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Attorney-Client Privileged Communication

June 19, 2015

Jennifer Lucchesi
Executive Officer
California State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, California 95825-8202

Dear Ms. Lucchesi:

This letter concerns the residential houseboat community at Redwood City's Docktown Marina. The marina is located on sovereign lands legislatively granted in trust to Redwood City in Statutes of 1945, chapter 1359, as amended. On behalf of the California State Lands Commission (Commission), you have requested this office's informal advice concerning whether the private residential use of houseboats or "liveaboards" on these sovereign tidelands is legally permissible.¹

For the reasons discussed in more detail below, our opinion is that private residential use of houseboats and liveaboards at Docktown violates both the terms of the statutes by which the Legislature granted these tidelands in trust to the City and the common law public trust doctrine. Dating back to the early 1970s, this office has consistently opined and advised the Commission, and the Commission has in turn advised legislators, other agencies (including Redwood City)

¹ A houseboat is typically a watercraft principally designed and used for residential rather than transportation purposes. (See, e.g., Wat. Code, § 13901.) A liveaboard is typically an unmodified boat used for extended periods of time for residential purposes. As a matter of convenience for the purposes of the analysis below, we refer to both types of vessels collectively as "houseboats."

and private parties, that residential houseboat use is inconsistent with the public trust doctrine.² Our legal research has uncovered no authority in the intervening four decades that would cause us to change this opinion.

Initially, we begin with some background on the public trust doctrine and the law governing legislatively granted sovereign lands. California acquired title to all tidelands, submerged lands, and the beds of all inland navigable waters within its borders as an incident of its sovereignty when it was admitted to the Union on September 9, 1850. (See, e.g., *Oregon ex rel. State Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 373-374; *Marks v. Whitney* (1971) 6 Cal.3d 251, 258; accord, *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434; *Citizens for East Shore Parks v. Cal. State Lands Com.* (2011) 202 Cal.App.4th 549, 570; Pub. Resources Code, § 6009, subd. (a).)³ The State owns these tidelands and submerged lands as a trustee for, and the public holds an easement over these lands for, statewide public purposes. (*Citizens for East Shore Parks v. Cal. State Lands Com.*, *supra*, 202 Cal.App.4th at p. 570; Pub. Resources Code, § 6009, subd. (a).)

The common law public trust doctrine traditionally defined these public trust uses as water-related commerce, navigation, and fishing. (*Marks v. Whitney*, *supra*, 6 Cal.3d at p. 259; Pub. Resources Code, § 6009, subd. (a).) However, California courts have recognized that public trust uses are “sufficiently flexible to encompass changing needs.” (*Marks v. Whitney*, *supra*, 6 Cal.3d at p. 259.) As a result, courts have also recognized bathing, swimming, boating, and other recreational purposes, as well as preservation of these lands in their natural state for scenic, scientific study, open space, and habitat values, as public trust uses. (*Marks v. Whitney*, *supra*, 6 Cal.3d at p. 259; *National Audubon Society v. Superior Court*, *supra*, 33 Cal.3d at pp. 434-435.)

² See, for example, December 20, 1971 letter from Attorney General Evelle Younger to State Sen. Jack Schrade; January 10, 1978 letter from William Northrop, Commission Executive Officer, to State Sen. Dennis E. Carpenter; November 5, 1985 letter from Robert Hight, Commission Chief Counsel, to Robert Tufts, Chairman, San Francisco Bay Conservation and Development Commission (BCDC); November 19, 1986 letter from Claire Dedrick, Commission’s Executive Officer, to Russell Smith; February 25, and August 7, 2014 letters from Sheri Pemberton, Commission’s Chief, External Affairs, to Bill Ekern, City of Redwood City. The Commission has found that small numbers of liveaboards within commercial marinas may be permissible for limited periods of time and in limited circumstances. (See, e.g., January 10, 1978, letter from William Northrop, Commission Executive Director, to State Sen. Dennis E. Carpenter, pp. 2-3.) However, the 80% of Docketown berths that houseboats currently occupy greatly exceeds any percentage the Commission has previously approved.

³ Tidelands are those lands lying between the lines of mean high tide and mean low tide. Lands seaward of the line of mean low tide are submerged lands. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 478 fn. 13.)

