



## MEMORANDUM

July 8, 2022

**TO: MEMBERS, PORT COMMISSION**

Hon. Willie Adams, President  
Hon. Kimberly Brandon, Vice President  
Hon. John Burton  
Hon. Gail Gilman

**FROM:** Elaine Forbes  
Executive Director

**SUBJECT:** Subject to approvals by the Board of Supervisors and the California State Lands Commission (“State Lands”), as required: request approval of a Final Settlement Agreement and related transaction documents to resolve disputed title claims as to a portion of Former Custer Avenue with the 2006 Murray G. And Doris M. Cole Revocable Trust (“Cole Trust”) including: (1) approval of a form Purchase and Sale Agreement (“Sale Agreement”) by the City to the Cole Trust, free of the Trust of a portion of Former Custer Avenue within 1650 Davidson Street San Francisco, California; (2) approval of a form Public Trust Exchange and Title Settlement Agreement For 1620-1650-1680 Davidson Avenue (“Exchange Agreement”) among the Port, the Cole Trust and State Lands by which the City and State Lands will quitclaim their interests in the property claimed by the Cole Trust and the Cole Trust will grant a new Public Trust Easement to the State and make a deposit into the Kapiloff Land Bank Fund; (3) authority to seek State Legislation and accept title to the new Public Trust Easement lands; (4) approval of an extension of the January 14, 2023 standstill date in the current settlement agreement between Port and the Cole Trust and delegation of authority for additional extensions to the Executive Director.

**DIRECTOR'S RECOMMENDATION:** Approve the Attached Resolution No. 22-35

## **Executive Summary**

This memorandum provides information and analysis regarding the recommendation by Port staff and the City Attorney's Office to approve a settlement agreement ("Final Settlement Agreement") between the City and a private party, the 2006 Murray G. and Doris M. Cole Revocable Trust ("Cole Trust" or the "Coles"), to permanently resolve a dispute regarding the underlying title and ownership of a portion of a "paper street" (known as a portion of Custer Avenue, here called "Former Custer Avenue"), which cuts through a portion of the property owned by the Cole Trust located at 1620-1650-1680 Davidson Street in the southern waterfront near Islais Creek.<sup>1</sup>

The need for the Final Settlement Agreement arose due to a title dispute in which the Port and State Lands assert that Former Custer Avenue is public trust property that was transferred from the State to the Port via the Burton Act of 1968 and the Cole Trust also claims ownership of the same portion of Former Custer Avenue. In May 2021, after being confronted by the possibility of litigation by the Coles, the Port entered into a settlement and standstill agreement with the Coles under which the parties agreed to work together in good faith over 18 months to resolve their disputes rather than to initiate litigation against the other (the "Initial Settlement Agreement"). The standstill provisions of the Initial Settlement Agreement expire on January 14, 2023.

In accordance with the Initial Settlement Agreement and in order to finally resolve the dispute, the proposed Final Settlement Agreement calls for the following transactions to be consummated by the Port, City and State Lands (collectively, the "Trust Parties") and the Coles: (1) the sale by the Port to the Cole Trust of a small portion of Custer Avenue comprised of approximately 2,364 square feet (known as the "SB 815 Parcel"); (2) an exchange of the fee interest in the remaining approximately 23,350 square feet of land in Former Custer Avenue for a public trust easement of approximately 7,082 square feet (the "New Easement") to ultimately be held in trust by the Port on a strip of land immediately adjacent to Islais Creek; and (3) a payment by the Cole Trust to the State that will be deposited into the Kapiloff Land Bank to be used by State Lands to acquire additional trust lands to offset the reduction to trust lands associated with the agreement. Upon closings of the transactions described above, the Port and Coles will release claims against each other.

In order to ensure that the contemplated transactions can be completed without the risk of litigation, the January 14, 2023 standstill expiration date under the Initial Settlement Agreement needs to be extended.

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<sup>1</sup> A "paper street" is a term used to identify a real property right-of-way originally planned as a street, but never formally constructed as a street.

## **Site Overview and Uses**

The Burton Act and San Francisco Charter Section B3.581 empower the San Francisco Port Commission with the power and duty to use, conduct, operate, maintain, manage, regulate and control the lands within Port Commission jurisdiction. The granted lands under the Burton Act include Former Custer Avenue.

The Cole Trust bought the property at 1620-1650-1680 Davidson Street consisting of approximately 2.46 acres of unimproved property starting in the 1960s (the “Davidson Properties”). Former Custer Avenue runs through the Davidson Properties. The relevant portion of Custer Avenue was vacated as a street by City ordinance in 1911. In connection with the Coles’ due diligence conducted for a proposed sale of the Davidson Properties in 2021, the Trust Parties have asserted a public trust and ownership claim over Former Custer Avenue.

The figures in **Exhibit 1** show the Davidson Properties location outlined in blue. The land is currently zoned “Production, Distribution, and Repair” (or “PDR”). The portion of Former Custer Avenue running through the Davidson Properties is approximately 25,714 square feet. The entire Davidson Properties including Former Custer Avenue are currently under a long-term lease with a third party tenant (“Tenant” or “DECA”) for school bus storage. The Coles plan to consummate a sale of all of the Davidson Properties to DECA on the same day as, and immediately following, the closing of the transactions with the Trust Parties described in this Memorandum. There are no planning applications on file affecting the Davidson Properties, and Port staff is not aware of part of any foreseeable development project on the property.

**Figure 3** in **Exhibit 1** shows the final configuration of the Trust lands on the Davidson Properties – only the New Easement will remain in the Trust after the closings contemplated by the Final Settlement Agreement.

## **Proposed Final Resolution and Implementing Documents**

The Burton Act prohibits the City from conveying a permanent interest in the granted lands; at most it could convey a 66-year lease or easement. Accordingly, for the City to convey permanent air and subsurface rights to the Cole Trust in order to resolve the title dispute, the public trust and Burton Act restrictions must be lifted from the disputed portion of Former Custer Avenue. Two existing State statutes authorize Port and the State to terminate the Public Trust interest conditioned upon certain findings and approvals by State Lands.

The proposed Final Settlement Agreement will settle the disputed claims regarding property ownership and will include the following elements:

- (1) City, acting by and through the Port, will quitclaim any interest it holds by virtue of the Burton Act in approximately 2,364 square feet of Former Custer Avenue to the Cole Trust pursuant to existing legislative

authority under SB 815. To effect the transfer, the Port will enter into the Sale Agreement with the Cole Trust that will govern the conveyance of the Custer Avenue parcel from City to the Cole Trust. The sale price of \$160,000 is based on the appraised value of the land as well as the risks and uncertainty associated with potential litigation regarding title.

- (2) City, acting by and through the Port, State Lands and the Coles will enter into the Exchange Agreement authorized by Public Resources Code section 6307 that will provide title to the remaining Davidson Properties free and clear of the Public Trust interest except for an 18' wide strip of land consisting of 7,082 square feet (the "New Easement") within the northern area of the property along Islais Creek which will be subjected to a public trust easement in favor of the State – to eventually be transferred to the City acting by and through the Port.
- (3) The Coles will also make a deposit of \$790,000 into the State Kapiloff Land Bank fund to account for the deficit in the square footage of land exchanged ("Kapiloff Deposit"). The Kapiloff Deposit must be used by State Lands to acquire new trust lands. Though the funds can be used anywhere in California, State Lands agrees that it (A) intends to use the funds in San Francisco and (B) will consider the acquisition of suitable property interests identified and proposed by Port for an amount up to the Kapiloff Deposit; provided that the acquisition price is not greater than the fair market value of any such property interest. Newly acquired trust lands in San Francisco will be under Port jurisdiction.

In order to ensure that the contemplated transactions can be completed without the risk of litigation, the January 14, 2023 standstill expiration date under the Initial Settlement Agreement needs to be extended in case more time is needed to consummate the contemplated transactions. Staff proposes that the Port Commission extend the date to July 14, 2023 and delegate authority for further extensions until January 14, 2024 to the Executive Director.

Approvals necessary to implement the Final Settlement Agreement include:

- (1) approval by the Port Commission of the Sale Agreement and Exchange Agreement, pursuant to its authority under Charter Appendix B,
- (2) approval by the Board of Supervisors of the Sale Agreement and Exchange Agreement under Charter Section 9.118(c) and authorization of the City's acceptance of the New Easement (to be held by Port as trustee), and
- (3) approval by State Lands of the Sale Agreement and Exchange Agreement and adoption of findings related to the sale of a portion of

Former Custer Avenue under SB 815.

### **Proposed Final Settlement Agreement**

Port staff, working in close collaboration with State Lands staff and with the Cole Trust, have negotiated a proposed Final Settlement Agreement, the terms of which staff believe to be favorable to Port. The final settlement proposal would result in a complete resolution of potential liability by taking advantage of existing state legislation and would avoid litigation delays, costs and risk.

#### ***Financial Benefits to Port***

The proposed final settlement would provide Port with direct financial benefits including sale proceeds of \$160,000 from the sale of the SB 815 Parcel to be used for capital purposes. The Port would also receive transaction reimbursement costs of \$25,000 plus the Port is able to collect the use fee estimated at \$112,000 through the closing. In addition, the Port would benefit from the settlement through the avoidance of potentially significant litigation costs.

#### ***Other Trust Benefits***

The Trust will benefit from the New Easement along Islais Creek that will ultimately be under Port's jurisdiction. The New Easement location could help provide a link to Rankin Street across the neighboring San Francisco Public Utilities Commission property. Additionally, if Port can identify appropriate opportunities, the entire Kapiloff Deposit could be re-invested in new trust lands in San Francisco under Port's jurisdiction. The key terms of the Initial Settlement Agreement, the Final Settlement Agreement and the Sale Agreement and Exchange Agreement are included as **Exhibit 2**.

### **Sale of SB 815 Parcel**

As depicted in **Figure 2** in **Exhibit 1**, the 2,364 square foot SB 815 Parcel proposed to be quitclaimed to the Cole Trust is more than 100 feet from the High Water Line of the San Francisco Bay and is considered a "paper street". Because of its isolated nature, including being landlocked from the San Francisco Bay, SB 815 has no material utility to the Port. The highest and best use of SB 815 to the Port and the Public Trust is to sell the property.

#### **Required Findings Under Governing Statutes**

Per SB 815, in order to enter into the Sale Agreement as described above, the Port Commission must make certain findings, including that:

- (a) the SB 815 Parcel: (i) lies at least 100 feet landward of the High Water Line of San Francisco Bay and is a paper street as defined in SB 815;*
- (ii) has been filed and reclaimed as part of a highly beneficial plan of harbor development and has ceased to be tidelands; (iii) is no longer*

*used or necessary for maritime commerce, navigation of fisheries purposes; (iv) constitutes a relatively small portion of tidelands granted to the City (the SB 815 Parcel is xx acres compared to a total of approximately 725 acres (exclusive of submerged lands); (v) is not amenable to any Public Trust uses, other than revenue generation for the Trust; and (vi) is and will be cut off from access to waters of San Francisco Bay by the Trust Easement; and*

*(b) the consideration for the sale of the SB 815 Parcel is the fair market value of such land in light of the title dispute; and*

*(c) the SB 815 Parcel 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 due to the sale; and*

*(d) the sale is consistent with the findings and declarations made by the California Legislature in Section 2 of SB 815; and*

*(e) the sale is in the best interest of the City and the State; and*

*(f) all revenues from the sale shall be deposited in a separate account in the harbor fund and shall be expended solely for purposes of implementing the Port's capital plan.*

For reasons described in this Staff Report, the Sale Agreement meets the requirements of SB 815.

### **Exchange Agreement**

As depicted in **Figure 2** and **Figure 3** in **Exhibit 1**, the Port will to quitclaim its Burton Act interest and State Lands will quitclaim its interest in the remaining Davidson Properties in exchange for the New Easement of approximately 7,082 square feet, to ultimately be held in trust by the Port on a strip of land immediately adjacent to Islais Creek. The New Easement is 18' wide and runs adjacent to and buffers the San Francisco Bay and Former Custer Avenue. The New Easement will enable new public access and open space along the waterfront. Additionally, the Exchange Agreement will provide a significant benefit to the Public Trust by contributing funds into the Kapiloff Fund, which can be used to acquire additional real property for the benefit of the Public Trust.

### **Required Findings Under Governing Statutes**

Similarly, the Port Commission is required to make certain findings in connection with the Exchange Agreement, per PRC Section 6307:

*(a) the exchange is for the purposes of resolving the title dispute;  
and*

- (b) former Custer Avenue, other than the New Easement, is cut off from water access and is no longer tidelands or submerged lands or navigable waterways by virtue of having been filled or reclaimed, and is relatively useless for Trust purposes; and*
- (c) the exchange of the current configuration of Former Custer Avenue for the New Easement which is immediately adjacent to Islais Creek will provide a significant benefit to the Public Trust by providing better public access or open space potential to or along the water; and*
- (d) the deposit into the Kapiloff fund will be used to acquire lands or interests in land, possibly in San Francisco, where the public use and ownership of the land is necessary or extremely beneficial for furtherance of Public Trust purposes; and*
- (e) the exchange does not substantially interfere with public rights of navigation and fishing; and*
- (f) the monetary value of the Public Trust Easement together with the Kapiloff deposit is equal to or greater than the appraised fair market value of the lands or interests in lands given by the Trust in exchange; and*
- (g) the exchange is in the best interests of the City and the State.*

For reasons described in this Staff Report, the Trust Exchange meets the requirements of PRC Section 6307.

### **California Environmental Quality Act (“CEQA”) Findings**

In a letter dated February 16, 2022, the City’s Planning Department determined that the Final Settlement Agreement is exempt from CEQA pursuant to Public Resources Code §21080.11. (Case No. 2022-001339GPR) No further environmental review is required.

### **Recommendation**

Port staff recommends that the Port Commission: (1) approve the Final Settlement Agreement and attached forms of Sale Agreement and Exchange Agreement, based on the necessary findings; (2) authorize subsequent State legislation and the transfer of the New Easement into Port jurisdiction; and (3) extend the Initial Settlement Agreement deadline in the current Initial Settlement Agreement to July 14, 2023 and delegate authority to the Executive Director to make further extensions as needed to that deadline.

## Next Steps

With Port Commission approval of the attached Resolution No. 22-XX, the immediate next steps include:

- \* Seek Board of Supervisors:(1) approval of the Sale Agreement and Exchange Agreement, based on the necessary findings; and (2) authorization for subsequent State legislation and the transfer of the New Easement into Port jurisdiction

*Anticipated: September 2022*

- \* Seek State Lands approval of the Sale Agreement and Exchange Agreement, based on the necessary findings.

*Anticipated: October 25, 2022*

Assuming these dates, prompt action by the policy bodies and signature by the Governor, the transaction could close by **December 31, 2022**. State legislation necessary to transfer the New Easement to the Port would follow.

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**PORT COMMISSION  
CITY AND COUNTY OF SAN FRANCISCO**

**RESOLUTION NO. 22-35**

WHEREAS, Pursuant to Chapter 1333 of the Statutes of 1968 (“Burton Act”) and the implementing Agreement Relating to Transfer of the Port of San Francisco from the State of California to the City and County of San Francisco (“Transfer Agreement”), the State of California granted to the City and County of San Francisco (“City”) certain current and former tidelands and submerged lands, to be held under the jurisdiction of the San Francisco Port (“Port”) subject to the Burton Act and the public trust for commerce navigation and fisheries (the “Public Trust”); and

WHEREAS, The Burton Act and San Francisco Charter Section B3.581 empower the San Francisco Port Commission with the power and duty to use, conduct, operate, maintain, manage, regulate and control the lands within Port Commission jurisdiction; and

WHEREAS, The granted lands under the Burton Act include a portion of Custer Avenue, lying generally between Islais Creek, Rankin Street, and Davidson Avenue; the relevant portion of Custer Avenue was a so-called “paper street” which was vacated as a street by City Ordinance in 1911 (“Former Custer Avenue”); and

WHEREAS, In 2021, a dispute arose regarding the underlying title and ownership of Former Custer Avenue between Port and the trustees of the 2006 Murray G. and Doris M. Cole Revocable Trust dated August 1, 2006 (“Cole Trust”), a private party that is the owner of the surrounding lands (comprised of 1620, 1650 and 1680 Davidson Avenue, the “Davidson Properties”) and that claims ownership of Former Custer Avenue; and

WHEREAS, In May 2021, Port and the Cole Trust entered into a Settlement Agreement (the “Initial Settlement Agreement”) under which the parties agreed, among other things, to refrain from filing any claim or cause of action relating to the disputed title claims until January 14, 2023, and to negotiate in good faith to obtain approvals for and to terminate any Public Trust interest on Former Custer Avenue; and

WHEREAS, The Public Trust interest can only be terminated by State Legislation; and

WHEREAS, Two existing State statutes authorize Port and the State to terminate the Public Trust interest conditioned upon certain findings and approvals by the California State Lands Commission (“State Lands”); and

WHEREAS, Without any admission of liability or responsibility for any purpose, the Port and the Cole Trust have negotiated a final resolution of their respective

claims as described in the proposed final settlement agreement (“Final Settlement Agreement”) which, among other terms and conditions, provides for the following transactions to be implemented in an orderly manner:

1. pursuant and subject to California Statutes of 2007, Chapter 660 (“SB 815”) Sections (1)(p)(3) and (8), the sale by the City to the Cole Trust of a portion of Former Custer Avenue free of the City’s Public Trust interest in accordance with an Agreement for Sale of Real Estate for Portions of Custer Avenue between the Port and the Cole Trust (“Sale Agreement”); and
2. as to the remainder of Former Custer Avenue, pursuant and subject to Public Resources Code section 6307, a Public Trust and Title Settlement Agreement among the Port, the Cole Trust and State Lands (“Exchange Agreement”) by which the City and State will terminate their Public Trust interests in exchange for: (A) the Cole Trust’s conveyance to the State of a Public Trust easement over an eighteen foot (18’) wide strip of land immediately adjacent to Islais Creek (a portion of which is not now subject to the Public Trust interest) (“New Public Trust Easement”); and (B) the Cole Trust’s deposit of moneys into the Kapiloff Land Bank Fund (Public Resources Code Section 8625(a)) which moneys can be used later by State Lands to acquire additional public trust lands; and

WHEREAS, Port, working with staff of the City’s Real Estate Department (“RED”), and the Cole Trust have negotiated the terms of the Sale Agreement, and Port and RED staff, the Cole Trust and State Lands staff have negotiated the terms of the Trust Exchange Agreement (collectively, the “Transaction Documents”) which call for a series of real property conveyances and require various findings and approvals as further described in the Memorandum to the Port Commission dated July 8, 2022; and

WHEREAS, In connection with the sale the of the approximately 2,364 square foot SB 815 Parcel under the Sale Agreement:

1. Per Administrative Code Section 23.3, the Port Commission finds that in order to resolve the title dispute without the cost and risk of litigation: (a) the public interest or necessity demands, or will not be inconvenienced by the sale; (b) a competitive bidding process is impractical, impossible or is otherwise not in the public interest and the negotiated direct conveyance will further a public purpose; (c) RED obtained an Appraisal (as defined by Administrative Code Section 23.3 dated March 24, 2022 performed by MAI appraiser Clifford Advisory LLC (“Clifford Appraisal”) on behalf of the Cole Trust which determined the fair market value of the SB 815 Parcel to be \$260,040, exclusive of any dispute regarding ownership of the

property; (d) RED obtained an Appraisal Review (as defined by Administrative Code Section 23.3) dated June 8, 2022 of the Clifford Appraisal dated March 24, 2022 performed by MAI appraiser R. Bluhm & Associates which determined the fair market value of the SB 815 Parcel to be \$260,040; (e) notwithstanding the appraised value and in light of the title dispute, the sale price of \$160,000 will further a public purpose; and

2. Per SB 815, The Port Commission finds that:

(a) the SB 815 Parcel: (i) lies at least 100 feet landward of the High Water Line of San Francisco Bay and is a paper street as defined in SB 815; (ii) has been filed and reclaimed as part of a highly beneficial plan of harbor development and has ceased to be tidelands; (iii) is no longer used or necessary for maritime commerce, navigation or fisheries purposes; (iv) constitutes a relatively small portion of tidelands granted to the City (a total of approximately 725 acres (exclusive of submerged lands); (v) is not amenable to any Public Trust uses, other than revenue generation for the Trust; and (vi) is and will be cut off from access to waters of San Francisco Bay by the New Public Trust Easement; and

(b) the consideration for the sale of the SB 815 Parcel is the fair market value of such land in light of the title dispute;

(c) the SB 815 Parcel 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 due to the sale; and

(d) the sale is consistent with the findings and declarations made by the California Legislature in Section 2 of SB 815; and

(e) the sale is in the best interest of the City and the State; and

(f) all revenues from the sale shall be deposited in a separate account in the harbor fund and shall be expended solely for purposes of implementing the Port's capital plan; and

3. the SB 815 Parcel is not subject to the State Surplus Lands Act (Cal. Gov. Code §§54220-54234), because it is property granted by the State in trust to a local agency and its disposition is otherwise authorized (Cal. Gov. Code §54221(f)(1)(H)); and

4. the Port Commission has not determined that the SB 815 Parcel is either "surplus" or "underutilized" as those terms are defined in the Surplus Public Lands Ordinance (S.F. Admin. Ch. 23A), which

expressly recognizes the jurisdictional authority of the Port Commission over Port property, and the Surplus Public Lands Ordinance does not limit the power of the Port Commission to sell the SB 815 Parcel as described in the Sale Agreement; and

WHEREAS, In connection with the Exchange Agreement, per Public Resources Code Section 6307, the Port Commission finds that (1) the exchange is for the purposes of resolving the title dispute, (2) Former Custer Avenue, other than the New Public Trust Easement, is cut off from water access and is no longer tidelands or submerged lands or navigable waterways by virtue of having been filled or reclaimed, and is relatively useless for Trust purposes; (3) the exchange of the current configuration of Former Custer Avenue for the New Public Trust Easement which is immediately adjacent to Islais Creek will provide a significant benefit to the Public Trust by providing better public access or open space potential to or along the water; (4) the deposit into the Kapiloff fund will be used to acquire lands or interests in land, possibly in San Francisco, where the public use and ownership of the land is necessary or extremely beneficial for furtherance of Public Trust purposes; (5) the exchange does not substantially interfere with public rights of navigation and fishing; (6) the monetary value of the New Public Trust Easement together with the Kapiloff deposit is equal to or greater than the appraised fair market value of the lands or interests in lands given by the Trust in exchange; and (7) the exchange is in the best interests of the City and the State.

WHEREAS, RED has reviewed and approved the terms and conditions of the Transaction Documents; and recommends approval by the Port Commission and Board of Supervisors; and

WHEREAS, In connection with the swap of land under the Exchange Agreement and the future transfer of the New Public Trust Easement from the State to the City, the Port Commission finds that the addition of the New Public Trust Easement to the land under Port's jurisdiction will benefit the Public Trust and serve a public purpose as described above including potential use as open space or public access use; and

WHEREAS, Upon closing of the transactions described in the Transaction Documents, the City will hold no Public Trust interest in Former Custer Avenue or any of the property claimed by the Cole Trust; and

WHEREAS, Subsequent to the closing of the Transaction Documents, State Lands and the Port will work together to seek State legislation to transfer the New Public Trust Easement to be held by the City, with Port as trustee, subject to the terms and conditions of the Burton Act; and

WHEREAS, Upon closing of the transactions described in the Transaction Documents, pursuant to the Final Settlement Agreement, the Initial Settlement

Agreement will expire and the City and the Cole Trust will be mutually released from all claims, except that the City will not release: (1) any tax liabilities, (2) any criminal liabilities, or (3) any other claim or liabilities unrelated to the disputed title claims; and

WHEREAS, The Transaction Documents are subject to the approval of the Board of Supervisors; and State Lands must make the findings required by SB 815 and make the findings required by Public Resources Code Section 6307 and approve the Exchange Agreement; and

WHEREAS, The Transaction Documents conform to all local laws and regulations and are not prohibited by the City's Charter; and

WHEREAS, The tolling provisions of the Initial Settlement Agreement expire on January 14, 2023 and need to be extended in order to allow time to obtain all approvals and close the transactions contemplated by the Final Settlement Agreement; and

WHEREAS, On February 16, 2022, the San Francisco Planning Department determined that this Agreement, the Final Settlement Agreement and the Exchange Agreement are statutorily exempt from review under the California Environmental Quality Act ("CEQA") under Public Resources Code Section 21080.11; and on March 10, 2022, the San Francisco Planning Department determined that the project, on balance, is in conformity with the General Plan; and therefore be it

RESOLVED, That the Port Commission approves an amendment to the Initial Settlement Agreement to extend the tolling expiration date until July 14, 2023; and authorizes the Port's Executive Director to further extend the expiration date in reasonable increments, but no later than January 14, 2024, in order to obtain all approvals and close the transactions contemplated by the Final Settlement Agreement; and be it further

RESOLVED, That, in order to finally resolve the title dispute and for the reasons set forth herein, the Port Commission has made the necessary findings to support approval of the Transaction Documents by the Board of Supervisors and State Lands under Administrative Code Section 23.3, SB 815 and Public Resources Code Section 6307, pursuant to their respective jurisdiction; and be it further

RESOLVED, That, in order to finally resolve the title dispute and for the reasons set forth herein, as recommended by the City Attorney, the Port Commission hereby approves the Final Settlement Agreement and the form of Sale Agreement and form of Trust Exchange Agreement including all attachments and exhibits thereto, and the transactions which such agreements contemplate on the terms and conditions set forth in the Port Commission Memorandum dated July 8, 2022, subject to the approval of

the Board of Supervisors and State Lands, and in such final form as is approved by the City Attorney; and be it further

RESOLVED, The Port Commission authorizes the Port's Executive Director to obtain approval of the Transaction Documents as required by the Board of Supervisors and State Lands; and be it further

RESOLVED, Upon approval by the Board of Supervisors and State Lands, the Port's Executive Director and the Director of Property or their designees are hereby authorized, in the name and on behalf of the City and the Port, to (i) determine satisfaction of all conditions precedent, (ii) execute the Final Settlement Agreement, Sale Agreement and Exchange Agreement with any additions, amendments or other modifications to the Final Settlement Agreement, form of Sale Agreement and form of Exchange Agreement that the Executive Director, in consultation with the City Attorney, determines are in the best interest of the Port, do not materially increase the obligations or liabilities of the City or Port, and are necessary or advisable to complete the transactions which the Final Settlement Agreement contemplates and effectuate the purpose and intent of this Resolution, such determination to be conclusively evidenced by the execution and delivery by the Executive Director or her designee of the Final Settlement Agreement, Sale Agreement and Exchange Agreement; (iii) execute and deliver any and all conveyance deeds, patents, and instruments contemplated by the Transaction Documents; and (iv) to take any and all other steps (including, but not limited to, the execution and delivery of any and all certificates, agreements, notices, consents, escrow instructions, closing documents and other instruments or documents) as they deem necessary or appropriate in consultation with the City Attorney, in order to consummate the transactions contemplated by the Final Settlement Agreement, Sale Agreement and Exchange Agreement in accordance with their terms, or to otherwise effectuate the purpose and intent of this Resolution, such determination to be conclusively evidenced by the execution and delivery by the Executive Director of any such documents; and be it further

RESOLVED, The Port Commission authorizes the Executive Director or her designees to work with State Lands to seek State legislation to transfer the New Public Trust Easement to be held by the City, with Port as trustee, subject to the terms and conditions of the Burton Act; and to execute and deliver any and all conveyance deeds, patents, and instruments and to take any and all other steps (including, but not limited to, the execution and delivery of any and all certificates, agreements, notices, consents, escrow instructions, closing documents and other instruments or documents) as deemed necessary or appropriate in consultation with the City Attorney, in order to consummate the transfer of the New Public Trust Easement, or to otherwise effectuate the purpose and intent of this Resolution, such determination to be conclusively evidenced by the execution and delivery

by the Executive Director of any such documents; and be it further

RESOLVED, That the Port Commission approves, confirms and ratifies all prior actions taken by the officials, employees and agents of the Port Commission or the City with respect to the Initial Settlement Agreement, Final Settlement Agreement and Transaction Documents.

***I hereby certify that the foregoing resolution was adopted by the San Francisco Port Commission at its meeting of July 12, 2022.***

DocuSigned by:  
*Carl Neita*  
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Secretary

# EXHIBIT 1

## Figures 1 - 3

Figure 1. Davidson Avenue and Custer Avenue Context Map

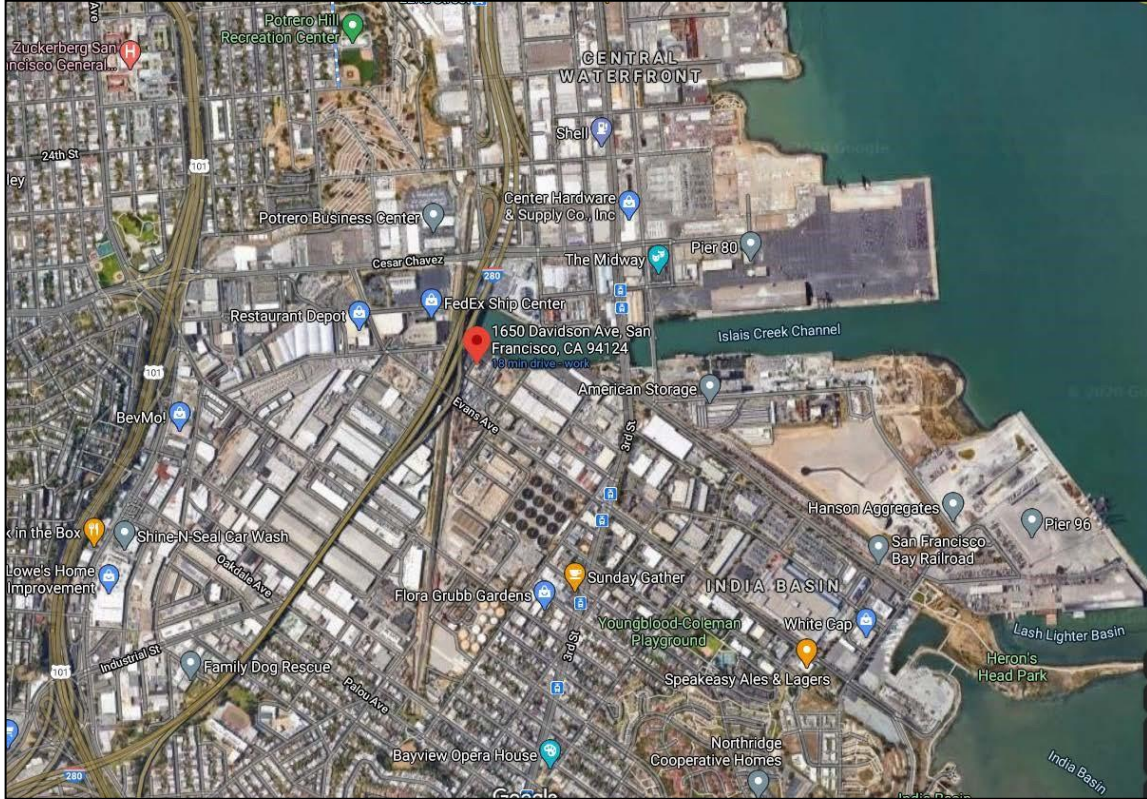




Figure 2. SB 815 Parcel

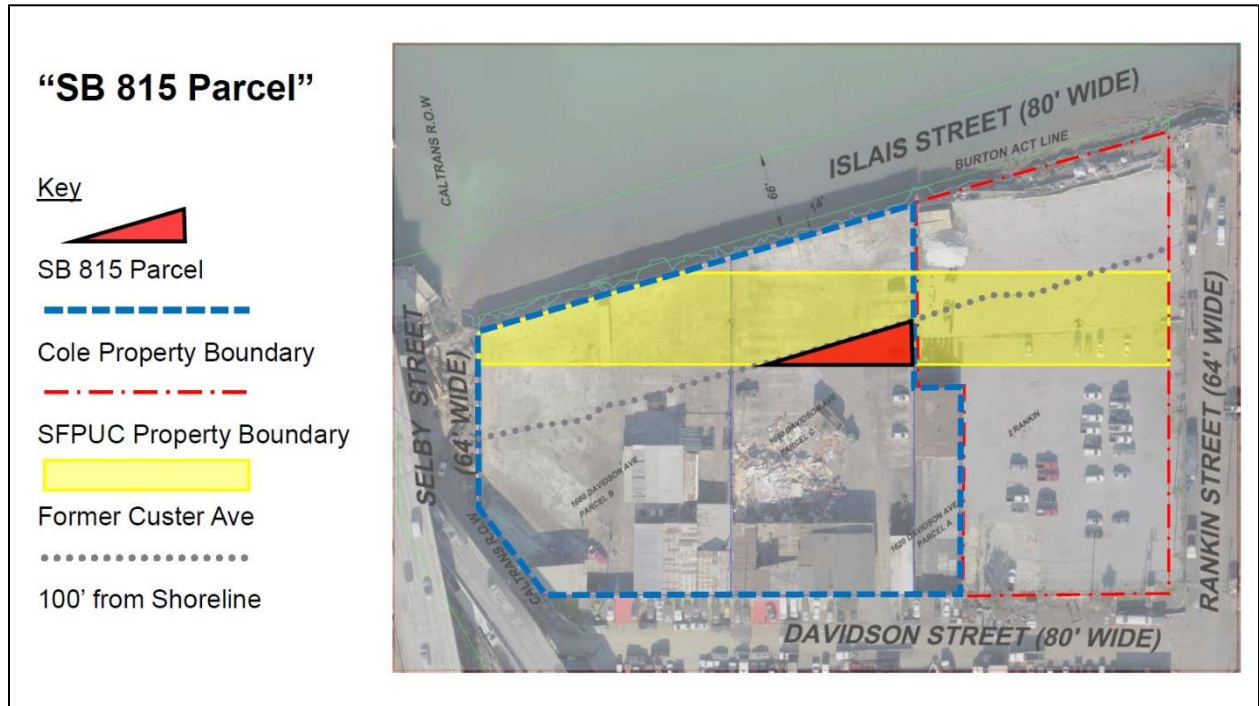


Figure 3. New Trust Easement



**EXHIBIT 2**  
**Key Terms of Agreements**

**Initial Settlement Agreement:**

**A. Standstill:** Parties will not file a lawsuit against the other until January 14, 2023 during which time the parties will work together in good faith to permanently resolve the title dispute. The stated goal is to terminate the Trust interest through a sale, trust swap, legislative fix or other mutually acceptable resolution (subject to approval by the Port Commission, Board of Supervisors and State Lands).

**B. Usage and Payment.** Port will not attempt to gain possession and the Coles and their tenants can continue to use Former Custer Avenue in exchange for a non-refundable monthly payment of \$6,420.75.

**C. Indemnity.** The Coles indemnify and hold Port harmless in connection with its property use and carry third party insurance coverage.

**D No Admission.** The parties do not admit any facts, liability or responsibility and the agreement cannot be used against either party if there is future litigation.

**E. Port Transaction Costs.** Coles to reimburse Port for its transaction costs in reaching a final resolution.

**Proposed Final Settlement Agreement:**

**I. Final Settlement Agreement (City/Port and Coles)**

**A. Execution of Transaction Documents.** The Final Settlement Agreement requires execution of a Sale Agreement and Exchange Agreement. The Sale and Exchange Agreements are subject to approval by the Board of Supervisors and State Lands.

**B. Mutual Releases.** The parties will release their title claims against each other. City will not release: any tax liabilities, any criminal liabilities, environmental hazard claims that occurred before 1917 and were not exacerbated by a third-party, or any other claim or liabilities unrelated to the title claims. The Initial Settlement Agreement will terminate except for those provisions that survive the termination of the Initial Settlement Agreement.

**C. No Admission.** The parties will not admit any facts, liability or responsibility and the agreement cannot be used against either party if there is future litigation.

**D. Port Transaction Costs.** Port to be reimbursed for \$25,000 of its

transaction costs.

## II. Sale Agreement (City/Port and Coles)

**A. Sale.** Sale by the City of a small portion of Former Custer Avenue that can be transferred under existing state legislative authority (SB 815).

**B. Sale Price.** Appraised Value of \$110/per square foot as appraised by John Clifford Assoc and affirmed by R. Blum and Associates. Proposed discounted sale price of \$67.68 per square foot for a total of \$160,000 to reflect the delays, uncertainty and risks associated with litigation.

**C. Claims by Title Companies.** As a closing condition, the Cole Trust must provide satisfactory evidence that it has settled, withdrawn, discontinued or disavowed any claim against Fidelity National Title Insurance Company and Old Republic Title, the original title companies, with respect to the disputed title; City may waive this requirement and instead obtain a release from these title companies or an indemnity against liabilities from the Cole Trust.

**D. Transaction.** Using City/Real Estate Department Form of Sale Agreement; complies with City requirements for sale of property, including necessary public purpose and other findings.

**D. Trust-Related Findings.** Port Commission, Board of Supervisors and State Lands to make various supporting findings required by law.

## III. Exchange Agreement (City/Port, Coles and State Lands)

**A. Swap.** Land swap under existing state legislative authority (Public Resources Code §6307) to essentially shift the strip of land that is Former Custer Avenue north to be adjacent to Islais Creek. That will become a new 18-foot public trust easement (“New Easement”) (a portion of the New Easement is currently in the Public Trust as a fee interest). Port will quitclaim the remainder of its Burton Act interests and State Lands will quitclaim its interest to the Coles free of the Trust.

**B. Kapiloff Payment.** Because the New Easement land going into the Trust is less than the land coming out of the Trust, a contribution to the Kapiloff Fund is needed to make up for the difference. The Cole Trust will make a deposit into the Kapiloff Land Bank Fund in an amount equal to \$790,000 to make up for the lost square footage. Kapiloff funds to be used later by State Lands to acquire additional Trust lands.

State Lands agrees that it intends to use the funds to in San Francisco and will consider the acquisition of suitable property interests identified and proposed by Port for an amount up to the Kapiloff Deposit; provided that the acquisition price is not greater than the fair market value of any such property interest. Newly acquired trust lands in San Francisco will be under Port jurisdiction.

**C. New Easement.** The New Easement will initially be held by the State, but Port will work together with State Lands to seek state legislation to transfer the New Easement to the City to be held by the Port as trustee, subject to the terms and conditions of the Burton Act. This item can be done later and does not require involvement by the Coles.

**D. Trust-Related Findings.** Port Commission, Board of Supervisors and State Lands to make various supporting findings required by law.