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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO – HALL OF JUSTICE

10
11 SAN DIEGO NAVY BROADWAY COMPLEX)
COALITION; and DOES 1 through 10,)
12 Plaintiffs and Petitioners,)
13 vs.)
14 CALIFORNIA COASTAL COMMISSION; and)
DOES 10 through 100,)
15 Defendants and Respondents;)
16
17 SAN DIEGO UNIFIED PORT DISTRICT; and)
DOES 101 through 1,000,)
18 Defendants and Real Parties in Interest.)
19
20

CASE NO. 37-2013-00077213-CU-TT-CTL
consolidated with CASE NO. 37-2014-
00006987-CU-TT-CTL

**PLAINTIFF AND PETITIONER SAN
DIEGO NAVY BROADWAY COMPLEX
COALITION'S OPENING TRIAL BRIEF;
DECLARATION OF DIANE COOMBS**

Lead Action Filed: November 25, 2013
Department: 73 (Wohlfeil)

Trial Date: December 15, 2016
Trial Time: 9:00 a.m.

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23 Plaintiff and Petitioner San Diego Navy Broadway Complex Coalition ("Plaintiff") respectfully
24 submits this opening trial brief on its claims against Defendant and Respondent California Coastal
25 Commission *et al.*
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1 I. INTRODUCTION

2 What’s this lawsuit all about? Why is Plaintiff fighting to protect the view corridor down Park
3 Boulevard from the Downtown Central Library and across San Diego Bay over to Coronado? Why is
4 Plaintiff fighting to save the 5.5-acre public park/plaza between the existing San Diego Convention
5 Center (“SDCC”) and the Hilton Bayfront Hotel? Why is Plaintiff trying to stop a park from being built
6 on the roof of the expanded SDCC to replace the existing park/plaza that’ll be bulldozed if expansion
7 occurs? All of that would be lost by expanding the SDCC to a point just a few feet away from the
8 water’s edge. Even worse, getting rid of the park/plaza and putting an inferior substitute park 100 feet
9 up, on top of the expanded SDCC’s roof, is the equivalent of cutting down Giant Sequoias and replacing
10 them with plastic trees. The public is entitled to real, unimpeded connections to the water, not an
11 artificial view from “on high” that comes at the expense of cutting off a direct connection to the coast.

12 More specifically, this lawsuit represents an attempt to uphold promises made at nearly every
13 level of government and by the private sector going back to 1996, promises that no more of the South
14 Embarcadero¹ would be “walled off” to sate the appetite of a few greedy, politically connected special
15 interests for prime waterfront real estate – the *public’s* real estate – to the exclusion of everyone else.
16 Not long after the SDCC’s opening in 1989, the City of San Diego (“City”) and the San Diego Unified
17 Port District (“Port”) began pushing to expand it again. That expansion, what is known as the “Phase
18 2” expansion approved by the California Coastal Commission (“Commission”) in 1996, was
19 controversial because it doubled the SDCC’s size on public tidelands that were transferred by the State
20 of California to the Port *in trust*.² To quell a growing opposition that included the *San Diego Union-*
21 *Tribune*, the City, the Port, the Commission, and the owners of the Hilton all took steps – until recently,
22 that is – to protect the space that would be destroyed by a subsequent expansion. Today, however, they
23 are trying to renege on those promises, with their sights set on forever destroying what two decades
24 earlier, when it was convenient for purposes of mollifying their opponents, they were more than happy
25 to protect.

26 _____
27 ¹ The South Embarcadero is generally known as the waterfront area from Seaport Village down to what
is now the Hilton Bayfront Hotel.

28 ² See Pl.’s Lodging of Omitted Admin. Record Items and Req. for Jud. Notice (“LOARI/RJN”), Item
1, pp. 8-6 (San Diego Unified Port Act, § 5.5(a) & (c) (describing “public trust lands” to be
administered by Port), § 30.5(e) (making property acquired by Port “an asset of the public trust”).

1 Plaintiff is suing to protect the public from the loss of the view corridor down Park Boulevard
2 to the Bay and beyond, and to protect the public park/plaza between the SDCC and the Hilton, from
3 assured destruction if the land-use approvals that are the subject of this lawsuit are not invalidated. The
4 mechanism by which the Commission and Port would destroy these aesthetic and environmental values
5 is known as Port Master Plan Amendment no. 45 (“the PMPA”), which is the planning document that
6 currently authorizes the SDCC Phase 3 and Hilton expansions.³ Under the California Coastal Act of
7 1976 (“Coastal Act”), the Port is required to prepare a port master plan amendment with substantial
8 public participation. The final product is then put before the Commission, for nothing more than a
9 thumbs-up or thumbs-down vote, to certify that the amendment is consistent with the Coastal Act and
10 the California Environmental Quality Act (“CEQA”).

11 The violations of the Coastal Act and CEQA are undeniable here, having been thoroughly
12 documented in the administrative record and admitted in writing by none other than the proponent: that
13 is to say, the Port. For example, the Port’s coastal and environmental experts, who looked in depth at
14 specific aspects of the proposed expansions and extensively analyzed the effects of the PMPA,
15 concluded that it is *inconsistent with the Coastal Act for multiple reasons*. The Port’s governing body
16 adopted that analysis as its own and passed it on, unchanged, to the Commission. Nobody – not at the
17 Commission, not at the Port, not at the City, not anyone – disputed that conclusion or attempted to
18 refute it. The *factually and legally untenable decision* by the Commission’s governing body – every
19 one of its members being a *political appointee* – to certify the PMPA as consistent with the Coastal Act
20 and CEQA despite the undisputed substantial expert and documentary evidence to the contrary is not
21 itself substantial evidence sufficient to justify the decision being challenged here.⁴

22 The Court does not need to be reminded that public access to coastal resources is extremely
23 important – every form of access is important – not only for aesthetic and environmental reasons but
24 for legal reasons too. Many people do not realize that the Coastal Act is the offspring of voter-approved
25 legislation in 1972 that began by recognizing “that the California coastal zone is a distinct and valuable
26

27 ³ A port master plan is the Port’s equivalent of a city’s or county’s general plan. See PUB. RES. CODE
28 § 30711(a)(1)-(5) (prescribing contents of port master plan).

⁴ There are other violations of the Coastal Act and CEQA that independently justify invalidation of the PMPA’s certification. They will be discussed later in this brief.

1 natural resource belonging to *all the people* and existing as a delicately balanced ecosystem; that the
2 *permanent protection* of the remaining *natural and scenic resources* of the coastal zone is a
3 *paramount concern to present and future residents of the state and nation.*” See LOARI/RJN, Item
4 2, p. 7 (Prop. 20) (emphasis added). Four years later, when the Legislature and Governor enacted the
5 Coastal Act, a bi-partisan coalition of lawmakers used even stronger language to recognize that the
6 “coastal zone is a distinct and valuable natural resource *of vital and enduring interest* to all the people
7 and exists as a delicately balanced ecosystem.” PUB. RES. CODE § 30001(a) (emphasis). This enhanced
8 recognition was in no way watered down by our elected representatives’ agreement with the voters that
9 “the permanent protection of the state’s natural and scenic resources is a paramount concern to present
10 and future residents of the state and nation.” *Id.*, § 30001(b). It’s against this legislative backdrop that
11 the Commission, Port, and Real Parties in Interest want to destroy one of the few public spaces that
12 remains on the South Embarcadero and one of the last remaining public viewing corridors of the Bay.

13 As the Court surely knows, its role here is not to second-guess the wisdom of the PMPA or the
14 development it would allow. The policy calls belong entirely to the Commission and the Port. What
15 this Court must do is determine (i) whether the Commission followed the law when it certified that the
16 PMPA is consistent with the Coastal Act and CEQA, and (ii) whether the decision to certify the PMPA
17 is backed up by the legally required substantial evidence in the administrative record.

18 If just one of these issues is resolved in the negative, the Court must invalidate the PMPA. For
19 the reasons explained below, the evidence and the law compel the Court to resolve both issues in the
20 negative.

21 II. BACKGROUND INFORMATION

22 1989-2001: SDCC’s Origins and Phase 2 Expansion

23 The SDCC opened in 1989. Admin. R. (“AR”) 1:4.⁵ The Commission approved a port master
24 plan amendment to accommodate a second expansion in 1996, the Phase 2 expansion, that for the most
25 part doubled the original facility’s size. *Id.*, 261:3722. The expanded SDCC opened for business in
26 2001. AR 1:4.

27 _____
28 ⁵ Citations to the Administrative Record refer first to the item number as shown on the AR’s index and
then to the item’s page number(s), with a colon in between. Thus, “AR 1:4” is a cite to page 4 of item
1 in the AR.

1 The Phase 2 expansion was controversial because it left very little *public* access and amenities
2 on the South Embarcadero waterfront. The public and the Commission’s staff were indeed concerned
3 that a subsequent expansion would destroy both the remaining views of the Bay looking south along
4 Park Boulevard⁶ and the waterfront public space that weren’t destroyed by the Phase 2 expansion. *See*
5 *generally* LOARI/RJN, Items 3-5, 8 & 10. To ensure that a subsequent expansion would not have these
6 serious adverse consequences on the public’s coastal resources, a former member of the Commission
7 and Port governing bodies recounted, the City’s mayor at the time, Susan Golding, “promised the public
8 that the ‘Walling Off’ of the waterfront would be limited. We also ‘chopped off’ the Southeast end of
9 the [SDCC’s Phase 2] expansion and promised open space and protection of the view corridors.”⁷ AR
10 31:356. Indeed, on the eve of the Commission’s approval of the Phase 2 expansion in 1996, Mayor
11 Golding wrote a letter to the Commission representing that “[t]he final plan now before you reflects the
12 numerous changes made to perfect the project, including the *extensive environmental mitigation and*
13 *public access aspects* of the project.” LOARI/RJN, Item 6, p. 2 (emphasis added). She explained that
14 the Phase 2 expansion’s “design attention includes a strong public access element and urban environs
15 plan.” *Id.* She added (albeit without the emphasis):

16 I feel strongly that the project should relate to the city fabric and be
17 *friendly to residents*. The grand stairs and funicular, leading to the
18 waterfront overlook rotunda and *the public plaza on the eastern end of*
the building are going to be *unique civic spaces that all San Diegans*
will be able to enjoy.

19 *Id.*⁸

20 2001-2004: South Embarcadero Redevelopment 2 with Two Hotels

21 In the immediate years following Phase 2’s approval, subsequent development proposals that
22 went before the Port and the Commission recognized the earlier commitments to protect the views along
23 Park Boulevard and the public park/plaza southeast of the SDCC. The 2001 port master plan

24 _____

25 ⁶ Park Boulevard was known back in the mid-1990s as Eighth Avenue. *See, e.g.*, AR 53:490 (public-
access plan substituting “Park Boulevard” for “Eighth Avenue”).

