

**STAFF REPORT  
C110**

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**CONSIDER APPROVAL OF DETERMINATIONS PURSUANT TO CHAPTER 660, STATUTES OF 2007 (SB 815), CHAPTER 757, STATUTES OF 2012 (AB 2649), AND CHAPTER 529, STATUTES OF 2016 (AB 2797), REGARDING THE PROPOSED DEVELOPMENT OF SEAWALL LOT 322-1, BOUNDED BY BROADWAY, FRONT STREET, AND VALLEJO STREET, AND LOCATED ON LEGISLATIVELY GRANTED LANDS IN THE CITY AND COUNTY OF SAN FRANCISCO**

**TRUSTEE:**

City and County of San Francisco, acting by and through the San Francisco Port Commission

**BACKGROUND:**

The lands comprising the San Francisco waterfront consist primarily of sovereign tidelands granted to the City by the State under the Burton Act (Chapter 1333, Statutes of 1968, as amended). Under the City's charter, the granted lands are held and managed by the San Francisco Port Commission (Port). The Burton Act authorizes the Port to use, conduct, operate, maintain, manage, regulate, improve, and control the San Francisco waterfront consistent with the Public Trust and the Burton Act trust.

In 2007, the Legislature enacted Chapter 660, Statutes of 2007 (SB 815), affecting the Port's granted Public Trust lands. SB 815 temporarily lifted the Public Trust and Burton Act trust use restrictions from certain designated seawall lots south of Market Street and authorized the Port to issue nontrust leases on the lands, subject to certain requirements and that the lease revenues be used for the preservation of the City's deteriorating historic finger piers and structures and the construction of waterfront plazas and open space. The finger piers and bulkheads along the embarcadero are among the last remaining examples of break-bulk piers in the nation.

Seawall lots are former tidelands that were filled and cut off from the waterfront by the construction of the Great Seawall (now occupied by the Embarcadero roadway) in the late 19th and early 20th centuries. The designated seawall lots are presently either vacant or are leased on an interim basis - primarily for commuter parking. In lifting the Public Trust use restrictions, the Legislature found that the designated seawall lots were cut off from the water, represented a

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relatively small part of the Port's granted land, and were no longer useful for the promotion of Public Trust and Burton Act trust purposes except to generate funding for the preservation and rehabilitation of historic piers and structures, for the construction of waterfront plazas and open space, and for improving public access to the waterfront for visitors and residents.

In 2011, the Port sponsored legislation, Chapter 757, Statutes of 2012 (AB 2649), to add Seawall Lot 322-1 to the list of designated seawall lots and to lift the Public Trust and Burton Act trust use restrictions, consistent with the terms of SB 815, for the specific purpose of an affordable housing project. Now, the Port, in cooperation with the San Francisco Mayor's Office of Housing and Community Development, requests that the Commission temporarily lift the Public Trust and Burton Act trust use restrictions over Seawall Lot 322-1 and approve a nontrust lease for an affordable housing development.

Project Site:

Seawall Lot 322-1, a 0.87-acre parcel of land, is currently a commuter parking lot. The Port, with the Mayor's Office of Housing and Community Development and the developers, Bridge Housing and the John Stewart Company, propose to build an affordable housing project on the Seawall Lot that would include 124 affordable units, one manager unit, and a restaurant located on the ground level. It may also include a roughly 5,000-square-foot childcare center that will serve 55 children, including some from low-income families. The Port characterizes the childcare center as incidental or ancillary to the affordable housing project. The proposed project also includes a senior housing component located on a City-owned parcel adjacent to Seawall Lot 322-1. The City-owned parcel is not subject to the Public Trust or Burton Act Trust. The Commission's findings and approvals are not required for the senior housing component.

Seawall Lot 322-1 is bounded by Broadway, Front, and Vallejo Streets, near the Embarcadero. Toward the waterfront on the east are two buildings and the adjacent City-owned parcel at 735 Davis Street. Final approvals for the project are pending but are anticipated to occur later this year. Construction is expected to start in 2019 with tenant move-in starting in 2021.

