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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SAN FRANCISCO**

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13 Neighbors to Preserve the Waterfront;
14 Friends of Golden Gateway; Telegraph Hill
15 Dwellers; San Franciscans for Reasonable
16 Growth; Golden Gateway Tenants Association;
17 San Francisco Neighborhood Network;
18 Barbary Coast Neighborhood Association;
19 Russian Hill Neighbors; Middle Polk
20 Neighborhood Association; Dolores Heights
21 Improvement Club; Sunset Parkside Education
22 Action Committee; Affordable Housing
23 Alliance; San Francisco Tenants Union; *et al.*

24 Petitioners,

25 v.

26 City and County of San Francisco, *et al.*;

27 Respondents,
28 _____/

29 San Francisco Waterfront Partners II, LLC;
30 *et al.*;

31 Real Parties in Interest.
32 _____/

Case No. CPF-10-510634

**Petitioners' Opening Brief
in support of
Petition for Writ of Mandamus**

Hearing Date: July 13, 2011
Time: 9:30 a.m.
Dept: 613

Honorable Ernest H. Goldsmith

1 **Introduction**

2 **As a former Supervisor and Mayor, I have had a long history with the**
3 **redevelopment area at Washington and Drumm Streets and concur [that]**
4 **this space was intended for recreation and open space. Please oppose**
5 **further development ... (AR3:1189 [Senator Dianne Feinstein].)**

6 San Francisco’s spectacular, bustling eastern waterfront is both scenic and dynamic. Its
7 welcoming mix of unparalleled views, historic resources, diverse architecture, commercial
8 development, offices, residences, open space, retail, restaurants, public art, and recreation
9 engages thousands of bay area residents daily and delights visitors from around the world.

10 This case challenges the City’s noncompliance with the mandates of state law in planning
11 new development on the west side of The Embarcadero. An unprecedented citywide coalition of
12 twelve public-interest groups seeks the Court’s peremptory writ, including Neighbors to
13 Preserve the Waterfront, Friends of Golden Gateway, Telegraph Hill Dwellers, San Franciscans
14 for Reasonable Growth, Golden Gateway Tenants Association, San Francisco Neighborhood
15 Network, Barbary Coast Neighborhood Association, Russian Hill Neighbors, Middle Polk
16 Neighborhood Association, Dolores Heights Improvement Club, Sunset Parkside Education
17 Action Alliance, and San Francisco Tenants Union, representing many thousands of San
18 Franciscans concerned about the City’s violations of the California Environmental Quality Act.

19 At issue is a high-end condominium project known as “8 Washington” based on its
20 location on Washington Street on the west side of The Embarcadero. The widely-opposed
21 project would destroy much-loved recreational uses at the outdoor pools and tennis courts of the
22 Golden Gateway Tennis and Swim Club, while its high-rise buildings would destroy open space
23 and block views from the Ferry Building and The Embarcadero to Telegraph Hill. Other
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1 environmental concerns involve public trust restrictions, aesthetics, shadows, transportation, air
2 quality, cultural resources, and tidal influences.

3
4 The problematic 8 Washington project has been pending for many years. Preparation of
5 an Environmental Impact Report began in 2004.¹ The legal issues before the Court spring from
6 the City’s actions to put the EIR on hold for two years while waterfront development guidelines
7 were amended to significantly increase the building heights allowed on the project site.

8
9 Specifically to facilitate the 8 Washington project, City and Port staff collaborated on a
10 “Study” outside of any CEQA process, intended to “guide the development of properties along
11 the west side of the Embarcadero” and to “establish guidelines” for design and massing of
12 development. City residents that attended community meetings on the Study railed against its
13 goal-oriented bias to facilitate 8 Washington’s high-rises and reduce open space and recreation.
14

15 The Northeast Embarcadero Study made general recommendations for the waterfront and
16 very specific recommendations directed at only one site: 8 Washington. In July 2010, a close [4-
17 3] vote of the San Francisco Planning Commission formally “recognize[d] the design principles
18 and recommendations of the [Study] for public realm improvements and new development in
19 the area” and “urged” the Port of San Francisco to apply them. The Commission declined
20 requests that the Study should be reviewed *without* “urging” the Port to apply its guidelines.
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23 Following completion of the Study, the 8 Washington developers revised their project to
24 expand to the increased heights endorsed by the Study and negotiated a detailed project “term
25 sheet” with the Port Commission in September 2010. The 8 Washington project Draft EIR that
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28 ¹ Facts referenced in the Introduction are cited to the record *post*.

1 had been put on hold since 2008 was resuscitated for the revised project. It remains pending.

2 Why was the Northeast Embarcadero Study not made part of the 8 Washington EIR that
3 was already in process in 2008? As pointed out to the Planning and Port Commissions,
4 endorsement of the Study and approval of the term sheet will have environmental consequences
5 that must first be analyzed within a public CEQA process.
6

7 CEQA applies to any discretionary government action that may have significant
8 environmental impact. Its processes must be scrupulously followed early enough in project
9 planning to avoid *post hoc* rationalization of decisions already made. The California Supreme
10 Court recently held that agency action is illegally premature when it moves a project's
11 momentum significantly forward without first complying with CEQA — even if the action is
12 short of a formally-binding approval and even if made contingent on future CEQA compliance.
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15 The City's actions relative to the Northeast Embarcadero Study were essential steps in
16 the 8 Washington project, akin to amending a specific plan or a zoning regulation that facilitates
17 new development. Absent a CEQA process that considers its environmental impacts and
18 alternatives, the Study unfairly dictates the shape of the 8 Washington project. The detailed term
19 sheet goes even further. Together, the Study and term sheet create momentum at 8 Washington
20 that precludes meaningful consideration of alternatives. Such pre-commitment is not undone by
21 Commissioners' recitations of careful wording to the contrary provided by the City attorneys.
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24 A peremptory writ of mandate should now issue to (1) order the Planning Commission to
25 rescind its actions to endorse and implement the Northeast Embarcadero Study; (2) order the
26 Port Commission to rescind its approval of the term sheet for the 8 Washington project, and
27 (3) require City decision-makers to refrain from further implementation of the Study and its
28

