

**CITY OF ALBANY
WATERFRONT COMMITTEE
STAFF REPORT**

Meeting date: February 1, 2012
Prepared by: JB

ITEM/ **5-7**

**SUBJECT: Report from staff on East Bay Regional Park District Acquisition of Land for
the Bay Trail.**

STAFF RECOMMENDATION

No action required. For information only.

BACKGROUND

The East Bay Regional Park District is in the process of acquiring through eminent domain approximately 8 acres of property at Golden Gate Fields for use as a link in the Bay Trail. Eminent domain is the process by which a public agency can acquire property when the property owner and the public agency cannot come to terms through negotiation in a conventional real estate transaction.

Acquiring property through eminent domain is a complex process that ultimately involves filing a complaint in Superior Court. In this situation, the EBRPD's eminent domain action is being challenged by Golden Gate Fields on the basis of a violation of the California Environmental Quality Act (CEQA). Attached is a copy of several of the most pertinent court filings.

Attachment

Court Filings related to Golden Gate Land Holdings vs. East Bay Regional Park District



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FILED
ALAMEDA COUNTY

MAY 12 2011

CLERK OF THE SUPERIOR COURT

By *[Signature]*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

GOLDEN GATE LAND HOLDINGS LLC, a
Delaware limited liability company,

Petitioner and Plaintiff,

v.

EAST BAY REGIONAL PARK DISTRICT, a
special district of the State of California,

Respondent and Defendant.

CASE NO. RG 11575462

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
INJUNCTIVE RELIEF**

(Pub. Res. Code §§ 21167, 21168, 21168.5,
Code Civ. Proc. §§ 1085, 1094.5, 1245.255)

1 in Public Resources Code sections 5500-5595. The District, which is governed by a board of seven
2 directors, has authority to condemn property through the eminent domain process under Public
3 Resources Code section 5542.

4 **FACTUAL AND PROCEDURAL HISTORY**

5 5. The District proposes to condemn portions of several parcels of real property
6 (comprising APN 066-2680-003-05 and 060-2535-001) along the shore of San Francisco Bay in the
7 cities of Albany and Berkeley, California. The District proposes to condemn 2.88 acres in fee and
8 4.88 acres in trail easement (together the "Property") stretching along roughly 1.5 miles of the Bay
9 shore. The District plans, once having acquired the Property, to undertake a series of significant
10 improvements and alterations including cliffside trail realignment, construction, and improvement,
11 expansion and restoration of dunes and wetlands, and demolition and installation of numerous
12 parking spaces. The District has already prepared construction plans illustrating some of this
13 planned construction. The purpose of the Condemnation and Construction Project is to build and
14 operate a new segment of the San Francisco Bay Trail, which is an envisioned recreational corridor
15 encircling the San Francisco and San Pablo bays, and the creation of a park.

16 6. At the current time, the Property is part of the roughly 140-acre grounds of a horse
17 racing track, Golden Gate Fields, which is owned by Golden Gate. The Property is currently used to
18 provide parking and vehicular access to the horse racing track. It also serves Golden Gate's
19 patrons and the general public as open space along San Francisco Bay, and is used by many
20 pedestrians and bicyclists by permission of Golden Gate, without charge.

21 7. An eminent domain action is an *in rem* proceeding initiated by a public agency filing
22 a complaint in superior court. (Code Civ. Proc. § 1250.110.) Before a public agency may bring an
23 eminent domain action, it must adopt a Resolution of Necessity authorizing the initiation of the
24 action. (Code Civ. Proc. §§ 1240.040, 1240.220.) Before such a resolution is adopted, the public
25 agency must make the property owner a precondemnation offer of compensation. (Code Civ. Proc. §
26 1245.230; Gov. Code § 7267.2.)

27 8. On August 27, 2010, the District sent Golden Gate a letter offering to purchase the
28 Property. The District identified "4.88 acres of land stretching from Buchanan Street south to

1 Gilman Street along the westerly boundary of the property adjacent to the San Francisco Bay” to be
2 acquired for a “trail easement” for “a critical 1.5-mile segment of the San Francisco Bay Trail, a
3 500-mile recreational corridor which will ultimately encircle San Francisco and San Pablo Bays and
4 provide a continuous network of bicycling and hiking trails along the shoreline.” The District also
5 identified 2.88 acres located east of Buchanan Street and stated:

6 The Park District is planning a beach and dune restoration and expansion in this area,
7 to include parking and restrooms for ADA-compliant access to the Albany Beach and
8 Albany Peninsula. When completed, these improvements will be part of the
Eastshore State Park.

9 9. On August 30, 2010, the District sent Golden Gate a follow-up letter reiterating its
10 offer to purchase the Property, which, the District stated, “is necessary for the construction and
11 operation of a segment of the San Francisco Bay Trail and the restoration and expansion of the
12 Albany Beach.”

13 10. On March 8, 2011, the District sent Golden Gate a letter in which it notified Golden
14 Gate that the District’s Board of Directors intended to consider adopting a Resolution of Necessity at
15 a meeting on April 5, 2010, to acquire the Property by eminent domain. The District further stated:

16 The District requires the easement which will provide a critical 1.5-mile segment in
17 the San Francisco Bay Trail, a 500-mile planned recreational corridor which will
18 ultimately encircle San Francisco and San Pablo bays and provide a continuous
network of bicycling and hiking trails along the shoreline. The 2.8± acre fee parcel is
required for a planned beach and dune restoration and improved public access to the
Albany Beach as part of the Eastshore State Park.

19 The District enclosed with its letter a drawing entitled *Preliminary Public Easement and Parcel*
20 *Acquisition Layout* showing some of the improvements the District planned for the Property. The
21 *Preliminary Public Easement and Parcel Acquisition Layout* depicts the “proposed cliffside trail
22 realignment” and sets forth notes pointing out various associated construction activities and
23 improvements in indicated locations, including “permanent removal of (45) marked parking spaces
24 @ north lot,” “permanent removal of (42) non-marked parking spaces @ edge of road,” “temporary
25 removal of (48) parking spaces @ edge of road during construction,” “temporary removal of (12)
26 parking spaces during construction,” “permanent removal of (46) marked parking spaces @ edge of
27 pavement in jockey lot,” and “jockey lot entrance to be widened [and] street light relocated.”

28 (Capitalization omitted.)

1 11. In its agenda materials for the April 5, 2011, Board meeting, the District described the
2 Condemnation and Construction Project as follows:

3 The District's proposed project consists of construction of 1.5 miles of the San
4 Francisco Bay Trail and the enhancement of the Albany Beach area to implement
5 improvements identified by the Eastshore State Park General Plan ("General Plan").
6 The trail is planned to be built on the shoreline along the westerly boundary of the
7 subject property, connecting two completed segments at Gilman Street in Berkeley
8 and Buchanan Street in Albany. The Albany Beach enhancement will expand dunes
9 and wetlands, stabilize eroding shoreline and improve public access to San Francisco
10 Bay. The proposed acquisitions will provide safe and unimpeded access for Bay Trail
11 users and provide additional recreational opportunities and wildlife viewing for park
12 visitors.

13 12. The District further stated in its agenda materials that "[t]he proposed project is
14 exempt from the California Environmental Quality Act pursuant to CEQA Guidelines, Section
15 15325." The CEQA Guidelines are regulations of the Resources Agency found at title 14 of the
16 California Code of Regulations, sections 15000-15387.

17 13. CEQA authorizes the Secretary of the Resources Agency to list in the CEQA
18 Guidelines classes of projects that have been found not to have a significant effect on the
19 environment and are thus deemed categorically exempt from CEQA. (Pub. Resources Code §
20 21084.) Section 15325 provides a categorical exemption for "the transfers of ownership of interests
21 in land in order to preserve open space, habitat, or historical resources" and lists six examples:

- 22 (a) Acquisition, sale, or other transfer of areas to preserve the existing natural
23 conditions, including plant or animal habitats.
- 24 (b) Acquisition, sale, or other transfer of areas to allow continued agricultural use of
25 the areas.
- 26 (c) Acquisition, sale, or other transfer to allow restoration of natural conditions,
27 including plant or animal habitats.
- 28 (d) Acquisition, sale, or other transfer to prevent encroachment of development into
flood plains.
- (e) Acquisition, sale, or other transfer to preserve historical resources.
- (f) Acquisition, sale, or other transfer to preserve open space or lands for park
purposes.

14. On April 5, 2011, the District held a public hearing to consider adoption of a
Resolution of Necessity to acquire by eminent domain the Property. Golden Gate, by its counsel,
submitted a letter to the Board and appeared at the hearing and urged the District not to adopt the
Resolution of Necessity. Golden Gate argued that none of the Eminent Domain Law's three
prerequisites for a condemnation are present here. Golden Gate further argued that the District could

1 not adopt the Resolution of Necessity because it had not complied with CEQA and observed that the
2 District “incorrectly contends that the ‘proposed project’ is exempt from CEQA pursuant to CEQA
3 Guidelines Section 15325 because ‘the project consists of acquisition of land.’” It noted that of the
4 six examples of exempt transfers identified in the section, “only one . . . is conceivably applicable
5 here: ‘Acquisition, sale, or other transfer to preserve open space or lands for park purposes.’”

6 Golden Gate explained:

7 Here, however, land is not being acquired for the mere “preservation” of open space
8 or park purposes. Rather, the purpose of the acquisition is to facilitate a major
9 waterfront construction project – in the words of your draft Resolution of Necessity,
10 to “complete Eastshore State Park and provide the opportunity to construct an
11 important segment of the San Francisco Bay Trail.” The Court of Appeal has
12 held that Exemption 25 does not apply where an acquisition is accompanied by
“significant construction.” (*California Farm Bureau v. California Wildlife
Conservation Board* (2006) 143 Cal.App.4th 173, 184 (Exemption 25 inapplicable to
the acquisition of a conservation easement where the accompanying management
plan required “significant construction.”)) Here, the Board’s plans for the proposed
project also require “significant construction”; thus Exemption 25 is inapplicable.

13 Mindful that several exceptions to the categorical exemptions render some listed classes of projects
14 nonetheless subject to CEQA, Golden Gate further argued:

15 Even if the Board were to find that Exemption 25 somehow applies here, the Board
16 still may not find that the project is categorically exempt from CEQA. Under CEQA
17 Guidelines Section 15300.2(c), where there is a “reasonable possibility” that an
18 activity will have a significant effect on the environment due to “unusual
19 circumstances,” the activity is not categorically exempt from CEQA. Although the
20 mere acquisition of land would not normally have a significant effect on the
21 environment, the unusual circumstances here – the ecologically sensitive bayside
location of the proposed project, the Board’s intention to construct extensive
waterfront improvements, and the already-prepared construction plans – create a
reasonable probability that there will be a significant effect on the environment, and
preclude the application of a categorical exemption.

22 The District nevertheless approved the Condemnation and Construction Project by adopting the
23 Resolution of Necessity. Upon adopting the Resolution of Necessity, the District enabled itself to
24 bring an eminent domain action against the Property at any time. A copy of the Resolution of
25 Necessity adopted for the Condemnation and Construction Project (“the Resolution of Necessity”) is
26 attached hereto as **Exhibit A**.

27 15. On April 7, 2011, the District filed a Notice of Exemption for the Condemnation and
28 Construction Project in the Alameda County Recorder’s office. The Notice of Exemption stated that

1 “[t]his project consists of the acquisition of land in order to protect open space and to secure future
2 public access to Eastshore State Park and the San Francisco Bay Trail.” Although the Notice of
3 Exemption cited five categorical exemptions provided in the CEQA Guidelines, none of them were
4 applicable to the Condemnation and Construction Project. Consequently, the Condemnation and
5 Construction Project was not exempt from CEQA analysis.

6 16. The District’s actions in approving the Condemnation and Construction Project by
7 adopting the Resolution of Necessity and filing the Notice of Exemption were illegal in that those
8 actions violated CEQA and the CEQA Guidelines.

9 17. Golden Gate has brought this action in the public interest, and is not seeking relief
10 greater than or different from the relief sought for the general public. If successful, this action would
11 enforce the mandates of CEQA and thus enforce the public’s right to adequate environmental review
12 under that statute. Because the State has insufficient resources to enforce CEQA with respect to
13 each and every project approval in the state, private enforcement is necessary and places a
14 disproportionate financial burden on Golden Gate in relation to Golden Gate’s stake in the matter.

15 JURISDICTION AND VENUE

16 18. Golden Gate realleges and incorporates by reference paragraphs 1 through 17 of this
17 petition and complaint.

18 19. This Court has jurisdiction to issue a writ of mandate to set aside the District’s
19 Resolution of Necessity under California Code of Civil Procedure sections 1085, 1094.5, 1245.255
20 and Public Resources Code sections 21168, 21168.5, and 21168.9.