26 ⁷ This person was told back then that the Phase 3 expansion – the subject of this lawsuit – “would
27 probably occur ‘across Harbor Drive over the top of the San Diego Trolley Station Yard.’ It was
28 NEVER contemplated to ‘Wall-Off more of San Diego Bay from the public.’” AR 31:356. As will be
explained later, two *off-waterfront* sites for the Phase 3 expansion were selected in 2003.

⁸ These commitments have been confirmed by pro-business, pro-development supporters of the SDCC.
See, e.g., AR 30:348.

1 amendment for the South Embarcadero Redevelopment 2 proposal contemplated two new hotels⁹ and
2 was expected to “enhance public access and recreational opportunities in an area where *limited public*
3 *access opportunities currently exist.*” AR 296:3969 (emphasis added); *see also* 261:3722 (describing
4 Commission’s approval of prerequisite port master plan amendment for Hilton). It was “*designed to*
5 *preserve existing public views* from major coastal access routes such as Harbor Drive and Eighth Ave.
6 [today’s Park Boulevard]/Convention Way, and from the Convention Center terraces.” *Id.*, 296:3969
7 (emphasis added). “This portion of the South Embarcadero is currently underutilized due to the nature
8 of the previous marine-related industrial uses and should be redeveloped to encourage public use of the
9 waterfront *which is not visible from Harbor Drive due to the presence of the Convention Center*” –
10 that is to say, because it is “walled off.” *Id.* (emphasis added). Though the redevelopment proposal
11 was partially praised by the Commission’s staff, they did criticize the 225-foot Spinnaker hotel “on the
12 seaward side of the primary pedestrian shoreline promenade and adjacent to the entrance to the South
13 Embarcadero Marina Park South [because it] would set an *adverse precedent for this scale and nature*
14 *of development in close proximity to the water’s edge.*” AR 296:3970 (emphasis added). In the end,
15 under the proposal’s Public Access Program, “[t]he new 5.5-acre open space park, will connect Harbor
16 Drive with existing Embarcadero Marina Park South.” *Id.*, 296:4015; *see also id.*, 296:4040 (2001 Port
17 map showing “Park/Plaza” southeast of SDCC structure).¹⁰

18 2002-2004: The Hilton Bayfront Hotel

19 The Port also endeavored to protect the views along Park Boulevard and the public park/plaza
20 on the waterfront when it approved the Hilton Bayfront Hotel’s construction.¹¹ The Hilton’s genesis
21 occurred in 2002 when the Port approved an option agreement that allowed the hotel to lease property
22 located at the southeast corner of Harbor Drive and what is now Park Boulevard. AR 299:4112.¹²

24 ⁹ The two hotels were an unnamed 1,000- to 1,200-room hotel and marina, and the 250-room Spinnaker
25 Hotel. AR 296:3969.

26 ¹⁰ In the record there’s a fairly good map showing the “WATERFRONT PARK AND PLAZA” as it
27 was envisioned in 2001. AR 296:4008. The record also contains a pretty good computer rendering
28 from 2009 showing the public park/plaza in the lower right-hand corner. *Id.*, 3:28.

¹¹ The Hilton was the unnamed 1,000- to 1,200-room hotel and marina contemplated by the South
Embarcadero Redevelopment 2 proposal.

¹² The Port’s resolution erroneously refers to the “southwest” corner; that’s where the SDCC is located.

1 Nearly six months later, the Port approved a conceptual design for the Hilton. *Id.* In 2004, the
2 Commission approved a *de minimis* amendment to the then-operative port master plan (no. 31), and the
3 Port gave final approval to a coastal development permit for the Hilton with up to 1,190 rooms. *See*
4 *generally id.*, 298:4083-4093 (Commission’s approval); 299:4112-4115 (Port’s approval).

5 Still honoring the promises for a public park/plaza and view protections made by Mayor Golding
6 when the SDCC’s Phase 2 expansion was approved, and fresh off the South Embarcadero
7 Redevelopment 2 approval that respected her promise and required the two new waterfront hotels to
8 build a roughly 5.5-acre public park/plaza in the place where she promised it, the Port made sure that
9 the Hilton’s development permit contained unambiguous requirements for building that hotel’s share
10 of the park/plaza and for protecting views of the Bay. The permit prohibited the Hilton from “walling
11 off” the waterfront visual and public access from Harbor Drive and the Park Boulevard view corridor.”
12 AR 299:4100. The permit also required the Hilton to build a new 4.3-acre park/plaza on the waterfront
13 within the Park Boulevard view corridor’s extension.¹³ *Id.* The public park/plaza is what kept
14 structures from obstructing the view corridor (so both are on the chopping block today).

15 2006: San Diego’s Downtown Community Plan

16 Even the City got into the act of protecting views along Park Boulevard. In 2006, it adopted the
17 Downtown Community Plan (“DCP”) with the purpose of establishing the “land use vision and
18 development policies for downtown, as a component of the City of San Diego’s General Plan. . . .” *See*
19 AR 224:2898 Supp. R., Ex. 12, p. 22.¹⁴ The DCP describes its “policies” as “reflect[ing] specific
20 direction, practice, guidance, and directives.” *Id.*, Ex. 12, p. 23. Policy 5.1-P-5 prohibits the
21 construction of any visible structure in a view corridor, while Policy 5.1-P-7 requires the City to “[w]ork
22 with the Port to maintain open view corridors of the water – that is, free of structures and landscaping
23 that would restrict the views.” *Id.*, Ex. 12, p. 86. The DCP shows the Park Boulevard view corridor¹⁵

25 ¹³ The balance of the 5.5-acre park would come from the Spinnaker Hotel’s development, approved as
26 party of the South Embarcadero Redevelopment 2 proposal.

27 ¹⁴ The Supplemental Record (“Supp. R.”) consists of electronic items that are part of the record but
28 were not *separately* bates-numbered and listed in the index. Excerpts will be printed for and lodge with
the Court.

¹⁵ This view corridor also appears on the DCP’s Table 5-1 and Figure 5-1. *Id.*, Ex. 12, pp. 84-85.

1 out across the Bay not only being unobstructed but also suffering *no encroachment* by the SDCC or
2 the Hilton – even “with potential downtown buildout.” *Id.*, Ex. 12, p. 86.

3 2009-2012: Port Approves PMPA and EIR for SDCC Phase 3 and Hilton Expansions

4 The Port began thinking seriously about the SDCC’s Phase 3 and the Hilton expansions in June
5 2009. AR 5:39. As originally conceived by the SDCC Corporation, a non-profit subsidiary of the City,
6 the Phase 3 expansion contemplated just 422,500 square feet of additional space, while the Hilton
7 expansion was looking at somewhere between 250 and 500 new guest rooms and related hotel
8 amenities; both would require a port master plan amendment. *Id.*, 2:16-18. That was the first time
9 anyone had rolled out the idea of a “roof-top” park, which in Orwellian fashion was touted as one of
10 the “Benefits” of the proposed expansions. *Id.*, 7:43. Conspicuously absent was any mention of the fate
11 of the public park/plaza that the Hilton built, or the Park Boulevard view corridor that the park/plaza
12 had been protecting, under its 2004 development permit. *See generally id.*

13 When the Port ran its expansion ideas by the Commission’s staff, the reception was frosty. The
14 Port summarized the staff’s concerns to include: “Difficulty of accessing new park atop Convention
15 Center”; “Creation of an additional amount of Convention Center, deemed to be a ‘lower priority
16 visitor-serving use’ along the bayfront (as set forth in the Coastal Act)”; “Consistency with the Public
17 Trust Doctrine and Coastal Act”; and “Ability to provide a sufficient amount of parking.” AR 8:46.

18 In April 2010, the Port took its first official steps toward completing the PMPA for the Phase
19 3 and Hilton expansions. That’s when it approved an assignment of the lease for the site of the
20 previously proposed Spinnaker Hotel from Fifth Avenue Landing, LLC, to the SDCC Corporation. *See*
21 *generally* AR 11:52-69. Staff from the Port and the Commission met two months later to continue their
22 discussions on the expansions. *Id.*, 13:171. The Port’s minutes from that meeting make clear that the
23 Commission’s staff was concerned that “*many of the issues the Commission agreed to* when they
24 approved the [South Embarcadero Redevelopment 2], which included the Spinnaker Hotel, *would be*
25 *reversed by this proposal*” to expand the SDCC toward the Bay. *Id.*, 16:184 (emphasis added).

26 Undaunted by concerns about public access, views of the Bay, or any of the promises made
27 previously – including those put into legally binding Commission and Port approvals – for the next two
28 years the Port moved full steam ahead with the PMPA to expand the SDCC and the Hilton. By

1 September 19, 2012, the PMPA that originally proposed less than 500,000 square feet of new
2 convention space and 250-500 hotel rooms was now calling not only for a nearly 740,000-square-foot
3 expansion of the SDCC, with a roughly five-acre rooftop park to replace the ground-level public/park
4 plaza repeatedly promised and eventually (mostly) delivered, but also for a maxed-out 500-room
5 expansion of the Hilton.¹⁶ AR 43:419. The Port’s governing body voted to approve the PMPA for the
6 expansions. *Id.*, 50:474-476. It also voted to certify the PMPA’s EIR, finding that it “reflects the
7 [Port’s] independent judgment and analysis. . . .” AR 63:584 (enumerated para. 3).

8 Not surprisingly, the Port’s findings in support of its certification of the EIR state that the **PMPA**
9 **will cause an unavoidable, unmitigable inconsistency with the Coastal Act.** See AR 224:2898 Supp.
10 R., Ex. 1, p. 47. Likewise, the **EIR itself states no less than six times** that the SDCC and Hilton
11 expansions contemplated by the PMPA will be **significantly and unavoidably inconsistent** with the
12 Coastal Act. See *id.*, Supp. R., Ex. 2, p. 49 (acknowledging two inconsistencies with Public Resources
13 Code Section 30253(c), inconsistency with Section 30212.5, and inconsistency with 30252(4)) & p. 50
14 (acknowledging inconsistencies with Sections 30212.5 and 30252(4)). A separate Coastal Consistency
15 Analysis, prepared three months after the Port found that the EIR reflected its independent judgment,
16 reiterated that the SDCC’s expansion and the Hilton’s expansion would **each** cause three
17 inconsistencies with the Coastal Act. AR 51:478, 484 & 485.

18 2012-2013: Commission Certifies PMPA as Consistent with Coastal Act and CEQA

19 The PMPA was submitted to the Commission for certification as consistent with the Coastal Act
20 and CEQA on December 7, 2012. AR 35:382-383. Still alarmed by what they’d seen when the
21 proposal was floated three years earlier, the Commission’s staff immediately criticized the PMPA
22 because it would harm views along Park Boulevard and replace the ground-level park/plaza with a
23 rooftop park. *Id.*, 277:3935-3936. Two months later, having to face the fact that it did not have its act
24 together enough to answer the concerns voiced by the Commission’s staff, the Port temporarily
25 withdrew the PMPA application for certification. *Id.*, 282:3944.