**LEGAL REQUIREMENTS:**

SB 815, as amended, allows the Port to issue a nontrust lease for fair market value (FMV) and on terms consistent with prudent land management practices, as determined by the Port. The Commission may then approve the nontrust lease by making the following findings:

1. The nontrust lease is for fair market value.

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2. The nontrust lease is consistent with the terms of the Public Trust and the Burton Act trust, other than their restrictions on uses.
3. The nontrust lease is otherwise in the best interest of the State.

In addition, under AB 2649, the Commission may lift the Public Trust use restrictions from Seawall Lot 322-1 by making the following findings to lift the Public Trust use restrictions from Seawall Lot 322-1:

1. Seawall Lot 322-1 is no longer necessary for Public Trust or Burton Act trust purposes.
2. Lifting the use requirements of the Public Trust, the Burton Act trust, and the Burton Act transfer agreement until January 1, 2106, is in the best interest of the State.

The Commission must make both sets of findings before the proposed affordable housing project at Seawall Lot 322-1 may proceed.

**ANALYSIS AND STAFF RECOMMENDATION:**

Approval of the Option to Lease, Ground Lease, and the Development Memorandum of Understanding:

Option to Lease Agreement:

The Option to Lease Agreement provides the Developer with evidence of site control to support its application for affordable housing tax credits from the California Tax Credit Allocation Committee. This agreement sets out the preconditions the Developer must meet to exercise its option to lease. When approved by the Port Commission and the Commission, the option agreement will be effective for approximately two years or until replaced by the Ground Lease. Most importantly, the form of the Ground Lease is attached to the Option to Lease Agreement. This Ground Lease is the nontrust lease proposed for Seawall Lot 322-1, as allowed by SB 815 and AB 2649. The Ground Lease will become effective after it has been executed, the Developer has received all required financing and closed escrow, and the Lease is recorded.

Ground Lease:

The Ground Lease conveys property rights subject to the negotiated terms and conditions under which the project site is leased to the Developer. The initial Lease term is for 57 years, plus one 18-year extension option. Before the Port authorizes the extension, the Chief Harbor Engineer must assess the condition of the City's Grand Seawall infrastructure and

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recommend any mitigation measures necessary to protect public health and safety.

The Port expects to receive a single lump-sum payment at FMV for the lease, which has been appraised at \$14.9 million. In addition to the FMV payment, the Port will receive \$20,000 per year for the residential portion of the development with escalation every five years, 30 percent of the net annual revenue collected by the Developer for the proposed restaurant sublease, 50 percent of excess rent from other subleases, and 15 percent of net proceeds from refinancing or sale of the non-residential portion of the Development.

The Ground Lease is consistent with all applicable requirements of the Public Trust and the Burton Act. The maximum term is 75 years, as allowed by SB 815, as amended. The Option to Lease and the Ground Lease will provide FMV to the Port, and the revenues will be used for Public Trust and Burton Act trust purposes. Staff has reviewed the Option to Lease and the Ground Lease and recommends the Commission approve the documents.

Development Memorandum of Understanding (MOU):

The Development MOU includes the terms and conditions the Port and the Mayor's Office of Housing and Community Development negotiated regarding the agencies' roles and responsibilities before closing of escrow on the Lease and during the term of the Lease. The term will run from the date the Development MOU is executed and terminate or expire concurrently with the Lease.

The Development MOU dictates the terms by which the Port will receive FMV immediately upon the Developer's close of escrow on the Lease. If the full payment is not made when escrow closes, then interest will accrue at 1.5 percent during the first and second years after closing escrow and at 3 percent from the third year until the FMV is paid in full.