21 20. This Court also has jurisdiction to enjoin the District from proceeding with any
22 further approvals or commencing an eminent domain action under California Code of Civil
23 Procedure sections 526 and 527.

24 21. Venue is proper in Alameda County Superior Court because each of the causes of
25 action arose in Alameda County.

26 22. Golden Gate has complied with the requirements of Public Resources Code section
27 21167.5 by serving a written notice of Petitioner’s intention to commence this action on the District
28 prior to filing this action. A copy of the written notice and proof of service is attached hereto as

1 **Exhibit B.**

2 23. Golden Gate has complied with the requirements of Public Resources Code section
3 21167.7 by concurrently sending a copy of this petition to the California Attorney General. A copy
4 of the cover letter and proof of service on the attorney general is attached hereto as **Exhibit C.**

5 24. Golden Gate has complied with the requirements of Public Resources Code section
6 21167.6(a) by concurrently filing a request that the District prepare the record of proceedings
7 relating to this action.

8 25. Golden Gate has standing to assert the CEQA claims in this petition because it holds
9 a beneficial interest in the action. Golden Gate is a land owner whose land will be adversely affected
10 by Condemnation and Construction Project. Golden Gate's interests are uniquely, directly, and
11 adversely affected by the District's approval of the Condemnation and Construction Project because
12 the Condemnation and Construction Project will condemn land belonging to Golden Gate, and the
13 proposed improvements will be constructed on property owned by Golden Gate and adjacent to
14 property owned by Golden Gate. Further, Golden Gate has standing in the public interest because
15 this case involves public rights and the enforcement of public duties. Specifically, the District owed
16 the public a mandatory duty to comply with the procedural and substantive requirements of CEQA.
17 Golden Gate has standing to assert the Eminent Domain Law claims in this petition because it is the
18 owner of the Property.

19 26. This action is timely under Public Resources Code section 21167(d), as the petition
20 was brought within 35 days of the filing of the County's Notice of Exemption ("NOE"). (CEQA
21 Guidelines § 15112(c)(5).)

22 27. Golden Gate has performed all conditions precedent to filing this instant action and
23 has exhausted the available administrative remedies to the extent required by law.

24 28. Irreparable harm to Golden Gate and the surrounding environment will occur if the
25 Condemnation and Construction Project is allowed to proceed, because the Property will be taken
26 from Golden Gate and be permanently physically altered. Further, Golden Gate's interests are
27 uniquely, directly, and adversely affected by the District's approval of the Condemnation and
28 Construction Project without first conducting an adequate environmental review under CEQA, due

1 to the potential impacts to biological resources, hazards, noise pollution, and dust pollution, and
2 other environmental impacts resulting from a major construction project being undertaken in an
3 ecologically sensitive bayside location. Golden Gate has no plain, speedy, or adequate remedy in the
4 course of ordinary law unless this Court grants the requested writ of mandate to require the District
5 to set aside its approval of the Condemnation and Construction Project.

6
7 **FIRST COUNT**
8 **(Violation of CEQA)**

9 29. Golden Gate realleges and incorporates by reference paragraphs 1 through 28 of this
10 petition and complaint.

11 30. CEQA, Pub. Res. Code §§ 21000, *et seq.*, prohibits state and local agencies from
12 approving public or private projects that may have adverse environmental effects without first
13 undergoing environmental review and avoiding or reducing the significant environmental effects of
14 those projects whenever feasible to do so.

15 31. CEQA applies to “discretionary projects proposed to be carried out or approved by
16 public agencies.” (Pub. Resources Code §21080(a).) A project is discretionary if it requires
17 judgment or deliberation by the public agency or body in approving or disapproving it. (CEQA
18 Guidelines, § 15357.) Under CEQA, a special district is a public agency. (CEQA Guidelines, §
19 15368.)

20 32. A “project” under CEQA is an activity that will result in a direct or reasonably
21 foreseeable indirect change to the physical environment. (Pub. Resources Code § 21065.) The term
22 “project” applies to “the whole of the action which may result in a direct or reasonably foreseeable
23 indirect impact.” (CEQA Guidelines, § 15378(a).)

24 33. CEQA requires public agencies to determine whether a project will have a significant
25 effect on the environment. (Pub. Resources Code § 21167(a).)

26 34. Where no exemption applies to the project, the public agency is required to prepare
27 and complete an initial study within 30 days after the project application is complete to ascertain
28 whether the project may have a significant effect on the environment. (CEQA Guidelines, § 15063.)

1 35. If the public agency finds no substantial evidence in the initial study or elsewhere in
2 the record that the project may significantly affect the environment, the agency may, at that time,
3 adopt a negative declaration. (Pub. Resources Code § 21080(c)(1); CEQA Guidelines, §§
4 15063(b)(2), 15064(f)(3).)

5 36. Where a project is revised to avoid or mitigate environmental impacts, the public
6 agency may adopt a mitigated negative declaration. (Pub. Resources Code § 2164.5; CEQA
7 Guidelines, § 15369.5.)

8 37. When a fair argument is made on the basis of substantial evidence that a project may
9 have a significant effect on the environment, CEQA requires that an agency prepare an
10 environmental impact report (“EIR”). (Pub. Resources Code §§ 21100, 21151.)

11 38. Noncompliance with the requirements outlined above constitutes a prejudicial abuse
12 of discretion under sections 21168 and 21168.5 of the Public Resources Code, regardless of whether
13 a different outcome would have resulted if the District had complied with those requirements in the
14 first place. (Pub. Resources Code, § 21005.) Abuse of discretion is established if the agency has not
15 proceeded in a manner required by law or if the agency’s determination or decision is not supported
16 by substantial evidence. (Pub. Resources Code, §§ 21168, 21168.5.)

17 39. The Condemnation and Construction Project is a discretionary action proposed to be
18 carried out by the District that will result in a direct or reasonably foreseeable indirect change to the
19 physical environment. It is therefore a “project” under Public Resources Code section 21065.
20 Acquisition of the Property and implementation of the construction comprising the Condemnation
21 and Construction Project will prompt, cause, and otherwise result in direct and indirect changes in
22 the physical environment. Because the District has already planned certain aspects of the
23 construction, as demonstrated in the District’s correspondence and in the *Preliminary Public*
24 *Easement and Parcel Acquisition Layout*, these direct and indirect changes in the physical
25 environment are “reasonably foreseeable.”

26 40. The Notice of Exemption filed by the District on April 7, 2011 cites five categorical
27 exemptions provided in the CEQA Guidelines, each of which is discussed below.

28 41. The Notice of Exemption cited CEQA Guidelines section 15061(b)(3), but offered no

1 explanation of its applicability to the Condemnation and Construction Project. This section states
2 that “[w]here it can be seen with certainty that there is no possibility that the activity in question may
3 have a significant effect on the environment, the activity is not subject to CEQA.” Because the
4 Condemnation and Construction Project involves extensive construction that will alter the physical
5 environment along 1.5 miles of shoreline, including cliff and wetland and dune areas, and remove
6 some existing improvements and install new improvements in these areas, it cannot be seen with
7 certainty that there is no possibility that the Condemnation and Construction Project may have a
8 significant effect on the environment. This section does not exempt the Condemnation and
9 Construction Project from CEQA.

10 42. The Notice of Exemption cited CEQA Guidelines section 15301, but offered no
11 explanation of its applicability to the Condemnation and Construction Project. This section provides
12 a categorical exemption for the “operation, repair, maintenance, permitting, leasing, licensing or
13 minor alteration of existing public or private structures, facilities, mechanical equipment, or
14 topographical features, involving negligible or no expansion of use beyond that existing at the time
15 of the lead agency’s determination.” Because the Condemnation and Construction Project involves
16 extensive construction that will alter the physical environment along 1.5 miles of shoreline,
17 including cliff and wetland and dune areas, and remove some existing improvements and install new
18 improvements in these areas, it is not limited to the minor activities described in section 15301. The
19 District’s purpose in proposing the Condemnation and Construction Project, moreover, is to facilitate
20 increased use of the shoreline. This section does not exempt the Condemnation and Construction
21 Project from CEQA.

22 43. The Notice of Exemption cited CEQA Guidelines section 15304, but offered no
23 explanation of its applicability to the Condemnation and Construction Project. This section provides
24 a categorical exemption for “minor public or private alterations in the condition of land, water,
25 and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry
26 or agricultural purposes.” Because the Condemnation and Construction Project involves extensive
27 construction that will alter the physical environment along 1.5 miles of shoreline, including cliff and
28 wetland and dune areas, and remove some existing improvements and install new improvements in

1 these areas, it is not limited to minor alterations in the condition of land, water, and vegetation
2 described in section 15304. This section does not exempt the Condemnation and Construction
3 Project from CEQA.

4 44. The Notice of Exemption cited CEQA Guidelines section 15316, but offered no
5 explanation of its applicability to the Condemnation and Construction Project. This section provides
6 a categorical exemption is for “the acquisition, sale, or other transfer of land in order to establish a
7 park where the land is in a natural condition or contains historical or archaeological resources and
8 either: (a) [t]he management plan for the park has not been prepared, or (b) [t]he management plan
9 proposes to keep the area in a natural condition or preserve the historic or archaeological resources.”

10 Because much of the Property is not in a natural condition and the Condemnation and Construction
11 Project is not intended to keep the Property in a natural condition, but rather to build numerous
12 improvements and install new trails, neither the Property nor the Condemnation and Construction
13 Project conform to the terms of section 15316. This section does not exempt the Condemnation and
14 Construction Project from CEQA.

15 45. The Notice of Exemption cited CEQA Guidelines section 15325, but offered no
16 explanation of its applicability to the Condemnation and Construction Project. This section provides
17 a categorical exemption for “the transfers of ownership of interests in land in order to preserve open
18 space, habitat, or historical resources”. Because the Condemnation and Construction Project
19 involves extensive construction that will alter the physical environment along 1.5 miles of shoreline,
20 including cliff and wetland and dune areas, and remove some existing improvements and install new
21 improvements in these areas, it is not limited to a transfer of ownership of land described in section
22 15325. This section does not exempt the Condemnation and Construction Project from CEQA.

23 46. Even if one or another of the exemptions cited by the District arguably applied, the
24 “exception to the exceptions” provision of the CEQA Guidelines would take the Condemnation and
25 Construction Project out of exempt status. Under CEQA Guidelines section 15300.2, where there is
26 a “reasonable possibility” that an activity will have a significant effect on the environment due to
27 “unusual circumstances”, the activity is not categorically exempt from CEQA. Here, the
28 ecologically sensitive bayside location, the existing construction plans, and the District’s stated

1 intent to construct extensive improvements create a reasonable possibility that there will be a
2 significant effect on the environment, so no exemption applies.

3 47. Because no exemption applies to the Condemnation and Construction Project, the
4 District was required to prepare an Initial Study. (CEQA Guidelines § 15063.)

5 48. Because there is a fair argument on the basis of substantial evidence that the
6 Condemnation and Construction Project will have a significant effect on the environment, the
7 District was required to prepare an EIR. (Pub. Resources Code §§ 21100, 21151.)

8 49. By relying upon inapplicable exemptions to avoid undertaking a CEQA analysis of
9 the Condemnation and Construction Project before adopting the Resolution of Necessity on April 5,
10 2011, the District prejudicially abused its discretion and failed to proceed in a manner required by
11 CEQA. Consequently, the District's adoption of the Resolution of Necessity is invalid and must be
12 set aside.

13 50. Golden Gate reserves the right to modify, delete from, or add to this list of CEQA
14 violations after the administrative record of proceedings for the Condemnation and Construction
15 Project have been fully and adequately prepared, certified, and analyzed.

16 **SECOND COUNT**
17 **(Violation of California's Eminent Domain Law)**

18 51. Golden Gate realleges and incorporates by reference paragraphs 1 through 50 of this
19 petition and complaint.

20 52. Under Code of Civil Procedure 1240.030, the power of eminent domain may only be
21 exercised if the following three criteria are established:

- 22 (A) The public interest and necessity require the proposed use.
23 (B) The proposed use is planned and located in the manner that will be
24 most compatible with the greatest public good and least private injury.
25 (C) The property sought to be acquired is necessary for the project.

26 53. A public entity may not commence an eminent domain proceeding until its governing
27 body has adopted a resolution of necessity. A resolution of necessity shall contain a declaration that
28 the governing body has found and determined that the three criteria identified in Section 1240.030
are satisfied. (Code Civ. Proc. § 1245.245(a)(3).)