26
27
28 ¹⁶ As ultimately approved, the Phase 3 expansion had ballooned from 422,500 square feet to 740,000
square feet. AR 276:3932. The additional 317,500 square feet equals roughly 7.3 acres (*i.e.*, 317,500
square ÷ 43,560 square feet per acre = 7.29). It’s no wonder the five-acre park/plaza at ground level
would have to be put on the roof; the Phase 3 expansion effectively swallowed the public’s space.

1 The Port took a month to reassess the situation and then submitted the PMPA again for
2 certification in March 2013. AR 79:705-706. The Commission’s staff sent a lengthy letter to the Port
3 asking about, among other things, *alternatives for not encroaching toward the existing view corridor*
4 along Park Boulevard and about *ways to improve public access and recreation along the waterfront*.
5 *Id.*, 284:3947-3951. Staff was particularly concerned about improving public access “to *offset the*
6 *isolation* of this [rooftop] public park that will result from” the Phase 3 expansion. *Id.*, 284:3948
7 (emphasis added).

8 On the subject of views, the Port responded by insisting that, due to the proposed size of the
9 Phase 3 expansion, the land where the public park/plaza exists today would have to be taken from the
10 public as necessary for “existing capacity” and for intake and other “pre-function space” to serve
11 convention-goers. *Id.*, 87:900. The Port added, to continue its Orwellian spin on the “benefits” of the
12 behemoth building, that expansion would be helpful in “creat[ing] a larger footprint for the public realm
13 space crowned by the iconic 5-acre rooftop park/plaza, which will provide *new* panoramas of the San
14 Diego Bay and City skyline.” *Id.* (“Public realm space” that’s “crowned” by a rooftop park is a
15 euphemistic description of formerly outdoor space converted to indoor space for private use.)

16 On the subject of public access, the Port touted its draft Public Realm Design Principles and
17 Programming Plan for the Phase 3 expansion. AR 87:902-904. The Port was either in denial or simply
18 oblivious to the fact that more than a decade of plans and approvals from prior projects required the
19 park/plaza in order to enhance public access to and use of the waterfront, and to protect the few
20 remaining views. The response gave no assurance that the latest promises would not be upended down
21 the road when some other new idea or alleged “need” came along.

22 A couple weeks before the public hearing scheduled for October 10, 2013, the Commission’s
23 staff remained unimpressed by the PMPA and the Port’s response to their concerns. Staff therefore
24 issued a blistering recommendation against a consistency certification for the PMPA. *See generally* AR
25 163:2477-2500. According to staff, the PMPA was inconsistent with the Coastal Act for a variety of
26 reasons. “The space between the SDCC and the Hilton is *one of few meaningful windows to the water*
27 anywhere along the entire span of the South Embarcadero. The *significant encroachment into this*
28 *view shed*, without any alternative means of drawing people to this area, would be *inconsistent with*

1 *the mandate of Section 30708 of the Coastal Act* that all port-related development shall be located,
2 designed, and constructed so as to provide for beneficial uses consistent with the public trust, including
3 recreational uses, to the extent feasible.” *Id.*, 163:2494 (emphasis added). Staff plainly summarized
4 its lengthy analysis by emphasizing that its “recommendation of **denial is based on inconsistency with**
5 **public access, public recreation, and visual quality protection policies** of Chapter 3 and Chapter 8”
6 of the Coastal Act.¹⁷ *Id.*, 163:2500 (emphasis added). Staff also concluded that there are feasible
7 alternatives and feasible mitigation measures to the PMPA that would substantially lessen its significant
8 environmental impacts, and therefore the PMPA is equally inconsistent with CEQA. *Id.*

9 Two days before the hearing, the Commission’s staff issued an addendum to its earlier memo
10 and apprised the public that the Port had agreed to a number of “noteworthy changes” to the PMPA but
11 ultimately concluded that they didn’t go far enough. *See generally* AR 190:2794-2795. “However,”
12 staff correctly observed, “these changes alone do not adequately mitigate for the above-described
13 serious impacts that would result from the PMPA--namely **expanding the building towards the public**
14 **accessway and shoreline, narrowing the public view corridor** between the existing buildings, and
15 **eliminating the ground level waterfront park** in favor of a rooftop park--all of which will **further**
16 **block, isolate, and privatize the tidelands.**”¹⁸ *Id.*, 190:2795 (emphasis added).

17 At the hearing, Plaintiff (through counsel) spoke at length in opposition to any consistency
18 certification for the PMPA due to its adverse impacts on views, public access, and many other values
19 codified in the Coastal Act.¹⁹ *See* Oct. 10, 2013 Tr., 46:11-60:12. Plaintiff also submitted extensive
20 written comments and back-up materials in opposition to certification. *See generally* AR 224:2898,
21

22 ¹⁷ The grounds for inconsistency identified by the Port in its EIR, which were never disputed by the
23 Commission, dealt with air pollution and parking – not merely as separate direct impacts but as separate
cumulative impacts. *See* AR 224:2898 Supp. R., Ex. 2, pp. 49-50. This becomes important below.

24 Another basis for the staff’s recommendation was the Port holding back information: “The proposed
25 changes in land and water uses **do not contain sufficient detail** in the port master plan submittal for the
26 Commission to make a determination that the proposed amendment is consistent with the Chapter 3 and
Chapter 8 policies of the Coastal Act.” AR 163:2500 (emphasis added).

27 ¹⁸ As explained later, these changes were illegally negotiated in secret and without public input.

28 ¹⁹ Because the challenges raised in this lawsuit are based on Plaintiff’s objections in the record, Plaintiff
expects no dispute that it exhausted its administrative remedies. Each of the challenges discussed in
detail below was pointed out to the Commission either orally or in writing, if not both.

1 225:2899-2907. Plaintiff’s written and oral comments referred to the Port’s inconsistency findings
2 beyond access, recreation, and views and explicitly called out the inconsistency findings dealing with
3 air pollution and parking. *See* AR 224:2898 Supp. R., “List of Problems,” p. 1 of 6 (following Cover
4 Letter); Oct. 10, 2013 Tr., 45:2-7. Plaintiff summarized its criticism thus:

5 After decades of piecemeal land-use planning by the Port of San Diego,
6 most of the South Embarcadero waterfront has been “walled off” from
7 the public by a long line of massive structures offering no significant
8 visual or pedestrian connection between downtown and the waterfront;
9 the existing convention center itself is almost half a mile long. Within
10 the South Embarcadero, the only remaining significant access from the
11 nearest major street to San Diego Bay, and the only remaining
12 unobstructed view of the Bay, will effectively be eliminated by the
13 Project because the proposed expansion will take up much of that space.
14 Enough is enough.

15 *See* AR 224:2898 Supp. R., Cover Letter, p. 1.

16 It was certainly no secret that the mitigation measures imposed long ago in exchange for the
17 earlier approval of the Phase 2 expansion and the Spinnaker and Hilton Bayfront Hotels – *viz.*, the five-
18 acre park/plaza and the view corridor down Park Avenue – were being “taken over and rolled forward”
19 into the rooftop park.²⁰ Oct. 10, 2013 Tr., 185:20-186:25.²¹ What the Port had kept secret, until
20 Plaintiff blew the whistle at the hearing, is that in 2003 the SDCC Corporation’s own “Customer
21 Advisory Board” had *selected two off-waterfront sites* as the preferred location for the Phase 3
22 expansion, just across the street from the SDCC and the Hilton, and *rejected the contiguous option*.²²
23 *See* AR 224:2898 Supp. R., Ex. 8, pp. 4-5 (describing option 1 as “Above Rail Yard,” Option 5 as “Port
24 Site Contiguous, Option 7 as “Tailgate Park,” and noting that “Options 1 and 7 were approved by the
25

26 ²⁰ The mitigation measures for the Phase 2 expansion approved back in 1996 included extensive
27 requirements for protecting views and public access. *See* LOARI/RJN, Item 9, pp. 9-17 (measures for
28 preserving views and public access under “Aesthetics”).

²¹ Citations to transcripts for the Commission’s hearings put the page number in the transcript before
the colon, with the line number(s) following the colon. Thus, “Oct. 10, 2013 Tr., 185:20” is a citation
to line 20 of page 185 of the transcript for the October 10, 2013 hearing.

²² Even though the Port did not disclose this history, the Commission’s staff members figured out for
themselves that the Port was conveniently spinning the “facts” to favor a contiguous expansion. As
revealed in their original memo (and without retreat in the addendum), the staff dismissed the Port’s
fiction that the Phase 3 expansion had to be contiguous. AR 163:2495-2496. Staff correctly observed
that the sole document on which the Port’s false premise was based did nothing but confirm the
marketplace’s *preference* for a contiguous expansion, rather than prove an economic necessity, and that
viable alternatives to contiguity existed but were consciously ignored. *Id.*

1 Committee”). Yes, the SDCC’s customers had no problem – in fact, they preferred – going just across
2 the street, inland, for the expansion.

3 After the public’s opportunity to speak had ended, the Commissioners and staff began
4 negotiating extensively with the Port over changes to the PMPA and its view- and access-related
5 provisions in an effort to save the PMPA from defeat. *See* Oct. 10, 2013 Tr., 167:23-196:24. At one
6 point toward the end of the negotiations, the Port’s representative flatly capitulated: “We amend our
7 proposal.” *Id.*, 192:23. Plaintiff (through counsel) tried to assert objections about the impropriety of
8 the negotiated changes because they were substantial but had not been subjected to public input. *Id.*,
9 197:2-3. The Commission’s chairwoman at the time, Mary Shallenberger, would not allow Plaintiff
10 to speak.²³ *Id.*, 197:4-8.

11 With negotiations exhausted, the Commissioners voted 11-0 to certify the PMPA as consistent
12 with the Coastal Act and CEQA – 180 degrees opposite the expert recommendation of its staff, ***without***
13 ***any new evidence***, but ***with lots of newly negotiated changes*** to the PMPA. AR 236:3510.

14 2014: Commission Revises Findings to Rationalize PMPA’s Consistency Certification

15 Shortly after the October 10, 2013 hearing, the Commission’s staff got to work on re-writing
16 their memo to flip in support of the consistency certification approved by the Commission. In a memo
17 dated November 22, 2013, staff acknowledged that, “since the PMPA was originally submitted,” the
18 Commission and the Port worked together to improve the PMPA – that is, ***after*** the public’s opportunity
19 to participate with the Port on its approval of the PMPA – and further admitted that the Port “***amended***
20 its submittal to include ***most*** of the items listed in the original staff report as Potential Revisions to the
21 PMPA.” AR 241:3602 (emphasis added). The November 2013 memo went on to describe a long list
22 – filling two paragraphs – of additional revisions, made ***after*** the October hearing, that enabled the
23 Commission to make its consistency finding.²⁴ *Id.*, 241:3602-3603; *see also id.*, 241:3613 (staff report
24 noting that “A number of revisions were made to the PMPA after the original submittal.”).