1 guidelines in waterfront planning processes, and to refrain from further actions to approve the 8
2 Washington project, pending completion of CEQA review. Petitioners also seek declaratory
3 relief to prevent the City from taking similar actions in processing future projects.
4

5 The Court's writ is of critical importance to the development of private and public trust
6 properties on the waterfront and to the ongoing implementation of CEQA in San Francisco.
7

8 **Statement of Facts**

9
10 **Driving along the palm-lined Embarcadero, with piers to one side and a**
11 **view of San Francisco's hills on the other and then — wham, a huge**
12 **chunky condo building right on the waterfront ... I cannot imagine that a**
13 **planning department looking out for the greatness of San Francisco could**
14 **possibly approve such a thing. There are multiple other locations for**
15 **condos ... and it would be a true shame to get rid of the open recreational**
16 **space offered by the Golden Gateway Tennis and Swim Club. I cannot think**
17 **of anything like it in other great cities. It has long been a very important**
18 **part of the lives of a great many city residents. (AR4:2048.)**

19 ***Golden Gateway Tennis and Swim Club History.*** The Golden Gateway Tennis and
20 Swim Club was built in the 1960's as part of the Golden Gateway project. (AR5:2355.) It
21 includes nine tennis courts and the only year-round outdoor swimming pools in the City. (*See*
22 AR5:2144, 2250-2252, 2373-2368.) In 1994, then-mayor Dianne Feinstein urged the City
23 Redevelopment Agency to reject a then-pending plan to build condominiums on the site:

24 To tear up the present tennis courts in order to crowd a condominium tower would be
25 regrettable. The Golden Gateway building plan, after all, was chosen over eight others in
26 an international design competition and the provision of open space was an important
27 factor in that selection. Further, the tower would shadow much of the area ... and block
28 views [of many who] presumed the open space would never be violated. ... I would hope
the Commission will resist in every way possible this attempt to tamper with a world-

1 acclaimed plan and accomplishment ...

2
3 (AR3:1163.) Former Redevelopment Agency Deputy Director Robert Rumsey had agreed in
4 1990 that a “tower of condominiums on open and recreational space at Washington and Drumm
5 streets” should not be considered, because “the provision of that open and recreational space
6 was a significant factor in the selection of the [Golden Gateway project] and, clearly, the space
7 was presumed to be kept that way in perpetuity.” (AR3:1164.)
8

9
10 ***8 Washington Project/Seawall 351 Environmental Review Chronology.*** Adjacent
11 to the Golden Gateway Tennis and Swim Club, the Port’s Seawall 351 property “is one of the
12 development opportunities in San Francisco created by removal of the Embarcadero Freeway
13 after the 1989 earthquake.” (AR1:228.) The current surface parking lot on the Seawall 351 site
14 “reflects its location adjacent to the former freeway. (*Ibid.*)
15

16 Almost ten years ago, in 2002, an “environmental evaluation application” was prepared
17 for a project at 8 Washington Street, between Drumm Street and the Embarcadero. (AR1:60.)
18 The project entailed removal of the Club, including nine tennis courts, two pools, and three
19 structures, and construction of an 8-story building with 120 residential units, a new health club
20 with two swimming pools, and 170 parking spaces. Six new tennis courts were proposed. (*Ibid.*)
21
22

23 A negative declaration was proposed for the 8 Washington project but was appealed to
24 the Planning Commission by Friends of Golden Gateway based on a number of environmental
25 impacts and zoning violations. (AR1:60.) The Planning Commission upheld the negative
26 declaration but it was overturned by the Board of Supervisors in April 2004. (*Ibid.*)
27

28 Three and a half years later, in December 2007, project sponsor San Francisco Waterfront

1 Partners II filed a new environmental evaluation application for a project that would encompass
2 both the original site and the Port's Seawall 351 public trust lot in use as a parking lot.

3 (AR1:61.)² Although not a project co-sponsor, the Port authorized submittal of the application.
4

5 (*Ibid.*) Seawall 351 is in a Public (P) zoning district and is part of the Ferry Building Mixed Use
6 Opportunity Area of the Waterfront Land Use Plan. The Plan was prepared in response to a
7 1990 citizen's ballot initiative. (AR1:65, 261; 967.) Acceptable land uses for Seawall 351 must
8 be consistent with the public trust and the purposes of the Waterfront Land Use Plan. (*Id.* at 65.)
9

10 The CEQA Initial Study prepared in December 2007 found that "the proposed residential
11 use" of Seawall 351 for the 8 Washington project "*is not consistent with the public trust.*"

12 (AR1:65, italics added.) To proceed would require either an act of the Legislature or the
13 authorization of the State Lands Commission to exchange a portion of Seawall 351 for non-trust
14 property. (*Ibid.*) The revised 2007 project increased the level of development to 170
15 condominiums and more than 500 underground parking places. Two primarily residential
16 buildings were proposed at eight stories (84 feet). (AR1:66.) The Golden Gateway Tennis and
17 Swim Club facility would be removed and replaced with smaller facilities. (AR1:66, 67-84.)
18
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20 The CEQA Environmental Checklist accompanying the December 2007 Initial Study was
21 significantly detailed. (AR1:99-176.) The conclusion was that a project EIR was required due to
22 significant environmental impacts. (AR1:99,176.)
23

24 A memorandum to the Port Commission from Port Executive Director Monique A.
25

26 ² The record shows that the combined 8 Washington and Seawall 351 project had already
27 been pending awhile; public comments regarding widespread opposition to the proposal were
28 transcribed from meetings at the Port Commission beginning in April 2006. (AR1:285-300.)

