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Albany Waterfront Committee
c/o Ms. Ann Chaney,
Community Development Director
City of Albany
1000 San Pablo Avenue
Albany, California 94706

CITY OF ALBANY

AUG 18 2009

**COMMUNITY DEVELOPMENT
DEPARTMENT**

RE: Ownership of Albany Beach.

Dear Ms. Chaney and Committee Members:

At your meeting on July 27, 2009, city staff was asked to report regarding who owns the Albany beach. I hope the following will be helpful to you in obtaining an authoritative answer to that question:

- ▶ On Wednesday, July 29, 2009, I went to the office of the Alameda County Assessor and spoke with Mr. John Thomson, a mapping supervisor (tele: 510.208-4878). We tried to identify a parcel number for the Albany beach, but it appeared there is no Alameda County parcel number for this real property. Because there is no parcel number, *the Assessor's office could not tell me the owner.*
- ▶ When the mapping supervisor used his computer for site orientation by overlaying assessor-lot lines onto images of the physical features at the Albany waterfront such as the beach and Buchanan Avenue, it became clear that while the beach itself is not privately (hence publically) owned, the western boundary line of the adjoining private property immediately to the east of the beach (e.g., the area of the northern parking lot) appeared to come almost to the water's edge. In other words, it appeared the dune area may be privately owned, so one should not just assume the western boundary of the private ownership is where the northern parking lot's pavement currently ends.

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In light of the foregoing, the issues are: (1) what public entity owns the Albany beach and the submerged land within the Albany cove; (2) how extensive is the publically owned beach area; and (3) is the dune area subject to "tidal action" so as to be still burdened by the sovereign public trust no matter who owns it?

- ▶ The Albany beach is not a natural geologic formation, but is an artificial building. Judging by lot lines depicted on the Assessor's maps (e.g., see Assessor Map 66-2680, which cites "Map No. 4, Salt Marsh and Tide Lands [Sale Map No. 11]"), much of the racetrack's northern parking lot as well as the Albany beach area was not *originally* upland (hence part of the Peralta rancho granted into private ownership by the King of Spain), but was submerged land, tideland or perhaps tidal salt marsh located below the "mean high water mark" of the San Francisco Bay (therefore *originally* publically owned as does a sovereign when, under federal law, legal title to this public domain devolved to the State of California upon entry into the Union in 1850).

- ▶ Beginning in 1870, specified lands laying under the waters of the San Francisco Bay (e.g., certain salt marsh, tide and submerged lands located below the mean high water mark "to a depth of nine feet at extreme low tide, within five statute miles of the exterior boundaries of [the City and County of San Francisco]")¹ were surveyed and subdivided into parcels of real property (e.g., "tideland lots"). Beginning in about 1872 *some* of these lots were sold by the State's Board of Tide Land Commissioners into private ownership as a means of raising "gold dollars" to endow the University of California.²

1

California Statutes 1870, Chapter CCCLXXXVIII, Sections 1-3, pages 541-542. (A copy of this is legislation is attached for your convenience.)

2

See Stats. 1870, Chapter CCCCLX, sections 1 & 2. (A copy of this legislation is attached for your convenience.)

- ▶ At some point, a former owner of the parcels of land upon which the racetrack operates (presumably Santa Fe Land Improvement Company) consolidated the ownership of *all privately owned* salt-marsh, tide land and submerged “lots” within the Cities of Albany and Berkeley (and maybe Richmond and Emeryville too), together with the original upland parcel(s) known as Fleming Point, formerly part of the Peralta grant known as the Rancho San Antonio. In due course some of these salt-marsh, tideland and submerged-land lots came to be dyked against the bay waters and covered with landfill, thus working to eliminate “tidal action” on the upland thereby artificially created (e.g., the north parking lot; the freeways, the Brickyard and Meadow in Berkeley). Consequently, the State’s sovereign public trust, inherited by operation of law upon American lands overflowed by navigable waters, no longer burdens such artificially created upland (and this is presumably true whether any such artificial upland is now privately or publically owned)³.

- ▶ ***Critical to the questions at hand:*** It is important to understand that the mere fact salt-marsh, tide or submerged lands were surveyed and plotted on an official map by the Board of Tide Land Commissioners in the 19th Century, thus accounting for depiction of lot lines on parcel maps of the Alameda County Assessor, does not necessarily mean all such legally described parcels were sold into private ownership. Although legally described and plotted, some parcels may never have been sold. Such parcels could simply have remained unsold in public ownership as part of the public domain.

