

ORIGINAL

Decision SZ OS 078 AUG 18 1982

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

HARBOR CARRIERS, INC.,

Complainant,

vs

GOLDEN GATE BRIDGE, HIGHWAY AND  
TRANSPORTATION DISTRICT and the  
BLUE AND GOLD FLEET,

Defendants.

Case 82-01-02  
(Filed January 13, 1982;  
amended February 1, 1982)Edward Hegarty, Attorney at Law, for  
complainant.Duane Garrett, Attorney at Law, for  
Golden Gate Bridge, Highway, and  
Transportation District, and  
Jerry Spolter and Thomas Mannion,  
Attorneys at Law, for Blue and Gold  
Fleet, defendants.Leland Jordan, City Attorney, for City  
of Sausalito, intervenor.Philip Scott Weismehl, Attorney at Law,  
and Richard Brozosky, for the  
Commission staff.

FINAL OPINION

I. Introduction

In this decision we determine that Golden Gate Bridge, Highway and Transportation District (District) must allow the use of its Sausalito passenger ferry terminal by Harbor Carriers, Inc. (Harbor) for Harbor's service between Sausalito and Fisherman's Wharf in San Francisco, with a schedule compatible with District's. We find that the alternate sites for Sausalito, proposed by District, are not reasonable.

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Our two previous decisions in this case dealt with whether defendants District and Blue and Gold Fleet (Blue and Gold) should be ordered to cease and desist from operating ferry service between Pier 39 in San Francisco and District's dock in Sausalito. In Decision (D.) 82-02-066 (February 4, 1982) we ordered such service to cease temporarily (see D.82-03-044 dated March 2, 1982 which clarified D.82-02-066 and granted a limited rehearing). Then in D.82-07-022 (July 7, 1982) we made our order permanent after holding a full hearing on the issue. ✓

We now pass to other issues presented to us by the Legislature under Public Utilities (PU) Code § 562, effective January 1, 1982. Subsection (a) of § 562 reads:

"Whenever the commission, on its own motion or upon the complaint of a public utility, finds that public convenience and necessity require the use by a public utility of all, or any part, of the passenger vessel terminal facilities operated or controlled by the Golden Gate Bridge, Highway and Transportation District, and the district and the public utility are unable to agree upon the use or the terms and conditions or compensation therefor, the commission shall by order direct that the use by the public utility be permitted, and prescribe a reasonable compensation and reasonable terms and conditions to be charged and observed, including, but not limited to, all related costs of construction, capital improvement, leasing or rental, and maintenance."

Subsection (b) gives this Commission special jurisdiction over the District for purposes of § 562. Harbor filed this complaint to invoke such jurisdiction. ✓

There is no dispute that under § 562(a) we must first determine whether public convenience and necessity require use by

Harbor of District's Sausalito ferry terminal, and, if the answer to that question is "yes," we must then determine terms, conditions, and compensation for its use. This is not a redetermination of whether Harbor's Sausalito-San Francisco service<sup>1</sup> is required by public convenience and necessity; the question is whether District's dock, or some other site, should be used. District contends that reasonable alternate sites are available in Sausalito; Harbor maintains that all of the alternate locations are unsuitable for one reason or another.

If we find that District's terminal must be used, we then have the task of determining compensation and conditions of its use.

## II. District's Dock Versus Alternate Sites

### History

To understand what issues are involved, and before proceeding to physical and operational questions, the history of the relationship between Harbor and Sausalito must be understood.

Faced with increasing congestion from tourism, Sausalito has, over the years, sought to preserve the appearance and character of its downtown. Sausalito's long-standing policy has been to avoid over-expansion of its downtown commercial area and to "provide public access, including visual access, to the [San Francisco Bay] water to the greatest extent feasible." (Sausalito's general plan, quoted in testimony of Jerry Cormack, Sausalito's planning director, Exhibit (Exh.) 26.)

After Harbor obtained its certificate for San Francisco-Sausalito ferry service from this Commission in 1968, it applied to Sausalito for a conditional use permit to locate a terminal in the downtown area. Its early applications were denied. Finally, Harbor sued Sausalito over the most recent denial. In 1974 the Marin County

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<sup>1</sup> Authorized by D.73811 dated March 5, 1968 (Application (A.) 49712) and never instituted, because of disputes over docking space in Sausalito. See our previous decisions in this case and the record in A. 52409, especially D.93419 (June 2, 1981).

Superior Court held that Sausalito's denial conflicted with our jurisdiction over ferry service and that our issuance of a certificate necessarily included a landing site in downtown Sausalito. Sausalito appealed. In Harbor Carriers, Inc. v City of Sausalito (1975) 46 CA 3d 773; 121 CR 577 the judgment was affirmed except for the trial court's definition of "downtown site." The opinion states (pp. 775-776):

"A terminal and docking facility is a necessity to the operation of a ferry service. To the extent that the city's zoning ordinance is applied to prevent establishment of any terminal in Sausalito, it must give way to the commission's grant of the right to operate a service to and from Sausalito.

"Earlier applications by respondent had been denied. The most recent denial was on grounds that: location of a terminal in the 'downtown' area would unduly increase traffic on city streets; being tourist, rather than commuter, oriented, it would not aid the residents of the city; it would duplicate ferry service of the Golden Gate Bridge District (not the holder of a commission certificate of public convenience and necessity); and would interfere with operation of the Sausalito Yacht Club.

"The trial court quite properly concluded that a 'downtown' terminal site was necessarily contemplated by the commission's certificate authorizing service, primarily for tourists, to Sausalito. The bulk of the grounds for denial of the current use permit application would necessarily bar any downtown terminal, and thus completely negate the commission grant of the certificate. [Emphasis added.]

"The history of respondent's applications extends over more than six years. It is apparent that, absent court intervention, the present view of city officials would continue to bar institution of the service granted by the certificate. The city must afford opportunity for a reasonable 'downtown' terminal site. . . ."

Faced with this decision, Sausalito issued Conditional Use Permit No. 574 to Harbor on November 7, 1979. The language in the resolution granting the use permit<sup>2</sup> recognizes that Sausalito must afford Harbor a downtown terminal even though to do so is not consistent with Sausalito's general plan guidelines. Paragraph (c) of the resolution states:

"(c) It is further found that, inasmuch as there are a minimal number of possible locations for a facility to serve the proposed ferry service by Harbor Carriers, Inc., and inasmuch as the preemptive jurisdiction of the Public Utilities Commission and the Court of Appeals decision requires that the City make a 'downtown' site available, the City Council determines that the Harbor Carriers, Inc. service shall arrive and depart from the existing Golden Gate Bridge Highway and Transportation District ferry terminal located at the foot of El Portal Street, Sausalito, California."

The conditional use permit itself contains sixteen conditions.<sup>3</sup> Of interest here is the condition requiring Harbor to "receive permission" from District for use of its terminal. This led to the stalemate between Harbor and District (reviewed in our previous decisions in this complaint) which ultimately resulted in passage of PU Code § 562.

The use permit also requires numerous improvements to District's terminal for joint use. It does not make completion of all the improvements a precondition to commencement of Harbor's service, but says the improvements may be constructed in stages. Harbor is authorized to begin service "upon commencement" of construction of the improvements.

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<sup>2</sup> The resolution and the use permit are attached to Exh. 26.

<sup>3</sup> Some of these may run afoul of our preemptive jurisdiction (scheduling, total number of passengers) but Harbor, apparently in an effort to expedite commencement of the service, has not challenged them. In any event, scheduling and passenger-load problems are beyond the scope of this complaint, which deals with our special jurisdiction under PU Code § 562.

It is clear that Sausalito's policy remains adamantly against construction and use of any second ferry terminal in the downtown area. While it recognizes Harbor's right to institute eminent domain proceedings to obtain an alternate site, counsel for Sausalito stated on argument that the City will exhaust all legal remedies to prevent establishment of any such terminal if Harbor takes, or is forced to take, such a course.

Legal Problems

Assuming the Commission determines that an alternate site should be used, can it be acquired? In conjunction with its stance against two ferry terminals, Sausalito argues it is unlikely that Harbor can exercise its eminent domain rights regarding four of the five proposed alternates.<sup>4</sup>

Code of Civil Procedure (CCP) § 1240.650(b) states:

"Where property has been appropriated to public use by a public entity, the use thereof by the public entity is a more necessary use than any use to which such property might be put by any person other than a public entity."

CCP § 1235.190 includes a city as a public entity. A public utility corporation is a "person" under CCP § 1235.160.

Additionally, CCP § 1240.680 establishes a rebuttable presumption that property is appropriated to the best and most necessary public use if it is (among other categories) "open space."

Four of the five sites include tidelands granted in fee to Sausalito by the State. District's proposals would require fill or building upon the tidelands portions of the sites incompatibly with the existing public purpose for which the tidelands are dedicated - open space and tideland uses. Thus, so the argument runs, Harbor cannot avail itself of CCP § 1240.510, under which property already appropriated to public use may be acquired for an additional public use if the new use will not impair the existing public use.

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<sup>4</sup> The exception is "site 5" - north of downtown near Zack's restaurant - which the record demonstrates is unsuitable for other reasons. (See discussion later in this opinion.)



Additionally, Sausalito maintains that these tidelands are subject to a public trust which requires their preservation as tidelands accessible to the public as such. The particular tidelands are owned by Sausalito in fee (one parcel is subject to a lease through the year 2002) as a result of a grant from the State, and with that grant Sausalito acquired the duty to administer the public trust. (Public Resources Code § 6301; Marks v Whitney (1971) 6 Cal 3d 251; 98 CR 790.) Nor can the public trust be terminated even by a deed from the appropriate public agency. (City of Berkeley v Superior Court (1980) 26 Cal 3d 515; 162 CR 327.)

Description of Dock and Surrounding Area

Arthur E. Gimmy of Gimmy Valuation Services (San Francisco) prepared two extensive reports: Exh. 23 which analyzes the revenue impact of Harbor's service<sup>5</sup> and possible alternate terminal sites, and Exh. 24 which analyzes the fair rental value of District's Sausalito ferry terminal. The narrative and diagrams in those exhibits may be relied upon for a general description of District's Sausalito docking facility and the surrounding area in Sausalito.

Sausalito, particularly its downtown shopping area, is a major tourist attraction. While its January 1981 residential population was only 7,050, its downtown area attracts over one million tourists annually. Exh. 24 shows that for 1980-81, District's ferries carried about 860,000 persons (down from over a million in the 1970s due to economic conditions), of which about 23% were commuters,<sup>6</sup> but to this figure must be added all those who arrive by bus or private car.

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<sup>5</sup> District argues that joint use of the Sausalito dock will result in passenger diversion. This is discussed later in the opinion.

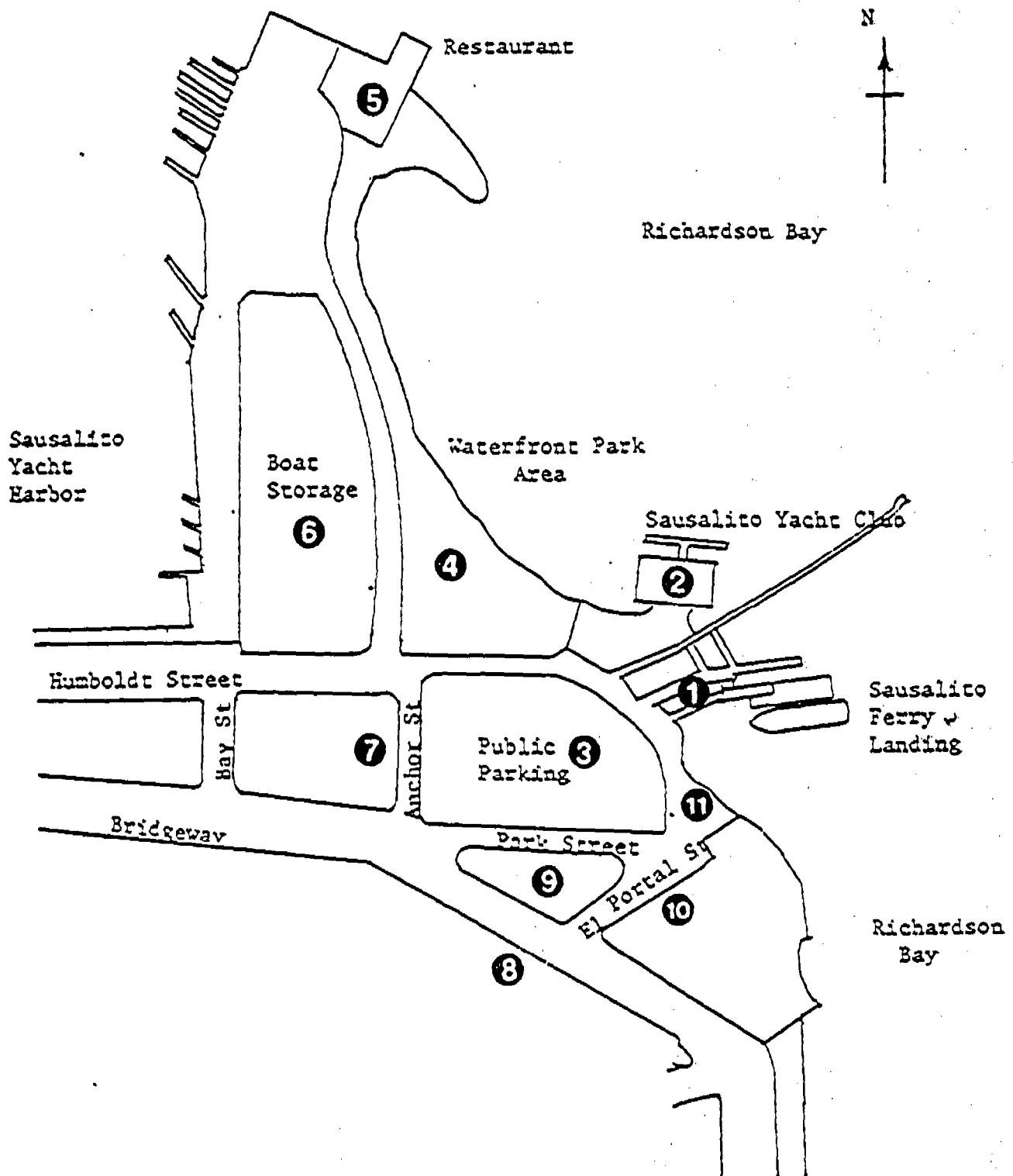
<sup>6</sup> The percentage is based on the "Torrey and Torrey report" (full title: "Initial Environmental Study For The Proposed Harbor Carriers Expanded Service to Sausalito") dated July 30, 1979. No witness directly sponsored it. It is part of voluminous background material attached to the prepared testimony of District's witness Jerome Kuykendall (Exh. 39). It was prepared for the Sausalito planning department.

Sausalito's central downtown area consists largely of tourist-oriented enterprises such as retail stores and bars. In 1980, taxable retail sales, including food and drink, totaled \$55,500,000.

