

# Staff Report 41

## **APPLICANT/LESSEE/SUBLESSOR:**

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Burlingame Bay Associates

## **SUBLESSEE:**

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Landry's, LLC, owned by Golden Nugget, LLC

## **PROPOSED ACTION:**

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Approval of a sublease endorsement; Denial of application for amendment to a General Lease – Commercial Use

## **AREA, LAND TYPE, AND LOCATION:**

Sovereign land in San Francisco Bay, adjacent to 60 Bay View Place, Burlingame, San Mateo County.

## **AUTHORIZED USE:**

Continued use and maintenance of a restaurant, parking lot, lagoon, footbridge, paved pedestrian path, landscaping, and shoreline protection.

## **TERM:**

66 years, beginning July 1, 1972

## **CONSIDERATION:**

The greater of \$31,000 per year or 30 percent of gross annual income.

## **SPECIFIC LEASE PROVISIONS:**

- Liability insurance in an amount no less than \$1,000,000 per occurrence.
- Deposit \$30,000 each year, beginning July 1, 2019, into a security account.  
Lessor must authorize any withdraw and no withdraw, levy, or other process will be honored against the funds without the approval of the Lessor.

## **STAFF ANALYSIS AND RECOMMENDATION:**

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### **AUTHORITY:**

Public Resources Code sections 6005, 6216, 6301, 6501.1, and 6503; California Code of Regulations, title 2, sections 2000 and 2003.

### **PUBLIC TRUST AND STATE'S BEST INTERESTS:**

On July 6, 1972, the Commission authorized Lease Number PRC 4687, a General Lease – Commercial Use, to Anza Pacific Corporation along with a Boundary Agreement and Land Exchange (BLA 131) ([Item 24, July 6, 1972](#)). On March 25, 1976, pursuant to BLA 131, the Commission authorized an assignment to Anza Shareholder's Liquidating Trust ([Item 47, March 25, 1976](#)).

On July 19, 1978, the Commission authorized a sublease to Victoria Station, Inc. for construction of a restaurant ([Item 17, July 19, 1978](#)). On November 16, 1982, the Commission authorized assignment of the lease to Kwok Hung Szeto and Nikki Szeto and amendment of the assignment to substitute Burlingame Bay Associates for the assignee ([Item 1, November 16, 1982](#)).

On October 29, 1990, the Commission authorized an amendment of the sublease to Restaurants Unlimited, Inc. due to Victoria Station selling the leasehold interest and personal property to the sublessee ([Item 10, October 29, 1990](#)). On April 5, 2019, the Commission authorized an amendment of the lease and a revision of rent ([Item 22, April 5, 2019](#)). On June 23, 2020, the Commission authorized an amendment of the lease to temporarily defer rent consistent with the Commission's COVID-19 rent deferral program ([Item 56, June 23, 2020](#)) since the Lessee did not qualify for that program based on the rent amounts. The Lease will expire on June 30, 2038. The Applicant is now applying for endorsement of a sublease for a new restaurant as described below, and an amendment to the lease to modify rent.

### **PROPOSED SUBLEASE ENDORSEMENT:**

The lease includes authorization for a sublease for the use and maintenance of a restaurant. The restaurant business is operated as Kincaid's Fish, Chop and Steakhouse. The business is owned by Landry's, LLC (Landry's). Landry's is owned by Golden Nugget, LLC. Golden Nugget, LLC is a national, diversified, restaurant, hospitality, entertainment, and gaming company principally engaged in the ownership and operation of full-service restaurants and Golden Nugget gaming facilities.

In August 2019, Landry's purchased the restaurant business from Restaurants Unlimited, Inc. from a bankruptcy sale. In addition, Landry's assumed the lease between Burlingame Bay Associates and Restaurants Unlimited, Inc.

