

# Staff Report 57

## **PARTIES:**

---

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

The City and County of San Francisco, a charter city and municipal corporation (City)

The State of California, acting by and through the California State Lands Commission (Commission)

The California State Lands Commission, acting in its role as Trustee for the Kapiloff Land Bank Fund (Kapiloff Trustee)

Murray G. Cole and Doris M. Cole, Trustees of the 2006 Murray G. and Doris M. Cole Revocable Trust dated August 1, 2006 (Cole Trust)

## **PROPOSED ACTION:**

---

Consideration of a settlement agreement concerning certain land parcels located adjacent to Islais Creek in the city and county of San Francisco. The settlement agreement includes: 1) a Public Trust Exchange and Title Settlement Agreement between the State of California, acting by and through the California State Lands Commission, the City and County of San Francisco, acting as a charter city and acting by and through the San Francisco Port Commission, and Murray G. Cole and Doris M. Cole, Trustees of the 2006 Murray G. and Doris M. Cole Revocable Trust; and, 2) the Commission making findings that are necessary to allow the City to sell a parcel of filled tidelands within the settlement area.

## **PROPOSED SETTLEMENT AGREEMENT:**

---

The Cole Trust owns or claims to own approximately 2.5 acres of land located at 1620, 1650, and 1680 Davidson Avenue, adjacent to Islais Creek in the City of San Francisco (the Cole Property.) The Cole Trust, City, and Port request the Commission's assistance to resolve a title dispute regarding a portion of a "paper street" known as Custer Avenue that runs generally east-west through the

middle of the Cole Property. (A “paper street” is an area that was designated to be a public street on historic maps, but which was either never built or has been long abandoned as a public right-of-way; in this case, the paper street crosses an area of filled sovereign lands.) The proposed settlement would end the dispute, allow the Cole Property to be sold through a private transaction, create an 18-foot wide public trust easement along the waterway, and compensate the state and public for the remaining value through a donation into the Commission’s Kapiloff Land Bank Fund.

Two statutes authorize the City and the state to settle the dispute over former Custer Avenue, conditioned on the Commission making certain findings and issuing certain approvals:

1. Public Resources section 6307 allows the Commission to enter into land exchange agreements. Through the proposed Public Trust Exchange and Title Settlement Agreement, the state would exchange its claimed interest in 23,350 square feet of former Custer Avenue for the Cole Trust granting an easement for public-trust purposes over an 18-foot wide strip of land along Islais Creek and accept a deposit of \$790,000 into the Kapiloff Land Bank Fund. The [Kapiloff Land Bank Fund](#) enables the Commission to hold money in trust to acquire property or property interests that further the purposes of the Public Trust.
2. Section 8 of [Chapter 660, Statutes of 2007](#) (SB 815), allows the City to sell specified paper streets that are located greater than 100 feet from the mean high tide line, provided the Commission makes certain findings to terminate the state’s interest. The Port proposes to sell 2,364 square feet of Custer Avenue to the Cole Trust pursuant to SB 815 (SB 815 Parcel). The Port will receive \$160,000 from the sale proceeds to be expended solely for purposes of implementing the Port’s capital plan, consistent with the Burton Act (Chapter 1333, Statutes of 1968, as amended) and the Public Trust.

The proposed settlement will be consummated through a series of land conveyances and monetary deposits coordinated through an escrow agent. If approved, the City and state will pursue legislation to grant the 18-foot wide public trust easement along the waterway to the Port for local management.

## LEGAL REQUIREMENTS:

---

### **PUBLIC RESOURCES CODE SECTION 6307**

Pursuant to Public Resources Code section 6307 (PRC 6307), the Commission is authorized, under certain circumstances, to enter into land exchange agreements by which the state will accept or confirm land in the public trust and terminate the state's public trust interests in other lands of equal or lesser value. Because the City does not have the legal authority to terminate the state's public trust interest on trust property, the Commission must take title to the Trust Termination Lands to be exchanged for interests in the public trust Lands, and, as part of that exchange, terminate the public trust interest in the Trust Termination Lands. To approve the proposed Agreement pursuant to PRC 6307, the Commission must make the following findings:

- 1) The exchange is for one or more of the following purposes:
  - a. To improve navigation or waterways
  - b. To aid in reclamation or flood control
  - c. To enhance the physical configuration of the shoreline or trust land ownership
  - d. To enhance public access to or along the water
  - e. To enhance waterfront and nearshore development or redevelopment for public trust purposes
  - f. To preserve, enhance, or create wetlands, riparian or littoral habitat, or open space
  - g. To resolve boundary or title disputes
- 2) The lands or interests in lands to be acquired in the exchange will provide a significant benefit to the public trust.
- 3) The exchange does not substantially interfere with public rights of navigation and fishing.
- 4) The monetary value of the lands or interests in lands received by the trust in exchange is equal to or greater than that of the lands or interests in land given by the trust in exchange.
- 5) The lands or interests in land given in exchange have been cut off from water access and no longer are in fact tidelands or submerged lands or navigable waterways, by virtue of having been filled and reclaimed, and are relatively useless for public trust purposes.
- 6) The exchange is in the best interests of the state.

The Kapiloff Land Bank Act ([Public Resources Code section 8600](#), et seq.) modifies PRC 6307 by allowing the Commission, acting as Kapiloff Trustee, to accept monetary payments as consideration for title settlements in lieu of land. This type of Kapiloff deposit is restricted by a statutory trust limiting its use solely to the purchase of lands or interests in lands suitable to be managed as part of the state's public trust lands.

## **SB 815**

Beginning in the 1850s, much of the San Francisco waterfront was filled and built out to create a deep-water harbor. Portions of the filled and reclaimed lands were cut off from the water as a result of these harbor improvements and conveyed into private ownership pursuant to legislative authorization. Other portions of these lands, including Custer Avenue, were platted as public streets and reserved to the state. In 1969, pursuant to the Burton Act, the state conveyed over 1,000 acres of filled lands (and a large quantity of submerged lands) to the Port, including these paper streets and other filled tidelands, to hold in trust for Public Trust and Burton Act trust purposes.

In accordance with SB 815 and Section 3, Article X of the California Constitution, the Legislature found that certain paper streets, as listed in SB 815, are no longer used or necessary for navigation purposes and authorized the City to lease, sell, or otherwise transfer all or any portion of the paper streets free of the Public Trust and the Burton Act Trust. Prior to any transfer, the Commission is required to make findings at a public meeting. These findings include that the land will be sold at fair market value, that the paper street has been filled and reclaimed, is cut off from access to the waters of San Francisco Bay, is no longer needed or required for the promotion of the Public Trust, and that the transfer will not substantially interfere with public trust uses and purposes. The Commission is also required to declare that the transfer is consistent with the findings in Section 2 of Chapter 660 and is in the best interests of the state.

## **STAFF ANALYSIS AND RECOMMENDATION:**

---

### **AUTHORITY:**

Public Resources Code sections 6005, 56216, 6301, 6307, and 8600, et seq.; Chapter 660, Statutes of 2007

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

The purpose of this title settlement and public trust exchange is to resolve a title dispute. The Cole Property, including former Custer Avenue, was tide and submerged lands on September 9, 1850, the date California was admitted to the Union. The state therefore received the land in trust, pursuant to the Public Trust Doctrine, for public purposes of commerce, navigation, and fisheries.

In 1868, the Legislature created the Board of Tideland Commissioners (BTLC; Chapter 543, Statutes of 1868), vesting in them the power to survey tidelands, to map them into blocks and lots, to sell the blocks and lots, and to reserve streets, canals, and basins for public use. The BTLC's surveyor, George Allardt, laid the Cole Property out as BTLC Blocks 51 and 53 divided by Custer Avenue (then known as Third Avenue). Blocks 51 and 53 were sold to private parties between 1872 and 1874. Over time, the blocks and streets were filled and reclaimed, raising them above the high-tide line of San Francisco Bay. Custer Avenue remained unsold in state ownership.

In 1872, the City acquired jurisdiction, but not fee ownership, of Custer Avenue. In 1914, the City formally closed this portion of Custer Avenue as a public right-of-way pursuant to City charter. In 1917, the City purported to exchange former Custer Avenue with adjacent property owners, and it has been controlled and occupied by private parties since 1917.

The Port and Commission assert that former Custer Avenue remains public trust property that was transferred from the state to the Port via the Burton Act. The Cole Trust disputes public ownership and trust status of Custer Avenue and claims ownership free of the Trust.

All parties wish to settle their claims through the proposed settlement and to avoid the expense, delay, and uncertainty of litigation. The settlement would terminate the trust in 25,714 square feet of Custer Avenue, impress the trust on 7,082 square feet along Islais Creek, and compensate the state and City for the remaining value. This will be accomplished through a Public Resources Code section 6307 land exchange agreement and an SB 815 paper street sale.

