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

10
11 Neighbors to Preserve the Waterfront; Friends of
12 Golden Gateway; Telegraph Hill Dwellers; San
13 Franciscans for Reasonable Growth; Golden Gateway
14 Tenants Association; San Francisco Neighborhood
15 Network; Barbary Coast Neighborhood Association;
16 Russian Hill Neighbors; Middle Polk Neighborhood
17 Association; Dolores Heights Improvement Club;
18 Sunset Parkside Education Action Committee;
19 Affordable Housing Alliance; San Francisco Tenants
20 Union; and Does 1 to 5;

21 Petitioners,

22 v.

23 City and County of San Francisco; Planning
24 Commission of the City and County of San Francisco;
25 Port of the City and County of San Francisco; Port
26 Commission of the City and County of San Francisco;
27 and Does 6 to 10;

28 Respondents,

San Francisco Waterfront Partners II, LLC; Pacific
Waterfront Properties; California State Teachers
Retirement System; and Does 11-20;

Real Parties in Interest.

Case No. CPF-10-510634

**Reply Brief
in Support of Petition
for Writ of Mandamus**

California Environmental
Quality Act
[CEQA]

Hearing Date: July 13, 2011

Time: 10:00 a.m.

Dept.: 613

Honorable Ernest H. Goldsmith

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Introduction

If you are genuinely looking for planning guidelines that make sense for San Francisco residents, I would put Number One the goal of preserving and protecting large areas of open space and recreation. Once destroyed, these large spaces would never be recreated. It makes no sense to destroy this invaluable open space resource that is the central part of the lives of hundreds of City residents in order to replace it with an unneeded parking garage and a small number of high-priced, luxury condos that will most likely be purchased by non-resident investors, corporations, and other speculators. (AR5:2108 [City Planner Matthew Hobbs].)

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Twelve diverse groups representing thousands of San Franciscans bring this case affecting the future of the City’s waterfront. They seek this Court’s writ in the public interest. They contend, and the record proves, that as a practical matter the material steps taken by the City’s Planning and Port Commissions — *outside of CEQA* — have advanced the 8 Washington project to the point of virtual commitment. The California Supreme Court has ruled that lacing such momentum with assurances of eventual CEQA compliance is not a cure-all. Before acting, the Commissions must await a Final EIR that informs their discretionary actions.

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The simplest part of this case is the remedy. A peremptory writ should issue that requires the Planning Commission to set aside its resolution that “urges” the use of the *ad hoc* Northeast Embarcadero Study’s new guidelines for the 8 Washington project. Any new development guidelines must first be analyzed in the project EIR. The writ should also order the Port Commission to set aside its premature approval of the 8 Washington term sheet.

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The Commissions’ actions may be considered anew following certification of the pending 8 Washington EIR. While this a long-term project that is years away from development, the Court may rest assured that this peremptory writ will not materially delay the City’s final and better-informed decision-making about project impacts, merits, and feasible alternatives.

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Standard of Review

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The parties agree that the issues before this Court turn on whether the City and Port proceeded *in the manner required by law* when they failed and refused to conduct CEQA review before (1) preparing and implementing the Northeast Embarcadero Study outside of the EIR

1 process and “urging” its application to the 8 Washington project and (2) approving the
2 8 Washington term sheet. These questions of law are determined by review of the certified
3 record. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131, n.10); Opening Brief
4 at 14; Opposition Brief at 12.) The Court owes no deference to the City decision-makers since
5 the substantial evidence standard does *not* apply.

6 7 **Discussion**

8 **The land in question is probably the most valuable undeveloped land in the**
9 **country ... make a plan ... and let the developers come to you. (AR5:2212.)**

10 Petitioners continue to primarily rely on their opening brief, incorporated by reference,
11 and will respond to issues warranting further clarification.

12 The parties agree that the California Supreme Court’s seminal decision in *Save Tara*,
13 *supra*, 45 Cal.4th 116, is the controlling precedent regarding the timing of environmental review.
14 (City Brief at 13.) *Save Tara* declined to impose a bright-line rule as to when an agency
15 approval that occurs prior to CEQA review is unlawful, but holds that CEQA is violated if,
16 based on “*surrounding circumstances ... as a practical matter*, the agency has committed itself
17 to the project *as a whole or to any particular features ...*” before completing environmental
18 review. (*Save Tara, supra*, 45 Cal.4th 114, 138, italics added.)

19 This Court will surely conclude that the actions of the City and Port under the
20 circumstances have gravely eroded the integrity of the 8 Washington EIR process *as a practical*
21 *matter*. This case is not about the merits or popularity of the Northeast Embarcadero Study and
22 its development guidelines, nor about the substance of the 8 Washington project and the deal
23 points laid out in its complex term sheet. The problem is the directed way that the project is
24 winding its way through the City’s administrative labyrinth, with Port and City staff assisting
25 the project developer, all without the benefit of CEQA review.

