

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071

**MEMORANDUM**

June 10, 2009

TO: Commissioners and Interested Parties

FROM: Sherilyn Sarb/South Coast Deputy Director (Orange County)

SUBJ: **Addendum to Commission Meeting Thursday, June 11, 2009 at 8:00am**

<u>AGENDA</u>	<u>APPLICANT</u>	<u>DESCRIPTION</u>	<u>PAGE#</u>
<u>COASTAL PERMIT:</u>			
Th24b(5-09-055)	Bay Island Club	Letter from John Briscoe (applicant rep) dated June 8, 2009 w/City Ltr as attachment	1 - 6
		Email from D.M. Ivester to J.J. Patterson and C. Pederson dated June 09, 2009	7 - 9
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SAN FRANCISCO, CALIFORNIA 94104
(415) 402-2700
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RECEIVED

JUN 09 2009

CALIFORNIA
COASTAL COMMISSION

John Briscoe
(415) 402-2701
jbriscoe@briscoelaw.net

June 8, 2009

Ms. Bonnie Neely, Chair
and Commissioners
California Coastal Commission
45 Fremont Street, Ste. 2000
San Francisco, CA 94105

Re: Application No. 5-09-055

Dear Chair Neely and Commissioners:

The application before you is to build a 10-foot-wide, 130-foot-long, private pedestrian bridge to replace an existing, deteriorating, private pedestrian bridge to Bay Island in Newport Bay. Scores of issues have been resolved by your staff and the applicant, and we thank Mr. Schwing and the rest of your staff for their diligence and courtesy. One issue remains, however. Your staff recommends that the applicant be required to open the new bridge to public access 24 hours a day, 365 days a year. The applicant, which does not own the land, but only a private bridge easement, opposes that condition. So does the owner of the lands, the City of Newport Beach, which is not before you in this application. The City Manager's June 1 letter to you stating the City's opposition is attached to this letter.

The City's letter articulates several policy reasons why such an access condition is ill-advised. The bridge, for one thing, would be nothing but an attractive nuisance encouraging more reckless diving into the shallow water below, producing spinal injuries (and lawsuits against the City, not to mention the applicant). The City's reasons are reason enough to decline the staff recommendation. But there are other reasons you should reject it.

Your applicant, the Bay Island Club, could not legally comply with such a condition. It holds only a private bridge easement over lands owned by the City, and cannot enlarge the scope of its small right, as by allowing public access. We have made your staff aware of this legal prohibition, and we reiterate the key legal points in the longer memorandum submitted in opposition to the proposed access condition.

Even if the Bay Island Club were the landowner, though, there would be no legal justification for the access condition recommended. Your staff points to provisions of the Coastal Act which “encourage” public access to waters or shoreline. See, e.g., Report p. 22. But the Act is subject to the federal Constitution’s provisions against the taking of private property without due process of law, and without just compensation. (There is no plainer taking of private property than requiring public use of it. *Kaiser-Aetna v. United States* (1979) 444 U.S. 164.) This Commission needs no primer on the requirements of a “nexus” between an alleged impact to public access and the condition exacted, much less on the requirement that any such exaction bear a “rough proportionality” to the impact. What does the staff offer as justifications, as the “nexi,” for the recommended access condition? We have sought to tease out from its Report its suggested justifications, and offer the following brief responses to them (fuller responses are found in our memorandum):

-- Your staff writes, “Although the public doesn’t presently have access upon the existing bridge, public access upon the new bridge would be beneficial.” Report, p. 21. The fact an exaction may be “beneficial” in the eyes of somebody does not constitute the “nexus” the law requires.

-- Staff suggests that there may have been public use in the past, Report, pp. 1-2, and thus hints, without explicitly saying, that its 24-hour public-access condition may be justified on the possibility there has been an implied dedication. To that hint are four answers. First, this Commission cannot determine that land has been impliedly dedicated, and thus cannot impose an access condition on the “possibility” there may be an implied dedication. That is law. *LT-WR, L.L.C. v. Cal. Coastal Com.* (2007) 152 Cal.App.4th 770, 806. Second, no prescriptive right could arise here because no such right can ripen against property owned by a public entity, as this property is. Civil Code section 1007. Third, the City in its letter confirms that “[t]he bridge has not in the past been open to the public.” Fourth, even if this Commission were a California Superior Court, and even if the owner were *not* the City, but a private entity, the evidence would support no finding of an implied dedication.

-- Staff suggests that the new bridge, which will have the same height as the existing bridge, will “perpetuate” a condition that limits the height of vessels that may navigate the narrow and shallow water beneath, and so justifies exacting the public-access condition. Report, p. 20. “Perpetuating” an existing condition is no trigger for a taking of private property. What is more, providing access to a private foot bridge could be no compensation for the inability of large fixed-mast yachts, or container or naval vessels for that matter, to navigate the shallow waters beneath.

-- Staff alludes to the public-trust doctrine as affording some justification for the access condition. Report, pp. 2, 21-22. The lands beneath the bridge, as we have painstakingly explained to staff, are not subject to the public trust. For one thing, there is the sworn, nineteenth-century eyewitness testimony of United States Deputy Surveyor Solomon Finley that the property in its historical condition was not "tidelands" -- that is, lands owned by the State as public trust lands -- but rather was uplands owned by the United States (and, by definition, not subject to the public trust).

In the usual case that would end the matter, but here there is more. In 1927 the State conveyed to the City of Newport Beach any interest it may have had in public-trust lands in Newport Bay within the City's boundaries. That statute made the City then -- and now -- the *trustee* of any public-trust lands within its boundaries. The following year, seeking to clarify its title, the City sued the Bay Island Club (and many other private property owners), and obtained a decree spelling out the property ownerships and boundaries. That decree included a description of the "ordinary high water mark" in Newport Bay -- that is, the boundary of public-trust lands within the Bay. The lands beneath the present and the proposed bridge were decreed *not* to be below the ordinary high water mark, meaning not subject to the public trust.

There is more yet: Following that judgment, the State Legislature passed a law *recognizing* the ordinary high water mark that the Court had decreed as the public-trust boundary.

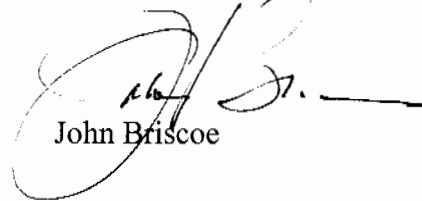
But let us suppose, hypothetically, that the lands beneath the bridge are in fact public-trust lands. The "trustee" of those hypothesized public-trust lands is not the Coastal Commission, is not the State Lands Commission; it is the City of Newport Beach. It would be for the City, in this hypothesized situation, to decide how to administer its public trust. And it has told you: It wants no public access on the bridge.

BRISCOE IVESTER & BAZEL LLP
Ms. Neely and Commissioners
June 8, 2009
Page 4

We ask you to approve the application, with all of the concessions the applicant has made, but without Special Condition No. 2.