The parties do not dispute that Harbor is entitled to a "downtown" terminal, although there was some minor disagreement among the witnesses on precisely what that term should include. For the purpose of considering a terminal location for tourist-oriented ferry service, it is reasonable to regard "downtown" as that area occupied by the "CC" (central commercial) zone on Sausalito's zoning map. (Exh. 29; see reproduction of a section of Exh. 29 printed later in this decision; see also color photograph showing aerial view, Exh. 24, p. 3.) This area starts south of Ondine's Restaurant on Bridgeway and extends north and then northeast along Bridgeway to a point short of its intersection with Caledonia Street. It is essential that a ferry service catering to tourists docks within easy walking distance of this area, and the closer the dock is to the center of the area (as is District's dock) the better.

Some of the salient features of the central portion of this downtown area are depicted in the following line drawing adapted from Exh. 24, page 24. The page following the diagram contains witness Gimmy's descriptions of the major points. Ondine's is located south of the portion of Bridgeway at the bottom of the map; the southern end of the CC zone is a short distance south of Ondine's; the opposite end of the zone is off the diagram to the left, along Bridgeway.

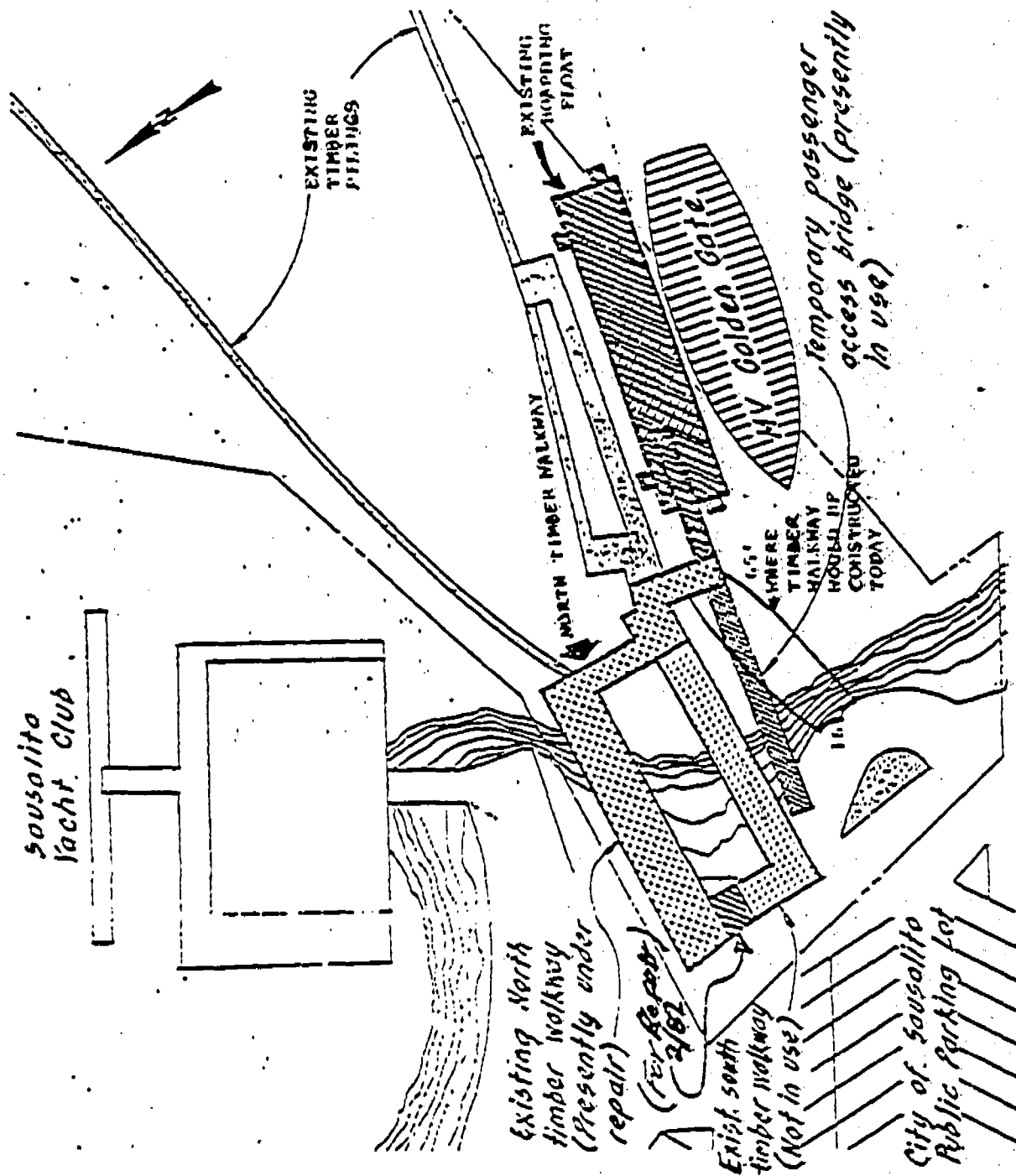
# Location Map.



- "1. Subject Site. [I.e., District's ferry terminal.]
- "2. Sausalito Yacht Club - This is a private club with very limited boat landing facilities. It is a one-story structure with a wood shingled exterior and has a paved private parking lot. It borders the subject site on its northern side.
- "3. City Parking Lot - This is a public parking lot maintained by the City of Sausalito; it borders the subject site on the west. It is a secured lot and provides uncovered parking for 200+ cars. This large area contributes to the open feeling of the downtown area. Landscaping consists of trees along the center of the parking strips.
- "4. Gabrielson Memorial Park - This is an attractive waterfront oriented park located northwesterly of the existing ferry terminal. Its benches, shade trees, lawn area, and pedestrian pathways provide an agreeable surrounding for tourists and others.
- "5. Spinnaker Restaurant - This restaurant is constructed over the water at the end of a filled land peninsula. Access to it is down a long tree lined driveway. According to a spokesman for the BCDC, a restaurant with this location and fill requirements could not be constructed today.
- "6. Boat Storage - This area consists of boats which are currently under repair and a parking lot for the adjacent Sausalito Yacht Harbor.
- "7. Bank of America - The Bank of America occupies the eastern portion of the block bounded by Humboldt Street, Bay Street, Anchor Street and Bridgeway. It is a two-story contemporary structure with attractive landscaping. On the Bridgeway side of the building is a covered bus stop with public men's and women's restrooms and phone facilities. It is conveniently located in the downtown area to serve residents and tourists.

- "8. Bridgeway Stores - Building sites on Bridgeway are mainly improved with two-story buildings with retail ground floor use and often retail second story use. Uses here are a combination of specialty stores, galleries, boutiques, restaurants and banks. The district starts at the Village Fair shopping center across from Bay Street and extends past Princess Street. Both of these streets are within easy walking distance from the ferry landing. The Village Fair shopping center contains 40 varied and unusual shops; recent construction adjacent to the west of it is extending the district by a couple of parcels."

District's Sausalito terminal occupies approximately 1.55 acres, about 3,000 square feet of which is upland (dry land). The terminal itself includes a waiting area, a pier structure and gangway, and a floating dock. The waiting area includes benches, a drinking fountain, and telephones. The configuration of the walkway and dock is difficult to describe in words because part of the walkway is superimposed upon the rotting timbers and pilings of the former Southern Pacific passenger-auto ferry slip. The following diagram (Exh. 24, p. 35) roughly illustrates the facility (see also various photos in Exhs. 23 and 24). (Additional detail concerning the site is presented in the section of this opinion on the subject of compensation for its use.)



Can the Dock be Used Both by District and Harbor?

The evidence does not demonstrate any navigational problems of dual use; the boats which Harbor intends for the service are of a size and type similar to District's (or Blue and Gold's). Whether District and Harbor can share the float depends on scheduling and whether the staging area, walkway, etc. can handle the volume of people generated by two services.

David W. Pence, general manager of passenger services for Crowley Maritime Corporation (Harbor's parent corporation) testified that the following initial schedule is contemplated:

<u>Leave</u> <u>Fisherman's Wharf</u>	<u>Arrive</u> <u>Sausalito</u>	<u>Leave</u> <u>Sausalito</u>	<u>Arrive</u> <u>Fisherman's Wharf</u>
11:05 a.m.	11:35 a.m.	11:45 a.m.	12:15 p.m.
12:25 p.m.	12:55 p.m.	1:10 p.m.	1:40 p.m.
1:55 p.m.	2:25 p.m.	2:35 p.m.	3:05 p.m.
3:15 p.m.	3:45 p.m.	3:55 p.m.	4:25 p.m.
4:45 p.m.	5:15 p.m.	5:30 p.m.	6:00 p.m.
6:10 p.m.	6:40 p.m.	6:50 p.m.	7:20 p.m.

Sausalito's conditional use permit<sup>7</sup> requires a schedule compatible with District's. This schedule meets that stipulation. This, in turn, should allow use of the staging area, walkway, etc. without overcrowding.

Economic Effect of Joint Use

District claims that joint use of the Sausalito dock will result in serious passenger diversion affecting its revenues; Harbor and the Commission staff regard the raising of this issue as a red herring and an attempt to relitigate public convenience and necessity for Harbor's service.

Witness Gimmy relied upon estimates in the 1979 Torrey and Torrey report (see footnote 6) and certain calculations to determine that in his opinion, Harbor's service would cause a 30% decrease in District's tourist (not commuter) ridership. He estimated an annual

<sup>7</sup> See previous discussion. A copy of it is part of Exh. 36.

revenue loss to District of \$467,400. (Exh. 24, pp. 24-25.) A similar result was reached by District's director of ferry services Stanley M. Kowleski, who testified that this loss would increase the existing annual fully allocated operating deficit from about \$500,000 to \$1,030,000. (Exh. 32.) Jerome Kuykendall, District's head of planning, projected the same deficit and emphasized the need to keep ferries running without an unreasonable deficit, since cutting such service would add bridge car traffic during rush hours.

Vincent LaCava, a marketing analyst for Crowley Maritime Corporation, testified that there would be no appreciable diversion from District's service. His testimony was that District's landing point in San Francisco, the Ferry Building, draws noncommuter business from downtown hotels and conventions using downtown facilities. (The Ferry Building is about 1.8 miles from Pier 45, measuring road distance along the Embarcadero.) LaCava's analysis (see Exh. 50 and associated testimony, Tr. 1045 ff.) shows that in his opinion diversion will be from Harbor's own Alcatraz run, which is overcrowded in peak season, and from Harbor's Bay Cruise, which costs more than the Sausalito trip.

LaCava stated that Harbor will actively market the service, thus attracting new patronage from bus tie-ins and other types of advertising. According to LaCava, there is little possibility of diversion from District's service during the week because District's weekday fare is cheaper.

We believe the short solution to this issue is that it can only be relevant to the problem of joint use of District's Sausalito dock if some evidence showed that use of that dock, as distinguished from one of the alternate sites, would cause District substantial passenger diversion. However, all the evidence concerned possible diversion in San Francisco, not Sausalito. All three of District's witnesses (Gimmy, Kowleski, and Kuykendall) stated on cross-examination that their assumed diversion would occur in



San Francisco. There is no evidence that shows joint use of District's Sausalito dock (as compared to Harbor's use of an alternate but well-located downtown dock in Sausalito) would itself cause diversion.

In any event, evidence of diversion is speculative. None of the witnesses, including LaCava, made a direct study; all relied upon secondary material and certain assumptions. Gimmy relied heavily on the Torrey and Torrey report, actually an environmental study. Its passenger estimates are based upon interviews of 192 persons conducted on one Sunday afternoon. We agree, however, with witness LaCava that any "appreciable" diversion in San Francisco is unlikely because of the dissimilar location of the two San Francisco terminals.

Finally, even assuming the issue's relevance (and as Harbor points out), District's service to Sausalito commenced two and one-half years after Harbor received its certificate to operate its Sausalito-San Francisco service, so it took the situation as it found it and is not now in a position to complain of Harbor's service finally becoming operative (assuming Harbor's schedule is compatible, which we believe it is). Neither has District promoted its service other than by making its schedules publicly available. District apparently has a no-advertising policy regarding its Sausalito-San Francisco service, regarding such advertising as a waste of money. (Kowleski, cross-examination, Tr. 552-553).<sup>8</sup>

#### Site Selection, Generally

Exh. 36 (witness Gimmy) reviews five alternate sites, to which he applied the following tests to establish a rating system:

1. Adequate Staging Area: Room on uplands portion of the site for a boatload of passengers to wait.

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<sup>8</sup> Compare District's argument, discussed later, that as a condition precedent to the commencement of Harbor's service, six months should be allowed for District to advertise to build up its patronage.

2. No Dredging Required: Cost of dredging is prohibitive because of environmental considerations.
3. Existing On-Site Facilities: Availability of improvements such as benches, drinking fountain, and telephone. (No allowance was made for restrooms because they do not exist at District's site.)
4. Distance From Fisherman's Wharf: Travel time from San Francisco.
5. Amenities: Type of surroundings; esthetics.
6. Acquisition Cost: Potential expenditure by Harbor to acquire the site.
7. Community Acceptance: A subjective rating which tries to consider community opposition to a new ferry terminal.
8. Proximity to Central Sausalito: (The better location being near to District's facility.)
9. Condemnation Problems: Legal issues and court proceedings.
10. Navigation Factors: Interference with small boat traffic.