1 Moyer in February 2008 discussed the “unsolicited development proposal” from San
2 Francisco Waterfront Partners II regarding the mixed-use condominium development at 8
3 Washington. Director Moyer explained that the project “includes Port-owned Seawall Lot 351,
4 located at Washington Street and the Embarcadero,” along with adjacent private property.
5 (AR1:225.) Director Moyer explained to the Port Commission that “with the Port’s
6 authorization,” the 8 Washington developers had already begun the project EIR process led by
7 the City Planning Department, and received comments on the Notice of Preparation in January
8 2008. (AR1:230.) Alternatives expected to be addressed in the EIR included the required “no
9 project” alternative, a reduced project alternative, an alternative that assumes “that the public
10 trust is not removed from [Seawall] 351,” and an “option that assumes that 351 and the 8
11 Washington site are developed independently.” (*Ibid.*) Director Moyer noted that there was
12 already significant community concern about the project and that an alternate development
13 proposal had been offered by Friends of Golden Gateway. (*Ibid.*; AR252-256.)

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18 The Draft EIR for the 8 Washington project was anticipated to be published “in Summer
19 2008 with Planning Commission hearings and policy actions in Fall 2008.” (AR1:230.) Minutes
20 of a Port Commission meeting in February 2008 note that “we’re in a somewhat different place
21 than most projects because the CEQA process is underway ... Many of the impacts will be
22 analyzed and we’ve given permission for the CEQA to go forward.” (AR2:769.) “By early
23 summer we will have a draft EIR ... that will help in policy making.” (*Ibid.*) Port staff then
24 created a project website and held meetings with concerned community members and with the
25 Northeast Waterfront Advisory Group in April 2008. “*Strong concerns were expressed about*
26 *any development other than open space on the [Seawall 351] site by most of the attendees.*”
27
28

1 (AR1:267, italics added.)

2 Many questioned why the Port was considering this site at this time and how this
3 consideration relates to the proposed 8 Washington Project involving the Club site.
4 *Specifically, people questioned why this was being considered prior to action on an*
5 *Environmental Impact Report on the project ... Height was the predominant concern*
6 *expressed about development of this site. Very strong concerns were expressed regarding*
7 *the existing 84-foot height limit being out of scale and blocking views. After ‘no*
8 *development’ the most common suggestion was 3 to 4 stories ... Discussion on the view*
9 *from the Ferry Building and the Embarcadero up to Coit Tower and Telegraph Hill*
10 *included concern that a building on this site would block that connection.*

11 (AR1:301, italics added.)

12
13 Draft design and development objectives for Seawall 351 were discussed in May 2008.

14 (AR1:208.) Director Moyer requested authorization from the Port Commission to issue a
15 Request for Proposals (RFP) for development of Seawall 351. (AR1:318.) The process for
16 selection of a project was to include staff recommendation of a developer to the Commission,
17 selection of a developer, and negotiation of an Exclusive Negotiation Agreement “to be utilized”
18 while “environmental review of the project is being conducted.” (AR1:321.) Following
19 completion of environmental review, “the Port Commission would consider the development
20 agreement, lease and related documents. The lease will also be subject to approval by the San
21 Francisco Board of Supervisors.” (*Ibid.*) There was no mention of a term sheet.

22
23
24 In July 2008, the Port commission authorized its staff to prepare and issue the RFP and
25 manage the developer solicitation process. (AR1:325.) It acknowledged that “issuance of an
26 RFP does not commit the Port to proceeding with any development project, and the Port cannot
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1 approve a ground lease or development agreement for the project until after environmental
2 review has been completed in compliance with ... CEQA.” (AR1:324.) Design and development
3 objectives for Seawall 351 were made part of the authorization, and included preservation of the
4 admittedly “iconic vista” from the Ferry Building and Pier 1 to Coit Tower. (AR1:328.)

5
6 While the Seawall 351 RFP process proceeded, the pending Draft EIR for the 8
7 Washington project did not. Nothing in the record explains why.
8

9 ***Northeast Embarcadero Study.*** In January 2009, Port staff reported receipt of two
10 development proposals for Seawall 351, one of which was for the 8 Washington project and the
11 other a hotel/restaurant/parking project by Dhaval Panchal. (AR1:388-427.)
12

13 In February 2009, Port staff requested and received approval to enter into exclusive
14 negotiations for the 8 Washington project and to develop a term sheet. (AR1:438-442.) The
15 proposed project was to include a “complex land swap where portions of [Seawall] 351 would
16 be exchanged” for portions of the current Golden Gateway Tennis and Swim Club site and put
17 in public-serving open space or visitor-serving commercial use. (AR1:443.) The 8 Washington
18 developers assured Port staff that “*we are not requesting a height/bulk or zone change.*”
19 (AR1:481, italics added.)
20

21
22 In February 2009, Supervisor David Chiu told the Port Commissioners that he thought an
23 update to the Port’s Waterfront Plan was needed. (AR1:490-491.) He proposed a “focused
24 public planning process” to address pending development affecting the Port’s Seawall 351
25 property as well as “future development along the northern waterfront.” (AR1:490-491.)
26

27 Following President Chiu’s recommendation, the Port Commission funded the Northeast
28

1 Embarcadero Study that is the focus of this lawsuit. (AR:441; 2:602; 612) It took a year to
2 prepare, from May 2009 to May 2010. (AR1:5; 2:612.) Community meetings to discuss the
3 Study were held and public comments were solicited. (AR2:602; 604; 907-927;937-939; 941-
4 946.) The Study was not subjected to any CEQA review process. (AR2:606; 608-696.)