Fair Market Value

Consistent with existing law, the Port arranged for an appraisal of Seawall Lot 322-1 using appraisal instructions that Commission staff reviewed and approved. The appraisal, dated June 29, 2018, determined a net present FMV of \$14.9 million, which is due when escrow closes. If escrow does not close within nine months of the date of the appraisal, FMV will be reset based on an updated appraisal, which would also be subject to the Commission's approval.

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The 75-year lease for Seawall Lot 322-1 was appraised at its highest and best use, market-rate housing, even though affordable housing will be built. Staff requires this form of appraisal to determine a proper FMV according to statute. AB 2649 allows the Port, under specific conditions, to use rent credits to make up for the difference in the value between an affordable-housing below-market lease and the FMV. The Port, however, has chosen to accept a cash payment of the market-rate FMV. The Mayor's Office of Housing and Community Development will pay the appraised FMV using affordable housing in-lieu fees from a future developer of Pier 70 Parcel K North, a site the Port intends to sell to fund the Pier 70 project. In-lieu fees are fees paid by a developer into the City's housing trust fund and used to finance affordable housing throughout the City. If the City's in-lieu fees do not become available, the Mayor's Office of Community Development is still obligated to pay the Port the property's full FMV from another source.

Staff reviewed the appraisal and agree with the conclusions that the consideration the Port will receive under the Development MOU and the Ground Lease constitute an amount equal to or greater than the FMV of the leased fee, consistent with the requirements in existing law.

### Public Trust or Burton Act Purposes

Seawall Lot 322-1 is filled and cut off from the water, constitutes a relatively small portion of the Port's tidelands, is not currently being used, and is not anticipated in the foreseeable future to be used for Public Trust or Burton Act trust purposes. Seawall Lot 322-1 has been used for commuter parking since 1998. In previous decades, it was used for tour bus parking, a service station, storage, and parking. The Port has not received maritime or other Public Trust-related proposals for Seawall Lot 322-1 other than a hotel proposal in the late 1990s that did not come to fruition. Recently, the Port entered into an exclusive negotiating agreement for development of a trust-consistent hotel and dinner theater on Seawall Lots 323 and 324. Once these are built, Seawall Lot 322-1 will be further disconnected from the water.

Based on the location of Seawall Lot 322-1 in relation to the water and the intervening development, its leasing history, and the lack of interest in Public Trust consistent development, staff recommends the Commission find that Seawall Lot 322-1 is not needed for Public Trust or Burton Act trust purposes, other than to generate revenue for Public Trust and Burton Act purposes. Staff also recommends the Commission find that the Ground Lease is consistent with the terms of the Public Trust and the Burton Act trust, other than their restrictions on use.

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Best Interest of the State

The proposed Option to Lease and Ground Lease (Lease Agreements) would provide the Port with more revenue than it would receive under its existing commuter parking lot lease. The net present value of lease revenues from the parking use, if extended over 75 years, is roughly \$11.3 million. The affordable housing project is anticipated to provide several benefits to the Port, the City, and the State, including \$14.9 million for the Port over the Lease initial term that will be used for Public Trust and Burton Act trust purposes, revenue from rent, and affordable housing. Revenue from Seawall Lot 322-1, as required by statute, will be used to fund the preservation of historic piers and structures, construct and maintain waterfront plazas and open space, and improve access to the waterfront for visitors and residents.

The State will also benefit from the addition of affordable housing. The lack of affordable housing is a statewide concern threatening the economic, environmental, and social quality of life in California. The Lease Agreements will produce 124 affordable housing units to families earning from 30-120 percent of the Area Median Income.

Staff recommend the Commission find that lifting of the Public Trust and Burton Act trust use requirements from Seawall Lot 322-1 and the proposed nontrust Ground Lease are in the best interest of the State.