- ▶ This distinction between a parcel’s legal description and it’s sale into private ownership is important because in 1919 the State of California granted in trust to the City of Albany *all* it’s tideland and submerged land lying within

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See *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 534-536. The sovereign public trust still burdens salt-marsh, tide- and submerged-land “lots,” whether in public or private ownership, that are still subject to tidal action, that is , overflowed by bay waters up to the “mean high water mark.”

then-current city boundaries.⁴ Obviously, the State could convey in trust only lands it still owned. Title to lands previously sold by the Board of Tide Land Commissioners, being no longer publically owned, could not have been conveyed in trust to the City of Albany by this 1919 legislation. But legal title to plotted tideland and submerged-land lots *that had not yet been sold out of the public domain* by the effective date of this trust grant would have passed to the City of Albany in trust. Under the foregoing circumstances the City of Albany, not the State of California, owns the Albany beach and cove as trustees for the people of California.

- ▶ Another possibility is that at some point *after* the 1919 trust grant, the State of California reacquired legal title to salt-marsh, tide or submerged land that had been either previously sold into private ownership, or conveyed to the City of Albany in trust, upon which the Albany beach and/or cove are located. Some such event must have happen for the State to currently own any tide or submerged lands within Albany's 1919 city limits.⁵ Conceivably title may have been reacquired by the State when lands for the Eastshore State Park were bought from Santa Fe Land Improvement Company 10 or so years ago. But if that had happened, would not the Albany beach and cove be known publically as part of the Eastshore State Park, rather than being depicted rather generically as owned by the "State of California" on maps used by the Voices to Vision planning study?

As lead agency in the Shared Vision planning study, you should be able to obtain an opinion letter regarding current ownership of lands upon which the Albany

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The State in conveyed in trust to the City of Albany *all the right, title and interest* it then held by *virtue of state sovereignty* in "all tidelands and submerged lands, whether filled or unfilled" within city boundaries. (See Stats. 1919, ch. 211, pp. 310-311, which sets forth the terms of trust, a copy of which is attached to this letter.)

5

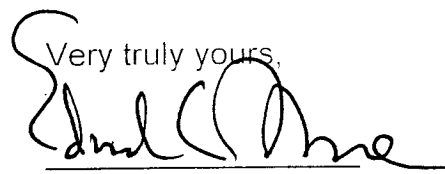
I checked recently and waterfront trust granted to the City of Albany has not been modified or repealed or judicially construed since 1919.

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beach and cove are constructed. The opinion letter would presumably be forthcoming from whatever State agency has the maps and records of sale of the Board of Tideland Commissioners, which would show whether or not bay lands upon which the beach and cove are now built were ever sold into private ownership. As legal counsel for State agencies, the Attorney General's Office would get involved too. The best approach might be to for your City Attorney to telephone the Assistant Attorney General who shepards State land-use issues about how best to expedite obtaining a written legal opinion regarding the ownership and boundary location. Answering the "tidal action" issue (see ante, p. 2, 1st par.) will be more complicated and there is little need for an answer now.

I hope you find this letter and it's attachments of assistance in determining authoritatively who owns the Albany beach and cove; the boundary vis-a-vis existing physical features; and the terms of ownership.

A frequently forgotten commonplace is that it has been through an intimate intercourse between public and private interests that the Waterfront in Albany and Berkeley has been enabled to evolve into the place power it has become. It is in essence an engineered configuration that so far -- *consistent with the highest of public trust purposes* -- successfully mirrors the Spirit of this place to harbor *for us* various presences of an intangible nature. These presences come and go depending upon who is looking. They are known by different names depending upon who is speaking. The world is full of such very special power places, although ours is a late comer in human development and -- thankfully -- is among the most non-sectarian and egalitarian of all. Successful intercourse requires that boundaries be both respected and at times ignored. With all due respect, you need to know with confidence who owns what at the Waterfront.

Very truly yours,

EDWARD C. MOORE

Cc: Fern Tiger Associates

charge, all wharves, docks, piers, slips, quays and other improvements constructed on said lands, or any part thereof, for any vessel or other water craft, or railroad, owned or operated by the State of California.

(c) That in the management, conduct or operation of said harbor, or of any of the utilities, structures or appliances mentioned in paragraph (a), no discrimination in rates, tolls, or charges or in facilities for any use or service in connection therewith shall ever be made, authorized or permitted by said city or its successors.