25
26 ²³ Earlier at the hearing Commission Shallenberger observed that she saw “nobody else at the dais” but
27 never actually closed the public hearing. Oct. 10, 2013 Tr., 133:6. She would not allow Plaintiff’s
28 counsel to state his objections to the illegal conduct that had transpired after he finished his earlier
comments. Meanwhile, she let lots of other people speak after seeing “nobody else at the dais.”

²⁴ This is in addition to the secret negotiations that took place in the days before the October hearing
and the other illegal ones at the end of that hearing.

1 So extensive were the revisions to the PMPA that the Port had to submit yet another version to
2 the Commission in conjunction with the revised findings. The index to the administrative record shows
3 Items 241-257 all dated November 22, 2013. The description for Item 241 mentions the “New Exhibit
4 21,” which is included in the record as Item 257 and turns out to be the again-revised PMPA.²⁵

5 On February 13, 2014, the Commission held a public hearing to adopt revised findings to
6 rationalize its consistency certification for the PMPA four months earlier. *See generally* Feb. 13, 2014
7 Tr., 7:12-21 & 9:11-19. During the hearing, the Commission’s staff stated that the revised findings
8 were based exclusively on evidence and testimony from the October 2013 hearing. *Id.*, 2:11-15 (noting
9 that staff used evidence and testimony from October 2013 hearing to substantiate revised findings); *see*
10 *also id.*, 5:19-20 (stating that no new materials were added to record since October 2013). The
11 Commission’s attorney confirmed this moments later, stating that no new evidence since that hearing
12 was being relied upon for the revised findings. *Id.*, 9:3-5.

13 In explaining the changes reflected in the revised findings, staff detailed the “number of
14 **additional** public access and recreational **improvements**” to the Phase 3 expansion that the Port had
15 incorporated “**at the time** of the [October 2013] hearing.” *See* Feb. 13, 2014 Tr., 2:16-23 (emphasis
16 added). The changes included removing a portion of the structure of the expanded SDCC, and
17 increasing access to and use of the rooftop park. *See generally id.*, 2:24-4:22. Staff acknowledged that
18 “**there were fairly significant revisions necessary** given this was a change from the findings supporting
19 denial.” *Id.*, 5:3-5 (emphasis added).

20 Plaintiff objected to the revised findings on a variety of grounds, including the fact that the
21 PMPA up for consideration at the meeting had been altered **after** the Commission’s October 2013 vote
22 and had not been the subject of any public hearings. *See* AR 272:3923.

25 ²⁵ The “New Exhibit 21,” Item 257 on the index, is dated October 10, 2013. However, it does not
26 appear in the index under the section dedicated to the Commission’s October 10, 2013 public hearing.
27 What’s more, the various versions of the PMPA that were up for consideration at that hearing – all but
28 the first of which having never been the subject of a public hearing **at the Port** – were dated October
7, 2013, or earlier. *See* AR 38:387 (May 2012 version), 178:2517 (Dec. 2012 version) & 192:2797
(Oct. 7, 2013 version). Based on the laws of time and space, and given the many changes to the PMPA
during the hearing on October 10, 2013, the version purportedly approved on that date could not have
been presented to the Commission before it gave its approval on that day.

1 The Commission approved the revised findings anyway. *See* Feb. 13, 2014 Tr., 9:11-19. The
2 final approved version of the PMPA clearly states on the front page that it was “Revised 10/10/2013.”
3 AR 262:3745. The record contains many good drawings that show the irreparable destruction of public
4 spaces on the South Embarcadero that will result if the Phase 3 and Hilton expansions occur, but two
5 of the best visual representations of the public’s loss of space and recreational opportunities stand out
6 because the Port was kind enough to show what there is now in green and what the public will lose in
7 blue. *Cf. id.*, 242:3633 (existing park space south and east of SDCC in green), 243:3634 (lost space in
8 blue).

9 **III. STANDING TO SUE**

10 Plaintiff’s first hurdle in maintaining this lawsuit is establishing its standing to sue. Plaintiff
11 anticipates no dispute on this issue but addresses it anyway before turning to the merits.

12 **A. Plaintiff Has Standing under the Coastal Act**

13 Under Public Resources Code Section 30801, any “aggrieved person” has the right to judicial
14 review of any decision or action of the Commission by filing a petition for writ of mandate, in
15 accordance with Code of Civil Procedure Section 1094.5, no more than 60 days after the decision or
16 action has become final. An “aggrieved person” is “any person who, in person or through a
17 representative, appeared at a public hearing of the commission . . . in connection with the decision or
18 action appealed, or who, by other appropriate means prior to a hearing, informed the commission . . .
19 of the nature of his concerns or who for good cause was unable to do either.” PUB. RES. CODE § 30801.
20 Plaintiff opposed the PMPA at the October 10, 2013 hearing and before the February 13, 2014 hearing.
21 *See generally* AR 224:2898, 225:2899-2907, 272:3923. Even if Plaintiff had not gone to such lengths,
22 “[a]ny person may maintain an action for declaratory and equitable relief to restrain any violation” of
23 the Coastal Act. PUB. RES. CODE § 30803 (making no reference to “aggrieved” person).

24 **B. Petitioner Has Standing under CEQA**

25 Cases brought pursuant to CEQA have a liberal standing requirement.²⁶ *See Bozung v. Local*
26 *Agency Formation Comm’n*, 13 Cal. 3d 263, 272 (1975) (explaining that “strict rules of standing that

27
28 ²⁶ Plaintiff believes that it need not establish standing under CEQA because (i) the Commission’s own
rules incorporate CEQA and (ii) Plaintiff has standing under the Coastal Act. Plaintiff addresses CEQA
standing only in an abundance of caution.

1 might be appropriate in other contexts have no application where broad and long-term [environmental]
2 effects are involved”); *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th
3 1184, 1198 (2004) (noting “CEQA’s liberal standing requirement”). The Supreme Court has
4 pronounced that “where the question is one of public right and the object of mandamus is to procure
5 the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest
6 in the result, since it is sufficient that he is interested as a citizen in having laws executed and the duty
7 in question enforced.” *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal.4th 155, 167
8 (2011) (internal citations omitted). The Supreme Court determined that “corporate entities should be
9 as free as natural persons to litigate in the public interest.” *Id.* at 168. The Supreme Court also
10 reaffirmed its earlier view that “strict rules of standing that might be appropriate in other contexts have
11 no application where broad and long-term [environmental] effects are involved.” *Id.* at 170. At worst:

12 To have standing to apply for a writ of mandate a private citizen must be
13 a “party beneficially interested.” * * * . . . [W]here a public right is
14 involved, and the object of the writ of mandate is to procure enforcement
15 of a public duty, the plaintiff is not required to have any legal or special
16 interest in the result; it is sufficient that as a citizen he is interested in
having the public duty enforced. [Citation omitted.] Accordingly, in a writ
of mandate against a municipal entity based on alleged violations of
CEQA, a property owner, taxpayer, or elector who establishes a
geographical nexus with the site of the challenged project has standing.

17 *Citizens Ass’n for Sensible Dev. of Bishop Area v. County of Inyo*, 172 Cal. App. 3d 151, 158 (1985).
18 Therefore, Plaintiff must demonstrate nothing more than (i) an interest in the enforcement of the public
19 duty, (ii) an organizational purpose related to the upholding of CEQA, and (iii) a member with a
20 geographical nexus to the project.

21 Plaintiff satisfies all three requirements for maintaining this challenge under CEQA. First,
22 Plaintiff has advocated for a number of environment-related quality-of-life issues related to coastal
23 resources. *See* Coombs Decl., ¶ 2. Second, ensuring that public officials adhere to CEQA and all other
24 applicable laws is one of Plaintiff’s core functions. *Id.*, ¶ 6. This interest is evidenced by the fact that
25 Plaintiff has diligently contested the PMPA’s consistency certification on environmental grounds.
26 Third, Plaintiff has at least one member who lives in the City of San Diego and may be impacted by the
27 PMPA, and has members who recreate in the area. *Id.*, ¶ 4. Thus, Plaintiff has standing to maintain
28 this action under CEQA.

1 **IV. STANDARD OF REVIEW**

2 Challenges under the Coastal Act and CEQA are to be adjudicated in accordance with Code of
3 Civil Procedure Section 1094.5 *See* PUB. RES. CODE §§ 21168 & 30801. Under Section 1094.5, the
4 central issue is whether the responding parties acted without or beyond their jurisdiction, failed to
5 provide a fair trial, or prejudicially abused their discretion. CODE OF CIV. PROC. § 1094.5(b). An abuse
6 of discretion exists when the responding parties have not proceeded in the manner required by law, their
7 order or decision is not supported by the findings, or the findings are not supported by the evidence.

8 *Id.*

9 The Court’s review of factual determinations should be deferential, but there is no deference
10 when considering whether there was a failure to act in the manner prescribed by law. *See Bakersfield*
11 *Citizens for Local Control, supra*, 124 Cal.App.4th at 1207-1208. Abuse of discretion is a question of
12 law for the courts to answer. *See Apple Computer v. Assessment Appeals Bd.*, 105 Cal.App.4th 1355,
13 1370 (2003). “If the Commission takes action that is inconsistent with, or that simply is not authorized
14 by, the Coastal Act, then its action is void.” *Security Nat’l Guar., Inc. v. California Coastal Comm’n*,
15 159 Cal. App. 4th 402, 419 (2008).

16 Similarly, CEQA must be applied in a manner that provides the “fullest possible protection to
17 the environment within the reasonable scope of the statutory language.” *Friends of Mammoth v. Board*
18 *of Supervisors*, 8 Cal.3d 247, 259 (1972) (disapproved on other grounds in *Kowis v. Howard*, 3 Cal.4th
19 888, 896 (1992)). Moreover, CEQA’s dictates must be “strictly enforced.” *Citizens of Goleta Valley*
20 *v. Board of Supervisors of Santa Barbara County*, 197 Cal.App.3d 1167, 1176 (1988). “Only by
21 requiring [the government] to fully comply with the letter of the law can a subversion of the important
22 public purposes of CEQA be avoided.” *Id.* In this endeavor, reviewing courts must follow the “rule
23 of reason.” *Id.* At the same time, there is no such thing as “harmless error” under CEQA; any violation
24 is “necessarily prejudicial.” *Resource Def. Fund v. Local Agency Formation Comm’n of Santa Cruz*
25 *County*, 191 Cal.App.3d 886, 897-898 (1987).

1 V. ARGUMENT AND ANALYSIS

2 Plaintiff challenges the Commission’s certification of the PMPA for a variety of independent
3 legal defects under the Coastal Act and CEQA. Each defect will be discussed below, in no particular
4 order, after Plaintiff provides an overview of the Coastal Act procedures applicable to the PMPA.