Sincerely yours,

BRISCOE IVESTER & BAZEL LLP



John Briscoe

JB/ajw
Enclosure



CITY OF NEWPORT BEACH

Office of the City Manager
(949) 644-3000

June 1, 2009

The Honorable Bonnie Neely, Chair
California Coastal Commission
South Coast District Office
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

VIA FACSIMILE: (562) 590-5084

RE: Bay Island Bridge, Newport Beach, California

Dear Chair Neely:

The City of Newport Beach has issued an Approval in Concept (AIC) for a Coastal Development Permit for the Bay Island Community Association's improvement and replacement of its access bridge. We have become aware that Commission staff may recommend, or has recommended, that the replacement bridge be made fully accessible to the public.

The bridge crosses lands likely owned by the City in fee, but the City has not been asked by the Commission if the City seeks additional responsibilities associated with the bridge. We do not seek such new responsibilities. Therefore, we do not agree with this recommendation, for the following reasons:

- The bridge is over City land and the Commission will be granting new rights to the public across City lands where the City has not made any application for permit rights.
- The bridge has not in the past been open to the public.
- Allowing full public access may cause the bridge user to infer that the City maintains or controls the bridge – we do not intend to maintain it, nor control or guide access across it.
- Importantly, this is a bridge that is over a very small and shallow area of Lower Newport Bay. We do not seek new liability associated with public access on this bridge. Even if we believe (and the Commission believes) that a city like our own is adequately indemnified from such access, we have little doubt that we will end up having to expend time and resources defending ourselves should a person be harmed using this bridge.

We understand and respect the Commission's desire to allow the public to enjoy this attractive vantage point of Lower Newport Bay. As such, we are willing to work with the Commission and the applicant to improve public views and access on the Balboa Peninsula side of the proposed bridge. But we respectfully urge the Commission to reject any changes to the bridge's current operation that could result in increased liability (including perceived liability) to the City, when such operations do not reflect past practice.

Sincerely,

A handwritten signature in black ink, appearing to read "Homer L. Bludau". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

HOMER L. BLUDAU
City Manager

cc: City Council
David Hunt, City Attorney
Chris Miller, Harbor Resources Division Manager

-----Original Message-----

From: David M. Ivester [mailto:divester@briscoelaw.net]

Sent: Tuesday, June 09, 2009 12:58 PM

To: Patterson, Jamee J.; Chris Pederson

Cc: John Briscoe; Peter S. Prows; Ficker, Jared

Subject: Bay Island Club - Application 5-09-055 - Applicant Lacks Ability to Provide Public Access on Private Easement

Dear Mr. Pederson and Ms. Patterson,

I write to call to your attention a legal issue raised by the Commission staff's recommendation on a CDP application to be heard by the Commission this Thursday--an issue discussed below and at greater length (along with other issues) in a memorandum to be delivered to the Commission shortly. Bay Island Club proposes to replace a private gated pedestrian bridge to a private island. The staff recommends granting a CDP for the new bridge—with a condition that would require the Club to allow public use of the bridge. Bay Island Club, however, cannot provide public access on the private bridge because its easement does not grant it the right to allow such access. We ask, therefore, that a CDP be approved for the bridge without a condition requiring the Club to provide public access on it.

In its report suggesting that the Commission require Bay Island Club to provide public access on the bridge, the staff asserts that the Club's easement does not expressly allow it to exclude the public from using the bridge. Cal. Coastal Comm., Staff Report re Application No. 5-09-055 (Bay Island Club), May 28, 2009, p. 22.

While certainly true that the Club's easement says nothing about excluding—or allowing—public use of the bridge, the staff's supposition that the Club's easement empowers it to allow public use is contrary to law. Bay Island Club's easement affords it limited use of land owned by the City of Newport Beach. That easement allows the Club to use the land to maintain a private bridge for access to Bay Island; it does not allow the Club to expand the uses made of the bridge, such as authorizing the public to use it.

An easement is an interest in land that entitles its owner to limited use of land in the possession of another. *E.g.*, *Wright v. Best* (1942) 19 Cal.2d 368, 381; Miller & Starr, Cal. Real Estate (3d ed. 2000) § 15.5, p. 15-19. An easement is appurtenant to a parcel when it is created to benefit that parcel or is attached to it. *E.g.*, *City of Anaheim v. Metropolitan Water Dist.* (1978) 82 Cal.App.3d 763, 767; Civ. Code § 803. An easement holder generally has only the rights of use expressly conveyed and any additional implied rights to do all things necessary and reasonable for use of the easement. *E.g.*, *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 866; *City of Pasadena v. California-Michigan Land & Water Co.* (1941) 17 Cal.2d 576, 578. Beyond that, an easement holder cannot lawfully make use of an easement in excess of the grant. *Id.* An easement appurtenant may be used only for the benefit of the dominant tenement (*i.e.*, the parcel for which it was created or to which it is attached). *E.g.*, *Wall v. Rudolph* (1961) 198 Cal.App.2d 684, 686. An

EMAIL FROM DAVID IVESTER TO J.J. PATTERSON & C. PEDERSON

easement holder cannot change or increase the use of an easement in a manner that imposes a new or greater burden on the servient tenement (*i.e.*, the parcel on which the easement is located). *Id.*; *Colegrove Water Co. v. City of Hollywood* (1907) 151 Cal. 425, 428. Nor can the holder of an easement license others to use it for purposes other than contemplated in the grant of easement. *E.g.*, *Kerr v. Brede* (1960) 180 Cal.App.2d 149, 151; *Wall v. Rudolph* (1961) 198 Cal.App.2d 684, 695-697; *Gaither v. Gaither* (1958) 165 Cal.App.2d 782, 785.

Here, Bay Island Club was granted an easement in 1927 “to construct, maintain, repair and replace a bridge for pedestrian and/or automobile travel over and across” a specified portion of a channel on land then owned by a private corporation and now owned by the City. This easement is appurtenant to Bay Island Club’s adjoining parcel on Bay Island, and it grants the Club the right to maintain and use a bridge for ingress and egress across the channel (the servient tenement) to Bay Island (the dominant tenement). The easement does not expressly grant Bay Island Club the right to license members of the public to use the easement at all, let alone for purposes other than access to Bay Island. Moreover, public use of the easement plainly is not necessary to Bay Island Club’s use of the easement, so there is no plausible basis for supposing the Club has an implied right to allow such public use. Bay Island Club’s easement simply does not afford it the right to allow public use of the easement.

While the Club’s easement does not give it a right affirmatively to *allow* public use of the easement, thereby adding new and greater burdens on the City’s underlying parcel, the easement does afford the Club the right to *exclude* public use of the easement. As the superior court determined in a quiet title action between the City and Bay Island Club, the Club’s easement is “for private road and bridge purposes.” *City of Newport Beach v. Bay Island Club, et al.*, (Super. Ct. Orange County, 1928, No. 24090) Findings of Fact and Conclusions of Law filed Aug. 22, 1928, p. 3, and Judgment filed Aug. 22, 1928, p. 2. When an easement is granted in general terms, without specifying or limiting the manner of its use, actual use of the easement with the acquiescence of the owner of the servient tenement serves to reveal the intent of the parties and fix the extent of the easement rights. *E.g.*, *Youngstown Steel etc. Co. v. Los Angeles* (1952) 38 Cal.2d 407, 410; *Tarr v. Watkins* (1960) 180 Cal.App.2d 362, 365. Here, Bay Island Club was already using a private bridge from which the public was excluded when the Club was granted an easement for that use in 1927. Thereafter, the Club continued to use the bridge in that fashion with the acquiescence of the private corporation that granted the easement—as well as the City after it acquired the servient tenement. While the grant of easement does not specify a right to exclude the public, that right plainly was intended by the parties, as evidenced by their interpretation and implementation of the easement.