(d) There is hereby reserved, however, in the people of the State of California the absolute right to fish in all the waters of said harbor, with the right of convenient access to said waters over said land for said purpose.

Conditions
of grant.

CHAPTER 211.

An act granting certain tidelands and submerged lands of the State of California to the city of Albany, and regulating the management, use and control thereof.

[Approved May 6, 1919. In effect July 22, 1919.]

The people of the State of California do enact as follows:

Tidelands
granted to
city of
Albany.

SECTION 1. There is hereby granted to the city of Albany, a municipal corporation of the State of California, and to its successors, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty in and to all tidelands and submerged lands, whether filled or unfilled, which are included within the present boundaries of the city of Albany, to be forever held by said city and by its successors in trust for the use and purposes, and upon the express conditions following, to wit:

(a) That said lands shall be used by said city and its successors, only for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays, and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said city or its successors shall not, at any time, grant, convey, give or alien said lands or any part thereof to any individual, firm or corporation, for any purposes whatever; *provided*, that said city or its successors may grant franchises thereon, for limited periods, but in no event exceeding fifty years for wharves and other public uses and purposes, and may lease said lands or any part thereof for limited periods, but in no event exceeding fifty years, for the purposes consistent with the trusts upon which said lands are held by the State of California, and with the requirements of commerce or navigation at said harbor.

(b) That said harbor shall be improved by said city without expense to the state, and shall always remain a public harbor for all purposes of commerce and navigation, and the State of California shall have at all times the right to use, without

Conditions
of grant.

CHAPTER CCCCLX.

An Act for the endowment of the University of California.

[Approved April 2, 1870.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Treasurer of State shall place to the credit of the University Fund so much of any moneys that may be received by him from the net proceeds of sale of any salt marsh and tide lands lying in and around the Bay of San Francisco, belonging to the State of California, as, being invested in the bonds of said State, or of the United States, shall yield an annual income of fifty thousand dollars (\$50,000).

SEC. 2. Said moneys shall be a fund, the capital of which shall remain undiminished, and the interest of which shall be inviolably applied to the support of the University of California; *provided*, that if, at any time, the income accruing to the University from the fund created by this Act, and the net income derived from all other sources, shall together exceed an average for the preceding years, reckoning from the date of the passage of this Act, of fifty thousand dollars per annum, then the excess above said average of fifty thousand dollars per annum shall be paid into the Common School Fund of the State.

SEC. 3. Whenever the sum paid into the University Fund, from the proceeds of the sale of salt marsh and tide lands, as directed in section one, shall amount to fifty thousand dollars, net proceeds, it shall be the duty of the Treasurer to advertise, in two daily newspapers published in English, in each of the Cities of San Francisco and Sacramento, for sealed proposals for the surrender of any of the civil bonds of the State of California, or of any gold-bearing bonds of the United States. He shall state in such advertisement the amount of money on hand applicable to the purchase of bonds, and be shall accept such proposals as will yield the greatest amount of annual interest in gold coin of the United States.

SEC. 4. All bonds thus purchased shall be indorsed "University Fund," and shall be held by the Treasurer of State, who shall collect the interest thereon, which interest, when collected, shall be paid into the University Fund to the extent provided for in section two of this Act, and paid out therefrom, semi-annually, to the Regents of the University, upon their order, to be by them expended for University purposes; *provided*, no portion of said interest so received shall be used for the erection or purchase of buildings nor for the purchase of lands.

SEC. 5. Whenever the principal of any of the bonds indorsed "University Fund," in the hands of the Treasurer, shall be paid, the amount so paid shall be reinvested in like manner as is provided for in section three.

University
Fund.

Excess of
income.

Purchase of
bonds.

Interest,
how applied.

Reinvested.

CHAPTER CXXXVIII.

An Act supplementary to, and amendatory of, an Act entitled an Act to survey and dispose of certain marsh and tide lands belonging to the State of California, approved March thirtieth, eighteen hundred and sixty-eight.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Board of Tide Land Commissioners shall have the charge and disposition of all the salt marsh and tide lands lying under water belonging to the State of California, and situate in the City and County of San Francisco, and all the salt marsh and tide lands, to nine feet of water at extreme low tide, within five statute miles of the exterior boundaries of said city and county, as fixed and established in section one (1) of an amendatory and supplementary Act, approved April eighteenth, eighteen hundred and fifty-seven; provided, that nothing herein contained shall give said Commissioners any control over the lands heretofore granted to the City of Oakland.