Gimmy's exh. also assigns each site an overall rating. After surveying the entire Sausalito waterfront, the sites he selected were:

Site 1: Foot of El Portal Street, southerly of District's terminal;

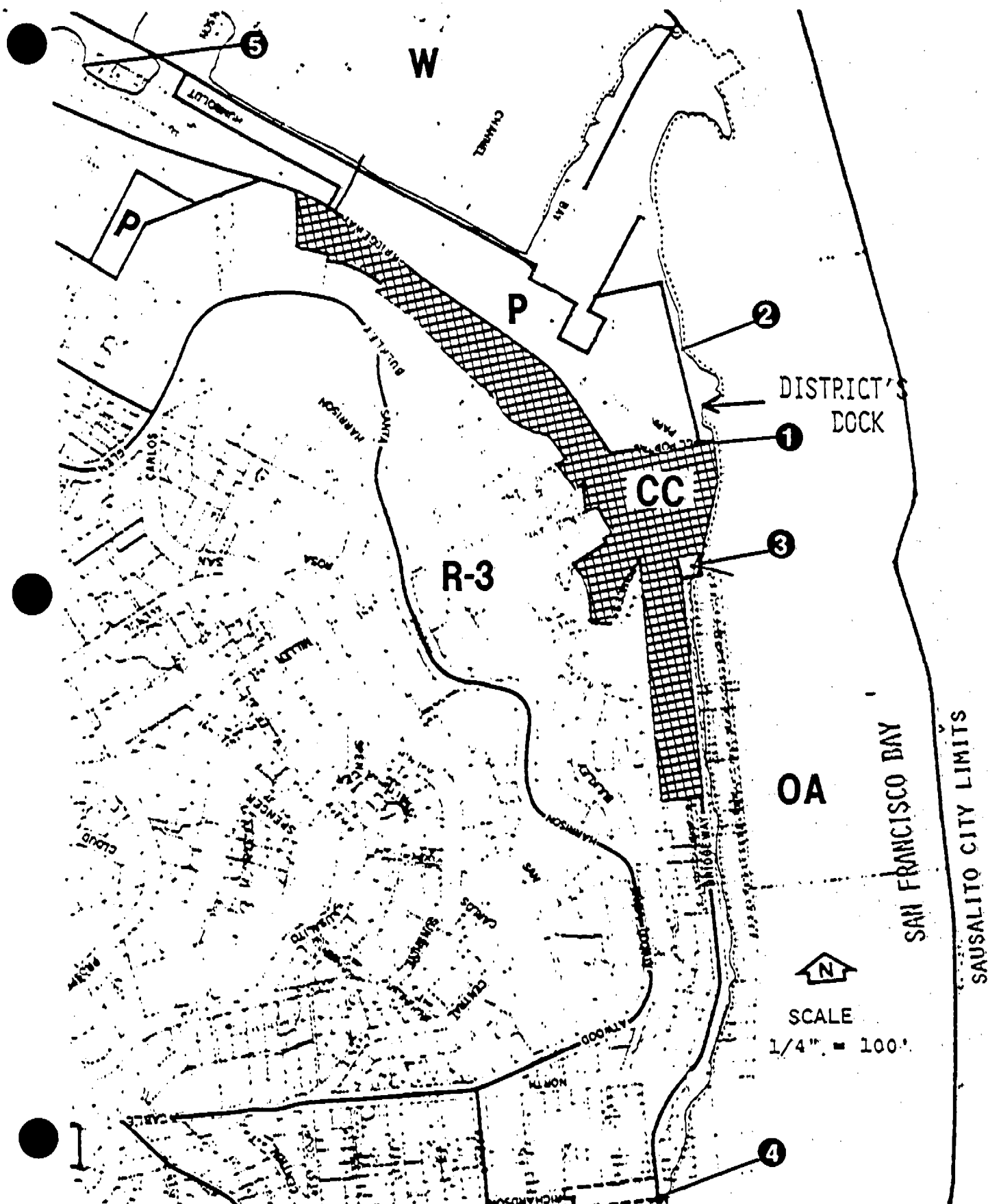
Site 2: Anchor Street and Humboldt Avenue, adjacent to Gabrielson Memorial Park;

Site 3: Yee Tock Chee Park, at Bridgeway and Princess Streets;

Site 4: Bridgeway at Richardson Street, to the north of Valhalla Restaurant;

Site 5: Foot of Pine Street, vicinity of Zack's Restaurant.

The map which follows shows these sites. (It is adapted from the Sausalito zoning map, Exh. 29, and the diagram appearing in Exh. 23 at page 31.) The CC zone comprises the central downtown shopping District. "P" means public facility and is either dedicated to park use or used for auto parking. "OA" means open area.



Harbor considers none of the sites to be acceptable for reasons which will be reviewed in the discussion of the various locations.

Sausalito's city engineer, Norman Wohlschleger, testified generally against use of any of the alternate sites. The witness pointed out that Sausalito's Conditional Use Permit No. 574 adopted November 7, 1979 requires Harbor to use District's dock at the foot of El Portal Street, but notwithstanding that, he examined the entire waterfront and he believes the area of District's terminal to be the only suitable location. In summary, he divided the waterfront into areas and explained problems with each area:

Ondine's to Yee Tock Chee Park: Street conditions (lack of room for a staging area) also, the land was acquired for park use only.

Yee Tock Chee Park to District's Terminal: The area is completely developed and not available for such a use.

District's Terminal to Spinnaker Point A terminal in this area would block views; heavy pedestrian traffic in Gabrielson Park would change its character; also, Sausalito Yacht Club's recreational activities would be interfered with.

North of Spinnaker Point: This is the yacht harbor area; many private yachts would make ferry operation hazardous.

Locust Street and Napa Street: Two-thirds of the area is owned by Sausalito. It was acquired with \$750,000 of bonds for an open water marine park with unobstructed views.

The witness conceded that his views of hazardous conditions associated with the Spinnaker Point area were based on general observation and not a specific study. He most emphatically ruled out any site that would have to use Bridgeway for a staging area, since there is no place for parking or stopping to pick up or discharge passengers and no place for crowds to gather.

Sites Four and Five

We will study these sites first because we believe they are obviously unsuitable and, therefore, our discussion of them may be abbreviated.

In our opinion, neither location is within easy walking distance of the entire CC zone, although each site may be said to be within such distance of that end of the CC zone nearest to it. This factor alone bars serious consideration of their use. It is not enough that those debarking from Harbor's ferries should be able to walk easily only to one end of the downtown commercial zone or the other.

Other adverse factors are also present. Site 4 (north of Valhalla Restaurant at the intersection of Bridgeway and Richardson) includes a handsome Victorian building which would have to be demolished to make way for the staging area. This building has been designated an historical monument (Gimmy testified he had been unaware of that designation). Lastly, extensive over-water construction would be necessary which, at this location, would certainly affect community tolerance of it.

Site 5 is by witness Gimmy's own testimony deserving of an overall rating of "poor."<sup>9</sup> He stated (Exh. 23, p. 59) that he included it only for comparison purposes to show the problems of selecting a site to the north of downtown. The main problems concern navigation and additional time for the ferry run. To get to it, ferries would have to pass the yacht harbor at slow speed, which, under crowded conditions could mean at bare steerageway (2 knots). This could add up to 15 minutes of additional travel time. This is also a bad site from the viewpoint of dredging, the cost of which Gimmy said "could be prohibitive." (Exh. 23, p. 58.)

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<sup>9</sup> On a scale of excellent, very good, good, fair, and poor. See summary of ratings, Exh. 23, p. 33.

Site One - Adjacent to District's Terminal

This site, which Gimmy rates as the best, is located to the south of District's terminal at the foot of El Portal Street. The property is owned by Sausalito.<sup>10</sup> Its location is shown at number "1" on the map of the sites, also see the downtown Sausalito location map, where the upland portion of it is shown at number "11."

The evaluation of this site in Exh. 23 is as follows:

"Adequate Staging Area: The amount of land that is outside the parking lot which is on the adjacent site is only about 1,500 square feet; however, this site is adjacent to the existing Golden Gate Ferry Terminal, and it is assumed that passengers could utilize the adjacent staging area while they were waiting for the ferryboat to arrive. Under this assumption, the arrivals and departures of the competing ferry systems would have to be timed so that undue crowds would not be created at these adjacent locations. Overall rating is very good because of the ability to share the adjacent staging area; also, it is possible that some of the passengers who are waiting would overflow onto adjacent public sidewalk and parking lot areas as they do now at the existing terminal.

"No Dredging Required: This site is adjacent to submerged land that is deep enough not to require dredging; the adjacent ferry terminal site has never had to dredge the approaches and docking area. Overall rating is excellent.

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<sup>10</sup> While Exh. 23 contains redrawings of the parcel maps for Sites 1, 2, and 3, there are no drawings in evidence similar to the location map of downtown Sausalito previously included, which would identify salient features. Understanding of the physical properties of these sites is best gained by reviewing the various color photographs in evidence, and certain exh.s on water depth. There is also an excellent large aerial photo of the whole waterfront (Exh. 22).

"Existing On-Site Facilities: Again, we have assumed that this ferry terminal site would share in the adjacent facilities that the Golden Gate ferry system has provided on their adjacent site, namely benches, telephone booths and a water fountain. However, the actual site being considered does not have any facilities of its own and may have to provide some in accordance with the wishes of the City of Sausalito; overall rating is very good.

"Distance From Fisherman's Wharf: This site has a very good rating but comparatively it is not the best because one of the sites we have analyzed is substantially closer to Fisherman's Wharf and would result in less travel time and, therefore, lower operating cost. If this site was not being compared to Site 4, the overall rating would be excellent.

"Amenities: This category refers to the outlook from the site of adjacent facilities and their relative attractiveness. Since the site overlooks the central area of Sausalito and the adjacent hills, it is rated as excellent.

"Acquisition Cost: The overall rating is excellent since only a small amount of upland areas would be acquired, and the submerged land adjacent to the site is currently not being utilized.

"Community Acceptance: This site is rated as very good, because it is adjacent to an existing ferry terminal so that impact on views would be minimal; we have assumed, however, that there will be some opposition, especially from the occupants of the adjacent office/residential building to the south.

"Proximity to Central Sausalito: This site is rated as excellent because it is directly in the center of the downtown area of central Sausalito.

"Condemnation Problems: This site is rated again as excellent because only one party would have to be dealt with, the City of Sausalito, and the property is currently not being utilized; impacts of the project would be minimal.

"Navigation: This problem is rated as excellent because it is in a location that will not interfere with small boat traffic in the Sausalito area.

"Overall Rating: The overall rating is excellent, minus, which means that the site is excellent, but has a few problems; it is rated No. 1 in our selection process. This site has been reportedly proposed in the past by operators of the Harbor Carrier system."

Harbor regards this site as unsatisfactory because it is unacceptable to Sausalito (it is presently a view area) and the City opposes a second ferry terminal, which would mean lengthy litigation to acquire it.<sup>11</sup>

Harbor also raises navigational objections. It introduced Shirley Kohlwes, who is Harbor's manager of marine operations. She holds a license to operate 100-ton passenger-for-hire vessels and has several year's experience operating ferries and other boats on San Francisco Bay. During the District's 1979 strike, she piloted ferries on the temporary San Francisco-Sausalito service performed by Red and White Fleet (a Crowley Maritime subsidiary).

She took soundings of the area on April 16, 1982 at low water. An adaptation of Exh. 45, which shows the soundings, follows on the next page. Starting from the left of the diagram (which is only roughly to scale) "structure overhang" depicts the condominium building immediately south of El Portal Street. The dock near it (in broken lines) is a rough representation of Site One. At the bottom is a separate diagram, approximately to scale, showing soundings immediately adjacent to the structure and the shoreline.

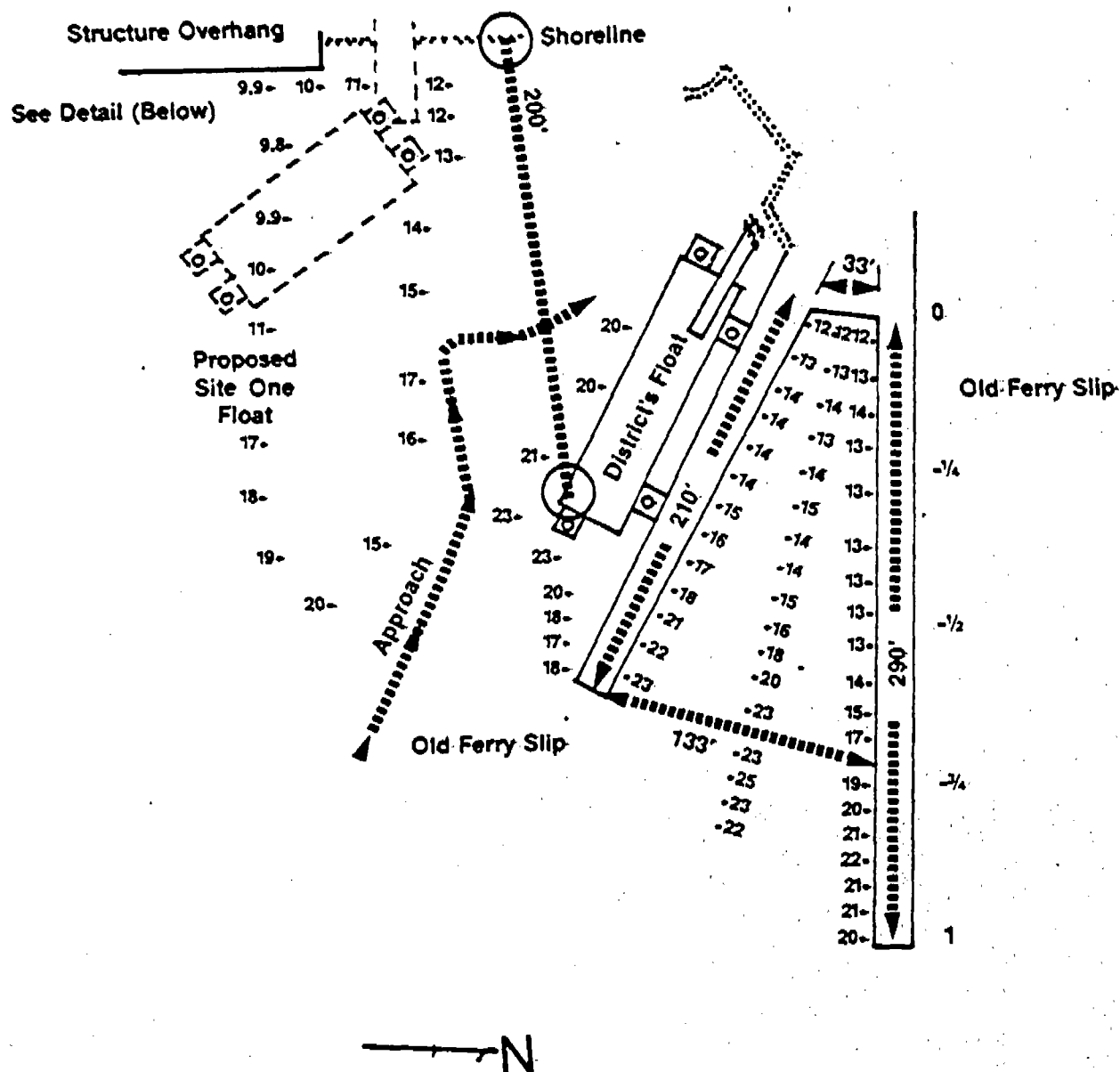
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<sup>11</sup> This is also the case with Sites 2 and 3. For a review of the legal problems, see that heading earlier in this section.

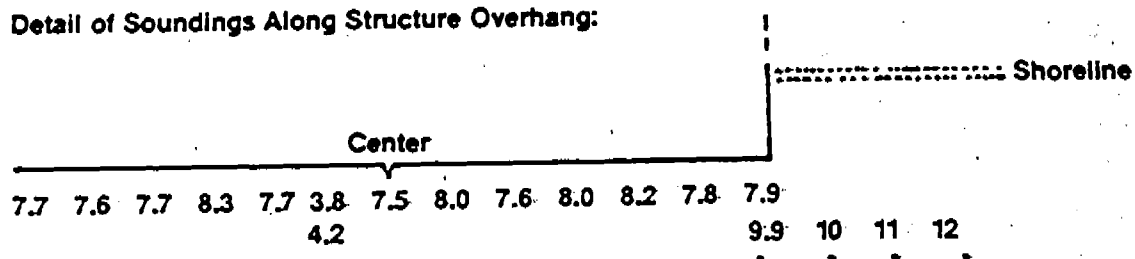


## SAUSALITO FERRY SLIP AND ADJACENT AREA/SOUNDINGS IN FEET

16 April 1982/Soundings Made From 1045 Hrs. to 1300 Hrs. PST/Low Tide at 1146 Hrs. PST/Low Water +0.5



## Detail of Soundings Along Structure Overhang:



In Kohlwes' opinion, water depth is not adequate without dredging. She said Harbor would operate vessels in the service which require a minimum depth for prudent navigation of 10 to 12 feet, depending on the vessel.