Apart from lacking any right under its easement to allow public access, Bay Island Club also is constrained by the law not to change or increase the use of the easement and thereby impose a new or greater burden on the City’s property underlying the easement. Public use of the easement would necessarily entail the risk of being considered liable to those who may be injured while there—a risk that both the City and Bay Island Club would face. Public use of

the easement may impose other burdens as well, such as more call for sanitation and law enforcement services. The law does not allow Bay Island Club to use its easement in a manner that would impose such new and greater burdens on the City.

For its part, the City, which, as owner of the land underlying the Club's easement, generally has the right of deciding who to allow on its land, has decided against allowing public use of the bridge. See Letter of Homer Bludau, City Manager, City of Newport Beach, to Bonnie Neely, Chair, California Coastal Commission (June 1, 2009). The City, in any event, is not a party to the Commission's proceeding on the Club's application for a CDP; there is, thus, no basis or occasion for the Commission to impose a "permit condition" on the City.

As Bay Island Club lacks the right under its easement to allow public access on the bridge, the Commission cannot lawfully condition its approval of the bridge on a requirement that the Club provide what is beyond its power. We ask, therefore, that a CDP be approved for the bridge without a condition requiring the Club to provide public access on it.

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LAND USE, ENVIRONMENTAL, AND NATURAL RESOURCES LAW AND LITIGATION

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
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June 10, 2009

ADDENDUM**TO: COMMISSIONERS AND INTERESTED PERSONS****FROM: SOUTH COAST DISTRICT STAFF****SUBJECT:** Item Th24b, Application No. 5-09-055 (Bay Island Club), for the Public Hearing on June 11, 2009**A. Summary of letter received from John Briscoe dated June 8, 2009 submitted on behalf of the applicant (attached).**

On June 9, 2009, Commission staff received a letter from John Briscoe dated June 8, 2009, arguing against Commission adoption of staff recommended Special Condition No. 2 which requires that the applicant allow public access upon the proposed bridge at the same time the bridge is opened for use to residents of Bay Island. Mr. Briscoe basically argues that the applicant holds an easement for a "private" bridge and that their easement doesn't allow Bay Island Club to open the bridge for public use. A number of supporting arguments are also made, which may be read in the attached letter.

B. Revisions to the Staff Recommended Findings:

Commission staff recommends that the Commission adopt the following changes to the staff report and findings:

~~Plain Text in Strike-Out~~ = Text to be deleted

Plain Text in Underline = Text to be added

- On pages 1-2, Summary of Staff Recommendation, revise the last paragraph on page 1 that carries onto page 2, as follows:

...The applicant is also proposing to demolish an existing gated pedestrian bridge that links the privately owned island to the mainland and construct a new gated pedestrian bridge in a slightly different alignment (placed immediately west of the existing alignment). The existing bridge is pile-supported; the new bridge is a "truss" type clear-span bridge that has no piles. The existing bridge and piles will be removed after construction of the new bridge, however, Commission staff has concerns regarding the construction of a gate on the mainland side of the new bridge that will prevent the public from using the bridge. This would replicate the existing condition. However, Commission staff believe replicating the existing condition would perpetuate an existing violation that improperly limits

Staff Response to Applicant and Changes to Staff Report

public access. According to letters submitted by members of the public, the existing gate was placed at the mainland terminus of the bridge sometime after 1976¹, but the applicant did not obtain a coastal development permit for that gate. Although the applicant maintains that the gate has been a longstanding component of the bridge, it has not provided any documentation that the gate existed in its present location prior to enactment of the Coastal Act or Proposition 20. Also, Commission staff possess photographs taken in 1998 that show there was no gate at the entry to the bridge at that time. Based on those photographs it appears that signage has also been added since 1998 to the bridge entry that discourages public use of the bridge. Furthermore, Commission staff does not believe it is consistent with the Coastal Act to prevent the public from using a bridge that spans a publicly owned waterway. The applicant has an easement to construct a bridge over the publicly owned waterway to the privately owned island...

- On page 21, Section IV.B.1. (Public Access), revise the second to last paragraph, as follows:

The general public currently has access to and along the bulkheaded bayfront on the mainland via public streets and a walkway that runs along the landward side of the bulkhead; however, they don't have access to the bridge at the subject site or to the private island². An existing gate at the mainland side of the bridge prevents public use of the existing bridge. Based on letters submitted by the public, and photographs in the Commission's possession (Exhibit 13), the existing gate and some signage discouraging public entry onto the bridge is unpermitted². There are public parking spaces on the mainland in the vicinity of the entrance to the bridge upon surrounding public streets.

- On page 21, Section IV.B.1. (Public Access), revise footnote no. 2, as follows:

² The applicant states that some form of entry control to the island (e.g. gate, guard, etc.) has been in place since the establishment of residential uses on the island in the 1920's. Letters submitted by the public indicate that the gate which is present today at the entry to the bridge was placed there sometime since 1976 (after passage of the Coastal Act). Some letters suggest that there was no gate prior to that time. Other letters suggest that a gate was present at the mid-point of the bridge and then was re-located to the mainland terminus of the bridge sometime after passage of the Coastal Act. Commission staff has reviewed photographs dated 1998 submitted to the Commission and which have been located in other coastal development permit application files (no. 5-98-022) which conclusively demonstrate that there was no gate at the mainland entry to the bridge at that time. Thus, there were no physical impediments to public entry onto the bridge at that time. New signage has also appeared at the entry since 1998 which states "no admittance". of the area from 1972 to present, however,

~~those photographs are inconclusive.~~—There are no coastal development permits for any gate to the bridge or signage that would deter public use of the bridge.

- On page 21, Section IV.B.1. (Public Access), revise footnote no. 3, as follows:

³ Letters submitted by the public indicate there has been public access to the bridge in the past. Photographs in the Commission's possession demonstrate that public entry onto the bridge was not obstructed as of 1998.

- On page 23, Section IV.B.1. (Public Access), after the second full paragraph on that page, add the following:

In its letter to the Commission dated June 8, 2009, and in an email to the Commission's attorneys dated June 9, 2009, the applicant requests that the Commission not impose special condition number 2 regarding public access and raises a number of legal concerns:

a) The applicant argues that its easement is for a private road and bridge and that it therefore does not have the authority to expand use of the bridge to include public use. The text of the easement, however, does not limit who may use the bridge. It simply provides that the bridge is for pedestrian and automobile use. The applicant refers to a 1928 court judgment that refers to the easement as one for a "private" road and bridge. That judgment, however, addressed who held fee title to certain lands. It noted the existence of various easements, but did not address the scope of those easements. The 1928 judgment therefore does not resolve the extent of the public's right to use the bridge.