Sec. 2. Said Commissioners shall have the said lands lying outside the boundary lines of said county and within five miles thereof, as aforesaid, surveyed to a depth of nine feet of water at the lowest stage of the tide, and subdivided into lots of not more than twenty acres or into lots of not less than fifty feet front by one hundred feet deep, as in the judgment of said Tide Land Commissioners, approved by the State Board, may seem fit for the best interests of the State; and the Commissioners shall locate, declare, lay down and establish a canal six hundred feet in width, along and adjoining the southern boundary line of the City and County of San Francisco, extending from the shore line of the Bay of San Francisco to Ships' Channel, in said bay; also, a canal of like width extending from the mouth of Guadalupe Creek, in the County of San Mateo, in a due east course to the Ships' Channel, and said Commissioners shall have power to locate and establish canals and basins upon the marsh and tide lands lying outside of the exterior boundaries of the County of San Francisco, mentioned in section one of this Act, whenever they deem them necessary for the purposes of drainage, navigation and the wants of commerce; and shall cause to be prepared the necessary maps, exhibiting the property as surveyed, the number, area, and location of each subdivision or lot, and all other matters proper and necessary to be shown thereon. The Commissioners shall file certified copies of said maps with the Surveyor-General of the State and with the Recorder of the City and County of San Francisco, retaining the original field notes and maps of said survey in their office at San Francisco.

Sec. 3. After the Commissioners shall have complied with the provisions of section two, they shall proceed to sell at public auction, to the highest bidder, on the following terms: Cash, in gold coin, twenty-five per cent., payable on the day of

sale to the Commissioners; and seventy-five per cent. payable twenty-five per cent. in one year, twenty-five per cent. in two years, and twenty-five per cent. in three years, thereafter, to the State Treasurer, at Sacramento. The Commissioners shall receipt to each purchaser for the amount of his payment of twenty-five per cent, stipulating that if the remaining seventy-five per cent. of the purchase money shall be paid in three equal parts—in one, two and three years thereafter, together with legal interest, to the State Treasurer, at Sacramento, he shall receive a deed from the State of California for the property purchased by him. Such sale shall be by lots, in accordance with the maps provided for in section two of this Act, and on the same terms as provided for in the sale of salt marsh and tide lands, in the Act of which this is amendatory and supplementary to; and the Commissioners shall appoint proper and competent auctioneers to sell said lands, and their compensation shall be one per cent. on the gross amount of sales of all lands outside of the exterior boundaries of said City and County of San Francisco, and one-half of one per cent. on the gross amount of sales of all lands within the boundaries of said City and County of San Francisco, and such sales shall be made in some public place in the city and county aforesaid.

Compen-
sation of
auctioneers.

State Board.

SEC. 4. The State Board, under this Act, shall consist of the Governor of the State, Surveyor-General of the State and the Controller of State, who shall have power to make all rules for the sales; and before such sales shall be deemed complete, shall be approved by said State Board. Such approvals to be made within sixty days after the report of such sales be filed with the State Board.

Commis-
sioners may
compromise.

SEC. 5. The Commissioners, or a majority of them, shall have the power to compromise with any adverse claimants to any portion or portions of lands mentioned in this Act, whenever and on such terms as they may deem it most conducive to the interests of the State; all such compromises to be approved by and with the consent of the State Board and by the advice of the Attorney-General of the State; *provided*, that all such compromises shall be made and in all respects completed, and the money paid, within eighteen months from the passage of this Act, and not afterwards.

Expenses.

SEC. 6. All salaries, bills and accounts for expenses incurred in enforcing this Act, shall be approved by the State Board; after they shall have been approved, the Secretary of the Commissioners shall certify the approval of the same to the Controller of State, who thereupon shall draw his warrants upon the General Fund for the separate amounts of such salaries, bills or accounts, in favor of the parties to whom it is due. The Secretary of the Board of Tide Land Commissioners shall receive, as compensation for his services as Secretary of said Board, the sum of two hundred dollars per month, payable out of the General Fund.

Salary of
Secretary.

Costs of
deeds.

SEC. 7. The costs and expenses of all deeds required to be made under the provisions of this Act, for the conveyance of such lands purchased by any persons, shall be paid by the purchasers at such sales, not to exceed five dollars for each and every conveyance so required to be made by said Commissioners.

SEC. 8. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

SEC. 9. This Act shall take effect and be in force from and after its passage.