**OTHER PERTINENT INFORMATION:**

1. AB 1423 (Chiu), pending legislation amending AB 2649, would revise the definition of affordable housing to allow other uses at Seawall Lot 322-1 if they are incidental or ancillary to the primary purpose of providing affordable housing or are consistent with the Public Trust. If this bill is enacted, the childcare facility will be deemed ancillary or incidental and the affordability range will extend from 100 percent to 120 percent of Area Median Income.
2. The San Francisco County Board of Supervisors approved the Option to Lease Agreement, the form of the ground lease, and Development MOU on July 24, 2018, on a 9-0 vote. On July 10, 2018, the San Francisco Port Commission approved the Option to Lease Agreement, the form of the Lease and the Development MOU, and, subject to approval by the Board of Supervisors and the Commission, approved the Lease. The Commission is not a party to the agreements.
3. Staff recommends that the Commission find that lifting the Public Trust and the Burton Act trust use restrictions on Seawall Lot 322-1 and approving the Option to Lease, Ground Lease, and Development MOU do

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not have a potential for resulting in either a direct or a reasonably foreseeable indirect physical change in the environment, and are, therefore, not projects in accordance with the California Environmental Quality Act (CEQA).

Authority: Public Resources Code section 21065 and California Code of Regulations, title 14, sections 15060, subdivision (c)(3), and 15378.

4. The proposed action is consistent with Strategy 1.2 of the Commission's Strategic Plan to provide that the current and future management of ungranted sovereign lands and resources and granted lands, including through strategic partnerships with trustee ports and harbor districts, is consistent with evolving Public Trust principles and values, particularly amid challenges relating to climate change, sea-level rise, public access, and complex land use planning and marine freight transportation systems; Key Action 1.2.1 to provide guidance to grantees on the elements of the Public Trust Doctrine, fiduciary duties, and use of trust lands and assets, generally and specifically in the context of sea-level rise and climate change; Key Action 1.2.2 to develop strategic partnerships with trustee ports to facilitate opportunities for responsibly enhancing California's economy, including California's "blue economy," consistent with the Public Trust Doctrine; and Key Action 1.2.3 to promote Public Trust consistent waterfront development and revitalization, addressing sea-level risk and climate change in the planning process.

**EXHIBIT:**

- A. Location and Site Map

**RECOMMENDED ACTION:**

It is recommended that the Commission:

**CEQA FINDINGS:**

Find that lifting the Public Trust and Burton Act trust use restrictions from Seawall Lot 322-1 and approving the Option to Lease, Ground Lease, and Development MOU are not subject to the requirements of CEQA pursuant to California Code of Regulations, title 14, section 15060, subdivision (c)(3), because the subject activity is not a project as defined by Public Resources Code section 21065 and California Code of Regulations, title 14, section 15378.

**AUTHORIZATION:**

1. Find that the Option to Lease, the Ground Lease, and the Development MOU is consistent with prudent land management

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practices because they are for fair market value, are consistent with the terms of the Public Trust and the Burton Act trust other than their use restrictions, and are in the best interest of the State.

2. Find that Seawall Lot 322-1 is no longer necessary for Public Trust or Burton Act trust purposes, except to generate funding for the preservation and rehabilitation of historic piers and structures, for the construction of waterfront plazas and open space, and for improving public access to the waterfront for visitors and residents.
3. Find that temporarily lifting the use requirements of the Public Trust and the Burton Act trust is in the best interest of the state.
4. Approve the Option Agreement, Ground Lease, and Development MOU in substantially the form on file with the Commission.

NO SCALE

**SITE**



SEAWALL LOT 322-1, CITY AND COUNTY OF SAN FRANCISCO

NO SCALE

**LOCATION**



MAP SOURCE: USGS QUAD

**Exhibit A**

G11-01  
 SWL 322-1  
 FINDINGS AND APPROVALS  
 UNDER SB 815, AB 2649  
 AND AB 2797  
 SAN FRANCISCO COUNTY



This Exhibit is solely for purposes of generally defining the lease premises, is based on unverified information provided by the Lessee or other parties and is not intended to be, nor shall it be construed as, a waiver or limitation of any State interest in the subject or any other property.