commerce and navigation." (*Id.*) The latter language was amended in 1975 to state that if the Port determines that any portion of the transferred lands is not required for trust uses, it may lease them "for the purposes of such development and use as the commission finds to be in the public interest." (Stats. 1975, ch. 422, § 3, subd. (6).) The Burton Act provided that any money derived from these non-trust leases "shall be used solely for the furtherance of the purposes specified by this act." (*Id.*)[3]

B. **The First Seawall Statute (SB 815)**

In 2007, the Legislature enacted SB 815, the first of two bills the Attorney General refers to as the "Seawall Statutes," and the legislation upon which petitioner's claim is primarily based. (Stats. 2007, ch. 660.)[4] In that legislation, the Legislature found that Seawall Lot 330 and certain other seawall lots were no longer tidelands, were then "leased on an interim basis for commuter parking or are vacant land," and had "ceased to be useful for the promotion of the public trust and the Burton Act trust," other than as a source of revenue to support those purposes. (Stats. 2007, ch. 660, § 2(h),(i),(l).) The Legislature found, "Given the foregoing lack of public trust use needs for the designated seawall lots, the designated seawall lots are not necessary for public trust or Burton Act trust purposes," with two narrow exceptions not applicable here. (*Id.* § 2(l).)[5]

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[3] The State Lands Commission in the Resources Agency is the successor to the Department of Finance, which is referred to in the Burton Act. (Pub. Res. Code § 6101.)

[4] Legislation relating to the seawall properties was also enacted in 2001 and 2003. (Stats. 2001, ch. 489; Stats. 2003, ch. 68.) However, those enactments do not appear to have any material bearing on the analysis of the issues presented here.

[5] The specified exceptions both referred to Seawall Lot 337, a parcel adjacent to Piers 48 and 50 that was then leased to the China Basin Ballpark Company for event-related parking, and which was designated as a port priority use area under the seaport plan. (*Id.* § 2(i), 6.)

Accordingly, it declared those lots to be "free from the use requirements of the public trust, the Burton Act trust, and the Burton Act transfer agreement for the period between the effective date of this act and January 1, 2094." (*Id.* § 3.)

Later legislation confirmed these findings. Thus, in AB 418, addressed in the next section, the Legislature summarized its findings and actions in SB 815 as follows:

> In Senate Bill 815, the Legislature found that certain lands within port jurisdiction, including seawall lot 330, have become separated from the San Francisco Bay by the Embarcadero roadway, were further cut off from the water by light rail tracks that were constructed in the median of the roadway, have ceased to be useful for the promotion of the public trust and the Burton Act trust except for the production of revenue to support the purposes of the Burton Act trust, [and] are leased on an interim basis for commuter parking or are vacant land . . . .
>
> Based on those findings, the Legislature concluded, inter alia, that seawall lot 330 was filled and reclaimed as part of a highly beneficial plan of harbor development, has ceased to be tidelands, constitutes a relatively small portion of the tidelands granted to the city, and is not necessary for public trust or Burton Act purposes. Accordingly, the Legislature freed seawall lot 330 from the use requirements of the public trust and the Burton Act trust through the year 2094. The Legislature further authorized the port to enter into nontrust leases for seawall lot 330 for periods of up to 75 years.

(Stats. 2011, ch. 477, § 8(i), (j).)

In SB 815, the Legislature authorized the San Francisco Port to lease "all or any portion of the designated seawall lots free from the use requirements established by the public trust" for nontrust purposes, subject to certain conditions, including that the lease be for no more than 75 years, and that revenues received by the Port from the nontrust lease be deposited in a separate account in the harbor fund to be expended for trust (harbor) purposes. (*Id.* § 4.) Among those conditions was the one that is the focus of the parties' dispute here: that "the nontrust lease is for fair market value and on terms consistent with prudent land management practices as determined by the port and subject to approval by the [State Lands] commission as provided in paragraph (1)." (*Id.* § 4(c).) That subparagraph, in turn, provides:

> Prior to executing the nontrust lease, the port shall submit the proposed lease to the commission for its consideration, and the commission shall grant its approval or disapproval in writing within 90 days of receipt of the lease and supporting documentation, including documentation related to value. In approving a nontrust lease, the commission shall find that the lease meets all of the following:

(A) Is for fair market value.
(B) Is consistent with the terms of the public trust and the Burton Act trust, other than their restrictions on uses.
(C) Is otherwise in the best interest of the state.