26 In a nutshell, the challenged actions of the San Francisco Planning and Port Commissions
27 telegraph their implicit approval of the 8 Washington project, aligned with new development
28 parameters created specifically for this site via the Northeast Embarcadero Study. The *ad hoc*
Study was developed while the 8 Washington EIR was put on hold for two years. The Study’s

1 Commission-endorsed prescriptions for the private 8 Washington site and its neighbor, Seawall
2 Lot 351 (held in public trust for the people of the State of California), now pronounce an
3 increased building height from 80 to 136 feet and the relocation of mandatory public trust uses.

4 The sequence of CEQA compliance is not the sole focus of this action; the substance of
5 the EIR is at issue as well. But timing and substance go hand in hand. The City has not
6 explained its worrisome short cuts, especially when there is no urgency to the 8 Washington
7 project. Why was the Study not simply folded into the 8 Washington EIR, subject to CEQA’s
8 review and comment processes? Why was the term sheet approved without EIR analysis? This is
9 not *Alice in Wonderland* [Red Queen: “Sentence first - verdict afterwards.”]. Timing matters.

10 Our circumstances do not mirror those of any of the cases relied upon by the City.
11 Fortunately, by issuance of a peremptory writ this Court can direct a meaningful EIR process for
12 this critical public trust site on The Embarcadero and bar “a journey whose destination is already
13 predetermined.” (*Save Tara, supra*, 45 Cal.4th 116, 135-136.)

14 **A. Implementation of the Northeast Embarcadero Study was Error**

15 **In response to the question ... — ‘why was the timeline shortened?’ [Port**
16 **Planner] David Alumbaugh replied that the Port wants it completed quickly**
17 **to minimize the delay to the 8 Washington project. This seriously**
18 **compromises the integrity of the study since a single project rather than**
comprehensive planning drives it. (AR4:1467.)

19 Objections to the Planning Commission Resolution relate both to the timing of the
20 approval of the 8 Washington project and to the procedure surrounding the Northeast
21 Embarcadero Study. (Amended Petition, ¶¶ 32-34.) Despite its focus on development at
22 8 Washington, the Study was segmented from that project’s EIR and prematurely applied.

23 ***Relevant Project Chronology.*** The 8 Washington project EIR has been pending since
24 December 2007. The Draft EIR was first scheduled for release in the summer of 2008.
25 (AR1:230; Opening Brief at 7.) Concurrently, the Northeast Embarcadero Study was funded by
26 the Port. As discussed in the opening brief and confirmed in the City’s opposition, the Study
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1 was requested by David Chiu, President of the Board of Supervisors, to address controversy
2 regarding development of seawall lots, and specifically Seawall Lot 351. (AR1:490.)

3 Despite President Chiu’s good intentions, the informally-conducted Study assumed a life
4 of its own when it developed development parameters for the 8 Washington project outside of
5 the EIR process. The completed Study does not simply “inform the coming debate,” as the City
6 now suggests, but openly discloses an intent to “*guide the development* of properties along the
7 west side of the Embarcadero,” starting at Washington Street. (AR2:614, italics added; City
8 Brief at 29.) City staff readily explained that the Study “*can be used* by the Port as a basis for
9 actions to be taken on Port [Seawall Lot] 351, including any development agreements ...”
10 (AR2:595, italics added.) The Study thus essentially admitted its aim to “dictate the outcome” of
11 the 8 Washington development proposal, although the City now denies it. (City Brief at 29.)

12 Internal City documents confirm staff’s careful efforts to facilitate the 8 Washington
13 project’s reductions in open space and to alter current restrictions on building height limits. (AR:
14 3:1318; 1348.) The Study recommends height increases from 84 feet to 130 feet, despite the fact
15 that, among other environmental concerns, acceptable land uses for Seawall Lot 351 must be
16 consistent with the public trust and the purposes of the Waterfront Land Use Plan, prepared in
17 response to a 1990 citizen’s ballot initiative. (AR1:65, 261; 2: 623, 662; 3:967; *see* Opening
18 Brief at 10-11.) The Exclusive Negotiating Agreement and the term sheet resolution confirm the
19 Study’s ambitious intentions to mold the 8 Washington project. (AR3:1558;1:33.)

20 ***CEQA Requirements.*** State law provides that when a project that is subject to CEQA
21 requires the amendment of existing land use regulations, the basis for — and alternatives to —
22 those land use changes must first be analyzed in an EIR to inform public review and agency
23 action. The EIR discussion begins with regulations and policies in place when the Notice of
24 Preparation of an EIR is published. (CEQA Guidelines [14 Cal.Code Regs] § 15125 (a).)