She also considers the space between District's dock and the proposed Harbor facility inadequate for a prudent course of approach or departure, assuming continued use of District's float. If, for example, a District vessel should approach District's float against a north wind and lose an engine, it could be driven down on a Harbor vessel or the proposed dock, though this hazard could be remedied by a series of pilings between the docks. This precaution, she said, would be mandatory for safe use of the proposed site.

As it is, she said, the approach to District's float is sometimes made harder by the wind, which necessitates approaching the dock from considerably south of it. While she was taking soundings from the water taxi she used for that purpose, and while at the location of the proposed float, she had to move out of the way to allow a District ferry to make a wide southerly approach to District's dock. This was not an emergency situation (to avoid collision) but District's vessel was approaching close enough to require the maneuver for prudence.

She also testified that when she was one of the persons operating emergency ferry service during the strike, she was told that when approaching District's Sausalito float, the boat should remain as far away as possible from the condominiums to protect the privacy of the residents.

John Graham, port captain for Crowley Maritime Corporation, also testified concerning this issue. He has held a master's license since 1948 and is familiar with vessel operations in San Francisco Bay.

He was operating the boat when Kohlwes took the soundings. He verified the approximate land measurements (length of old ferry slips, etc.) and stated that it is approximately 200 feet from the tip of the southern slip to the shoreline near the condominiums. He verified Kohlwes' opinion that District's proposed float location for Harbor was too close to District's for prudent navigation (under certain conditions). He testified that if, as Kohlwes suggested, pilings had been placed between District's dock and the proposed Harbor float, the District vessel for which they moved the water taxi out of the way would have knocked the pilings down.

Site One presents the closest question of fact concerning its use as an alternate site. We believe, on balance, that it is not an adequate location. Only minimal dredging would be required but its location involves some navigational hazard, at least under certain wind conditions. Pilings could improve this situation, but apparently to place them as suggested would interfere with the wide southerly approach sometimes necessary for District's boats.

Additionally, the staging point, while large enough, is owned by Sausalito as a public use. Sausalito regards the proposed staging area as a vista and a civic amenity. It is therefore by no means certain that Harbor could acquire it by condemnation.

Site Two - Gabrielson Memorial Park

This site is also owned by Sausalito. It begins at Humboldt Street at the south, between Anchor Street and the waterfront, and then gradually narrows as it travels northward on Spinnaker point. (See "4" on location map.) Witness Gimmy's review of it follows:

"Adequate Staging Area: This location is rated excellent because of the size of the park; there is adequate area here for 200 or 300 people to wait without using a substantial amount of space in the park.

"No Dredging Required: This site is rated as excellent because of the depth of the submerged land adjacent to the uplands; the water is deep enough not to require dredging.

"Existing On-Site Facilities: This site is rated as excellent because the park has benches, play area and drinking fountain.

"Distance from Fisherman's Wharf: This site is rated as very good because it is in a central location and is as close to Fisherman's Wharf as the first three sites; the only site that is closer is No. 4; therefore, it is rated as very good.

"Amenities: This site is rated as excellent because of the attractive view outlooks from the site, where it is adjacent to the retail shopping area, park, Spinnaker Restaurant, yacht harbor, etc.

"Acquisition Cost: This characteristic is rated as very good. Because the proposed use is consistent with the current use, the land could be shared by the general public. Possible impacts on the park would have to be considered. The rating is very good, because some cost would be required even though the submerged land is not being utilized for any other purpose.

"Community Acceptance: This characteristic is rated as fair because it is perceived by the appraiser that there would be community opposition to large groups of people waiting in the park area for a ferry boat to arrive and depart. Impacts on views, however, would be minimal. Except for this one fair rating, this site would be rated as equivalent or better than No. 1.

"Proximity to Central Sausalito: This rating is excellent because it is located directly in the center of the downtown area.

"Condemnation Problems: This rating is very good, because even though only one other party is involved, the problems of dealing with the acquisition of rights from a park may be more complicated than those dealing with the land at Site No. 1 which is not being utilized for any particular purpose at this time.

"Navigation: This site is rated as excellent because there will be minimal interference with small boat traffic.

"Overall Rating: The overall rating of this site is excellent, minus; the only reason the rating is not higher is because of the one fair rating that was given because of the likelihood of community opposition to use of the park by patrons waiting for boat departures. In an event, we do not feel that this impact is great and that the site is virtually as good as No. 1, and possibly better. It is rated as No. 2 only by a slight degree."

Harbor's witness Kohlwe's testified to taking soundings approximately 350 feet from the shore of Gabrielson Park, beginning with the Sausalito Yacht Club area and continuing to the vicinity of the Spinnaker Restaurant at the end of the point. Exh. 42 shows these soundings, which range (near the area suggested for the site) from 8.5 to 9.5 feet.

Harbor also points out that turning this park - or at least that portion of it near the waterfront - into a staging area cannot be considered a compatible use and would change the character of it. As many as 400 people may wait for a ferry. Such a crowd would block the view, use up all the benches, and cause litter problems. In our opinion this is not a viable alternate site.

Exh. 42 and the associated testimony establishes that witness Gimmy's assumption of no dredging is erroneous. Considerable dredging would be necessary to allow a 12-foot water depth (or in the alternative, it would be necessary to build an unsightly pier several hundred feet long).

We also believe that Sausalito would have a strong argument in any condemnation action that staging area use at this location is incompatible with the park use as it exists. Some system of queuing passengers at the waterfront side of the park would have to be devised. Such an accumulation of passengers would block some of the view. And at least during tourist season and on weekends, the park's character would be changed by crowds of waiting passengers.

Site Three - Yee Tock Chee Park

This park is located on the shore side of Bridgeway, at Princess Street. Again, Sausalito is the owner. Witness Gimmy's review follows:

"Adequate Staging Area: This site is rated as fair because patrons who are waiting for the boat will overflow onto adjacent sidewalk areas. The upland at this site is equivalent in size to Site No. 1, but the location is adjacent to a street with heavy automobile traffic, while Site No. 1 is adjacent to a parking lot where there is little problem of dealing with the conflict between pedestrians and vehicles.

"No Dredging Required: This site is rated as excellent because it is adjacent to water that is deep enough not to require dredging.

"Existing On-Site Facilities: This site is rated as excellent because the park facilities contain a drinking fountain and seating areas.

"Distance from Fisherman's Wharf: This site is rated as very good because it is very close to the existing ferry terminal and practically the same distance, although slightly less, than Sites 1 and 2. The only site that is superior is No. 4 which gets the only excellent rating in this category.

"Amenities: This site is rated as excellent because it is overlooking attractive buildings and the hillside of Sausalito.

"Acquisition Cost: This site has the same rating as No. 2. Both are public parks that are being used for general public purposes, a use that is consistent with a ferry terminal site to some degree; therefore, the rating is very good.

"Community Acceptance: This site is rated as fair, for the same reasons described under Site No. 2 which has the same fair rating because it is an existing park. We perceive that there would be public opposition to combined uses of this land.

"Proximity to Central Sausalito: This site is rated as excellent because it is adjacent to the most heavily pedestrian traveled sections of the downtown area.

"Condemnation Problems: This site is rated as very good for the same reasons outlined under Site No. 2.

"Navigation: This site is rated as excellent because there will be minimal interference with small boat traffic.

"Overall Rating: The overall rating of this site is very good, minus; the primary difference between this site and No. 2 is the inadequacy of the staging area and hazards associated with nearby automobile traffic."

The photographs of this park show it to be so small that it is difficult to imagine its use as both a park and a staging area. To make effective use of it for ferry passengers it would, in our opinion, have to be redesigned entirely as a staging area with, at most, incidental park use. This is unacceptable to Sausalito, and this in turn would mean a contested condemnation proceeding in which it is most likely that Harbor would be unable to prove that the new use would not impair the existing use.

Additionally, and as witness Gimmy concedes, there would be overflow onto adjacent sidewalk areas. Harbor points out that because there is no place to park along Bridgeway, and no stopping at this point, persons could not get directly to or from the location by vehicle. Attempts to do so would cause traffic enforcement problems. This site is not acceptable as an alternate.

#### Conclusion - Site Selection

We believe, in sum, that none of the proposed sites are reasonable alternatives to joint use of District's facility. Our decision could rest on an analysis of the sites alone, but

additionally, we must look to the realities of what would happen to commencement of the long-delayed service were we to select the best of the alternates. Sausalito would contest the eminent domain action (as might some local citizens groups). Although counsel for Sausalito conceded that there are no cases dealing precisely with tidelands public trust issues as applied to this situation, a review of the authorities cited demonstrates that there are other defenses available and the legal problems are substantial. At best there would be years of additional delay; at worst, the courts might finally decide that the selected site cannot be condemned for ferry landing use and we would be back to square one.

Additionally, construction of an alternate site may require approval of the San Francisco Bay Conservation and Development Commission (SFBCDC)<sup>12</sup> and assuming SFBCDC's approval, there could then be court challenges to that decision. For any dredging an additional permit from the U.S. Army Corps of Engineers is necessary.

We have previously found that public convenience and necessity require the service, and after 14 years of delay we should resolve the issues so that the public has service now, not at some indefinite point in the future.

For the foreseeable future, the only logical choice is District's dock and float; therefore our conclusion under PU Code § 562 is that public convenience and necessity require Harbor's use of it.

The best alternative to permanent use of District's Facility in its present form (which was not explored in detail and

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<sup>12</sup> Government Code §§ 66620 et seq.; see especially § 66632. While § 66633 enumerates certain public works exceptions, this section is narrowly drawn and does not include construction of wharves, docks, floats, etc.



was simply the subject of some general testimony on cross-examination) may well be an improved float which could be used from both sides after removing the southern row of pilings. The water is deep enough and the northern pilings would act as a breakwater. This possible future improvement is, however, not necessary for Harbor's proposed schedule, and institution of the service should not be put off pending further study.

Conditions Requested by District

On argument, counsel for District proposed that if we found use of District's Sausalito terminal necessary, we impose the following conditions:<sup>13</sup>

1. A six-month delay in the start of Harbor's service while District enters into a promotional and advertising campaign to "build up its revenue and solidify its ridership." (Tr. 1480.)
2. Restrict Harbor to a maximum of four round trips per day.
3. After one year of Harbor's operation, the Commission should "reexamine the impact of use of the float by Harbor Carriers from a public convenience and necessity standpoint" (Tr. 1481) to determine the impact of (alleged) diversion.

These requests are inappropriate, if not frivolous.

District is in no position to ask this Commission to delay Harbor's service pending a six-month advertising campaign. The record shows District has regarded advertising the service as a waste of money; if it has not solidified its ridership due to its advertising policies to date, it has no one but itself to blame.

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<sup>13</sup> PU Code § 562(a), quoted earlier in this opinion, allows the Commission to prescribe "reasonable terms and conditions" for the use of District's terminal.

We consider diversion evidence on this record inadequate to make any order restricting Harbor's service to four round trips. Diversion was discussed previously and, as the evidence shows, if any occurs, it will be in San Francisco, not Sausalito. Therefore, the issue is not before us regarding use of District's Sausalito terminal.

The third condition is inappropriate because of the same reasons as for the second. Additionally, it is not customary for us to, in effect, encumber a certificate of public convenience and necessity with a time limit, or to put a certificate holder (or this Commission) to the time and expense of retrying the issue every so often. Even if we were to impose such a condition, a few years rather than one year would have to be allowed so that demand for the service over more than one tourist season could be established.

Finally, District has destroyed the credibility of requesting such conditions by entering into the arrangement with Blue and Gold, which was the subject of our previous decisions in this case.

### III. Compensation for Use of Terminal

#### Introduction

Having found that public convenience and necessity require joint use of District's Sausalito ferry terminal by District and Harbor, and since District and Harbor are unable to agree upon compensation for Harbor's use, we now must "prescribe a reasonable compensation and reasonable terms and conditions"<sup>14</sup> to be charged and observed, including, but not limited to, all related costs of construction, capital improvement, leasing or rental, and maintenance." (PU Code § 562(a).)

The wide divergence in recommendations for compensation stem partly from theories of compensation. District proceeds on the

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<sup>14</sup> Certain terms and conditions recommended by District and principally concerning how and when the terminal should be used (as distinguished from terms associated with compensation) are discussed in the preceding section.

basis of what may be described as a partial condemnation analysis. Conceding that § 562 does not define "reasonable compensation," District maintains that the statute is one of condemnation, and that compensation to be awarded is the "fair market value" of the property taken (CCP § 1263.310). "Fair market value," District reminds us, is defined in CCP § 1263.320(a) as:

"...the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available."

Thus, District argues that to the extent that exercise of PU Code § 562 constitutes a taking of its property, District possesses a right to just compensation. (Hunter v Pittsburgh (1907) 207 US 161; Richmond Redev. Agency v Western Title Guaranty Co. (1975) 48 CA 3d 343, 350.)

Harbor and the staff, while not disputing that District is entitled to just compensation, reject District's contention that rent for the terminal should be based upon what District claims would be the upland portion's best use - a restaurant. Instead, Harbor and the staff rely on comparative valuations (District's Sausalito terminal versus other similar facilities), and certain analyses of District's out-of-pocket costs.

#### Additional Facts on Sausalito Terminal

The general location and configuration of District's terminal were discussed previously, but certain additional factors must be understood regarding the compensation issue.

Arthur Gimmy, who testified extensively for District on site selection, also prepared Exh. 24 on the subject of compensation, which may be relied upon for descriptive material concerning the

site.<sup>15</sup> It is an irregularly shaped parcel of approximately 1.55 acres. On its west side it borders in part on a city parking lot. Only about 3,000 square feet are uplands and the remaining 64,518 square feet are submerged land. Normal utility service is available; water, electricity, and sewer lines extend from the shore to the float. The terminal has no facilities for refueling the boats. All parties agree that its central location is ideal as a passenger ferry terminal.

The parcel was deeded to Sausalito from the State of California, along with other tidelands, in 1953 (Exh. 54, Tr. 1174). The statute conveying such lands restricted them to use for commerce, navigation, and recreational purposes. The grant allows Sausalito:

"...to grant franchises thereon for limited periods (but in no event exceeding 50 years), for wharves and other public uses and purposes and may lease said lands, or any part thereof, for limited periods (but in no event exceeding 50 years), for purposes consistent with the trust upon which said lands are held by the State of California, and with the requirements of commerce and navigation at said harbor...." (Exh. 54.)

In 1955 Sausalito leased the site to Madden and Lewis Company, the lease expiring on February 23, 2002. On August 28, 1970, District subleased the site for three years at \$50 per month, for ferry purposes. In June 1976, District obtained a final condemnation order for the leasehold interest for \$79,500.