5
6 Space does not permit citation to relevant comments on the Study, addressing planning
7 considerations vis-à-vis recreation and open space, aesthetics and views, shadow impacts,
8 cultural resources including the historic ship buried on the Seawall site, and tidal influences, but
9 comments respectfully recommended for the Court’s review include AR1:461-474, 482;
10 AR2:941-946; AR3:975, 977-1048, 1433-1467; AR4:1756-1757,1760-1776; AR5:2013-2018,
11 2048-2010, 2055-2061, 2067, 2081, 2083-2084, 2087, 2088-2089, 2090-2093, 2018, 2110, 2114
12 -2116, 2120, 2131-2139, 2140-2143, 2144, 2150, 2156, 2162-2165, 2144, 2150, 2156, 2162-
13 2166, 2168, 2173, 2180-2196, 2200, 2203-2212, 2218, 2221-2234, 2241-2244, 2250-2252,
14 2258, 2262-2273, 2355, 2433, and 2437-2470.³

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18 The Study declared its intent to “*guide the development* of properties along the west side
19 of the Embarcadero, from Washington Street to North Point Street, in a common direction.”
20 (AR2:614, italics added.) City staff explained that “the guidelines developed as a result of the
21 study will be applied to any new development fronting The Embarcadero.” (AR2:569.) Further,
22

23
24 ³ While the record shows that most public input regarding the study and the 8
25 Washington project demonstrated significant opposition, it is undisputed that the record also
26 contains substantial comment from local businesses, design professionals, and some planning
27 and neighborhood organizations *in favor* of the Study recommendations, including the increased
28 heights for the 8 Washington buildings and removal of the Golden Gateway Tennis and Swim
Club. Such public controversy does not negate the arguments here presented, and is largely
irrelevant, but further underscores the importance of a full CEQA process before implementing
the Study guidelines as a basis for decisionmaking by City and Port officials.

1 the Study “can be used by the Port as a basis for actions to be taken on Port Seawall 351,
2 including any development agreements for the parcel.” (AR2:595.) Port staff was told to include
3 Study recommendations into any development agreement for 8 Washington. (*Ibid.*, footnote.)
4

5 Internal City documents reflect staff’s intent to direct the the Study to justify reduction in
6 open space and an increase in current building height limits, specifically as applied to pending
7 the 8 Washington project and Seawall 351. (AR: 3:1318; 1348; *see post* at 20-23.) Hundreds of
8 comments received on the Study were described as “strong and diverse, making the effort to
9 reach consensus impossible, particlarly for Port Seawall 351.” (AR2:602.)
10

11 The Study includes guidelines for “site design and massing” for new development.
12 (AR2:660-673.) It recommends building height increases along Washington and Drumm
13 Streets, solely affecting the 8 Washington project site, from 84 feet to 130 feet. (AR2:623; 662.)
14 Director Moyer told the Port Commission in July 2010 that the 8 Washington developer was
15 required to submit a new development plan responding to the Study recommendations.
16

17 (AR2:697.) Based on that proposal, the Port staff and developer planned to develop a term sheet
18

19 ... describing the basic elements of the Project, site plan, use program, economic
20 parameters, and fundamental terms that will serve as the basis for negotiating transaction
21 documents. *The project must receive endorsement from the Port Commission and the*
22 *Board of Supervisors prior to the Port moving forward with environmental review,*
23 *project design review, and negotiation of transaction documents.* Port staff anticipates
24 concluding negotiations on a term sheet by the end of summer 2010.

25 (AR2:697, italics added.)
26

27 ***Planning Commission Action.*** The Study was presented to the San Francisco Planning
28

1 Commission on July 8, 2010. (AR2:602-604; AR3:948-1115 [transcript].) Planning staff assured
2 the Commission that the city attorney had determined that its action would “not require an
3 environmental analysis in and of itself.” (AR3:1079-1080). The Commission was requested to
4 resolve that it “*recognizes* the design principles and recommendations of the Study for public
5 realm improvements and new development in the area” and “*urges* the Port of San Francisco to
6 consider the principles and recommendations proposed in the North Embarcadero Study when
7 considering proposals for new development in the study area and when considering public
8 infrastructure improvements in the area.” (AR1:1-3, italics added.)
9
10

11 Members of the public as well as the Commission pointed out that the Commission
12 majority’s action unlawfully occurred without any CEQA process because it endorsed
13 development guidelines with potentially significant environmental impacts. (AR3:1002,1092.)
14 The Commission was requested to simply receive the report, take no action, and continue the
15 matter. (AR3:1002; 1095; 1097; 1100; 1106; 1108, 1111-1112.) A pending alternate plan for the
16 site, prepared by Asian Neighborhood Design, was lauded by members of the public who
17 requested that the Commission’s consideration of the Study be delayed. (AR3:975-988.) Three
18 commissioners agreed. (AR3:1092-1112.)
19
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21 Commissioner Borden noted that the “only thing that seems to be in conflict is ... one
22 reference to potentially changing a zoning on a lot related to the seawall lot ... and we all know
23 that’s what ... has got people upset about it ...” (AR3:1080-1081.) Commissioner Sugaya was
24 concerned about CEQA compliance, noting that the impetus for the Study was the 8 Washington
25 project. (*Id.* at 1092.) Commissioner Moore focused on increasing maximum building heights to
26 accommodate 8 Washington: “this specific recommendation is hidden in this [Study]. And I
27
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1 think it stands out ... because it hasn't been properly done ... we shouldn't be moving ahead
2 with this.” (AR3:1110.)