54. A resolution of necessity is ineffective "to the extent that its adoption or contents

1 were influenced or affected by gross abuse of discretion by the governing body.” (Code Civ. Proc. §
2 1245.255(b).) As the Court of Appeal has written, “an agency that would take private property for
3 an alleged public purpose, must, as a prelude to determining that there exists the necessary requisites
4 for taking under Code of Civil Procedure section 1240.030, conduct a fair hearing and make its
5 determination on the basis of evidence presented in a judicious and nonarbitrary fashion. If it fails to
6 so conduct itself, it will find itself . . . having the burden of proving its case in court with the court
7 being the final determiner of whether the taking satisfies Code of Civil Procedure section 1240.030.
8 The governmental agency in such a situation cannot act arbitrarily and then seek the benefit of
9 having its decision afforded the deference to which it might otherwise be entitled.” (*Redevelopment*
10 *Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1130.)

11 55. In addition, a public agency commits a gross abuse of discretion if it was irrevocably
12 committed to the condemnation of the property regardless of the evidence presented at the hearing
13 on the resolution of necessity. (*Santa Cruz County Redevelopment Agency v. Izant* (1995) 37
14 Cal.App.4th 141, 149.)

15 56. Before the public entity commences eminent domain proceedings, judicial review of a
16 Resolution of Necessity may be obtained by the filing of a petition for writ of mandate under Code
17 of Civil Procedure 1085. (Code Civ. Proc. § 1245.255.)

18 57. Here, the District adopted a Resolution of Necessity for the Condemnation and
19 Construction Project, Resolution No. 2011-4-079. That Resolution concludes:

- 20 5. The public interest and necessity require the real property rights to be acquired;
21 6. The project is planned and located in the manner which will be the most
22 compatible with the greatest public good and the least private injury;
23 7. The real property rights described herein are necessary for the project.

24 58. No evidence supported any of the three findings under Section 1240.030, much less
25 “substantial evidence,” and, moreover, uncontroverted evidence contradicted those findings.
26 Because there is no substantial evidence that the requirements of Section 1240.030 are satisfied here,
27 the District committed a gross abuse of discretion.

28 59. Further, the District had irrevocably committed to the Condemnation and
Construction Project before the hearing. By irrevocably committing to the Condemnation and

1 Construction Project in advance, the District committed a gross abuse of discretion.

2 **THIRD COUNT**
3 **(Preliminary and Permanent Injunction)**

4 60. Golden Gate realleges and incorporates by reference Paragraphs 1 through 59 of this
5 petition.

6 61. Golden Gate has no plain, speedy, or adequate remedy in the ordinary course of law
7 unless the Court grants this writ. Since the Resolution of Necessity has been adopted, the District
8 could commence eminent domain proceedings at any time. The Condemnation and Construction
9 Project will have significant environmental effects, due to the potential impacts to biological
10 resources, noise pollution, and dust pollution, and other environmental impacts resulting from a
11 major construction project being undertaken in an ecologically sensitive bayside location. These
12 environmental effects, among others, have not been evaluated, much less mitigated as required under
13 CEQA. The Condemnation and Construction Project will also result in the permanent alternation of
14 property owned by Golden Gate.

15 62. Unless the District is enjoined and restrained from approving and proceeding with the
16 Condemnation and Construction Project, the environment surrounding the Property will be
17 irreparably damaged, and damaged in a manner contrary to California law.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Petitioner prays for judgment as follows:

- 20 1. For an alternative and peremptory writ of mandate directing the District to vacate and
21 set aside its adoption of the April 5, 2011, Resolution of Necessity;
- 22 2. For an alternative and peremptory writ of mandate preventing the District from taking
23 the Property through eminent domain;
- 24 3. For an alternative and peremptory writ of mandate directing the District to comply
25 with CEQA and the CEQA Guidelines and to take any other action as required by Public Resources
26 Code section 21168.9;
- 27 4. For an alternative and peremptory writ of mandate directing the District to comply
28 with the Eminent Domain Law;

1 5. For a temporary stay, temporary restraining order, and preliminary and permanent
2 injunctions restraining the District and its agents, servants, and employees, and all others acting in
3 concert with the District or on its behalf, from filing an eminent domain complaint, or taking any
4 other action that may result in a change or alteration in the physical environment until the District is
5 in full compliance with the requirements of CEQA and the CEQA Guidelines;

6 6. For Golden Gate's costs of suit;

7 7. For Golden Gate's attorneys' fees as authorized by Code of Civil Procedure section
8 1021.5 and other provisions of law; and

9 8. For such other relief as the Court may deem just and proper.

10
11 DATED: May 11, 2011

BRISCOE IVESTER & BAZEL LLP

12
13 By:  _____

John Briscoe
Attorneys for Petitioner
GOLDEN GATE LAND HOLDINGS
LLC



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EAST BAY REGIONAL PARK DISTRICT

RESOLUTION NO.: 2011 - 4 -

April 5, 2011

RESOLUTION OF THE BOARD OF DIRECTORS OF THE EAST BAY REGIONAL PARK DISTRICT DECLARING THE ACQUISITION OF CERTAIN REAL PROPERTY RIGHTS NECESSARY FOR THE SAN FRANCISCO BAY TRAIL AT EASTSHORE STATE PARK, AND AUTHORIZING THE ACQUISITION THEREOF AND THE TRANSFER OF FUNDS THEREFOR (PORTIONS OF APNS 060-2535-001 AND 066-2680-003-05):
EASTSHORE STATE PARK

RECITALS

East Bay Regional Park District (the "District") wishes to acquire certain real property rights described herein below for District use by the exercise of the power of eminent domain.

1. The acquisition of such rights is required to help to complete Eastshore State Park and provide the opportunity to construct an important segment of the San Francisco Bay Trail. In addition, the acquisition will protect important natural resources and the visual integrity of the existing park. The proposed project is to acquire the real property described herein below for the above-mentioned purposes;
2. Pursuant to Chapter 4, Title 7, Part 3 of the Code of Civil Procedure, written notice of the intent to consider the adoption of this resolution of necessity was sent to record owners of subject properties.
3. Due consideration of all oral and documentary evidence introduced has been given.

Now, therefore, by vote of 2/3 or more of its members, the Board of Directors of the District does find and resolve as follows:

1. The findings and declarations contained in this resolution are based upon the record with respect to the real property rights to be acquired before the Board of Directors of the District at its hearing of April 5, 2011, and the testimony, records and documents produced at the hearing, all of which are incorporated by this reference;
2. This project is exempt from the California Environmental Quality Act pursuant to CEQA guidelines, Section 15325. The Board of Directors has directed staff to file a Notice of Exemption for this project;
3. The real property rights to be acquired are described as portions of APNs 060-2535-001 and 066-2680-003-05, more specifically described in Exhibits A-F attached hereto

and made a part hereof. In particular, the property to be acquired consists of fee title to land described in Exhibits A, B and F, and a permanent trail easement as described in Exhibits C, D, E and F;

4. The said real property rights are to be acquired for purposes of preservation of open space, habitat and natural conditions, pursuant to the authority granted in California Constitution, Article 1, Section 19; California Public Resources Code Sections 5540, 5541, 5541.1 and 5542; Title 7, Part 3 of the Code of Civil Procedure; and other provisions of law;
5. The public interest and necessity require the real property rights sought to be acquired;
6. The project is planned and located in the manner which will be the most compatible with the greatest public good and the least private injury;
7. The real property rights described herein are necessary for the project; and
8. The offer required by Section 7267.2 of the Government Code has been made to the owner or owners of record;
9. Special counsel, Price Postel & Parma LLP are hereby AUTHORIZED AND EMPOWERED:

To acquire in the District's name, by condemnation, the said real property rights in accordance with the provisions of the eminent domain law, the Code of Civil Procedure and the Constitution of California; and

To prepare and prosecute in the District's name such proceedings in the proper court as are necessary for such acquisition; and

To deposit the probable amount of compensation, based on an appraisal, and to apply to said court for an order permitting the District to take immediate possession of said property and to use said property for said District uses and purposes.

This Resolution supersedes any prior Board resolutions, if any, concerning the subject property.

BE IT FURTHER RESOLVED that the Board hereby transfers \$193,841 from Designated for Land Acquisition/Measure AA–Eastshore project area, \$566,428 from Pt. Isabel to Emeryville project area (229900BAAA), \$800,000 from Measure AA Interest–West Metro (229900BAAI) and \$212,767 from Measure WW–Eastshore project area (229900WP00) to Bay Trail/Golden Gate Land Holdings LLC (CIP No. 218800), along with previously appropriated funds as shown on the attached Budget Change form, as consideration for the purchase of the property and to fund the following costs:

Purchase Price	\$1,686,036
Legal Costs	50,000
Staff Time	25,000
Title Fees and Closing Costs	<u>12,000</u>
Total	\$1,773,036
Previously appropriated	<u>55,000</u>
Total Project Cost	\$1,828,036

BE IT FURTHER RESOLVED that the General Manager is hereby authorized and directed, on behalf of the District and in its name, to execute and deliver such documents and to do such acts as may be deemed necessary or appropriate to accomplish the intentions of this resolution.

Moved by Director _____, seconded by Director _____ and adopted this 5th day of April, 2011, by the following vote:

FOR:

AGAINST:

ABSTAIN:

ABSENT:



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BRISCOE IVESTER & BAZEL LLP

155 SANSOME STREET
SEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
(415) 402-2700
FAX (415) 398-5630

John Briscoe
(415) 402-2701
jbriscoe@briscoelaw.net

May 10, 2011

Ms. Beverly Lane, President
and Members
Board of Directors
East Bay Regional Park District
2950 Peralta Oaks Court
Oakland, CA 94605

Ted C. Radosevich, District Counsel
East Bay Regional Park District
2950 Peralta Oaks Court
Oakland, CA 94605

Re: Notice of Commencement of Action Challenging East Bay Regional Park District's Adoption of Resolution No. 2011-4-079, *Resolution of the Board of Directors of the East Bay Regional Park District Declaring the Acquisition of Certain Real Property Rights Necessary for the San Francisco Bay Trail at Eastshore State Park, and Authorizing the Acquisition Thereof and the Transfer of Funds Therefor (Portions of APNs 060-2535-001 and 066-2680-003-05): Eastshore State Park*

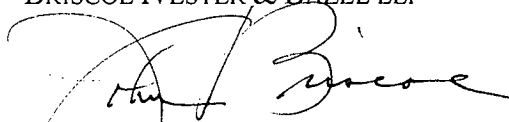
Dear President Lane, Board Members, and District Counsel:

Pursuant to California Public Resources Code sections 21167 and 21167.5, please take notice that the Golden Gate Land Holdings, LLC intends to file a Petition for Writ of Mandate and Complaint for Injunctive Relief challenging the East Bay Regional Park District's ("District") adoption of Resolution No. 2011-4-079, *Resolution of the Board of Directors of the East Bay Regional Park District Declaring the Acquisition of Certain Real Property Rights Necessary for the San Francisco Bay Trail at Eastshore State Park, and Authorizing the Acquisition Thereof and the Transfer of Funds Therefor (Portions of APNs 060-2535-001 and 066-2680-003-05): Eastshore State Park*.

This legal challenge will include claims that the District violated the California Environmental Quality Act, Pub. Res. Code §§ 21000 *et seq.*, and the Eminent Domain Law, Cal Code Civ. Proc. §§ 1230.010 *et seq.*, by its adoption of the Resolution of Necessity.

Sincerely,

BRISCOE IVESTER & BAZEL LLP



John Briscoe

cc: Todd Amspoker

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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco, and my business address is 155 Sansome Street, Suite 700, San Francisco, California 94104.

On May 10, 2011, at San Francisco, California, I served the attached document(s):

Notice of Commencement of Action Challenging East Bay Regional Park District's Adoption of Resolution No. 2011-4-079, Resolution of the Board of Directors of the East Bay Regional Park District Declaring the Acquisition of Certain Real Property Rights Necessary for the San Francisco Bay Trail at Eastshore State Park, and Authorizing the Acquisition Thereof and the Transfer of Funds Therefor (Portions of APNs 060-2535-001 and 066-2680-003-05): Eastshore State Park

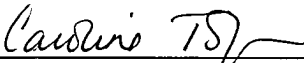
on the following parties:

Ms. Beverly Lane, President
and Members
Board of Directors
East Bay Regional Park District
2950 Peralta Oaks Court
Oakland, CA 94605

Ted C. Radosevich, District Counsel
East Bay Regional Park District
2950 Peralta Oaks Court
Oakland, CA 94605

BY FIRST CLASS MAIL: On the date written above, I deposited with the United States Postal Service a true copy of the attached document in a sealed envelope, with postage fully prepaid, addressed as shown above. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing contained in this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on May 10, 2011, at San Francisco, California.