5 The process for certification of the PMPA is prescribed by statute. First, the Port’s governing
6 body gives public notice, holds a public hearing, and considers the public’s input, and *thereafter it*
7 *adopts* the PMPA and submits the document to the Commission for certification as consistent with the
8 Act.²⁷ PUB. RES. CODE § 30714. After holding a separate public hearing on the PMPA, the
9 Commission must certify it in whole or in part and reject whatever portion cannot be certified for
10 consistency. *Id.* The Commission “may not modify the plan as submitted as a condition of
11 certification.” *Id.* The Commission shall certify the PMPA only after finding (i) that the PMPA
12 conforms to what are commonly known as the “Chapter 8” policies and (ii) that, for any appealable
13 development projects identified in the PMPA, those projects conform to what are known as the
14 “Chapter 3” policies. *Id.*; *see also* CAL. CODE OF REGS., tit. 14, § 13632(d) (authorizing consistency
15 certification “only if” Commission finds that Chapter 3 and Chapter 8 policies are satisfied).

16 What are the Chapter 3 and Chapter 8 policies? The former are set forth in Public Resources
17 Code Sections 30700-30721, and they are applicable to all port master plan amendments. *See* PUB. RES.
18 CODE § 30702. The latter are found in Public Resources Code Sections 30200-30265.5, and they apply
19 whenever an amendment includes (i) an office or residential building not principally devoted to the
20 administration of activities within the port; (ii) hotels or shopping facilities not principally devoted to
21 the sale of commercial goods utilized for water-oriented purposes; or (iii) some combination thereof.
22 *See* PUB. RES. CODE §§ 30714(b) & 30715(a)(4).

23 The Commission acknowledged that the Chapter 3 and Chapter 8 policies apply to the Hilton
24 expansion. AR 261:3721. According to the Commission, however, only the Chapter 8 policies apply
25 to the SDCC Phase 3 expansion because that specific development “is not identified [in the PMPA] as
26 an appealable project.” *Id.*, 261:3721-3722. The Commission erred in concluding that the Phase 3

27 _____
28 ²⁷ The same standards and procedures that apply to the approval of a port master plan apply to any
amendments thereof. PUB. RES. CODE § 30716(a).

1 expansion is not subject to the Chapter 3 policies because, as the Port’s EIR makes clear, the SDCC will
2 include “Visitor-Serving **Retail**” facilities. *See* AR 224:2898 Supp. R., Ex. 7, p. 158 (emphasis added).
3 Shopping facilities “not principally devoted to the sale of commercial goods utilized for water-oriented
4 purposes” are appealable. PUB. RES. CODE § 30715(a)(4). Nothing in the record suggests that the retail
5 facilities that’ll be housed in the expanded SDCC will be “water-oriented.” Thus, Chapter 3 also
6 applies to the Phase 3 expansion.²⁸

7 Plaintiff now turns to the specific violations of the Coastal Act and CEQA.

8 **A. The Port Master Plan Amendment Is Inconsistent with the Coastal Act on Issues**
9 **Relating to Public Access, Recreation, and View Preservation**

10 The PMPA conflicts with a number of Chapter 3 policies. For instance, “[p]ublic access from
11 the nearest public roadway to the shoreline and along the coast ***shall be provided in new development***
12 ***projects*** except where (1) it is inconsistent with public safety, military security needs, or the protection
13 of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely
14 affected.” PUB. RES. CODE § 30212(a) (emphasis added). Exceptions (1) and (3) are inapplicable on
15 their face.

16 Exception (2) is inapplicable because there isn’t adequate access now. One of the biggest
17 criticisms of the PMPA by the Commission’s staff was that development since the SDCC was first built
18 has had the effect of “walling off” the public from San Diego Bay. *See, e.g.*, AR 163:2492 (“Under
19 these [current South Embarcadero] circumstances, it is particularly critical that all new shoreline
20 development in the North and South Embarcadero regions be sited and designed to restore and enhance
21 the visual quality of the area. Even a relatively small increase in the existing wall of development along
22 the bayfront should be avoided when at all feasible.”); 296:3984 (discussing Spinnaker Hotel’s efforts
23 to “preserve views and prevent a tunneling or walled-off effect on public use of the promenade”). “The
24 linkage between the SDCC and the City’s popular Gaslamp District is ***challenging***, requiring

25
26 ²⁸ This dispute may be academic because the Chapter 8 policies require all port-related developments
27 to be located, designed, and construed so as to minimize substantial adverse environmental impacts;
28 and to provide for other beneficial uses consistent with the public trust, such as recreational uses, to the
extent feasible. PUB. RES. CODE § 30708(a) & (d). Eliminating one of the last remaining views of the
Bay and the five-acre public park/plaza so that businesses not engaged in water-related activities have
a place to convene is not consistent with the public trust as embodied in the Coastal Act.

1 pedestrians to cross train tracks, trolley tracks, and five lanes of traffic.” AR 261:3730 (emphasis
2 added). Due to the SDCC’s earlier expansion, “the only vehicular access to the bayfront and
3 Embarcadero Marina Park is now Park Boulevard/Convention Way. However, this streetscape is
4 currently uninviting to both public pedestrian and vehicular traffic.” *Id.* “Under these circumstances,
5 it is particularly critical that all new shoreline development in the North and South Embarcadero regions
6 be sited and designed to restore and enhance the visual quality of the area.” *Id.*, 261:3731. “This
7 portion of the South Embarcadero is currently underutilized due to the nature of the previous marine-
8 related industrial uses and should be redeveloped to encourage public use of the waterfront **which is not**
9 **visible from Harbor Drive due to the presence of the Convention Center.**” *Id.*, 296:3969. Putting it
10 bluntly: “Pushing the SDCC so close to the water and the promenade will result in the building
11 **towering over and dominating the narrow public corridor**, making the shoreline feel like **the private**
12 **backyard of the SDCC**. It will serve as an additional **deterrent** rather than induce or invite the public
13 to the water.”²⁹ *Id.*, 163:2493 (emphasis added).

14 There are many more inconsistencies between the PMPA and the Coastal Act. Another Chapter
15 3 policy provides: “Wherever appropriate and feasible, public facilities, including parking areas or
16 facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and
17 otherwise, of overcrowding or overuse by the public of any single area.” PUB. RES. CODE § 30212.5.
18 The Port’s governing body and its environmental experts found that the PMPA – *i.e.*, both the SDCC’s
19 Phase 3 expansion and the Hilton’s expansion – would violate this policy. AR 51:478. Meanwhile, the
20 Commission’s revised findings are conspicuously silent on Section 30212.5. *See generally id.*,
21 261:3727-3740.

22 Other Chapter 3 policies are also being violated. “Coastal access suited for water-oriented
23 recreational activities that cannot readily be provided at inland water areas shall be protected for such
24 uses.” PUB. RES. CODE § 30220. The PMPA would re-align Convention Way, the street that currently
25 runs south of Harbor Drive between the SDCC and the existing public park/plaza, further south until
26

27
28 ²⁹ As the Commission had to admit in its revised findings, “[l]ocating a **100-foot high, over a 1000-foot long building so close to the waterfront** is a **significant departure** for San Diego County.” *Id.*, 261:3732 (emphasis added).

1 it is right up against the promenade running next to the Bay.³⁰ See AR 163:2484 (pointing out PMPA’s
2 “Realignment and narrowing of Convention Way bayward”). Putting a narrowed street right up against
3 the promenade, overshadowed by the “100-foot high . . . 1000-foot long building,” *harms* recreational
4 uses. Even the Commission’s staff was critical of the towering mass that Phase 3 would impose on
5 people visiting the public’s waterfront. *Id.*, 261:3732 (“Pushing the SDCC so close to the water and
6 the promenade has the potential to result in the building towering over and dominating the narrow
7 public corridor.”). Water-oriented recreational activities (*e.g.*, saltwater fishing³¹) cannot be done
8 inland, and they cannot be done from inside the SDCC, 100 feet up on the roof, or on the ground with
9 the building towering behind and above. Indeed, staff had warned the Port back in 2009: “Creation of
10 an *additional amount of Convention Center* [is] deemed to be a ‘*lower priority* visitor-serving use’
11 along the bayfront (as set forth in the Coastal Act).” *Id.*, 8:46 (emphasis added).

12 Similarly, “[o]ceanfront land suitable for recreational use shall be protected for recreational use
13 and development unless present and foreseeable future demand for public or commercial recreational
14 activities that could be accommodated on the property is *already* adequately provided for in the area.”
15 PUB. RES. CODE § 30221 (emphasis added). Here, the PMPA would eliminate the very recreational
16 space that’s serving the need and move it to the SDCC’s rooftop. “This portion of the South
17 Embarcadero is currently underutilized,” however, “and should be redeveloped to encourage public use
18 of the waterfront *which is not visible from Harbor Drive due to the presence of the Convention*
19 *Center.*”³² *Id.*, 296:3969. The Commission’s implication is clear: the public park/plaza would continue
20 to be suitable for recreational uses despite the visual obstruction presented by the *existing* SDCC;
21 making the SDCC even bigger by destroying recreational space that’s already suitable for such uses is
22 not going to achieve the Coastal Act’s goal of protecting oceanfront land for recreational use. So
23

24
25 ³⁰ Significantly, the Port’s EIR defines the “Park/Plaza” land-use designation to include “public fishing
26 piers. . . .” See AR 224:2898 Supp. R., Ex. 7, p. 270.

27 ³¹ “The economic, commercial, and *recreational* importance of fishing activities shall be recognized
28 and protected.” PUB. RES. CODE § 30234.5 (emphasis added).

³² As the Commission put it in its revised findings, “[l]ocating a *100-foot high, over a 1000-foot long*
building so close to the waterfront is a *significant departure* for San Diego County.” *Id.*, 261:3732
(emphasis added).

1 whatever “*oceanfront* land suitable for recreational use” means, it certainly does not mean a phony park
2 on a rooftop 100 feet above the Bay, leaving the paltry recreational opportunities that would remain at
3 ground level (basically walking or skating along the esplanade) seriously impaired and highly
4 unattractive. To quote the Commission in its own revised findings:

5 ***Locating a 100-foot high, over a 1000-foot long building so close to the***
6 ***waterfront is a significant departure for San Diego County.*** In addition
7 to the existing SDCC, buildings in the surrounding area include the
8 Hyatt hotel tower, which is set back approximately 275 feet from the
9 water’s edge, the Marriott hotel tower, set back approximately 160 feet,
10 and the Hilton, which is set back only 50 feet, but at its narrowest edge.
11 ***Pushing the SDCC so close to the water and the promenade has the***
12 ***potential to result in the building towering over and dominating the***
13 ***narrow public corridor.***

14 AR 261:3732 (emphasis added).

15 What about scenic and visual qualities? What does Chapter 3 have to say about them? Consider
16 this:

17 The ***scenic and visual qualities*** of coastal areas shall be considered and
18 ***protected as a resource of public importance.*** Permitted development
19 shall be ***sited and designed to protect views to and along the ocean and***
20 ***scenic coastal areas,*** to minimize the alteration of natural land forms, to
21 ***be visually compatible with the character of surrounding areas,*** and,
22 where feasible, to ***restore and enhance visual quality*** in visually
23 degraded areas. * * *

24 *Id.*, § 30251 (emphasis added). The Commission’s revised findings confirm that the PMPA will pose
25 a serious problem: “The proposed expansion would also have a ***significant*** effect on views towards the
26 shoreline from Harbor Drive.” AR 261:3732 (emphasis added). “The space between the SDCC and
27 the Hilton is one of ***few meaningful windows to the water anywhere*** along the entire span of the South
28 Embarcadero.” *Id.*, 261:3733 (emphasis added). The Commission even admits, given the Port’s refusal
to build a bridge over Harbor Drive at 4th Street and further given other physical obstacles between
downtown and the waterfront, that “there is currently ***almost no relationship between upland areas and***
the coast.” *Id.*, 261:3734 (emphasis added). Preserving the views along Park Boulevard down to the
Bay and across to Coronado is therefore essential under the Coastal Act. No matter how much political
pressure it was under, the Commission did not have the power to trade away one of the last “windows
to the water” for a peephole.