Administration of the public trust is a matter entrusted to the Legislature. (*County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 707-708.) It is a question for the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be continued, modified, or extinguished. (*Marks v. Whitney, supra*, 6 Cal.3d at pp. 260-261.) The Legislature has delegated to the Commission exclusive jurisdiction over all state-owned ungranted tidelands and submerged lands as well as all jurisdiction remaining in the State as to tidelands and submerged lands to which grants, such as that to Redwood City, have been or will be made. (Pub. Resources Code, § 6301.)

A common thread running through these recognized public trust uses is that they benefit all people of the State. (*Marks v. Whitney, supra*, 6 Cal.3d at pp. 259-260; accord, *Colberg, Inc. v. State ex rel. Dept. of Public Works* (1967) 67 Cal.2d 408, 417.) Uses that provide only a local benefit are inconsistent with the public trust doctrine. (See *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209-211.) For example, the California Supreme Court explained in *Mallon* that city storm drains, a city incinerator, libraries, hospitals, and public parks were not public trust uses because they conferred a purely local, not statewide, benefit. (*Ibid.*)

A use that is purely local in benefit or is otherwise not a recognized public trust use may still be permissible if it is incidental to a legitimate statewide public trust use. (*People v. City of Long Beach* (1959) 51 Cal.2d 875, 879-880 [proposed operation of facility in harbor providing lodging and recreation for naval personnel and merchant seamen was consistent with and supported public trust use of harbor for commerce and navigation]; *Haggerty v. City of Oakland* (1958) 161 Cal.App.2d 407, 413-414 [proposed convention, banquet, and exposition facilities in the City's port area held incidental to public trust use, as facilities would encourage associations and interested persons to learn about port facilities and exchange ideas about maritime commerce].)

The Legislature may grant tidelands and submerged lands in trust to local entities. Granted lands remain subject to state supervision. The state acts as both the trustor and the representative of the people as beneficiaries of the public trust for the granted lands, and the grantee acts as trustee. (Pub. Resources Code, § 6009.1, subds. (a), (b).) Grantees must manage granted lands in a manner "consistent with the terms and obligations of their grants and the public trust. . . ." (Pub. Resources Code, § 6009, subd. (d).) As a result, grantees may neither use state-granted lands for non-trust uses nor apply revenues generated by such lands for purely local, non-trust purposes. (*Mallon v. City of Long Beach, supra*, 44 Cal.2d at pp. 210-211; *City of Long Beach v. Morse* (1947) 31 Cal.2d 254, 257-258.) A legislative grant of sovereign lands to a municipality such as Redwood City, however, does not place the lands beyond the supervision of the State. The State has a duty to continue to protect the public trust on behalf of all of the people of California. (*Illinois Central R.R. Co. v. Illinois* (1892) 146 U.S. 387, 452-453; *City of Coronado v. San Diego Unified Port Dist.* (1964) 227 Cal.App.2d 455, 474.)

In this case, the Legislature in 1945 granted the sovereign lands where Docktown is located in trust to Redwood City for "the establishment, improvement and conduct of a harbor, including an airport or aviation facilities, and for the construction, maintenance and operation

thereon of wharves, docks, piers, slips, quays and other utilities, structures, facilities and appliances necessary or convenient for the promotion and accommodation of commerce and navigation by air as well as by water....” (Stats. 1945, chap. 1359, § 1(a), as amended.) This grant permits Redwood City to lease parts of these lands for up to 50 years but only “for purposes consistent with the trust upon which said lands are held by the State of California....” (*Ibid.*) Under the grant, these lands must “always remain available for public use for all purposes of commerce and navigation....” (*Id.*, § 1(b).) The grant reserves “in the people of the State of California the absolute right to fish in the waters of said harbor with the right of convenient access to said waters over said lands for said purposes.” (*Id.*, § 1(d).)

Redwood City’s charter mirrors these restrictions. The charter provides that the City’s legislatively-granted “Harbor Lands” are “required for use for purposes in connection with or for the promotion and accommodation of commerce, navigation or fishery. . . .” and may be leased “subject to the trusts and conditions contained in the grants of such property to the City of Redwood City.” (City Charter, § 48.)