Caroline Tofaneli

EXHIBIT C



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SAN FRANCISCO, CALIFORNIA 94104
(415) 402-2700
FAX (415) 398-5630

John Briscoe
415-402-2701
jbriscoe@briscoelaw.net

May 12, 2011

California Attorney General's Office
1300 "I" Street
Sacramento, California 95814-2919

**Re: *Golden Gate Land Holdings LLC v. East Bay Regional Park District*; Verified
Petition for Writ of Mandate and Complaint for Injunctive Relief**

To Whom It May Concern:

I have enclosed a copy of the Golden Gate Land Holdings LLC's Verified Petition for Writ of Mandate and Complaint for Injunctive Relief in the above-entitled action. This notice is provided in accordance with Public Resources Code section 21167.7 and Code of Civil Procedure section 388.

Please feel free to contact me if you have any questions about this action.

Sincerely,

BRISCOE IVESTER & BAZEL LLP


John Briscoe

JB/cdt
Enclosure

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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco, and my business address is 155 Sansome Street, Suite 700, San Francisco, California 94104.

On May 12, 2011, at San Francisco, California, I served the attached document(s):

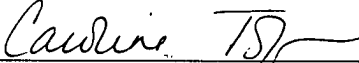
**LETTER TO CALIFORNIA ATTORNEY GENERAL'S OFFICE ENCLOSING
GOLDEN GATE LAND HOLDINGS LLC'S PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR INJUNCTIVE RELIEF**

on the following parties:

California Attorney General's Office
1300 "T" Street
Sacramento, CA 95814-2919

BY FIRST CLASS MAIL: On the date written above, I deposited with the United States Postal Service a true copy of the attached document in a sealed envelope, with postage fully prepaid, addressed as shown above. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing contained in this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on May 12, 2011, at San Francisco, California.



Caroline Tofaneli

1 GGF is seeking a writ of mandate. The District denies any remaining suggestion in said
2 paragraph that the District has not complied with CEQA and/or the Eminent Domain Law.

3 **PARTIES**

4 3. Responding to the allegations contained in Paragraph 3, District has insufficient
5 information and belief upon the subject to enable it to answer said paragraph, and basing its
6 denial upon that ground, denies each and every allegation contained therein, and each and every
7 part thereof.

8 4. Responding to the allegations contained in Paragraph 4, District admits the
9 allegations thereof.

10 **FACTUAL AND PROCEDURAL HISTORY**

11 5. Responding to the allegations contained in Paragraph 5, the District admits the
12 allegations beginning with the word "The" on page 3, line 5 and ending with the word "shore."
13 Further responding to the allegations of said paragraph, the District alleges that the purpose of the
14 proposed condemnation is to acquire property for the purpose of a new segment of the San
15 Francisco Bay Trail, and for other public park and recreation purposes, and that preliminary
16 schematic plans have been prepared for a future trail project. Except as expressly herein
17 admitted and alleged, the District denies the remaining allegations of said paragraph.

18 6. Responding to the allegations contained in Paragraph 6, the District alleges that
19 portions of the property proposed to be condemned are used by members of the public for
20 recreation purposes. Except as expressly herein alleged, the District has insufficient information
21 and belief upon the subject to enable it to answer the remaining allegations of said paragraph, and
22 basing its denial upon that ground, denies each and every other allegation contained therein, and
23 each and every part thereof.

24 7. Responding to the allegations contained in Paragraph 7, the District admits the
25 allegations thereof.

26 8. Responding to the allegations contained in Paragraphs 8, 9 and 10, the District
27 alleges that the contents of its letters of August 27, 2010, August 30, 2010, and March 8, 2011
28 speak for themselves. Except as expressly herein alleged, the District denies the allegations

1 thereof.

2 9. Responding to the allegations contained in Paragraphs 11 and 12, the District
3 alleges that the contents of its agenda materials for the April 5, 2011 Board meeting speak for
4 themselves. Except as expressly herein alleged, the District denies the allegations thereof.

5 10. District admits the allegations of Paragraph 13.

6 11. Responding to the allegations contained in Paragraph 14, the District admits that it
7 held a public hearing to consider adoption of a Resolution of Necessity to acquire the subject
8 property on April 5, 2011, that GGF's counsel submitted a letter objecting to the proposed action,
9 and that the District adopted a Resolution of Necessity which enabled itself to bring an eminent
10 domain action against the subject property. Further, District alleges that the contents of GGF's
11 counsel's letter speak for themselves. Except as expressly herein admitted and alleged, the
12 District denies the remaining allegations of said paragraph.

13 12. Responding to the allegations contained in Paragraph 15, the District admits that it
14 filed a Notice of Exemption relating to its adoption of the subject Resolution of Necessity on
15 April 7, 2011. Further, the District alleges that the contents of the Notice of Exemption speak for
16 themselves. Except as expressly herein admitted and alleged, the District denies the remaining
17 allegations of said paragraph.

18 13. District denies each and every allegation contained in Paragraphs 16 and 17.

19 **JURISDICTION AND VENUE**

20 14. District realleges and incorporates the allegations of paragraphs 1 through 13 of
21 this Answer as if fully set forth.

22 15. Answering Paragraphs 19 and 20, the District alleges that the contents and
23 requirements of the laws providing jurisdiction for this court speak for themselves. The District
24 denies that the facts of this matter provide any basis for this court issuing the remedies requested
25 by GGF.

26 16. Responding to the allegations contained in paragraphs 21 through 28, the District
27 admits that GGF has complied with certain procedural requirements for filing this action. Except
28 as expressly herein alleged, the District denies all remaining allegations of said paragraphs.

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FIRST COUNT

17. District realleges and incorporates by reference the allegations of paragraphs 1 through 16 of this Answer as if fully set forth.

18. Responding to the allegations of Paragraphs 30 through 38, the District alleges that the contents and requirements of CEQA speak for themselves. Except as expressly herein alleged, District denies the allegations of said paragraphs.

19. District denies the allegations of Paragraph 39.

20. Responding to the allegations of Paragraph 40, the District alleges that the contents of the Notice of Exemption speak for themselves. Except as expressly herein admitted, the District denies the allegations of said paragraph.

21. Responding to the allegations of Paragraphs 41 through 50, District denies each and every allegation thereof.

SECOND COUNT

22. District realleges and incorporates by reference the allegations of paragraphs 1 through 20 of this Answer as if fully set forth.

23. Responding to the allegations of Paragraphs 52 through 56, District alleges that the contents of the various statutes, case law, and other laws cited therein speak for themselves. Except as expressly herein alleged, the District denies the allegations thereof, and further denies that it has violated the Eminent Domain Law in any manner.

24. Responding to the allegations of Paragraph 57, District alleges that it adopted a Resolution of Necessity, and that the contents of the Resolution of Necessity speak for themselves. Except as expressly herein alleged, the District denies the allegations of said paragraph.

25. Responding to the allegations of Paragraphs 58 and 59, the District denies each and every allegation contained therein.

THIRD COUNT

26. District realleges and incorporates by reference the allegations of paragraphs 1 through 25 of this Answer as if fully set forth.

1 27. Responding to the allegations of paragraphs 61 and 62, District denies each and
2 every allegation contained therein.

3 **AFFIRMATIVE DEFENSES**

4 AS AND FOR A FIRST, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to
5 the Petition and Complaint, and each cause of action thereof, District alleges that the Petition and
6 Complaint fail to state a cause of action against Respondent.

7 AS AND FOR A SECOND, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE
8 to the Petition and Complaint, and each cause of action thereof, District alleges that the issues
9 presented in the Petition and Complaint are not ripe for consideration by this court.

10 AS AND FOR A THIRD, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to
11 the Petition and Complaint, and each cause of action thereof, Respondent alleges that
12 Plaintiff/Petitioner has waived and is estopped and barred from alleging the matters set forth in
13 said Petition and Complaint.

14 AS AND FOR A FOURTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE
15 to the Petition and Complaint, and each cause of action thereof, District alleges that
16 Plaintiff/Petitioner has failed to exhaust its administrative remedies.

17 AS AND FOR A FIFTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to
18 the Petition and Complaint, and each cause of action thereof, District alleges that it performed all
19 duties in accordance with California law.

20 WHEREFORE, District prays for relief as follows:

- 21 1. For judgment for District.
- 22 2. For costs of suit.
- 23 3. For all other relief as the court deems proper.

24
25 Dated: June 24, 2011

PRICE, POSTEL & PARMA LLP

26
27 By: Todd A. Amspoker
Todd A. Amspoker
Attorneys for Respondent
28 East Bay Regional Park District

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PROOF OF SERVICE

STATE OF CALIFORNIA; COUNTY OF SANTA BARBARA

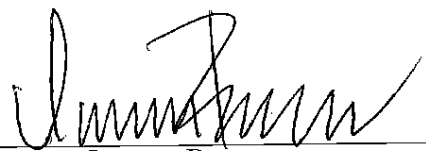
I am employed in the county of Santa Barbara, State of California. I am over the age of 18, and not a party to the within action. My business address is 200 East Carrillo Street, Santa Barbara, California 93101.

On June 24, 2011, I served the foregoing document described as **EAST BAY REGIONAL PARK DISTRICT'S ANSWER TO VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE RELIEF** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, addressed as follows:

John Briscoe David M. Ivester Melanie Tang Briscoe Ivester & Bazel LLP 155 Sansome Street, 7th Floor San Francisco, CA 94104	Attorneys for Petitioner and Plaintiff Golden Gate Land Holdings LLC
---	--

- BY MAIL: I placed a true copy in a sealed envelope addressed as indicated above. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.
- BY PERSONAL DELIVERY: I personally delivered a true copy in a sealed envelope addressed as indicated above.
- BY OVERNIGHT DELIVERY: I placed a true copy in a sealed, fully prepaid Federal Express, Next Day Air envelope addressed as indicated above, which is picked up by Federal Express on that same day in the ordinary course of business.
- BY FACSIMILE: I personally sent a true copy to the parties authorized to accept service as set forth above at the fax numbers indicated above. The facsimile machine I used complied with CRC Rule 2003(3) and the transmission was reported as complete and without error. Pursuant to CRC Rule 2005(i), a transmission verification report was properly issued by the transmitting facsimile machine, stating the time and date of such transmission.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 24, 2011, at Santa Barbara, California.



 Lauren Beers



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JOHN BRISCOE (053223)
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Email: divester@briscoelaw.net
Email: wmost@briscoelaw.net
Attorneys for Petitioner and Plaintiff
GOLDEN GATE LAND HOLDINGS LLC

FILED
ALAMEDA COUNTY

DEC 19 2011

CLERK OF THE SUPERIOR COURT

By *H. Bonetta*
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF ALAMEDA

GOLDEN GATE LAND HOLDINGS LLC, a
Delaware limited liability company,

Petitioner and Plaintiff,

v.

EAST BAY REGIONAL PARK DISTRICT, a
special district of the State of California,

Respondent and Defendant.

No. RG11575462

ASSIGNED FOR ALL PURPOSES TO
JUDGE Evelio Grillo
DEPARTMENT 31

**GOLDEN GATE'S MEMORANDUM IN
SUPPORT OF PETITION FOR WRIT OF
MANDATE**

Hearing Date: March 12, 2012
Time: 10:30 a.m.
Date Action Filed: May 12, 2011
Department: 31
Judge: Hon. Evelio Grillo

BY FAX

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INTRODUCTION AND SUMMARY OF ARGUMENT 1

STATEMENT OF FACTS 1

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TABLE OF AUTHORITIES

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Banker's Hill, Hillcrest, Park West Community Group v. City of San Diego
 (2006) 139 Cal.App.4th 249 8, 14

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 (2006) 143 Cal.App.4th 173 6, 10, 11, 12

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 (2002) 103 Cal.App.4th 98 14

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 (1999) 76 Cal.App.4th 931 7

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 (1981) 115 Cal.App.3d 827 8

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 (1992) 9 Cal.App.4th 644 8

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 (1988) 202 Cal.App.3d 1136 7, 12, 13

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2	Code Civ. Proc. § 1240.040	16, 17
3	Code Civ. Proc. § 1245.220	16
4	Code Civ. Proc. § 1245.230	17
5	Code Civ. Proc. § 1245.255	16
6	Code Civ. Proc. § 1260.120 (c).....	16
7	Gov. Code § 66632.4	18
8	Pub. Resources Code § 21083	7
9	Pub. Resources Code § 21084	13
10	Pub. Resources Code § 21084(a).....	7

Other Authorities

11	California Law Revision Commission, The Eminent Domain Law, December 1975	16
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1 AR 553-560, 578-596.) For more than 70 years, Golden Gate¹ has allowed racing patrons and
2 members of the general public to use the open space along the Bay for recreation, sightseeing,
3 walking, bicycling, and parking, without charge. (3 AR 673.)