Only the northwest end of former Custer Avenue touches Islais Creek; the rest is surrounded by the Cole Property and has been used for decades as an automobile storage yard. The Cole Property is not publicly accessible. Former Custer Avenue provides no public trust purpose or amenities. The lands adjoining former Custer Avenue have been freed of the trust, preventing the parcel from being used for commerce, navigation, and fisheries, and making it relatively useless for public trust purposes. Terminating the Public Trust on this parcel would not substantially interfere with public trust uses, including public rights of navigation and fishing, since the

parcel is land locked and the public is unable to navigate or fish on the filled parcel. In exchange for terminating the trust in former Custer Avenue, the Cole Trust would grant a public trust easement along the entire length of Islais Creek within the Cole Property, which will eventually enable new public access and open space along the waterfront.

The SB 815 Parcel is the approximately 2,364 square feet of former Custer Avenue that is located 100 feet or further from the mean high-water line of San Francisco Bay, the furthest upland portion of former Custer Avenue. Just as with the remainder of Custer Avenue, the SB 815 Parcel is filled and reclaimed, cut off from the water, and relatively useless for public trust purposes in its present condition.

The parties have conducted independent studies and valuations of their respective factual and legal positions relating to the disputed title and boundary claims. This factual and legal analysis, along with an independent appraisal shows that the \$790,000 Kapiloff deposit and public trust easement lands received by the trust is equal to or greater than that of the lands within Custer Avenue to be removed from the trust, and that the \$160,000 sale of the SB 815 Parcel is fair market value. The Commission agrees to consider using the Kapiloff Land Bank Fund deposit to acquire property interests within the City and County of San Francisco, if identified and proposed by the Port. The Commission and Port will seek legislation granting the City the Public Trust Easement Lands to be held in Trust.

### **CONCLUSION:**

As described in the preceding paragraphs and in the proposed Agreement, the facts support each of the necessary findings the Commission must make. Commission staff and the Attorney General's Office have reviewed the proposed Agreement and believe all necessary legal elements have been met. Staff recommends that the Commission approve the Agreement, contingent on approval by the City and County of San Francisco Board of Supervisors, in substantially the form on file at the Commission's Sacramento Office and authorize its execution and the execution and recordation of all documents necessary to implement it.

### **OTHER PERTINENT INFORMATION:**

---

1. The Board of Supervisors of the City and County of San Francisco will consider approving the Agreement on October 25, 2022, but likely after the Commission's meeting, on the same day, has adjourned. The Port of San Francisco approved the Exchange on July 12, 2022.

2. This action is consistent with the “Meeting Evolving Public Trust Needs” and “Committing to Collaborative Leadership” Strategy Strategic Focus Areas of the Commission’s 2021–2025 Strategic Plan.
3. **Approval of the proposed settlement:** Staff recommends that the Commission find that this activity is exempt from the requirements of the California Environmental Quality Act (CEQA) as a statutorily exempt project. The project is exempt because it involves settlement of title and boundary problems and an exchange in connection with the settlement.

Authority: Public Resources Code section 21080.11.

4. **Acceptance of Kapiloff Deposit:** The staff recommends that the Commission find that this activity is exempt from the requirements of CEQA as a statutorily exempt project. The project is exempt because it involves an action taken pursuant to the Kapiloff Land Bank Act, Public Resources Code section 8600 et seq.

Authority: Public Resources Code section 8631.

## EXHIBIT:

---

A. Location and Site Map

## RECOMMENDED ACTION:

---

It is recommended that the Commission:

## CEQA FINDINGS:

- a. **Approval of the proposed settlement:** Find that the activity is exempt from the requirements of CEQA pursuant California Code of Regulations, title 14, section 15601 as a statutorily exempt project pursuant to Public Resources Code section 21080.11 and California Code of Regulations, section 15282, subdivision (f), settlement of title and boundary problems.
- b. **Acceptance of Kapiloff Deposit:** Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, title 14, section 15061 as a statutorily exempt project pursuant to Public Resources Code section 8631, an action taken pursuant to the Kapiloff Land Bank Act, Public Resources Code section 3600 et seq.

**PUBLIC TRUST AND STATE'S BEST INTEREST:**

Find that the Agreement, consistent with the authorizations below, places a public trust easement into the trust that will promote and enhance trust uses along the shoreline and has an equal or greater value than the lands removed from the trust; removes from the trust lands that have been filled, reclaimed, and cut off from access to the water, limiting their relative value for the promotion of the Public Trust; that the Agreement will settle a bona fide dispute and avoid costly and uncertain litigation; and that the Agreement is consistent with the Public Trust Doctrine and in the best interests of the State.