25 Every project EIR is required to explain, beginning with its “environmental setting”
26 section, any inconsistencies between the subject project and relevant existing land use plans.
27 (Guideline § 15125 (d).) “All phases” of a project must then be considered when evaluating
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1 potentially significant impacts on the environment, including project “planning” as well as
2 development and operation. (Guideline § 15126.)

3 As held in *Planning and Conservation League v. Department of Water Resources* (2000)
4 83 Cal.App.4th 892, 911, “CEQA compels process. It is a meticulous process designed to ensure
5 that the environment is protected ... the EIR is the heart and soul of CEQA ...” The oft-quoted
6 *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th
7 1109, consistently holds that “...everything that is required to be considered in an EIR must be
8 contained in that formal report.” (*Id.* at 1124, italics added.) Here, the contents of the EIR must
9 include the proposed amendments of development standards for 8 Washington.

10 ***CEQA Violations.*** Comments on the Notice of Preparation for the 8 Washington project
11 EIR were received in January 2008. (AR1:230; 2:769; Opening Brief at 7.) The baseline for this
12 project EIR is the land use regulations in effect in January 2008. (Guidelines § 15125 (a).) Any
13 proposed changes must be analyzed in the EIR as a basis for project approvals. It is an anathema
14 to the letter and spirit of CEQA for an EIR to be halted in mid-production and then resume only
15 after a project’s underlying development parameters have been significantly adjusted in an *ad*
16 *hoc* process devoid of CEQA’s procedural protections. Yet that is what has happened here.

17 The Northeast Embarcadero Study is project-specific, not simply a general non-binding
18 planning study. (City Brief at 26-27.) This is partially evidenced by the fact that the Exclusive
19 Negotiating Agreement required the project to reflect the Study’s recommendations.
20 (AR3:1558.) Later, of course, the Planning Commission “urged” the Study’s specific
21 recommendations on the Port Commission (AR1:1-3) despite concerns expressed by the public:

22
23 You are being asked to recognize the recommendations and design principles for new
24 development in the area, including heights, for the proposed 8 Washington project, and to
25 urge the Port to consider them. Such action is clearly intended to influence decision-
26 making. And yet the City cannot yet have legally taken a position on what development
27 should happen because there has not yet been the completion and review of an
28 environmental impact report.

1 (AR4:1002) Following the Planning Commission’s Resolution, the 8 Washington developers
2 immediately amended their application to increase the project height. (AR1:26.)¹ The
3 subsequent Port resolution approving the term sheet recites its reliance on the Study. (AR1:33.)
4

5 The descriptive title of Resolution 18132 proclaims that the Planning Commission is
6 **URGING THE PORT ... TO CONSIDER THE PRINCIPLES AND RECOMMENDATIONS**
7 **PROPOSED IN THE NORTHEAST EMBARCADERO STUDY WHEN CONSIDERING PROPOSALS**
8 **FOR NEW DEVELOPMENT IN THE STUDY AREA ...**

9 (AR1:1-3, italics added; *attached.*) Petitioners have emphasized that the Resolution “*urges* the
10 Port ...” to utilize the Study. (AR1:2; Opening Brief at 2, 12, 23.) Yet the Court will note that
11 the Statement of Facts filed by the City, Port, and 8 Washington developers (collectively, the
12 City) studiously avoids any mention of the key words “urges” and “urging” when describing the
13 Resolution. (City Brief at 6-7.) The City contends that the Resolution does nothing more than to
14 call upon the Port and the City to ‘consider’ its recommendations.” (*Id.* at 24; *see* 6-7.) Only
15 once in 35 pages does the City make passing reference to the Resolution’s *urging* that the Port
16 utilize the Study. (*Id.* at 23.) Downplaying a material fact does not make it go away; the
17 “urging” of the Commission is a relevant circumstance informing this Court’s review.

18 Petitioners’ primary argument is *not* that the Northeast Embarcadero Study *could* be
19 treated as an independent project. (City Brief at 26-27, Opening Brief at 23.) More importantly,
20 just as in *Save Tara, supra*, 45 Cal.App.4th 116, all parties agree that the 8 Washington/
21 Seawall Lot 351 development “is a project requiring evaluation in an EIR; *they disagree ... on*
22 *the required timing of that EIR process.*” (*Id.* at 129, n.8, italics added.)

23 The Study’s analysis of the 8 Washington/ Seawall Lot 351 site vis-à-vis the future of the
24 north waterfront, and its recommendations for altered development standards for the site, are

25 ¹ The City emphasizes that the developer’s 8 Washington project revisions responded to
26 the recommendations of the Northeast Embarcadero Study but are “not identical.” (*E.g.*, City
27 Brief at 9, 24.) That in no way diminishes petitioners’ CEQA arguments regarding the premature
28 implementation of the Study and does not change the fact that the Study recommended the now
significantly-increased maximum height for the 8 Washington project that will block views of
Telegraph Hill. (AR1:301.)