(*Id.* § 4(c)(1).) Finally, Section 5 of the legislation provides, "Nothing in this act shall be construed as limiting the port's existing authority to use or lease the designated seawall lots under the Burton Act, subject to any applicable limitations of state law." (*Id.* § 5.)

C. AB 418

In 2011, the Legislature enacted AB 418. (Stats. 2011, ch. 477.) In anticipation of the 34th America's Cup race (AC34) being held in San Francisco, that legislation authorized the State Lands Commission to carry out an exchange of lands in the area of Pier 70, and to terminate the public trust and the Burton Act trust in those lands that no longer are useful for trust purposes. (Id. §§ 2(a), 3, 8(l), 9.) With respect to Seawall Lot 330 specifically, the Legislature found that "seawall lot 330 is not needed for any trust use for the foreseeable future, that the residual value to the trust of reserving seawall lot 330 for trust uses after the year 2094 is minimal, and that allowing the port to obtain a major investment in waterfront improvements to address its critical capital needs through the sale of seawall lot 330 would provide substantially greater benefit to the trust." (*Id.* § 8(l).) Based on those findings, the Legislature conditionally declared Seawall Lot 330 "to be free of the public trust and the Burton Act trust in perpetuity." (*Id.* § 9(a).) Subject to the same condition, the Legislature granted "all of the state's right, title, and interest in seawall lot 330 . . . , free of the public trust and the Burton Act trust, to the port." (*Id.* § 9(b).) "The port shall hold seawall lot 330 as an asset of the trust, free of any public trust, Burton Act trust, or Senate Bill 815 use or alienation restrictions, but subject to the requirement that all revenues or other proceeds generated on seawall lot 330 be deposited in the harbor fund and used for trust purposes." (*Id.*)

The condition in question, embodied in subdivision (d), read as follows:

> If the AC34 match has not been held in the city, as contemplated by the host agreement, by December 31, 2013, or such later date as may be approved in writing by the

> commission, the termination of the trust in seawall lot 330 under this section shall be rescinded, and seawall lot 330 shall be subject to the public trust, the Burton Act trust, and Senate Bill 815.

(*Id.* § 9(d)(1).) The legislation also authorized the Port to lease Seawall Lot 330, free of any trust or other restrictions, provided that certain conditions were met:

> Notwithstanding anything to the contrary in this section, the port may lease seawall lot 330 to any person, free of the public trust, the Burton Act trust, and the restrictions of Senate Bill 815 if all of the following conditions are met:
>
> (A) The term of the lease does not exceed 75 years.
> (B) The consideration received by the port is equal to or greater than the fair market value of the fee interested conveyed as determined by the port.
> (C) The consideration is used by the port for trust purposes.
> (D) The lease provides that, at the sole discretion of the port, any improvements on seawall lot 330 made by the lessee shall become the property of the port upon termination of the lease without any additional consideration to the lessee.

(*Id.* § 9(e)(1).) Finally, it stated, "Except as specifically provided in [section 9,] subdivisions (d) and (e), this section supersedes the requirements of the Burton Act and Senate Bill 815 to the extent that those requirements apply to seawall lot 330." (*Id.* § 9(f).)

D. The Second Seawall Statute (AB 2797)

Finally, in 2016, the Legislature enacted the second Seawall Statute, AB 2797. (Stats. 2016, ch. 529.) In pertinent part, this statute amended section 4 of SB 815 to authorize the Port to enter into nontrust leases, defined as "a lease of all or any portion of the designated seawall lots free from the use requirements established by the public trust, the Burton Act trust, and the Burton Act transfer agreement." (Stats. 2016, ch. 529, § 4(a).) In contrast to SB 815, which had authorized such leases on the conditions that the term not exceed 75 years and terminate no later than January 1, 2094 (Stats. 2007, § 4(a)), AB 2797 revised those conditions to provide that the term of a nontrust lease shall not exceed 75 years from the initial occupancy date, and shall terminate no later than December 1, 2105. (Stats. 2016, ch. 529, § 4(c).) Thus, the legislation had the effect of authorizing the Port to enter into lengthier nontrust leases. It reiterated the same conditions as had been placed on nontrust leases by SB 815, including prior submission to and

approval by the Port Commission. (*Id.*, § 4(e); compare Stats. 2007, ch. 660, § 4(c) [substantially identical language.])

