

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**FILED**  
San Francisco County Superior Court

NOV 22 2019

CLERK OF THE COURT  
BY: *Jose Gonzales*  
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

**SAFE EMBARCADERO FOR ALL, a  
California non-profit corporation,**  
  
Petitioner,  
  
v.  
  
**STATE OF CALIFORNIA, acting by and  
through its STATE LANDS  
COMMISSION; CITY AND COUNTY OF  
SAN FRANCISCO; and DOES 1 through  
20,**  
  
Respondents.  
  
**SAN FRANCISCO PLANNING  
DEPARTMENT; and SAN FRANCISCO  
DEPARTMENT OF HOMELESSNESS AND  
SUPPORTIVE HOUSING,**  
  
Real Parties in Interest.

No. CPF-19-516841

**ORDER DENYING PETITIONER'S  
MOTION FOR PEREMPTORY WRIT  
OF MANDAMUS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**INTRODUCTION**

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

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

**FACTUAL BACKGROUND**

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

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

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

13 The lease is for a maximum term of 56 months, including 48 months of operation, time for  
14 construction prior to operation, and time to restore the site at the end of the term. (MOU § 5.)  
15 The Navigation Center will be operated for an initial term of 24 months (two years). (MOU §  
16 6.1).<sup>1</sup> That initial two-year term may be extended by HSH for an additional two years if HSH  
17 demonstrates to the Port Commission, and the Port finds, (A) that over the first two-year period,  
18 there has been a decrease in the number of homeless people in the designated outreach zone,  
19 which extends south to China Basin, north to the Ferry Building, and west to Yerba Buena; (B)  
20 that the City has provided dedicated beat officers within the safety zone around the property,  
21 which includes the Rincon Hill and South Beach neighborhoods, and HSH has provided  
22 dedicated cleaning services in the area; (C) that HSH has provided quarterly reports to the Port  
23 that include information on publicly available crime statistics and other community impact  
24 measures in the safety zone, program utilization and outcomes, and cleaning efforts; and (D) that  
25 HSH and its Navigation Center operator have complied with the required good neighbor policy.

26  
27 <sup>1</sup> The operational term of the Embarcadero Navigation Center was reduced from four  
28 years to two years with a two-year option term as a result of input the City received from  
organizations, local businesses, and individuals in the community.

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

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

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

## 24 PROCEDURAL BACKGROUND

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

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

#### 10 **I. THE PETITION IS NOT PREMATURE.**

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

16 Code of Civil Procedure section 1094.5 does not invariably require a party seeking a writ of  
17 mandate to prepare and file the entire administrative record. Rather, it provides, "*All or part of*  
18 *the record of proceedings before the inferior tribunal, corporation, board, or officer may be filed*  
19 *with the petition, may be filed with respondent's points and authorities, or may be ordered to be*  
20 *filed by the court.*" (Code Civ. Proc. § 1094.5(a) (emphasis added).) Thus, the petitioner and the  
21 respondent may each submit relevant portions of the administrative record sufficient to give the  
22 trial court an adequate basis for ruling on the issues before it. (See *Anderson v. City of La Mesa*  
23 (1981) 118 Cal.App.3d 657, 660 [rejecting city's "unmeritorious[]" contention that trial court  
24 improperly granted relief because petitioner "did not submit to the court the full record of the  
25 administrative hearing before the City Council," where both parties attached to their pleadings  
26 portions of the administrative record as permitted by § 1094.5(a) and the city's answer admitted  
27 most of the significant facts].)  
28



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

6 **A. The Burton Act**

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

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

16 (*Defend Our Waterfront v. State Lands Commission* (2015) 240 Cal.App.4th 570, 576 [footnote  
17 omitted].) The "public trust" has traditionally been defined in terms of "navigation, commerce  
18 and fisheries," including "the right to fish, hunt, bathe, swim, to use for boating and general  
19 recreation purposes the navigable waters of the state, and to use the bottom of the navigable  
20 waters for anchoring, standing, or other purposes." (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259.)

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

1           The Port’s powers under the Burton Act included the ability to lease the granted lands for  
2 limited periods of up to 66 years and to collect rents for those leases, with the requirement that  
3 those leases be for purposes consistent with the public trust and the Burton Act. (Stats. 1968, ch.  
4 1333, § 3, subd. (6).) However, if the Port determined that any portion of the granted lands was  
5 not required for these purposes, it was authorized to lease them “for the purposes of such  
6 development and use as the [San Francisco harbor] commission finds will yield maximum profits  
7 to be used by the commission in the furtherance of commerce and navigation.” (*Id.*) The latter  
8 language was amended in 1975 to state that if the Port determines that any portion of the  
9 transferred lands is not required for trust uses, it may lease them “for the purposes of such  
10 development and use as the commission finds to be in the public interest.” (Stats. 1975, ch. 422,  
11 § 3, subd. (6).) The Burton Act provided that any money derived from these non-trust leases  
12 “shall be used solely for the furtherance of the purposes specified by this act.” (*Id.*)<sup>3</sup>

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

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

23           <sup>3</sup> The State Lands Commission in the Resources Agency is the successor to the  
24 Department of Finance, which is referred to in the Burton Act. (Pub. Res. Code § 6101.)