1 undeniably tied to and part of *this project*. Its environmental analysis and recommendations
2 require EIR review incorporating public and agency review and comment. The City’s failure to
3 proceed as required by law has generated great public concern and dismay. (Opening Brief at
4 21-23.) The Planning Commission’s Resolution has implemented an *ad hoc* Study, treating its
5 recommendations as if they are adopted regulations. This is much more than an agency’s
6 indication of interest-in or esteem-for a project. (City Brief at 13.)

7 The City argues that the Northeast Embarcadero Study “is akin to an action
8 recommending an agency consider adopting land-use policy ... in the future,” similar to
9 *St. Vincent’s School for Boys v. City of San Rafael* (2008) 161 Cal.App.4th 989, in which CEQA
10 review was not required “prior to adopting a resolution specifying guidelines for potential
11 amendments to the general plan.” (City Brief at 25.) The City mischaracterizes the case.

12 In *St. Vincent’s*, a City Council directed its staff to prepare proposed amendments to a
13 general plan, which it approved and implemented following a complete EIR process. (161
14 Cal.App.4th 989, 999-1002.) The appellant’s proposed mixed-use development was denied while
15 the proposed plan amendments [affecting its parcel] were still pending, and the Court held that
16 the two City actions could occur independently without violating CEQA. (*Id.* at 998-999.)²
17 Here, changes to waterfront development guidelines were developed in the *ad hoc* Northeast
18 Embarcadero Study in a year-long process. The Study is now being treated as a planning
19 document. Its recommendations have already defined the 8 Washington development parameters
20 and even its term sheet, despite never having been subjected to CEQA review.

21 Just as the Port Commission could not legally rely on the *ad hoc* Study recommendations
22 to shape the project term sheet, the 8 Washington EIR will not be able to rely on the Study as a
23 baseline for project analysis. The EIR must begin at the pre-Study baseline and analyze the
24 existing regulatory and land use plans and policies applicable to the site *along with* site-specific
25 and cumulative waterfront impacts of the new development standards proposed by the Study.
26 The Study cannot be segmented from the project, as the amendment of development guidelines
27 is part of the “whole of the action” that is the 8 Washington project. (Opening Brief at 15-16.)

28 ² An agency’s denial of a project is always *exempt* from CEQA, further distinguishing *St. Vincent’s*. (Pub. Resources Code § 21080 (b)(5); Guideline § 25061 (b)(4).)

1 There is no question but that the Planning Commission Resolution urged the
2 Port Commission to immediately apply the Port-funded *ad hoc* Study’s recommendations *to the*
3 *8 Washington project*. (AR1:1-3; *see* 1002-1003.) The term sheet then did so. (AR1:33.)

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5 ***Remedy.*** The Court is respectfully requested to find that the Northeast Embarcadero
6 Study’s recommendations are not part of the baseline for the 8 Washington EIR’s environmental
7 setting. The Study’s development guidelines require EIR analysis. The peremptory writ should
8 so order, also setting aside the Planning Commission’s premature resolution that urged the Port
9 Commission to apply the Study’s recommendations to its 8 Washington project approvals.

10 **B. The Term Sheet Approval Violated CEQA**

11 ***Import of the Term Sheet.*** The timing and substance of the City’s implementation of
12 the Northeast Embarcadero Study and approval of the term sheet are interrelated. The City
13 contends that its actions connected with the Northeast Embarcadero Study were somehow not
14 “approvals” but only show “an intention to vet, analyze, and study all aspects of a development
15 proposal prior to even considering land use and financing approvals for that proposal.” (City
16 Brief at 1.) Yet, as already discussed, the “vetting and analysis” of the Study led to immediate
17 amendment of the 8 Washington project, including significant height increases from 80 to 130
18 feet — and then directly informed the negotiation and adoption of the 8 Washington term sheet.
19 These are not opinions, but facts manifest in the administrative record. (AR1:6, 33.)

20 The 8 Washington term sheet “sets forth essential terms” that have been negotiated
21 between the Port staff and the 8 Washington developer, describing the revised project largely as
22 recommended in the new Northeast Embarcadero Study development guidelines. (AR1:33-57.)
23 While acknowledging CEQA contingencies, Port Commission Resolution 10-66 signals its very
24 favorable view of the project. (AR1:33-35.)