III. THE NAVIGATION CENTER LEASE DOES NOT REQUIRE APPROVAL OF THE STATE LANDS COMMISSION.

The City and the State Lands Commission contend that prior approval of the MOU by the Commission was not required before the City could execute that agreement. The Court agrees, albeit on a ground advanced only by the City.

A. Interim Nontrust Uses by the Port

Respondents' primary argument in common is that the Burton Act conveyed complete authority to the Port to lease the seawall lots for short-term interim uses when not needed for trust purposes, and that the Seawall Statutes did not limit that authority. Indeed, respondents contend that the Seawall Statutes actually expanded the Port's authority as to nontrust uses, and they assert that their position is supported by long-standing administrative interpretations of the legislation. In particular, by way of unopposed requests for judicial notice,[6] the City and the State Lands Commission show that for many years following the enactment of the Burton Act, including after the enactment of the Seawall Statutes in 2007 and 2016, the Attorney General and the State Lands Commission consistently have taken the view that this "public interest" exception authorizes the Port to enter into non-trust leases of transferred properties without State Lands Commission approval if: (1) the use is relatively short-term; (2) there is no present or immediate trust use for the property and the non-trust use will not interfere with surrounding trust uses; (3) the non-trust use does not establish permanent construction or otherwise impede a future conversion to trust use; (4) the Port reserves the right to terminate the lease to reclaim the lands for trust purposes when needed; and (5) the Port is paid fair market value under the lease. Leases are considered "relatively short-term" if they are five years or shorter. The City asserts that the

[6] None of the parties' requests for judicial notice of the pertinent statutes or administrative interpretations is opposed, and those requests therefore are granted to the extent pertinent to the Court's discussion of the issues.

Port has entered into "thousands" of such interim leases without State Lands Commission approval, including over 500 in the last six fiscal years alone. And, respondents argue, this administrative interpretation makes sense: it allows for productive and economic use of trust lands to support the trust, while still preserving leased properties for future trust uses, should the need arise.

Respondents' argument appears, at least at first blush, to be at odds with the plain statutory language. SB 815 authorizes the Port to "enter into a lease of all or any portion of the designated seawall lots . . . , provided" that certain conditions, including prior State Lands Commission approval, are met. (Stats. 2007, ch. 660, § 4.) However, nothing in the statutory language distinguishes between "interim" or "short-term" nontrust leases, on the one hand, and longer-term leases, on the other. As petitioner observes, the legislation defines "lease" very broadly to mean "a ground lease or space lease of real property, license agreement for use of real property, temporary easement, right-of-way agreement, development agreement, or any other agreement granting to any person any right to use, occupy, or improve real property under the jurisdiction of the port." (*Id.* § 1(n).) Read literally, as the Court observed at the hearing, this provision would appear to require the Port to obtain State Lands Commission approval for *every* such agreement, even for a use as comparatively trivial as a license to place a newsrack on the sidewalk. While it seems unlikely that the Legislature intended such a result, if it had intended to allow the Port to enter into interim nontrust leases without prior State Lands Commission approval, it could have said so explicitly by carving out such temporary or short-term leases from the statutory requirements. It did not.

Respondents respond by pointing to the savings clause of SB 815, section 5 of that legislation. That provision states, "Nothing in this act shall be construed as limiting the port's existing authority to use or lease the designated seawall lots under the Burton Act, subject to any applicable limitations of state law." (*Id.* § 5.) Thus, Respondents argue, SB 815 preserved the Port's existing authority to enter into interim nontrust leases. They also rely upon the maxim that the Legislature is presumed to be aware of a long-standing administrative interpretation of a statute by an agency charged with its enforcement. (See, e.g., *Yamaha Corp. v. State Bd. of*

Equalization (1998) 19 Cal.4th 1, 13 [conc. opn. of Mosk, J.] ["'a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it.'"].) Petitioner, for its part, points to the last sentence of section 3 of the same legislation. There, after declaring the designated seawall lots to be free from the use requirements of the public trust until January 1, 2094, the Legislature stated, "The designated seawall lots shall remain subject to all other terms, provisions, and requirements of the public trust, the Burton Act trust, and the Burton Act transfer agreement, *and any additional requirements set forth in this act, as applicable.*" (Stats. 2007, ch. 660, § 3 [emphasis added].) Petitioner argues that the emphasized language necessarily includes the contested language of section 4.