In addition, the bridge easement crosses a publicly owned waterway to which the general public has the right of access. The caselaw that the applicant cites regarding easements that cross private property is therefore distinguishable. In those cases, the general public would have no right of access to the servient tenement.

Although the staff recommendation is not based on the assumption that the waterway is subject to the public trust, the deed granting the channel to the City is expressly conditioned on the City maintaining the channel as a public waterway. If the City ever ceases to maintain the channel as a public waterway, the deed provides that the channel would immediately revert to the successors in interest to the East Newport Town Company. Among the attributes of public waterways is that the general public is allowed access to and across the waterway. To argue that allowing the public onto a bridge over the public waterway is overburdening the easement disregards the nature of the property interests involved in this particular case.

b) The applicant also argues that, because the easement is for a private road and bridge, it has the affirmative right to exclude the public. As explained above, this argument depends upon the applicant's over-reliance on a passing reference in the 1928 judgment to the easement as one for a private road and bridge.

To further support its position, the applicant maintains that the bridge has historically not been used by the general public. The record, however, does not support this. As recently as 1998, there was not a gate at the mainland end of the bridge. The Commission has also received numerous comments from members of the public stating that they used to go onto the bridge to enjoy the views.

c) The applicant argues that the public should not be allowed onto the bridge because the City opposes public access. The City's letter, however, includes several inaccuracies. For example, the City characterizes the staff recommendation as granting new rights to public access across City lands. The City land at issue, however, is required to be maintained as a public waterway to which public access rights already pertain. The City's letter also asserts that "the bridge has not in the past been open to the public." A subsequent email from City staff to Commission staff, however, rebuts this claim. As explained above, as recently as 1998, there was no gate at the mainland end of the bridge and the general public did make use of the bridge.

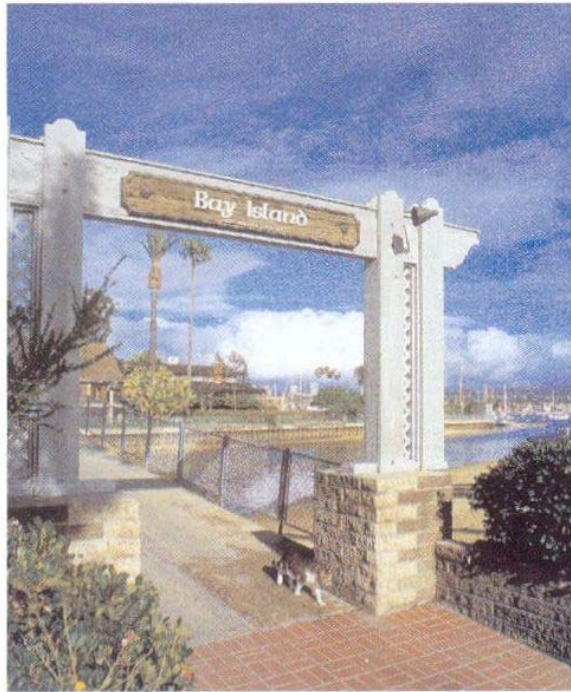
The City also raises concerns about potential liability. State law, however, provides extensive immunity. For example, Civil Code section 846 provides that owners of property generally do not owe a duty of care to people who are on the property for recreational purposes (unless the owner expressly invites them or the visitors have paid the owner consideration). Government Code section 831.2 provides immunity for injuries caused by natural conditions of unimproved public property. Pursuant to Government Code section 831.7, public entities are also generally immune from claims for hazardous recreational activities, including diving off structures where warning is provided that diving is prohibited.

d) The applicant contends that the staff recommendation would amount to a taking absent sufficient nexus findings. As explained above, the staff recommendation is simply protecting existing rights, not requiring an expansion of those rights.

e) The applicant argues that the Commission does not have the authority to adjudicate implied dedications. The staff recommendation, however, is not based on a theory of implied dedication. In any event, *LT-WR, LLC v. California Coastal Commission* (2007) 152 Cal.App.4th 770, is distinguishable because that case did not involve access to water and did not involve the various Coastal Act policies that require the Commission to protect access to the coast.

f) The applicant also contends that the channel is not subject to the public trust. The staff recommendation, however, is not based on the possible applicability of the public trust.

- ADD EXHIBIT 13 - Photographs of Mainland Entry to the Bridge from 1998



A regular visitor to the Island strolls off the bridge in this photo taken from a 1998 real estate brochure. Photo courtesy Buz Bonsall.

Photograph supplied by the City of Newport Beach dated 1998



Scan of slide dated 02-16-1998 taken by CCC staff from file no 5-98-022

EXHIBIT#13

Page 1 of 1

Application Number:
5 - 0 9 - 0 5 5



California Coastal
Commission

PHOTOGRAPHS OF MAINLAND ENTRY TO THE BRIDGE FROM 1998

RECEIVED
South Coast Region

April 27, 2009

JUN 8 - 2009

CALIFORNIA
COASTAL COMMISSION

Item #W14a
Permit #5-09-055
Michele & Jerry Silver
Opposed to #2 of Proposal

To California Coastal Commissioners:

My family is proud to have lived on the Peninsula for 58 years and consider one of the important qualities of Balboa has been its tourist friendly attractions and availability for public use of our beaches and harbor which we enjoy. My husband and I have lived in our home for over 30 years at 103 East Edgewater Avenue, which is one of two homes which face Bay Island at the base of its bridge. The project being presented to you is comprised of 3 proposals, all of which will directly affect our life and neighborhood.

- 1). Reinforce and replace Bay Island's bulkhead.
- 2). Demolish and construct in a "slightly different alignment" their private gated bridge connecting the island to the mainland.
- 3). Construct a sand retention wall off their western shore.

The estimate for the length of time to complete this project is approximately six to nine months and will affect not only us but also the public's use and enjoyment of this area.

For the thirty years we have lived in our home we have tolerated construction of continual remodeling of Bay Island's homes. Less than five years ago, Bay Island moved their original gate located half-way across their bridge to the land side less than twenty feet from our home. This new location eliminated any public entry by installation of an electronic key pad which operates an electronic gate for all entries on and off the island at any hour of the day and night. Your report mentions in many places that recreational facilities shall be protected, encouraged and provided to the public and in Policy #3.1.1-2 it states to protect and enhance all existing public street ends providing public access to the shoreline, beaches, coastal parks and trails. This proposal's second item requests demolishing and constructing a "slightly different alignment" of Bay Island's present private bridge which will eliminate an area to the west of the current bridge where many people enjoy fishing.

On August 8, 2007, we presented along with many neighbors to the Newport Beach Harbor Commission our many concerns regarding this project. At that time we had hoped to receive some assurances to our many real concerns and possible potential dangers. None have been received as of receipt of your notice of the Coastal Commission hearing.

We appreciate your tireless work on behalf of California's public to ensure their ability to enjoy our beaches and coastal waters. We are emphatically stating that this project is flawed as currently proposed. We understand the need for replacement and repair of the bulkhead. We agree with your assessment that the bridge should allow public access. We also agree with your proposal that there will be a diminishing area of water by building a sand retention wall. But the project currently being proposed prohibits and diminishes the public's right to access the bridge and the fishing area which has always existed. The length of time estimated for this project will not only affect the many residents who live nearby but will also limit use of this area by many people who come to Balboa to enjoy our beaches and bay.