25 The Commission Resolution “*endorses*” the term sheet. (AR1:34.) It also instructs the
26 Port staff to “present the term sheet to the Board of Supervisors for *its* review and endorsement.”
27 (*Ibid.*, italics added.) If the Board of Supervisors does not endorse the term sheet, the Port
28

1 Commission Resolution instructs staff either to terminate the Exclusive Negotiating Agreement
2 or negotiate a revised term sheet and return to the Commission for further consideration. (*Ibid.*)

3 There can be no question that the Port Commission’s endorsement of the term sheet is a
4 discretionary action with potentially significant environmental impacts because it documents its
5 favorable view of the 8 Washington project *just as now revised*. It is assuredly not a final,
6 binding approval. But along with the Planning Commission’s Resolution “urging” application of
7 the Study’s new development guidelines for the 8 Washington site, and considered in concert
8 with the actions of City and Port staff during the development of the Study (Opening Brief at
9 20-23), the Port Commission has definitively increased the momentum to define the project just
10 as delineated in the term sheet’s detailed exhibits. (AR1:36-57.)

11 The term sheet gives the Port Commission’s imprimatur to what is no longer simply a
12 development application; it is a project that has a size and scope and financial framework
13 “endorsed” by the Commission whose approval is essential. The practical reality is that the
14 Port’s future consideration of alternatives in the CEQA process has been materially diminished.

15 The question left unanswered by the City’s brief, which claims that delaying the actions
16 of both of the Commissions would somehow “place an unneeded obstacle in the path of project
17 formulation and development,” is “how so?” Even if their actions could somehow be justified,
18 *why* must the Planning Commission resolution urging use of the Study and the Port
19 Commission’s endorsement of the term sheet each occur before the EIR process is complete?
20 (City Brief at 14, citing *Save Tara*.) We are not told. If nothing else, this underscores the fact
21 that the public benefit remedy of a peremptory writ will cause no prejudice to the developer.

22 ***Relevant Project Chronology.*** Environmental review must occur “as early as feasible
23 in the planning process to enable environmental considerations to influence project program and
24 design and yet late enough to provide meaningful information for environmental assessment.”
25 (Guideline § 15004 (a), cited in *Save Tara, supra*, 45 Cal.4th 116, 129; Opening Brief at 16.) The
26 Port cannot reasonably argue that its challenged decisions made in 2010 occurred *too early* for
27 environmental review; preparation of the 8 Washington EIR began in late 2007. (*Ante* at 6.)
28

1 The Port received comments on the Notice of Preparation of the EIR in January 2008,
2 projected the publication of a Draft EIR in the summer of 2008, and anticipated Planning
3 Commission hearings on the EIR and the project in the fall of 2008. (Opening Brief at 6-7;
4 AR1:99,176, 230.) Port staff conceded that the 2008 Draft EIR was expected to “*help in policy*
5 *making*” for the 8 Washington project, assumedly referring to the potential transferring of the
6 public trust restrictions on Seawall Lot 351 as well as resolution of environmental concerns
7 about the density and height of the proposed new development and its displacement of the
8 unique recreational amenities of the Golden Gateway Tennis and Swim Club. (AR2:769.)

9 Again, the City’s brief never explains why the Commissions’ actions were not or could
10 not be folded into the already-begun EIR process. Both the Planning and Port Commissions
11 knew that many City residents believed their proposed actions would violate CEQA. Why could
12 they not wait, as asked? No compelling reason is provided beyond “we do not think we have to.”

13 While the City states that the term sheet is necessary to define the project “for the
14 purpose of undertaking environmental review,” its statement is belied by the fact that the
15 developer readily provided a project description for the Initial Study in 2007 as a basis to initiate
16 EIR review and amended it in 2010 before the term sheet’s approval. (AR1:14-20, 36-57, 226.)
17 Looking to the circumstances surrounding the chronology of events, petitioners have referenced
18 a 2008 Memorandum from Port Executive Director Monique A. Moyer regarding the Request
19 for Proposals for development of Seawall 351. Moyer explains the project sequence. The
20 Exclusive Negotiating Agreement was to precede CEQA compliance while the “development
21 agreement, lease, and related documents” would be approved after “environmental review and
22 finalization of negotiation by Port staff.” (Opening Brief at 24; AR1:321, 323.)

23 In response, the City requests judicial notice of a 2004 Management Audit of the Port of
24 San Francisco. Petitioners have no objection. The City cites the “Response to Management
25 Audit” that recommends that the Port Commission submit term sheets for projects costing over
26 \$10 million “to the Board of Supervisors for endorsement.” (*Ibid.*; City’s Request for Judicial
27 Notice, Exhibit B, page 51.) The City contends that the Audit supports its contention that the
28 8 Washington term sheet was “developed to comply with Port and City policy to evaluate the
financial merits and viability of proposed projects at the outset.” (City Brief at 8.)