These provisions are not readily harmonized. Ordinarily, a court will "look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.'" (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) Where, as here, the statutory language is ambiguous or susceptible of more than one reasonable interpretation, a court may turn to extrinsic aids to assist in interpretation. (*Id.*) Here, respondents have submitted the long-standing administrative interpretation referred to above, whch is certainly one such extrinsic aid. However, while an administrative agency's "construction of a statute is entitled to consideration and respect, it is not binding and it is ultimately for the judiciary to interpret [the] statute." (*Id.* at 1105 n.7.) The parties have not directed the Court's attention to any pertinent legislative history that would shed light on the Legislature's understanding or intent when it enacted them concerning the Port's leasing practices, nor has the Court's own research uncovered such history.

Ultimately, however, the Court need not resolve these thorny issues, because the Court concludes that Seawall Lot 330 is no longer subject to whatever restrictions were imposed on the Port by SB 815. That conclusion follows from the plain language of subsequently enacted legislation, AB 418, which was passed in 2011.

B. **The Legislature's Termination of Seawall Lot 330's Public Trust Status.**

As discussed above, when it enacted SB 815 in 2007, the Legislature found that Seawall Lot 330 had "ceased to be useful for the promotion of the public trust and the Burton Act trust," other than as a source of revenue to support those purposes, and it declared it to be "free from the use requirements of the public trust, the Burton Act trust, and the Burton Act transfer agreement for the period between the effective date of this act and January 1, 2094." (Stats. 2007, ch. 660, § 3.) In enacting AB 418 four years later, the Legislature took a further step: it *completely* released Seawall Lot 330 from the public trust and the Burton Act trust, not just the use requirements of the trusts. In particular, the Legislature unambiguously declared Seawall Lot 330 "to be free of the public trust and the Burton Act trust in perpetuity," and it granted "all of the state's right, title, and interest in seawall lot 330 . . . , free of the public trust and the Burton Act trust, to the port." (Stats. 2011, ch. 477, § 9(a), (b).) The Legislature also expressly declared, "The port shall hold seawall lot 330 as an asset of the trust, free of any public trust, Burton Act trust, *or Senate Bill 815 use or alienation restrictions*, but subject to the requirement that all revenues or other proceeds generated on seawall lot 330 be deposited in the harbor fund and used for trust purposes." (*Id.* § 9(b) (emphasis added).)

These declarations were subject to an express condition subsequent:

> If the AC34 match has not been held in the city, as contemplated by the host agreement, by December 31, 2013, or such later date as may be approved in writing by the commission, the termination of the trust in seawall lot 330 under this section shall be rescinded, and seawall lot 330 shall be subject to the public trust, the Burton Act trust, and Senate Bill 815.

(*Id.* § 9(d)(1).) Thus, according to the City, so long as San Francisco hosted the America's Cup regatta before the statute's two-year anniversary, the Legislature granted Seawall Lot 330 to the Port "free of any . . . Senate Bill 815 use or alienation restrictions." (Stats. 2011, § 9(b).) By way of a supplemental request for judicial notice, the City submits the 2010 Host Agreement and Protocol relating to that regatta, and asks the Court to take judicial notice that the AC34 "match" was indeed held in San Francisco Bay in September 2013. Petitioner does not oppose the City's request for judicial notice or dispute that San Francisco hosted the America's Cup in 2013, but asserts that the match was not "held in the city, *as contemplated by the host agreement*," and

therefore the Legislature's termination of Seawall Lot 330's public trust status was rescinded by operation of law. Petitioner bases that argument on the fact that the America's Cup did not utilize Piers 30-32 for various stages of the event, for team bases, for a superyacht center, or for vessel mooring, but instead those uses were relocated to other facilities in San Francisco. Petitioner also points out that the land exchanges that the legislation was intended to facilitate were not actually carried out.