We need the Coastal Commission to not only serve our same right to enjoy our beaches and coastal waters but also the public. We request that you examine the many complexities of this proposal and further serve the public's right to access our surrounding area.

Sincerely,
Michele and Jerry Silver

RECEIVED
South Coast Region

JUN 8 - 2009

CALIFORNIA
COASTAL COMMISSION

June 5, 2009

Item #TH24b
Permit#5-09-055
Michele & Jerry Silver
Opposed to #2

To California Coastal Commission:

Enclosed is our first letter sent to you on 4/27/09 for the first public hearing regarding the Bay Island Club Coastal Permit application which was postponed. As we stated then we understand that your organization represents the public's use of California's coastal waters and beach access. The same issues for our neighborhood are stated and have not changed.

We do want to express again how strongly we disagree with the second item and would appreciate your careful review regarding the "slightly different alignment" of the private gated bridge connecting the island to the mainland. We remain hopeful that your commissioners will continue to uphold the public's right to access the area that has been an extremely popular fishing area. If the bridge remains in its current location the area will allow the public their continual enjoyment of what has been in effect for many years. We rely on your review of whether the bridge should allow public access as it did in the past.

We still remain hopeful that upon your consideration you will determine the best course of action for not only Bay Island, but also our neighborhood and the many people who come to Balboa to enjoy our beaches and coastal waters.

Thank you in advance for your assistance and considerable time to resolve this project which remains very important to us and our many neighbors.

Sincerely,
Michele & Jerry Silver

FORM FOR DISCLOSURE
OF EX PARTE
COMMUNICATION

RECEIVED
JUN 09 2009
CALIFORNIA
COASTAL COMMISSION

Date and time of communication: 6/8/09, 2:30 pm
(For messages sent to a Commissioner by mail or facsimile or received as a telephone or other message, date time of receipt should be indicated.)

Location of communication: By Phone
(For communications sent by mail or facsimile, or received as a telephone or other message, indicate the means of transmission.)

Person(s) initiating communication: Jared Ficker, CA Strategies

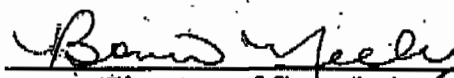
Person(s) receiving communication: Commissioner Bonnie Neely

Name or description of project: Agenda Item Th24b - Bay Island Club, Newport Beach, Orange County

Detailed substantive description of content of communication:
(If communication included written material, attach a copy of the complete text of the written material.)

Mr. Ficker agrees with the staff report with the exception of special condition #2. City easement is limited to private access.

Date: 6/8/09


Signature of Commissioner

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

If communication occurred seven or more days in advance of the Commission hearing on the item that was the subject of the communication, complete this form and transmit it to the Executive Director within seven days of the communication. If it is reasonable to believe that the completed form will not arrive by U.S. mail at the Commission's main office prior to the commencement of the meeting, other means of delivery should be used, such as facsimile, overnight mail, or personal delivery by the Commissioner to the Executive Director at the meeting prior to the time that the hearing on the matter commences.

If communication occurred within seven days of the hearing, complete this form, provide the information orally on the record of the proceedings and provide the Executive Director with a copy of any written material that was part of the communication.

Coastal Commission Fax: 415 904-5400

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071

Th24b

Filed: March 20, 2009
49th Day: May 8, 2009
180th Day: September 16, 2009
Staff: Karl Schwing-LB
Staff Report: May 28, 2009
Hearing Date: June 10-12, 2009
Commission Action:



STAFF REPORT: REGULAR CALENDAR

APPLICATION NO.: 5-09-055

APPLICANT: Bay Island Club

AGENT: Jared Ficker, California Strategies, LLC

PROJECT LOCATION: 1-26 Bay Island, Newport Beach
(Orange County)

PROJECT DESCRIPTION: On a private island developed with 24 single family residences, 1) reinforce, in part, and replace, in part, the entire 1,200 linear foot long bulkhead system; 2) demolish the existing gated pedestrian bridge linking the private island to the mainland and construct a new gated, pedestrian bridge in a different alignment; and 3) construct a 'sand retention wall' offshore of a small private beach on the western side of the island.

SUMMARY OF STAFF RECOMMENDATION:

The proposed project involves construction of shoreline protective devices (bulkhead and sand retention wall) and a new private gated bridge to a private island that is developed with 24 single family homes and various group facilities. The bulkhead component of the project includes placement of a new bulkhead seaward of the existing one resulting in the fill of coastal waters. The Commission typically will only authorize seaward expansion of a shoreline protective device when the applicant has demonstrated there is no feasible alternative that would avoid such seaward expansion (e.g. in-alignment replacement or landward replacement). The applicant did consider the in-alignment/landward placement option and has proposed to implement that option for about half of the proposed bulkhead project. However, for the other half, the applicant has demonstrated that seaward placement of the bulkhead is the only feasible option. The Commission's staff coastal engineer has reviewed the applicant's analysis and has concurred. The applicant is proposing on-site mitigation of open coastal water/benthic habitat to offset the fill impacts caused by seaward placement of the bulkhead.

The applicant is also proposing to demolish an existing gated pedestrian bridge that links the privately owned island to the mainland and construct a new gated pedestrian bridge in a slightly different alignment (placed immediately west of the existing alignment). The existing bridge is pile-supported; the new bridge is a "truss" type clear-span bridge that has no piles. The existing bridge and piles will be removed after construction of the new bridge, however, Commission staff has concerns regarding the construction of a gate on the mainland side of the new bridge that will prevent the public from using the bridge. This would replicate the existing condition. However, Commission staff believe replicating the existing condition would perpetuate an existing violation that improperly limits public access. According to letters submitted by members of the public, the

existing gate was placed at the mainland terminus of the bridge sometime after 1976¹, but the applicant did not obtain a coastal development permit for that gate. Although the applicant maintains that the gate has been a longstanding component of the bridge, it has not provided any documentation that the gate existed in its present location prior to enactment of the Coastal Act or Proposition 20. Furthermore, Commission staff does not believe it is consistent with the Coastal Act to prevent the public from using a bridge that spans a publicly owned waterway. The applicant has an easement to construct a bridge over the publicly owned waterway to the privately owned island. However, that easement does not grant the applicant any right to exclude the public from using the bridge. In addition to privacy concerns, the applicant makes an argument that the bridge spans a waterway that is not subject to the public trust. Coastal Commission staff is conferring with State Lands Commission staff regarding the public trust status of the channel dividing the island from the mainland. Coastal Act provisions protecting the public's right of access to coastal waters, however, are not limited to public trust lands. Thus, Commission staff is recommending that the Commission require the applicant to place the gate on the island-side of the bridge. This will allow the public use of the bridge (for access, views, fishing, etc.) over the publicly owned waterway, but will still allow the applicant to maintain the privacy of the island.