4 The District has long planned to extend the Bay Trail (a recreational trail anticipated
5 ultimately to encircle San Francisco and San Pablo Bays) across Golden Gate's land. Toward that
6 end, in 2003 the District obtained a license from Golden Gate to use a corridor along the shoreline of
7 its land (1 AR 188-193) and in 2005 announced "a two-step approach to opening the trail segment to
8 the public," explaining that it "would like to open an interim trail with appropriate safety and
9 security features during the term of the temporary license [and a]t the same time, . . . complete the
10 engineering and design studies required to construct a permanent Bay Trail link when the right of
11 way issues are resolved." (1 AR 195.) The District contracted with Questa Engineering Corp. to
12 prepare engineering plans and construction specifications and assist with pre-construction and
13 construction work. (1 AR 196-202, 206-222.) The plans and specifications were initially completed
14 in 2006 and then revised in 2007 and 2008 to set forth three alternatives. (1 AR 5, 224-242; 2 AR
15 243-309, 322-330, 337-342, 345, 355-363, 373-403.)

16 During this time, the District and Golden Gate negotiated about the District's use and/or
17 acquisition of the shoreline corridor. (2 AR 310, 331-336, 343-344, 346-353, 362-373.) Golden
18 Gate expressed a preference for extending the license, an approach that would preserve its flexibility
19 in integrating design of the trail with its ultimate use of the rest of its 140 acres. (2 AR 346, 350-
20 354, 368-369.) The District preferred to acquire a longer-term interest in the property, saying that
21 "[t]he engineering challenges for permanently curing the hill problem and the use conflicts are
22 considerable and costly" and "the changes to the entrance road and ped. lane were significant enough
23 that they should be consider[ed] permanent until [Golden Gate] need[s] to change [them]" when
24 ultimately doing something with its land. (2 AR 310, 332; see 2 AR 335-336, 343-344, 346.)

25 Ultimately focusing on what it called the "Cliffside Trail Alignment," the District contracted
26 with Questa Engineering to survey the portions of Golden Gate's land it intended to acquire for the

27
28 ¹ Unless otherwise indicated, "Golden Gate" refers to Golden Gate Land Holdings LLC, and its
predecessors, MEC Land Holdings (California), Inc., formerly known as Ladbroke Land Holdings,
Inc., and MI Developments US Financing, Inc. (1 AR 188; 2 AR 418, 486; 3 AR 553-560, 578-596.)

1 trail project and prepare property descriptions. (2 AR 398, 408-416, 434-447.) This alternative was
2 estimated to cost \$722,287.13 and entail construction of parking lot improvements (restoring
3 pavement at the top of the bank and restoring a post and cable barrier), new trail alignment
4 earthwork (excavating 3,500 cubic yards of material from the embankment for new trail surface,
5 disposing of the material off site, and installing 700 linear feet of soil stabilization for the excavated
6 embankment), new barrier wall and fence (installing 850 linear feet of concrete barrier wall one foot
7 thick and two feet high with footing, cast in place, and 900 linear feet of chain link fence on the
8 barrier wall), new trail pavement (installing 850 linear feet of asphalt concrete trail 10 feet wide with
9 aggregate base shoulders one foot wide), and two stormwater catch basins, piping, and outfalls. (2
10 AR 398.) The District recognized at the outset that this alternative “will result in impacts to parking
11 which is an area for future discussion.” (2 AR 448.)

12 With these descriptions in hand, the District wrote to Golden Gate expressing its wish to
13 acquire an easement “for the construction and operation of a segment of the San Francisco Bay
14 Trail,” plus fee title to approximately 2.8 acres of land next to Albany Beach. (2 AR 449.)

15 The District later wrote to Golden Gate offering to purchase an easement on 4.88 acres of its
16 land stretching along the shore of San Francisco Bay for “a critical 1.5-mile segment of the San
17 Francisco Bay Trail, a 500-mile recreational corridor which will ultimately encircle San Francisco
18 and San Pablo Bays and provide a continuous network of bicycling and hiking trails along the
19 shoreline.” (3 AR 597.) The District offered \$54,900 for these five acres, the waterfront portion of
20 this waterfront property. (3 AR 598.) It also offered to acquire fee title to 2.88 acres for “beach and
21 dune restoration and expansion” and “parking and restrooms for ADA-compliant access to the
22 Albany Beach and Albany Peninsula,” adding that “[w]hen completed, these improvements will be
23 part of the Eastshore State Park.” (3 AR 597; see also 3 AR 613, where the District reiterated that its
24 purchase “is necessary for the construction and operation of a segment of the San Francisco Bay
25 Trail and the restoration and expansion of the Albany Beach.”)

26 On March 8, 2011, the District notified Golden Gate that it intended to consider adopting a
27 resolution of necessity to acquire Golden Gate’s property by eminent domain, explaining:

28

1 The District requires the easement which will provide a critical 1.5-mile segment in
2 the San Francisco Bay Trail, a 500-mile planned recreational corridor which will
3 ultimately encircle San Francisco and San Pablo bays and provide a continuous
4 network of bicycling and hiking trails along the shoreline. The 2.8± acre fee parcel
is required for a planned beach and dune restoration and improved public access to
the Albany Beach as part of the Eastshore State Park.

5 (3 AR 639.) With its notification, the District sent a Preliminary Public Easement and Parcel
6 Acquisition Layout showing some planned improvements for the “proposed cliffside trail
7 realignment” and noting associated construction activities and improvements in indicated locations,
8 including “permanent removal of (45) marked parking spaces @ north lot,” “permanent removal of
9 (42) non-marked parking spaces @ edge of road,” “temporary removal of (48) parking spaces @
10 edge of road during construction,” “temporary removal of (12) parking spaces during construction,”
11 “permanent removal of (46) marked parking spaces @ edge of pavement in jockey lot,” and “jockey
12 lot entrance to be widened [and] street light relocated.” (3 AR 641, capitalization omitted.)

13 The District scheduled a meeting on April 5, 2011, to consider such a resolution of necessity,
14 and its staff issued its report explaining:

15 The District’s proposed project consists of construction of 1.5 miles of the San
16 Francisco Bay Trail and the enhancement of the Albany Beach area to implement
17 improvements identified by the Eastshore State Park General Plan (“General Plan”).
18 The trail is planned to be built on the shoreline along the westerly boundary of the
19 subject property, connecting two completed segments at Gilman Street in Berkeley
20 and Buchanan Street in Albany. The Albany Beach enhancement will expand
21 dunes and wetlands, stabilize eroding shoreline and improve public access to San
22 Francisco Bay. The proposed acquisitions will provide safe and unimpeded access
23 for Bay Trail users and provide additional recreational opportunities and wildlife
24 viewing for park visitors.

25 (1 AR 27, 29.) The staff added, without explanation, that “[t]he proposed project is exempt from the
26 California Environmental Quality Act pursuant to CEQA Guidelines, Section 15325.” (1 AR 30.)

27 On April 5, 2011, Golden Gate wrote to the District and appeared at the meeting. Noting that
28 its land was under consideration by the University of California for a second campus for the
Lawrence Berkeley National Laboratory, Golden Gate asked the District not to take the unnecessary
action of adopting a resolution of necessity to condemn the lands, but rather wait a reasonable time
to see whether the University selected Golden Gate Fields as the site for its second campus. If it did,
Golden Gate observed, then the District, the cities of Albany and Berkeley, the Bay Conservation

1 and Development Commission, the University, Golden Gate, and the public generally would enjoy
2 an all-too-rare opportunity to master-plan a major segment of the Bay Trail and other open spaces as
3 part of the redevelopment of an extraordinary part of the shoreline of the Bay. (1 AR 55-62: 3 AR
4 671-672.)

5 Golden Gate explained that the California Eminent Domain Law's three prerequisites for
6 condemnation were not present here: First, the public interest and necessity do not require the
7 project.

8 The public can walk, jog or cycle the waterfront – as they have been able to for 70
9 years – and use substantial other portions of the property as well, including the
10 beach areas. What is more, the public is allowed to park in the parking areas of the
11 property, and use facilities, such as the restrooms. Golden Gate Fields has sought
for 70 years to be a good neighbor, and has generously allowed the public to use its
lands. . . .

12 (3 AR 673.) Second, the proposed project is not planned and located in the manner most compatible
13 “with the greatest public good and the least private injury.”

14 The greatest public good would be achieved by acquiring the necessary lands for the
15 Trail and Park, and having them developed, in the most cost-effective manner. The
16 least private injury can only be assured if the planning of the Bay Trail is done as part
of a master redevelopment plan for the Golden Gate Fields site. . . .

17 (3 AR 674.) Third, acquisition of the property is not necessary for the project.

18 The public fully enjoys the use of the property, all at no expense to the taxpayer,
19 and there are no plans to change that status quo.

20 (*Id.*)

21 Golden Gate explained as well that the District could not approve the project until after it
22 reviewed and considered the project's environmental effects under CEQA. It argued that the project
23 is not exempt from CEQA under Guidelines section 15325, as contended by the District staff:

24 Under Section 15325, “the transfers of ownership of interest in land in order to
25 preserve open space, habitat, or historical resources” may be exempt from CEQA.
26 Section 15325 identifies six examples of exempt transfers, only one of which is
27 conceivably applicable here: “Acquisition, sale, or other transfer to preserve open
28 space or lands for park purposes.” (Section 15325(f).) Here, however, land is not
being acquired for the mere “preservation” of open space or park purposes. Rather,
the purpose of the acquisition is to facilitate a major waterfront construction project –
in the words of your draft Resolution of Necessity, to “complete Eastshore State Park
and provide the opportunity to construct an important segment of the San Francisco
Bay Trail.” (Recital, ¶1.) The Court of Appeal has held that Exemption 25 does not

1 apply where an acquisition is accompanied by “significant construction.” (*California*
2 *Farm Bureau v. California Wildlife Conservation Board* (2006) 143 Cal.App.4th 173,
3 184 (Exemption 25 inapplicable to the acquisition of a conservation easement where
4 the accompanying management plan required “significant construction.”).) Here, the
5 Board’s plans for the proposed project also require “significant construction”; thus
6 Exemption 25 is inapplicable.

7 (3 AR 675.) Golden Gate explained as well that a pertinent exception to the exemptions precluded
8 exemption of this project:

9 Even if the Board were to find that Exemption 25 somehow applies here, the Board
10 still may not find that the project is categorically exempt from CEQA. Under CEQA
11 Guidelines Section 15300.2(c), where there is a “reasonable possibility” that an
12 activity will have a significant effect on the environment due to “unusual
13 circumstances,” the activity is not categorically exempt from CEQA. Although the
14 mere acquisition of land would not normally have a significant effect on the
15 environment, the unusual circumstances here – the ecologically sensitive bayside
16 location of the proposed project, the Board’s intention to construct extensive
17 waterfront improvements, and the already-prepared construction plans – create a
18 reasonable probability that there will be a significant effect on the environment, and
19 preclude the application of a categorical exemption.

20 (*Id.*)

21 The District nevertheless approved the project by adopting a resolution of necessity,
22 authorizing it to take Golden Gate’s property by condemnation in order to construct the trail and
23 associated improvements. (1 AR 1-23.)

24 Two days later, the District posted a notice of exemption stating that the District “has
25 approved this project and found it to be exempt from [CEQA],” citing Guidelines section 15325,
26 plus four other sections (15061(b)(3), 15301, 15304, and 15316) not previously mentioned in the
27 District’s proceedings, and adding: “Reasons why project is exempt from CEQA: This project
28 consists of the acquisition of land in order to protect open space and to secure future public access to
Eastshore State Park and the San Francisco Bay Trail. Any development of this property and land
use changes would be subject to future CEQA review.” (1 AR 26.)

On May 12, 2011, Golden Gate timely filed a petition for writ of mandate to set aside the
District’s approval of the project on the grounds that it had not complied with CEQA or the Eminent
Domain Law in adopting the resolution of necessity.

1 **I. IN FAILING TO REVIEW THE PROJECT'S ENVIRONMENTAL EFFECTS, THE**
2 **DISTRICT VIOLATED THE CALIFORNIA ENVIRONMENTAL QUALITY ACT**

3 **A. CEQA Carefully Circumscribes The Types Of Projects It Exempts From The**
4 **General Requirement That Agencies Review And Consider The Environmental**
5 **Effects Of Projects Before Approving Them**

6 While generally requiring agencies to review the environmental effects of projects before
7 approving them by preparing and considering initial studies and negative declarations or
8 environmental impact reports, CEQA authorizes the Secretary of the Natural Resources Agency to
9 adopt implementing regulations, the CEQA Guidelines, and include in them a list of classes of
10 projects the Secretary has found do not have a significant effect on the environment and which thus
11 will be exempt from CEQA. (Pub. Resources Code §§ 21083, 21084(a).) The Secretary has listed
12 33 such classes of projects. (14 Cal. Code Reg. §§ 15300-15329.) These "categorical exemptions"
13 are not absolute. Apart from the limitations implicit in the criteria defining each of them, they are
14 limited by several general exceptions, one of which is pertinent here. If there is a "reasonable
15 possibility" that a project will have a significant effect on the environment due to "unusual
16 circumstances," an agency may not find the project to be exempt. (14 Cal. Code Reg. § 15300.2(c).)