The Court is unpersuaded. As the City points out, the statutory condition for rescinding Seawall Lot 330's trust status turned on whether the "AC34 match" was held in the City, as the host agreement contemplated. It is undisputed that it was. AB 418 defined "AC34 match" as "the final series of races between the team representing the Golden Gate Yacht Club and the team representing the challenger accepted by the Golden Gate Yacht Club, the winner of which will hold the America's Cup, and is intended to have the same meaning as the term 'match' as defined in the host agreement." (Stats. 2007, ch. 477, §1(d).) The host agreement, in turn, is defined to mean "the Host and Venue Agreement between the Event Authority and the city setting forth certain conditions . . . under which the city will act as host city for AC34 events." (Id. § 1(m).) That Agreement provides that "'Match' has the meaning given in Section 1(ii) of the Protocol." (CCSF Supp. RJN, Ex. G at 49.) And the Protocol, finally, defines "Match" to mean "the series of races between the Defender and the Challenger for the America's Cup." (CCSF Supp. RJN, Ex. H. at 4.)

Given the undisputed fact that "the match" was in fact held in San Francisco, the rescission condition was never triggered. The term "match" does not incorporate or refer to any specific real estate development plans or property exchanges. Nor does the rescission provision of AB 418 state, as petitioner would have the Court read it, "If the AC34 match has not been held in the city, based *from Piers 30-32*, as contemplated by the host agreement," or "If the AC34 *events* [a separately defined term in AB 418] are not held in the City, ..." Thus, the Legislature terminated the trust status of Seawall Lot 330 in AB 418 in 2011, and that termination was never rescinded as a matter of law. The Legislature granted Seawall Lot 330 to the Port "free of any . . . Senate Bill 815 use or alienation restrictions," which includes the requirement of prior State

Lands Commission approval.[7] If that is correct, then, as petitioner's counsel candidly conceded at the hearing, it follows inescapably that the City is entitled to "win this case."

Finally, if there were any doubt as to this conclusion, it is removed by the legislative history of AB 2797, enacted in 2016. In that legislation, the Legislature re-enacted, in slightly different language, the same requirement of prior State Lands Commission approval for nontrust leases. (Stats. 2016, ch. 529, § 4(e).) Unlike SB 815, however, the legislation made no explicit reference to Seawall Lot 330—although, confusingly, it did cross-reference that earlier bill's definition of "designated seawall lots." (*Id.*, § 1(m).) However, the legislative history of AB 2797 makes it crystal clear that at the time—fully three years after the America's Cup race was held in San Francisco in September 2013—the Legislature believed that Seawall Lot 330 was not subject to SB 815's restrictions, and that the termination of its trust status therefore had not been rescinded. We know that because the Committee analyses provided to both houses of the Legislature at the final sessions before the bill was submitted to the Governor for his signature read as follows: "[Existing law] [a]llows the Port to lease Seawall Lot 330 to any person, *free of the public trust, the Burton Act trust, and the restrictions of SB 815* if all specified conditions are met." (AB 2797, as amended August 19, 2016, Sen. Rules Comm., Ofc. of Senate Floor Analyses, Third Reading, at 2 ¶ 6; Concurrence in Senate Amendments, at 3 ¶ 6 (emphasis added).) In contrast, those analyses stated that *other* designated seawall lots remained subject to the SB 815 restrictions, including State Lands Commission approval. (*Id.*)

In short, in 2011, the Legislature lifted the SB 815 restrictions it had previously placed on Seawall Lot 330, including the requirement of prior State Lands Commission approval of nontrust leases, and that action was never rescinded. The City therefore was not required to obtain such

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[7] Relying on this language, petitioner makes a last-ditch argument that the requirement of State Lands Commission approval in SB 815 is not a "use or alienation restriction." Of course it is: it restricts the Port's use of the designated seawall lots by conditioning the Port's authority to lease those properties on prior approval by the Commission. Petitioner's argument is also irreconcilable with the plain language of section 9(f) of AB 418: "Except as specifically provided in [section 9,] subdivisions (d) and (e), this section *supersedes the requirements of* the Burton Act and *Senate Bill 815 to the extent that those requirements apply to seawall lot 330*." (Stats. 2011, ch. 477 § 9(f) (emphasis added).)

approval before entering into the Memorandum of Understanding governing the Embarcadero Navigation Center, and petitioner's challenge to the Port's action fails.

CONCLUSION

For the foregoing reasons, petitioner's motion for a peremptory writ of mandamus is denied.

IT IS SO ORDERED.

Dated: November 22, 2019

HON. ETHAN P. SCHULMAN
JUDGE OF THE SUPERIOR COURT

CPF-19-516841
SAFE EMBARCADERO FOR ALL VS. STATE OF CALIFORNIA ET AL

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on November 22, 2019 I served the foregoing on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: November 22, 2019

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