Since postponement of this item by the Commission in May 2009, Commission staff has modified its recommendation relative to the timing of opening the bridge to public use. Previously, Commission staff recommended the applicant be allowed to gate the bridge on the mainland side until such time that an entity, such as the City or a non-profit assume liability and maintenance for public use of the bridge or until either the City of Newport Beach or the State Lands Commission determines that the bridge spans land subject to the public trust. Staff's recommendation for this allowance was based in part on the premise that the existing bridge was legally gated and that staff didn't believe the applicant should be exposed to liability issues they were not already exposed to. However, public comments indicate that the existing gate isn't legal (wasn't approved by the Commission and no evidence of City approval of the gate has been supplied yet). The bridge was once open for public use and was illegally obstructed. Thus, staff believe it is appropriate to restore public access to the bridge. Furthermore, state law limits the liability of property owners with respect to recreational uses of property.

Since the May postponement, Commission staff has also further investigated claims that the new bridge will adversely impact public fishing opportunities from the bulkhead area that presently exists to the west of the existing bridge. If the bridge were placed where the applicant had been proposing it in May, the project would have usurped some area that could be used for fishing and thus the project would have had an adverse recreational impact. However, the applicant has now re-designed the bridge alignment so that the new bridge is moved closer to the existing alignment, opening up more of the bulkhead-front area for fishing. The new alignment will still cover some bulkhead-front area, however, the area to be covered is not well suited to fishing due to existing impediments in the water (e.g. groin wall, bridge pilings) that interfere with cast fishing line. The applicant has also made a commitment to remove existing access and visual impediments (e.g. planters) and to provide new landscaping, pavers, benches and trash cans to the area so that it becomes more useful to the public, including for fishing. Finally, removal of the existing bridge will uncover some beach area that could be used for fishing. Some members of the public have challenged the usefulness of the area to be uncovered by the old bridge for fishing because they believe that people don't fish from the beach. Commission staff don't agree

¹ Some letters indicate that work on the gate occurred as recent as 5 years ago, others indicate from 10 to 30 years ago.

with that statement. During a site visit Commission staff observed people using the beach area for fishing and the area to be uncovered will be useful for that purpose.

Finally, staff's recommendation also more fully addresses the impact that entry monumentation will have on public access by requiring that such monumentation be placed on the Bay Island side of the bridge.

Another component of the project is the installation of a 'sand retention wall' offshore of a small private beach on the western side of the island. The 'sand retention wall' is designed to allow placement of sand to expand the private beach seaward of its present location and to slow down erosion of the sand that is placed there. The sand retention wall is comprised of a partially-submerged sheetpile that will alter local sediment transport and act as a shoreline protective device. The sheetpile also constitutes fill of coastal waters. Development of a private beach is not one of the purposes for which fill can be allowed under Section 30233 of the Coastal Act. Also, the Coastal Act only requires the Commission to approve a shoreline protective device that results in fill of coastal waters when there is no feasible alternative and the device is necessary to protect existing development or a public beach in danger of erosion. The sand retention wall is not necessary to protect existing development (a landward bulkhead already protects the homes on the island) and the beach the applicant is proposing to expand and protect is not public; thus it does not have to be approved under Section 30235. Finally, there are feasible alternatives available (beach nourishment) that are already routinely performed without significant adverse impacts and achieve the same result. Thus, staff is recommending **denial** of the sand retention wall component of the project.

In summary, Staff recommends that the Commission take one vote adopting a two-part resolution, which would **APPROVE** the proposed bulkhead and bridge, subject to conditions addressing the gating, revised plans (to address other conditions and restoration of fishing area), sign requirements, conformance with geotechnical recommendations, water quality protection (during and after construction), protection of access during construction, protection of eelgrass and bay habitat, submittal of a final revised benthic habitat mitigation plan, future prohibition on seaward extension of the bulkhead, future development, inspection requirements, assumption of risk, City of Newport Beach final approval, preservation of existing public rights, landscaping, and deed restriction; and **DENY** the proposed sand retention wall.

Section 30600(c) of the Coastal Act provides for the issuance of coastal development permits directly by the Commission in regions where the local government having jurisdiction does not have a certified Local Coastal Program. The City of Newport Beach only has a certified Land Use Plan and has not exercised the options provided in 30600(b) or 30600.5 to issue its own permits. Therefore, the Coastal Commission is the permit issuing entity and the standard of review is Chapter 3 of the Coastal Act. The certified Land Use Plan may be used for guidance.

LOCAL & OTHER APPROVALS RECEIVED: Revised Approval in Concept by the City of Newport Beach Harbor Resources Division dated November 26, 2008; Clean Water Act Section 401 Water Quality Standards Certification issued by the California Regional Water Quality Control Board, Santa Ana dated April 14, 2008; Letter from U.S. Coast Guard dated June 6, 2006 regarding navigability of proposed bridge.

SUBSTANTIVE FILE DOCUMENTS: Letter from Moffatt & Nichol dated October 7, 2008; Letter from Moffatt & Nichol dated February 27, 2006; Letter from Moffatt & Nichol dated March 17, 2006;

Letter from Moffatt & Nichol dated August 23, 2007; Condition Assessment, Bay Island Club prepared by Cash & Associates dated June 10, 2004; Bay Island Subtidal Habitat Compensatory Mitigation Plan for the Bay Island Bulkhead and Bridge Project...prepared by Coastal Resources Management dated November 2006; Beach Stabilization Study-Bay Island, Newport Beach, California prepared by Moffatt & Nichol dated August 2007; Geotechnical Investigation Bay Island Sea Wall and Bridge Newport Beach, CA prepared by Dial, Yourman & Associates dated January 17, 2006; Clean Water Act Section 401 Water Quality Standards Certification for the Bay Island Bulkhead and Bridge Project, City of Newport Beach (ACOE Reference No. 2006-00441 dated April 14, 2008 issued by the California Regional Water Quality Control Board, Santa Ana Region; Mitigated Negative Declaration by the City of Newport Beach published 10/4/2006; City of Newport Beach, Harbor Committee Staff Report dated March 14, 2007 from Tom Rossmiller to the Harbor Commission, concerning Global Warming and Sea Level Rise Effects on Newport Harbor; Undated document titled "The Bay Island Club's Right to Rebuild Its Bridge" (a.k.a. title history/title primer), no author identified, submitted by applicant; Letter from Jared Ficker dated 3/18/2009 with attachments (truss bridge plans) resubmitting the application; undated, untitled photographs and text submitted by applicant addressing existing and proposed fishing area conditions.

EXHIBITS

1. Vicinity Map
2. Bridge Profile
3. Visual simulation of proposed bridge
4. Existing and proposed bridge gate
5. Bulkhead/sheetpile alignments and mitigation plan
6. Plan and profile views of sand retention wall
7. Profile view of bulkhead/sheetpile to be placed seaward of existing bulkhead
8. Profile view of bulkhead/sheetpile to be placed in alignment or landward of the existing bulkhead
9. Applicant's summary of the title history of the island and channel between the island and mainland
10. Applicant's easement to construct a bridge over the channel between the island and mainland
11. Fishing Area on Mainland Affected by Bridge Relocation
12. New Bridge Alignment

STAFF RECOMMENDATION:

I. STAFF RECOMMENDATION OF APPROVAL IN PART AND DENIAL IN PART

Staff recommends that the Commission adopt the following two-part resolution. The motion passes only by affirmative vote of a majority of the Commissioners present

A. Motion

“I move that the Commission adopt the staff recommendation to approve in part and deny in part Coastal Development Permit No. 5-09-055, by adopting the two part resolution set forth in the staff report.”