For several reasons, our opinion is that allowing private residential houseboats on these granted tidelands is inconsistent with both the public trust doctrine and the terms of this granting statute.

First, despite the public trust doctrine’s “flexibility” as recognized in *Marks*, our legal research has uncovered no California case holding that either residential land use generally, or residential houseboat use in particular, qualifies as a public trust use. To the contrary, while the California Supreme Court has not directly addressed the issue, several justices, in dissent, have opined that residential uses of land are not public trust uses. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 538 [Clark, J., dissenting: “...under the [public] trust tidelands may be filled and used for commercial and recreational purposes but not residential purposes.”]; *State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 235 [Clark, J., concurring and dissenting: “[T]here are certain common land uses which are not included within [public] trust uses, namely, residential, agricultural, and general governmental.”])

Nor has our research uncovered out-of state case law holding otherwise. Instead, two cases from Washington held in the context of regulatory takings claims that the residential use of tidelands is inconsistent with the public trust doctrine. *Esplanade Properties, LLC v. City of Seattle* (9th Cir. 2002) 307 F.3d 978 held that the City’s decision denying plaintiff’s application to develop tidelands with residences effected no regulatory taking because the tidelands were subject to the public trust, which in turn precluded residential development that might interfere with their public recreational use. (*Id.*, at p. 985-987, applying Washington law.) *Orion Corp. v. State* (Wash. 1987) 747 P.2d 1062 held that because the public trust doctrine precluded dredging and filling of tidelands for proposed residential development, state regulations protecting these tidelands did not interfere with a landowner’s “investment-backed expectations” for regulatory takings purposes. (*Id.*, at pp. 1072-1073, 1086; accord, Eichenberg, Bothwell, and Vaughn, *Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay* (2010) 3 Golden Gate U. L. Rev. 243, 259 [a property owner

“would normally not have reasonable-investment backed expectations for filling tidelands for non-trust private residential or agricultural uses under the public trust doctrine and consequently prohibiting those uses generally would not constitute a taking,” citing *Orion Corp. v. State*, *supra.*)]

Second, as to residential houseboat use in particular, the court in *People ex rel. San Francisco Bay Conservation and Development Com. v. Smith* (1994) 26 Cal.App.4th 113, 123, interpreting whether liveaboards in the San Francisco Bay required a permit under the McAteer-Petris Act (Government Code, §§ 66600, et seq.) observed that residential liveaboard boat use is not a public trust use. (See also BCDC, San Francisco Bay Plan, p. 77 [“A houseboat is neither a water-oriented use nor a use that furthers the public trust and does not serve a statewide public benefit.”]) Though this case arose from the specific McAteer-Petris statutory scheme governing the San Francisco Bay and shoreline, we believe its analysis – grounded in the public trust doctrine – applies equally to the sovereign tidelands at Redwood City. We have found no California case law that reaches a contrary holding.

Third, that residential houseboat use violates the public trust doctrine logically follows from the nature of the public trust. Private occupancy of such boats for residential purposes confers a purely local benefit. It does not provide a benefit to citizens of California statewide. (See *Marks v. Whitney*, *Colberg, Inc. v. State ex rel. Dept. of Public Works*, *supra.*) At best, it facilitates the use of the granted tideland area by those few who occupy these boats. It is not a use tied to sovereign tidelands because private residences can be, and normally are, located on non-sovereign uplands. Private houseboat use is also not incidental to any public trust use. It does not further or encourage recognized public trust uses. We have found no case holding that private residential use of any sort is incidental to recognized public trust uses.⁴

If anything, the private use of houseboats in fact detracts from these legitimate public trust uses. For example, by restricting areas of the harbor to private residential use, houseboats deprive the public of access to the tidelands for recreational, navigation, and similar public trust purposes. The loss of such access is particularly pronounced here, where residential houseboats dominate Docktown Marina. As the City has recognized, private houseboats occupy 70 of the 87 boat berths at the Docktown Marina, or approximately 80% of these berths. (City Manager’s Report to Mayor and City Council, April 27, 2015.) In the analogous context of the San Francisco Bay, BCDC has recognized that houseboats contravene the public trust by competing for vessel berths that the broader public might otherwise use for trust purposes. (BCDC, San Francisco Bay Plan, p. 77.)