Exh. 24 reviews the improvements on the site as follows (pp. 34-38):

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<sup>15</sup> The diagram of District's dock is reprinted earlier in this decision. The exhibit also contains numerous color photographs. See also Exh. 25 (larger map of leasehold area) and associated testimony of witness Wohlschleger, and the color photographs in the staff's exhibit (57).

"The improvements can be segregated into three groups; the uplands consisting of the waiting area; the piers and improvements for the ferry boat operation; and, other miscellaneous improvements. The ferry service commenced in 1970 and until 1979 the existing north pier was used for loading of passengers and as a waiting area. In 1979, at a cost of approximately \$130,000, the following repairs or additions were made:

- "1. Demolition of existing north pier dock;
- "2. Replacement of deteriorated wood framing and provision for new connectors;
- "3. Piling protection by wrapping or concrete encasement;
- "4. Placement of a new concrete deck;
- "5. Changing the location of the utility lines;
- "6. Other miscellaneous work;
- "7. Temporary passenger access.

"At that time, the engineers for [District] estimated that the improvements had a seven year life. Based on this calculation, in 1986 extensive repairs again will be necessary.

#### "Waiting Area

"The passenger waiting area contains approximately 3,000 square feet of upland and is immediately adjacent to the city owned parking lot. There is an aggregate concrete covered walkway, a half circle, asphalt covered, viewing or standing area and a section with benches which is immediately adjacent to the north timber walkway. The improvements here are rather minimal; there is a wood planter containing approximately 350 square feet, with shrubbery that is rather neglected looking, in the middle of the waiting area.

There is a wood framed, wire mesh perimeter fence which affords protection without blocking the outstanding views of San Francisco in this area. On the north section of the site are two telephone booths, garbage can and newspaper dispensers. There is ice plant along the Bay side of the fence on top of the seawall which does add some greenery. These improvements are in average condition but the fence and planter needs painting.

"Ferry Boat Improvements

"The north timber walkway starts at the northwest section of the site and jogs down to the boarding float. The pier follows the route of a previous pier and if it were reconstructed today would be in a straight, direct direction from the shore to the float. With the exception of approximately 216 square feet of steel bridge forming the second section, the basic construction is a concrete topped wood deck on piles. The first section of the pier extends out approximately 100 feet from the shore and, in all, approximately 2,041 square feet of surface area comprises the timber walkways.

"The poured concrete is between 3½ inches and 5½ inches in depth and is atop a thin piece of metal decking. The metal deck is supported by wood stringers which are 6 inches by 14 inches which are attached to the pile caps. The pile caps or beams, which are supported by the piles, are 14 inches wide, 12 inches high and 18 feet long. There are 48 piles under the timber walkway which are about 40 feet long and extend below the mean low water line into the sandy mud bottom. Hydraulic grouting mortar is placed around the pilings and forced into interstices of riprap to form the mud wrap seal. Of the 48 piles, 21 have concrete encasement and 27 are plastic wrapped. The casement of wraps extend seven feet above the MLLW [mean low low water] and the cement is of Type 2. The plastic wrap is comprised of four sections as follows:

- "1. A polyvinyl chloride sheet tensioned around the circumference of the pile;
- "2. A clear polyethylene sheet liner which is in between the pile and the polyvinyl sheet;
- "3. A three inch wide polyurethane foam seal encircling the top of the wrap and any verticle [sic] lap joints;
- "4. A one inch wide aluminum sheet encircling the seals.

"The piles, when wrapped, are approximately 14 inches in diameter. The piles have wood bracing forming a right triangle between the deck and the pile. This wrapping or concrete encasement helps protect the piles from microscopic marine animals and the tremendous energy of the wave and tidal action.

"There is a rampway which connects the north timber walkway to the floating pier and it contains approximately 235 square feet of surface area and is 47 feet long. There is a four foot high wood framed, wire mesh fence which borders both sides of the walkway and ramp for protection. There is a locked gate at the end of the first section of pier which is only opened when the ferry boat is embarking or disembarking. There are scattered lights along the fence.

"The ferry boat landing float where the boat docks is a steel structure. It is approximately 22 feet by 110 feet and contains 2,420 square feet. It is held afloat by two hollow pontoons which are six feet wide and run the length of the structure. Four steel piles hold the floats in location. Atop of these piles are some potted plants.

"Miscellaneous Improvements

"The existing ferry terminal is on the site of a former ferry boat landing. Some improvements from that time still remain. Extending in a northeasterly direction from the north pier and paralleling just north of the landing float are the old ferry boat slips. These consist of wood pilings extending approximately 310 feet and 240 feet, respectively, and were used to guide the ferry boats into dock. They are not currently in use or needed by the Golden Gate Ferry service. They serve as a bird refuge and possibly as a breakwater for the Sausalito Yacht Club. Although not functional, they are aesthetically an attractive part of the waterfront. What is known as the south pier extends about 70 feet from the shoreline south of the north pier. It is not in use and is extremely dilapidated. It is an eyesore and beyond repair; the concrete deck is caved in in spots and missing in others. It is the City of Sausalito's position that these improvements should be removed by [District]. Because of the extreme wear and tear that pilings suffer in the water, there is no salvage value to them; in fact, costs are involved in demolition and disposal of the materials."

As can be seen from the photographs and Exh. 25, the leasehold's submerged land includes the old Southern Pacific ferry slip, which is presently unsuitable for ferry use because of the old pilings. Thus, only about 34% of the total leasehold interest (both uplands and tidelands) are actually used by District for its ferry operation (Gimmy, cross-examination, Tr. 1201). Gimmy testified that in his opinion it is not proper (in determining just compensation) to make an allowance for the fact that only 34% of the total site is usable for ferry purposes.



Harbor's use permit from Sausalito includes conditions requiring substantial improvement to the terminal. Harbor's evidence is that it intends to spend about \$200,000 for the improvements including a building of about 1,000 square feet for restrooms, a covered waiting area of about 400 square feet, and other miscellaneous additions such as landscaping, trash receptacles, and a kiosk displaying information about Sausalito.

There is no evidence of record on Sausalito's intentions concerning use of the site after expiration of the lease in the year 2002, although the continued use of it as the one downtown ferry terminal would be consistent with Sausalito's present zoning and planning policies.

District's Analysis

Under District's partial condemnation theory, witness Gimmy regards the highest and best use for the property as a restaurant. While the area is zoned OA (open area district), a conditional use permit, if issued, would allow a restaurant and certain other marine uses. Gimmy believes the central location could support a restaurant. Gimmy notes:

"This use may appear to be somewhat speculative because the Golden Gate District lease on the property extends only to 2002; however, GG has the power of condemnation and can acquire additional property rights through this process. Thus, the existing term of the lease is not a limiting factor." (Exh. 24, p. 42.)

Gimmy believes that "no information of any significance" is available which would allow comparison with rentals paid for similar ferry terminals, and, therefore "the rental value must be determined by application of an appropriate rate of return" to values assigned by a costing approach.

Gimmy investigated land values for restaurant sites at Jack London Square and Embarcadero Cove in Oakland. He considers the former area more comparable to the Sausalito site. He concluded that the "site value" for the Sausalito terminal is \$500,000, and applied a 10% return to that estimate for an annual rental of \$50,000.

He then added a rental value for the improvements based on replacement cost of the pier, etc. He estimated depreciated replacement cost of \$345,000 to which he again applied a 10% factor for return plus a 6.67% factor for depreciation of improvements over 15 years. This calculates to an annual rental requirement for the improvements of \$57,000. The total annual rental (\$50,000 for the site; \$57,000 for improvements) is thus \$107,000.

The next step was an apportionment of the value between District and Harbor based on number of ferry landings (57 landings for District versus 42 for Harbor) and derivation on that basis of the annual rental for Harbor as \$45,580 (or a rounded monthly figure of \$3,800).<sup>16</sup>

Then, additionally, Gimmy stated that it is common for West Coast ports to include percentage rental clauses in their leases. After reviewing such fees elsewhere, he estimated an appropriate rate as 7% of Harbor's gross revenues. (He calculated no annual estimate in dollars.)

#### Harbor's Evidence

Vincent LaCava of the Crowley Maritime marketing department presented a comparison study which described locations and leases of other ferry terminals. (Exh. 49.) The exhibit includes:

- Harbor's float at the San Francisco Ferry Building
- Pier 41 lease (Fisherman's Wharf vicinity)
- Pier 43½ lease (Fisherman's Wharf vicinity)
- Tiburon passenger vessel facility
- Jack London Square (Oakland)
- Long Beach landing facilities
- San Pedro - Berth 95
- Avalon (Santa Catalina Island)

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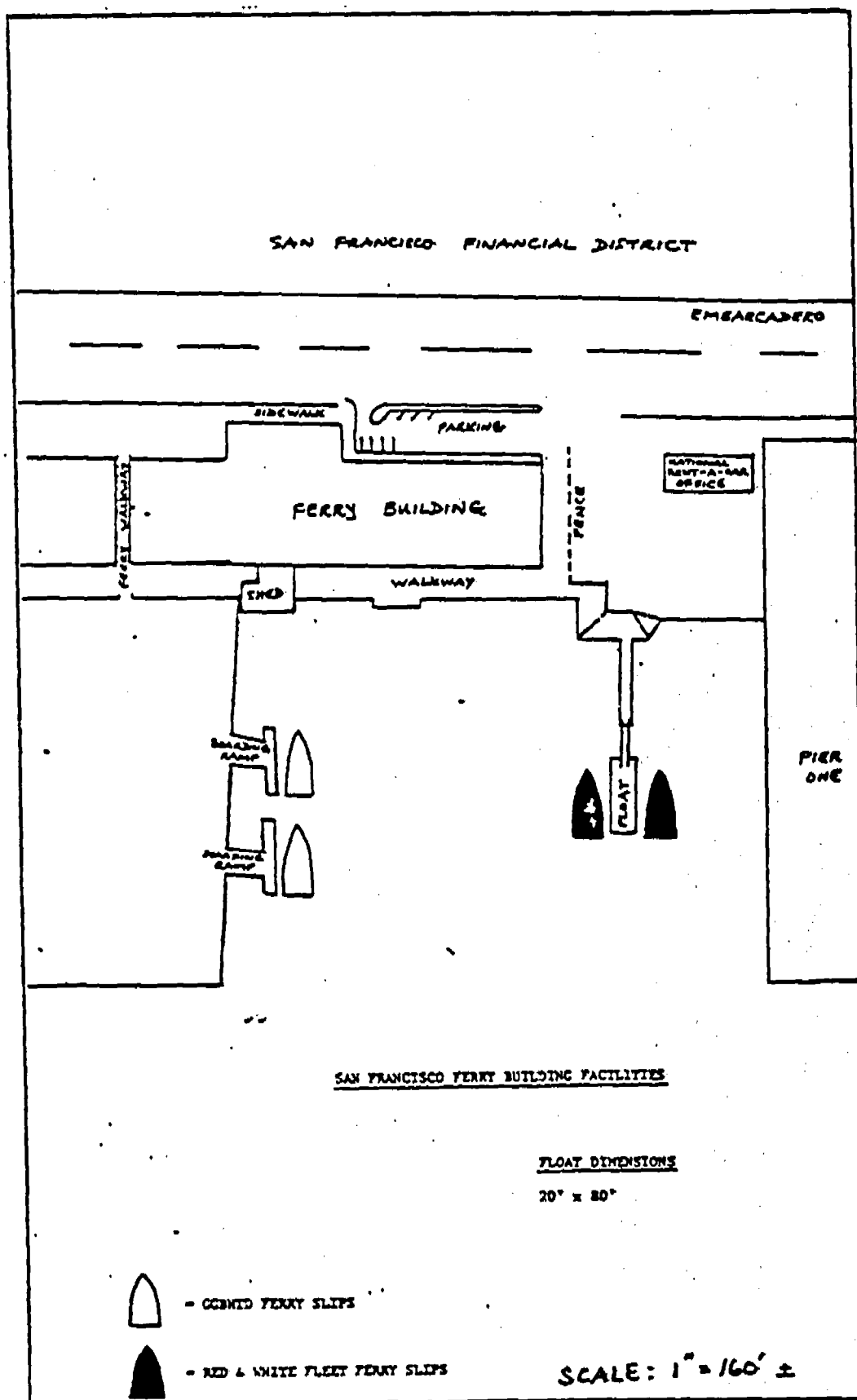
<sup>16</sup> The staff proposed the same method, which means a 42.4% allocation to Harbor. This is a reasonable method.

The very last lease was included only because of an assertion in the complaint which was erroneous. The lease is for office space. The other two Southern California locations need not be reviewed because the evidence showed them to be in industrial port areas and therefore not good comparisons. The brief descriptions of the San Francisco Bay Area locations and line drawings by witness LaCava follow:

"Ferry Building Landing

"The San Francisco Ferry Building facility is at the north end of the Ferry Building at the foot of Market Street. It is described by the lessor, San Francisco Port Commission, as a boat landing privilege at Ferry Ship 201. The improvements consist of a 20' x 80' float with a ramp leading from the staging area level next to the Ferry Building.

"The present lease was established with the San Francisco Port Commission on January 1, 1977 at a rental of \$5,412 per year (\$451 per month). Annual adjustments correlate with adjustments in the Consumer Price Index. The current lease rate is \$7,957 per year (\$663.08 per month). The term is month to month. The docking float can accommodate simultaneous berthing or loading and unloading of passengers of two vessels. The Ferry Building float is leased for the exclusive use of Harbor Carriers, Inc., or its affiliated corporations, and one of its primary uses is for the arrival and departure of passengers using the Tiburon Ferry."