3
4 The Commission majority refused to continue the hearing, proceeding on a 4-3 vote to
5 adopt the resolution as proposed. As advised by counsel, it stated that its action was neither a
6 project approval nor a commitment. (AR1:2-3, 3:1080-1081; 1112-1114.) No CEQA
7 determination was made and no administrative appeal was available. (AR1:1-3.)
8

9 ***Port Commission Action.*** Following the Planning Commission's endorsement of the
10 Study, the 8 Washington project application was amended to request a height limit increase from
11 eight stories [84 feet] to twelve stories [130 feet]. (AR1:6.) An application for a revised CEQA
12 process was also submitted. (AR3:1135.) A project term sheet for the 8 Washington project was
13 negotiated between the developer and port staff, setting forth “the economic parameters and
14 other fundamental terms, with a basis for negotiating further transaction documents, leases,
15 property transfer agreements, ...” (*Ibid.*)
16
17

18 The proposal reflected in the term sheet “is a swap of the public trust on certain
19 properties of Seawall 351 to certain portions of the Golden Gateway Tennis and Swim Club site
20 ... we're no longer looking at a lease payment, but we're looking essentially at a sale.”
21 (AR3:1135-1137.) The Port Commission approved the term sheet, repeating at various times in
22 rote fashion as advised by counsel that the term sheet was not contractually binding and that the
23 Commission would “revisit the project” following completion of CEQA review. (AR3:1159.)
24
25

26 This mandamus action was filed in August 2010. Publication of the 8 Washington EIR is
27 pending and no further project approvals have yet occurred to petitioners' knowledge.
28

1 **Issue Presented and Standard of Review**

2 **We do not need any more highrises that create dark, windy tunnels and**
3 **take away our sun. Having a community recreation center is critical ... I**
4 **implore you to keep this area green on The Embarcadero. (AR3:1001.)**

5 In deciding whether to issue a writ for violations of CEQA, the Court will decide whether
6 the Planning Commission or the Port Commission committed prejudicial abuses of discretion.
7 The sole issue is whether actions taken by the Commissions implementing the Northeast
8 Embarcadero Study and the 8 Washington Term Sheet required prior CEQA review. Whether
9 deferral of CEQA review was unlawful is a matter of procedure and presents an issue of law to
10 be reviewed without deference to the findings of the Planning Commission or Port Commission.
11 (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 627.)
12
13

14 **Discussion**

15 **I am in shock that we find a one man developer who wants to destroy a**
16 **neighborhood and open space for selfish development. The Golden**
17 **Gateway Tennis Club is the last bastion of open space ... (AR4:1760**
18 **[Joseph Blue, former Director of the Golden Gate Bridge District].)**

19 While petitioners are passionately concerned about the future of Seawall 351, held in
20 public trust, and related recreation, open space, and views, the merits of the 8 Washington
21 project are *not* before the Court. The question is whether the City violated CEQA when it put the
22 long-pending EIR process for the 8 Washington project on hold while the Planning Commission
23 adopted new guidelines for development of the site, including increasing the maximum building
24 heights from 8 to 12 stories, and when the Port then approved a detailed project term sheet.
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1 **A. Definition of “Project”**

2 Public Resources Code section 21065 defines a ‘project’ subject to CEQA review as any
3 activity that “may” cause a direct physical environmental impact or a “reasonably foreseeable
4 indirect physical change in the environment” and is either directly undertaken by a public
5 agency or requires an agency to issue a lease, permit, or other entitlement for use. A rezoning or
6 use permit for development is an easily-understood category of project.
7

8
9 The California Supreme Court has also ruled that advisory planning documents may be
10 CEQA projects. In *Muzzy Ranch Company v. Solano County Airport Land Use Commission*
11 (2007) 41 Cal.4th 372, the Travis Air Force Base Land Use Compatability Plan (TALUP) set
12 forth policies to ensure that future land uses in the vicinity of the airport would be compatible
13 with aircraft activity. The mandatory TALUP policies were required to be “reflected” in the
14 “land use instruments” adopted by entities having jurisdiction over nearby lands. (*Id.* at 379.)
15

16 The Airport Land Use Commission argued that the TALUP had no potential
17 environmental impacts because the actual land use decisions would be made by other public
18 entities that might not follow its advice. (*Id.* at 382.) The Supreme Court disagreed. Noting its
19 prior decision in *Fullerton Joint High School District v. State Board of Education* (1982) 32
20 Cal.3d 779, 797, when it found a school board’s preliminary decision to divide a school district
21 to be a project because it was “an essential step leading to potential environmental impacts,” the
22 Court emphasized that “CEQA does not speak of projects which *will* have a significant effect,
23 but those which *may* have such effect. [citation.]” (*Id.* at 383, italics in original.)
24
25

26
27 Environmental regulatory controls have also been identified as CEQA projects (*Plastic*
28 *Pipe and Fittings Ass’n v. California Building Standards Commission* (2004) 124 Cal.App.4th

1 1390), as are the adoption or amendment of zoning ordinances or general plans. (CEQA
2 Guidelines [14 Cal.Code Regs.] § 15378(a)(1).)

