

**CALIFORNIA STATE LANDS
COMMISSION**

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Established in 1938

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September 9, 2022

File Ref.: G09-00

Orange County Parks
Tom Starnes, Orange County Parks Director
13042 Old Myford Road
Irvine, CA 92602
Via Email <Tom.Starnes@ocparks.com>

Subject: Public Trust Violation Located at APN 439-051-14, Upper Newport Bay
Ecological Preserve, County of Orange

Dear Mr. Starnes,

The California State Lands Commission (Commission) is aware that a private party has erected a chain link fence on Assessor Parcel Number 439-051-14 (Public Trust Parcel) in the Upper Newport Bay Ecological Preserve. The fence privatizes public trust land and thus violates the County's statutory trust grant.

In 2003, the Orange County Board of Supervisors adopted a resolution¹ that permanently dedicated the Upper Newport Bay Nature Preserve as public trust lands to be held by the County in trust pursuant to its legislative trust grant. In 2004, the Commission approved the dedication, stating in its analysis that, "Staff believes that it is in the statewide public's best interest to permanently dedicate the Upper Newport Bay Nature Preserve as public trust lands to be held by the County, in trust, thereby allowing for public use, enjoyment and protection of this property, as well as, supporting the Upper Newport Bay Ecological reserve, with its unique natural resources".

The California Legislature accepted the dedication through [Chapter 361, Statutes of 2004](#). This statute amended the County's statutory trust grant to state that the property is "accepted as assets of the public trust and shall be held in trust by the County of Orange, pursuant to the provisions of this act."

¹ Orange County Board of Supervisors Resolution No. 03-385, adopted December 16, 2003.

The parcels are to remain in perpetuity as public trust lands that create an open space buffer to the Ecological Reserve. The dedication also allows the County to use trust revenues from other granted trust lands to operate and maintain the parcels. A 2021-2022 County of Orange Grand Jury Report described the history of the property, along with an attempted 2021 sale by the County and the current privatization of the parcel. The Report found that “[b]y allowing the owner-installed fence surrounding APN 439-051-14 to remain in place, the County has permitted the homeowner to inappropriately privatize this parcel at no cost to the homeowner and in a manner inconsistent with the well-established public trust designation.” (Finding F5.) The Report recommended that “the Orange County Board of Supervisors should order the removal of the chain link fence surrounding APN 439-051-14 along with any other encroachments on that parcel to return the land to its natural (original) state.” (Recommendation R7.)

Staff agrees with the Grand Jury recommendation. The County, as a trustee, is responsible for managing these lands in a manner that is consistent with the common law Public Trust Doctrine and the terms of its legislative trust grant, as well as to administer the trust solely in the interest of its beneficiaries, the people of California. The privatization of the Public Trust Parcel resulting from the fence is a violation of the County's legislative trust grant and associated fiduciary duties, and a violation of the Public Trust Doctrine.

Section 1, subdivision (a) of Chapter 526, Statutes of 1919, as amended by [Chapter 415, Statutes of 1975](#), requires trust property to be used “for purposes in which there is a general statewide interest[,]” and that section lists the acceptable uses of the property. The privatization of the parcel for the benefit of an adjacent landowner is not in the statewide public's interest and is not an authorized purpose under Section 1.

[Public Resources Code section 6009](#) states, “Grantees are required to manage the state's tidelands and submerged lands consistent with the terms and obligations of their grants and the public trust, without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or excises.” The presence of the fence and privatization of the parcel violate the County's obligation not to subjugate statewide interest to local concerns.

[Public Resources Code section 6009.1](#) lists the fiduciary duties incumbent on the County to the State in its management of granted public trust lands. The presence of the fence and privatization of the parcel violates the County's fiduciary duties, including:

- “The duty to administer the trust solely in the interest of the beneficiaries [the people of the state]” (Section 6009.1, subd. (c)(5).)
- “The duty to not use or deal with trust property for the trustee's [County's] own profit or for any other purpose unconnected with the trust” (Section 6009.1, subd. (c)(7).)
- “The duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property” (Section 6009.1, subd. (c)(8).)

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The Public Trust Doctrine provides that lands subject to the public trust may only be used for certain purposes, including public recreation, fishing, maritime commerce, and environmental preservation. (See *Marks v. Whitney* (1971) 6 Cal.3d 251, 259.) The privatization of the property is not a permissible public trust use and is a violation of the Public Trust Doctrine.

For all of these reasons, the County must remove the fence immediately from the Public Trust Parcel.

The contemplated 2021 sale of the Public Trust Parcel would be a flagrant violation of the parcel's dedication to the State, the County's trust grant, and the Public Trust Doctrine. While the sale did not occur, the Grand Jury Report describes steps that were taken to sell the property, including a January 2021 Board of Supervisors vote to proceed with the sale. The Report found that the "Board of Supervisors Staff Report and the OC Park Commission Staff Report prepared for the 2021 potential sale of Newport Beach Back Bay parcel APN 439-051-14 were conclusory, incomplete, and contained inaccurate statements." (Finding F2.) Staff is concerned that the County may not have sufficient safeguards to ensure the management of its granted lands is consistent with its legal and fiduciary obligations.

Please provide Commission staff with a written explanation of how the County will ensure that the fence is expeditiously removed from the Public Trust Parcel and that the land is restored to its natural state. Commission staff are happy to assist the County if it has questions regarding its responsibilities managing property as the State's trustee.

Sincerely,



Reid Boggiano
Granted Lands Program Manager

cc: Andrew Vogel, Supervising Attorney General
Frank Kim, Executive Officer, County of Orange
Jennifer Lucchesi, Executive Officer, State Lands Commission
Seth Blackmon, Chief Counsel, State Lands Commission
Sheri Pemberton, Chief of External Affairs, State Lands Commission
Ben Johnson, Staff Attorney, State Lands Commission