25           <sup>4</sup> Legislation relating to the seawall properties was also enacted in 2001 and 2003. (Stats.  
26 2001, ch. 489; Stats. 2003, ch. 68.) However, those enactments do not appear to have any  
27 material bearing on the analysis of the issues presented here.

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



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

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

6 In Senate Bill 815, the Legislature found that certain lands within port jurisdiction,  
7 including seawall lot 330, have become separated from the San Francisco Bay by the  
8 Embarcadero roadway, were further cut off from the water by light rail tracks that were  
9 constructed in the median of the roadway, have ceased to be useful for the promotion of the  
10 public trust and the Burton Act trust except for the production of revenue to support the  
11 purposes of the Burton Act trust, [and] are leased on an interim basis for commuter parking  
12 or are vacant land . . . .

13 Based on those findings, the Legislature concluded, inter alia, that seawall lot 330 was  
14 filled and reclaimed as part of a highly beneficial plan of harbor development, has ceased to  
15 be tidelands, constitutes a relatively small portion of the tidelands granted to the city, and is  
16 not necessary for public trust or Burton Act purposes. Accordingly, the Legislature freed  
17 seawall lot 330 from the use requirements of the public trust and the Burton Act trust  
18 through the year 2094. The Legislature further authorized the port to enter into nontrust  
19 leases for seawall lot 330 for periods of up to 75 years.

20 (Stats. 2011, ch. 477, § 8(i), (j).)

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

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

- 1  
2 (A) Is for fair market value.  
3 (B) Is consistent with the terms of the public trust and the Burton Act trust, other than their  
4 restrictions on uses.  
5 (C) Is otherwise in the best interest of the state.

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

9 **C. AB 418**

10 In 2011, the Legislature enacted AB 418. (Stats. 2011, ch. 477.) In anticipation of the 34<sup>th</sup>  
11 America’s Cup race (AC34) being held in San Francisco, that legislation authorized the State  
12 Lands Commission to carry out an exchange of lands in the area of Pier 70, and to terminate the  
13 public trust and the Burton Act trust in those lands that no longer are useful for trust purposes.  
14 (*Id.* §§ 2(a), 3, 8(l), 9.) With respect to Seawall Lot 330 specifically, the Legislature found that  
15 “seawall lot 330 is not needed for any trust use for the foreseeable future, that the residual value  
16 to the trust of reserving seawall lot 330 for trust uses after the year 2094 is minimal, and that  
17 allowing the port to obtain a major investment in waterfront improvements to address its critical  
18 capital needs through the sale of seawall lot 330 would provide substantially greater benefit to the  
19 trust.” (*Id.* § 8(l).) Based on those findings, the Legislature conditionally declared Seawall Lot  
20 330 “to be free of the public trust and the Burton Act trust in perpetuity.” (*Id.* § 9(a).) Subject to  
21 the same condition, the Legislature granted “all of the state’s right, title, and interest in seawall lot  
22 330 . . . , free of the public trust and the Burton Act trust, to the port.” (*Id.* § 9(b).) “The port  
23 shall hold seawall lot 330 as an asset of the trust, free of any public trust, Burton Act trust, or  
24 Senate Bill 815 use or alienation restrictions, but subject to the requirement that all revenues or  
25 other proceeds generated on seawall lot 330 be deposited in the harbor fund and used for trust  
26 purposes.” (*Id.*)

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

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

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

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

5 Notwithstanding anything to the contrary in this section, the port may lease seawall lot  
6 330 to any person, free of the public trust, the Burton Act trust, and the restrictions of  
7 Senate Bill 815 if all of the following conditions are met:

- 8 (A) The term of the lease does not exceed 75 years.  
9 (B) The consideration received by the port is equal to or greater than the fair market value  
of the fee interested conveyed as determined by the port.  
10 (C) The consideration is used by the port for trust purposes.  
11 (D) The lease provides that, at the sole discretion of the port, any improvements on  
seawall lot 330 made by the lessee shall become the property of the port upon  
12 termination of the lease without any additional consideration to the lessee.