3 A CEQA project always encompasses “the whole of an action” that may be subject to
4 several discretionary approvals by public agencies; it does not mean each separate governmental
5 approval. (Guideline §§ 15378 (a) and (c).) Importantly, when a public agency may describe a
6 project either as the adoption of a regulation or as a development proposal that may require
7 several governmental approvals, it “shall describe the project as the development proposal for
8 the purpose of environmental analysis.” (*Id.* at subsection (c).)

11 **B. Timing of Environmental Review**

12 The purpose of CEQA is to inform the public and public officials of the environmental
13 consequences of decisions before they are made. (*Citizens of Goleta Valley v. Board of*
14 *Supervisors* (1990) 52 Cal.3d 553, 564.) Guideline section 15004 explains that EIRs “should be
15 prepared as early as feasible in the planning process to enable environmental considerations to
16 influence project project program and design and yet late enough to provide meaningful
17 information for environmental assessment.” Environmental review must be completed in time to
18 inform project “approval,” defined in the Guidelines as a decision committing a public agency to
19 a course of action, or, in the case of a private project, an agency commitment to issue a project
20 entitlement. (Guideline § 15352.)

21 The question of whether environmental review must at times be conducted before
22 something *less* than a binding project commitment has occurred has received much judicial
23 scrutiny. Over CEQA’s forty-year history, there have been many cases discussing the
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1 appropriate timing of environmental review. These are not here offered for discussion because
2 the California Supreme Court provided definitive analysis of the issue in 2008 with the
3 publication of *Save Tara*. In that case, the City of West Hollywood took a number of actions to
4 facilitate the development of 35 affordable housing units while demolishing a portion of a 1923
5 cultural resource. While a development agreement was made expressly contingent on CEQA
6 review, the public-interest group Save Tara objected that the City should certify an EIR
7

8
9 ... *before* approving any new agreement, making a loan, or renewing the purchase option.
10 Despite that ... the city council ... voted to (1) approve a ‘Conditional Agreement for
11 Conveyance and Development of Property’ ... including a \$1 million City loan to the
12 developer, in order to ‘facilitate development of the project and begin[] the process of
13 working with tenants to explore relocation options’; (2) authorize the city manager to
14 execute the agreement ‘substantially in the form attached’; and (3) have appropriate City
15 commissions review ‘alternative configurations’ for the planned new building and obtain
16 more public input ‘on the design of project elements.’

17
18 (*Save Tara, supra*, 45 Cal.4th 116, 123-124.)

19 The Supreme Court agreed with Save Tara and required the City of West Hollywood to
20 set aside its agreements pending preparation of an EIR. The Court explained that the timing of
21 environmental review must not be “so late that such review loses its power to influence key
22 public decisions.” (*Save Tara, supra*, 45 Cal.4th 116, 131.) A City action in furtherance of a
23 project with potentially significant environmental impacts, such as the Tara development
24 agreement, must be viewed in light of all of the surrounding circumstances to see whether it
25 commits an agency to a project “as a practical matter,” regardless of whether it is conditioned on
26 subsequent CEQA review. (*Id.* at 132.) Environmental analysis should not be delayed until
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1 “bureaucratic and financial momentum render it practically moot. [citations.]” (*Id.* at 130.)
2 While refusing to provide a bright line rule, the Court emphasized “transparency,” and “the
3 practical over the formal” so that CEQA review will not await “unconditional agreements that
4 irrevocably vest development rights.” (*Id.* at 135-136.)

5
6 A number of decisions have interpreted *Save Tara* in the last two and a half years. In
7 *Riverwatch v. Olivehain Municipal Water District* (2009) 170 Cal.App.4th 1186, a responsible-
8 agency water district violated CEQA when it approved a contract to supply recycled water to a
9 landfill for which the lead agency had not yet completed environmental review. In *Sustainable*
10 *Transportation Advocates of Santa Barbara v. Santa Barbara County Association of*
11 *Governments* (2009) 179 Cal.App.4th 113, placement of a transportation-related sales tax on a
12 ballot was “funding” not meeting the definition of a CEQA project. *Parchester Village*
13 *Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305, found a municipal
14 services agreement for a tribal casino not a CEQA project since the City had no land use
15 authority. In *City of Santee v. County of San Diego* (2010) 186 Cal.App.4th 55, an agreement
16 committing to identify prison sites was not a CEQA project since there were no attendant
17 significant impacts. None of these cases are directly relevant to the facts before this Court.
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22 However, one case published on April 28, 2011, and not yet final, *is* directly relevant
23 because it involves a term sheet for a major development approved contingent on subsequent
24 CEQA review. *Cedar Fair, L.P., v. City of Santa Clara* (2011) __ Cal.App. __ contains
25 substantial discussion of *Save Tara*, and acknowledges that “determining on which side of the
26 *Save Tara* line the term sheet falls is not an easy judgment call.” (Slip Opinion at 17.) *Cedar*
27 *Fair* was litigated not by public-interest groups but by the owner of the Great America
28