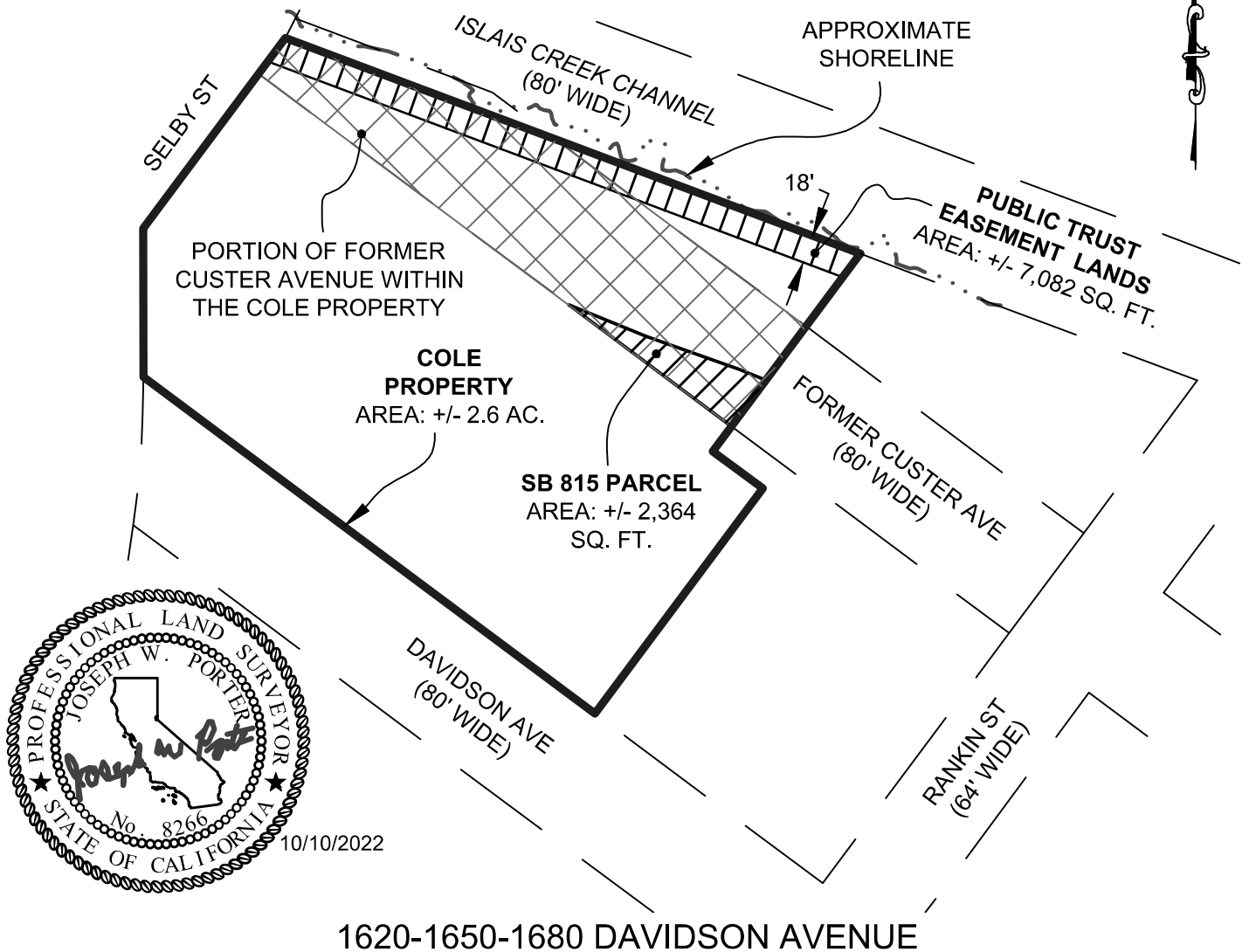
**AUTHORIZATION:**

1. Find that there is a bona fide dispute among the parties about the location and extent of the state's interests in the Cole Property.
2. Find that the below findings, with respect to the proposed Public Trust Exchange and Title Settlement Agreement, will be effective when the documents are recorded, as provided in the Agreement:
  - a. Former Custer Avenue is a relatively small portion of the lands granted to the City.
  - b. The Agreement is for the purposes of resolving boundary and title disputes; enhancing public access to and along the water; and enhancing waterfront and nearshore development and redevelopment for public trust purposes.
  - c. The 18-foot wide public trust easement will provide a significant benefit to the public trust, and the Kapiloff Deposit will be used to acquire lands or interests in land where the public use or ownership of the land is necessary or extremely beneficial for furtherance of Public Trust purposes.
  - d. The exchange provided for in this Agreement will not substantially interfere with public rights of navigation and fishing.
  - e. The public trust easement and the Kapiloff deposit have a monetary value equal to or greater than the value of former Custer Avenue.
  - f. Former Custer Avenue is cut off from water access (other than the public trust easement) and is no longer in fact tidelands or submerged lands or navigable waterways, by virtue of being filled or reclaimed, and is relatively useless for public trust purposes.
  - g. The Agreement is in the best interests of the state.
3. Acting as Trustee of the Kapiloff Land Bank Fund, authorize the acceptance and deposit of \$790,000 into the Kapiloff Fund to be used to purchase interests in land pursuant to Public Resources Code section 8613, subdivision (a).