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

#### 16 **D. The Second Seawall Statute (AB 2797)**

17 Finally, in 2016, the Legislature enacted the second Seawall Statute, AB 2797. (Stats.  
18 2016, ch. 529.) In pertinent part, this statute amended section 4 of SB 815 to authorize the Port to  
19 enter into nontrust leases, defined as “a lease of all or any portion of the designated seawall lots  
20 free from the use requirements established by the public trust, the Burton Act trust, and the  
21 Burton Act transfer agreement.” (Stats. 2016, ch. 529, § 4(a).) In contrast to SB 815, which had  
22 authorized such leases on the conditions that the term not exceed 75 years and terminate no later  
23 than January 1, 2094 (Stats. 2007, § 4(a)), AB 2797 revised those conditions to provide that the  
24 term of a nontrust lease shall not exceed 75 years from the initial occupancy date, and shall  
25 terminate no later than December 1, 2105. (Stats. 2016, ch. 529, § 4(c).) Thus, the legislation  
26 had the effect of authorizing the Port to enter into lengthier nontrust leases. It reiterated the same  
27 conditions as had been placed on nontrust leases by SB 815, including prior submission to and  
28

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

3  
4 **III. THE NAVIGATION CENTER LEASE DOES NOT REQUIRE APPROVAL  
OF THE STATE LANDS COMMISSION.**

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

8 **A. Interim Nontrust Uses by the Port**

9 Respondents' primary argument in common is that the Burton Act conveyed complete  
10 authority to the Port to lease the seawall lots for short-term interim uses when not needed for trust  
11 purposes, and that the Seawall Statutes did not limit that authority. Indeed, respondents contend  
12 that the Seawall Statutes actually expanded the Port's authority as to nontrust uses, and they  
13 assert that their position is supported by long-standing administrative interpretations of the  
14 legislation. In particular, by way of unopposed requests for judicial notice,<sup>6</sup> the City and the State  
15 Lands Commission show that for many years following the enactment of the Burton Act,  
16 including after the enactment of the Seawall Statutes in 2007 and 2016, the Attorney General and  
17 the State Lands Commission consistently have taken the view that this "public interest" exception  
18 authorizes the Port to enter into non-trust leases of transferred properties without State Lands  
19 Commission approval if: (1) the use is relatively short-term; (2) there is no present or immediate  
20 trust use for the property and the non-trust use will not interfere with surrounding trust uses; (3)  
21 the non-trust use does not establish permanent construction or otherwise impede a future  
22 conversion to trust use; (4) the Port reserves the right to terminate the lease to reclaim the lands  
23 for trust purposes when needed; and (5) the Port is paid fair market value under the lease. Leases  
24 are considered "relatively short-term" if they are five years or shorter. The City asserts that the  
25

26 \_\_\_\_\_  
27 <sup>6</sup> None of the parties' requests for judicial notice of the pertinent statutes or administrative  
28 interpretations is opposed, and those requests therefore are granted to the extent pertinent to the  
Court's discussion of the issues.

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

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

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

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

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

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

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

2                   As discussed above, when it enacted SB 815 in 2007, the Legislature found that Seawall  
3 Lot 330 had “ceased to be useful for the promotion of the public trust and the Burton Act trust,”  
4 other than as a source of revenue to support those purposes, and it declared it to be “free from the  
5 use requirements of the public trust, the Burton Act trust, and the Burton Act transfer agreement  
6 for the period between the effective date of this act and January 1, 2094.” (Stats. 2007, ch. 660, §  
7 3.) In enacting AB 418 four years later, the Legislature took a further step: it *completely* released  
8 Seawall Lot 330 from the public trust and the Burton Act trust, not just the use requirements of  
9 the trusts. In particular, the Legislature unambiguously declared Seawall Lot 330 “to be free of  
10 the public trust and the Burton Act trust in perpetuity,” and it granted “all of the state’s right, title,  
11 and interest in seawall lot 330 . . . , free of the public trust and the Burton Act trust, to the port.”  
12 (Stats. 2011, ch. 477, § 9(a), (b).) The Legislature also expressly declared, “The port shall hold  
13 seawall lot 330 as an asset of the trust, free of any public trust, Burton Act trust, *or Senate Bill*  
14 *815 use or alienation restrictions*, but subject to the requirement that all revenues or other  
15 proceeds generated on seawall lot 330 be deposited in the harbor fund and used for trust  
16 purposes.” (*Id.* § 9(b) (emphasis added).)