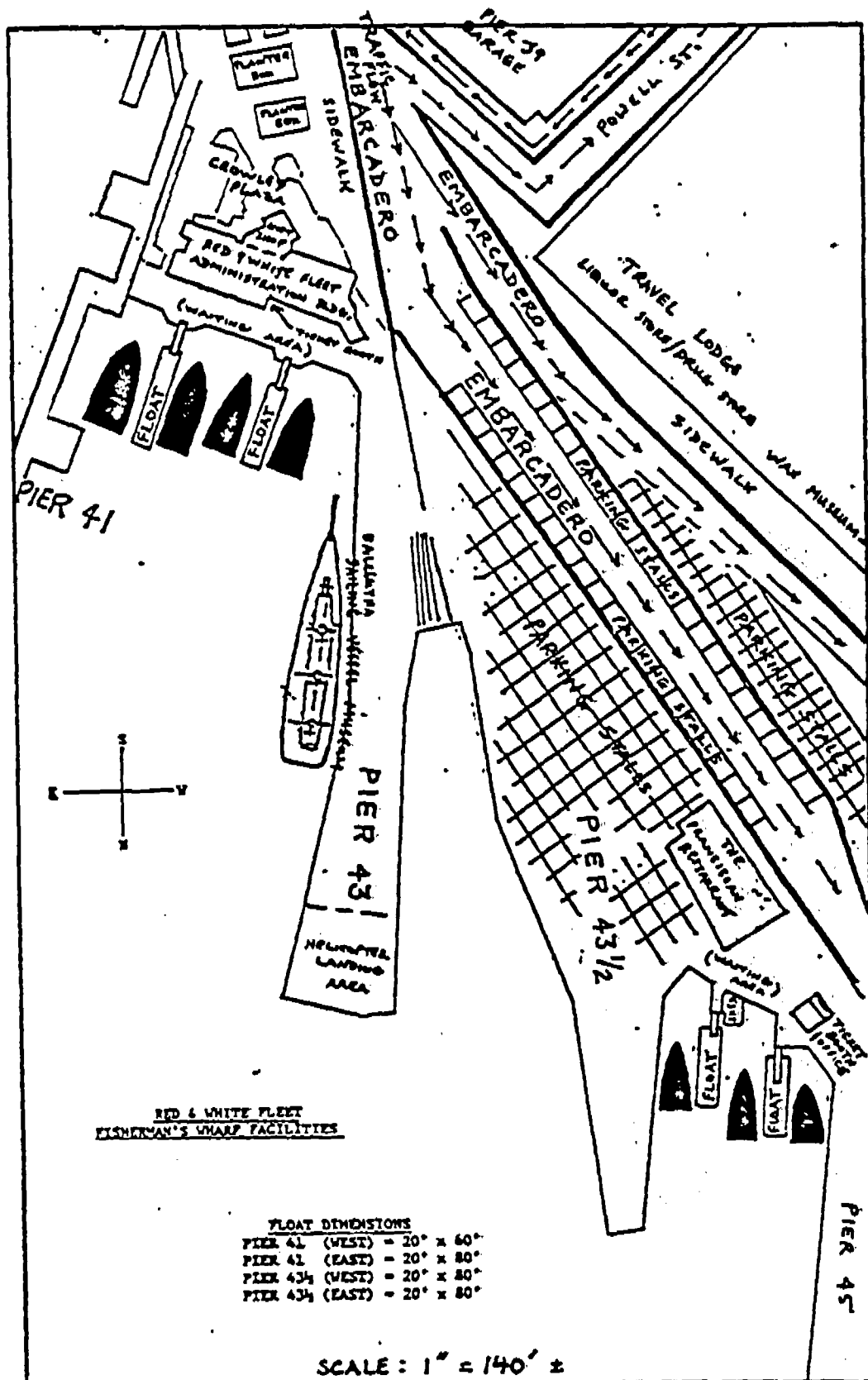
"Pier 41 - 43 $\frac{1}{2}$  - San Francisco

"The other two San Francisco locations leased by Harbor Carriers, Inc., or its affiliated corporations, are in the Fisherman's Wharf area. The San Francisco Port Commission has leased almost two acres of water frontage at two locations combined into one lease agreement. These are designated as Pier 41 and Pier 43 $\frac{1}{2}$ .

"The lease at Pier 41 consists of some 59,292 square feet. On October 26, 1981, Crowley Maritime Corporation officially dedicated its new Pier 41 facilities featuring berthing for four vessels, a waiting area, a 15,000 square foot, two-story structure which houses a ferry and charter terminal, a gift shop, a snack bar, a kitchen for catering facilities and the administrative offices for all Northern California passenger vessel services. It is from this facility that Harbor Carriers, Inc. intends to provide its San Francisco-Sausalito mid-day ferry service.

"The lease at Pier 43 $\frac{1}{2}$  consists of some 23,626 square feet with berthing for three vessels, a ticket booth and office and a waiting area.

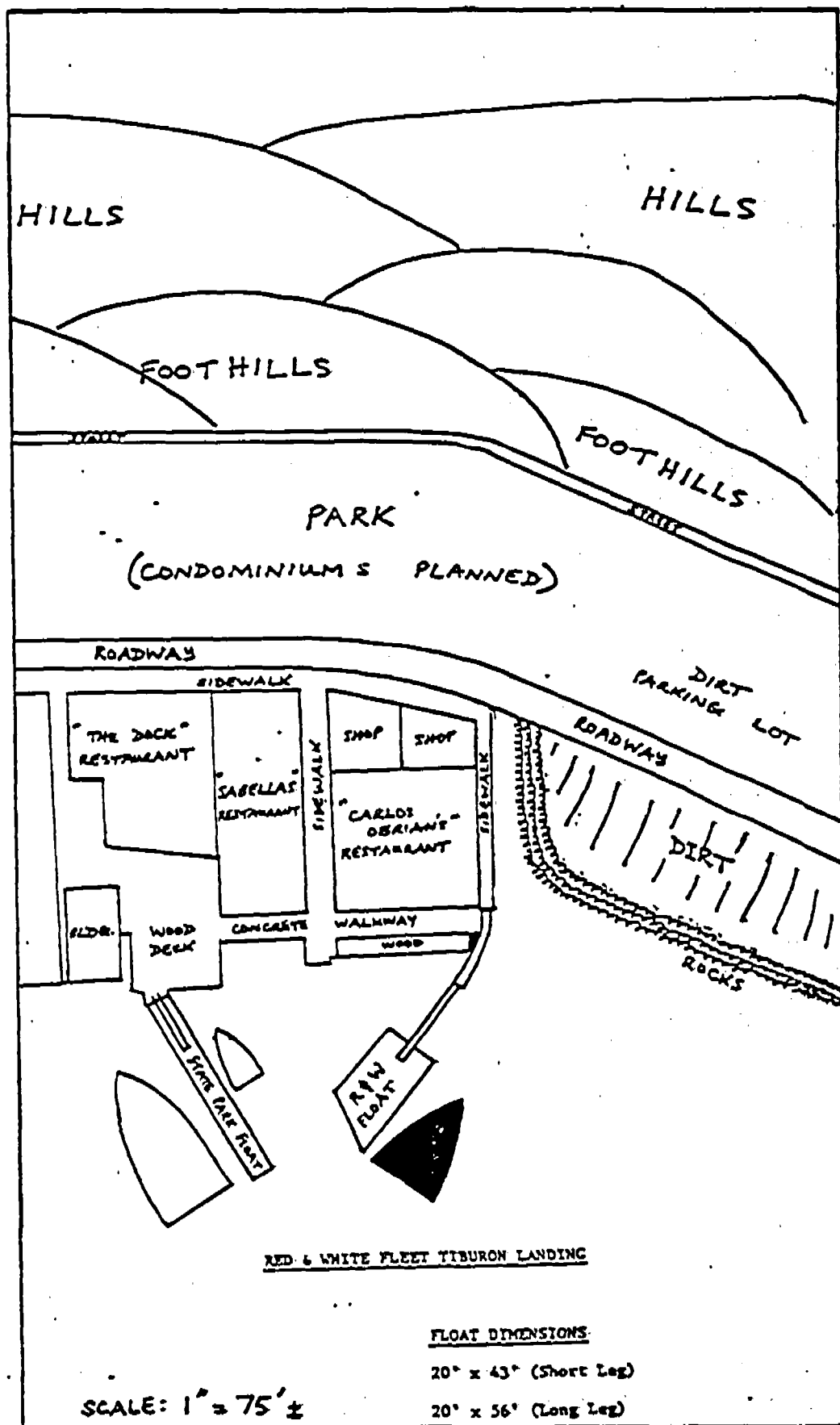
"The current lease between the San Francisco Port Commission and Harbor Carriers, Inc. for the combined Pier 41 and Pier 43 $\frac{1}{2}$  leasehold interest is \$100,000 per year (\$8,333.33 per month) or 7% of gross receipts, whichever is greater. The combined premises will simultaneously berth or load and unload passengers for all seven passenger vessels in Harbor Carriers, Inc.'s present fleet and it is leased on an exclusive basis."



"Tiburon Passenger Vessel Facility

"Harbor Carriers, Inc. has provided a San Francisco-Tiburon Ferry service for many years. It leases property in Tiburon from Main Street Properties which is owned by a Mr. Fred G. Zelinsky. At the time the complaint in this proceeding was filed, the lease which provided rental payments of \$7,800 per year (\$650 per month) has just expired and new terms were to be negotiated. Subsequent to January 13, 1982, a new four year lease has been negotiated providing for a monthly rental of \$700. In addition, Harbor Carriers, Inc. has an option to terminate said lease upon 60 days prior written notice. The present lease is effective through December 31, 1985.

"The Tiburon float is 20' wide and 43' long on one side and 56' long on the other side. A ramp leads from the float to the sidewalk level in close proximity to parking and the various restaurants and shops of interest in Tiburon."

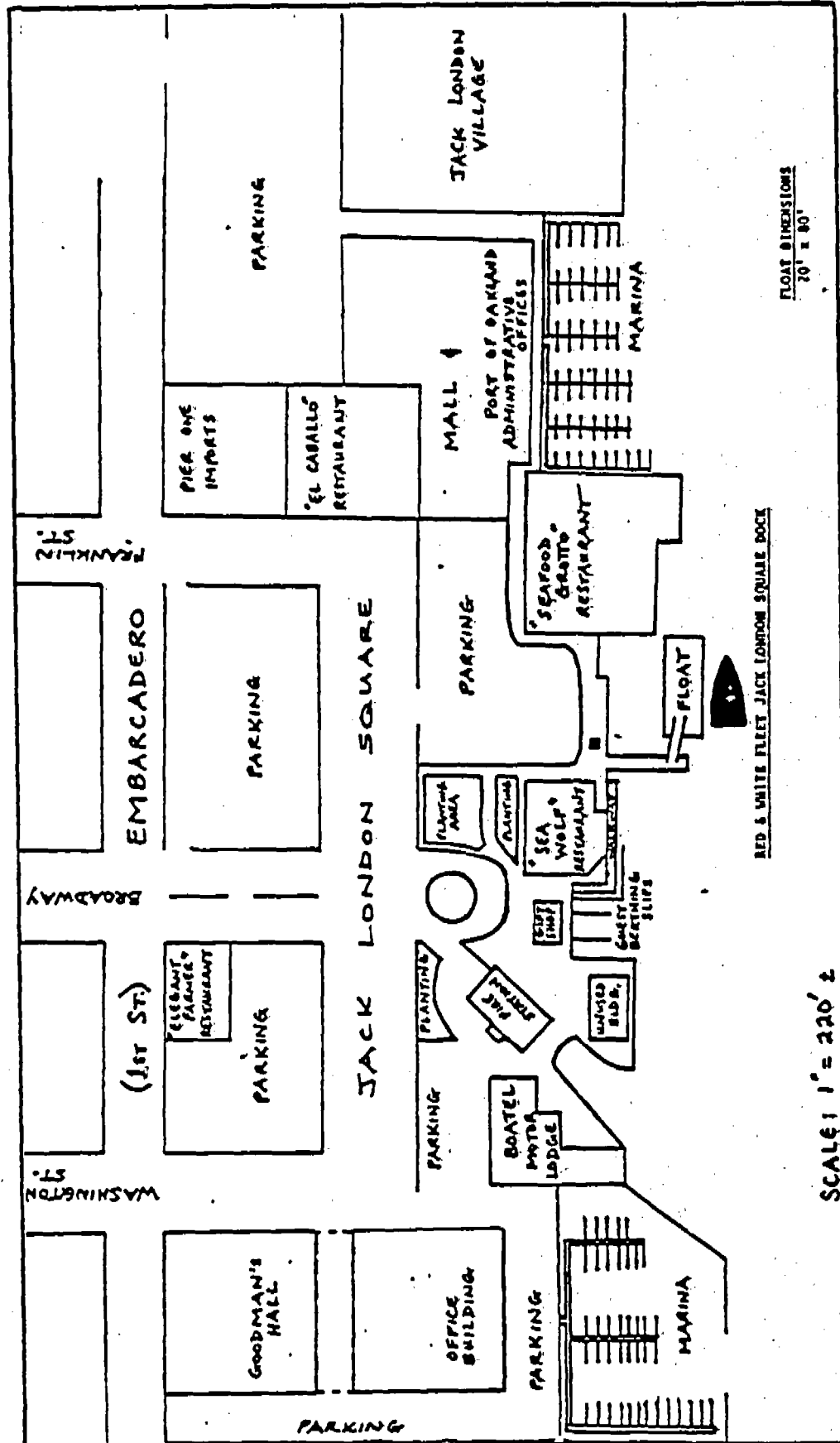




"Jack London Square

"Harbor Tours, Inc., an affiliate of Harbor Carriers, Inc., leases some 21,052 square feet of water, berthing and shore property at Jack London Square in the City of Oakland. This property provides a landing site, berthing space, ticket booth and other necessary facilities for the purpose of embarking and debarking passengers to and from boats operated in loop service sightseeing tours along the Estuary of San Antonio, elsewhere in the San Francisco Bay and for occasional charters. The leased property is directly adjacent to the many shops and restaurants located at Jack London Square and is for the exclusive use of Harbor Tours, Inc. or one of its affiliated corporations.

"A new lease from the City of Oakland was effective January 1, 1982 and it provides for a landing fee of 5% of gross receipts generated in Oakland with a \$300 per month minimum. The term is one year."



On the basis of the leases for these various locations, LaCava stated (Exh. 48, p. 5):

"Exhibit 49 has been prepared to demonstrate what Harbor Carriers, Inc., or its affiliated corporations, and its various lessors have agreed to as reasonable compensation for passenger-ferry docking locations used in California. Only three of these facilities have a simple float with a ramp leading to street level comparable to the existing arrangement at Sausalito. These are the facilities at the Ferry Building in San Francisco and at Tiburon and Oakland. Exclusive use leases have recently been negotiated at each of these three landing sites for less than \$1,000 per month. The standing offer by Harbor Carriers, Inc. for non-exclusive use of the Sausalito float owned by Golden Gate Bridge, Highway and Transportation District is \$12,000 per year or \$1,000 per month. Based upon the information which is available to us, we believe this is a reasonable offer."

Assuming a rental of \$12,000 per year, the witness prepared a pro forma income statement for Harbor's Sausalito-Fisherman's Wharf service assuming authorized fares and estimated a "margin" (return) of 4.0%. (Exh. 48, appendix.)

Staff's Evidence

Richard Brozosky of the staff's Transportation Division presented Exh. 57 which compared additional wharfage fees and also included an analysis of District's improvements and maintenance costs since condemnation of the leasehold. The witness' table of these costs follows.<sup>17</sup> Insurance and supervision costs were excluded on the basis that Harbor will carry its own liability insurance to protect District and will perform its own supervision.

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<sup>17</sup> See comment on this table in Footnote 22.