B. Resolution

Part 1: Approval with Conditions of a Portion of the Development

The Commission hereby **APPROVES**, as conditioned, a coastal development permit for the portion of the proposed development regarding the reinforcement, in part, and replacement, in part, of the entire 1,200 linear foot long bulkhead system and demolition of the existing gated private pedestrian bridge linking the island to the mainland and construct a new pedestrian bridge in a slightly different alignment, and adopts the findings set forth below on grounds that the development as amended and subject to conditions will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3 of the Coastal Act, and will not have any significant adverse effects on the environment within the meaning of the California Environmental Quality Act.

Part 2: Denial of the Remainder of the Development

The Commission hereby **DENIES** the portion of the proposed application for coastal development permit for construction of a 'sand retention wall' offshore of a small private beach on the western side of the island, and adopts the findings set forth below, on the grounds that the development would not conform with the policies of Chapter 3 of the Coastal Act and would prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3 of the Coastal Act. Approval of this portion of the application would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

II. STANDARD CONDITIONS

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent,

acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.

2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

III. SPECIAL CONDITONS

1. DELETION OF SAND RETENTION WALL

The proposed sand retention wall and all affiliated components shall be removed from the proposed project. Revised final plans depicting the removal of this component of the project shall be submitted in accordance with Special Condition 6.

2. PUBLIC ACCESS UPON BRIDGE

Concurrent with the commencement of use of the proposed bridge by residents of Bay Island, the proposed bridge shall be opened for public use. The bridge shall be open to the general public for use 24-hours per day. After the bridge is opened for public use, any 'development', as that term is defined in Section 30106 of the Coastal Act, that diminishes permanent public pedestrian access and passive recreational use of the bridge is prohibited. Temporary restrictions on public access that are necessary due to maintenance activities that have received Coastal Act authorization may be allowed. Upon opening the bridge for use, the applicant shall remove any existing obstructions and signage that prohibits and/or discourages public use of the bridge, and erect signs in accordance with the sign plan required pursuant to Special Condition 3. The applicant may establish gating to prevent public access to and upon privately owned Bay Island at the termination of the bridge at Bay Island in accordance with final plans required pursuant to Special Condition 4.

3. SIGN PLAN

- A. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT,** the applicant shall submit, for the Executive Director's review and approval, two (2) full size sets of final project plans for signs identifying all signs that will be placed on the bridge and in the vicinity of the bridge at its mainland terminus. Signs that discourage or prohibit public use of the bridge or surrounding public areas shall be prohibited. Signs that establish controls

on public use of any area (e.g. no jumping or diving from the bridge) may only display language enforcing requirements explicitly established in the Newport Beach Municipal Code so long as that language doesn't discourage or prohibit public use of the bridge. Signs and displays not explicitly permitted in this sign plan shall require an amendment to this permit unless the Executive Director determines that no amendment is legally required.

- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

4. BRIDGE GATING & ENTRY MONUMENTATION PLAN

- A. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit, for the Executive Director's review and approval, two (2) full size sets of final project plans for all entry monumentation/community identification markers and gating. Any entry monumentation, community identification markers and/or gating may only be placed at the Bay Island termination of the bridge. Any entry monumentation, community identification markers, and gate shall replicate (in dimensions, materials, opacity and design) the existing structures that will be demolished when the existing bridge is demolished. The existing gate and entry monumentation shall be demolished and removed immediately upon opening the new bridge for use and said work shall be completed in no case more than 1 month after opening the new bridge for use.
- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

5. FISHING AREA IMPROVEMENTS

- A. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit, for the Executive Director's review and approval, two (2) full size sets of final project plans for the bayfront area of land, at the mainland terminus of the proposed bridge (as depicted in Exhibit 12), which shall demonstrate the following:
 - (1) In order to retain bulkhead area from which to fish, the proposed bridge will be located as close to the alignment of the existing bridge as is feasible, as shown generally on Exhibit 12 of the May 28, 2009 staff report; and
 - (2) Upon completion of construction of the new bridge, the existing bridge shall be immediately demolished and removed and the area underneath the demolished bridge restored to be relatively flat, open and unobstructed for public use and fishing therefrom. Such demolition, removal and restoration shall be completed within 3 months of completion of construction of the new bridge; and

(3) The publicly owned bulkhead-front land at the mainland terminus of the bridge and generally to the west of the bridge shall be made open and unobstructed for public use and fishing therefrom, including but not limited to, removal of the existing planters and landscaping that partially obstruct views and physical access to the area from the Island Avenue street end and sidewalk; installation of pavers or other hardened walking surface from the sidewalk and to and along the bulkhead; installation of landscaping (e.g. trees) to provide shading (but placed so as not to obstruct public views or physical access to the area and tall enough to avoid being an impediment for fishing); installation of trash cans and benches (to be designed consistent with such facilities that are present in public parks in the City including with City logo).

- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

6. **FINAL PROJECT PLANS**

- A. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit, for the Executive Director's review and approval, two (2) full size sets of final project plans (i.e. site plan, elevations, cross-sections, grading, foundation, structural, etc.) revised to be consistent with the conditions of this permit.
- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

7. **FINAL PLANS CONFORMING TO GEOTECHNICAL RECOMMENDATIONS**

- A. All final bulkhead replacement design and construction plans shall be consistent with all recommendations contained in *Geotechnical Investigation Bay Island Sea Wall and Bridge Newport Beach, CA prepared by Dial, Yourman & Associates dated January 17, 2006*. No changes to the approved plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.
- B. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit, for the Executive Director's review and approval, two full sets of plans with evidence that an appropriately licensed professional has reviewed and approved all final design and construction plans and certified that each of those final plans is consistent with all the recommendations specified in the above-referenced report.
- C. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive

Director. No changes to the approved final plans shall occur without a Commission amendment unless the Executive Director determines that no amendment is legally required.

8. CONSTRUCTION RESPONSIBILITIES AND DEBRIS REMOVAL

- A. The permittee shall comply with the following dredging and construction-related requirements:
- (1) No construction materials, equipment, debris, or waste shall be placed or stored where it may be subject to wave/wind erosion and dispersion;
 - (2) Any and all debris resulting from construction activities shall be removed from the site within 24 hours of completion of construction;
 - (3) Machinery or construction materials not essential for project improvements shall not be allowed at any time in the intertidal zone;
 - (4) Sand from the beach, cobbles, or shoreline rocks shall not be used for construction material;
 - (5) If turbid conditions are generated during construction; a silt curtain shall be utilized to control turbidity;
 - (6) Floating booms shall be used to contain debris discharged into coastal waters and any debris discharged shall be removed as soon as possible but no later than the end of each day;
 - (7) Divers shall recover non-buoyant debris discharged into coastal waters as soon as possible after loss.