17                   These declarations were subject to an express condition subsequent:

18                   If the AC34 match has not been held in the city, as contemplated by the host agreement, by  
19 December 31, 2013, or such later date as may be approved in writing by the commission,  
20 the termination of the trust in seawall lot 330 under this section shall be rescinded, and  
21 seawall lot 330 shall be subject to the public trust, the Burton Act trust, and Senate Bill 815.  
22 (*Id.* § 9(d)(1).) Thus, according to the City, so long as San Francisco hosted the America’s Cup  
23 regatta before the statute’s two-year anniversary, the Legislature granted Seawall Lot 330 to the  
24 Port “free of any . . . Senate Bill 815 use or alienation restrictions.” (Stats. 2011, § 9(b).) By way  
25 of a supplemental request for judicial notice, the City submits the 2010 Host Agreement and  
26 Protocol relating to that regatta, and asks the Court to take judicial notice that the AC34 “match”  
27 was indeed held in San Francisco Bay in September 2013. Petitioner does not oppose the City’s  
28 request for judicial notice or dispute that San Francisco hosted the America’s Cup in 2013, but  
asserts that the match was not “held in the city, *as contemplated by the host agreement*,” and

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

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

20 Given the undisputed fact that "the match" was in fact held in San Francisco, the rescission  
21 condition was never triggered. The term "match" does not incorporate or refer to any specific  
22 real estate development plans or property exchanges. Nor does the rescission provision of AB  
23 418 state, as petitioner would have the Court read it, "If the AC34 match has not been held in the  
24 city, based *from Piers 30-32*, as contemplated by the host agreement," or "If the AC34 *events* [a  
25 separately defined term in AB 418] are not held in the City, . . . ." Thus, the Legislature  
26 terminated the trust status of Seawall Lot 330 in AB 418 in 2011, and that termination was never  
27 rescinded as a matter of law. The Legislature granted Seawall Lot 330 to the Port "free of any . . .  
28 Senate Bill 815 use or alienation restrictions," which includes the requirement of prior State



1 Lands Commission approval.<sup>7</sup> If that is correct, then, as petitioner’s counsel candidly conceded at  
2 the hearing, it follows inescapably that the City is entitled to “win this case.”

3 Finally, if there were any doubt as to this conclusion, it is removed by the legislative history  
4 of AB 2797, enacted in 2016. In that legislation, the Legislature re-enacted, in slightly different  
5 language, the same requirement of prior State Lands Commission approval for nontrust leases.  
6 (Stats. 2016, ch. 529, § 4(e).) Unlike SB 815, however, the legislation made no explicit reference  
7 to Seawall Lot 330—although, confusingly, it did cross-reference that earlier bill’s definition of  
8 “designated seawall lots.” (*Id.*, § 1(m).) However, the legislative history of AB 2797 makes it  
9 crystal clear that at the time—fully three years after the America’s Cup race was held in San  
10 Francisco in September 2013—the Legislature believed that Seawall Lot 330 was not subject to  
11 SB 815’s restrictions, and that the termination of its trust status therefore had not been rescinded.  
12 We know that because the Committee analyses provided to both houses of the Legislature at the  
13 final sessions before the bill was submitted to the Governor for his signature read as follows:  
14 “[Existing law] [a]llows the Port to lease Seawall Lot 330 to any person, *free of the public trust,*  
15 *the Burton Act trust, and the restrictions of SB 815* if all specified conditions are met.” (AB  
16 2797, as amended August 19, 2016, Sen. Rules Comm., Ofc. of Senate Floor Analyses, Third  
17 Reading, at 2 ¶ 6; Concurrence in Senate Amendments, at 3 ¶ 6 (emphasis added).) In contrast,  
18 those analyses stated that *other* designated seawall lots remained subject to the SB 815  
19 restrictions, including State Lands Commission approval. (*Id.*)

20 In short, in 2011, the Legislature lifted the SB 815 restrictions it had previously placed on  
21 Seawall Lot 330, including the requirement of prior State Lands Commission approval of nontrust  
22 leases, and that action was never rescinded. The City therefore was not required to obtain such  
23

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

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

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CONCLUSION**

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

**IT IS SO ORDERED.**

Dated: November 22, 2019

  
HON. ETHAN P. SCHULMAN  
JUDGE OF THE SUPERIOR COURT

CPF-19-516841

SAFE EMBARCADERO FOR ALL VS. STATE OF CALIFORNIA ET AL

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

Date: November 22, 2019

By: GINA GONZALES  
Deputy Clerk

BRIAN F. CROSSMAN (241703)  
DEPUTY CITY ATTORNEY  
1 DR. CARLTON B. GOODLETT PL  
CITY HALL, ROOM 234  
SAN FRANCISCO, CA 94102-4682

JESSICA E. TUCKER-MOHL (262280)  
OFFICE OF THE ATTORNEY GENERAL OF CALIFORNIA  
1300 I STREET, SUITE 125  
P.O. BOX 944255  
SACRAMENTO, CALIFORNIA 94244

JOHN BRISCOE (053223)  
BRISCOE IVESTER & BAZEL LLP  
155 SANSOME STREET  
SEVENTH FLOOR  
SAN FRANCISCO, CA 94104

SHARI B. POSNER (168738)  
DEPUTY ATTORNEY GENERAL  
1300 I STREET, SUITE 125  
P.O. BOX 944255  
SACRAMENTO, CA 94244