ANNUAL COSTSCONDEMNATION, IMPROVEMENTS, AND MAINTENANCE

Item	Amount	Date Completed	No. of Years to 2002	Annual Cost
Condemnation Cost	\$ 99,000	June 24, 1976	25.5	\$ 3,880
Pier Refurbishment	177,421	June 1980	21.5	8,250
Pile Repairs	16,500	Oct. 27, 1976	25.2	660
Superstructure Improvements	35,000	March 1978	23.8	1,470
Annual Maintenance (five-year average)	27,050	-	-	<u>27,050</u>
<b>Total</b>				<b>\$ 41,310</b>

Brozosky then apportioned the costs between District and Harbor based on number of round trips per day for each carrier, and found that Harbor should pay 42.4% or \$1,460 per month, on a cost basis. But then his final recommendation was that Harbor pay District \$1,460 per month "or 7% of revenue derived from passenger fares, whichever is greater," on the basis that payment of a revenue percentage is "characteristic of the market place" (Exh. 57, p. 5). This statement of the witness is based on his survey of dockage fees, an appendix to his exhibit which shows such fees are frequently included. This appendix (with certain references to additional appendix material deleted) is reprinted on the following pages. Certain figures in the exhibit were updated during the course of the hearing. These updated amounts are substituted where appropriate; therefore, the pages which follow are not identical to the exhibit in its original form. ✓

SURVEY OF WHARFAGE FEES  
EXCURSION VESSELS

Sheet 1 of 3

Carrier	Location	Remarks	Average Monthly: Fee	Percentage: of Revenue
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Harbor Carriers

Sausalito (Proposed)	Harbor Carriers has agreed to pay Sausalito 5% of gross revenue generated in Sausalito or 2½% of gross revenue generated in the proposed San Francisco-Sausalito service.	\$ 2,900	2½%, 5%
	Harbor Carriers proposes to construct improvements at Sausalito which it estimates to cost approximately \$200,000.	(Estimated by Harbor Carriers)	

Port of San Francisco Pier 201 (Vic. Ferry Building)	Harbor Carriers pays Port of San Francisco \$663 per month. This is adjusted to changes in the Consumer Price Index.	\$ 663	-
	Harbor Carriers uses this facility for its weekday morning and evening commute service to Tiburon.		

Port of San Francisco Piers 41, 43½ (Fisherman's Wharf)	Harbor Carriers pays Port of San Francisco 7% of gross receipts or \$8,333 per month, whichever is greater. Harbor Carriers is allowed to amortize up to \$1,500,000 in construction costs when rental exceeds \$100,000 per year. Harbor Carriers does not pay any fees on ferry boat fares. This facility is used for Harbor Carriers' sightseeing loop operations, service to Alcatraz, Angel Island, and weekend Tiburon service. It is proposed to use this facility to serve Sausalito. See Appendix 7. [Cost of improvements by Harbor was \$5,000,000.]	\$ 8,333 Minimum	7%
	No fee on ferry boat fares.		

Port of Oakland (Jack London Square)	Harbor Carriers pays Port of Oakland 5% of gross receipts or \$3,600 per year, whichever is greater.	\$ 300 Minimum	5%
	Facilities were installed by Harbor Carriers. Installations are estimated by the Port to have cost \$30,000. Harbor Carriers is responsible for maintenance and repairs.		

SURVEY OF WHARFAGE FEES  
EXCURSION VESSELS

Sheet 2 of 3

Carrier	Location	Remarks	Average Monthly Fee	Percentage of Revenue
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Golden Gate Bridge District

Port of San Francisco District does not pay any ongoing rent. Its initial payments to Port of San Francisco amounted to \$373,833. All installations (including dock and substructure) were installed by the District. [Their cost was \$3,000,000.]

See Appendix 8.

Blue and Gold Fleet

Port of San Francisco Pier 39, which includes restaurants and other concessions as well as Blue and Gold Fleet, will pay the Port of San Francisco \$420,000 in 1982. Starting in 1984 Blue and Gold Fleet will pay 7% of gross receipts. This will be reduced to 5% until the 2% differential amortizes \$1,800,000 in pier development costs.

5%, 7%  
(Starting 1984)

See Appendix 9.

Gold Coast Cruises

Port of San Francisco Pier 45 (Fisherman's Wharf) Gold Coast Cruises pays the Port of San Francisco 10% of gross sales or \$135 per month, whichever is greater. Will resume operations for the season in June.

\$ 135 Minimum 10%

See Appendix 10.

Harbor Carriers

Tiburon

Harbor Carriers pays a private party \$8,000 per year. Terms of new lease are to be negotiated. [This was renegotiated for \$700 per month. See excerpt from LaCava's exhibit above.]

\$ 700

SURVEY OF WHARFAGE FEES  
EXCURSION VESSELS

Sheet 3 of 3

Carrier	Location	Remarks	Average Monthly: Fee	Percentage: of Revenue
<u>H. Tourist</u>				
Avalon Santa Catalina Island		H. Tourist pays Avalon \$356 per month. Avalon assesses each passenger landing 50¢, and each passenger embarking 50¢. H. Tourist's tariff to Catalina is \$7.90 per adult passenger, \$3.95 per child. Assuming weighted average fare is \$7.33 (based on Alcatraz experience), the effective percent paid on ticket sales is 6.8%. H. Tourist does not have exclusive use of docking facilities.	\$ 356	6.8% Effective
<u>H. Tourist</u>				
City of Long Beach		H. Tourist pays the City of Long Beach 5% of gross or \$5,000 per month, whichever is greater. H. Tourist provides service to Catalina. Facilities were constructed by the city.	\$ 5,000 Minimum	5%
<u>Star and Crescent Boat Company</u>				
Port of San Diego		Star and Crescent pays Port of San Diego 6 1/4% of ticket sales and snack bar, 5% of gift shop, 25% of vending machines and 10% of miscellaneous. Building (2,400 square ft.) is a property of Port. Carrier offers tours of the harbor.	\$ 9,450 Minimum	6 1/4% (Ticket sales)
<u>H. Tourist</u>				
City of Los Angeles		H. Tourist pays City of Los Angeles 5% of gross receipts or \$5,270 (plus utility fee) per month, whichever is greater, plus 8% of gross receipts of giftshop. City built and maintains the facilities except those areas which are used exclusively by H. Tourist. One other carrier (approximately one-fifth capacity of H. Tourist) shares the concrete wharf.	\$5,270	5%



Replacement Value of District's Float

During the direct portion of the case, no party offered engineering testimony on the replacement value of District's Sausalito float. Gimmy's estimate was based on certain records of District, apparently not complete, and not introduced into evidence, and his discussions with marine contractors. Harbor introduced the testimony of its project construction manager who inspected that part of the float visible to him.

Because of questions concerning the witnesses' ability to make correct estimates with the information available, counsel for Harbor and for district both offered to present engineering rebuttal witnesses on the subject. These offers of proof were made on the next-to-last day of hearing and were rejected on the basis that the scope of the technical evidence offered exceeded proper rebuttal and would have necessitated additional hearing dates after allowing time for counsel to prepare for cross-examination. The ALJ commented that such extensive material should have been part of each party's case-in-chief since it was well-known that costs relating to District's dock would be in issue. The ALJ also stated that the offers of proof called into question the probative value of the evidence because (1) Harbor's proposed witness had made only a quick inspection of the float and (2) District's witness would have been offered to prove the value of the float new, and that while Harbor does not stipulate to that value, its main argument is that even assuming District's estimate for a new float (\$425,000) is correct, this is not the figure to use for valuation purposes because the float was acquired in 1970. (Tr. 1322-1332.) The ruling is affirmed.

Thus, insofar as evidence is available concerning replacement costs of the docking facility, the following summary shows the differences:

	<u>District</u>	<u>Harbor Carriers</u>
Upland Improvements	\$ 7,326*	\$ 7,326
Pier and Ramp	101,500	100,000
Boarding Float	425,000	145,000
Architectural & Engineering	16,015*	16,015
Contingencies	<u>26,691*</u>	<u>26,691</u>
Total Replacement Cost	\$576,532	\$295,032

Asterisks indicate estimates of District which were accepted by Harbor.

Analysis and Argument of the Parties

Almost every facet of the evidence is in dispute. District argues:<sup>18</sup>

1. District's witness (Gimmy) was the only person qualified to appraise real estate who testified; neither Harbor nor the staff used any proper appraisal techniques.
2. Gimmy and staff witness Brozosky agree in principle that compensation should include a cost-based monthly amount and a percentage of gross revenue.
3. The leases in Oakland, Tiburon, and the San Francisco Ferry Building are not comparable to the Sausalito situation because no uplands are included, nor are any ramps, gangways, or floats included. Additionally, Harbor's lease at the Ferry Building is nonexclusive.
4. The only site really comparable to Sausalito (as Gimmy testified) is Harbor's facilities at San Francisco's Pier 41 and 43 $\frac{1}{2}$ . These are also in areas of intense tourist activity.
5. No credit should be given Harbor for any construction of its own because District acquires no interest in such improvements and did not request them.

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<sup>18</sup> As with the evidence, the arguments are considerably abbreviated. See, generally, District's and Harbor's briefs, and argument of staff counsel (Tr. 1516-1523).

6. Any fee Harbor pays to Sausalito should not be offset against payment to District because the value of District's dock to Harbor Carriers is not diminished by it.

Harbor argues:

1. District's "restaurant" valuation is improper due to zoning and other restrictions. A restaurant is not a use compatible with a ferry terminal.
2. Based on Harbor's pro forma income statement, a fee of 7% of its gross revenue would mean an annual payment of about \$98,000, which is unreasonable as far in excess of District's costs.
3. Harbor's lease with the Port of San Francisco obligates Harbor to pay \$8,333 per month (\$100,000 per year) or 7% of its revenue, but fees paid to the State are excluded, and Harbor may deduct the sums required to rebuild the terminal, etc. This has resulted in an actual payment of 4%.
4. Witness Gimmy conceded that the Fisherman's Wharf area enjoyed a "much greater degree of tourism and patronage" than Sausalito.
5. Harbor's landing sites at the San Francisco Ferry Building, Tiburon, and Oakland's Jack London Square are actually more comparable. They are all in commercial areas and the simple landing facilities more nearly resemble District's Sausalito site.
6. PU Code § 562(a) requires a fee which has some relation to cost.
7. A fee based on a percentage is anticompetitive and monopolistic and will force Harbor either to raise rates, lose money, or abandon the service (cf Northern California Power Agency v PUC (1971) 5 Cal 3d 370; see other cases cited in Harbor's brief).
8. The evidence demonstrates that when a percentage fee is charged, the municipality charging it also furnishes police, fire, and

other services, the cost of which bears some relation to volume of use. District does not furnish such services (and additionally, Sausalito charges Harbor a per capita fee under its use permit).

9. District does not even propose that the percentage fee be limited to receipts for Sausalito service (Harbor's Oakland, Long Beach, and San Pedro leases cover only business generated in those locations).

Harbor's brief concludes on this subject by stating that District's own expenses are the best evidence of what should be charged. District paid \$79,500 for the leasehold which, divided by the years at the time of the acquisition (26), equals \$3,058 per year. District spent \$327,921<sup>19</sup> in improvements, including condemnation expenses. Applying District's own 40% depreciation factor the value of the improvements would be \$196,753. Thus Harbor calculates:

10% return on \$196,753	\$19,675
Annual "rent"	<u>3,058</u>
Total	22,733
Harbor's 42% share (monthly equals \$795)	9,457

Harbor excludes maintenance on the ground that it should receive some credit for the \$200,000 it must spend under the use permit from Sausalito.

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<sup>19</sup> The total under "amount" in the table in the staff exh., excluding maintenance. Brozosky acquired these figures from District (see Exh. 33). However, as he testified on cross-examination, there was no allowance for the float.

The staff agrees with Harbor that valuation of the site for restaurant purposes is not appropriate, and would only be relevant if District were transferring its entire interest to a party which could use the property as it saw fit.

Staff also believes that, in calculating a payment for Harbor, the same principles are not involved as in setting fares for the public, and therefore Harbor should receive no credit for its improvements (nor should any adjustment to District's facilities be made because of certain Urban Mass Transit Administration grants). Staff argues that since District did not request Harbor's \$200,000 improvements, there is no basis for such an adjustment.

Type of Compensation - Discussion

No aspect of this case is more difficult to decide, and determination of the monthly payment reflects, in part, judgmental considerations by the witnesses and this Commission. A precise mathematical calculation based on entirely known quantities is impossible.

Harbor asserts that we may not compute a percentage fee based on gross receipts as all or part of the compensation. We disagree. PU Code § 562 requires us to determine "reasonable compensation and reasonable terms and conditions to be observed, including, but not limited to, all related costs of construction, capital improvements, leasing or rental, and maintenance." (Emphasis added.) It is clear that the statute's language does not select a particular methodology for the Commission, or tie the Commission to a mechanically cost-based formula; on the other hand, District's costs must be considered in establishing compensation, and any award to District above its costs must meet the test of reasonableness. A percentage fee which excessively benefits District would not meet that test. Query, on the other hand, whether we could base District's compensation solely on a percentage of Harbor's gross receipts, with no "floor" based on costs.

In our opinion we should first determine what compensation is owed District on a strictly cost-based approach. After that, we may then consider whether a gross-receipts percentage should be added if the record shows such a fee to be reasonable.<sup>20</sup>

Basic Compensation and Valuation

We believe that witness Gimmy's methodology for valuing the improvements is the best available on this record, but we disagree with his (and District's) contention that the value of the site should be estimated as if its highest and best use is a restaurant. Such a valuation fails to consider zoning restrictions and the present public ownership of the land, and the fact that the particular public owner (Sausalito) is against further commercial development of view areas and waterfront locations now devoted to public use. Under the discussion of valuation for eminent domain purposes, Cal Jur 3d states:

"Zoning restrictions whereby the use of property is limited may have a bearing on its market value, although whether a zoning ordinance has the effect of increasing or of reducing market value is a question of fact to be established by evidence. Similarly, the prospect of removal of restrictions by a change of the zoning ordinance may be relevant. The general rule that market value must be determined by consideration only of the uses for which the land is adapted and for which it is available does not apply where the land is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law but the evidence tends to show a reasonable probability of a removal, in the near future, of such restriction. Rather, the effect of that probability on the minds of purchasers generally may be taken into consideration in fixing the present market value

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<sup>20</sup> District's counsel stated on the record that District did not raise the passenger diversion issue in this connection but only concerning the selection of an alternate site. In any event, we have stated that diversion evidence is speculative.

of the property. Indeed, where there is a reasonable probability the zoning restrictions will be altered in the near future, the jury should consider not only uses currently permitted, but also other uses to which the property could be devoted in the event of such change. However, if a strip taken to widen a street is part of the land the owner would have had to dedicate for street purposes in order to obtain the zoning change necessary to develop his remaining property to its highest and best use, the strip taken must be valued only for its highest and best use under the existing zoning, since the land could never be used for any other purpose." [Cal Jur 3d, Eminent Domain, § 94; footnotes and citations omitted.]

The record clearly establishes that there is no reasonable probability of a zoning change which would allow a restaurant or any equally intensive commercial use. For the foreseeable future the leasehold's highest and best use is its present use, and the site should be valued as such.

What is that value?<sup>21</sup> Harbor suggests that it is the amount derived by amortizing the cost of condemnation over its life span ( $\$79,500 \div 26 \text{ years} = \$3,058 \text{ per year}$ ). This method of calculation, however, does not account for the changed value of the property since 1976. Further, the value of real property is not usually measured through amortization or depreciation. Its value is determined by the market demand for it. In this case, however, the value can only be estimated because of the property's location and the restricted uses to which it can be put. Such an estimate may be derived by any method of valuation which is just and equitable (CCP § 1263.320(b)). We find that District would be fairly compensated if it earned a 10% return on its leasehold. We believe such a return is reasonable for District to expect to receive on this real property investment. We thus find the annual value of the leasehold to be \$7,950 for purposes of this decision.