4. Find that, with respect to the proposed sale of the SB 815 Parcel under SB 815:
  - a. The proposed value of \$160,000 is the fair market value for the land.
  - b. The SB 815 Parcel has been filled and reclaimed, is cut off from access to the waters of San Francisco Bay, is no longer needed or required for the promotion of the Public Trust, and no substantial interference with the public trust uses and purposes will ensue by virtue of the transfer.
  - c. The sale of the SB 815 Parcel is consistent with the findings and declarations made by the Legislature in section 2 of SB 815.
  - d. As a result of the paper street not being suitable for any public trust purpose and to settle a bona fide dispute, the sale of the SB 815 Parcel is in the best interests of the state.
5. Contingent on the City and County of San Francisco Board of Supervisors approving the proposed Agreement, approve and authorize the staff of the Commission and of the California Attorney General to take all necessary or appropriate actions on behalf of the Commission, including the execution, acknowledgment, and recordation of the Agreement and associated deeds and acceptances, in substantially the form of the copy of such Agreement on file with the Commission; and to appear on behalf of the Commission in any legal proceedings relating to the subject matter of the Agreement.

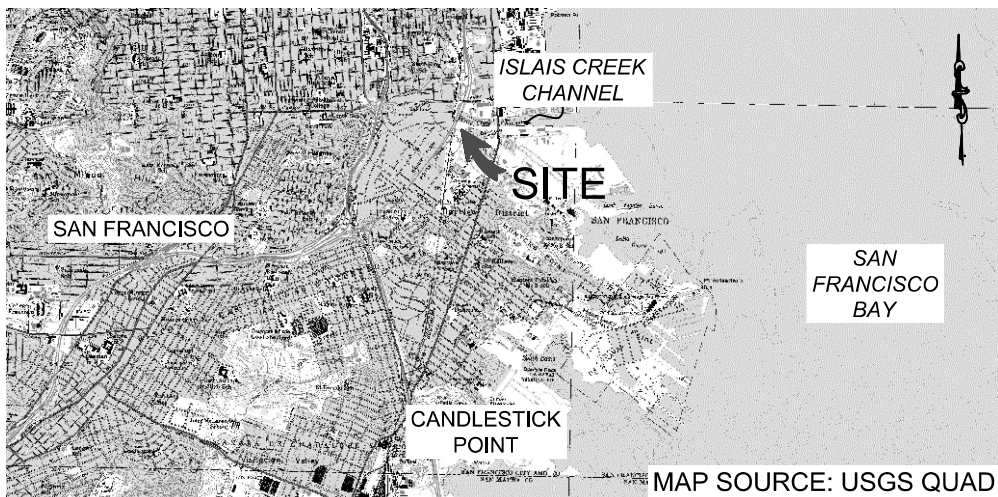
NO SCALE

## SITE



NO SCALE

## LOCATION



THIS EXHIBIT IS SOLELY FOR PURPOSES OF GENERALLY DEFINING THE TITLE SETTLEMENT AND EXCHANGE AGREEMENT PREMISES, IS BASED ON UNVERIFIED INFORMATION PROVIDED BY 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

G11-01/ AD 692  
PUBLIC TRUST EXCHANGE  
AND TITLE SETTLEMENT  
AGREEMENT  
CITY & COUNTY OF  
SAN FRANCISCO