1 In sum, there are multiple inconsistencies between the PMPA and the Coastal Act, though any
2 one of them alone is enough to bar the Commission from certifying the PMPA as being fully consistent
3 with the Act. The Court should invalidate the PMPA’s consistency certification for any or all of these
4 reasons.³³

5 **B. The Port Master Plan Amendment Is Inconsistent with the Coastal Act on Issues**
6 **Relating to Air Pollution and Parking**

7 Chapter 3 includes an article setting forth development policies beyond public access, recreation,
8 and views. Among them are this one: “New residential, *commercial*, or industrial development . . .
9 shall be located . . . where it will *not have significant adverse effects*, either *individually or*
10 *cumulatively*, on coastal resources.” PUB. RES. CODE § 30250(a) (emphasis added). The Port’s EIR
11 concludes that there will be significant and unavoidable individual and cumulative air-quality impacts.
12 See AR 224:2898 Supp. R., Ex. 2, p. 49. The Port’s separate consistency analysis confirms that there
13 will be significant air-quality impacts (albeit citing a different policy being violated). *Id.*, 51:485.

14 The opposing parties may try to claim, preposterously, that clean air is not a “coastal” resource.
15 Such a claim would be unavailing because elsewhere Chapter 3 specifically requires new development
16 to “[b]e consistent with requirements imposed by an air pollution control district or the State Air
17 Resources Board *as to each particular development*.” PUB. RES. CODE § 30253(c) (emphasis added).
18 The Port’s own EIR concluded that the PMPA will violate not only the State Implementation Plan (SIP)
19 for the federal Clean Air Act but also Regional Air Quality Standards (RAQS); individually and
20 cumulatively, both the Phase 3 expansion and the Hilton expansion will dangerously pollute the air.
21 See, e.g., AR 224:2898 Supp. R., Ex. 2, p. 490; AR 51:485 (showing inconsistency for each expansion).

22 Of course, polluting the air isn’t the PMPA’s only problem. The tremendous increase in the
23 demand for parking generated by both the SDCC and the Hilton expansions will also be huge problem.
24 “The location and amount of new development should maintain and enhance public access to the coast
25 by . . . (4) providing *adequate parking facilities* or providing substitute means of serving the

26
27 ³³ Any doubts on issues involving public access and recreation should be resolved in favor of more
28 access and recreational opportunities. The Coastal Act “shall be liberally construed to achieve its
purposes and objectives.” PUB. RES. CODE § 30009. Among the Act’s goals is “[m]aximiz[ing] public
access to and along the coast and maximiz[ing] public recreational opportunities in the coastal zone.
. . .” *Id.*, § 30001.5(c).

1 development with *public transportation*. . . .”³⁴ PUB. RES. CODE § 30252 (emphasis added). Both the
2 Phase 3 expansion and the Hilton expansion were found by the Port and its team of environmental
3 experts to be inconsistent on this point. AR 51:484.

4 Though the Commission revised its findings to cover its tracks in light of Plaintiff’s criticisms,
5 the Commission did not make any revised findings focused on the subject of adverse effects generally
6 or on air pollution or parking specifically. Indeed, the revised findings make no mention of Public
7 Resources Code Section 30250, 30252, or 30253 despite citing several other specific policies within
8 Chapter 3. *See* AR 261:3727-3729 & 3740. As a consequence, even if there were no inconsistencies
9 between the PMPA and the Coastal Act on public-access, recreation, or visual grounds, the Phase 3
10 expansion and the Hilton expansion would each violate the Act’s policies against adverse effects, air
11 pollution, and parking problems.

12 The Commission did discuss a Chapter 8 policy that’s similar to the three discussed above from
13 Chapter 3: Section 30708(a). *See* AR 261:3729. Even if the failure to make findings that the PMPA
14 is consistent with those three policies in Chapter 3 could be ignored, which no legal authority allows
15 due to the presumption against superfluous statutes, the evidence to support a finding of consistency
16 under Section 30708(a) does not exist. In fact, overwhelming substantial evidence proves the
17 inconsistency.

18 Section 30708(a) requires all port-related developments to be located, designed, and constructed
19 so as to “[m]inimize substantial adverse environmental impacts.” But in the record there is *no evidence*
20 *to support* a finding of consistency under Section 30708(a). The evidence – provided by the Port in its
21 expert-prepared EIR and never disputed while the matter was before the Commission – is *180 degrees*
22
23

24 ³⁴ Insufficient parking is an adverse environmental impact. *See Taxpayers for Accountable School*
25 *Bond Spending v. San Diego Unified School Dist.*, 215 Cal. App. 4th 1013, 1051 (2013) (disagreeing
26 “with the broad statement . . . that a parking shortage is merely a social inconvenience and can never
27 constitute a primary physical impact on the environment. . . . [C]ars and other vehicles are physical
28 objects that occupy space when driven and when parked. Therefore, whenever vehicles are driven and
parked, they naturally must have some impact on the environment. The fact that a vehicle’s impact may
be only temporary (e.g., only so long as the vehicle remains parked) does not preclude it from having
a physical impact on the environment around it. Therefore, as a general rule, we believe CEQA
considers a project’s impact on parking of vehicles to be a physical impact that could constitute a
significant effect on the environment.”).

1 *opposite*.³⁵ See AR 224:2898 Supp. R., Ex. 2, p. 49 (finding individual/cumulative air-quality impacts)
2 & p. 50 (finding individual/cumulative parking impacts); AR 51:484 (showing Phase 3 and Hilton
3 expansions' inconsistencies with parking standards) & 485 (showing Phase 3 and Hilton expansions'
4 inconsistencies with air-quality standards); 241:3631 (listing numerous significant adverse
5 environmental impacts *other than* air quality and parking).

6 So whether it's because the Commission failed to make the necessary findings under Chapter
7 3 as they related to a long list of significant adverse environmental impacts, or because the Commission
8 has no substantial evidence to support a conclusion that the PMPA is consistent with Chapter 8's
9 prohibition against development with such impacts, the Commission's consistency determination must
10 be invalidated. Unable to make the requisite findings, the Commission was precluded from certifying
11 the PMPA as consistent with the Coastal Act. See CAL. CODE OF REGS., tit. 14, § 13632(d) (allowing
12 certification "only if" findings of consistency with Chapter 3 and Chapter 8 policies can be made).

13 **C. The Port Master Plan Amendment Was Significantly Changed by the Commission**
14 **after the Port Approved It, and the Changes Were a Condition of the Consistency**
15 **Certification, in Violation (Twice) of the Coastal Act**

16 The Coastal Act explicitly *prohibits* changes made to the PMPA as a condition of its approval
17 by the Commission. As noted earlier, the Port's governing body was authorized to adopt the PMPA
18 only *after* giving public notice, holding a public hearing, and considering the public's input. PUB. RES.
19 CODE § 30714. "The commission may not modify the plan as submitted as a condition of certification."
20 *Id.* That, of course, is exactly what the Commission did here. The many substantial changes made by
21 the Commission without public input, no doubt done so it could create some "cover" for itself and
22 approve the PMPA without disappointing the special interests demanding it, effectively disenfranchised
23 the public and thus constituted an abuse of discretion. *Cf.* PUB. RES. CODE § 30006 (declaring that
24 "public has a right to fully participate in decisions affecting coastal planning," "achievement of sound
25 coastal conservation and development is dependent upon public understanding and support," and
26 "planning and implementation of programs for coastal conservation and development should include
27 the widest opportunity for public participation").

28 ³⁵ Plaintiff does not expect the opposing parties to deny that air pollution is an environmental impact.

1 The version of the PMPA that the Port’s governing body approved was, at the time of its
2 approval by that body, last updated in May 2012. *See* AR 224:2898 Supp. R., Ex. 1, p. 188. By the
3 time of the Commission’s hearing on October 10, 2013, the PMPA had been modified in December
4 2012 and again on October 7, 2013 – both after the Port’s September 2012 approval of the May 2012
5 version.³⁶ *See* AR 178:2517 (Dec. 2012 version) & 192:2797 (Oct. 7. 2013 version).

6 The Commission’s deputy director in the San Diego office (and two of her colleagues) did admit
7 at the subsequent hearing on the revised findings – on February 13, 2014 – that “*there were fairly*
8 *significant revisions necessary* given this was a change from the findings supporting denial.”³⁷ Feb.
9 13, 2014 Tr., 5:3-5 (emphasis added). Staff made this comment after detailing the “number of
10 additional public access and recreational improvements” to the Phase 3 expansion that the Port had
11 incorporated “*at the time of* the [October 2013] hearing.” *See id.*, 2:16-23 (emphasis added). The
12 changes included removing a portion of the structure of the expanded SDCC, and increasing access to
13 and use of the rooftop park. *See generally id.*, 2:24-4:22.

14 Further proof of the significance of the last-minute changes to the PMPA is contained in e-mail
15 communications between the Commission’s staff and representatives of the Port – all behind the scenes
16 – in the days leading up to the October 10, 2013 hearing. At 9:29 p.m. on September 26, 2013, the
17 Commission’s Deputy Director Sherilyn Sarb e-mailed a “Final proposal” to Port representatives and
18 gave them reason to believe that the staff might be willing to flip-flop on its recommendation:

19 We believe if this language, along with the revision to the bldg. (the
20 notch) and all the other changes to the public access program, plan text
21 and projects list that have been agreed to by Port staff are incorporated
22 into the Port Master Plan amendment request, CCC staff could
23 recommend approval.

24 AR 290:3960. That proposal fizzled because, according to Port representatives, “we just ran out of
25 time.” *Id.*, 291:3963. Nonetheless, the proposal was important enough that the chair of the Port’s

26 ³⁶ Additionally, the South Embarcadero Public Access Program (“SEPAP”) and the San Diego
27 Convention Center Public Access Program (“SDCCPAP”) were both “incorporated into the [Port
28 Master] plan by reference” *and* were both revised after the Port’s governing body approved the PMPA
on September 19, 2012. *See* AR 178:2525 (end of paragraph in right-hand column), 110:1119 (SEPAP
showing “Revised 9/20/2013”), 111:1130 (SDCCPAP showing “Revised 10/7/13”).