1 amusement park in Santa Clara, opposed to a stadium proposed on adjacent property by the San
2 Francisco 49ers NFL football franchise. (Slip Opinion at 1.) In June 2009, the 49ers franchise
3 and the City of Santa Clara agreed on a term sheet for development of the stadium. Six months
4 later, on December 8, 2009, Cedar Fair filed its legal action; the City certified the stadium
5 project EIR on the same day. (*Id.* at 2, 26.) A general plan amendment allowing the stadium use
6 was approved in March 2010. (*Id.* at 26.) Cedar Fair’s sole legal challenge was to the term sheet.
7

8
9 Comparing its various facts to those in *Save Tara*, the Sixth District upheld a demurrer
10 against Cedar Fair, finding that under the totality of the circumstances the detailed term sheet
11 was not yet a project requiring CEQA review. The Court relied on the fact that a public vote was
12 still required in order for the project to proceed and that the City had not committed loan funds
13 to the developer as in *Save Tara*. It found public statements by City officials supporting the
14 project to be largely irrelevant. EIR adequacy was not at issue. (Slip Opinion, *passim*.)
15

16 17 **C. Implementation of the Northeast Embarcadero Study Violated CEQA**

18 In looking at the totality of the circumstances, as required by *Save Tara*, a key factor here
19 is that the EIR for the 8 Washington project was well under way when the City, the Port, and the
20 developer chose to put it on hold. Why did that happen? It appears the reason was to change the
21 underlying planning guidelines to provide a basis for the City and Port to approve the project.
22 Yet there is no precedent for removing such action from the already-pending environmental
23 review for the project. Amending connected planning documents or applicable zoning
24 regulations cannot be separated from a pending project’s environmental review. In *Cedar Fair*,
25 for example, the rezoning of the stadium site occurred only after certification of the project EIR.
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1 (Cedar Fair, supra, Slip Opinion at 2, 26.)

2 The 8 Washington project falls into the conceptual framework of CEQA Guideline
3 section 15378 (c). When there are both zoning changes and a development proposal, for
4 example, the latter is the primary described project for environmental review. (Ante at 15.) Here,
5 8 Washington is “the project,” and the Northeast Embarcadero Study provides accomodating
6 planning guidelines. The Study is part of the “whole of the action.”
7

8
9 The record demonstrates that, while Supervisor [and current Board President] David Chiu
10 may have intended the Study to develop a community consensus about the 8 Washington project
11 [AR2:931-933], City staff in fact crafted the Study to be specifically oriented to implementation
12 of its vision of the 8 Washington project and as an essential step in its approval. As explained in
13 an inter-departmental email from Diane Oshima, Assistant Deputy Director of Waterfront
14 Planning, to members of City and Port staff, the goal was to orient the study to approve the 8
15 Washington project, in turn requiring that the Seawall 351 *not* continue to be open space:
16

17
18 We should talk further about ... *presenting information to conclude that the [Study] has*
19 *no open space needs.* As you know, many public comments have argued for such need ...
20 Planning doesn't think open space needs don't [sic] need further address in the seawall
21 lot study ... It may be difficult for [the 8 Washington developer] to figure out
22 whether/how its project design is refined to respond to the planning process outcomes. *If*
23 *the politics of these issues get deferred to the rezoning/[conditional use] application*
24 *review process, the process would not increase certainty for this project. This is a*
25 *concern for us.*

26 (AR3:1326-1327, italics added; see also 3:1318-1333.) Other staff communications regarding
27 the Study also discuss the 8 Washington project, including its pending EIR and proposed zone
28

1 change. (AR3:1370, 1380, 1383.) As disclosed in a staff email in July 2009, “the idea is that 8
2 Washington would move forward in tandem with the preparation of the [Study];” further, the 8
3 Washington developer expected to wait to revise the 8 Washington project “until a draft plan is
4 issued (or close to being issued) by our Department, *so they don’t appear to be jumping the gun*
5 *or undermining the process.*” (AR3:1475.) The clear implication is that staff intended the Study
6 to facilitate 8 Washington, including the increase of building heights from 84 feet to 130 feet.
7 (See also AR3:1334.) Director Moyer explained that the Study “laid out a road map for public
8 realm improvements and development ...” (AR5:2380.)

9
10
11 Members of the concerned public, including petitioner groups now before this Court,
12 became disillusioned following hearings on the Study, due to the foregone outcome:

- 13
14 • The Study ignores that “from the beginning, the public and neighborhood
15 representatives have spoken forcefully of the need for recreational open space,
16 workforce and affordable housing, children’s playgrounds, and development
17 accessible to everyone, not just high-priced condominiums to benefit a wealthy
18 few. The Planning Department seems to have been focused around permitting the
19 8 Washington project ... As the process continued, we became increasingly
20 frustrated that Planning was not listening to us ...” (AR3:1010-1011 [Andy Katz].)
- 21 • “We were told over and over by Planning that heights would not be touched. They
22 were touched ... they’re recommending four different height limits at 8
23 Washington ... the [Study] presumed that 8 Washington would be built. And when
24 you do a planning study around a development, it is not a genuine effort.
25 (AR3:989) ... the current waterfront planning is really a cover to implement” the 8
26 Washington project. (AR4:1671 [Vedica Puri, Telegraph Hill Dwellers].)
- 27 • The 8 Washington project is the “elephant in the room.” (AR3:992, *see also*
28 AR5:2036 [Lee Radner, Friends of Golden Gateway].)