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<sup>21</sup> At this point it should be remembered that we are valuing the site. The improvements are considered separately.

In this connection we agree with Gimmy that the entire leasehold must be valued, and not simply that area of it currently used for ferry operations or staging. Just as District took the leasehold the way it found it, Harbor should share the entire leasehold. (In any event, the parts of the leasehold which are unused and unusable for ferry terminal purposes most likely have only nominal value to District.)

We turn now to valuation of the improvements. We adopt Gimmy's methodology. Harbor's testimony regarding cost of an alternate float was not well-developed, and staff's Exh. 57 may not have included all float costs. Gimmy relied on District records, which were incomplete, but he backstopped his investigation with estimates from construction firms.

We also believe Gimmy's method of establishing replacement value and then taking depreciation is better for valuation purposes than simple calculation of out-of-pocket costs (except for maintenance, which is discussed later). Gimmy's development also allows a 10% return and a 6.67% depreciation factor, which are reasonable.

Harbor, however, is obligated to expend substantial sums to improve the uplands portion of the terminal. Should it be credited for those expenditures? We believe the answer is "yes" because what Sausalito wants, and is going to get under its conditional use permit, is a joint terminal with better staging facilities, not two staging areas, each for the separate use of District's passengers, on the one hand, and Harbor's, on the other hand. While of course there may possibly be signs and separate queuing locations to ensure that passengers board the correct boat, the entire staging area and its amenities will be available to those arriving at or departing from Sausalito by ferry. Harbor's improvements will thus benefit District (whether or not District desires them) just as District's leasehold and improvements benefit Harbor.



What method should be used for offsetting Harbor's payments to District? No immediate offset is appropriate since Harbor's improvements are not in place. To achieve fairness while avoiding a multiplicity of supplemental proceedings, we will permit Harbor to apply to reduce its monthly payment to District by an appropriate apportionment of the value of the improvements when they are installed and in use, so long as it can be shown that they are reasonably required by the use permit and are not gratuitous. As with District's improvements, we will determine their annual value by estimating their useful life. District will be required to file any protest to the application within 30 days.

The last problem is maintenance expense. District furnished staff with a lump-sum figure which District stated is an average over five years, in the amount of \$27,050 (see "annual costs" table reprinted from Exh. 57, above).<sup>22</sup>

Harbor presented evidence from its records to show that it maintains an even larger float and appurtenances of similar construction in Long Beach for which it experiences annual maintenance costs of \$9,250 (LaCava, Exh. 52).

Neither District nor Harbor developed the issue of maintenance with much detail, but we believe Harbor's more complete presentation carries greater weight and we will adopt Harbor's annual figure of \$9,250.

Harbor's own maintenance figures on its future improvements are unknown and will not be considered at this time. When Harbor completes the improvements required under the use permit and files

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<sup>22</sup> The staff's table does not include costs of the float. The estimate for annual maintenance which the table includes is actually District's figure.

its application to adjust its payment, it may include a reasonable estimate of such expense as a claimed offset.

A summary of the annual rental which we have adopted follows:

Summary of Annual Rental

Annual value of leasehold, without improvements	\$ 7,950
Annual value of improvements	57,500
Annual maintenance	<u>9,250</u>
Total annual rental value	74,700
42.4% apportionment to Harbor	31,673

(Monthly payment equals \$2,639 less any credits due Harbor for apportioned value of its own improvements and maintenance after finding by Commission.)

Percentage Fee

Should we award District a fee based on Harbor's ferry service receipts, in addition to the compensation found reasonable above? We believe that based on this record, the answer is no.

Preliminarily, we dismiss District's contention that such a fee should be based on Harbor's total ferry business. Other leases on which information was available concern percentages of business using the particular terminal for which the lease is drawn. No rational relation can be shown to exist between Harbor's total gross receipts for all its services and District's legitimate interests. We deal in this section of the opinion only whether such a fee should be charged for the gross receipts on Harbor's Fisherman's Wharf to Sausalito service.

By far the strongest argument in favor of percentage payments is that they are customary. Should the Commission consider custom in the industry and then set a gross-receipts fee based upon comparisons between District's Sausalito dock and other ferry terminals? This question might well be answered in the affirmative

if District were in the same position as other lessors known to demand such fees, but it is not. As Harbor points out, lessors charging such percentage fees are municipalities or agencies of local governments, whose responsibilities extend to public health and safety problems. It may well be reasonable for those lessors to charge a fee based on volume to offset problems caused by large numbers of people who arrive by such facilities and who make use of the city generally, as well as the landing site, after arriving. In this instance, Sausalito, not District, is in this position.

Sausalito has reserved the right to charge Harbor a gross receipts percentage fee under the conditional use permit (based on the business generated by the San Francisco-Sausalito service only). District pays no similar fee to the city.<sup>23</sup> Sausalito's current resolution adopted under the use permit sets the fee at 5% of the gross receipts. District would have us, in effect, impose a second-tier fee of 7%.

The anticompetitive effect of such pyramiding cannot go unnoticed, and we may not ignore it (Northern California Power Agency v PUC, supra). Furthermore, governmental agencies, including District, can no longer consider that they have blanket immunity from antitrust doctrine. (Community Communications Co., Inc. v City of Boulder, Colorado (1982) \_\_\_ US \_\_\_, 70 L Ed 2d 810.) We suggest no collusion between Sausalito and District; regardless of that, the anticompetitive effect of Harbor's being subject to a two-tiered percentage fee based on gross receipts, while District pays no such fees at the same location, is obvious. Harbor would be placed at a disadvantage in soliciting tourist business since its fares

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<sup>23</sup> Sausalito may not be able to charge a political subdivision of the State such a fee, and additionally, most of District's San Francisco-Sausalito business is commuter rather than tourist. It would be difficult if not impossible to segregate the business by types of passengers to compute such a charge.

would have to be set at a level to cover these charges and still permit it to make a reasonable return, while District would be under no similar economic pressure.

Lastly, the commercial leases which are a matter of record are, to our knowledge, the result of unregulated bargaining between the parties. What is customary may or may not be reasonable. We have already allowed for a 10% return on both the site and improvements and a 6.67% depreciation factor on the improvements (District's own recommendation). We deem this sufficient for the foreseeable future. If conditions change, then these factors should be adjusted in preference to adding a gross receipts percentage fee.

#### IV. Conclusion

This decision hopefully ends 14 years of disputes over the start of Harbor's service. Because public need for the service has been demonstrated and its institution has been long-delayed, we will permit Harbor to begin it on three days' notice to District and the public, and we will make the order in this decision effective immediately.

While the parties did not raise this point, we believe it reasonable to require Harbor to make its monthly payment in advance. If service commences at some time other than the first of the month, payment by Harbor should be pro rated on a daily basis.

#### Findings of Fact

1. Harbor, a common carrier by vessel under PU Code § 211(b), holds a certificate of public convenience and necessity from this Commission to transport passengers by vessel between its dock in the Fisherman's Wharf area of San Francisco and downtown Sausalito. This authority was originally granted by D.86188 dated August 31, 1978 (A.49712) but has never been operated except during brief emergency periods because of Harbor's inability to obtain docking space in Sausalito. We have from time to time extended the deadline for commencement of the service. (See history and references in D.82-07-022 in this proceeding, issued July 7, 1982.)

2. District operates a passenger ferry terminal in Sausalito at the foot of El Portal Street as more fully described in the opinion section of this decision.

3. Sausalito's zoning and planning policies have been, and are, against the construction and operation of any second ferry terminal in its downtown area. Sausalito's conditional use permit, issued to Harbor, requires Harbor to use District's Sausalito terminal jointly with District, and to maintain a schedule compatible with District's. Sausalito recognizes Harbor's condemnation powers but is on record as being committed to exhausting all legal remedies to prevent condemnation of an alternate site.

4. District proposes five alternate sites for Harbor's Sausalito terminal. These locations are unacceptable as ferry terminal sites for the reasons set forth in the opinion section of this decision, which, in summary, are:

- a. Sites 4 and 5: neither site is within easy walking distance of the entire "CC" downtown commercial zone; use of Site 4 would require demolition of an historical landmark; Site 5 would lengthen the ferry trip up to 15 minutes and would require extensive dredging.
- b. Site 1: There are navigational hazards concerning its use, and it is located in a view area.
- c. Site 2: Use of this park as a staging area would unduly change its character, at least during peak tourism periods, and either extensive dredging or a long and unsightly pier would be required.
- d. Site 3: This park site is so small that its use as a staging area would preclude all but incidental use as a park, and it is so located that there is no lawful vehicular access to it. Overflow onto adjacent sidewalk areas could occur.

5. Sausalito owns all the sites except the least acceptable choice (Site 5). Sites 1, 2, 3, and 4 are devoted to public use. Attempts to condemn Sites 1, 2, 3, or 4 for ferry terminal use might prove unsuccessful, and even if successful would result in indefinite delay in commencement of the service.

6. For the foreseeable future, the only reasonable location for Harbor's Sausalito terminal is District's terminal there.

7. The record does not demonstrate that any joint use of District's dock (as opposed to use of the suggested alternate sites) will result in diversion of passengers from District's service.

8. Harbor's proposed schedule is compatible with District's.

9. None of the conditions for use of District's Sausalito terminal, proposed by District, are reasonable or appropriate.

10. District's terminal is situated on an irregularly shaped parcel of which only about 3,000 square feet are uplands and the remaining 64,518 square feet are submerged land. The site has been improved for ferry landing purposes as more fully set forth in the opinion. District holds the remaining years of a 26-year lease which it condemned, and which expires in the year 2002.

11. Harbor's use permit from Sausalito requires Harbor to spend about \$200,000 in improvements to the terminal upon commencement of the service. These improvements, as well as District's, will not be divided or segregated and will be available for use by all ferry passengers.

12. It is reasonable to determine Harbor's annual rental for District's terminal by the following method:

- a. Determine the annual value of the leasehold, including a return;
- b. Determine the annual value of the improvements, including a return and a factor for depreciation;
- c. Determine District's annual maintenance expenses;

- d. Add (a), (b), and (c) above to determine total annual rental value;
- e. Apportion annual rental value between Harbor and District on the basis of landings per week (42.4% to Harbor);
- f. After installment of Harbor's required improvements, allow Harbor to apply for an offset to its payment to District based upon the annual value of the improvements and Harbor's annual maintenance expenses, apportioned between District and Harbor.

13. The reasonable annual value of District's ferry terminal leasehold site is \$7,950, including the return on it.

14. Just as District condemned the leasehold as it found it, Harbor must share the use of the site as it exists and should not be permitted to discount the value of any portion of it not actually used for ferry landing purposes.

15. The reasonable annual value of District's improvements is \$57,500.

16. It is reasonable to estimate District's annual maintenance expense at \$9,250.

17. Based upon the amounts found reasonable in Findings 13, 15, and 16, the total reasonable annual rental value is \$74,700.

18. Based upon the total reasonable annual rental value in the preceding finding and the methodology in Finding 12, Harbor's annual rental payment to District is \$31,673, which equals a monthly payment of \$2,639. (See table entitled "Summary of Annual Rental" in opinion.)

19. Harbor should be allowed to offset its payments to District by an apportioned annual value of such improvements, when they are installed and in use, and by an apportioned annual estimate of Harbor's own maintenance costs connected with the improvements.

20. It is not reasonable to allow District to charge Harbor a percentage fee based on Harbor's gross receipts, or on a portion of such gross receipts.

Conclusions of Law

1. Public convenience and necessity require the use of District's Sausalito passenger vessel terminal facilities by Harbor, on a compatible schedule and subject to the terms and conditions in the order which follows.

2. Harbor should compensate District for the use of the terminal on a monthly basis, such payment equaling  $1/12$  of the annual value of the site and the improvements, plus  $1/12$  of District's estimated annual maintenance expenses, apportioned 42.4% to Harbor.

3. Harbor should be allowed to apply to this Commission for an offset against such payments based upon the annual rental value of improvements required to be installed under Harbor's use permit from Sausalito and on annual maintenance costs associated with such improvements. Such application should not be made until the improvements are installed and in use.



FINAL ORDER

IT IS ORDERED that:

1. Golden Gate Bridge, Highway and Transportation District (District) shall permit Harbor Carriers, Inc. (Harbor) to make use of District's Sausalito passenger vessel terminal for Harbor's passenger ferry service between the Fisherman's Wharf area of San Francisco and Sausalito.

2. Harbor shall adhere to a schedule of six round trips per day, as follows:

<u>Leave</u> <u>Fisherman's Wharf</u>	<u>Arrive</u> <u>Sausalito</u>	<u>Leave</u> <u>Sausalito</u>	<u>Arrive</u> <u>Fisherman's Wharf</u>
11:05 a.m.	11:35 a.m.	11:45 a.m.	12:15 p.m.
12:25 p.m.	12:55 p.m.	1:10 p.m.	1:40 p.m.
1:55 p.m.	2:25 p.m.	2:35 p.m.	3:05 p.m.
3:15 p.m.	3:45 p.m.	3:55 p.m.	4:25 p.m.
4:45 p.m.	5:15 p.m.	5:30 p.m.	6:00 p.m.
6:10 p.m.	6:40 p.m.	6:50 p.m.	7:20 p.m.

Timetable changes shall be submitted to the Commission with copies to District and Sausalito at least 10 days before their effective date.

3. Harbor may commence its service on 3 days' notice to District and the public.

4. Neither District nor Harbor shall, by act or omission, interfere with each other's passenger vessel operations.

5. For the use of District's facility, Harbor shall pay to District a monthly sum of \$2,639. Payment shall be made in advance, on or before the first day of each month. For any period less than a month, payment shall be made in advance on a pro rata basis.

6. When Harbor completes the improvements to the leasehold area required by its use permit from Sausalito, and when the improvements are in use, it may apply to this Commission to offset its monthly payments by the annual rental value of the improvements plus annual maintenance, apportioned between Harbor and District. District shall file any protest to such an application within 30 days of its filing date prepared in accordance with the Commission's Rules of Practice and Procedure.

This order is effective today.

Dated AUG 18 1982, at San Francisco,  
California.

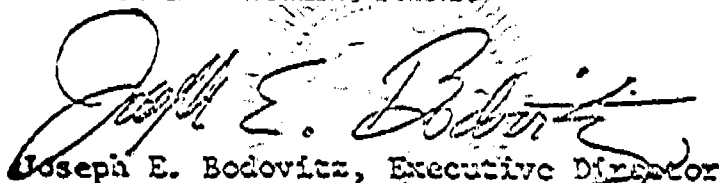
RICHARD D. GRAVELLE  
LEONARD M. GRIMES, JR.  
VICTOR CALVO  
Commissioners

Commissioner JOHN E. BRYSON

Present but not participating.

Commissioner Priscilla C. Grew,  
being necessarily absent, did  
not participate

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

  
Joseph E. Bodovitz, Executive Director