³⁷ As noted earlier, during the October 10, 2013 hearing, Plaintiff warned the Commission that it could
not make changes to the PMPA after the Port approved it because doing so would exclude the public.
Oct. 10, 2013 Tr., 49:1-50:8.

1 governing board, Ann Moore, was “going back to her Board on Tuesday morning [October 1, 2013] and
2 we will get together thereafter and hopefully come up with language that is acceptable.” *Id.* The Port’s
3 “Final Document” – one that “we hope will allow staff to recommend our project” – was e-mailed to
4 the Commission’s staff a few days later, with Ms. Moore copied on the message. *Id.*, 292:3964. This
5 evidence amply demonstrates that the Commission’s staff and the Port were in full-blown negotiations
6 mode – entirely in secret – on revisions so important that they required the Port’s entire governing body
7 to weigh in.

8 The Coastal Act allowed only a “yea” or “nay” vote on the original version of the PMPA that
9 the Port submitted for certification. The final version was modified substantially and repeatedly in order
10 to garner the Commission’s support. The Port’s governing body did not hold a single *public* hearing
11 to discuss the revisions, so it received zero public input on the changes. It was an abuse of discretion
12 for the Commission to let that happen.

13 **D. The Commission’s Executive Director Failed to Make a Determination on the**
14 **Materiality of the Revisions to the Port Master Plan Amendment after the Port**
15 **Approved It, in Violation of the Coastal Act; Either Way, the Regulation Allowing**
16 **the Determination Is Invalid**

17 Not only was the PMPA inconsistent with the Coastal Act, and not only was it wrong for the
18 Commission to condition its approval of the PMPA on changes made after the Port submitted it for
19 certification, but the process by which it was repeatedly and substantially changed also violated the
20 Coastal Act. The Commission’s certification in violation of the prescribed procedure constitutes
21 another abuse of discretion.

22 With so many revisions to the PMPA after the Port’s governing body approved it on September
23 19, 2012, the Commission’s executive director was ostensibly required to determine, *before* the
24 Commission voted to certify it, “if such amendment is material *and* includes changes that have not been
25 the subject of public review and comment before the Commission.” CAL. CODE OF REGS., tit. 14, §
26 13634 (emphasis added). “If the executive director finds that both of these factors exist, the amendment
27 shall not be considered by the Commission unless a new public hearing is scheduled with a view toward
28

1 allowing full public participation and attendance at the hearing on the amendment as required by
2 Section 30712.” *Id.*

3 The Commission voted to certify the PMPA at the end of the hearing on October 10, 2013. *See*
4 Oct. 10, 2013 Tr., 197:10-18. As the transcript of oral proceedings confirms, the Commission’s
5 executive director made no such determination during the hearing. *See id.*, 176:21, 176:24-25, 178:2-3,
6 193:18-194:4, 194:22-195:5, 195:16-17, 195:20-21, 195:23, 196:3-7, 196:11-12, & 196:15 (executive
7 director’s statements during hearing). Nothing elsewhere in the record appears to be a determination
8 prior to the Commission’s vote.³⁸

9 The regulation authorizing changes to the PMPA based on the executive director’s determination
10 of insignificance is invalid. It directly conflicts with Public Resources Code Section 30714’s explicit
11 prohibition against conditioning a consistency certification on the making of modifications. The
12 Commission, however, does not have the power to adopt regulations that contradict the governing
13 legislative authority. As the Court of Appeal explained more than 50 years ago:

14 In the absence of valid statutory authority, an administrative agency may
15 not, under the guise of a regulation, substitute its judgment for that of the
16 Legislature. It may not exercise its sub[-]legislative powers to modify,
alter or enlarge the provisions of the legislative act which is being
administered.

17 *Harris v. Alcoholic Beverage Control Appeals Bd.*, 228 Cal. App. 2d 1 (1964) (invalidating regulation
18 that imposed a requirement removed by legislation). Yet the regulation purporting to empower the
19 executive director to allow the repeatedly modified PMPA to proceed to a vote flies in the face of the
20 statutory prohibition against such conduct by the Commission. Likewise, it cannot be squared with the
21 requirement that the PMPA be adopted by the Port’s governing body and submitted to the Commission
22 *after* the Port has given public notice, held a public hearing, and considered the public’s input. PUB.
23 RES. CODE § 30714.

24 Even if the regulation were lawful, the Court should invalidate the Commission’s consistency
25 certification because the executive director did not make the necessary determination. Furthermore, had
26 he done so, his determination would not be supported by substantial evidence because (i) the

27 _____
28 ³⁸ As mentioned earlier, Plaintiff (through counsel) attempted to prevent the Commission from voting
so the public could comment beforehand on the changes being made. *See* Oct. 10, 2013 Tr., 197:2-8.

1 indisputable evidence shows that the PMPA was revised multiple times after the Port’s governing body
2 approved it and (ii) the Commission’s own staff deemed the changes “fairly significant.” Feb. 13, 2014
3 Tr., 5:3-5. The revised PMPA must go back to the Port’s governing body so that the public has an
4 opportunity to weigh in on the changes *in front of that body*. Circumventing members of the public
5 on matters affecting their tidelands and waterfront is an abuse of discretion.

6 **E. The Port Master Plan Amendment Makes Future Developments Unappealable, in**
7 **Violation of the Coastal Act**

8 The PMPA as certified by the Commission purports to make any future coastal development
9 permit issued by the Port for the SDCC’s Phase 3 expansion *not* appealable.³⁹ See AR 262:3763
10 (“N[o]” appearing under “App[ea]l” column for “CONVENTION CENTER PHASE III”). According
11 to the Port’s EIR, however, the Phase 3 expansion “includes . . . up to 45,000 square feet of *visitor-*
12 *servicing retail* opportunities. . . .” See AR 224:2898 Supp. R., Ex. 7, pp. 30 (emphasis added) & 158
13 (noting expansion will include “Visitor-Servicing Retail” facilities); see also *id.*, 261:3713 (noting
14 expanded SDCC’s “visitor-servicing uses such as retail”) & 163:2485 (noting “visitor-servicing retail”
15 accessible from the interior and exterior of expanded SDCC). The Phase 3 expansion will take place
16 in an area designated by the Port as “Commercial Recreation,” where “developments are intended to
17 serve tourism with a balance of commercial and public amenities, and include hotels, *restaurants*,
18 *shopping*, marinas, sport fishing, and convention center.” See AR 224:2898 Supp. R., Ex. 7, pp. 111,
19 114 & 270 (emphasis added).

20 Under the Coastal Act, shopping facilities “not principally devoted to the sale of commercial
21 goods utilized for water-oriented purposes” are appealable. PUB. RES. CODE § 30715(a)(4). Nothing
22 in the record suggests that the retail facilities that’ll be housed in the expanded SDCC will be “water-
23 oriented.” Furthermore, back in 2013, the Commission’s staff argued extensively and persuasively that
24 the term “shopping” under Public Resources Code Section 30715(a)(4) includes restaurants. See
25 LOARI/RJN, Item 6, pp. 17-22 (explaining why Port permits for restaurants are appealable). In making
26

27 _____
28 ³⁹ The Commission’s staff report acknowledges that any permits issued by the Port for Phase 3 are not
identified as appealable under the PMPA. *Id.*, 261:3721.

1 its case, staff pointed out that the Port has – with the exception of two anomalies – always considered
2 restaurants to be appealable projects. *Id.*

3 Because the Phase 3 expansion will include visitor-serving retail facilities like restaurants and
4 shopping facilities, any coastal development permit that the Port may issue for the expansion must be
5 appealable to the Commission. The Commission’s certification of the PMPA without that protection
6 for the public was an abuse of discretion.

7 **F. The Commission’s Conclusion that Feasible Mitigation for the Impacts of, and**
8 **Feasible Alternatives to, a Contiguous Convention Center Expansion Do Not Exist**
9 **Is Not Supported by Substantial Evidence, in Violation of the Coastal Act and**
10 **CEQA**

11 Before certifying the PMPA as consistent with the Coastal Act, the Commission was required
12 to make all the findings required by CEQA. *See* CAL. CODE OF REGS., tit. 14, § 13632(d) (requiring
13 Commission to make “any findings required pursuant to [CEQA]”). Because the *contiguous* expansion
14 of the SDCC will have significant adverse environmental effects, as discussed above, CEQA required
15 the Commission to make a finding that there is no more feasible mitigation to reduce the expansion’s
16 environmental impacts to a level of insignificance, and a finding that there is no feasible alternative to
17 the expansion. PUB. RES. CODE § 21081(a)(1) & (3); CAL. CODE OF REGS., tit. 14, § 15091(a)(1) & (3).
18 Additionally, CEQA required the Commission to make a finding stating the reasons that justify going
19 forward with such an environmentally damaging proposal. PUB. RES. CODE § 21081(b); CAL. CODE OF
20 REGS., tit. 14, § 15093(b). Under CEQA, these are separate findings that must both be made; one
21 without the other is legally insufficient. CAL. CODE OF REGS., tit. 14, §§ 15091(f), 15093(c).

22 Even after all the private haggling over revisions to the PMPA, the Commission’s staff
23 continued to believe that a bridge was necessary to mitigate the serious harm to public access and
24 recreational opportunities caused by the Phase 3 expansion. *See, e.g.*, AR 190:2795. The Port studied
25 the bridge in its EIR but insisted that there wasn’t enough money to pay for it. *See e.g.*, Oct. 10, 2013
26 Tr., 13:1-14:17, 138:1-8. On September 20, 2013, staff asked the Port to substantiate its \$41.9 million
27 estimate for the bridge, and the Port responded with a cursory e-mail providing a terse five-line estimate
28 that was more than four years old. AR 288:3957. The Port claimed it was using a “prudent estimate,”

1 but then it *falsely* stated that the budget for the Phase 3 expansion was \$550 million. *Id.* In truth, the
2 City had authorized bonds up to \$575 million.⁴⁰ *See City of San Diego v. Shapiro*, 228 Cal. App. 4th
3 756, 764 (2014) (“*Shapiro*”) (noting amount of bonds authorized for expansion).

4 The evidence of the bridge’s economic infeasibility is insubstantial. “The fact that an alternative
5 may be more expensive or less profitable is not sufficient to show that the alternative is financially
6 infeasible. What is required is evidence that the additional costs or lost profitability are *sufficiently*
7 *severe as to render it impractical to proceed with the project.*” *Uphold Our Heritage v. Town of*
8 *Woodside*, 147 Cal. App. 4th 587, 598 (2007) (emphasis added). “Accordingly, the question is not
9 whether [the developer] can afford the proposed alternative, but whether the *marginal costs* of the
10 alternative as compared to the cost of the proposed project are *so great that a reasonably prudent*
11 *property owner would not proceed* with the rehabilitation.” *Id.* at 600 (emphasis added). “The agency
12 may not simply accept at face value the project proponent’s assertions regarding feasibility.” *Save*
13 *Round Valley Alliance v. County of Inyo*, 157 Cal. App. 4th 1437, 1461 (2007).