- 1 • "...have we then been effectively herded like dumb sheep to comply with some
2 hidden timetable that the Port wants? ... to win at this gamble for the Embarcadero
3 Westside parking lots ...?" (AR5:1988-1989 [Arthur Chang, Northeast Waterfront
4 Advisory Group].)
- 5 • "I want to express my disgust with the way we have been duped into this faux
6 planning 'study' which is totally lacking in any of the resources, tools, or science
7 normally associated [with planning] ... the Port's efforts to manipulate this
8 process have been well known ..." (AR5:2030 [Nan Roth].)
- 9 • The [Study] seems to be specially tailored to fit [the] proposal for 8 Washington
10 Street ... that is wrong. The plan should be one that addresses the needs of San
11 Francisco citizens and preserves the beauty of one of the most beautiful cities in
12 the world and its wonderful waterfront." (AR5:2044 [Irene Glassgold].)
- 13 • The Study diminishes the importance of the Golden Gateway Tennis and Swim
14 Club without conducting any study of its many benefits, which are relevant to the
15 Study's proposed guidelines and the 8 Washington project, "the fundamental
16 reason for the [Study]." (AR5:2055 [Bill Venkavitch].)
- 17 • "I had the sense from the beginning that the Port's enthusiastic approval was a
18 done deal and that we were engaged in a sort of Noh play required by law but
19 devoid of substance. It was a waste of our time and a waste of Port resources.
20 Sadly the [Planning] Department's meetings have left the same impression."
21 (AR5:2162-2165 [James M. Seff].)
- 22 • The Study "guidelines seemed to mock our efforts and almost totally ignored"
23 public comments. (AR5:2168 [Martie Young].)
- 24 • "8 Washington is a prime example of a project gone wild with the Planning
25 Department totally ignoring the clearly expressed opinions of the community.
26 (AR5:2203-2204 [George Connell].)
- 27 • The community has been ignored in the Study's plan, which demonstrates a
28 "feverish insistance that no more open space is needed in the area south of

1 Broadway ...” (AR5:2218 [George Teekell].)

- 2 • Former City Planning Director Gerald Green was quoted as commenting that it
3 “makes no sense to talk about design, height, bulk and architecture until you’ve
4 settled on a sane use of land.” (AR5:2242 [Phil Ryan].)

5 Substance aside, the circumstances surrounding the Study indicate that it was treated by
6 the City as an essential step in furtherance of the 8 Washington project. In segmenting the Study
7 from the other project land use entitlements, the City failed to first consider “the whole of the
8 action” in the 8 Washington project EIR. Alternatively, the Study itself may be considered a
9 project, as it is a discretionary City action with potentially significant environmental impacts.
10 The developer responded to the Planning Commission’s “recognition” of the Study and its
11 “urging” of the Port to follow it by revising 8 Washington’s height limits.
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14 Under the circumstances, the contrived Study was not exempt from CEQA. The
15 Commission’s actions should be set aside, and the Study subjected to CEQA review within the
16 pending 8 Washington project EIR.
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19 **D. The Term Sheet Approval Violated CEQA**

20 The Port’s approval of the term sheet, predicated on the Study that predictably led to the
21 revision of the 8 Washington project parameters, violated CEQA for all of the reasons discussed
22 above. The term sheet “sets forth the economic parameters and other fundamental terms, with a
23 basis for negotiating further transaction documents, leases, property transfer agreements, etc.”
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1 (AR 3:1135.) Unlike the factual scenarios in *Save Tara* and *Cedar Fair*,⁴ approval of the 8
2 Washington term sheet occurred following segmentation of the underlying Study from the *in-*
3 *process* EIR. There was no reason to segregate the pieces of the 8 Washington project approvals.
4
5 Putting the new 8 Washington guidelines in place, sans EIR review, and then going beyond the
6 Exclusive Negotiating Agreement to a detailed term sheet, created momentum that does not
7 reasonably allow consideration of alternatives. The approval process initially outlined by staff
8 for the 8 Washington approval never indicated that a term sheet would be approved prior to EIR
9 certification. (AR1:321.) It should now be included in the pending EIR.
10

11 Petitioners request that a peremptory writ issue to set aside the term sheet approval
12 pending EIR certification, to inform the discretion of the Port Commission.
13

14 **E. Declaratory Relief Should Be Granted**

15 The parties disagree as to whether a parcel-specific study creating guidelines for a
16 specific pending development must be subjected to CEQA review for that development project,
17 and whether a term sheet resulting from project revisions resulting from such a study should also
18 receive prior CEQA review. Declaratory relief is requested to answer in the affirmative.
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27 ⁴ Petitioners note that the *Cedar Fair* EIR was certified on the same day that the CEQA
28 lawsuit challenging the term sheet was filed. Here, the EIR remains pending almost a year later.
Petitioners also respectfully suggest that *Cedar Fair* is not consistent with *Save Tara*.

1 **Conclusion**

2 **People want open space and not an enclave for luxury condo owners. In a**
3 **district that is as densely populated as Manhattan, open space and**
4 **recreation facilities are more important for the common good than another**
5 **concrete block. San Francisco prides itself as a 'green' city and we trust**
6 **'green' stands for nature and not for money. (AR4:1764.)**

7 The inclusion of the Northeast Embarcadero Study and the 8 Washington project term
8 sheet in the pending 8 Washington EIR is required by state law. The record provides no
9 justification for their separation from the prescribed CEQA process.
10

11 A peremptory writ is respectfully requested to set aside the unlawful resolutions of the
12 Planning and Port Commissions in the public interest. Declaratory relief should be granted.
13

14
15 May 7, 2011

Respectfully submitted,

16 BRANDT-HAWLEY LAW GROUP

17 

18 by _____
19 Susan Brandt-Hawley
20 Attorney for Petitioners
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