17 **B. In Reviewing Agencies' Determinations Regarding Categorical Exemptions, Courts**
18 **Apply Various Standards Of Review Depending On The Issue**

19 Interpreting the scope of a categorical exemption is a question of law for the court to decide.
20 (E.g., *Save Our Carmel River v. Monterey Peninsula Water Mgmt. Dist.* (2006) 141 Cal.App.4th
21 677, 793.) Because categorical exemptions operate as exceptions to CEQA, they must be narrowly
22 construed in keeping with their statutory authorization, which confines such exemptions to classes of
23 projects determined not to have a significant effect on the environment, and thereby afford the
24 greatest environmental protection within the reasonable scope of their terms. (E.g., *County of*
25 *Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 966; *Azusa Land*
26 *Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192;
27 *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1148.)

28 When reviewing an agency's factual determinations pertinent to whether a project fits the
criteria of a categorical exemption, the court generally assesses whether such factual determinations
are supported by substantial evidence in the record. (E.g., *Committee to Save the Hollywood*

1 *Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1187; *California Unions for*
2 *Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225.)

3 When reviewing an agency's factual determinations pertinent to whether one of the
4 exceptions to the categorical exemptions precludes exempting a project from CEQA review, the
5 court should apply the "fair argument" test to assesses whether there is any substantial evidence in
6 the record that the project *might* result in significant environmental effects and, if so, the exception
7 precludes exempting the project notwithstanding there may also be substantial evidence to the
8 contrary.² (E.g., *Azusa, supra*, 52 Cal.App.4th 1165, 1202.)

9 It remains then to review the applicability of each of the five claimed exemptions and the
10 exception to the exemptions.

11 **C. The Project Does Not Qualify For The Section 15061(b)(3) Common Sense**
12 **Exemption For Activities Certain Not To Have A Significant Environmental Effect**

13 Guidelines section 15061(b)(3) codifies a judicially developed "common sense" exemption
14 "[w]here it can be seen with certainty that there is no possibility that the activity in question may
15 have a significant effect on the environment" (See *Muzzy Ranch Co. v. Solano County Airport*
16 *Land Use Comm'n* (2007) 41 Cal.4th 372.)

17 The District did not offer any finding or explanation supporting its exemption determination
18 other than to state: "This project consists of the acquisition of land in order to protect open space
19 and to secure future public access to Eastshore State Park and the San Francisco Bay Trail. Any
20 development of this property and land use changes would be subject to future CEQA review." (1
21 AR 26.) The District said nothing whatever of a certainty the project will not have a significant
22 environmental effect, nor does the record contain evidence of any such certainty.

23
24 ² The foregoing is the better and majority rule, but the law is not entirely settled. Two courts earlier
25 applied the substantial evidence test to factual determinations regarding the exceptions to the
26 categorical exemptions (*Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, 843-845;
27 *Centinela Hosp. Ass'n v. City of Inglewood* (1990) 225 Cal.App.3d 1586, 1601). Several courts
28 have since rejected that approach and applied the fair argument test to such determinations,
reasoning, for instance with respect to the significant effects exception, that because it is triggered by
the possibility of a significant effect, the exception should apply when there is substantial evidence
such an effect might occur (*Azusa, supra*, 52 Cal.App.4th at 1202-1208; *Banker's Hill, Hillcrest,*
Park West Community Group v. City of San Diego (2006) 139 Cal.App.4th 249, 277-278; *Dunn-*
Edwards Corp. v. Bay Area Air Quality Mgmt. Dist. (1992) 9 Cal.App.4th 644, 654-655; *Association*
for Protection of Env't'l Values v. City of Ukiah (1991) 2 Cal.App.4th 720, 728-736).

1 Indeed, the only certainty pertinent here is that the record contains evidence to the contrary,
2 i.e., that the project certainly will change the physical environment and may well have significant
3 environmental effects in that it entails excavating thousands of cubic yards of material from a steep
4 rock embankment along the shore of San Francisco Bay, constructing an asphalt concrete trail with
5 an adjoining concrete retaining wall and fence in the face of that embankment, installing soil
6 stabilization, erosion control, storm drains and outfalls, and parking lot improvements, and restoring
7 and expanding dunes and wetlands, all certain to affect the physical and aesthetic characteristics of
8 the shoreline, dunes, and wetlands, the flow and quality of storm water reaching the Bay, public
9 safety, and existing parking. (1 AR 1, 6, 20, 29, 31-32, 49, 52, 67, 76-77, 195; 2 AR 310, 331-332,
10 334, 337, 347, 349, 366, 370, 383, 393, 398, 412, 448-449; 3 AR 597, 603, 641, 665, 667, 673-676.)

11 The District's claim of exemption under section 15061(b)(3), thus, is entirely unsupported.

12 **D. The Project Does Not Meet The Criteria For The Exemption For Repair Or Minor**
13 **Alteration Of Existing Structures**

14 Guidelines section 15301 exempts "the operation, repair, maintenance, permitting, leasing,
15 licensing or minor alteration of existing public or private structures, facilities, mechanical
16 equipment, or topographical features, involving negligible or no expansion of use beyond that
17 existing at the time of the lead agency's determination."

18 Again, the District did not make any findings nor offer any evidence to support its
19 determination the project is exempt under this section.

20 Its suggestion now that construction of 1.5 miles of trail and associated facilities, installation
21 of storm drains and parking improvements, and restoration and expansion of dunes and wetlands fit
22 the section's terms defies credulity. Even cursory comparison of the project's description, as related
23 above, with those terms readily reveals the section has no application here. The project would, for
24 instance, construct a new trail in a new alignment along the face of a steep embankment where
25 currently no trail exists—hardly repair, maintenance, or minor alteration of existing structures. (1
26 AR 6, 20, 29, 31-32, 52, 76-77; 2 AR 331-332, 337, 349, 370, 383, 393, 398, 411-412, 448-449; 3
27 AR 603, 641.) It would, as well, install storm drains where none currently exist and permanently

1 remove over one hundred existing parking spaces. (1 AR 6, 20, 76-77; 2 AR 349, 398, 411-412,
2 448; 3 AR 603, 641.)

3 **E. The Project Does Not Fit The Criteria For The Exemption For Minor Alterations**
4 **To Land**

5 Guidelines section 15304 exempts “minor public or private alterations in the condition of
6 land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except
7 for forestry or agricultural purposes.”

8 Again, the District did not make any findings nor offer any evidence to support its
9 determination the project is exempt under this section.

10 As the project entails not only excavation of land, but also construction of infrastructure and
11 facilities below, on, and above ground, it plainly extends beyond the mere alteration of land covered
12 by the exemption. (E.g., 1 AR 29; 2 AR 398; 3 AR 641.) Moreover, the excavation alone amounts
13 to more than a minor alteration of land. In *California Farm Bureau Fed’n v. California Wildlife*
14 *Conserv. Bd.* (2006) 143 Cal.App.4th 173, the court disallowed use of this exemption for a project to
15 create wetlands on relatively flat farmland by reconstructing existing levees and adding others up to
16 three feet high, grading swales one or two feet deep, and planting vegetation. Noting that the “work
17 will clearly alter existing drainage patterns and elevations of the land [and] change the nature of the
18 land from level fields to wetlands,” the court held that “[t]his is not a ‘minor’ physical alteration to
19 the land” and thus “does not fit within” this exemption. (*Id.* at 191-192.) Here, the project carves a
20 twelve-foot wide path sloping across the face of a 45-foot high embankment and installs storm
21 drains, thus altering the topography and existing drainage patterns much more than the work in
22 *California Farm Bureau Fed’n* and changing the nature of the land from natural cliff to
23 transportation and recreation infrastructure. (1 AR 37, 2 AR 398, 446, 641.)

24 Perhaps most telling is that the project does not resemble any of the nine examples of minor
25 alterations presented in section 15304. Indeed, in specifying “[g]rading on land with a slope of less
26 than 10 percent” as one example, the section effectively precludes exempting this project, which
27 entails substantial excavation and construction on a steep embankment far exceeding 10 percent.
28 (*California Farm Bureau Fed’n v. California Wildlife Conserv. Bd.*, *supra*, 143 Cal.App.4th at 188-

1 189, 192, interpreting the scope of exemptions to cover activities similar in kind to the specified
2 examples.)

3 **F. The Project Does Not Qualify For The Exemption For Transfer Of Ownership Of**
4 **Land To Preserve Existing Natural Conditions**

5 Guidelines section 15325 exempts “transfers of ownership of interests in land in order to
6 preserve open space, habitat, or historical resources.” This section “by its terms covers only
7 acquisitions, sales or other transfers of ownership interests for particular purposes [and] does not
8 cover anything else.” (*California Farm Bureau Fed’n v. California Wildlife Conserv. Bd.* (2006)
9 143 Cal.App.4th 173, 193.)

10 In support of its determination that this section exempts the project, the District stated that
11 “[t]his project consists of the acquisition of land in order to protect open space and to secure future
12 public access to Eastshore State Park and the San Francisco Bay Trail.” (1 AR 26.)

13 For two reasons, the District’s determination is erroneous. First, because the project entails
14 more than *just* the acquisition of land, the exemption does not cover it. The project is “the whole of
15 the action” that may result in a direct or reasonably foreseeable indirect physical change in the
16 environment. (14 Cal. Code Reg. § 15378(a).) When an agency condemns land for a project, the
17 project includes not just the acquisition of land, but also the intended use of that land.

18 [C]ompliance with CEQA is mandatory before a public entity may condemn
19 property for a proposed project. Thus, if the public entity fails to prepare a valid
20 EIR or negative declaration for the proposed project prior to condemning the
21 property, the trial court is authorized to dismiss the action. [Citations.] A
22 municipality could evade all of these environmental protections by deliberately
23 failing to define ‘the project’ or couching the resolution in such vague language that
24 no one could definitively determine what use the legislative body had in mind for
25 the property.

26 (*City of Stockton v. Marina Towers LLC* (2009) 171 Cal.App.3d 93, 108, footnote omitted.)

27 Here, the District has forthrightly confirmed that its project consists of more than just the
28 acquisition of land:

The District’s proposed project consists of construction of 1.5 miles of the San
Francisco Bay Trail and the enhancement of the Albany Beach area to implement
improvements identified by the Eastshore State Park General Plan (“General Plan”).
The trail is planned to be built on the shoreline along the westerly boundary of the

1 subject property, connecting two completed segments at Gilman Street in Berkeley
2 and Buchanan Street in Albany. The Albany Beach enhancement will expand
3 dunes and wetlands, stabilize eroding shoreline and improve public access to San
4 Francisco Bay. The proposed acquisitions will provide safe and unimpeded access
for Bay Trail users and provide additional recreational opportunities and wildlife
viewing for park visitors.

5 (District staff report at 1 AR 29; see also 1 AR 6, 43, 46-47, 49, 77; 2 AR 398, 449; 3 AR 597, 613,
6 639-641.) In *California Farm Bureau Fed'n, supra*, 143 Cal.App.4th 173, a project consisting not
7 only of acquisition of land, but also construction of levees, swales, and other drainage features to
8 convert farmland to wetland was ruled outside the scope of this exemption. Similarly, in *McQueen*
9 *v. Board of Directors* (1988) 202 Cal.App.3d 1136, the court held that a project consisting of
10 acquisition of land and also subsequent use of existing buildings and maintenance or disposal of
11 hazardous substances on the land was not covered by this exemption. For much the same reasons,
12 the District's project falls outside the exemption as well.

13 Second, even if the project were confined to the acquisition of land, it would not be exempt
14 under this section because the purpose of the acquisition is not to protect existing open space, but
15 rather, as described above, to add a 1.5-mile segment of the Bay Trail, install parking improvements,
16 and restore and expand dunes and wetlands. (See *California Farm Bureau Fed'n, supra*, 143
17 Cal.App.4th at 193.

18 **G. The Project Does Not Fit The Criteria For The Exemption For Transfer Of**
19 **Ownership Of Land To Create Parks**

20 Guidelines section 15316 exempts "the acquisition, sale, or other transfer of land in order to
21 establish a park where the land is in a natural condition or contains historical or archaeological
22 resources and either: [¶] (a) [t]he management plan for the park has not been prepared, or [¶] (b)
23 [t]he management plan proposes to keep the area in a natural condition or preserve the historic or
24 archaeological resources."