14 The record here lacks any evidence about how a reasonably prudent developer of an expanded
15 SDCC would view the additional costs of the bridge. The only evidence that the Commission
16 considered on the subject of economic feasibility is the Port’s self-serving assertion that it couldn’t
17 afford the bridge – an assertion built on a \$25 million lie about the size of the Phase 3 expansion’s
18 budget. *Cf.* AR 288:3957 (four-year-old estimate claiming \$550 million budget); *Shapiro, supra*, 228
19 Cal. App. 4th at 764 (noting \$575 million budget). There is nothing in the record examining, much less
20 substantiating, the proposition that a \$16.9 million shortfall in a \$575 million expansion renders the
21 development infeasible. The Commission abused its discretion by allowing the Port to escape having
22 to build the bridge due to a bogus claim of economic infeasibility.

23 Turning from mitigation to alternatives, the CEQA Guidelines state that “[t]he key question and
24 first step in analysis [of alternatives] is whether any of the significant effects of the project would be
25 avoided or substantially lessened by putting the project in another location.” CAL. CODE OF REGS., tit.
26 14, § 15126.6(f)(2)(A). The Commission’s staff believed very strongly that the Port did not do an

27
28 ⁴⁰ At least two Commissioners were told by the Port that it liked the bridge but there was no money to pay for it. AR 221:2894, 222:2896.

1 adequate job of studying alternative locations for an expansion and was merely expressing a *preference*
2 for a contiguous expansion without any evidence of *genuine need*. See, e.g., AR 163:2495-2496
3 (rejecting Port’s claim that Phase 3 expansion had to be contiguous). A former member of the
4 governing bodies of the Commission and the Port made a similar point, as did a staunchly pro-SDCC
5 developer. *Id.*, 30:350-352 (explaining that expansion on Tailgate Park would meet 89% of unmet
6 demand for convention space), 31:356 (noting Port’s expert report stated “Preferred to have Contiguous
7 Space”). Even the SDCC Corporation’s “Customer Advisory Board” had selected two off-waterfront
8 sites as the preferred location for the expansion and rejected the contiguous option. *Cf.* AR 224:2898
9 Supp. R., Ex. 8, pp. 4-5 (describing option 1 as “Above Rail Yard,” Option 5 as “Port Site Contiguous,
10 Option 7 as “Tailgate Park,” and noting that “Options 1 and 7 were approved by the Committee”).

11 As shown by the Commission’s staff, by a former member of the Commission’s and the Port’s
12 governing bodies, and by the pro-SDCC developer, among others, the only evidence offered in support
13 of the Port’s “Give Me Contiguous or Give Me Death” mantra actually shows the off-waterfront facility
14 satisfying almost all of the unmet customer demand *without any of the adverse coastal impacts*. Such
15 evidence is not substantial enough to sustain – indeed, it belies – the opposite conclusion.

16 In sum, the Commission’s certification of the PMPA as consistent with CEQA fails for two
17 independent reasons. First, the Commission made findings that the pedestrian bridge is infeasible and
18 that there are no feasible alternatives to the contiguous expansion, but those findings are not supported
19 by substantial evidence and are therefore fatal; for either finding, the lack of substantial evidence
20 constitutes an abuse of discretion. Second, the Commission abused its discretion with its wholesale
21 failure to make a finding that the benefits of the contiguous Phase 3 expansion are worth the extensive
22 adverse environmental harm it will impose upon the coast.⁴¹ See PUB. RES. CODE § 21081(b) (requiring
23 finding that specifies benefits outweighing project’s significant environmental impacts); CAL. CODE OF
24 REGS., tit. 14, § 15093(b) (requiring statement of overriding considerations). The Commission pointed

26 ⁴¹ Even though the findings by the Commission’s staff of significant impacts on public access,
27 recreation, and coastal views were ignored by the Commissioners, the revised findings *never even*
28 *mention* the long list of other significant environmental impacts caused by the PMPA. See AR
261:3743 (listing significant, unavoidable impacts identified by Port). Consequently, the lack of
substantial evidence to support the revised findings on public access, recreation, and views is beside
the point.

1 out that the Port found the benefits to outweigh the adverse environmental impacts. AR 261:3744. But
2 *nowhere did the Commission* make that finding for itself – another fatal error.

3 Because each of these findings had to be made and supported with substantial evidence, the
4 Commission has abused its discretion by failing to do as the law required. *See* CAL. CODE OF REGS., tit.
5 14, § 15091(f) (requiring finding thereunder and under Section 15093), § 15093(c) (requiring finding
6 thereunder and under Section 15091). The PMPA’s certification must therefore be invalidated not only
7 on Coastal Act grounds but equally on CEQA grounds.

8 **G. At Least Six Commissioners Voted on the Port Master Plan Amendment but Failed**
9 **to Fully and Timely Disclose *Ex Parte* Communications with the Port, in Violation**
10 **of the Coastal Act**

11 The Coastal Act strictly regulates *ex parte* communications between Commissioners and
12 interested persons. “*Ex parte* communication” means any oral or written communication between any
13 of the Commissioners and any interested person on a matter pending before the Commission but outside
14 a public hearing. PUB. RES. CODE § 30322(a). “Interested person” refers to an applicant, an employee
15 or other agent of an applicant, or any paid representative of an applicant; the definition extends to
16 representatives of civic, environmental, and similar organizations. *Id.*, § 30323(a)-(c). Unless a proper
17 disclosure of an *ex parte* communication is made, both in terms of timing and substance, each of the
18 Commissioners who participated in the *ex parte* communication (and knew he or she was engaged in
19 it) was prohibited from voting on, or attempting to influence the vote on, the PMPA consistency
20 certification. *Id.*, § 30327(a).

21 On October 1, 2013 – nine days before the Commission’s October 10, 2013 hearing on the
22 PMPA – Commissioners Mitchell and Bochco had separate *ex parte* communications concerning the
23 PMPA. Oct. 10, 2013 Tr., 15:5-24. The Coastal Act required each of them to submit written *ex parte*
24 disclosures *within seven days after* their communications occurred because the hearing was more than
25 a week away. *See* PUB. RES. CODE § 30324(a). There is no written disclosure from either of them in
26 the AR’s index (and Plaintiff has not stumbled across it during examination of the record).

27 Making matters worse, apparently Commissioners Mitchell and Bochco both went over a
28 “PowerPoint presentation” during their *ex parte* communications (*see* Oct. 10, 2013 Tr., 15:5-24), but

1 the AR's index shows no PowerPoint presentation having been given to any of the Commissioners.
2 That's a significant omission because Commissioner Garcia also stated that he discussed a PowerPoint
3 presentation during his *ex parte* communication. *Id.*, 19:7-16. To be a sufficient disclosure of an *ex*
4 *parte* communication, however, the Commissioners were required to provide "[a] **complete description**
5 of the content of the communication, **including the complete text of any written material** that was a
6 part of the communication." PUB. RES. CODE § 30324(b)(1)(C) (emphasis added). None of these three
7 provided anything close to a "complete description" of the PowerPoint presentation and certainly didn't
8 provide its "complete text."

9 On October 3, 2013, Commissioner Vargas participated in an *ex parte* communication at the
10 SDCC. AR 222:2895-2896. His written disclosure stated that he "went through a briefing booklet
11 **previously provided to staff**," but he neglected to include the "complete text of any written material that
12 was a part of the communication."⁴² *Cf. id.* (emphasis added); PUB. RES. CODE § 30324(b)(1)(C)
13 (requiring such information in *ex parte* disclosures). His oral disclosure of the communication during
14 the hearing on October 10, 2013, said even less: "I had a conversation with the same folks that the other
15 ten commissioners seems [*sic*] to have, and . . . I received a briefing on the Port Master Plan
16 Amendment." Oct. 10, 2013 Tr., 17:19-18:1. Just 90 minutes after Commissioner Vargas had his
17 meeting, Commissioner Cox also participated in an *ex parte* communication at the SDCC. AR
18 221:2894. Though his written disclosure mentioned the same written materials that Commissioner
19 Vargas mentioned, the text of those materials is never described. *Id.*

20 Commissioner Brennan stated on the record that his *ex parte* disclosure for the PMPA was "on
21 file," but the AR's index shows no disclosure for him. Without identifying when, where, or with whom
22 he held the *ex parte* communication, he stated only that his "discussion was the same substance reported
23 by the other commissioners on the dais." Oct. 10, 2013 Tr., 17:22-25.

27 ⁴² Since the only briefing booklet in the record is Item 234, which the Commission's own AR index
28 describes as a "Port District Submittal to CCC at October 10, 2013 Hearing," it cannot possibly be the
"briefing booklet" that Commissioner Vargas describes as "previously provided to staff." Other items
provided to staff by the Port before October 10 2013, can be found everywhere in the index.

1 The vote to certify the PMPA as consistent with the Coastal Act and in compliance with CEQA
2 was 11-0. AR 236:3510. However, six of the 11 – and possibly seven⁴³ – were disqualified from
3 participating in the vote because their *ex parte* communications were improperly reported under Public
4 Resources Code Section 30324 in one way or another and were therefore illegal. *See* PUB. RES. CODE
5 § 30327(a) (prohibiting each Commissioner from voting on or using his/her position to influence
6 Commission decision if he/she has knowingly had *ex parte* communication not properly reported under
7 Section 30324). Failing to make the required disclosure denied Plaintiff and other members of the
8 public of their right to a fair hearing under Code of Civil Procedure Section 1094.5(b) and was therefore
9 contrary to the procedures prescribed by law. Moreover, one violation is enough to invalidate an
10 approval, but at the October 2013 meeting alone six (if not seven) of the Commissioners had each
11 committed at least one *ex parte* violation. With only five (and maybe as few as four) members of the
12 Commission eligible to vote, there was no quorum, the Commission had no authority to act, and the
13 certification vote was invalid. *Id.*, § 30315 (requiring a majority of appointed members for a quorum
14 and, with a quorum present, a majority vote of members present).

15 **VI. SUMMARY**

16 For all the foregoing reasons, or any of them, the Court is urged to find that the Commission
17 abused its discretion and therefore invalidate the PMPA’s consistency certification.

18 Date: September 30, 2016.

Respectfully submitted,

19 BRIGGS LAW CORPORATION

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21 By:

Cory J. Briggs

22 Attorneys for Plaintiff and Petitioner San Diego Navy
23 Broadway Complex Coalition

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25
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27 ⁴³ Only 10 of the 11 Commissioners admitted to having *ex parte* communications. The disclosure by
28 Commissioner Vargas indicates that Commissioner Shallenberger, who did not provide any oral or
written report of such a communication, in fact participated in at least one. She is the tenth person in
his “*other ten* commissioners” comment. *See* Oct. 10, 2013 Tr., 17:19-18:1 (emphasis added).