Staff believe the sublease is an appropriate use of sovereign lands. The proposed endorsement of a sublease does not alienate the State's fee simple interest in the underlying land, nor will it permanently impair public rights. The Lessee will remain primarily responsible for compliance with the lease terms. The revenue generated from the restaurant may serve to increase payments to the State which benefit the State General Fund.

**LEASE AMENDMENT APPLICATION:**

The lease commenced in 1972 with consideration being one-half the net cash income from the lease property, which in no event would be less than \$3,000 per year. On April 5, 2019, the Commission authorized an amendment of the lease and revised the rent to \$42,228 for the period of July 1, 2018 through June 30, 2019, and the greater of \$31,000 per year or 30 percent of gross income, effective July 1, 2019; and acceptance of the 2018/2019 rent in two installments due on July 1, 2019, and July 1, 2020. The rent was revised per an appraisal prepared by the Lessee's appraiser following Commission staff review.

Pursuant to COVID-19 shelter-in-place orders, Landry's temporarily closed the restaurant between March and September 2020, but after re-opening in September had reduced capacity with limited outdoor dining service. Because of the temporary closure and limited seating capacity, the restaurant revenue was reduced along with the ability to pay the monthly rent to the Lessee. As a result, Landry's requested rent abatement from the Lessee.

Subsequent to Landry's request for rent abatement, the Lessee requested an amendment of its lease to: forgive rent from April 1, 2020 through June 30, 2021; reduce rent from July 1, 2021 through June 30, 2022 to \$15,000 annually and use the reserved security deposit for payment of rent; and defer rent payments for 24 months with a subsequent payment plan. The Commission's COVID-19-Related Rent Deferral program did not provide for waiving or reducing rent. Although this request is not specifically under the authorized COVID-19 Rent Deferral program, staff carefully analyzed this request to ensure any recommendation would not violate Article XVI, Section 6 of the California Constitution which prohibits making a gift of any public thing of value, including use of State land. Staff requested specific financial information from the Lessee to support its proposed rent modifications but did not receive the necessary information requested. Staff's review and analysis of the financial information the Lessee did provide indicated the Lessee experienced declines in revenues from COVID-19, but net income did not appear significantly

impacted during 2020. The Lessee had a net income of approximately \$10,500 in 2020. In comparison, the Lessee had a net loss of \$23,249 in 2019.

In August 2021, the Lessee paid all outstanding rent, including interest and penalties owed on late payments, and submitted the required annual security deposit as required pursuant to the lease and the COVID-19 rent deferral amendment described above.

Article XVI, Section 6 of the California Constitution specifically prohibits the Legislature from making or authorizing any gift of public money or thing of value to any individual, municipality, or corporation. A 'thing of value' includes the use of State-owned land for private benefit with no rent or compensation for such use. Under Title 2, Division 3 of the California Code of Regulations, and the Public Resources Code, the Commission has broad discretion in all aspects of leasing state lands, including the amount of rent that is most appropriate (tit. 2 Cal. Code of Regulations, § 2000(b)). Rents must be set to serve the best interests of the State.

Staff recommends that the Commission deny the Lessee's application to amend its lease to modify the rent. Staff has not recommended waiving rent for individuals and small businesses located on State land, and the lessee is a well-capitalized corporation with significantly better ability to withstand the financial impacts of COVID-19. Thus, the proposed rent modifications may constitute a violation of the California Constitution as a gift of State-owned land for private benefit with reduced or no rent or compensation for such use, and would result in the State not receiving the fair market rent for the lease.

### **CONCLUSION:**

The proposed approval of a sublease endorsement does not alienate the State's fee simple interest in the underlying land, nor will it permanently impair public rights. In addition, approval of a sublease endorsement and denial of the amendment of this lease will not result in a change in the use of or impacts to Public Trust resources. Commission staff believes approval of a sublease endorsement and denial of the amendment is consistent with the common law Public Trust Doctrine and is in the best interests of the State.