⁴ This office has opined that a public agency trustee may lease a portion of filled tidelands for construction of a timeshare resort, which involves a purchaser’s right to exclusive residential occupancy of a timeshare unit for a period of time. But we reached this opinion in significant part because timeshares may enhance public access to the shoreline for public trust purposes and provide visitor-serving accommodations to the public. (79 Ops.Cal.Atty.Gen. 133, 145-146 (1996).) Private residential houseboats do neither.

Fourth, houseboats detract from other public trust uses as well. As BCDC has stated, private houseboats detract from the scenic and habitat value of surrounding waters by restricting views, blocking beneficial sunlight penetration into tideland waters, and causing detrimental sedimentation by reducing wind and wave action. (BCDC, San Francisco Bay Plan, p. 77.)⁵

Environmental and public health effects of houseboat use also may negatively affect public trust uses. Houseboat use may result in discharge of raw sewage or used "grey water" into surrounding tideland waters, potentially endangering wildlife. (*People ex rel. San Francisco Bay Conservation and Development Com., supra*, 26 Cal.App.4th at p. 121 n. 5 [citing Regional Water Quality Control Board data on houseboat related pollution in Richardson Bay].) In the analogous context of the San Francisco Bay, BCDC has specifically identified substandard sewage systems in houseboat areas as a source of high coliform bacteria count in the Bay. (BCDC Final Staff Report, *Water Quality Protection and Nonpoint Source Pollution Control in San Francisco Bay* (October 2003) (http://www.bcdc.ca.gov/pdf/planning/reports/water_quality_nonpoint_source.pdf), p. 30.) Similarly, a San Francisco Bay Regional Water Quality Control Board study identified houseboat marinas as "consistently the most significant sources of pollution in Richardson Bay" over the 1994-2003 period. (San Francisco Regional Water Quality Control Board, *Pathogens in Richardson Bay Total Maximum Daily Load (TMDL)* (http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/tmdls/richardsonbaypathogens.shtml) (July 2008), p. 14.) Such environmental impacts detract from the preservation of tidelands and submerged lands for their habitat value.

For these reasons, residential houseboat use is inconsistent not just with the public trust doctrine but also with Redwood City's granting statute. The statute makes no reference to residential use generally, or houseboat use specifically, as a permitted use of the granted lands. As discussed above, houseboat use is not "necessary or convenient for the promotion and accommodation of" trust uses authorized under this statute either. It interferes with the "right of convenient access" for fishing in nearby waters that the granting statute expressly reserves to the public. And permitting continued residential houseboat use would also violate the City's fiduciary obligations as trustee to "administer the trust solely in the interest of the beneficiaries" (here, the people of the State) and not to use trust property "for any other purpose unconnected to the trust." (Pub. Resources Code, § 6009.1, subds. (c)(5), (c)(7).)

We understand that proponents of residential houseboat use in Redwood City have contended that rising housing prices in the area have left houseboats as one of few affordable housing options. We also anticipate that these proponents might argue that potential flooding at Redwood City as a result of ongoing global climate change and sea level rise might eventually make houseboats necessary to replace lost upland housing. However, our opinion is that neither

⁵ The San Francisco Bay Plan does explain that the BCDC could authorize limited houseboat use but only subject to strict conditions. These conditions include that the number of houseboats is limited, their use is part of a broader area plan, and their use is limited in duration. Based on the facts known to us, none of these conditions apply here.

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the former argument if accurate nor the latter risk if realized makes residential houseboat use consistent with the public trust doctrine or Redwood City's granting statute. The California Supreme Court in *Marks* specifically identified "population pressures" as one of the reasons why preservation of the public trust is critical. (*Marks v. Whitney, supra*, 6 Cal.3d at p. 257.) And *Marks* held that the public trust doctrine is "sufficiently flexible to encompass changing needs." (*Id.* at p. 259.) More than four decades have passed since the *Marks* decision. Over that period, no California court has held that the public trust encompasses residential use of tidelands generally or residential houseboat use specifically. Redwood City may not effectively expand the public trust on its own by allowing continued houseboat use on its granted lands here.

We appreciate the opportunity to provide this opinion to you. Please let us know if you have any questions.

Sincerely,



ANDREW M. VOGEL
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

AMV: