

Special Council Meeting Public Comment

From: Jesse Marquez [REDACTED]
Sent: Monday, November 13, 2023 5:03 PM
To: Clerk <Clerk@nationalcityca.gov>; cityattorney@nationalcityca.gov
Cc: Jesse Marquez [REDACTED]
Subject: Request To Appeal A Port of San Diego Board of Port Commission Decision

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November 13, 2023

National City - City Council
1243 National City Blvd.
National City, CA 91950

Kerry K. Bigelow, MMC
City Clerk
clerk@nationalcityca.gov

City Attorney
cityattorney@nationalcityca.gov

Ben Martinez
City Manager
citymanager@nationalcityca.gov

Re: Port of San Diego Board of Port Commission Meeting 10-10-2023 Agenda Item 1. 2023-0264

Su: Request To Appeal A Port of San Diego Board of Port Commission Decision

Dear City Council and City Attorney:

The Coalition For A Safe Environment is submitting this Appeal Request to void and rescind the censure placed on Port of San Diego (San Diego Unified Port District) National City Commissioner Sandy Naranjo and request the city investigate identified potential violations by the Port of San Diego and Board of Port Commissioners of both the Brown Act and the Bagley-Keene act on open meetings. The Port of San Diego's deliberate lack of transparency, initial refusal to publicly share evidence, and unjustified haste to push through a decision gravely affecting a disadvantaged Port City and the public trust requires review from you as a city member, as the sole oversight authority of the San Diego Unified Port District Port Commissioner's actions through your appointee(s) to the Port Commission.

Please see attachments.

Respectfully Submitted,

Jesse N Marquez



Coalition For A Safe Environment

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November 13, 2023

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Re: Port of San Diego Board of Port Commission Meeting 10-10-2023
Agenda Item 1. 2023-0264

Su: Request To Appeal A Port of San Diego Board of Port Commission Decision

Dear City Council and City Attorney:

The Coalition For A Safe Environment is submitting this Appeal Request to void and rescind the censure placed on Port of San Diego (San Diego Unified Port District) National City Commissioner Sandy Naranjo and request the city investigate identified potential violations by the Port of San Diego and Board of Port Commissioners of both the Brown Act and the Bagley-Keene act on open meetings. The Port of San Diego's deliberate lack of transparency, initial refusal to publicly share evidence, and unjustified haste to push through a decision gravely affecting a disadvantaged Port City and the **public trust requires review from you as a city member, as the sole oversight authority of the San Diego Unified Port District Port Commissioner's actions through your appointee(s) to the Port Commission.**

The Coalition For A Safe Environment wishes to advise you that Commissioner Sandy Naranjo is not a member of our organization and has never been a member of our organization. She is not a member or past member of any organization that we are affiliated with. Commissioner Sandy Naranjo did not contact us for any assistance or involvement. We were notified by other organizations of the actions that the Port of San Diego Board of Port Commissioners were going to take to censure her and we decided to intervene on her behalf.

The Coalition For A Safe Environment is a 22-year-old community-based Environmental Justice Organization and based on our review of public information, our research and discussions with multiple stakeholders and our extensive knowledge of the history of Port Management and the current Port General Legal Counsel, we have taken the position to support and defend Port of

San Diego Commissioner Sandy Naranjo, the duly appointed representative from the port city of National City.

San Diego's Port Commissioners voted on October 10, 2023 to censure Commissioner Naranjo. This was directed by the Port of San Diego's management and legal counsel. On the October 10, 2023 meeting date, the Board of Port Commissioners violated The Brown Act and the Bagley-Keene act in their neglect of required public notice and authority and purpose for calling a "special meeting" which requires an urgent act in the public interest, which this action clearly was not time sensitive in the public interest, but only in the Port of San Diego's staff's interest.

This decision to censure and remove National City's Port representative from any meaningful participation was based on a secretive investigation. The investigation report was not released prior to the censure, but two days afterwards due to public outcry and litigation threats. ***The Port's investigation report concluded, grudgingly, there was no wrongdoing of Ms. Naranjo's conduct.*** Additionally, the Port Commissioners failed in their duties to perform their own independent due diligence to investigate Commissioner Naranjo's pointed public questions, information and concerns about Port Management and Port Legal Counsel decisions and actions, a dereliction of their sworn duties as Port Commissioners operating in the public trust.

There is substantial evidence of the Port of San Diego's Management and Legal Counsel's violation of Ethics, Annual Statement of Economic Interest Disclosure, Contract Awards, Public Trust, Public Transparency, Public Disclosure and Public Right to Know. And yet the General Counsel was not investigated. Commissioner Naranjo was investigated instead, and censured for merely questioning the outside interests of the General Counsel during his performance review closed session meeting (the facts now made public).

It is for these reasons outlined and for the following reasons that we submit our request for the formal Administrative Appeal, or any actions under your powers as applicable and described in the following:

1. On behalf of the public interests and our members we file this Appeal Request to the City Council. We request to be placed on a City Council Agenda where we can discuss, present and submit additional information to support our Appeal.
 - 1a. Decisions made by a non-elected body (Commission) of a governmental agency can be Appealed to the Elected Body having jurisdiction over the Non-Elected Body, which is solely the City Council of member cities.
 - 1b. We went to your city website and could find no procedure or information on how to file an Appeal to the city regarding a Port of San Diego Commission vote and decision.
2. On behalf of the public interests and our members we are requesting that the City Council take actions to acknowledge and verify that the Port of San Diego Board of Port Commissioners have no authority to censure a fellow commissioner.
 - 2a. The "Board establishes policies under which the Port's staff - supervised by the President and Chief Executive Officer - conducts its daily operations."
 - 2b. The Board has no statutory or legal authority to create or request a Resolution and vote to censure another port cities appointed Port Commissioner.
 - 2c. The Board has no statutory or legal authority to create a Resolution and vote to strip or deny another port cities appointed Port Commissioner of their city obligations and rights to participate in Board of Port Commissioners Internal and External Committee Assignments, voting actions and decision making.
 - 2d. A Board Port Commissioner is not an elected "legislative body member."
 - 2e. It appears that the Board of Port Commissioners have had no or inadequate training on their fiduciary and due process authorities and responsibilities.

3. On behalf of the public interests and our members we are requesting that the City Council take actions to acknowledge and verify the Port of San Diego Board of Port Commission's violation of The Brown Act and the Bagley-Keene Act, and to void and rescind the Port Commissions meetings and votes to censure Port Commissioner Sandy Naranjo and other related actions taken.
 - 3a. The Port Commission failed to post notice of a Special Meeting on the Home Page of the Port of San Diego website or the Board of Port Commissioners website homepage as required, by law.
 - 3b. The Port Commission failed to post 24-hour notice of the change of times of the Special Meeting on the Home Page of the Port of San Diego website or the Board of Port Commissioners website after changing the time of the special meeting by several hours.
 - 3c. The Port Commission failed to post 24-hour notice of the change in the Regular Port Meeting Agenda by adding a new agenda item, closed session and additional Censure items without notice and held a vote on said agenda changed item.
4. On behalf of the public interests and our members we are requesting that the City Council use any powers available to void and rescind the censure placed on Port of San Diego Port Commissioner Sandy Naranjo and to reinstate her with full authority.
 - 4a. The Port Commission acted on information and a legal consultant's report provided by the Port of San Diego which was prejudiced against Commissioner Naranjo and was extremely limited in scope, appearing to skew the outcome.
 - 4b. The Port Commission acted on information provided by the Port of San Diego General Counsel Thomas A. Russell that was intended to prevent Commissioner Naranjo from disclosing information and requesting an investigation regarding his potential Ethics Violations, Annual Statement of Economic Interest Disclosure Violations and Conflicts of Interests.
 - 4c. Commissioner Naranjo was not allowed Due Process and Reasonable Time to prepare responses to the allegations against her and to seek legal counsel. Indeed, she was given no information at all until public outcry forced the Port Commission to grudgingly disclose their purported evidence after the illegally held censure vote.
 - 4d. It is the intent of the Port of San Diego Management and Legal Counsel to prevent Port Commission Vice Chair Commissioner Sandy Naranjo from being elected to Chair of the Port Commission on November 14, 2023 because she was making inquiries about Port Management and Legal Counsel decisions and actions while performing the duties of *her sworn responsibility to the people of California as National City's representative*.
 - 4e. The Port of San Diego Legal Counsel Thomas A. Russell failed to disclose to the Board of Port Commissioners that they would be in violation of the San Diego Unified Port District Memorandum - Rotation of Officers dated September 27, 2021 and BPC Policy No. 001 which states that the President position is to be rotated annually and the policy for the election of the Board of the Chair, Vice-Chair and Secretary. This year the National City Port Commissioner Sandy Naranjo is to be elected Chair. It is evident the timing of the censure was intentional and staff withheld information for almost a year after the purported offense and was driven by staff concerns of transparency.

5. On behalf of the public interest and our members we are requesting that the City Council immediately notify their authorized representative Commissioners to take no voting actions to make any changes to the current Board or hold elections of officers until all investigations have been completed.
 - 5a. The Port Commissioners failed to conduct any Due Diligence to research Port Commissioner Sandy Naranjo inquiries, concerns and requests.
 - 5b. The Port of San Diego counsel is providing the Port Commissioners information that is prejudiced, incomplete, missing and misrepresented.
6. On behalf of the people of California, people of San Diego, and our members we are requesting that the City Council and all authorities take immediate actions to prevent the Port of San Diego management and personnel from violating Employee Hiring, Personnel Ethics Monitoring, Complete Statement of Economics Interest Reporting and Conflict of Interest Reporting requirements.
 - 6a. The Port of San Diego is not conducting any Personnel Ethics Monitoring.
 - 6b. The Port of San Diego is not adequately reviewing Statements of Economic Interest Reporting upon hiring new employees for potential conflicts of interest.
 - 6c. The Port of San Diego is not adequately reviewing all hired staff Statement of Economics Interest Reporting annually for changes which would reveal conflicts of interest and should be easily and publicly available and currently is not.
 - 6d. The Port of San Diego is not investigating and reporting Port Commissioner inquiries, concerns and questions about Port Management or Legal Counsel decision making, actions and inactions.
 - 6e. The Port of San Diego did not detect in the Form 700 Statement of Economics Interest Reporting filed by Port General Counsel Tom Russell his stock positions in numerous companies that have continual business before the Port.
 - 6f. The Port of San Diego did not detect in the Form 700 Statement of Economics Interest Reporting filed by Thomas A. Russell that companies he owned, was partner or owned stock in could present a conflict of interest.
7. On behalf of the public interests and our members we are requesting that the City Council take actions to prevent the Port of San Diego management and staff from violating contract application review, applicant qualifications, background checks, issuing of non-competitive awards and non-compliance for full disclosure reporting requirements.
 - 7a. The Port of San Diego awarded a multi-million-dollar non-competitive award to Clean Air Engineering-Maritime Inc. (CAEMI) contrary to standard governmental agency policies.
 - 7b. The Port of San Diego failed to investigate the background of Clean Air Engineering-Maritime Inc. (CAEMI) which is owned by Nicholas G. Tonsich aka Nick Tonsich who is entangled in litigation (now settled) by Port of Los Angeles AND Port of San Diego tenant Pasha, Stevedoring & Terminals L.P. asserting a "multi-year conspiracy," "fraudulent documents, falsified invoices, inflated amounts paid to Tonsich," and illegal kickbacks to Pasha staff who have since been fired. The CAEMI Pasha Terminal on-dock ShoreKat ship emissions capture and treatment system were a complete failure. The CAEMI On-Dock ShoreKat System was allegedly the same as the CAEMI Barge METS 1 system.
 - 7c. Pasha Stevedoring & Terminals L.P. is also a major tenant at the Port of San Diego.

8. On behalf of the public interest and our members we are requesting that the City Council use any powers available to it and its appointees at the Port Commission to initiate an investigation into the potential Ethics and Conflict of Interest Violations of General Legal Counsel Thomas A. Russell aka Tom Russell.
 - 8a. Port of San Diego Legal Counsel Tom Russell did not disclose he knew Nick Tonsich nor his company, Clean Air Engineering-Maritime Inc. (CAEMI) until Commissioner Naranjo brought it to the Board's attention and voiced her concerns in closed session, for which retaliation in the form of an investigation into Ms. Naranjo is now clear
 - 8b. Port of San Diego Legal Counsel Tom Russell did not disclose he knew and worked closely with Nick Tonsich. Russell was the Port of Los Angeles General Counsel when Tonsich was the Port of Los Angeles Board of Port Commission President and Commissioner.
 - 8c. Port of San Diego Legal Counsel Tom Russell did not disclose that he was aware that Nick Tonsich and his company Clean Air Engineering-Maritime Inc. currently had a lawsuit pending by Port of Los Angeles tenant Pasha Stevedoring & Terminals L.P.
 - 8d. Port of San Diego Legal Counsel Tom Russell knowingly approved a multi-million-dollar non-competitive award to Clean Air Engineering-Maritime Inc. (CAEMI).
 - 8e. Port of San Diego Legal Counsel Tom Russell did not disclose in his Form 700 Statement of Economics Interest Reporting he had established new business which might be a conflict of interest.
 - 8f. Port of San Diego Legal Counsel Tom Russell did not disclose he had filed and was awarded a U.S. Patent for a propeller which could be used by Clean Air Engineering-Maritime Inc. while being employed by the Port of San Diego. *Patents filed and awarded to a government agency employee are owned by the government agency. Mr. Russell apparently domiciled his "invention" business in the state of Wyoming, evading required California taxes and keeping this potential conflict of interest from public scrutiny.*
 - 8g. Port of San Diego Legal Counsel Tom Russell and Port staff did not inform the Port Commissioners that they would be violating The Brown Act and the Bagley-Keene act on October 10, 2023 with inadequate public notice, unjustified urgency calling a special meeting, and changing the time and agenda of the meeting several times within 24 hours and during the meeting even though members of the public called out this violation in real-time during public comment on October 10, 2023.

The Coalition For A Safe Environment (CFASE) submitted a Letter of Confidence and Support for Commissioner Sandy Naranjo to the Port of San Diego and to the Port Commission on October 10, 2023. CFASE further submitted verbal public comments during the Board of Port Commissioners meeting. The Port of San Diego's Port Commissioners failed to conduct any independent due diligence or request that the Port investigate and respond to any of Commissioner Naranjo's concerns, inquiries and questions regarding Tom Russell and Nick Tonsich. See attachment.

CFASE additionally submitted a new Letter of Support for Commissioner Sandy Naranjo to the Port of San Diego and to the Board of Port Commissioners on November 1, 2023, which included extensive information with attachments supporting her justification for inquiring about the Port of San Diego legal counsel Tom Russell and his relationship with Nick Tonsich and a recently approved non-competitive project grant award. See attachments.

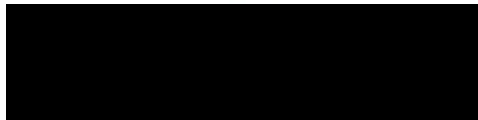
We have extensive work history knowledge of Tom Russell, current legal counsel for the Port of San Diego who was the former legal counsel at the Port of Los Angeles and Nick Tonsich,

former President of the Board of Port Commissioners at the Port of Los Angeles and their long-standing business relationships.

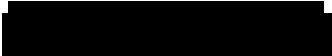
Please feel free to contact me for any additional information. Please respond as soon as practicable, as this issue has urgency in the governance of the Port and the integrity of system of oversight of public agencies. As the recent grand jury investigation into the governance of the Port of San Diego shows, this is an agency that believes they “can do whatever they want” as stated by current chair Rafael Castellanos. Your oversight is not only requested, it is the sole remedy the people of California have to assure representation, honesty, and integrity on the Port Commission.

The Port Commission is not allowed to pick and choose their fellow Commissioners. That authority only resides with the Port member city councils. Please use what powers you have to reign this public entity in and enforce compliance with the laws of the State of California, and allow National City it’s representation.

Respectfully submitted,

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Jesse N Marquez
Executive Director
Coalition For A Safe Environment

A black rectangular redaction box covering contact information.

See attachments



Coalition For A Safe Environment

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October 10, 2023 V2

Board of Harbor Commissioners
Port of San Diego Unified Port District
3165 Pacific Coast Highway
San Diego, CA 92101
publicrecords@portofsandiego.org

Re: Agenda # 2023-0264
Su: Letter of Confidence

Dear Board of Port Commissioners:

The Coalition For A Safe Environment wishes to submit our Letter of Confidence and Support for Commissioner Sandy Naranjo and ask that you not approve the proposed censure resolution Agenda # 2023-0264.

Commissioner Naranjo was nominated and appointed by the city of National City to the Port of San Diego Board of Port Commissioners to represent their residents and Environmental Justice Communities best interests. Her professional career, academic and community involvement background illustrate her unique qualifications to properly represent her city and port neighboring Environmental Justice Communities.

Questioning and researching port and board management decision making, staff actions, policies, proposals, projects, programs, reports, and presentations are within the rights of board members to provide full public transparency.

The Port of San Diego Unified Port District has historically approved port projects and programs that have been opposed by Environmental Justice Communities because the prepared Environmental Impact Reports failed to identify all negative impact sources, failed to assess all environmental impacts, failed to include feasible alternatives and failed to mitigate all environmental impacts. These have been acts of discrimination and environmental racism that continue today and must be stopped.

The information provided in the Draft Resolution discloses serious legal violations of public agency transparency, public disclosure, public right to know, allegation details and due process.

The Draft Resolution does provide or disclose:

1. Copies of any evidence and information collected to support the censure allegations.
2. Commissioner Naranjo rebuttal and information to the allegations.
3. Was National City notified and involved in the investigation of allegations.

We request that the Board of Port Commissioners not vote and not approve the proposed Censure Resolution in Agenda # 2023-0264 because there has not been a comprehensive investigation of the allegations.

I would also like to advise that I will submit a formal Public Records Act Request for all documents, information, phone calls and text messages on this matter from all Port management, staff and any third party involved.

Respectfully Submitted,



Jesse N Marquez
Executive Director



Coalition For A Safe Environment

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jnm4ej@yahoo.com 424-264-5959 310-590-0177

May 5, 2016

Port of Los Angeles
Board of Harbor Commission

Re: Non-Agenda Item
SU: Public Comments

Port of Los Angeles & Nicholas G. Tonsich Ethics Violations II

Ambassador Martinez and Board of Harbor Commissioners:

On February 18, 2016 I came and spoke before the Board of Harbor Commissioners on a non-agenda item and submitted a letter regarding Port of Los Angeles and prior BOHC President and Commissioner Nicholas G. Tonsich Ethics Violations.

At the end of my public comments Ambassador Martinez asked that Port staff research my allegations and prepare a report back to the Board of Harbor Commissioners. Since that date I have not heard if a report had been completed and submitted to you. If one has been completed I would like to request a copy of that report.

Since that time CFASE has continued its research related to this topic via the POLA Website, documentation from the South Coast AQMD, the California Air Resources Board, Advanced Cleanup Technologies, Inc. (ACTI)/ Advanced Engineering Group (AEG-AMECS) and has found the following:

1. ACTI-AMECS was first built as an On-Dock System at the Port of Long Beach Metropolitan Stevedore Company Bulk Terminal in 2007.
2. ACTI began testing of the AMECS On-Dock System on Port of Long Beach Metropolitan Stevedore Company Bulk Terminal ships in 2008.
3. On December 15, 2008 CARB advised ACTI of its support for AMECS and their review of two source-test reports from two ships from May 26, 2008 and July 16, 2008.
4. On June 22, 2011 the South Coast AQMD approved a Performance/Compliance Protocol for the AMECS On-Dock System after refining three previous submitted test protocols dated April 12, 2011, May 10, 2011 and June 8, 2011
5. ACTI had been continually tested ships every year at the Port of Long Beach from 2008-2012 on over 35 ships.
6. On May 17, 2012 the POLA BOHC'c approved an agreement with Clean Air Engineering for \$ 1,500,000 to, "demonstrate a barge mounted emission control system,

7. developed by Clean Air Engineering (CAE) which is designed to reduce ocean going vessel at-berth auxiliary engine emission,” funded by the CAAP TAP.
8. On November 20, 2006 the POLA and POLB adopted the San Pedro Bay Ports Clean Air Action Plan (CAAP) and the establishment of the Technology Advancement Program (TAP). The TAP is the catalyst for identifying, evaluating, and demonstrating new and emerging emissions reduction technologies applicable to the port industry that could be utilized in future updates to the CAAP as new control measures, alternatives to existing measures, or as additional mitigation options for new projects
9. The Port of Long Beach did not contribute its customary 50% for this project because it already was supporting the ACTI-AMECS technology demonstration and development. The POLB was supporting the ACTI-AMECS because ACTI already had built a prototype AMECS On-Dock System.
10. The POLA BOHC approved \$ 1.5 million for CAEM who did not have a prototype or any version of a “ship emissions capture technology” to demonstrate.
11. The standard protocol for POLA TAP grants has been that a company must have a prototype to demonstrate. CAEM did not. The POLA illegally waived this requirement and literally gave CAEM free money to build a prototype in order to demonstrate and profit from.
12. CAE had no CARB or SCAQMD test protocol approval or review of its ship emission capture system technology to justify approval by the POLA BOHC because it did not have a prototype.
13. ACTI owns 8 US Patents on its technologies and CAE has no patents to our knowledge. The POLA will not be allowed to use CAEM’s technology in the future.
14. CAE is owned by former POLA BOHC President and Commissioner Nicholas G. Tonsich who had no previous experience in ship emission capture technology or any other type of emissions capture technology.
15. The Los Angeles City Attorney Rocky Delgadillo in 2001 and in 2004 advised Nicholas G. Tonsich that he had legal conflicts of interests.
16. The Los Angeles City Ethics Commission Executive Director LeeAnn M. Pelham in 2009 advised Nicholas G. Tonsich that he had legal conflicts of interests.
17. ACTI which is now Advanced Engineering Group (AEG) built a barge version of AMECS in 2012 after numerous times being told by the POLA that an On-Dock System was not good because it would interfere with On-Dock Cranes and other port terminal equipment.
18. The AMECS technology is a superior and more cost effective technology than CAEM/Tri-Mer. AMECS exceeds CAEM/Tri-Mer in design, technologies and efficiencies.
19. CFASE has further investigated the claim that Nicholas G. Tonsich was an owner or partner in the Advanced Cleanup Technologies, Inc. (ACTI) company and we have

found out that it is not true. Nicholas G. Tonsich law firm was hired by ACTI for a temporary time to do bill collections of outstanding debts from customers that had nothing to do with the Port of Los Angeles or City of Los Angeles. An error also on research on the part of the Los Angeles City Attorney.

20. CFASE has also discovered that Nicholas G. Tonsich propositioned ACTI to make him a part owner or partner and that ACTI refused, which is the primary reason Nicholas G. Tonsich created his own company to compete with ACTI/AEG and has used the Port of Los Angeles to take revenge and retaliation for ACTI's refusal to make him a business partner for personal financial gain.

The Coalition For A Safe Environment requests that the Port of Los Angeles Board of Harbor Commissioners authorize an independent 3rd party to investigate our and others members of the public allegations of Ethics Violations of the Port of Los Angeles staff, legal department and former BOHC President and Commissioner Nicholas G. Tonsich. It is obvious the Port of Los Angeles staff are not disclosing all the truth and providing documentation as requested.

We further request that the BOHC investigate the business relationship that Nicholas G. Tonsich has with current Port of Los Angeles tenants. To include but not be limited to: business consulting agreements, new business & income development contracts, legal services contracts etc. To include but not limited to: TraPac, Pasha and China Shipping.

We further request that the BOHC investigate the business relationship that Nicholas G. Tonsich may have with current and past Port of Los Angeles staff. Request that the BOHC request that all Port of Los Angeles staff turn over all documentation and personal correspondence related to this matter and Port of Los Angeles tenants.

We specially ask you to see the Port of Los Angeles website on Vendor/Supplier Bids, Contracts and Purchasing Mission Statement and the Contracts and Purchasing Code of Ethics. Go to:

https://www.portoflosangeles.org/business/bids_vs.asp

CFASE also refers you to the City of Los Angeles Governmental Ethics Ordinance and specifically Section 49.5.11 Lobbying Activities of Former Officials and Employees. Go to: <http://ethics.iit.edu/ecodes/node/3546>

Respectfully Submitted,

A black rectangular redaction box covering the signature of Jesse N. Marquez.

Jesse N. Marquez
Executive Director



<https://www.portofsandiego.org/press-releases/general-press-releases/port-san-diego-deploy-bonnet-system-help-further-reduce-0>

May 19, 2022

ENVIRONMENT

Port of San Diego to Deploy Bonnet System to Help Further Reduce Cargo Vessel Emissions on and around San Diego Bay

CONTACT: *Brianne Mundy Page, 619.348.1518, bpage@portofsandiego.org*



As a national leader in deploying clean air technologies, the Port of San Diego is moving forward with a system to control and capture cargo vessel emissions, also known as a bonnet. The bonnet will be available for use by cargo vessels that aren't yet equipped to connect to shore power.

In support of the Port's new Maritime Clean Air Strategy (MCAS), the Board of Port Commissioners has approved an agreement with Clean Air Engineering – Maritime, Inc. (CAEM) to design, build, and operate a barge-based emissions control and capture system, also known as the Marine Exhaust Treatment System (METS), which will be certified by the California Air Resources Board (CARB).

For vessels that aren't yet shore power compatible, the METS places a bonnet over the vessel's stack to capture and treat exhaust while the ship is at berth. CARB requires the exhaust treatment to

be equivalent to electric power at berth. CAEM has received CARB approval on similar technologies that remove over 95% of particulate matter and nitrogen oxide. Shore power allows vessels to plug-in to shore-based electricity so they don't have to run their diesel engines while at berth. Having a bonnet in addition to shore power at the Port of San Diego's cargo terminals – one at the Tenth Avenue Marine Terminal and one coming soon at the National City Marine Terminal – will help to further reduce certain air pollutants like nitrogen oxides and diesel particulate matter.

“The bonnet will give some of our cargo carriers a great option in reducing their air quality impacts while they work to transition their vessels to being shore power compatible,” said Chairman Dan Malcolm, Board of Port Commissioners. “This is another example of how we can maintain and grow our maritime business – and protect jobs – while also improving air quality and quality of life for all who live, work, and play on and around San Diego Bay.”

Nick Tonsich, President of Clean Air Engineering – Maritime added, “The Port of San Diego is aggressively pursuing every mitigation measure available to ensure the highest air quality of any port community. We are proud to work with the Port and provide our years of experience in this public-private partnership.”

The bonnet system supports the Port's MCAS “Health Equity for All” vision – specifically, the goal to reduce emissions from ocean-going vessels. Additionally, CARB regulations require that auto carrier vessels reduce emissions while at-berth at California seaports beginning in 2025 by utilizing either shore power or bonnet technology. The Port's National City Marine Terminal primarily processes automobile imports.

The total cost of the project is approximately \$11.5 million, with the Port directing \$4.9 million in grant funds received from the California Transportation Commission (CTC). CAEM is covering the rest. The bonnet system is anticipated to be operational by January 1, 2025.

CAEM was founded in 2010 and has over eleven years of working experience on over 400 vessel calls and 23,000 hours of vessel exhaust treatment. They are a full-service company providing both design and build as well as operations and maintenance of emissions capture and control systems. They have a successful operational history at the Port of Los Angeles and Long Beach.

The agreement is a good business deal for the Port. CAEM is providing up-front capital financing for the portion of the project not covered by the CTC grant and has agreed to the following:

1. CAEM will design, build, and deliver to the Port a METS unit which is compliant with CARB regulations;
2. CAEM will provide the capital necessary for the construction, delivery, and operation of the METS (subject to reimbursement of certain costs through grant funding obtained by the Port);

3. CAEM will operate and maintain the METS during the duration of the contract through a revenue sharing arrangement with the Port;
4. The Port's share of revenue will be applied to reduce the capital investment of CAEM over time; and
5. CAEM and the Port will jointly own the METS until CAEM has fully recovered its capital investment in the ECCS.

Other notable clean air projects in the works at the Port include:

- Doubling shore power for cruise ships in fall 2022.
- Installation in 2023 of two all-electric Konecranes Gottwald Generation 6 Mobile Harbor Cranes to replace the obsolete diesel mobile harbor crane at the Tenth Avenue Marine Terminal.
- The first all-electric tugboat in the U.S., being built and to be operated by Crowley, will operate in San Diego Bay beginning in 2023.
- In 2023, 16 new electric trucks and vans will replace gas- or diesel-powered vehicles in the Port's fleet.

ABOUT THE PORT OF SAN DIEGO

The Port of San Diego serves the people of California as a specially created district, balancing multiple uses on 34 miles along San Diego Bay spanning five cities. Collecting no tax dollars, the Port manages a diverse portfolio to generate revenues that support vital public services and amenities.

The Port champions Maritime, Waterfront Development, Public Safety, Experiences and Environment, all focused on enriching the relationship people and businesses have with our dynamic waterfront. From cargo and cruise terminals to hotels and restaurants, from marinas to museums, from 22 public parks to countless events, the Port contributes to the region's prosperity and remarkable way of life on a daily basis.

ABOUT PORT OF SAN DIEGO ENVIRONMENT

Port of San Diego Environment champions the safekeeping and environmental care of our diverse ecosystems. Year after year, environmental goals are set and measured to evolve environmental initiatives – ensuring San Diego Bay remains a vibrant resource and contributes to a remarkable way of life for visitors and residents for generations to come.

GOVERNANCE OF SAN DIEGO BAY AND ITS TIDAL LANDS AND REGIONS

SUMMARY

The 2022/2023 Grand Jury (Grand Jury) undertook an investigation of the San Diego Unified Port District (Port District), the County of San Diego and the five Port Cities of Chula Vista, Imperial Beach, Coronado, San Diego and National City to assess how these organizations interact around the governance of San Diego Bay tidal lands and resources. This assessment was undertaken in response to a perception that the Port of San Diego and its unelected seven-member Board of Commissioners is not accountable to either the elected officials or the electorate of its five member cities or the County of San Diego, especially in the planning, development and implementation of projects in those cities. The Port District is an independent governmental agency created by the State of California and approved by voters in Chula Vista, Coronado,¹ Imperial Beach, National City and San Diego in 1962 to manage the tidelands and submerged lands of San Diego Bay.

This report will briefly review previous Grand Jury reports on the Port District and look at its creation, governance, relation to State agencies, and funding. The Grand Jury will also investigate conflicts and issues surrounding the Port District's operations in regard to the equitable representation of residents of the five Port Cities and their governing bodies, as well as the residents of the County of San Diego and its residents. Finally, the Grand Jury will also discuss the Port District's planning process and how its proposed projects have affected the five Port Cities, the County of San Diego and residents of these regions.

The report's recommendations include increasing the Port District's public participation and transparency by:

- Scheduling regular updates and presentations at publicly noticed open meetings of the city councils of its member cities;
- Simplification of the Port Master Plans around the Port District Planning Districts falling within each of the Port City's jurisdictional boundaries and three of the County's supervisorial districts;
- Submitting the Port Master Plan, and all future updates and amendments, to the relevant city council and County Supervisor for discussion and ratification;
- Lobbying the California State Legislature to introduce legislation enabling the County of San Diego to assume oversight of the activities of the San Diego Unified Port District and decisions of the Board of Port Commissioners, and share in the Port District's duty as guardian of the public trust in the tidal and submerged lands of San Diego Bay;
- Depending on the outcome of the legislation recommended above, exploring an alternate form of governance for the Port District, with participation from the County Board of Supervisors and elected officials of the five member cities;
- Encourage a limit of two four-year terms that a Port Commissioner can serve;
- Include staff from each of the five cities on each of the Port District's advisory committees; and
- Post meeting minutes and agendas of each of the Port District's advisory committees on-line.

¹ While the 1962 vote to approve creation of the Port involved tallying the combined votes of the five port cities, voters in the City of Coronado voted against Proposition D by a margin of 3 to 1.

INTRODUCTION

“We can do whatever we want, right?”² The words were spoken – and repeated several times-- by a commissioner of the San Diego Unified Port District during a public meeting of the Board of Port Commissioners. A Commissioner went on to describe what was believed to be “the absolute sovereignty of this board to make any decision that we want from this dais at any time.”³ The comment was made during a discussion of the changes proposed for the Port District’s policy on Capital Improvement Projects, and while made in the specific context of achieving greater flexibility for capital project funding, inadvertently characterized the broad authority and perceived nature of this organization – led by a seven-member unelected board of commissioners, largely autonomous, self-governing, self-funded and independent of oversight by local elected officials.

The 2022-23 San Diego County Grand Jury (Grand Jury) is not alone in its concern over the lack of oversight, transparency and accountability of an organization with such far reaching power and jurisdiction. Over the last several decades, two separate San Diego County Grand Juries have reached similar conclusions, the earliest being the 1986-87 Grand Jury and more recently the 1997-98 Grand Jury.

The 1986-87 Grand Jury Report concluded, “An enterprise of the scope and importance of the Port District must include a strong concern for community relations, public input and accountability ... yet, in the public’s mind, it conducts itself as does a private company, responsible only to its stockholders. The fact is that it is a public corporation, guarding a public trust and spending public money.”⁴ Similarly, the synopsis of the 1997-98 Grand Jury report concluded that the seven commissioners of the Port District “are viewed as operating with almost unlimited discretion regarding how they spend money with minimal accountability. Commissioners are not required to gain approval for their actions from the voting public or even from the city councils which appoint them.”⁵

In practice, the Port District requires a fiduciary oath of its commissioners to act in the best interests of the Port District, and in its role as guardian of the public trust, to the benefit of the residents of California. As appointees of one of five Port District cities, each commissioner must also represent the perspectives of the city appointing them as commissioner.

In representing the *interests* of the Port District but only the *perspectives* of the port cities appointing them, a dichotomy is created. The dichotomy allows port commissioners to manage the valuable resources of San Diego Bay in a unified, comprehensive manner but limits elected governments of the Port Cities and their constituents in making their views known or in determining the actions that are in their best interests. As a result, this dichotomy leads not only to voter disenfranchisement, but to a disconnection between elected municipal governments and their constituents, who must subordinate and subject their interests to the interpretations of the unelected Board of Port Commissioners.

² San Diego Unified Port District Port Commissioners Meeting, September 13, 2022, video recording @ 1:14:25. [Board of Port Commissioners on 2022-09-13 1:00 PM \(granicus.com\)](#)

³ San Diego Unified Port District Port Commissioners Meeting, September 13, 2022, video recording @ 1:15:50. [Board of Port Commissioners on 2022-09-13 1:00 PM \(granicus.com\)](#)

⁴ 1986-87 San Diego County Grand Jury, The County of San Diego and The San Diego Unified Port District Report No. 15, June 30, 1987, page 5-6.

⁵ 1997-98 San Diego County Grand Jury, The San Diego Unified Port District: It’s Time for Taxpayers and Citizens to Have a Direct Say, Final Report, June 30, 1998, page 103.

Severe as these assessments are, they are rooted in the San Diego Unified Port District Act (Port Act)⁶, enacted by the California Legislature in 1962, through which the State of California delegates the power and responsibility for management of the tidelands and submerged lands of San Diego Bay. The Port Act delegates these powers to the Port District from the California State Lands Commission (SLC) as guardian of these tidelands and submerged lands through the public trust doctrine. This doctrine “provides that tide and submerged lands and the beds of lakes, streams and other navigable waterways are to be held in trust by the State for the benefit of the people of California.”⁷ The Port District acts in this capacity as an independent governmental special district without direct oversight of its seven commissioners by other local city or county agencies. The unsalaried commissioners are appointed to four-year terms by city councils of each of the five cities that border San Diego Bay, (San Diego, Chula Vista, Coronado, Imperial Beach, and National City). While the commissioners must reside in the city that appointed them, they can serve an unlimited number of four-year terms, except in the City of Coronado which limits its port commissioners to two terms. Port commissioners may be recalled by majority vote of the city council which appointed them. Other than these limitations, no oversight by local governmental bodies is authorized by the Port Act, and decisions by the Board of Port Commissioners are not subject to approval, veto or appeal by city councils or voters of the five Port Cities or the county.^{8,9}

Democratic theory equates responsible government with popular participation in and control over policy formulation, political equality for the individual, deciding divisions of opinion by majority rule with complete freedom of discussion, and periodically holding free and meaningful elections.¹⁰ Yet by virtue of the legislation that created the San Diego Unified Port District, values such as these that citizens have come to expect in our governmental legislative, regulatory and judicial institutions have not been embraced.

METHODOLOGY

The Grand Jury conducted interviews and requested information from municipal and county governmental organizations affected by the Port Act.

The Grand Jury researched and reviewed these documents:

- California Harbors and Navigation Code, Appendix I, also known as the San Diego Unified Port District Act (Port Act)
- The 1986-1987 Grand Jury report: “The County of San Diego and the San Diego Unified Port District, Report No. 15” and responses
- The 1997-1998 Grand Jury report: “The San Diego Unified Port District: It’s Time for Taxpayers and Citizens to Have a Direct Say” and responses from the cities of San Diego, Chula Vista, Coronado, Imperial Beach, and National City
- Meeting Minutes and Agendas from the cities of San Diego, Chula Vista, Coronado, Imperial Beach, and National City as well as the San Diego Unified Port District
- Historical records and articles relating to formation of the Port District (per footnotes)
- Grand Jury Reports on Ports in other California Counties

⁶ California Harbors and Navigation Code, Appendix 1, San Diego Port District Act, Document no. 70987, filed March 3, 2020, Office of the District Clerk.

⁷ <https://www.slc.ca.gov/public-engagement/>

⁸ California Harbors and Navigation Code, Appendix 1, San Diego Port District Act

⁹ The City of Coronado limits the number of terms served by Port Commissioners to two terms

¹⁰ Bachrach, Peter. The Theory of Democratic Elitism (Chicago, 1962), p. 94.

- San Diego Unified Port District Website: www.portofsandiego.org
- Detailed electronic maps showing specific boundaries and areas within the San Diego Unified Port District

DISCUSSION

Creation of the San Diego Unified Port District

When California became a state in 1850, it acquired title to navigable waterways as trustee for the protection of public lands, streams, lakes, marshlands, and tidelands. This is referred to as common law public trust doctrine. Per the State of California State Lands Commission (SLC), “The public’s right to use California’s waterways for navigation, fishing, boating, natural habitat protection and other water-oriented activities is protected by the Common Law doctrine of the Public Trust.” Historically, the Public Trust has referred to the basic right of the public to use its waterways to engage in “commerce, navigation, and fisheries.” The SLC further states that the “Public Trust provides that tide and submerged lands and the beds of lakes, streams and other navigable waterways are to be held in trust by the State for the benefit of the people of California.”¹¹

San Diego Unified Port District: Unique Among California Ports

The San Diego Unified Port District is unique among California’s 12 ports in its establishment by state law. According to the Port Act, this was necessary because of the geography and other special characteristics of the locale:

It is hereby declared to be the policy of the State of California to develop the harbors and ports of this State for multiple purpose use for the benefit of the people. A necessity exists within San Diego County for such development. Because of the several separate cities and unincorporated populated areas in the area hereinafter described, only a specially created district can operate effectively in developing the harbors and port facilities. Because of the unique problems presented by this area, and the facts and circumstance relative to the development of harbor and port facilities, the adoption of a special act and the creation of a special district is required.¹²

With passage of the enabling Proposition D in November 1962, the SLC granted regulation and control of the tidelands and submerged lands of San Diego Bay to the newly created Port District. Following passage of San Diego County’s Proposition D, the cities of San Diego, Chula Vista, Coronado, Imperial Beach, and National City were to transfer the management of state tidal and submerged lands in San Diego Bay to the jurisdiction of a newly formed San Diego Unified Port District.

Proposition D Controversy

Passage of Proposition D was not obtained without controversy. Prior to the election, the city councils of Coronado, Imperial Beach and Chula Vista opposed formation of the Port District. Supporters of the proposition focused on the economic benefits made possible by the combined efforts of Port Cities on such projects as construction of South Bay channel and the resulting job growth from expansion of industrial development and maritime activities. Opponents of the proposition focused primarily on the potential control wielded by an unelected board of port commissioners who would have the power to

¹¹ <https://www.slc.ca.gov/public-engagement/>

¹² California Harbors and Navigation Code, Appendix 1, San Diego Port District Act, §2, pg 7.

<https://pantheonstorage.blob.core.windows.net/administration/San-Diego-Unified-Port-District-Act.pdf>, March 3, 2020.

issue bonds, levy taxes and develop local tideland resources without input from individual Port Cities. Another concern was the unequal number of commissioners allocated to each of the Port Cities; the City of San Diego would get three commissioners while each of the remaining four Port Cities would get one commissioner each, potentially allowing San Diego to exert dominance over Port Commission resources and priorities.¹³

A study commissioned by the Coronado Chamber of Commerce three months prior to the 1962 election suggested that instead of the simple majority required by the Port Act to constitute a quorum for Commissioners to conduct business, the act be amended to require a quorum of at least two commissioners from the four Port Cities of Coronado, Imperial Beach, Chula Vista and National City. An additional change in the make-up of the port commission was also suggested to include only two San Diego Commissioners, one commissioner from San Diego County, and one each from the four other Port Cities, allowing appointment of a commissioner representing interests of unincorporated bay front areas of the county.¹⁴

While Proposition D was approved by a majority of voters in the cities of San Diego, Chula Vista, Imperial Beach and National City, the proposition was defeated in Coronado by a 3 to 1 margin. An unsuccessful lawsuit filed by Coronado, Imperial Beach and Chula Vista attempted to make acceptance of membership in the Port District optional, resulting in a temporary delay, but formation of the Port District was completed on December 18, 1963, following certification of the votes cast for Proposition D in the November 6, 1962 election.¹⁵

Port District Funding of Operations

Port District operations are financed primarily through leases and fees generated through its real estate operations, parking, harbor police and other services or fees provided to public or commercial customers of the Port District. As a landlord, the Port District generates most of its revenue from tenants and subtenants who pay rent or fees to conduct business on tidelands. The list includes hotels, restaurants, retail shops, marinas, landings, yacht clubs, shipyards, cargo operators, aerospace firms and cruise ships. While allowed by the Port Act to do so, the Port District does not collect taxes. Various provisions of the Port Act also allow the Port District to issue general obligation, revenue bonds or levy property or other forms of taxation.

In the Fiscal Year ending June 30, 2022, over \$90 million, or 55% of the Port District's operating revenue were generated by leases and other Real Estate revenue, while parking, maritime and other fees provided another \$77 million in operating revenue, or approximately 45% of operating revenues.

Like commercial business entities that are dependent on revenue streams to remain viable, economic activities that support the Port District's operations have also represented a significant source of economic risk. Recently, impacts of the COVID-19 pandemic on Port District operations severely limited most revenue generating Port District activities, resulting in a \$19.3 million loss in the fiscal year ending June 2021 and prompting one Port Commissioner to consider the need to "analyze and

¹³ San Diego County Registrar of Voters, Arguments for and Against Proposition D, San Diego County General Election, November 7, 1962.

¹⁴ The Wyatt Report: Here's Text of Advisory on United Port, San Diego Evening Tribune, August 22, 1962, A14-A15.

¹⁵ Ibid.

understand options for potential taxation.”¹⁶ However, the Port District qualified for \$29 million in stimulus fund assistance in the following year, leading to the generation of a \$68.3 million income in the fiscal year ending June 2022.¹⁷

While these tidelands-associated revenue streams allow the Port District to operate free of budget constraints typical of other state or local government agencies, the need to generate such revenue can lead to a significant source of bias in the deliberations of Port Commissioners and obscure motives and objectives of staff at all levels of the organization. In a recent informal briefing by the Port District, a sizeable, expected return on investment from a proposed project was praised as a justification for the large public investment of tax dollars needed to fund the project, with less emphasis placed on the project’s other characteristics.

Balanced Interests?

The Grand Jury investigation revealed many concerns by the Port District’s stakeholders. Smaller Port Cities reported a lack of follow through or investment in their cities proportional to the revenue generated for the Port District by tidelands activities occurring in their municipal boundaries. Others cite a lack of prioritization for projects not associated with lucrative leasing contracts or other significant revenue sources. The Grand Jury acknowledges such views, and sees the dilemma faced by the Port District in balancing the many diverse and potentially competing municipal, state and public interests it must manage as both nuanced and complex in ways less understood by the public in general, and in some cases by the city and county governments it serves.

How does a port commissioner balance or prioritize the needs or interests of separate communities, neighborhoods or municipalities against one another or against the interests of the Port District itself? As the adage goes, actions speak louder than words; perhaps recent activities by the Port District and votes by the Board of Port Commissioners can help to answer such questions.

Chula Vista Hotel and Convention Center

The key piece of the Chula Vista Bayfront Master Plan is the Gaylord Pacific Resort and Convention Center, a \$1.1 billion project that broke ground in 2022 for a 1,600-room hotel alongside a 275,000 square foot convention center on a 36.5-acre site. In 2012, after almost a decade of planning, the City of Chula Vista and the Port District received approval from the California Coastal Commission for this project allowing for the conversion of 535 acres of vacant and industrial property into a Resort Hotel and Convention Center, RV Park, and parking structure. An existing motel, also part of the project sits on land adjacent to Port District boundaries.

The project is important because both the City of Chula Vista and the Port District collaborated on the Master Plan and were involved in seeking its approval, and both parties consider the development project a great success. The Grand Jury investigation revealed an alignment of interests of both parties centered on the regional economic benefits from development of these underused and undervalued tideland assets. Both parties were fully engaged, fully committed and enjoyed the support of the community during all phases of the project, from the initial master plan approval to selection of the

¹⁶ Jennifer Van Grove, San Diego’s Bayfront is Controlled by a Little-understood Agency With Power That Will Be Tested in The New Year, February 5, 2021, page 13; [San Diego's bayfront is controlled by a little-understood agency with power that will be tested in new year - The San Diego Union-Tribune \(sandiegouniontribune.com\)](https://www.sandiegouniontribune.com)

¹⁷ San Diego Unified Port District, Annual Comprehensive Financial Report, Fiscal Years Ended June 30 2022 and 2021. Page 48, [CAFR-2022 \(window https://pantheonstorage.blob.core.windows.net/administration/2022-ACFR-final.pdf.net\)](https://pantheonstorage.blob.core.windows.net/administration/2022-ACFR-final.pdf)

operator and developer, as well as the formation of multiple financing agreements. Both parties are to share in the public infrastructure costs expected to approach \$370 million, but also retain shares of excess revenues.

Dole Fruit Company Contract

First signed in 2002, this agreement leased portions of San Diego’s 10th Avenue terminal to Dole Fruit Company for imports of fruit into the U.S. west coast market. Primary operations centered on long-haul trucking operations delivering fruit to many sites in the Southern California region, as well as short-haul trucking operations to sites in San Diego County. The short-haul local operations involved many more trips by smaller-sized trucks and were perceived to create a more significant source of air pollution than long-haul operations which involved larger loads and fewer trips on semi-trailer trucks.

Following negotiation for a 25-year lease extension through 2036, terms were not released until three days prior to the proposal’s approval by the Board of Port Commissioners on August 14, 2012. The agreement not only extended Dole’s lease, but also moved its short-haul trucking operation out of San Diego’s Barrio Logan neighborhood. This move was perceived to reduce pollution in an area already affected by significant pollution from the nearby freeway and industrial maritime and manufacturing activities. However, the short-haul trucking operation was only relocated to a location in the neighboring city of National City, thereby increasing pollution that potentially affected the health and well-being of nearby residents of that city.

The actions taken by the Port District in approving the Dole Fruit Company lease, reduced potential health hazards for residents of San Diego’s Barrio Logan neighborhood at the expense of the health of National City residents.

Mitsubishi Cement Factory

The Port District recently considered an application by Mitsubishi Cement Corporation (Mitsubishi) for a Coastal Development Permit (CDP) that would allow Mitsubishi to construct and operate a cement import, storage, loading and distribution facility within the Tenth Avenue Marine Terminal.¹⁸

Beginning in 2015, Mitsubishi had been negotiating with the Port District to ship cement-making materials to the Port-operated Tenth Avenue Marine Terminal warehouse for storage and shipment to Southern California construction sites. Nearby residents perceived the project would have introduced a new significant source of pollution to surrounding neighborhoods already experiencing pollution from maritime and industrial activities and freeways in the area.

While the Port District has approved a Maritime Clean Air Strategy (MCAS) to replace diesel fuel burning trucks with electric vehicles by 2030, the technology supporting zero emission electric power for vehicles the size of cement trucks was not yet available, and the Port District announced in a press release that negotiations with Mitsubishi “were not moving forward,” but expressed a willingness to re-consider the proposal, “should the day come when they want to re-open negotiations.”¹⁹

¹⁸ San Diego Unified Port District, Ordinance 2936, February 25, 2019, <https://pantheonstorage.blob.core.windows.net/administration/Ordinance-No-2936.pdf>

¹⁹ San Diego Unified Port District, Port of San Diego Issues Statement on Mitsubishi Cement Proposal, General Press Release, February 1, 2023, <https://www.portofsandiego.org/press-releases/general-press-releases/port-san-diego-issues-statement-mitsubishi-cement-proposal>

The process for evaluation of such projects by the Port District is well established and logical in its progression from the proposal, preliminary approval, planning, development, environmental and coastal commission review phases. Yet consideration of the project by a local elected governmental entity might have given greater priority to the health concerns of community members and resulted in a more equitable balance between economic and health concerns earlier in the project's evaluation process.

Coronado Cottages at the Cays

Recent decisions by the Port District surrounding the proposed Cottages at the Cays Project on Coronado's North Grand Caribe Isle exemplify the disconnection and disenfranchisement of the voting public and elected governmental bodies resulting from the Port District's independence from local governmental oversight. The Port District had considered a development application from a lessee of property on Coronado's North Grand Caribe Island to build 41 two-bedroom short stay units limited to six guests per unit. In a letter addressed to the Board of Port Commissioners dated December 23, 2022, the Mayor of Coronado expressed strong opposition to the project, stating, "this project does not reflect the will of the community or the Coronado City Council." Specific objections to the project cited in the letter included:²⁰

- A unanimous vote by the Coronado City Council in opposition to the proposed project.
- Opposition from community groups such as the Coronado Cays Homeowner's Association and community members who provided petitions in opposition.
- Reversal of the Port District policy refined in the 2021 Port Master Plan Update (PMPU) to "expressly disallow the development of more hotel rooms and to convert the land use designation to Recreational Open Space, which preserves the area for environmental preservation and complete public access."
- The project would create "preferential access to those that can afford what will most likely be costly room rates similar to other hotel rates in the area."
- The project contravenes the PMPU commitment for the "protection and management of natural resources that best reflect environmental stewardship for present and future generations", on property expected to be highly vulnerable to sea level rise in the decades to come.
- The project would "create a hotel use which is not compatible with the surrounding residential area..." posing significant traffic impacts and safety concerns on the community of approximately 1,200 homes which can only be accessed through a single entrance.

Due to policies governing the rights of lessees, The Port District was obligated to present this development proposal for a vote to the Board of Port Commissioners. In addition, the Port District viewed the land use designation of Recreational Open Space for the parcel reflected in the 2021 Port Master Plan Update as being unbinding and preliminary, pending approval by the California Coastal Commission. Had it been approved, this land use would have represented a land use inconsistent with the Coronado Cays development proposal which required a Commercial Open Space designation currently in place for the property. On February 14, 2023, the Board of Port Commissioners approved the Cottages at the Cays Project by a vote of 4-3 in favor of initiating a California Environmental Quality Act (CEQA) review, followed by consideration of a Port Master Plan Amendment to add the project to the Port Master Plan, prior to application by the developer for a coastal development permit.

²⁰ Mayor Richard Bailey, Letter of Opposition to Cottages at the Cays Development Project Proposal, December 23, 2022.

Who Watches the Watchers? California Coastal Commission and State Lands Commission

In response to the Grand Jury's concern that the Port District is largely autonomous, self-governing, self-funded and independent of oversight by local elected officials, the Port District views the oversight of its decisions and activities provided by the California State Lands Commission (SLC) and the California Coastal Commission as more than adequate.

The SLC oversight is to ensure Port District activities are consistent with the public trust doctrine. In this role the Port District consults with the SLC on an as needed basis, to seek clarification, advice and guidance in matters affecting the Port District's role as guardian of the public trust for San Diego Bay. If determined to be inconsistent with this doctrine, the SLC could direct the Port District to stop, discuss and resolve the issues causing such concern.

In addition to the State Lands Commission and California Coastal Commission approvals, the CEQA requires that "state and local agencies consider environmental protection in regulating public and private activities and should not approve projects for which there exist feasible and environmentally superior mitigation measures or alternatives." In the absence of any documented exemptions provided for in the act, CEQA requires the publication of detailed Environmental Impact Reports for projects approved by the Port District for public review and comment.²¹

Requirements of the California Coastal Commission and CEQA also affect Port District activities relating to the approval of the Port Master Plan, Master Plan Updates or Amendments. In addition, Port District approved projects often require a coastal development permit from the California Coastal Commission.

While members of port city councils or San Diego County Supervisors have no direct oversight of Port District activities or ability to appeal decisions of the Board of Port Commissioners, the Port District indicated the existence of multiple venues to make their views known, and commissioners as a whole place a very high value on the desires of member cities. In addition, the public has access to most of the public meetings of the SLC, California Coastal Commission and also to regular meetings of the Board of Port Commissioners, as well as access to the public websites of these organizations. Also, decisions of the three-member California Coastal Commission can be appealed with the agreement of two of three commissioners to first hear the appeal and then vote to reverse their decision.

Public Participation and the Port District of San Diego

The Grand Jury noted meetings of the Board of Commissioners are posted on the Port District's website and that public participation is allowed. Meeting agendas are posted, and minutes are made available. In addition, the Board of Port Commissioner meetings are recorded, and recordings are available for public viewing. The Port District's policy regarding public participation is spelled out in Board of Port Commissioners Policy 060 which was adopted June 10, 2008.²²

The Board of Port Commissioners also formed several subcommittees, forums, or working groups to solicit public input in the Board's decision-making process. "In setting policies for our dynamic waterfront, the Port District of San Diego seeks to make decisions that are in the public interest. To that end, the Board of Port Commissioners has formed various committees, forums and working

²¹ California Environmental Quality Act, Chapter 1: Policy (archive.org)

²² BPC-Policy-No-060-Public-Participation-in-Board-of-Port-Commissioners-Board-Meetings.pdf.
<https://pantheonstorage.blob.core.windows.net/administration/>

groups to discuss current issues. These meetings are an important tool for gathering information, exploring ideas, and obtaining feedback for use in decision making by the Board.”²³

These groups include the Accessibility Advisory Committee; Arts, Culture, and Design Committee; Audit Oversight Committee; Bayfront Cultural and Design Committee Chula Vista; Chula Vista Bayfront Facilities Financing Authority; Environmental Advisory Committee; Maritime Forum; San Diego Harbor Safety Committee; Wildlife Advisory Group; and World Trade Center San Diego.

Researching information available on the Port District’s website, the Grand Jury notes that agendas and meeting minutes for some but not all the advisory committees are available. The screenshot below documenting the information concerning the Port’s Environmental Advisory Committee for all years available.²⁴

All Meetings

List View **Calendar View**

Search: All Years Environmental Advisory Committee notes closed captions

Search Calendar Help

10 records Group Export

Name	Meeting Date	Meeting Time	Meeting Location	Meeting Details	Agenda	Accessible Agenda	Agenda Packet	Minutes	Accessible Minutes	Video	eComment
Environmental Advisory Committee	9/14/2022	9:30 AM	Virtual Meeting REVISED AGENDA	Meeting details	Agenda	Accessible Agenda	Not available	Not available	Not available	Not available	Not available
Environmental Advisory Committee	6/8/2022	9:30 AM	Virtual Meeting	Meeting details	Agenda	Accessible Agenda	Not available	Not available	Not available	Not available	Not available
Environmental Advisory Committee	3/16/2022	9:00 AM	Virtual Meeting	Meeting details	Agenda	Accessible Agenda	Not available	Not available	Not available	Not available	Not available
Environmental Advisory Committee	12/1/2021	9:30 AM	Virtual Meeting	Meeting details	Agenda	Accessible Agenda	Not available	Not available	Not available	Not available	Not available
Environmental Advisory Committee	9/22/2021	9:30 AM	Virtual Meeting	Meeting details	Agenda	Not available	Not available	Not available	Not available	Not available	Not available
Environmental Advisory Committee	6/2/2021	9:30 AM	Virtual Meeting	Meeting details	Agenda	Not available	Not available	Not available	Not available	Not available	Not available
Environmental Advisory Committee	3/17/2021	9:30 AM	Virtual Meeting	Meeting details	Agenda	Not available	Not available	Not available	Not available	Not available	Not available
Environmental Advisory Committee	12/2/2020	9:30 AM	Virtual Meeting	Meeting details	Agenda	Not available	Not available	Not available	Not available	Not available	Not available
Environmental Advisory Committee	9/16/2020	9:30 AM	Virtual Meeting	Meeting details	Agenda	Not available	Not available	Not available	Not available	Not available	Not available
Environmental Advisory Committee	6/3/2020	9:30 AM	Virtual Meeting	Meeting details	Agenda	Not available	Not available	Not available	Not available	Not available	Not available

The Grand Jury notes that only four of the eight meetings had “accessible” agendas, while none of the meetings had minutes posted online. According to the last posted agenda for the Environmental Advisory Committee, the agenda included a discussion with respect to the National City Balanced Plan portion of the proposed updated Master Plan. However, in reviewing the posted membership of the Environmental Advisory Committee there are no staff members listed from National City (nor any of the other Port Cities). This points to a lack of transparency with regards to the coordination of the Port District with the member cities.

²³ <https://www.portofsandiego.org/people/other-public-meetings>

²⁴ <https://portofsandiego.legistar.com/Calendar.aspx>

Master Plan Documents and Updates

Under Section 19 of the Port Act, the Port District was to “draft a master plan for harbor and port improvement and for the use of all of the tidelands and submerged lands which shall be conveyed to the district pursuant to the provisions of this act.” This Port Master Plan was approved by the Board of Port Commissioners in 1980 and later certified by the California Coastal Commission on January 21, 1981.²⁵ Subsequently the Port District approved 41 amendments to the 1980 Master Plan.

In 2019, SB 507 §5.7 was incorporated into the Port Act requiring Port District to “submit to the State Lands Commission a trust lands use plan for trust lands ...describing any proposed development, preservation, or other use of the trust lands.” Section 5.7 goes on to state that the “State Lands Commission, in its sole discretion, may consider whether the submission of the Port Master Plan...meets the requirements of ...a trust lands use plan.”²⁶

Particular confusion exists among Port Cities leaders and residents regarding the provisions Port Master Plan that is periodically updated by the Port District. Much of the confusion is associated with the size and complexity of the Master Plan document itself—the most recent but-still-unapproved-update (2021) is well over 400 pages in length when including appendices, while the public comments alone comprise another 800 pages. As an indicator of the complexity of information contained in the Plan comments alone, the format for the comments received for the 2021 Master Plan Update was an electronic PDF flat file format comprising comments from 10 agencies, 19 organizations, 10 businesses or Port Tenants and individuals from all 10 planning districts. Questioned about how the Port District responded to comments, how the comments were used or acted upon, the Port District asserted that copies of the document were provided for public review and comment and multiple public workshops were held and questionnaires provided to collect public comments.

The plan is categorized into 10 geographical Port planning districts. Despite the fact that these planning districts could be organized around each of the Port Cities within which the smaller planning districts exist, this approach has not been used in the past. However, such an approach could foster greater understanding of these plans by residents and leaders alike while greatly simplifying the review and approval process for each Port city’s Master Plan.

While the Port Act identifies requirements for development of Port Master Plans and Trust Use Plans, the Grand Jury concluded that the Port Act does not preclude the Port Cities or the County of San Diego from requiring ratification by Port Cities or the county of such plans prior to submission to the appropriate state agency for approval. Further, such ratification by each Port City Council or the County Board of Supervisors would allow elected officials to ensure that these plans are in the best interest of their constituents and aligned with plans and objectives of these government bodies.

To that end, the Grand Jury will recommend that Port Cities and County Supervisors of supervisorial districts fronting San Diego Bay be required to ratify all port master plans, master plan updates, master plan amendments or trust use plans for Port District activities occurring within their boundaries; further, that such ratification be required prior to Port District proceeding with submission of such plans for approval by the California Coastal Commission, State Lands Commission or approval of

²⁵ California Harbors and Navigation Code, Appendix 1, San Diego Port District Act §19, San Diego Unified Port District, Document 70987, March 3, 2020, page 15.

²⁶ California Harbors and Navigation Code, Appendix 1, San Diego Port District Act §19, San Diego Unified Port District, Document 70987, March 3, 2020, page 10.

coastal development permits. Finally, once ratified by a Port City or County agency, each Port City’s master plan update would become the current Port Master Plan for project planning purposes.

Options: Where to go from here? Port Commissioner Status Reports to City Councils

The recommendations of the 1997-1998 Grand Jury report were directed to the city councils of the five cities affected by the Port District and to the County Board of Supervisors. Recommendation 98-50 to the five city councils were to “create and implement formal policies requiring their port commissioner representatives to report regularly to their respective city councils in a formal manner.” The City of San Diego responded to these recommendations saying that policies were already in place governing qualifications for port commissioners as well as formal reporting to the city council. The cities of Coronado and Imperial Beach reported that briefings from their Port Commissioners concerning Port District activities were scheduled as part of each regularly scheduled city council meeting. The City of Chula Vista reported the city council meets with their port commissioner “quarterly, or as often as needed,” while National City reported receiving periodic reports from their Port Commissioner on an informal basis.

The current Grand Jury investigated the current practices of the Port Cities in pursuing regular updates in regularly scheduled public forums such as City Council meetings. Communication with Port Commissioners was reported to occur regularly on an informal basis, but confirmation of such informal meetings proved impractical, and such informal meetings do not allow for transparent communications or public comment. As a result, the Grand Jury reviewed readily available public meeting agendas and minutes of the Port City councils during 2022. We discovered the following:

- San Diego: The Grand Jury could not find any minutes or agenda items recognizing that any of its Port Commissioners made presentations regarding Port District activities in public City Council meetings. However, an annual report to the committee on economic development and intergovernmental relations is required by San Diego City Council policy. The most recent report occurred on March 8, 2023.
- Chula Vista: on August 23, 2022, Port Commissioner Moore gave an update of the Chula Vista Bayfront development project at a special City Council meeting.²⁷
- Coronado: According to reviewed minutes and agenda items, a single update from the city’s commissioner occurred on April 19, 2022.
- Imperial Beach: According to reviewed minutes and agenda items, only one update took place on January 19, 2022.²⁸
- National City: An agenda item for reports from their commissioner is created for each City Council meeting. The Grand Jury was unable to learn if that was the result of a published council policy.

In view of the information provided through testimony and surveys of public records regarding Port Commissioner reports and briefings to their city councils on the activities of the Port District, the Grand Jury concluded that such reporting in publicly accessible venues such as city council meetings does not take place on a frequent or regular basis. Combined with a preference for informal channels of communication with their appointed representatives, these tendencies call into question whether Port Commissioners and Port City Councils maintain open and transparent relationships.

²⁷ Additional appearance by Port Commissioner Moore occurred on January 11, 2022, for reappointment as Port Commissioner, and on June 7, 2022 to receive a proclamation of Port Commissioner Ann Moore Day.

²⁸ City of Imperial Beach, City Council, Regular Meeting Minutes, January 19, 2022, 6:00 p.m., Virtual Meeting

Re-engagement of Port Cities and County of San Diego

The Grand Jury has concluded that because of the Port District's independence and autonomy from local governmental review or approval of its decisions, voters and elected representatives in the Port Cities and County of San Diego have become disenfranchised. Elected representatives cannot prevent or appeal Port District decisions that adversely affect their constituents, and as a result, voters cannot depend on their elected representatives to act in their best interests. As a result of such shortcomings, accountability of representatives to their constituents is limited when the normal expected prerogatives of elected office holders have been supplanted instead by an unelected entity such as the Port District.

Balancing the rights and interests of diverse coastal cities, communities and neighborhoods throughout the San Diego County region is a significant challenge, even for an elected governing body not motivated by economic incentives. Attempting this task through a largely independent and autonomous organization such as the Port District that is dependent on revenue from development projects and leasing activity may be too much to ask of the organization, especially without the guidance of deliberative elected city councils, county supervisors or other elected government bodies. The Grand Jury concludes that only with the re-engagement of the elected government bodies affected by Port District activities and lands within their jurisdictional boundaries can the interests of residents be equitably balanced with competing Port District goals and objectives.

FACTS AND FINDINGS

Duties, Responsibilities and Powers

Fact: The public trust doctrine provides that tidal and submerged lands, beds of lakes, streams and other navigable waterways are to be held in trust by the State for the benefit of the people of California.

Fact: The Port District Act delegates the power and responsibility for management of the tidelands and submerged lands of San Diego Bay from the State of California to the San Diego Unified Port District.

Fact: Many elected officials of Port Cities believe Port Commissioners are to act in the best interest of the cities appointing them.

Fact: The Port Act limits the ability of elected officials to represent the interests of the voters who elect them.

Fact: It is the duty of each Port Commissioner to act as a guardian of the public trust for tidal and submerged lands of San Diego Bay in the interests of all California residents.

Fact: Port Commissioners take a fiduciary oath to act in the best interests of the Port District.

Finding 01: Port Commissioners are only required to represent the perspectives, not the interests of the Port City appointing them to the Board of Port Commissioners.

Finding 02: The Port District acts as an independent special district without direct oversight from local city or county governments.

Fact: The oversight provided by the State Lands Commission and California Coastal Commission of Port District activities is viewed by the Port District as more than sufficient.

Fact: Port Commissioners must live in the Port City appointing them.

Fact: Port Commissioners may be recalled by a majority vote of the city council appointing them.

Fact: Port Commissioners can serve an unlimited number of four-year terms, except in the City of Coronado in which Commissioners can serve a maximum of two terms.

Finding 03: Because the interests of residents of Port Cities and the County of San Diego are subject to the interpretations of the unelected Board of Port Commissioners, their interests may not be heard, prioritized or represented accurately.

Finding 04: Briefings by Port Commissioners to Port City Councils in noticed public meetings regarding issues affecting their jurisdictions, will increase the level of public participation and knowledge regarding Port District activities, Port Master Plans, Master Plan Updates, Port Master Plan amendments or additions.

Finding 05: Currently, the Board of Port Commissioners does not have term limits. Considering term limits would foster democratic principles by providing more opportunities for diverse and talented individuals to serve, prevent the accumulation of influence, and uphold the public trust by keeping the Board representative responsive to its community.

Initial Opposition to Port District Formation

Fact: The City Councils of the cities of Coronado, Imperial Beach and Chula Vista initially opposed formation of the Port District in 1962.

Fact: Formation of the Port District in 1962 occurred despite concerns that an unelected board of Port Commissioners would have the power to issue bonds, levy taxes and develop local tideland resources without input or approval of individual Port Cities.

Fact: Opposition to the formation of the Port District in 1962 involved the unequal number of commissioners allocated to each of the Port Cities; the City of San Diego would get three commissioners while each of the remaining four Port Cities would get one commissioner each, potentially allowing San Diego to exert dominance over the resources, priorities and decisions of the Port District.

Finding 06: With three of seven port commissioners appointed to the Board of Port Commissioners by the City of San Diego, the potential exists for the City of San Diego to exert dominance over the priorities, resources and decisions of the Port District.

Port District Potential Source of Bias

Fact: Port District operations are financed primarily through leases and fees generated through its real estate operations, parking, harbor police and other fees provided by customers of the Port District.

Finding 07: The Port District is incentivized to maximize revenue to fund its operations, a goal that may create conflicts of interest in the priorities, allocation of resources and other decisions made by the Port Commission.

Chula Vista Convention Center and Hotel

Fact: The \$1.1 billion Chula Vista Hotel and Convention Center broke ground in 2022.

Finding 08: Success in the development of the Chula Vista Hotel and Convention Center has been obtained because of a close collaboration and alignment of interests between the Port District and the City of Chula Vista.

Dole Fruit Company Proposal

Fact: A 2012 approval of the Board of Port Commissioners for a lease of warehouse space on the Port District's Tenth Avenue Terminal to Dole Fruit Company also moved a staging area for short-haul trucking to the National City area.

Finding 09: The Port Commissioners decision to move short-haul truck staging for local deliveries of Dole Fruit products relocated a source of pollution from the Barrio Logan community to communities in National City.

Mitsubishi Cement Corporation Proposal

Fact: Mitsubishi Cement Corporation's proposal for storage and shipment by truck of cement products to construction sites in the region generated controversy and negative publicity among residents of nearby neighborhoods affected by potential health risks.

Fact: Consideration of the Mitsubishi Cement Corporation project was terminated by mutual agreement of the Port District and Mitsubishi Cement Corporation.

Fact: In its public statement, the Port District expressed a willingness to re-open negotiations related to this proposal with Mitsubishi Cement Corporation in the future.

Fact: The Mitsubishi Cement Corporation project was terminated due to technical concerns around the availability of zero emission trucks capable of the loads required for cement deliveries.

Finding 10: The controversy surrounding the Mitsubishi Cement Corporation Project's potential health effects on the Barrio Logan neighborhood and other nearby residents damaged the Port District's community relations with these communities and contributed to the decision to discontinue the project.

Finding 11: Oversight of the Mitsubishi Cement Corporation project by the City of San Diego or San Diego County governments might have given greater priority to the health concerns of community members and resulted in a more equitable balance between economic and health concerns earlier in the project's evaluation process.

Coronado Cottages at the Cays Proposal

Fact: The Cottages at the Cays development proposal met with significant opposition not only from the Coronado mayor and city council, but also from residents and members of the Coronado Cays Homeowner's Association representing the community of 1,200 homes.

Fact: Maintaining free access by California residents to San Diego Bay for recreational use is often cited as an obligation of the public trust by the Port District.

Fact: Three of seven Port Commissioners voted to oppose the Cottages at the Cays development proposal, including the City of Coronado's Port Commissioner, the National City Port Commissioner as well as one of three San Diego Port Commissioners.

Fact: The Cottages at the Cays development proposal was consistent with the property's designation in the Port Master Plan as commercial recreation space as approved by the California Coastal Commission.

Fact: The Cottages at the Cays development proposal was not consistent with the property's designation as recreational open space in the more recent California Coastal Commission-unapproved Port Master Plan Update.

Fact: Without the approval of the California Coastal Commission, the Port District viewed the Coronado Cays Port Master Plan Update land use designation of recreational open space as non-binding and preliminary.

Fact: The Coronado Mayor, City Council members and residents of Coronado affected by the Cottages at the Cays development proposal relied on the property use designation for recreational open space adopted most recently in the Port Master Plan Update document, believing this document should control use of property proposed for the Cottages at the Cays development.

Finding 12: The Port's decision to approve the Cottages at the Cays development proposal could negatively impact access to San Diego Bay and approving the plan favors those willing or able to pay costly hotel rates typical of the Coronado area.

Public Participation

Fact: Port Commissioner reports and briefings to their city councils on the activities of the Port District, in publicly accessible venues such as city council meetings do not take place on a frequent or regular basis.

Finding 13: Given a preference for informal channels of communication by Port City councils and mayors with their appointed Port District representatives, neither Port Commissioners nor Port City Councils maintain completely open and transparent relationships allowing for public involvement or awareness of Port District activities.

Master Plan Documents and Updates

Fact: Ratification of Port Master Plans, Master Plan Updates or Master Plan Amendments by Port Cities or County of San Diego for planning districts with their jurisdiction is not prohibited by the Port Act.

Finding 14: In its current form, the Port Master Plan and Master Plan Update documents published by the Port District are overly complex, difficult to understand and too broad in scope to foster meaningful comprehension by Port City residents, elected municipal or county officials.

Finding 15: Ratification of Port Master Plans, Master Plan Updates or Master Plan Amendments would allow residents of Port City Planning districts and San Diego County to acknowledge and confirm their understanding of Port District development plans and projects within their municipal and county boundaries and provide reliable documents for communities to plan for the future.

RECOMMENDATIONS

The 2022/2023 San Diego County Grand Jury recommends that the City Councils of the cities of San Diego, Chula Vista, Coronado, Imperial Beach, and National City:

- 23-90:** Enact ordinances or policies placing a two-term limit on the number of terms that a Port Commissioner can serve (as already enacted for the City of Coronado).
- 23-91:** Institute ordinances or formal policies requiring the appointed Commissioners from each city be required to give at a minimum, quarterly updates to the City Councils at officially scheduled city council meetings open to the public.
- 23-92:** Institute ordinances or formal policies that require ratification of the Port Master Plans, proposed Port Master Plan Updates or amendments to the Port Master Plan for Port District planning districts within each city's boundaries.
- 23-93:** In consultation with the San Diego County Board of Supervisors, explore and implement an alternate form of governance for the Port District allowing for participation in, and oversight of Port District activities and decision by the San Diego County Board of Supervisors and the elected city councils of the five Port Cities.

The 2022/2023 San Diego County Grand Jury recommends that the County of San Diego Board of Supervisors:

- 23-94:** Institute ordinances or formal policies that require ratification of the Port Master Plans, proposed Port Master Plan Updates or amendments to the Port Master Plan by each of three county supervisors for Port District planning districts within each of three county supervisorial district boundaries.
- 23-95:** Direct the County Office of Intergovernmental Relations to lobby California State legislators to introduce legislation enabling the County of San Diego to assume oversight of the activities of the San Diego Unified Port District or decisions of the Board of Port Commissioners and share in the Port District's duty as guardian of the public trust in the tidal and submerged lands of San Diego Bay.
- 23-96:** Depending on the outcome of Recommendation (23-XX, above), consider exploring and implementing an alternate form of governance for the Port

District allowing for participation in, and oversight by the San Diego County Board of Supervisors and the elected city councils of the five port cities.

The 2022/2023 San Diego County Grand Jury recommends that San Diego Unified Port District Board of Commissioners:

- 23-97: Institute formal policies or procedures allowing for appeal of any action taken by the Board of Port Commissioners, including decisions, ordinances, or project approvals.**
- 23-98: Institute formal policies to enable Port Cities and County of San Diego to ratify the Port Master Plans, proposed Port Master Plan Updates or amendments to the Port Master Plan for Port District planning districts within each city's and county boundaries.**
- 23-99: Directly inform each of the five City Councils at officially scheduled City Council meetings open to the public how the proposed updated Port Master Plan affects areas within their jurisdictional boundaries.**
- 23-100: To increase the coordination of Port District activities with the Port Cities and their staffs, institute a policy of including staff from each of the five Port Cities and County of San Diego on each of the Port District's advisory committees.**
- 23-101: Post meeting minutes and agendas of each of the Port District's advisory committees.**
- 23-102: In consultation with the City Councils of San Diego, Chula Vista, Coronado, Imperial Beach and National City, consider placing a two-term limit on the number of terms that a Port Commissioner can serve (as already enacted for the City of Coronado).**
- 23-103: Institute ordinances or formal policies requiring the appointed Commissioners from each city be required to give at a minimum, quarterly updates to the City Councils at officially scheduled city council meetings open to the public.**
- 23-104: In consultation with the San Diego County Board of Supervisors, explore an alternate form of governance for the Port District allowing for participation in, and oversight of Port District activities and decision by the San Diego County Board of Supervisors and the elected city councils of the five Port Cities.**

REQUIREMENTS AND INSTRUCTIONS

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court

on the findings and recommendations pertaining to matters under the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such comment shall be made *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

- (a) As to each grand jury finding, the responding person or entity shall indicate one of the following:
 - (1) The respondent agrees with the finding
 - (2) The respondent disagrees wholly or partially with the finding; in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.
- (b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
 - (1) The recommendation has been implemented, with a summary regarding the implemented action.
 - (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
 - (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.
 - (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.
- (c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision-making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required from the:

Responding Agency	Recommendations	Date
City of San Diego, City Council	23-90 through 23-93	8/28/2023
City of Chula Vista, City Council	23-90 through 23-93	8/28/2023
City of Imperial Beach, City Council	23-90 through 23-93	8/28/2023
City of Coronado, City Council	23-90 through 23-93	8/28/2023

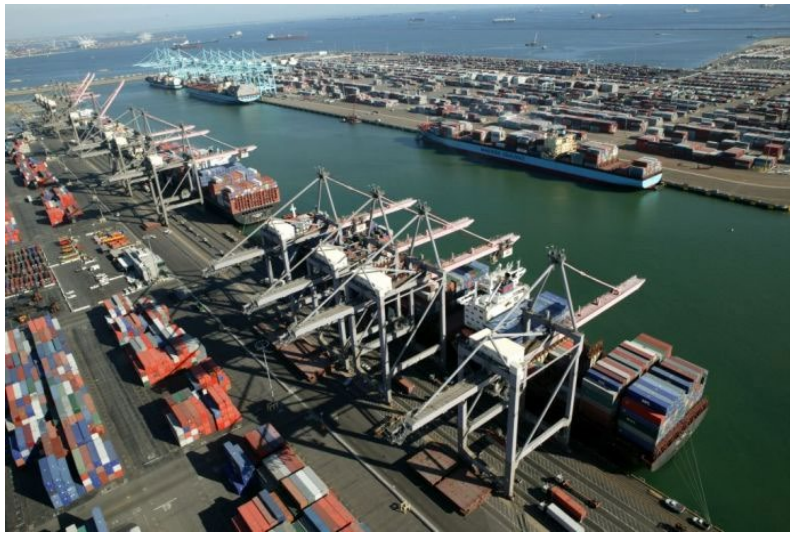
City of National City, City Council	23-90 through 23-93	8/28/2023
County of San Diego, Board of Supervisors	23-94 through 23-96	8/28/2023
San Diego Unified Port District, Board of Port Commissioners	23-97 through 23-104	8/28/2023



Another Green Glitch

By Paul Rosenberg May 20, 2019

<https://www.randomlengthsnews.com/archives/2019/05/20/another-green-glitch/23316>



A controversial pollution control system is drawing renewed fire following a closed-door demonstration in early April, as news leaked out about its complete lack of a greenhouse gas component—a key purpose of the overall “Green Omni Terminal” plan of which it is part.

The ShoreCat Vessel Emission Capture System is a product of Clean Air Engineering and Maintenance (CAEM), owned by former Port of LA Board President Nick Tonsich. It’s a copycat of emission capture technology developed by Advanced Cleanup Technologies, Inc., which tested on over 35 ships at the Port of Long Beach from 2008-2012 before POLA first committed to CAEM’s knock-off version. It was integrated into the Pasha Green Terminal plan with the promise of added control of greenhouse gases [GHGs], but following a demonstration at Pasha on April 10, local activists wrote to Governor Gavin Newsom and the head of the California Air Resources Board, Richard Corey, to complain.

“The ShoreCat system actually increases GHGs on the terminal,” said the letter from Jesse Marquez, Executive Director of the Coalition For A Safe Environment and Chuck Hart, President of San Pedro Peninsula Homeowners United, one of the initial China Shipping lawsuit plaintiffs, which is responsible for fundamentally transforming the port’s environmental practices.

“The CAEM ShoreCat ship emissions capture system claimed it would have a GHG component to reduce or eliminate GHGs from the diesel generators used to power the ShoreCat system. It did not;

it does not and now we find out will not ever address GHGs,” the letter said. “This was not allowed under the grant proposal and funding criteria.”

Random Lengths asked Marquez about the basis of claim regarding the lack of a GHG component. It came both from sources close to Pasha and from the ARB, “unofficially,” he said. ARB implicitly confirmed the lack of GHG component, after *Random Lengths* contacted them, seeking comment. And two sources close to Pasha explicitly confirmed that there was no GHG component.

“There is no CO₂ or green carbon capture piece that’s part of this,” one source told *Random Lengths*. When CARB came for the demonstration, “The NO_x part of that worked,” the source said. “They used the crane, put it on the vessel and they collected the NO_x.”

But there it was more like a proof of concept than anything else, for lack of comprehensive data. There did not appear to be a monitoring of the base emissions, and the test only lasted three hours—a small fraction of the three typical three days in port for one vessel, which in turn might not be representative of other vessels.

In addition, according to a second source, Trimer—who manufactures the capture technology used by CAEM—had advised CARB not to use the data from the test, because the equipment was too new, in its burn-in phase. “It’s like a brand-new engine, its not going to show you its output till it’s all sealed and everything else,” they said. In short, Trimer reportedly said, “There’s data here, but you really shouldn’t use it.” As a result, “Basically, it was a dog and pony show,” entertaining, rather than informative.

But the total testing requirement is also problematic, the source pointed out. “The total amount of hours that thing has to prove itself is 200 hours,” compared to a full year of data for the other project components. That’s slightly less than three full cycles of a ship’s typical 72-hours in port, with no way of accounting for differences between them. “You’re talking three vessels, and you’re saying, ‘Okay, this is it. This is proven.’ To me that that’s just a joke. It’s too little,” the source said.

As for the lack of GHG capture, ShoreCat is only making things worse, according to both sources.

“You’ve now introduced another big generator that’s got a 400- almost 500-gallon fuel tank and is running on the dock and it’s spewing out carbon and now nobody is collecting that,” the first source said. In addition, there’s the crane, which “is also a diesel engine, is putting out carbon. So now you introduce actually two carbon generators... I don’t know how much that helps with carbon emissions when you’ve now introduced two new carbon pieces on the dock.”

Tonsich is still promising that he will come up with a GHG component, but “There’s no date. There’s nothing that’s in the works.”

When *Random Lengths* asked CARB for confirmation, they implicitly confirmed these accounts. Rather than respond directly, they provided an earlier letter from Corey to Hart, dated April 26.

That letter talks about zero-emissions [GHG] vehicles and equipment separately from its discussion of ShoreCat, which it said “is expected to address the largest source of diesel particulate matter and criteria pollution emissions at the terminal,” so it “is providing additional emission reduction benefits that would not happen otherwise.” There was no discussion of any of the issues raised above, much less an attempt to promote ShoreCat as addressing GHGs.

When *Random Lengths News* asked POLA for comment, they provided a copy of the same letter.

There are other problems with ShoreCat: it's bulkier and heavier than promised, so it can't be moved with existing equipment, requiring the outside hiring of a semi to move it around. It's fallen short of its promises repeatedly, but neither CARB nor the port have seen fit to question it, so the questions just keep multiplying.

Company Barred From Seeking L.A. Port Job

BY PATRICK MCGREEVY

OCT. 1, 2004 12 AM PT

<https://www.latimes.com/archives/la-xpm-2004-oct-01-me-tonsi1-story.html>

Concluding that Harbor Commission President Nick Tonsich stands to benefit financially from his ties to an environmental firm, the Los Angeles city attorney on Thursday barred the company from competing for a \$2-million port grant to reduce air pollution.

City Atty. Rocky Delgadillo also disqualified Tonsich from voting on whether to award a separate toxics cleanup contract to the company because it is a client of Tonsich's law firm.

Delgadillo issued the 10-page legal opinion after Tonsich requested the review last month when questions were raised about his relationship to Advanced Cleanup Technologies Inc.

"It's an enormous conflict of interest," said Janet Gunter, a San Pedro activist who had complained in writing to Delgadillo.

As commission president, Tonsich played a leading role in negotiating the settlement of a lawsuit by environmentalists over pollution at a container terminal used by China Shipping.

The settlement approved by Tonsich required the Harbor Commission to create a \$20-million air quality management fund to pay for projects to reduce air pollution.

One of the firms bidding for a \$2-million grant from the fund is Advanced Cleanup Technologies Inc., which proposed to use a technology co-owned by Tonsich that would divert diesel emissions from ships and remove toxic chemicals.

"Because of your prior participation in establishment of the fund, any subsequent contract through use of that fund from which you would benefit would be prohibited," Delgadillo wrote to Tonsich. "Therefore, the ACTI proposal may not be considered."

The legal opinion is the latest official challenge to operations at the Port of Los Angeles. Federal and county grand juries are investigating contracting at the Harbor Department, and the port's executive director, Larry Keller, resigned two weeks ago under a barrage of criticism, including complaints that he didn't do enough to reduce pollution.

Councilwoman Cindy Miscikowski had asked Delgadillo whether the entire Harbor Commission should be disqualified from acting on air pollution grants because one of the applications proposed to use the Advanced Marine Emission Control System that Tonsich helped developed and co-owns.

Miscikowski is chairwoman of a board that takes up issues when commissions are disqualified from acting.

The city attorney said that after Advanced Cleanup Technologies was out of the running, Tonsich and the commission should be able to consider other grant requests for the city's Air Quality Management Fund.

However, Tonsich is still disqualified from considering a separate contract with the company for hazardous material remediation and cleanup services because he's a partner in a law firm that represents Advanced Cleanup Technologies on other legal matters.

The environmental company, which paid Tonsich's law firm more than \$10,000 last year, was one of four firms recommended by the Harbor Department executive director in July to perform hazardous material remediation and disposal services on an as-needed basis.

Though Tonsich must recuse himself, the rest of the five-member commission can participate because his law firm will not get any payment as a result of the contract, Delgadillo concluded.

"The legal opinion is very helpful," Miscikowski said. "It very clearly answers the questions about what law is triggered and how."

Tonsich did not return calls for comment Thursday, and a vice president of the company declined to comment.

Tonsich had submitted a written notice in May that he planned to abstain from voting on the grant proposed for Advanced Cleanup Technologies, but Miscikowski had questioned whether his colleagues would then be allowed to award the grant to a firm using Tonsich's technology.

Gunter said Tonsich was using his insider's position on the negotiations to figure out a way to make money.

"How can you be involved legally in coming up with a settlement and then get involved in a business opportunity created by that settlement?" Gunter asked.

This is not the first time Tonsich has had to recuse himself from actions of the commission because of a potential conflict of interest.

He also has recently abstained from voting on matters involving the Harbor Department's membership in the Alameda Corridor Transportation Authority, which awarded Tonsich's law firm a contract to provide the agency with legal representation.

Tonsich has been a major political fundraiser for Mayor James K. Hahn, who appointed him to the harbor panel in 2001.

The Times reported Sept. 11 that the city attorney's office has also launched an inquiry to determine whether Tonsich violated ethics laws by holding a fundraiser for Hahn that was attended by firms with recent or pending business before the Harbor Commission.



Fail Forward Fast

By Paul Rosenberg June 8, 2023

<https://www.randomlengthsnews.com/archives/2023/06/08/fail-forward-fast/45087>



The Shorekat system, part of the Pasha Green Omni Terminal project. The system was unsuccessful, and Pasha intends to replace it. Photo courtesy of Clean Air Engineering - Maritime Inc.

Was Pasha's Green Omni Terminal 0-For-3?

Pasha Senior Vice President Jeffrey Burgin called it “a Wright Brothers moment.” Harbor Commissioner Anthony Pirozzi compared it to the moon landing. It was “going to change the world,” Commissioner Ed Renwick said. That was the Pasha Green Omni Terminal project, as presented to — and applauded by the Harbor Commission on May 19, 2016. And they were only approving phase one of three.

“The Harbor Department assembled this team with commercialization in mind,” staff promised in accompanying written material. “The team’s commercialization focus will help make the Green Omni Terminal Project a catalyst for scalable and widespread commercialization.”

“The Harbor Department assembled this team with commercialization in mind,” staff promised in accompanying written material. “The team’s commercialization focus will help make the Green Omni Terminal Project a catalyst for scalable and widespread commercialization.”

“This project has been the subject of more community comment than almost anything, and we received some just in the last day or so,” said Middleton. “I have to say I really agree with a lot of the community comments,” she said, “except one really important thing. That is, I want to evaluate this

based on the facts, I do not want to evaluate it based on personal attacks, and I totally want to disassociate myself from anything that refers to you as a liar.”

But historically, it’s difficult to draw such a sharp line, particularly where the Shorekat system — originally almost a quarter of the grant money — is concerned. And without attention to contradictory and unfulfilled claims in the past, it’s impossible to assess who are trustworthy partners the port, as a public agency, should continue working with in the future.

Middleton was apparently referencing an email from Janet Gunter, communications administrator for San Pedro Peninsula Homeowners United (SPPHU). “Almost everything about the Green Omni Terminal (GOT) is a lie,” Gunter wrote. “Calling the GOT a success is an egregious misrepresentation of the facts.”

Gunter had initially praised the project concept as “exemplary in its thought for the future and its planning,” but problematic in the process that led to the Shorekat funding, because it involved former Harbor Commission President Nick Tonsich, who is arguably forbidden to receive port funds for clean air projects in light of his role in shaping that market. [The LA City Ethics Commission in Sept. 18, 2009 issued an opinion to Tonsich stating in part, “you are subject to a permanent ban on receiving compensation ... regarding matters in which you were substantially involved”.]

Since the \$15 million grant funding came from the California Air Resources Board, it was all perfectly legal, staff claimed at the time, as was the fact it was a no-bid process.

“The actions of staff and business dealings of Mr. Tonsich may or may not be criminal, but at minimum they are certainly highly unethical,” Gunter countered in her 2016 public comment. “The public trust is what the Harbor Commission should be concerned about, not whether something is technically legal or illegal.”

Unbeknownst to the board, Cannon had already made two contradictory claims about what the Shorekat system would do in a Dec. 7, 2015 email to CARB staff. On the one hand, he wrote that it was the same as an earlier barge-based system, which provides no greenhouse gas reduction, while on the other, he claimed it *would* reduce greenhouse gasses — both from the ship emissions it captured and from its own operations. But he only identified the general process for treating the ship emissions, not any specific technology, and the three methods for reducing its own emissions were seriously flawed, as Gunter and others would repeatedly point out after the email came to light.

Initially, Tonsich claimed the CO2 reductions would come from Trimer, a company it was already working with. But this never materialized. Trimer itself had no such technology and two Trimer subcontractors failed to deliver. “The carbon sequestration elements were not able to be carried out and so money was diverted by the Air Resources Board to another aspect of the project,” Cannon told Middleton at the June 3, 2021 Harbor Commission meeting.

In the end, the Shorekat system proved utterly unfeasible — far too slow, bulky and cumbersome to meet Pasha’s needs, so they plan to return it to a barge-based system — although Cannon tried to argue, “the results are mixed,” presumably because it did receive CARB certification in an executive order dated last December, a move that SPPHU strongly objected to in a letter that Gunter attached to her email comment.

“Why issue the EO when you know that another ShoreKat system will **never** operate under the new regulation and that another ShoreKat system will **never** be built under the 2007 regulation that was the *original basis* for CARB approval?” Gunter asked. “Exactly who does this EO help besides CAEM (Tonsich’s company) with its claim that ShoreKat has CARB approval?”

Indeed, a March 28 press release from CAEM carried the banner claim that “ShoreKat’s Highly Efficient Air Pollution Control System Expands Options for Reducing Emissions from Ships and other Marine Vessels” — a claim hardly reflecting Pasha’s first-hand experience.

In contrast to Middleton, “I’m going to be more charitable,” Commissioner Lee Williams said. “I think it’s important that we fail forward fast.”

But seven years for a three-year project isn’t exactly fast.

The micro-grid system is expected to be functional by the end of the year, but it was the driving motivation behind the project, first brought to port staff two years before the grant application

— meaning its completion will have taken almost a decade since initially proposed. The firm behind it, Burns & McDonnell, had previously begun developing similar systems for the military, and their vision — which Pasha fully endorsed — was for a three-phase process, going far beyond just meeting the goals presented in 2016. While Burns & McDonnell has remained in the background as project managers, they’re actually the driving force that first planted the seeds of the idea, then put together the team, as their project manager, Matt Wartian, made clear in the 2016 meeting when the project was approved.

Was this a good approach to have taken? How does their choice of technology partners look in retrospect? Who performed well and who didn’t? None of these questions were even asked, much less discussed by the commissioners, despite what should have been some clear contrasts — none clearer than that between the two makers of yard trackers.

BYD, as mentioned earlier, was the only project participant that demonstrably *did* learn and move closer to commercialization. Their first generation yard tractors didn’t work, Cannon said, but a second generation is in service at Pasha, with a third generation “being tested at other locations in the port.”

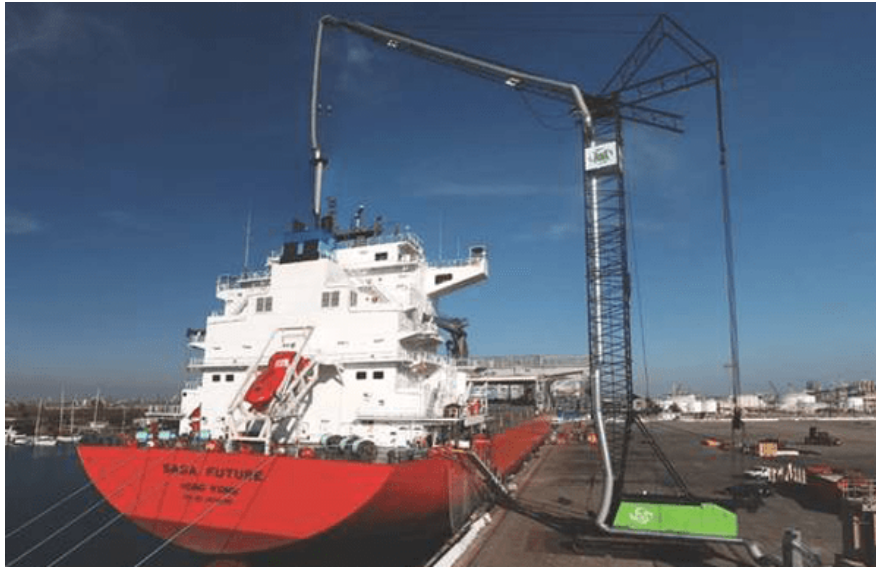
In contrast, two of the three TransPower/Kalmar yard tractors burst into flames — one as a result of such poor design that when making a sharp turn, “the chassis that it was pulling poked into the battery system,” Cannon said. This kind of problem should have been caught by Kalmar in the design phase, and serve as a warning flag about partnering with them in the future. On the other hand, the second caught fire overnight after several months out of service — pointing to a different sort of problem with TransPower’s technology, and resulting in the company pulling its forklifts from the project as well, a welcome sign of prudence on their part.

In short, it’s a welcome start, but not enough, for commissioners to begin questioning staff’s Pollyannaish spin. Commissioner Williams is right. It *is* important to fail forward fast. And that means it’s important for commissioners to become much more hands on, detail-oriented, and proactive in evaluating the qualifications, capacities and track records of everyone involved. Shorekat was a foreseeable massive failure. Gunter was not alone in pointing it out at the time. Which leads to one last question the commissioners forgot to ask: What can we learn from this to do better next time?

Green Terminal White Elephant Exposed

By Paul Rosenberg June 10, 2021

<https://www.randomlengthsnews.com/archives/2021/06/10/green-terminal-white-elephant-exposed/34030>



CAEMs controversial ShoreKat system. File photo

Past POLA president Tonsich is sued

Almost five years after the Port of Los Angeles unveiled Pasha’s Green Omni Terminal as a model for the future, an ugly truth buried in the heart of it was finally openly admitted at the June 3 Harbor Commission meeting. While it may still approach being “the first all-electric operated terminal” as Mayor Eric Garcetti promised at a July 12, 2016 press conference, it will not capture or offset the carbon emissions of docked ships, thus exposing a significant gap between “all-electric” — the means — and “carbon neutral” — the goal. A lot of greenhouse gases will still be generated; it didn’t have to be that way.

Chris Cannon, POLA’s chief environmental officer, stated under questioning that the controversial ShoreKat system, developed by Clean Air Engineering-Maritime or CAEM, owned by former Harbor Commission President Nick Tonsich, is no longer expected to play any positive greenhouse gas role.

Local environmental activists have questioned the ShoreKat system from the beginning on multiple counts — because of the lack of demonstrable technology, the lack of an open-bid process, and the involvement of Tonsich himself, who some believe is forbidden from receiving port contracts flowing from policies he had a

hand in creating. POLA staff has used the project's structure — with CAEM as a subcontractor and the California Air Resources Board, or CARB, not POLA, as the funding source — to fend off the latter two objections. But at the recent June 3 Harbor Commission meeting, the activists have once again seized on the perceived lack of technology.

Jesse Marquez, founder and president of Coalition For A Safe Environment, and Janet Gunter, an initiator of the 2001 China Shipping lawsuit, both sent letters to the commission concerning the ShoreKat system as the board prepared to rubber-stamp the extension of the project schedule, as was previously done on April 16, 2020. Marquez also called in a public comment, causing the extension to be pulled from the consent calendar for commissioners to discuss.

“We are concerned about the continued Port of Los Angeles staff misrepresentation on the status of the Green Omni Terminal project,” Marquez said. “If you read the letter you will see that we have given you very specific details.”

“The ShoreKat is not as agile and mobile as proposed and it cannot service large container ships,” the letter noted. “In addition, one [of] the critical requirements was for ShoreKat to meet the CARB AB 32 mandate to reduce greenhouse gases and it does not.... We are concerned about the continuing Port of Los Angeles management and staff unethical and illegal support of Clean Air Engineering-Maritime Inc. and its owner, former Los Angeles Board of Harbor Commission Port of Los Angeles President and Commissioner Nicholas G. Tonsich.”

“I am concerned about the issues raised by Mr. Marquez, and the issues raised in another series of letters that were sent to the commissioners ... correspondence we've received from Ms. Gunter,” Commissioner Diane Middleton said. “How do we handle this?”

“We're happy to do a report on the overall status of the OMNI project, including the ShoreKat elements of it,” Chris Cannon responded. “It's true there were some things that were altered and we can just be honest about it; and the carbon sequestration elements were not able to be carried out and so money was diverted by the Air Resources Board to another aspect of the project.

“It was a new technology and they had proposed to do it. And once they got into it they found out that they couldn't.”

But the story is more complicated than that and still not entirely clear — including the role POLA staff has played.

In a December 2015 email to CARB, Cannon wrote that “CO2 reductions will be realized through improved overall system energy efficiency by three methods as described below.”

But these only reduced CO2 from the ShoreKat operating system — not from the ship emissions it was supposed to contain. The ShoreKat system itself is not all-electric. For example, the first involved “a heat exchanger that will reduce the amount of diesel required to operate the system by at least 50%.”

So, it's still a producer of greenhouse gases.

To remove CO2 from the ship emissions, Cannon wrote, “the capture of CO2 will be demonstrated by amine scrubbing with thermochemical regeneration.”

This is a decades-old technology used in oil refineries, for example, with well-recognized limits and trade-offs, so a reasonably plausible prototype, model or at least design would have been required in any sensible open-bid process. The lack of this reflects a seriously flawed process, critics charge.

“There have been delays but we are hoping it will be operational within the next two months,” CARB spokesman Dave Clegern told *Random Lengths News* in February 2019.

At the same time, in contrast, Cannon said that two different technologies would each be tested for a six-month period.

“CARB understands that to date, the originally anticipated greenhouse gas (GHG) reduction component of the ShoreKat system has experienced challenges and is not ready for demonstration in this project,” CARB Executive Officer Richard Corey wrote to Marquez three months later, on May 30. “[CARB] has not paid for any milestones related to GHG reductions from the ShoreKat system.”

This came 10 days after *Random Lengths News* had reported that the Air Resources Board implicitly confirmed the lack of a greenhouse gas component.

By the next year, the project’s status report #14, for the first quarter of 2020 stated that “The ShoreKat demonstration period has been completed,” but that “Carbon treatment system testing has been excluded from the project based on the lack of progress on securing viable systems by CAEM.” As a result, “By mutual agreement of CARB and POLA project funding is being reallocated from the carbon treatment component of the project to the acquisition of another yard tractor.”

This occurred in the early weeks of the pandemic, without any public visibility, and remained virtually buried from public view. But a lawsuit Pasha filed against CAEM on April 27 alleges that it wasn’t the only problem with the ShoreKat system, charging that “CAEM has breached and continues to breach its duties under the Agreement. For over seven months, CAEM has been holding up delivery of the ShoreKat by refusing to submit the ShoreKat for certification by CARB.”

It has also stopped paying fuel invoices, refused to obtain insurance, and “failed to design the ShoreKat consistent with the specifications of the Agreement,” according to the complaint.

Most notably, the lawsuit alleges it’s unable to be towable at distances up to 5,000 feet at 10 miles per hour as promised, it can’t travel safely above five miles per hour and there are non-payment and safety design issues as well. The failure to develop a carbon capture component is not part of the lawsuit, however.

The contract’s wording, according to the lawsuit, only called for CAEM to “provide for a *demonstration project* of an emerging technology for the reduction of CO2 and greenhouse gases.” [Emphasis added.]

The suit alleges that “At Tonsich’s direction, CAEM is holding the ShoreKat hostage because he is upset that he is being sued by Pasha for his role in a \$4 million illegal kickback scheme,” which *Random Lengths* reported on last year. Tonsich responded by suing *Random Lengths* — a suit he dropped after losing two preliminary arguments.

The kickback suit is scheduled for trial in September, but a settlement is rumored to be near, so all that transpired in that case may be buried. But the Omni Terminal involved public financing. What happened to it shouldn’t be buried. A thorough review of this project component and POLA’s flawed oversight is long overdue.

Icarus Falls

By Paul Rosenberg July 9, 2020

<https://www.randomlengthsnews.com/archives/2020/07/09/icarus-falls/29262>



Former Los Angeles Harbor Commissioner President Nick Tonsich and the Pasha Terminal

Former POLA president Nick Tonsich sued for \$5 million in fraud complaint

“This is a Wright brothers moment!” Pasha Terminal’s then-vice president, Jeff Burgin, exclaimed on July 12, four years ago. “We’re standing on the cliff with some wings strapped to our arms. We know we can fly, we’re just not sure how far.”

But Burgin now seems more like Icarus, plunging into the sea, taking a much more prominent partner down with him — former Port of Los Angeles Commission President Nick Tonsich. At the time, he was touting Pasha’s Green Omni Terminal, intended to be the Port of LA’s showcase all-electric terminal. But on May 8, his former employer—headquartered in Northern California—sued him for \$5 million, along with Tonsich, whose firm, Ocean Terminal Services, also known as OTS, allegedly received at least \$4.25 million in overbilled invoices on a shady crane services contract — by far the largest sum of money involved in the scheme.

The suit is a counterclaim in response to a suit OTS filed in February, after Pasha terminated the contract in December.

“In response to the suit, Pasha began reviewing invoices over the life of the OTS contract,” the suit read. It explains:

On inspection, the invoices revealed significant discrepancies between the tonnage that was reported to POLA and the volume of tonnage on which OTS charged Pasha. Pasha realized that it had been overcharged for tonnage, including being charged for tonnage from berths not covered by the OTS Agreement.

Pasha also conducted an investigation into Tonsich’s relationship with Burgin and uncovered the illegal kickback scheme.

Pasha had not known about any of this prior to its investigation because Tonsich and Burgin actively concealed their scheme from Pasha corporate headquarters and executives.

The suit includes four counts of action: fraud, aiding and abetting fraud, breach of contract and unfair competition. The same day, Pasha also filed a direct answer to the OTS suit, asserting 35 affirmative defenses.

Tonsich also had a stake in the OMNI Terminal project, getting a \$3.75 million grant via another company he owns, Clean Air Engineering-Maritime, better known as CAEM, for technology that’s failed to deliver.



Former senior vice president, Jeff Burgin

In that case, ethics regulations would have blocked the Port of LA from giving him the grant, but the port allowed Pasha — meaning Burgin — to include Tonsich’s speculative technology in its package grant proposal, with no subcontractor bidding process.

Tonsich’s history of sliding around the rules goes back more than 20 years. In 1999, just one year after founding his own law firm, Glaser Tonsich & Brajevich, he landed a \$200,000 no-bid contract from the Alameda Corridor Transportation Authority — a joint project of the ports of LA and Long Beach. By 2005, the *Los Angeles Times* reported that his firm had racked up a total of \$1.25 million in no-bid contracts with ACTA, the vast majority approved while Tonsich was president of POLA’s board.

But now that long history may be coming to an end.

“The scheme was simple: OTS issued invoices to Pasha that were inflated or, in some cases, completely made up,” the suit alleges. “The invoices improperly added tonnage from other berths not covered by the contract to make the invoices bigger. Burgin would approve the inflated tonnage numbers and, at times, even increase the tonnage based on what he believed he could ‘get away with.’ Other times, OTS issued multiple invoices for the same charge or billed Pasha at rates not allowed by the contract.”

A table included shows that Pasha’s overbilling grew from \$244,677 in 2011 (13.95%); to \$1,271,958 in 2015 (66.4%); before tapering off slightly to \$898,698 in 2016 (54.25%). The total overbilling, \$4,259,684, was \$45.9% of the total billed in those five years.

OTS provided “maintenance and repair work” on three cranes located at Pasha’s Berth 174-181 container terminal, but — approved by Burgin, while hidden from Pasha’s corporate management in Northern California — Tonsich billed Pasha based on cargo at Berths 154 and 206-209 as well.

Beyond that, the suit charges, they “set up phony companies using vacant addresses at POLA,” and generated phony invoices for work never done. The majority of activity charged was undertaken by Burgin. He was the inside man, and thus Pasha’s initial internal inquiry has turned up far more information about how he operated.

In response, Tonsich’s lawyers filed a demurrer on June 16, seeking to remove him from the lawsuit, and leaving Burgin holding the bag. “Neither OTS nor Mr. Tonsich are alleged to have knowledge or involvement in these separate schemes other than to supposedly receive payments from Mr. Burgin,” the demurrer claims. That they were actually multi-million dollar over-payments simply amounts to “an issue of contract interpretation,” it argues, and “Pasha cannot twist this contractual interpretation dispute into a fraud claim against OTS and Tonsich.”

But a contract designed for the purpose of fraud is surely an essential part of the fraud. And, the groundwork for everything was laid in the initial crane services contract “that included highly irregular terms (e.g., payment based on tonnage rather than man hours) and that locked Pasha into a long-term arrangement (10 years plus options to extend/renew).”

As the suit explains, “crane services are almost always priced based on manning, not tonnage. This is because tonnage is not necessarily proportional to the amount of crane maintenance and repair services that will be required.”

But it’s ideally suited for an over-billing scheme — one that can almost run on autopilot.

As a lawyer since 1989, Tonsich obviously played the lead role in laying this foundation. The unprecedented use of tonnage rather than hours clearly enabled him to bill for shipments at other terminals — and then use this very defense against any accusations of fraud. Plus, the long-term nature of the agreement (versus one to three years, as is normal) was designed to keep the scheme going as long as possible.

In violation of Pasha’s procurement policies, Burgin signed the contract on behalf of Pasha without any review from Pasha’s corporate headquarters or legal department, the suit alleges. It all started when POLA stopped providing crane services to terminal operators. The logical response—which most operators took—would have been to directly hire the same crane service workers that POLA had used, and pay them standard ILWU contract wages. There would have been no added overhead. But instead, Burgin signed a contract with OTS.

“On paper, this decision made no sense,” the suit states. “OTS had no experience in crane maintenance, had no track record, and only had one or two other clients.”

However, both Burgin and Tonsich had previous patterns of behavior leading to this decision. The suit notes previous examples of Burgin defrauding Pasha — particularly a prolonged scheme involving Dunrite Construction, which billed \$5.5 million for work that was never done “with kickbacks going to Burgin” — and notes:

Tellingly, before the OTS contract was signed, Burgin told another Pasha executive that he was going to invest in and become a partner in a crane maintenance company. Shortly thereafter, Burgin approved the OTS contract. By his action, it is very possible that Burgin has an ownership interest in OTS.

If this proves to be the case, that’s game over for Tonsich’s attempt to blame everything on Burgin. As for Tonsich himself, this isn’t the first time he’s gotten a contract with little or no track record or scrutiny. It’s virtually his modus operandi. A 2005 *Los Angeles Times* article cited the 1999 no-bid contract with the Alameda Corridor Transportation Authority mentioned above, as well as another almost-simultaneous example:

Tonsich’s firm was one of 25 approved to handle police misconduct cases [in response to the Ramparts scandal] by the city attorney’s office when [James] Hahn headed that office. All of them had substantial experience defending public agencies except Tonsich’s firm, which cited just one case on its application....

Tonsich’s clean air firm, CAEM, also followed the same pattern. It received a \$1.5 million grant from POLA in 2012, as we reported in May 2016, when Wilmington-based activist Jesse Marquez raised the issue in a letter to POLA:

Tonsich had claimed to be a part owner of ACTI, but the company claimed it rejected his ownership bid, and that afterward Tonsich formed Clean Air Engineering-Maritime to compete with them. As of 2012, ACTI had a working prototype, Tonsich’s company did not, yet his company got the \$1.5 million grant without a competitive bid process.

When we asked if POLA had evidence to the contrary of the claim that CAEM had no experience, port spokesman Arley Baker replied, “The CAE system is made by Tri-Mer. You can read about their experience in this technology at tri-mer.com.”

However, Tri-Mer had actually developed its technology working with ACTI — as confirmed in a 2009 letter from Tri-Mer to ACTI, which also noted that “This customer [TraPac] is not going to work with ACTI under any circumstances ... this is written in granite.” Tonsich was also TraPac’s lawyer. Thus, the “experience” Tonsich claimed was actually that of his competitor’s.

It notes that “Tonsich had formerly been a lawyer for ACTI handling collections,” but that Tonsich had a falling out with ACTI’s owner, Ruben Garcia, after ACTI applied for a \$2.5 million pollution control grant at POLA, as part of the China Shipping Agreement, which was initially approved:

However, the Los Angeles City Attorney told Garcia that ACTI was conflicted out because Tonsich was its lawyer and had worked on the China Shipping settlement while a commissioner. Garcia agreed to withdraw the grant application. Tonsich was furious, and told Garcia that the grant was the money Tonsich was putting into ACTI as his investment in ACTI. Garcia refused to make Tonsich a partial owner.

Tonsich then formed his competing company CAEM, stole ACTI's intellectual property relating to its emissions control systems, and used that information to illegally obtain contracts and grants from POLA.

What's significant here is at least three-fold: First, Tonsich's role as a lawyer handling collections was a rare example where his involvement was arguably innocent — it was a minor role with no relationship to POLA. Second, there was a sharp contrast between Garcia, who abided by the city's ethics ruling, and Tonsich, who was furious. Third, Tonsich evidently was depending on his relationship with the port (thus validating the city attorney's judgment) — at least in advancing his claim that ACTI should make him a partner, for what he had supposedly done.

Tonsich's actions have repeatedly drawn criticism over the years, but he's always managed to wriggle his way out of legal difficulties, in part because of the lax corporate political culture in which the city and the Port of LA is embedded. He's betting he'll be able to do it once again. But this lawsuit represents a much more serious effort to hold him accountable than what he's accustomed to. And, the broader political culture is obviously changing as well.

CITY OF LOS ANGELES
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CITY ETHICS COMMISSION

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CITY ETHICS COMMISSION
200 N. SPRING STREET
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September 18, 2009

Via Facsimile and U. S. Mail

Nicholas G. Tonsich
Glaser & Tonsich, LLP
2500 Via Cabrillo Marina, Suite 3410
San Pedro, CA 90731

Re: CEC Advice No. 2009-04

Dear Mr. Tonsich:

This letter is a response to your request for formal advice dated July 30, 2009, regarding restrictions that may apply to you as a former City official. Your question and the Commission's advice are based on the facts that you provided and facts that are available through City documents.

Section 705 of the Los Angeles City Charter (Charter) authorizes the Ethics Commission to provide formal advice regarding the City's campaign finance, ethics, and lobbying laws. When applicable, and with the concurrence of the City Attorney's office, the Commission's written advice may also include an analysis of related provisions of the California Political Reform Act of 1974, when terms used in City law are defined there. However, the Commission does not advise about other City, state, or federal laws, because those laws do not fall within the Commission's jurisdiction.

Formal written advice provides the requestor with the immunity in Charter § 705(b). However, the immunity does not address or apply to actions that predate this letter. Under Los Angeles Administrative Code (LAAC) § 24.1.1(f)(2)(K), immunity is limited to the requestor and to the specific facts contained in this advice.

QUESTION

What restrictions apply to me, as a former member of the Los Angeles Board of Harbor Commissioners, in representing a Port of Los Angeles lessee in negotiations with the Harbor Department?



CONCLUSION

You are subject to a permanent ban on receiving compensation to attempt to influence any City agency regarding matters in which you were personally and substantially involved. You are also subject to a permanent ban on receiving compensation to assist or advise a person who is attempting to influence action on those matters. Finally, you are prohibited from disclosing any confidential information that you acquired during City service for personal gain.

RELEVANT FACTS

We have determined that the following facts are relevant to your request:

1. You served as president of the Los Angeles Board of Harbor Commissioners (the Board) from August 14, 2001 to June 27, 2005.
2. The City entered into Permit 999 with China Shipping Holding Company LTD (China Shipping) on May 8, 2001. The 25-year permit authorized China Shipping to significantly expand its operations at the Port of Los Angeles. The expansion was to occur in three phases: Phase I included operation of a container terminal and wharf at Berths 100-102; Phase II included an extension to Berth 100, a wharf extension of Berth 102, and 35 acres of adjacent backlands for storing and handling containers; and Phase III included 24 additional acres of adjacent backlands. Additional information regarding the permit may be found in Council File Number 01-0723.
3. In June 2001, Permit 999 was placed on hold because of a lawsuit filed by the Natural Resources Defense Council (NRDC) against the City and China Shipping. The use of Berths 100-102 was prohibited until an additional environmental impact report (EIR) was implemented for all three phases of the project.
4. On April 13, 2004, China Shipping brought a claim against the City seeking delay damages, because the NRDC lawsuit delayed China Shipping's use of Berths 100-102 and resulted in unexpected environmental mitigation measures. The Board entered into a settlement agreement with China Shipping regarding the claim on May 27, 2005 (approved as to form by the City Attorney's office on June 3, 2005).
5. You participated in the negotiation and settlement of the NRDC lawsuit on behalf of the City. The Board approved the First Amendment to Permit 999 on May 25, 2005 (Order No. 6825), and the City Council approved it on June 28, 2005. The First Amendment reflects the terms of a settlement agreement and a stipulated judgment and includes the following provisions:
 - a. Credits of approximately \$12,000 granted to China Shipping for minimum annual guarantee (MAG) and twenty-foot equivalent unit (TEU) charges.

- b. Payout of \$10,000 to China Shipping within 10 days after approval of the First Amendment.
- c. Reimbursements of up to \$3 million per year to China Shipping for retrofitting and using alternative marine power (AMP).
- d. An extension of time from certification of the new EIR to the Port's delivery of Phases II and III.
- e. Additional credits of up to \$7.1 million (an absolute cap) granted to China Shipping if project delivery dates for Phases II and II do not meet agreed-upon deadlines.

6. You currently represent China Shipping as legal counsel in a variety of matters. China Shipping recently asked you to assist them in negotiations with the Harbor Department regarding components of Permit 999, including compensation, the logistics of landing four quayside container cranes at Berths 101-102 in the Port of Los Angeles (Phase II), and other potential amendments to Permit 999 that could result in a second amendment to that permit.

APPLICABLE LAWS

To prevent former City officials from exercising or appearing to exercise improper influence over City decisions, the Governmental Ethics Ordinance (GEO, Los Angeles Municipal Code (LAMC) §§ 49.5.1 *et seq.*) establishes certain “revolving door” limits on their attempts to influence City decisions for compensation after they leave City service. A “City official” is defined as a person who is required to file statements of economic interests¹ pursuant to a City agency’s conflict of interests code. LAMC § 49.5.2. A City “agency” is defined as an office that is required to adopt a conflict of interests code² subject to City Council approval. *Id.*

There are two types of revolving-door restrictions that apply to former City officials: 1) a time-based ban on attempting to influence decisions for compensation; and 2) a permanent ban on attempting to influence, for compensation, a matter in which the City official was personally and substantially involved. LAMC § 49.5.11.

For City officials who were not high-level officials³, the first restriction prohibits direct communications with an agency if all of the following apply:

¹ The California Political Reform Act (Government Code §§ 81000 *et seq.*) requires certain local public officials to file personal financial disclosure reports known as statements of economic interests (also known as the California Form 700). See also LAMC §§ 49.5.6 and 49.5.7.

² The Political Reform Act also requires agencies to adopt and implement conflict of interests codes, to identify which officials must file statements of economic interests.

³ High-level officials are identified in LAMC § 49.5.2. The term includes elected officials, certain members of their staffs, and some enumerated departmental executives.

1. The purpose of the communication is to attempt to influence an action or decision on a matter pending before that agency;
2. The communication is made on behalf of a person other than an agency; and
3. The communication is compensated.

LAMC § 49.5.11(D). The ban applies to any agency in which the official served in the 12 months prior to leaving City service and lasts for one year afterward. *Id.*

The second restriction applies to all former City officials who personally and substantially participated during their City tenures in a decision, proceeding, claim, piece of legislation, or other specific matter. It prohibits them from attempting to influence any action on that matter if all of the following apply:

1. The matter is still pending with the City, the City is a party to the matter, or the City has a direct or substantial interest in the matter;
2. The attempt is made on behalf of a person other than an agency; and
3. The attempt is compensated.

LAMC § 49.5.11(A). A City official “personally and substantially” participates in a matter by, among other things, making a decision, making a recommendation, conducting research, investigating, or rendering advice. *Id.* In addition, former City officials are prohibited from receiving compensation to advise or assist others who are attempting to influence action on those matters for compensation. LAMC § 49.5.11(B).

The “personal and substantial” ban does not apply in limited circumstances. For example, it does not prohibit a former City official from making a statement based on the official’s own special knowledge, as long as the official does not receive compensation other than what is required by law or regulation for witnesses. LAMC § 49.5.11(C)(1). It also does not apply if a court or agency makes written findings that the former City official has “outstanding and otherwise unavailable qualifications” necessary in a particular matter and that the public interest would be served by the former official’s participation. LAMC § 49.5.11(C)(2). Finally, the ban does not apply to a former official’s communication in a proceeding before a court or agency when at least five years have passed since the former official left City service and the former agency determines that the public interest would not be harmed. LAMC § 49.5.11(C)(3).

“Attempting to influence” means “promoting, supporting, opposing or seeking to modify or delay any action on municipal legislation . . . by any means, including but not limited to providing or using persuasion, information, statistics, analyses or studies.” LAMC § 49.5.2. “Direct communication” means “appearing as a witness before, talking to (either by telephone or in person), corresponding with (including sending electronic mail to), or answering questions or inquiries from, any City official or employee, either personally or through an agent.” *Id.* “Municipal legislation” is any legislative or administrative matter pending before an agency but does not include a request for advice, a direct response to an enforcement proceeding with the Ethics Commission, a ministerial action, an action relating to a collective bargaining agreement

or memorandum of understanding, a proceeding before the Civil Service Commission, or the preparation of items that must be submitted to the City's planning department. LAMC § 48.02.

Neither the time-based ban nor the "personal and substantial" ban applies to former City officials who represent themselves or their immediate family members, in their individual capacities, in connection with any matter pending before a City agency. LAMC § 49.5.11(H).

All current and former City officials are prohibited from receiving "pecuniary gain or personal advantage or privilege" by using or disclosing confidential information that they acquire in the course of their official duties with the City. LAMC § 49.5.3.

ANALYSIS & CONCLUSION

Because you were required, as a member of the Board, to file statements of economic interests under the Harbor Department's conflict of interests code, you were a City official. You were not a high-level official, because the position you held is not identified in LAMC § 49.5.2.

City law does not restrict the type of employment in which you may engage after leaving City service. However, your status as a former City official does restrict your compensated attempts to influence action or decisions on matters that are pending before City officials under certain circumstances.

One-Year Ban

You served as a Board commissioner from August 2001 to June 2005. More than one year has elapsed since you left City service. Therefore, you may engage in compensated attempts to influence and communicate with employees and officials at your former agency and other City offices on behalf of others, unless those attempts are subject to the "personal and substantial" ban discussed below.

"Personal and Substantial" Ban

City officials are prohibited from receiving compensation to influence matters in which they were personally and substantially involved while in City service. In addition, they may not receive compensation to assist or advise another person who is attempting to influence action on those matters. This ban lasts as long as the matter is pending with the City or the City is a party to or has a direct or substantial interest in the matter, except for a few very narrow circumstances in which the ban does not apply.

A City official personally and substantially participates in a matter by, among other things, making a decision, making a recommendation, conducting research, investigating, or rendering advice. During your tenure on the Board, you negotiated a settlement agreement regarding Permit 999 on behalf of the City and participated in the Board decision to approve the First Amendment to Permit 999. The First Amendment approved and implemented the terms of the NRDC settlement agreement you negotiated, and it also approved and implemented the

settlement terms in China Shipping's claim against the City for damages. These actions rise to the level of personal and substantial involvement.

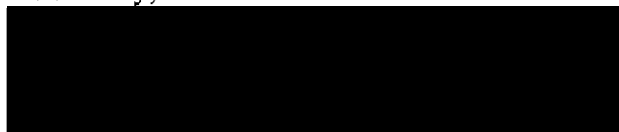
The settlement negotiations in which you were involved specifically addressed compensation, Berths 101-102, and Phase II of Permit 999, all of which are matters regarding which you would be representing China Shipping. In addition, the City is still a party to and, as lessor, has a direct and substantial interest in Permit 999. As a result, you are prohibited from receiving compensation to influence—or to assist or advise another person who is attempting to influence—matters related to the permit on behalf of China Shipping or any other person who is not a City agency.

Confidential Information

Finally, as a reminder, you may not disclose any confidential information that you acquired in the course of your City service for pecuniary or personal gain or advantage. This applies to all current and future business endeavors.

Thank you for requesting advice from the Ethics Commission. If you have any questions regarding this matter, please do not hesitate to contact our office.

Sincerely,



LeeAnn M. Penham
Executive Director

Villaraigosa Calls for Criminal Probe of Tonsich

BY PATRICK MCGREEVY AND NOAM N. LEVEY

MAY 11, 2005 12 AM PT

<https://www.latimes.com/archives/la-xpm-2005-may-11-me-mayor11-story.html>

Mayoral candidate Antonio Villaraigosa and two Los Angeles City Council allies called Tuesday for a criminal investigation into the business dealings of Mayor James K. Hahn's Harbor Commission president.

The Times reported Tuesday that Commissioner Nicholas G. Tonsich's law firm received no-bid government contracts as well as a payment from a lobbyist who reported lobbying the Harbor Commission.

"It's clear from what I read today there should be at a minimum an Ethics Commission investigation, and maybe much further than that," Villaraigosa told reporters after The Times detailed how Tonsich had benefited from his connection to the mayor.

"There were a number of issues there that were frankly very disturbing."

Councilmen Jack Weiss and Bernard C. Parks, who have endorsed Villaraigosa, also called on Hahn to ask Tonsich to resign from the Harbor Commission and to join them in asking for an investigation by the city Ethics Commission, the Los Angeles County district attorney and the U.S. attorney.

Hahn said Tuesday afternoon he had "no intention" of asking Tonsich to resign. "I think that Nick Tonsich has done a great job at the Port of Los Angeles," Hahn said, citing the San Pedro attorney's work on environmental and security issues there.

Tonsich has said he received no special treatment from Hahn or his appointees, and Hahn has said he gave Tonsich no special consideration.

Tonsich and his family have donated nearly \$12,000 to the mayor and his sister, Councilwoman Janice Hahn, since 1999. Tonsich's legal partners and their families, the firm's clients and a fundraising event that Tonsich held brought the Hahns at least \$30,000 more.

Villaraigosa, Weiss and Parks said they specifically were concerned to learn that Tonsich's law firm has earned \$1.254 million worth of no-bid contracts from the Alameda Corridor Transportation Authority, a public agency whose legal contracting work was overseen by a Hahn appointee.

The authority, which is conducting its own investigation, can find no record of how Tonsich's firm was selected.

In addition, the councilmen said they were troubled to learn that the city attorney's office under Hahn approved Tonsich's law firm to receive city contracts to represent police officers in Rampart corruption cases. Tonsich's firm cited only one case of defending government agencies and none defending police officers.

The councilmen also said any investigation should look into a payment of at least \$10,000 made by lobbyist Clark Davis to Tonsich's firm in 2003. That same year, Davis reported that he lobbied the Harbor Commission for one client, which later received a \$3.3-million master-planning contract from the Harbor Commission. Tonsich did not vote on that contract.

Davis and Tonsich told The Times that they could not recall what work Tonsich had done for Davis. But Tonsich said Monday it had nothing to do with Davis clients who had business at the port.

Defending his work on the Harbor Commission, Tonsich issued a statement through the port Tuesday afternoon stating that he could not discuss his work for Davis because of attorney-client privilege.

Councilwoman Hahn, who is a member of the Alameda Corridor board, offered a more vigorous defense of Tonsich, disputing the comments by Weiss and Parks as "distortions."

She said the payment by Davis is "not pay to play" and has nothing to do with the mayor. And she predicted that an internal Alameda Corridor investigation "will find there was no wrongdoing."

The councilwoman also praised Tonsich for his work at the port.

"He's been absolutely what the community wanted for 100 years, a commissioner willing to challenge the port on issues, including clean air," she said.

Parks, whose unsuccessful mayoral campaign hammered Hahn's fundraising practices, said Tuesday marked at least the third time he has called for an investigation of one of the mayor's appointees.

"This is another indication of business as usual, corruption in this city. And that we need to bring it to an end," said the former police chief.

The dispute over Tonsich came on a day when both Hahn and Villaraigosa alleged that the other has fallen short in making Los Angeles safe.

Villaraigosa took a helicopter tour of the Port of Los Angeles and declared the bustling harbor vulnerable to terrorists because of what he said was Hahn's failure to make port security a priority.

The mayor, whose administration fiercely disputed that characterization, summoned reporters to his Wilshire Boulevard headquarters to attack Villaraigosa for voting against a state law that toughened the penalties against child abusers who kill a child.

Villaraigosa campaign manager Ace Smith said Hahn was taking the former Assembly speaker's votes out of context.

Also Tuesday, the Los Angeles Police Protective League, which represents Los Angeles Police Department officers, said it will launch a \$149,000 independent campaign with mailers praising Hahn for helping to reduce crime.

At City Hall, Weiss and council members Wendy Greuel and Cindy Miscikowski on Tuesday introduced a motion calling for the Ethics Commission to enforce a 1972 law that requires commissioners to file a report within 10 days of receiving a loan, grant, lease or any type of contract from the city. The Ethics Commission voted 4 to 1 on Tuesday to support the change.

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8 and PASHA HAWAII LOGISTICS LLC

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

12 OCEAN TERMINAL SERVICES, INC.,
13 Plaintiff,
14 v.
15 PASHA STEVEDORING & TERMINALS
L.P.; PASHA HAWAII LOGISTICS LLC;
16 and DOES 1 to 25, inclusive,
17 Defendants.

18 PASHA STEVEDORING & TERMINALS
19 L.P., a California limited partnership,
20 Cross-Complainant,
21 v.
22 OCEAN TERMINAL SERVICES, INC., a
California corporation; NICHOLAS G.
23 TONSICH, an individual; JEFFREY W.
BURGIN, an individual; and ROES 1-50,
24 inclusive,
25 Cross-Defendants.

CASE NO. 20STCV04623
CROSS-COMPLAINT FOR:
(1) FRAUD;
(2) AIDING AND ABETTING FRAUD;
(3) BREACH OF CONTRACT; AND
(4) UNFAIR COMPETITION UNDER
CAL. BUS & PROF. CODE § 17200.

[DEMAND FOR JURY TRIAL]
Assigned for All Purposes to:
Hon. Ruth Ann Kwan, Dept. 72
Action Filed: February 5, 2020
Trial Date: None Set

1 Defendant and Cross-Complainant Pasha Stevedoring & Terminals L.P. (“Cross-
2 Complainant” or “Pasha”), alleges in this cross-complaint as follows:

3 **INTRODUCTION**

4 1. This suit arises from a stunning, multi-year conspiracy by Cross-Defendants Nick
5 Tonsich (“Tonsich”) and Jeff Burgin (“Burgin”) at the Port of Los Angeles (“POLA”). Tonsich
6 and Burgin entered into fraudulent contracts, falsified invoices that inflated amounts paid to
7 Tonsich and third parties, intimidated and threatened potential whistleblowers, set up fake
8 companies at vacant addresses, and stole millions of dollars from Pasha—which Tonsich funneled
9 back to Burgin through illegal kickbacks, lavish vacations, and favors at the Port.

10 2. Tonsich is a business owner, lawyer, and the former president of the Board of
11 Harbor Commissioners (“Harbor Commission”)—the powerful municipal agency that oversees
12 billions of dollars in economic activity at POLA. The so-called “pay-to-play” system thrived
13 under Tonsich’s watch. Terminal operators, shipping companies and other private interests all
14 found ways to pay favors to Tonsich, even retaining Tonsich’s own law firm to represent them in
15 dealings with the Harbor Commission. Instead of recusing himself, Tonsich voted to hand out
16 generous leases, relief from environmental laws, and, in some cases, millions of dollars in cash
17 payments from the City.

18 3. Tonsich resigned in 2005 after public outrage grew and the new Mayor-elect called
19 for him to be investigated for crimes. Unfazed, Tonsich switched sides and took on well-
20 compensated legal work for the same private companies he formerly regulated, routinely handling
21 matters that Tonsich had personally supervised while on the commission. The conflicts of interest
22 were obvious and the Los Angeles City Ethics Commission issued a formal opinion condemning
23 them as unlawful. Tonsich found still other ways to immerse himself in POLA’s lucrative
24 business environment. He formed several companies, including Cross-Defendant Ocean Terminal
25 Services, Inc. (“OTS”), a crane maintenance and repair company.

26 4. Burgin is a former top executive at Pasha, one of the largest terminal operators at
27 POLA, and was in charge of its day-to-day operations at the POLA. Burgin met Tonsich when he
28 was the Harbor Commission president.

1 5. In or about 2010, Tonsich and Burgin conspired to defraud Pasha using Tonsich’s
2 company OTS. Tonsich and Burgin laid the groundwork for this the fraud by preparing a services
3 contract between Pasha and OTS that included highly irregular terms (e.g., payment based on
4 tonnage rather than man hours) and that locked Pasha into a long-term arrangement (10 years plus
5 options to extend/renew). In violation of Pasha’s procurement policies, Burgin signed the contract
6 on behalf of Pasha without any review from Pasha’s corporate headquarters or legal department.

7 6. The scheme was simple: OTS issued invoices to Pasha that were inflated or, in
8 some cases, completely made up. The invoices improperly added tonnage from other berths not
9 covered by the contract to make the invoices bigger. Burgin would approve the inflated tonnage
10 numbers and, at times, even increase the tonnage based on what he believed he could “get away
11 with.” Other times, OTS issued multiple invoices for the same charge or billed Pasha at rates not
12 allowed by the contract.

13 7. But that wasn’t enough—Burgin and Tonsich wanted more. So what they did was
14 set up phony companies using vacant addresses at POLA, had those companies enter into
15 agreements for services with Pasha that were unilaterally approved by Burgin, and then had those
16 companies submit phony invoices to Pasha for work that was never performed. Burgin would
17 approve and pay the invoices, and then he would split the proceeds with Tonsich. None of these
18 companies existed; no work was performed; and Burgin and Tonsich pocketed the cash.

19 8. Over time, Tonsich and Burgin stole millions of dollars from Pasha and used their
20 kickbacks to fund extravagant lifestyles beyond their means. For example, Burgin acquired
21 expansive houses in California and Oregon, completed sweeping home renovations, bought
22 expensive luxury automobiles and motorcycles, and even purchased his own yacht.

23 9. Pasha had systems in place that were supposed to prevent this type of fraud but,
24 with assistance from Pasha employees Braxton Craghill (Controller), Randy Kodis (Finance
25 Director), and Tim Tess (Vice President, Administration), Burgin had the invoices approved and
26 paid every time. When other employees asked questions, Burgin threatened to retaliate if they told
27 Pasha’s corporate headquarters in Northern California. Pasha paid millions of dollars to OTS that
28 it never should have paid, and it all went into the pockets of Tonsich and Burgin.

1 10. Burgin had firm grasp on Pasha’s facility at POLA and he concealed this fraud for
2 many years. His scheme did not come to light until after OTS filed suit against Pasha this
3 February. When Pasha’s corporate office began reviewing invoices over the life of the OTS
4 contract, it discovered striking discrepancies between the tonnage that was reported to POLA and
5 the tonnage on which OTS charged Pasha.

6 11. Worse yet, it learned this was not the first time that Tonsich and Burgin worked
7 together to defraud Pasha. From 2003 to 2010, Tonsich and Burgin conspired with a construction
8 firm called Dunrite Construction (“Dunrite”) to overbill Pasha for work allegedly done at Pasha’s
9 berths at POLA, with kickbacks going to Tonsich and Burgin. Over this period, Pasha paid over
10 \$5.5 million to Dunrite, yet little to no work was actually done by Dunrite.

11 12. Pasha is owed millions of dollars in damages. Pasha seeks a trial on its claims
12 against Cross-Defendants for fraud, breach of contract, and other unlawful conduct. At trial,
13 Pasha will seek compensatory, treble and punitive damages, attorney’s fees and costs, and all other
14 relief authorized by law.

15 **PARTIES**

16 **A. Cross-Complainant**

17 13. Cross-Complainant Pasha Stevedoring & Terminals L.P. is a California limited
18 partnership, with its principal place of business in Los Angeles County.

19 **B. Cross-Defendants**

20 14. Cross-Defendant Ocean Terminal Services, Inc. is a California corporation, with its
21 principal place of business in Los Angeles County.

22 15. Cross-Defendant Nicholas G. Tonsich is an individual who resides, on information
23 and belief, in Los Angeles County.

24 16. Cross-Defendant Jeffrey W. Burgin is an individual who resides, on information
25 and belief, in Orange County, California.

26 17. Cross-Complainant is informed and believes, and on that basis alleges, that Cross-
27 Defendants ROES 1 through 10, inclusive, are individually and/or jointly liable to Cross-
28 Complainant for the wrongs alleged herein. The true names and capacities, whether individual,

1 corporate, associate or otherwise, of Cross-Defendants ROES 1 through 10, inclusive, are
2 unknown to Cross-Complainant at this time. Accordingly, Cross-Complainant sues Cross-
3 Defendants ROES 1 through 10, inclusive, by fictitious names and will amend this Cross-
4 Complaint to allege their true names and capacities after they are ascertained.

5 18. Cross-Complainant is informed and believes, and on that basis alleges, that except
6 as otherwise alleged herein, each of the Cross-Defendants is, and at all times relevant to this
7 Cross-Complaint was, the employee, agent, employer, partner, joint venturer, alter ego, affiliate,
8 and/or co-conspirator of the other Cross-Defendants and, in doing the acts alleged herein, was
9 acting within the course and scope of such positions at the direction of, and/or with the
10 permission, knowledge, consent, and/or ratification of the other Cross-Defendants. In the
11 alternative, Cross-Complainant is informed and believes, and based thereon alleges, that each
12 Cross-Defendant, through its acts and omissions, is responsible for the wrongdoing alleged herein
13 and for the damages suffered by Cross-Complainant.

14 **C. Non-Party Co-Conspirators**

15 19. Certain other non-party individuals and entities played roles, direct or indirect, in
16 Cross-Defendants' fraudulent and illegal scheme. Foremost among these individuals and entities
17 are the following:

18 20. Braxton Craghill is an individual who resides, on information and belief, in Orange
19 County, California.

20 21. Randy Kodis is an individual who resides, on information and belief, in Orange
21 County, California.

22 22. Tim Tess is an individual who resides, on information and belief, in Orange
23 County, California.

24 23. Dunrite Construction is a California corporation, with its principal place of
25 business in Orange County, California.

26 **JURISDICTION AND VENUE**

27 24. The Court has jurisdiction in this matter pursuant to California Code of Civil
28 Procedure section 410.10 and the California Constitution, Article VI, § 10. Section 410.10 of the

1 Code of Civil Procedure provides that California state courts “may exercise jurisdiction on any
2 basis not inconsistent with the Constitution of [California] or of the United States.” The exercise
3 of jurisdiction by California is constitutionally permissible here because each of the Defendants
4 resides, conducts business, has bank accounts and/or owns property in California. Therefore, each
5 Defendant has sufficient minimum contacts with the State of California, and/or has intentionally
6 availed itself of—and/or purposefully directed its activities toward—the State of California, so as
7 to render the exercise of jurisdiction over them by California courts consistent with traditional
8 notions of fair play and substantial justice.

9 25. Venue is proper under California Code of Civil Procedure sections 395(a) and
10 395.5 because Cross-Complainant and Cross-Defendants OTS and Tonsich are based in Los
11 Angeles County, and the actions taken by Cross-Defendants to cause harm to Cross-Complainant
12 occurred in Los Angeles County.

13 FACTUAL ALLEGATIONS

14 A. Cross-Defendants Conspire To Defraud Pasha Using OTS

15 1. Pasha Stevedoring & Terminals, L.P.

16 26. Pasha Stevedoring & Terminals, L.P. (“Pasha”) is a US-owned company that has
17 been in business for over 70 years. Pasha is one of the nation’s three largest terminal operators
18 and transports more than \$500 million in cargo annually. Pasha is a wholly-owned subsidiary of
19 The Pasha Group, a diversified transportation and logistics company that is headquartered in San
20 Rafael, California.

21 27. Pasha has a large presence at POLA, occupying terminals at Berths 153-155, 174-
22 181, and 206-220. Pasha performs stevedoring services for imported breakbulk steel slabs and
23 coils. Berths 174-181 handle a majority of Pasha’s container and breakbulk cargo.

24 28. Historically, Pasha has always been largely independent of its corporate parent,
25 The Pasha Group, in Northern California. Not only is Pasha is hundreds of miles away, but The
26 Pasha Group has always placed trust in its subsidiaries and employees. This independence
27 allowed the team on the ground in Los Angeles to select business partners, execute contracts, and
28 otherwise carry out business as it wanted, without a lot of oversight.

1 29. Burgin was the head of Pasha’s facility at POLA. He met Tonsich while Tonsich
2 was the president of the Harbor Commission. As set forth below, Burgin and Tonsich took
3 advantage of Pasha’s autonomy to steal from Pasha and enrich themselves.

4 **2. Cross-Defendants Take Advantage of Pasha’s Need For Crane Services**

5 30. In or about 2010, the POLA stopped leasing cranes to companies like Pasha to
6 move tonnage across their berths. Pasha therefore had a newfound need for cranes and crane
7 maintenance mechanics. From that, Tonsich and Burgin saw a new opportunity to steal from
8 Pasha and enrich themselves.

9 31. The logical thing for Pasha to do would have been to directly hire the crane
10 maintenance mechanics that had been employed by the POLA. Those mechanics were available
11 and were hired by many other companies operating at the Port. This would have been the
12 financially and fiscally right decision. In fact, several Pasha employees suggested to Burgin that
13 Pasha hire directly.

14 32. That did not happen. Instead, Burgin caused Pasha to enter into a crane
15 maintenance and services contract with Tonsich’s company, OTS. On paper, this decision made
16 no sense. OTS had no experience in crane maintenance, had no track record, and only had one or
17 two other clients. Burgin did not care about OTS’s qualifications—he cared about getting paid.

18 33. Tellingly, before the OTS contract was signed, Burgin told another Pasha executive
19 that he was going to invest in and become a partner in a crane maintenance company. Shortly
20 thereafter, Burgin approved the OTS contract. By his action it is very possible that Burgin has an
21 ownership interest in OTS.

22 **3. Pasha’s Crane Services Contract With OTS**

23 34. Pasha and OTS signed the Crane Maintenance and Repair Agreement (the “OTS
24 Agreement”), effective June 30, 2012.¹ Burgin and Tonsich prepared the OTS Agreement
25 themselves. Burgin signed on behalf of Pasha and Tonsich signed on behalf of OTS. The OTS
26
27

28 ¹ The OTS Agreement supersedes a prior contract between the parties, dated June 1, 2010.

1 Agreement has a stated term of “ten (10) years,” but purports to expire on January 27, 2021, less
2 than nine years from the inception date. (OTS Agreement, § 2.1.)

3 35. Under the OTS Agreement, OTS was to “perform maintenance and repair work” on
4 three of Pasha’s hammerhead cranes (209-09, 209-10, and 209-15), all of which were “located at
5 Pasha’s Berth 174-181 container terminal in Wilmington, California.” (OTS Agreement, § 1.3.)
6 The fee schedule was set forth in Schedule “A”. Any changes to the OTS Agreement would not
7 be effective “unless in writing, signed by representatives of both parties authorized to amend this
8 Agreement.” (OTS Agreement, § 9.7.)

9 36. Schedule “A” to the OTS Agreement dictates that Pasha shall pay OTS a flat rate
10 for each and every metric ton that is transported through Berths 174-181 *only*, subject to certain
11 enumerated changes over time. Specifically, Pasha was to pay:

- 12 • \$1.03 per metric ton, for all breakbulk and slab transported through Berths 174-
13 181, between June 31, 2010 and June 31, 2013;
- 14 • \$1.12 per metric ton, for all breakbulk and slab transported through Berths 174-
15 181, between July 1, 2013 and December 31, 2016;
- 16 • To be negotiated, for all breakbulk and slab transported through Berths 174-181,
17 between January 1, 2017 and December 31, 2019; and
- 18 • To be negotiated, for all breakbulk and slab transported through Berths 174-181,
19 between January 1, 2020 and January 27, 2021.²

20 37. This rate schedule was highly unusual. In maritime shipping, crane services are
21 almost always priced based on manning, not tonnage. This is because tonnage is not necessarily
22 proportional to the amount of crane maintenance and repair services that will be required.

23 38. This was not the only unusual feature of the OTS Agreement. A standard contract
24 for crane maintenance services runs between one (1) to three (3) years. This allows transport
25 companies, like Pasha, to re-bid their contracts more often, using competition between vendors to

26 _____
27 ² For other services beyond what was called for in the Agreement—namely, any “Parts, materials
28 OTS was to bill Pasha at cost plus 15 percent. (OTS Agreement, Sch. “A”.)

1 push down rates. A contract that locks the consumer to a single crane services provider for ten
2 (10) years, like the OTS Agreement, is very rare.³

3 39. These irregular aspects were deliberate and were intended to help them manipulate
4 the invoices and overcharge Pasha for many years. It was not until 2017 that Pasha and OTS
5 amended the OTS Agreement to provide that OTS was to be paid based on manning and not
6 tonnage; the parties operated under this rate structure until Pasha terminated the OTS Agreement
7 for cause on November 22, 2019.

8 4. OTS Issues Fraudulent Invoices

9 40. With the OTS Agreement in hand, Tonsich and Burgin carried out their scheme by
10 falsifying invoices and having Pasha pay for tonnage that did not go over Berths 174-181.

11 41. A comparison of the transport records kept by POLA with the invoices that Pasha
12 paid shows that OTS billed Pasha for tonnage beyond what moved across Berths 174-181. This
13 was a breach of the Agreement because only tonnage from Berths 174-181, not Pasha's other
14 berths at 154 and 206-220, was supposed to be used for calculating the monthly bill under
15 Schedule "A". Specifically, Pasha moved the following tonnage at Berths 174-181 between 2012
16 and 2016, and overpaid OTS, as follows:

	2012	2013	2014	2015	2016
Tonnage at Berths 174-181	1,702,855	1,734,764	1,865,402	1,710,276	1,479,101
Fee owed at \$1.03/ton or \$1.12/ton ⁴	\$ 1,753,941	\$ 1,864,871	\$ 2,089,250	\$ 1,915,509	\$ 1,656,593
Pasha' actual payment to OTS	\$ 1,998,618	\$ 2,653,888	\$ 3,144,584	\$ 3,187,467	\$ 2,555,291
Pasha's overpayment	\$ 244,677	\$ 789,017	\$ 1,055,334	\$ 1,271,958	\$ 898,698

24
25
26 ³ The OTS Agreement also did not include a cancellation clause that allows either side to cancel with 90 days (or less) advanced notice, which is standard for the industry.

27 ⁴ Per Schedule "A", Pasha was to pay \$1.03 per metric ton until June 31, 2013, and \$1.12 per
28 metric ton between July 1, 2013 and December 31, 2016

1 42. OTS also invoiced Pasha for auxiliary services in round amounts (e.g., \$60,000)
2 with no supporting documentation provided. Under Schedule "A", Pasha can be billed for
3 services beyond crane maintenance and repair, but only in an amount equal to OTS's costs plus 15
4 percent. The round numbers that were billed over and over show that OTS did not follow this
5 term. In still other cases, OTS issued duplicate invoices for the same period. Pasha would pay
6 twice.

7 43. Pasha had systems in place that were supposed to prevent this type of fraud.
8 Invoices from vendors were required to be reviewed by multiple internal departments to ensure the
9 amounts charged were accurate. Burgin circumvented these systems with the help of Craghill,
10 Kodis and Tess. Burgin also pressured subordinate employees to stay quiet. If they spoke out,
11 Burgin would tell them he knew the Pasha family personally and would make sure their careers
12 were ruined. Burgin was in charge of the office and surrounded by his friends. He was
13 untouchable.

14 44. On one occasion, a Pasha accountant was asked to authorize payment on an
15 \$186,000 invoice, which was identical to another \$186,000 invoice that Pasha had already paid.
16 When the accountant refused, Craghill berated her and then went to another accountant to approve
17 the charge. On another occasion, an accountant was asked to authorize payment on a phony
18 invoice, and was offered "her half" if she approved the payment. She refused, but Burgin had the
19 payment authorized by someone else.

20 **B. Cross-Defendants Conspire To Defraud Pasha Using Phony Companies**

21 45. Burgin and Tonsich also defrauded Pasha by setting up phony vendors to bill Pasha
22 for services that were never provided. Specifically, Burgin would have Craighill set up phone
23 companies using addresses at or around the POLA that were either abandoned or used by
24 companies they had a relationship with. Craighill would then create invoices from those phone
25 companies and submit them to Pasha for payment, which Burgin would approve and pay.

26 46. Burgin would then split the money with Tonsich and the non-party co-conspirators.
27
28

1 47. On one occasion, Burgin found out that Craighill had kept all of the money from
2 one of these kickbacks and did not give Burgin his “share.” Burgin became furious, confronted
3 Craighill, and demanded the money.

4 48. Burgin’s and Tonsich’s kept an eye on their money, and no one would stop them or
5 interfere with their kickbacks.

6 **C. Burgin Uses The Kickbacks To Fund His Extravagant Lifestyle**

7 49. Burgin used these kickbacks to fund an extravagant lifestyle far beyond what his
8 salary at Pasha would have otherwise allowed.

9 50. While at Pasha, Burgin often boasted of the expansive ranch that he owned in
10 Bend, Oregon. He told coworkers that he had spent hundreds of thousands of dollars on
11 renovations. Burgin also kept a million-dollar home closer to work in Huntington Beach,
12 California. Burgin regularly showed off his luxury vehicles, motorcycles, and even a yacht. On
13 information and belief, Burgin was married to an elementary school teacher and his children did
14 not work.

15 51. Burgin spent freely using his ill-gotten money. He donated \$1 million to Edison
16 High School in Huntington Beach, California. The funds were used to renovate a soccer stadium
17 that is named in Burgin's honor. Using Burgin's donation, the school installed high-end artificial
18 turf, drainage, lighting and bleachers. Burgin also paid for a remodel of the football field, and
19 purchased uniforms, helmets and pads for the team.

20 **D. The Fraud Is Discovered After OTS Files Suit Against Pasha**

21 52. On February 5, 2020, OTS filed a complaint against Pasha and an affiliated entity
22 called Pasha Hawaii Logistics LLC. OTS alleges that Pasha breached the OTS Agreement and
23 asserts claims for breach of contract, tortious interference and common counts..

24 53. In response to the suit, Pasha began reviewing invoices over the life of the OTS
25 contract. On inspection, the invoices revealed significant discrepancies between the tonnage that
26 was reported to the POLA and the volume of tonnage on which OTS charged Pasha. Pasha
27 realized that it had been overcharged for tonnage between 2012 and 2016.
28

1 54. As part of this investigation, Pasha learned this was not the first time that Tonsich
2 and Burgin worked together to defraud Pasha. From 2003 to 2010, Tonsich and Burgin conspired
3 with a construction firm called Dunrite Construction to overbill Pasha for work allegedly done at
4 Pasha's berths at POLA, with kickbacks going to Tonsich and Burgin. The owner of Dunrite is
5 close personal friends with Burgin.

6 55. In or around 2000, Burgin caused Pasha to hire Dunrite to handle various
7 construction-related projects around Pasha's terminals at the POLA. Burgin would have Dunrite
8 submit phony invoices to Pasha, which Burgin would then approve and pay, without any input
9 from Pasha's corporate headquarters. Burgin made sure that Dunrite got paid every time by
10 having Tim Hess, his friend that he hired to serve as head of Administration, prepare a work order
11 and check request. Burgin's assistant would see to it that a check was made to Dunrite for the
12 amount requested.

13 56. The payments to Dunrite were substantial. Pasha paid Dunrite over \$5.5 million on
14 approximately 88 invoices between 2003 and 2010. Some of these invoices exceeded \$100,000.
15 Dunrite was overcharging Pasha and not doing the work it was charging for. Instead, Dunrite
16 would keep a small portion of the payments, and funnel the majority back to Burgin and Tonsich.
17 Dunrite would also kickback the payments to Burgin and Tonsich by doing construction on their
18 properties and not charging them.

19 57. At Burgin's request, Dunrite also provided no-cost renovations at homes owned by
20 Pasha employees Craghill, Kodis, and Tess. These employees were loyal to Burgin, not Pasha,
21 and assisted with the fraud. Craghill was the on-site controller and accounting coordinator. He
22 and Kodis, who was the Finance Director, made sure that invoices were always approved. Tess
23 prepared work orders and check requests for Dunrite. Each of these employees benefitted
24 personally by the free home improvements they received.

25 58. When Pasha employees questioned the Dunrite invoices or refused to process the
26 payments, Burgin would tell them that they should keep quiet because he knew the owners of The
27 Pasha Group and he would have them fired if they didn't cooperate. On occasion, Burgin or the
28

1 non-party co-conspirators would offer to “share” the kickback with other Pasha employees to have
2 the payments made.

3 FIRST CAUSE OF ACTION

4 *Fraud*

5 **(By Cross-Complainant Against All Cross-Defendants)**

6 59. Cross-Complainant repeats and realleges each and every foregoing and subsequent
7 allegation contained in the cross-complaint, and further alleges as follows.

8 60. Unbeknownst to Pasha, Ocean Terminal Services, Inc., Nicholas G. Tonsich and
9 Jeffrey W. Burgin waged a multi-year campaign to mislead Pasha, issue false and/or inflated
10 invoices, and return millions of dollars in kickbacks to themselves. Cross-Defendants used the
11 OTS Agreement to enable their fraud, including by locking Pasha in to a highly-irregular and
12 long-term contract of ten (10) years, omitting any type of cancellation clause, which is standard in
13 the industry, and providing that Pasha would be charged based on tonnage, not manning.

14 61. Under their scheme, OTS and Tonsich issued invoices to Pasha on OTS letterhead
15 that were false and/or inflated. Burgin wielded his control over Pasha to ensure the invoices were
16 paid. Burgin took actions to ensure the fraud would continue, including (a) installing his close
17 friends in executive roles; (b) pressuring subordinate employees to ignore the overcharges and
18 approve false and/or inflated invoices; (c) sharing kickbacks with colleagues to ensure their
19 silence; and (d) threatening to or retaliating against employees who wished to speak out or raise
20 their concerns with The Pasha Group.

21 62. This fraud by OTS, Tonsich and Burgin was a substantial factor in causing millions
22 of dollars of damages and losses to Pasha, in an exact amount to be proven at trial. In addition,
23 any person who “receives any property that has been stolen or that has been obtained in any
24 manner constituting theft” commits a violation of California Penal Code section 496(a). Pasha is
25 therefore allowed to recover treble (3x) damages. Pasha is also entitled to attorneys’ fees and
26 costs, pursuant to section 9.8 of the OTS Agreement.

1 **SECOND CAUSE OF ACTION**

2 ***Aiding and Abetting Fraud***

3 **(By Cross-Complainant Against Cross-Defendants Tonsich and Burgin)**

4 63. Cross-Complainant repeats and realleges each and every foregoing and subsequent
5 allegation contained in the cross-complaint, and further alleges as follows.

6 64. The First Cause of Action pleads a fraud claim against Cross-Defendants Ocean
7 Terminal Services, Inc., Nicholas G. Tonsich and Jeffrey W. Burgin. In the alternative, Pasha
8 pleads an aiding and abetting claim against Tonsich and Burgin. Tonsich and Burgin knew that
9 invoices issued by OTS were false and/or inflated, and therefore overstated the sums for crane
10 maintenance and repair services, or other services, that Pasha owed to OTS.. Nonetheless,
11 Tonsich and Burgin substantially assisted in the preparation of these invoices, and took steps to
12 ensure that Pasha paid them the overstated amounts, all while knowing the numbers reported on
13 these invoices were false. Tonsich and Burgin used the OTS Agreement to enable their fraud,
14 including by locking Pasha in to a highly-irregular and long-term contract of ten (10) years,
15 omitting any type of cancellation clause, which is standard in the industry, and providing that
16 Pasha would be charged based on tonnage, not manning.

17 65. Inside Pasha, Burgin was in charge of the facility and took steps to ensure the fraud
18 would continue unabated, including (a) installing his close friends in executive roles;
19 (b) pressuring subordinate employees to ignore the overcharges and approve false and/or inflated
20 invoices; (c) sharing kickbacks with colleagues to ensure their silence; and (d) threatening to or
21 retaliating against employees who wished to speak out or raise their concerns with The Pasha
22 Group.

23 66. This assistance by Tonsich and Burgin was a substantial factor in causing millions
24 of dollars of damages and losses to Pasha, in an exact amount to be proven at trial. In addition,
25 any person who “receives any property that has been stolen or that has been obtained in any
26 manner constituting theft” commits a violation of California Penal Code section 496(a). Pasha is
27 therefore allowed to recover treble (3x) damages. Pasha is also entitled to attorneys’ fees and
28 costs, pursuant to section 9.8 of the OTS Agreement.

1 72. Pasha is entitled to recover the overcharges from OTS, in an amount to be proven
2 at trial, but believed to be in excess of \$5,000,000. Pasha is also entitled to attorneys' fees and
3 costs, pursuant to section 9.8 of the OTS Agreement.

4 **FOURTH CAUSE OF ACTION**

5 ***Unfair Competition***

6 **(By Cross-Complainant Against All Cross-Defendants)**

7 73. Cross-Complainant repeats and realleges each and every foregoing and subsequent
8 allegation contained in the cross-complaint, and further alleges as follows:

9 74. The Unfair Competition Law ("UCL"), California Business and Professions Code
10 § 17200 *et seq.*, prohibits any person from engaging in unfair competition, which includes any
11 "unlawful, unfair or fraudulent business act or practice," "unfair, deceptive, untrue or misleading
12 advertising," and any act prohibited by Chapter 1 (commencing with section 17500) of Part 3 of
13 Division 7 of the Business and Professions Code.

14 75. The acts and practices alleged herein of OTS, Tonsich and Burgin constitute
15 unlawful, fraudulent, and/or unfair business acts and practices within the meaning of the UCL and
16 California common law. These acts and practices include but are not limited to (a) concealing a
17 multi-year conspiracy to defraud Pasha by issuing false or inflated invoices, with the payments
18 from Pasha used to provide kickbacks to Tonsich and Burgin; (b) making misleading statements to
19 or concealing facts from Pasha in order to secure payment of invoices on the basis of false
20 pretenses; (c) pressuring subordinate Pasha employees to ignore the overcharges and approve false
21 and/or inflated invoices; and (d) threatening to or retaliating against employees who wished to
22 speak out or raise their concerns with The Pasha Group.

23 76. As a result of these fraudulent, unlawful, and/or unfair acts and practices, Pasha has
24 lost money and/or property. Pursuant to sections 17203 and 17204 of the California Business and
25 Professions Code, Pasha is entitled to compel OTS, Tonsich and Burgin to restore to Pasha the
26 money or property they have wrongfully acquired by means of their unfair competition. Pasha is
27 also entitled to attorneys' fees and costs, pursuant to section 9.8 of the OTS Agreement.

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PRAYER FOR RELIEF

WHEREFORE, Cross-Complainant Pasha Stevedoring & Terminals L.P. respectfully prays for judgment against Cross-Defendants Ocean Terminal Services, Inc., Nicholas G. Tonsich, Jeffrey W. Burgin, and ROES 1-50, inclusive, as follows:

- (1) For an award of compensatory damages in an amount that conforms to proof, but which is estimated to exceed \$5,000,000;
- (2) For an award of treble and/or punitive damages;
- (3) For an award of pre-judgment and post-judgment interest at the maximum allowing interest rate;
- (4) For an award of attorneys’ fees and costs, pursuant to section 9.8 of the OTS Agreement, and to the extent otherwise permitted by law; and
- (5) For any other relief that the Court deems just and proper.

DATED: May 1, 2020

MILLER BARONDESS, LLP

By: _____

LOUIS R. MILLER
Attorneys for Defendant and Cross-Complainant
PASHA STEVEDORING & TERMINALS L.P.

DEMAND FOR JURY TRIAL

Cross-Complainant hereby demands a jury trial.

DATED: May 1, 2020

MILLER BARONDESS, LLP

By: _____

LOUIS R. MILLER
Attorneys for Defendant and Cross-Complainant
PASHA STEVEDORING & TERMINALS L.P.

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