1 Yet, while the City pronounces that the 2004 Audit “highlights” the fact that approval of
2 the term sheet “at early stages” is “normal,” nothing in the Audit prescribes approval *before*
3 *certifying a project EIR*. While a term sheet can be prepared at any time, the City does not
4 provide any authority for its characterizations of “early” term sheet *approval* as “normal.” (City
5 Brief at 9,16, citing the Audit at 6, 45, 51.) When the City promises examples of its consistent
6 practice of developing term sheets “early in the planning process,” its record citations reference
7 none. (City Brief at 16, citing AR2:801, 805-806, 894; 4:1652.)

8 But, more importantly, even if early term sheet review has been a consistent City policy
9 since the 2004 Audit, it could not excuse the lack of CEQA review. Logically, the evaluation of
10 the financial merits and viability of a proposed project can occur via workshops and/or public
11 hearings and/or committee meetings and/or staff submittals that provide information and
12 feedback — without a contractually-significant approval circumventing an open CEQA process.

13 Similarly, the City’s explanation that the Exclusive Negotiating Agreement for the
14 8 Washington project contains “performance benchmarks” including “approval of a term sheet
15 by the Port Commission and Board of Supervisors” is not relevant. (City Brief at 7, 9;
16 AR4:1579.) The Agreement was executed in August 2009, *after* the 8 Washington Draft EIR
17 was put on hold and while the Northeast Embarcadero Study was in production between May
18 2009 and May 2010. (*Ibid.*; AR1:33.) The benchmarks provide that CEQA review should be
19 completed by the time the Board of Supervisors approves the term sheet³ but not necessarily by
20 the time the Port Commission approves it. (AR4:1579.)

21 Does the Agreement’s reference to that fact in the Exclusive Negotiating Agreement
22 serve somehow as a defense to this CEQA action? It does not. The Port’s belief that it may
23 choose to approve a term sheet for a significant project before the project EIR is completed, or
24 that it may enter into an Exclusive Negotiating Agreement that so provides, is a given, and has
25 led to a prayer for declaratory relief. (Amended Petition at ¶¶ 38-39.) And of course the
26 *developer’s* obligations under an Exclusive Negotiating Agreement are irrelevant to a *public*
27 *agency’s* duty to fully comply with the salutary mandates of CEQA. (City Brief at 9.)

28 ³ The Board of Supervisors has not considered or approved the 8 Washington term sheet.

1 **CEQA Violation.** Without explaining why it would be problematic for term sheet
2 approval to occur *after* certification of the 8 Washington EIR and a close look at feasible
3 alternatives, the City also contends that the term sheet does not violate CEQA because it is
4 conditioned upon future compliance. (AR1:53, 57 [term sheet].) Looking again to *Save Tara*:

5 A CEQA compliance condition can be a legitimate ingredient in a preliminary public-
6 private agreement for exploration of a proposed project, but if the agreement, *viewed in*
7 *light of all the surrounding circumstances, commits the public agency as a practical*
8 *matter* to the project, the simple insertion of a CEQA compliance condition will not save
9 the agreement from being considered an approval requiring prior environmental review.

10
11 (*Save Tara, supra*, 45 Cal.4th 114, 132, italics added.) The “general rule” remains that
12 “development having potentially significant environmental effects must be *preceded*, not
13 *followed*, by CEQA review. (Id. at 134, italics in original.) Whether CEQA review for the
14 8 Washington project is compromised by the approvals to date is the question of law before this
15 Court. Petitioners contend that the term sheet’s “compliance conditions” are not enough to
16 ensure adequate CEQA review in light of the surrounding circumstances.

17
18 **Relevant Case Law.** The City points out that many discretionary project approvals will
19 be required for the 8 Washington project following certification of the EIR and that the project
20 circumstances differ from *Save Tara*. (City Brief at 11, 19.) That is true. Naturally, every major
21 CEQA project presents its own unique set of required approvals, often from multiple agencies. It
22 is also true that the 8 Washington term sheet is not a legally-binding commitment that is free of
23 contingencies. (City Brief at 16.) But the *Save Tara* test for when a delay in EIR preparation
24 goes too far, as here demonstrated by the combination of the Study implementation and term
25 sheet endorsement, goes beyond traditional contractual legalities:

26 ... *we have emphasized the practical over the formal* in deciding whether CEQA review
27 can be postponed, insisting it be done early enough to serve, realistically, as a meaningful
28 contribution to public decisions ... (Citations.) ... The full consideration of

1 environmental effects CEQA mandates must not be reduced ‘to a process whose result
2 will be largely to generate paper, to produce an EIR that describes a journey whose
3 destination is already predetermined.’ (Citation.) ...

4 When an agency reaches a binding, detailed agreement with a private developer and
5 publicly commits resources and governmental prestige to that project, the agency’s
6 reservation of CEQA review until a later, final approval stage is unlikely to convince
7 public observers that before committing itself to the project the agency fully considered
8 the project's environmental consequences. Rather than a ‘document of accountability’
9 (citation), the EIR may appear, under these circumstances, a document of *post hoc*
10 rationalization.

11
12 (*Save Tara, supra*, 45 Cal.4th 116, 135-136.)

13 The fact that a significant initial step toward project approval is accomplished via a
14 contingent document with attorney-driven boilerplate language assuring future CEQA
15 compliance (as is here contained in both the Planning and Port Commission Resolutions,
16 AR1:2-3, 34-35, as well as via scripts read into the record by Commissioners, referenced by the
17 City at 18-19) does not automatically undo the approval-momentum apparent in the surrounding
18 circumstances. In *Save Tara*, the Supreme Court overturned a major development agreement
19 *despite* unequivocal language that the City retained “‘complete discretion over ... any actions
20 necessary to comply with CEQA’; and that the agreement imposes ‘no duty on City to approve
21 ... any documents prepared pursuant to CEQA.’” (*Id.* at 126.)

22 All parties reference the same five cases that follow *Save Tara*. (Opening Brief at 18;
23 City Brief at 14, 21.) In addition, the City relies on a pre-*Save Tara* case, *St. Vincent’s, supra*,
24 161 Cal.App.4th 989, while again mischaracterizing its relevance. (City Brief at 19, *see ante* at
25 8.) The *St. Vincent’s* Court cogently held that a City Council’s direction to its staff to process
26 desired amendments to its own general plan did not violate CEQA, since the plan amendments
27 were in fact not approved until an EIR was prepared. (*Id.* at 989-1001.) How does a general plan
28 amendment process, and its EIR, commence except by such direction? It must begin somewhere.

1 Endorsement of a project’s term sheet before an EIR is published is not at all equivalent
2 to the “agency direction to staff” upheld in *St. Vincent’s*. A term sheet signals to a developer and
3 to the public that the agency supports a significant development application as to the project’s
4 size, scope, description, and even its financing. There is political and even emotional weight to
5 such action that reasonably leads to a mutual sense of agreement and entitlement. While a
6 subsequent CEQA process may still address the project’s environmental impacts and mitigation
7 measures, the term sheet endorsement makes open consideration of project alternatives less
8 likely, *as a practical matter*. That is why CEQA requires EIRs to be prepared “as early as
9 feasible in the planning process.” (Guideline § 15004 (b).)

10 The fact that the City points to no reason for the Planning Commission and Port
11 Commission’s actions to precede the EIR preparation and certification is also an important part
12 of the surrounding circumstances in this case. There is surely a reasonable argument supported
13 by the record that the Commissions’ actions tangibly signal their anticipated approval of the
14 8 Washington project. It would surely be better for the EIR consideration of project alternatives
15 to be completed without being influenced or in any way diminished by those actions, especially
16 for this site that is so critically important to The Embarcadero and its surrounding community.

17 *Cedar Fair v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, is relevant to the Court’s
18 consideration of these points. (Opening Brief at 18-20, 23.) Unlike our case, in which many
19 private citizen organizations with no financial interest in the outcome have joined together
20 because their government is making decisions about the San Francisco Waterfront without
21 CEQA compliance, in *Cedar Fair* a huge corporation brought a CEQA action driven by its
22 admitted financial interest in saving its commercial parking lot. (*Cedar Fair, supra*, 194
23 Cal.App.4th 1150, 1155-1156.)

24 Among other distinctions, including a required public vote in *Cedar Fair*, the 8
25 Washington EIR has been in process since 2007, while the *Cedar Fair* term sheet was approved
26 in June 2009, the project EIR was in process as of the following month [July 2009],⁴ and the

27 ⁴ In a small point, the City references *Cedar Fair*’s July 2009 EIR reference as the
28 “summer of 2009” and then incorrectly equates the time as if overlapping the month-earlier term
sheet approval in June 2009. (City Brief at 20, n.11.)

1 Cedar Fair lawsuit was filed in December 2009, which is when the project EIR was certified.
2 Here, the 8 Washington EIR remains pending. (*Id.* at 1156-1158.) As a practical matter, under
3 the circumstances, not only are the petitioners, the projects, the long-pending EIR and the
4 influence of the Northeast Embarcadero Study distinctions between the cases, here a reasonable
5 remedy is less onerous since the EIR process is ongoing.

6 When considering whether delay in a particular EIR process is allowable as a matter of
7 law, the relevant “surrounding circumstances” surely include whether or not the EIR is in
8 process when project-related decisions are made. Does it make sense to make significant
9 decisions about a project in the middle of environmental review? At that point, should not there
10 be a good reason to separate any project-related decision from the ongoing EIR analysis? None
11 of the cases have addressed this situation to date.

12 The City’s insistence that term sheets are not contractually binding agreements is
13 irrelevant. That is not the point. CEQA declares as the policy of the state that agencies should
14 not approve projects as proposed if feasible alternatives would substantially lessen significant
15 environmental effects. (Pub. Resources Code § 21002.) Naturally, any non-contingent
16 agreement committing the City to approve the 8 Washington project would require CEQA
17 compliance as a prerequisite, to ensure adequate considerations of alternatives. But such
18 straightforward facts would not even come within the rubric of *Save Tara*, which addresses
19 situations in which an agency’s admittedly *less-than-final* approval action or series of actions
20 may jeopardize the salutary goals of CEQA.

21 While *Save Tara* set aside a development agreement, the Court made clear (against the
22 wishes of appellant Save Tara) that not all development agreements require prior CEQA review.
23 (*Save Tara, supra*, 45 Cal.4th 116, 136-137.) Similarly, the fact that *Cedar Fair* allowed a
24 particular term sheet to be approved without CEQA review is not a blanket ok for pre-EIR term
25 sheets. The Supreme Court has provided direction:

26 A public entity that, in theory, *retains legal discretion to reject a proposed project may,*
27 *by executing a detailed and definite agreement with the private developer and by lending*
28 *its political and financial assistance to the project, have as a practical matter committed*

1 *itself to the project.* When an agency has not only expressed its inclination to favor a
2 project, but has increased the political stakes by publicly defending it over objections,
3 putting its official weight behind it, devoting substantial public resources to it, and
4 announcing a detailed agreement to go forward with the project, the agency will not be
5 easily deterred from taking whatever steps remain toward the project’s final approval.

6
7 (*Id.* at 135.) Many of these *Save Tara* factors are present here.

8 The Port Commission selected the 8 Washington developer after the Request for Proposal
9 process and entered into an Exclusive Negotiating Agreement. (AR1:441.) The resultant
10 *negotiated* term sheet, albeit contingent, provides a detailed description of the project parameters
11 and financing, including in part: a 66-year lease, “realignment of the public trust at the Site” to
12 sell a portion of Seawall Lot 351, two condominium buildings with 165 condominiums at
13 various heights *up to 136 feet*, ground floor retail and restaurant, 3-level parking garage,
14 demolition and rebuilding of the Golden Gateway Tennis and Swim Club with rooftop pools,
15 land purchase price of \$3 million, transfer payments of 0.5% of condominiums in perpetuity,
16 specified ground rents, an infrastructure financing district, and Mello-Roos Community
17 Facilities District. (AR1:55-57; 5:2424.)

18 The actions of the Planning and Port Commissions and staff signal a strong depth of
19 support for the project, underscored by the Planning Commission’s rather outrageous “*urging*”
20 of the Port Commission to apply the Study development guidelines, and the Port Commission’s
21 affirmative response. In terms of agency investment, the Port sponsored the year-long Northeast
22 Embarcadero Study process administered by the City Planning Department that facilitated the
23 project as now memorialized in the term sheet.

24 Under these facts and circumstances, the momentum for this complex project has reached
25 a point equivalent to approval as a practical matter. Setting aside the Planning Commission
26 Resolution and the Port Commission’s endorsement of the term sheet will restore integrity to the
27 pending EIR process and, most importantly, to the consideration of project alternatives.
28

1 **Conclusion**

2 **We need to keep our open space and outdoor recreation areas accessible**
3 **... in a dense urban environment that becomes demographically more**
4 **dense over time, the need for access to this open space/outdoor recreation**
5 **area becomes even more critical ... The proposed plan would allow only a**
6 **few elite people to own what is already space made accessible for all**
7 **people. (AR5:2173 [Resident Tom Herhauz].)**

8 A peremptory writ should now issue in the public interest setting aside Planning
9 Commission Resolution 18132 and Port Commission Resolution 10-66. Declaratory relief
10 should be granted to confirm that the City may not lawfully implement a planning study or
11 guidelines for significant developments without first complying with CEQA. In particular, the
12 City and Port must have the benefit of a certified EIR as a basis to exercise land use discretion in
13 considering the merits and alternatives to the 8 Washington/Seawall Lot 351 project.

14 June 27, 2011

Respectfully submitted,

15 Susan Brandt-Hawley
16 Attorney for Petitioners
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PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to the within entitled action; my business address is P.O. Box 1659, Glen Ellen, CA 95442.

On June 27, 2011, I served one true copy of:

Reply Brief in Support of Petition for Writ of Mandamus

 By placing a true copy thereof enclosed in a sealed envelope with prepaid postage, in the United States mail in Glen Ellen, California addressed to the persons listed below.

X By placing a true copy thereof enclosed in a sealed envelope and postage thereon fully prepaid, **by overnight mail** in the United States at Sonoma, California, addressed as follows:

X By emailing a copy to counsel as noted below.

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I declare under penalty of perjury that the foregoing is true and correct and is executed on June 27, 2011, at Glen Ellen, California.

Jeanie Stapleton