### **OTHER PERTINENT INFORMATION:**

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1. Approval or denial of the endorsement of a sublease and amendment of lease is a discretionary action by the Commission. Each time the Commission approves or rejects a use of sovereign land, it exercises legislatively delegated

authority and responsibility as trustee of the State's Public Trust lands as authorized by law.

2. This action is consistent with the "Meeting Evolving Public Trust Needs" Strategic Focus Area of the Commission's 2021-2025 Strategic Plan.
3. The endorsement of a sublease is not a project as defined by the California Environmental Quality Act because it is an administrative action that will not result in direct or indirect physical changes in the environment.

Authority: Public Resources Code section 21065 and California Code of Regulations, title 14, section 15378, subdivision (b)(5).

## **EXHIBIT:**

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A. Site and Location Map

## **RECOMMENDED ACTION:**

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It is recommended that the Commission:

### **PUBLIC TRUST AND STATE'S BEST INTERESTS:**

Find that the proposed endorsement of a sublease and denial of the amendment of the lease will not substantially interfere with Public Trust needs and values at this location, at this time, and for the remaining term of the lease; and is in the best interests of the State.

### **AUTHORIZATION:**

1. Authorize, by endorsement, a sublease between Burlingame Bay Associates and Landry's, LLC owned by Golden Nugget, LLC, of Lease Number PRC 4687, which shall be subject to the terms of Lease 4687, for the operation of a restaurant facility on sovereign land located in the San Francisco Bay, as shown on Exhibit A, Site and Location Map, (for reference purposes only) attached and by this reference made a part hereof.
2. Deny the application to amend Lease Number PRC 4687, a 66-year General Lease – Commercial Use, of sovereign land located in the San Francisco Bay, as shown on Exhibit A, Site and Location Map, (for reference purposes only) attached and by this reference made a part hereof, for forgiveness of rent from

April 1, 2020 through June 30, 2021; a reduction of rent from July 1, 2021 through June 30, 2022; and deferral of rent payments.



NO SCALE

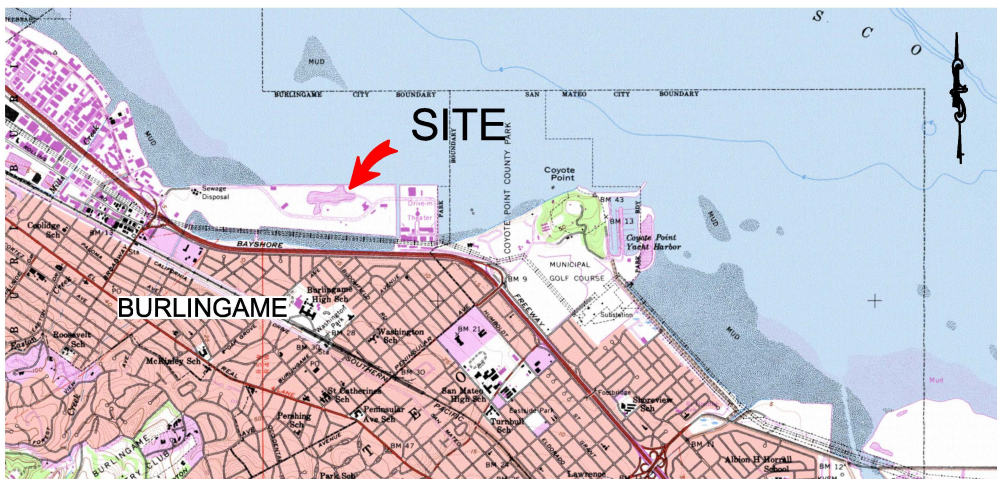
## SITE



60 BAY VIEW PLACE, BURLINGAME

NO SCALE

## LOCATION



MAP SOURCE: USGS QUAD

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.

## **Exhibit A**

PRC 4687  
BURLINGAME BAY  
ASSOCIATES  
APN 026-363-510  
GENERAL LEASE -  
COMMERCIAL USE  
SAN MATEO COUNTY



TS 10/06/2020