25 The District did not make any findings nor offer any evidence to support its determination
26 the project is exempt under this section.

27 Because much of the land the District seeks to condemn is not in a natural condition, but
28 rather is improved with asphalt parking, an asphalt road, an asphalt trail, and associated fences and

1 other features (1 AR 195; 2 AR 448; 3 AR 603, 618, 622, 641), the District's acquisition of that land
2 is not exempt under this section. (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136,
3 1148, holding the exemption inapplicable where the record contains no evidence the land is in a
4 natural condition.)

5 Moreover, the District plainly intends to use the land in ways other than the two covered by
6 this section. As the land is not currently in a natural condition and the District plans substantial
7 construction as described above, the District obviously cannot and does not propose "to keep the
8 area in a natural condition" in keeping with subsection (b). Nor have plans for the land not been
9 prepared as provided in subsection (a). To the contrary, the District has stated that its plan, as
10 described above, is to add a 1.5-mile segment of the Bay Trail, install storm drain and parking
11 improvements, and restore and expand dunes and wetlands, all in keeping with several plans it and
12 other agencies have already adopted. (1 AR 1, 29, 31.)

13 The project, thus, is not exempt from CEQA under this or any of the other exemptions.

14 **H. A "Reasonable Possibility" The Project Will Have A Significant Environmental**
15 **Effect Due To "Unusual Circumstances" Precludes Exempting It From CEQA**

16 Even if one of the exemptions appeared on its face to apply—which none does—the unusual
17 circumstances "exception to the exemption," as it is sometimes called, removes the District's project
18 from the exempt category.

19 In *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206, the Supreme Court held that
20 because the Secretary of the Natural Resources Agency is authorized to exempt only those activities
21 that do not have a significant environmental effect (Pub. Resources Code § 21084), "where there is
22 any reasonable possibility that a project or activity may have a significant effect on the environment,
23 an exemption would be improper." Codifying this holding, the Guidelines provide that even if a
24 project fits within an exempt class, the exemption "shall not be used for an activity where there is a
25 reasonable possibility that the activity will have a significant effect on the environment due to
26 unusual circumstances." (Cal. Code Reg. § 15300.2(c).) This provision calls for an agency to
27 determine whether an activity within a class the Resources Agency has found *normally* does not
28 threaten the environment should be excepted from an exemption and evaluated further because,

1 owing to unusual circumstances, there is a reasonable possibility the particular activity will have a
2 significant environmental effect. (*Azusa, supra*, 52 Cal.App.4th at 1206.)

3 Ascertaining whether this exception precludes exempting a project involves two inquiries:
4 (1) whether the project presents “unusual circumstances” and (2) whether there is a “reasonable
5 possibility” under such circumstances the project will have a significant environmental effect. (E.g.,
6 *Committee to Save the Hollywood Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168,
7 1186.) With respect to the former, “any factual determination relating to the existence of a certain
8 circumstance is reviewed by the court under the substantial evidence standard, but ‘the question
9 whether that circumstance is “unusual” within the meaning of the significant effect exception would
10 normally be an issue of law that the court would review de novo.’” (*Banker’s Hill, Hillcrest, Park
11 West Community Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 262 n11, quoting *Azusa,
12 supra*, 52 Cal.App.4th at 1207.) With respect to the latter, the agency must apply a fair argument
13 approach in determining whether there is a reasonable possibility of a significant environmental
14 effect due to unusual circumstances (*id.* at 264-267), and accordingly the court should
15 “independently review the record using that standard” and if it “perceive[s] evidence of a fair
16 argument that there may be a significant effect on the environment due to unusual circumstances, [it]
17 will conclude that the [agency] abused its discretion because its decision to the contrary is not
18 supported by substantial evidence” (*id.* at 267).

19 Whether a project’s circumstances are “unusual” is gauged by assessing whether “the
20 circumstances of a particular project (i) differ from the general circumstances of the projects covered
21 by a particular categorical exemption, and (ii) those circumstances create an environmental risk that
22 does not exist for the general class of exempt projects.” (*Azusa, supra*, 52 Cal.App.4th at 1207;
23 *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 129.)

24 The District’s factual determinations of the existence of the pertinent circumstances here and
25 the substantial evidence supporting them are clear and uncontradicted: The project site comprises
26 cliffs, steep embankments, dunes, and wetlands, all stretching along 1.5 miles of the shore of San
27 Francisco Bay. (1 AR 20, 29, 43, 47, 52; 2 AR 339-341, 408-413, 434-447; 3 AR 597, 603, 639-
28 641, 675.) Many, including the District, enthused about the shoreline site’s extraordinary beauty

1 and views³, and the District affirmed that its acquisition will protect “important natural resources” (1
2 AR 32).

3 Any one of the site’s basic characteristics (cliffs, steep embankments, dunes, wetlands, 1.5
4 miles of Bay shoreline, extraordinary beauty and views) suffice to differentiate it from the typical
5 circumstances associated with projects of the sorts covered by sections 15061(b)(3), 15301, 15304,
6 15316, and 15325 and present environmental risks not typical of those types of projects. Together,
7 these several critical characteristics of the site render the project’s circumstances decidedly unusual
8 and fraught with more than typical environmental risks. The cliffs and steep embankments along the
9 shoreline, for instance, by their very nature pose substantial engineering and construction challenges
10 and present risks regarding slope failure, erosion, sedimentation of Bay waters, fish and wildlife
11 habitat, public safety, and aesthetic impacts.⁴ The shoreline dunes and wetlands also present
12 inherent risks regarding fish and wildlife habitat, water quality, and aesthetic impacts.

13 On this sensitive and difficult terrain, the District plans to excavate an alignment for a trail,
14 construct a twelve-foot wide asphalt concrete trail with an adjoining concrete retaining wall and
15 fence, install soil stabilization, erosion control, storm drains and outfalls, and parking lot
16 improvements, and restore and expand dunes and wetlands. (1 AR 1, 6, 20, 29, 31-32, 49, 52, 67,
17 76-77, 195; 2 AR 310, 331-332, 334, 337, 347, 349, 366, 370, 383, 393, 398, 412, 448-449; 3 AR
18 597, 603, 641, 665, 667, 673-676.) The reasonable possibility this project may have environmental
19 effects owing to the very risks posed by its unusual circumstances is manifest. Certainly, the record
20 offers substantial evidence to support a fair argument the project may have such effects, including
21 effects on the physical and aesthetic characteristics of the shoreline, dunes, and wetlands, the flow
22 and quality of storm water reaching the Bay, public safety, and existing parking. (1 AR 1, 6, 20, 29,
23 31-32, 49, 52, 67, 76-77, 195; 2 AR 310, 331-332, 334, 337, 347, 349, 366, 370, 383, 393, 398, 412,
24

25 ³ The District staff proclaimed the site to be “beautiful and scenic,” and the District President echoed
26 “this trail is going to be a beauty.” (1 AR 47, 82.) Others added that “[t]his land at the edge of the
San Francisco Bay is a unique place with extraordinary potential” (3 AR 689), it is “one of the most
beautiful settings in the East Bay” (3 AR 708), and it “offers a world-class view” (1 AR 67).

27 ⁴ The courts have recognized that extensive grading on steep, scenic terrain presents unusual
28 circumstances with increased risks of soil erosion, sedimentation of waters, degradation of natural
conditions, and aesthetic impacts. (*Azusa, supra*, 52 Cal.App.4th at 1207; *Myers v. Board of
Supervisors* (1976) 58 Cal.App.3d 413, 426.) Here, the District acknowledged the challenges as
well. (1 AR 20, 29, 31-32, 49, 52, 76-77; 2 AR 310, 370, 398, 411-412; 3 AR 603, 641.)

1 448-449; 3 AR 597, 603, 641, 665, 667, 673-676.) Mindful that the project would permanently
2 remove over a hundred parking spaces and temporarily remove scores more, the District
3 acknowledged the project “will result in impacts to parking which is an area for future discussion.”
4 (2 AR 448.) Recognizing, moreover, that construction as well as operation of the project may affect
5 the environment, the District’s President noted the project would install storm drains and observed
6 that “a drain would be ultimately gentle on the land but not so gentle to install.” (1 AR 77.)

7 Because there is a reasonable possibility that the project will have a significant effect on the
8 environment due to unusual circumstances, it is not exempt from CEQA. (Cal. Code Reg. §
9 15300.2(c).)

10 **II. THE DISTRICT ABUSED ITS DISCRETION AND FAILED TO COMPLY WITH**
11 **EMINENT DOMAIN LAW IN ADOPTING ITS RESOLUTION OF NECESSITY**

12 **A. An Agency May Condemn Property Only In Compliance With Requirements**
13 **Prescribed By Law, And Failure To Comply Precludes Condemnation**

14 An agency may exercise the power of eminent domain to acquire private property only if it
15 makes a finding of public necessity in the form of a resolution of necessity. (Code Civ. Proc. §§
16 1240.040, 1245.220.) The resolution of necessity serves to ensure that the public entity makes a
17 considered decision both of the need for the property as well as the proposed project itself.
(California Law Revision Commission, *The Eminent Domain Law*, December 1975 at p. 1026.)

18 The public agency’s discretion is limited by California’s eminent domain law:

19 The power of eminent domain may be exercised to acquire property for a proposed
20 project only if all of the following are established: [¶] (a) The public interest and
21 necessity require the project. [¶] (b) The project is planned or located in the manner
22 that will be most compatible with the greatest public good and the least private injury.
[¶] (c) The property sought to be acquired is necessary for the project.

23 (Code Civ. Proc. § 1240.030, hereafter, the “Three Requirements.”)

24 A resolution of necessity is subject to judicial review if its adoption or contents were affected
25 by a gross abuse of discretion. (Code Civ. Proc. § 1245.255.) If a court determines that the public
26 agency does not have the right to take the property by eminent domain, it must dismiss the
27 condemnation proceeding. (Code Civ. Proc. § 1260.120 (c); see *City of Stockton v. Marina Towers*
28 *LLC* (2009) 171 Cal.App.4th 93, 105, a fatally vague statement of purpose in a resolution of

1 necessity was a gross abuse of discretion barring the right to take.) A gross abuse of discretion
2 occurs where the public agency acts arbitrarily or capriciously, renders findings that are lacking in
3 evidentiary support, or fails to follow the required procedures before condemning the property. (*City*
4 *of Stockton, supra*, 171 Cal.App.4th at 114.)

5 Here, the District has no right to take the property for several reasons: each of the District's
6 determinations of the Three Requirements is deficient; the District did not follow its own pre-
7 condemnation procedures; and the District impermissibly committed itself to the condemnation
8 before the resolution of necessity hearing.

9 **B. The Public Interest and Necessity Do Not Require The Project and The District**
10 **Failed To Determine That They Do**

11 The District's resolution fails the first of the Three Requirements because it does not make
12 the determination required by law. Even if it had made the right determination, the District would
13 not have the right to take the property because the public interest and necessity do not truly require
14 this project.

15 **1. The District Did Not Make The Required Determination**

16 "A public entity may exercise the power of eminent domain only if it has adopted a
17 resolution of necessity that meets the requirements" of the Eminent Domain Law. (Code Civ. Proc.
18 § 1240.040.) A facial flaw in a resolution of necessity therefore prevents an agency from having any
19 right to take the desired property, and a condemnation action should be dismissed. (*City of Stockton,*
20 *supra*, 171 Cal.App.4th at 100, 114-115, project description in Stockton's resolutions of necessity
21 was so vague, uncertain and sweeping in scope that the resolutions were facially invalid.)

22 In order to meet the requirements of the Eminent Domain Law, a resolution of necessity must
23 contain specific declarations. (Code Civ. Proc. § 1245.230). It must include a declaration that the
24 condemning agency has determined that "[t]he public interest and necessity require the proposed
25 project." (*Id.* at (c).) The District failed to make that determination.⁵

26
27
28 ⁵ The closest thing the District included in its resolution was a determination that "[t]he public
interest and necessity require the real property rights sought to be acquired." (1 AR 2.) That is not
one of the determinations required by Code Civ. Proc. § 1245.230.

1 Because the District's resolution of necessity is facially invalid for lack of a critical
2 determination, its condemnation action should be dismissed.

3 **2. The Public Interest and Necessity Do Not Require the Project**

4 A gross abuse of discretion occurs where the public agency acts arbitrarily or capriciously or
5 renders findings that are lacking in evidentiary support. (*City of Stockton, supra*, 171 Cal.App.4th at
6 14.) The District cannot "exercise its right of eminent domain (condemnation) except as a last resort
7 or at the request of the property owner." (1 AR 132.) Even if the District had determined that the
8 public interest and necessity required the proposed project, it would not be able to support that
9 determination with substantial evidence.

10 Upon redevelopment of the property, the City of Albany and the San Francisco Bay
11 Conservation and Development Commission will demand dedication of the bayside areas as a
12 condition of approval, as they have for past proposals to redevelop Golden Gate Fields. (See City of
13 Albany General Plan CROS 7.3, "Require public access to the shoreline and to Albany Point be a
14 part of any future waterfront development plans"; Gov. Code § 66632.4.) The District has been
15 following the progress Golden Gate is going through to be selected as the site of the new Lawrence
16 Berkeley National Laboratory second campus, and is aware that redevelopment will lead to
17 dedication demands. (1 AR 50-51.) This alone suggests that the condemnation could not be
18 necessary. As the Chair of the Sierra Club's East Bay Public Lands Committee pithily wrote to the
19 District:

20 Frankly, it make[s] no sense to use eminent domain for the Albany trail section when
21 the track will close and any development of the site will have to give away the trail
22 for any development. . . . The Park District should not waste taxpayer dollars to buy
land that will have to be donated away."

23 (3 AR 716-717.) The District's president echoed the Sierra Club's concern:

24 I was wondering if it would be better to wait until we know what the university is
25 going to do and whether or not the university is going to select this site, and we may
26 know that pretty soon. I was wondering whether it would be advisable to put this
27 over for that purpose.

1 (1 AR 50.) The District's staff allayed this concern by suggesting:

2 The Board can make a decision to adopt the resolution of necessity, and then we can
3 hold off filing the eminent domain action for up to six months. So that should give
4 the university plenty of time to make their decision.

5 (1 AR 51.)

6 This "declare necessity and then postpone condemnation" strategy became an explicit
7 rationale for the board's decision to adopt the resolution of necessity:

8 I think, although [the Sierra Club] letter does alert us to an issue, that is a very
9 important issue, I think that the strategy of passing the resolution today but, perhaps,
10 holding off to file the legal action would satisfy that concern.

11 (1 AR 86.)

12 The District thus adopted the resolution of necessity on the explicit premise that they had
13 another option—waiting a short while to see if Golden Gate Fields would be selected as the site for a
14 new laboratory, which would result in a free dedication of the Bay shore land to park purposes.

15 For this reason, the District's determination in the resolution that "the public interest and
16 necessity require the property rights" being condemned is arbitrary and capricious and lacking in
17 evidentiary support. Furthermore, the discussion of the District's other, better options proves that
18 condemnation cannot be a "last resort." These abuses of discretion void the District's right to take
19 the property.

20 **C. The Project Is Not Planned or Located In The Manner Most Compatible With The
21 Greatest Public Good and the Least Private Injury**

22 The District determined in its resolution of necessity that the project is planned or located in
23 the manner most compatible with the greatest public good and the least private injury. (1 AR 2.)
24 This requirement of the greatest public good encompasses "all aspects of the public good including
25 but not limited to social, economic, environmental, and esthetic considerations." (*Redevelopment
26 Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1126.) This determination of the second of
27 the Three Requirements is unsupported by the evidence and arbitrary and capricious and therefore a
28 gross abuse of discretion.

The greatest public good would be achieved at Golden Gate Fields by acquiring the
necessary lands for the trail and park and having them developed in the most cost-effective, visually

1 esthetic, and environmentally sound manner possible. The greatest public good can only be assured
2 if the planning of the Bay Trail is done as part of a master redevelopment plan for the Golden Gate
3 Fields site, allowing the trail to be integrated with the esthetics and environmental continuity
4 features of the redevelopment. The owner of Golden Gate Fields has a vision of a Green
5 Technology Collaborative at the site that would incorporate the Lawrence Berkeley National
6 Laboratory, cleantech start up companies, open space and public access. (3 AR 678-706.)

7 The least private harm can also only be achieved by integrating the Bay Trail planning with
8 the redevelopment of Golden Gate Fields. The District claims that its condemnation will “have no
9 adverse impact on any foreseeable future development plan proposed by the property owner.” (1 AR
10 31.) This is not so. The condemnation would have two significant adverse impacts on the owner.
11 First, it would presumably preclude the owner from incorporating any portion of the property within
12 the Trail easement – meaning the portion along the water – into the development. Waterfront
13 amenities such as restaurants, or water-conveyance terminals, would be off-limits to the developer.
14 The most valuable part of waterfront property, of course, is its water frontage. Second, all
15 developers of waterfront property know well that the strongest “chip” they hold in the entitlements
16 process is usually what they can offer the public and the land-use agencies by way of waterfront
17 amenities.

18 Condemnation and development by the District would prevent the Bay Trail project from
19 being organically integrated into the Green Technology Collaborative plan, thwarting the project
20 from achieving the greatest public good and least private injury.

21 **D. The Property To Be Condemned Is Not Necessary For The Project**

22 The District determined in its resolution of necessity that the property to be condemned is
23 necessary for the project. (1 AR 2.) This determination of the third of the Three Requirements is
24 also unsupported by the evidence and arbitrary and capricious and therefore a gross abuse of
25 discretion. The District seeks to link up the unconnected sections of the San Francisco Bay Trail to
26 allow biking and hiking along the shoreline. (1 AR 28.) This condemnation cannot be necessary for
27 that project because the public already has free access for waterfront hiking, jogging, and bicycling
28 at Golden Gate Fields. (3 AR 673.) The owners of Golden Gate Fields have allowed public access

1 to a bay side trail and to beach areas for seventy years. (*Id.*) They have also allowed use of parking
2 and restroom facilities, and provide security at no cost to local governments. (*Id.*) Even if the
3 District feels that there are issues with the manner of the public's access to the trail along the bay at
4 Golden Gate Fields, the plaintiff has offered in the past to work with the District to find solutions. (1
5 AR 59; 3 AR 674.) This abuse of discretion void's right to take the property.

6 **E. The District Failed To Follow Its Own Precondemnation Procedures**

7 A gross abuse of discretion occurs where the public agency a fails to follow required
8 procedures before condemning the property. (*City of Stockton, supra*, 171 Cal.App.4th at 114.)

9 The District's Master Plan requires that "[b]efore acquiring land or land rights, the District
10 will prepare an Acquisition Evaluation for the proposed land, based on the best available
11 information, to determine its consistency with the Master Plan and its suitability as an addition to the
12 District's park and trail system." (1 AR 132.) This "comprehensive Acquisition Evaluation . . .
13 includes compliance with the Regional Parkland and Trail Map, a property boundary determination,
14 a preliminary resource evaluation, including recreational potential, and an estimate of acquisition,
15 development and annual operating costs over a five-year period." (*Id.*)

16 The District never prepared this required Acquisition Evaluation. Nowhere in the
17 administrative record does an Acquisition Evaluation appear, and when asked, the District could not
18 provide it.

19 All the District prepared was a six-page agenda item summary and the three-page resolution
20 of necessity. (1 AR 27-35.) While the agenda item summary does mention compliance with the
21 Regional Parkland Map, it does not include a resource evaluation and only estimates the costs of
22 acquisition without addressing costs of development and annual operations over a five-year period.
23 (*Id.*) The District's failure to follow its own precondemnation procedure is an abuse of discretion
24 that voids its right to take the property.

25 **F. The District Was Irrevocably Committed To Condemnation**

26 The District abused its discretion when it adopted the resolution of necessity. The take was
27 predetermined and the District was irrevocably committed to the take regardless of the evidence
28 presented at the hearing on the resolution of necessity. Thus, Court should invalidate the underlying

1 resolution of necessity and rule that the District has no right to take the property.

2 A condemnor commits a gross abuse of discretion if it was irrevocably committed to the take
3 of property regardless of the evidence presented at the hearing on the resolution of necessity.

4 (*Redevelopment Agency v. Norm's Slauson* (1985)173 Cal.App.3d 1121.)

5 In *Norm's Slauson, supra*, 173 Cal.App.3d 1121, the court invalidated the resolution of
6 necessity because the condemnor was irrevocably committed to the take regardless of the evidence
7 presented. It involved the condemnation of property for a redevelopment project. Bond funds were
8 committed to the project and the construction contract was in place before the hearing on the
9 resolution of necessity. The court noted that an agency, when arriving at its decision to take at the
10 resolution of necessity hearing, must "engage in a good faith and judicious consideration of the pros
11 and cons of the issue" and the decision to take "must be buttressed by substantial evidence of the
12 existence of the three basic requirements set forth in Code of Civil Procedure, section 1240.030."

13 (*Norm's Slauson*, 173 Cal.App.3d at 1125-1126.) The court determined that the condemnor's
14 irrevocable commitment prior to the hearing was a gross abuse of discretion, and therefore, "the
15 effect of that abuse was, if not to nullify, to deprive the resolution of any conclusive effect on the
16 three critical issues involved." (*Id.*)

17 Here, the District had similarly made up its mind about whether and how to condemn the
18 property prior to the resolution of necessity hearing. The President of the District's board announced
19 as much at the hearing:

20 [T]he one consistent position is the park district has taken is the San Francisco Bay
21 Trail needs to be in this location, and I've seen enough San Francisco Bay Trail
22 discussions to know that this trail to be is going to be a beauty.

23 (1 AR 82.)

24 The San Francisco Bay Trail does not run along the shoreline at every point. It goes inland,
25 for instance, to bypass Point Pinole and Point Molate, and does not run along the shore for much of
26 its trip through Richmond and El Cerrito. (1 AR 176.) But the District has already decided where it
27 will be at Golden Gate Fields. The Bay Trail has already been placed along the shore on either side
28 of plaintiff's property, leaving only a short gap. (*Id.*) Having already laid down the Bay Trail to the
immediate north and south of Golden Gate Fields, it strains credulity to believe that the District had

1 not yet decided whether it would go through Golden Gate Fields. (See 1 AR 42, "The trail is now
2 complete from Gilman Street south . . . and from Buchanan Street north".)

3 The District's statements over the years show that it had already made up its mind about
4 where the trail would be. For many years the District had attempted to place the trail on the shore at
5 Golden Gate Fields by acquiring a license from the owners. (1 AR 195.) In March 2006, the
6 District contracted with Questa Engineering to design a Bay Trail connection across Golden Gate
7 Fields. (2 AR 344.) At no point did the District ask Questa Engineering to develop any alternatives
8 that did not cut through Golden Gate Fields.

9 Because the District had already decided to run the Bay Trail through Golden Gate Fields
10 prior to the hearing, the adoption of the resolution of necessity is an abuse of discretion and should
11 be voided.

12 CONCLUSION

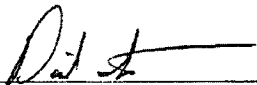
13 The District violated CEQA by approving the project without first reviewing its
14 environmental effects. Contrary to the District's claim, the project is not exempt from CEQA.

15 The District also failed to comply with California's Eminent Domain Law. Having already
16 irrevocably committed itself to taking Golden Gate's property, the District adopted the resolution of
17 necessity without following its own procedural requirements, without making necessary findings,
18 and without supporting the findings it did make with substantial evidence.

19 For the foregoing reasons, Golden Gate asks that the Court set aside the District's resolution
20 of necessity and enjoin it from taking any further action on the project until it first reviews the
21 project's environmental effects in compliance with CEQA, follows its own procedural requirements,
22 and complies with the eminent domain law.

23 Dated: 12/19/2011

BRISCOE IVESTER & BAZEL LLP

24 By: 
25 David Ivester
26 Attorneys for Petitioners
27 GOLDEN GATE LAND HOLDINGS LLC

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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco, and my business address is 155 Sansome Street, Suite 700, San Francisco, California 94104.

On December 19, 2011, at San Francisco, California, I served the attached document(s):

GOLDEN GATE'S MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDATE

on the following parties:

Mr. Todd A. Amspoker
Price, Postel & Parma LLP
200 E. Carrillo Street, Suite 400
Santa Barbara, CA 93101
Facsimile: (805) 965-3978
Email: tampoker@ppplaw.com

*Attorney for Respondent and Defendant
East Bay Regional Park District*

BY OVERNIGHT DELIVERY: On the date written above, I delivered the Federal Express package to a location authorized by Federal Express to receive documents for pickup. The package was placed in a sealed envelope or package designated by Federal Express with delivery fees paid or provided for, addressed to the persons on whom it is to be served at the addresses shown above.

BY E-MAIL OR ELECTRONIC TRANSMISSION: On the date written above, I e-mailed the documents to the persons on the service list at the e-mail addresses listed above. I did not receive, within a reasonable time after transmission, any electronic message or other indication that transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on December 19, 2011, at San Francisco, California.



Margaret Howlett