9. LOCATION OF DEBRIS DISPOSAL SITE

PRIOR TO ISSUANCE OF A COASTAL DEVELOPMENT PERMIT, the applicant shall identify in writing, for the review and approval of the Executive Director, the location of the disposal site of the construction debris resulting from the proposed project. Disposal of construction debris shall occur at the approved disposal site. If the disposal site for the construction debris is located in the coastal zone, a coastal development permit or an amendment to this permit shall be required before disposal can take place.

10. DRAINAGE AND POLLUTED RUNOFF CONTROL PLAN

- A. PRIOR to the issuance of the COASTAL DEVELOPMENT PERMIT, the permittee shall submit for the review and approval of the Executive Director, two (2) copies of a final Drainage and Runoff Control Plan, including supporting calculations. The plan shall be prepared by a licensed civil engineer or qualified licensed professional and shall incorporate Best Management Practices (BMPs) including site design and source control measures designed to control pollutants and minimize the volume and velocity of stormwater and dry weather runoff leaving the developed site. In addition to the

specifications above, the consulting civil engineer or qualified licensed professional shall certify in writing that the final Drainage and Runoff Control Plan is in substantial conformance with the following minimum requirements:

- (1) BMPs should consist of site design elements and/or landscape based features or systems that serve to maintain site permeability, avoid directly connected impervious area and/or retain, infiltrate, or filter runoff from rooftops, driveways and other hardscape areas on site, where feasible. Examples of such features include but are not limited to porous pavement, pavers, rain gardens, vegetated swales, infiltration trenches, cisterns.
- (2) Landscaping materials shall consist primarily of native or other low-maintenance plant selections which have low water and chemical treatment demands. An efficient irrigation system design based on hydrozones and utilizing drip emitters or micro-sprays or other efficient design should be utilized for any landscaping requiring water application.
- (3) All slopes should be stabilized in accordance with provisions contained in the Landscaping and/or Erosion and Sediment Control Conditions for this Coastal Development Permit.
- (4) Runoff shall be conveyed off site in a non-erosive manner. Energy dissipating measures shall be installed at the terminus of outflow drains.
- (5) For projects located on a hillside, slope, or which may otherwise be prone to instability, final drainage plans should be approved by the project consulting geotechnical engineer.
- (6) Should any of the project's surface or subsurface drainage/filtration structures or other BMPs fail or result in increased erosion, the applicant/landowner or successor-in-interest shall be responsible for any necessary repairs to the drainage/filtration system or BMPs and restoration of the eroded area. Should repairs or restoration become necessary, prior to the commencement of such repair or restoration work, the applicant shall submit a repair and restoration plan to the Executive Director to determine if an amendment or new coastal development permit is required to authorize such work.
- (7) The final Drainage and Runoff Control Plan shall be in conformance with the site/development plans approved by the Coastal Commission. Any changes to the Coastal Commission approved site/development plans required by the consulting civil engineer/water quality professional or engineering geologist shall be reported to the Executive Director. No changes to the Coastal Commission approved final site/development plans shall occur without an amendment to the coastal development permit, unless the Executive Director determines that no amendment is required.

11. STAGING AREA DURING CONSTRUCTION

- A. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit a plan for the review and approval of the Executive Director which indicates that the construction staging area(s) will avoid impacts to public access, beach areas or to sensitive habitat areas.
- (1) The plan shall demonstrate that:
 - a. Construction equipment or activity shall not occur outside the staging area
 - b. Public parking areas shall not be used for staging or storage of equipment nor for construction personnel parking
 - c. Public sandy beach or habitat (vegetated) areas shall not be used for staging or storage of equipment
 - d. The staging area for construction of the project shall not obstruct vertical or lateral public access to the beach, bayfront or other public recreational areas
 - (2) The plan shall include, at a minimum, the limits of the staging area(s) and location of construction fencing and temporary job trailers, if any.
- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

12. EELGRASS REQUIREMENTS

- A. **Pre Construction Eelgrass Survey.** A valid pre-construction eelgrass (*Zostera marina*) survey shall be completed during the period of active growth of eelgrass (typically March through October). The pre-construction survey shall be completed prior to the beginning of construction and shall be valid until the next period of active growth. The survey shall be prepared in full compliance with the "Southern California Eelgrass Mitigation Policy" Revision 8 (except as modified by this special condition) adopted by the National Marine Fisheries Service and shall be prepared in consultation with the California Department of Fish and Game. The applicant shall submit the eelgrass survey for the review and approval of the Executive Director within five (5) business days of completion of each eelgrass survey and in any event no later than fifteen (15) business days prior to commencement of any development. If the eelgrass survey identifies any eelgrass within the project area which would be impacted by the proposed project, the development shall require an amendment to this permit from the Coastal Commission or a new coastal development permit.
- B. **Post Construction Eelgrass Survey.** If any eelgrass is identified in the project area by the survey required in subsection A of this condition above, within one month after the conclusion of construction, the applicant shall survey the project site to determine if any eelgrass was adversely impacted. The survey shall be prepared in full compliance with the "Southern California Eelgrass Mitigation Policy" Revision 8 (except as modified by this special condition) adopted by the National Marine Fisheries Service and shall be prepared in consultation with the California Department of Fish and Game. The applicant shall

submit the post-construction eelgrass survey for the review and approval of the Executive Director within thirty (30) days after completion of the survey. If any eelgrass has been impacted, the applicant shall replace the impacted eelgrass at a minimum 1.2:1 ratio on-site, or at another location, in accordance with the Southern California Eelgrass Mitigation Policy. All impacts to eelgrass habitat shall be mitigated at a minimum ratio of 1.2:1 (mitigation:impact). The exceptions to the required 1.2:1 mitigation ratio found within SCEMP shall not apply. Implementation of mitigation shall require an amendment to this permit or a new coastal development permit unless the Executive Director determines that no amendment or new permit is required.

13. PRE-CONSTRUCTION CAULERPA TAXIFOLIA SURVEY

- A. Not earlier than 90 days nor later than 30 days prior to commencement or re-commencement of any development authorized under this coastal development permit (the "project"), the applicant shall undertake a survey of the project area and a buffer area at least 10 meters beyond the project area to determine the presence of the invasive alga *Caulerpa taxifolia*. The survey shall include a visual examination of the substrate.
- B. The survey protocol shall be prepared in consultation with the Regional Water Quality Control Board, the California Department of Fish and Game, and the National Marine Fisheries Service.
- C. Within five (5) business days of completion of the survey, the applicant shall submit the survey:
 - (1) for the review and approval of the Executive Director; and
 - (2) to the Surveillance Subcommittee of the Southern California Caulerpa Action Team (SCCAT). The SCCAT Surveillance Subcommittee may be contacted through William Paznokas, California Department of Fish & Game (858/467-4218) or Robert Hoffman, National Marine Fisheries Service (562/980-4043), or their successors.
- D. If *Caulerpa taxifolia* is found within the project or buffer areas, the applicant shall not proceed with the project until 1) the applicant provides evidence to the Executive Director that all *C. taxifolia* discovered within the project and buffer area has been eliminated in a manner that complies with all applicable governmental approval requirements, including but not limited to those of the California Coastal Act, or 2) the applicant has revised the project to avoid any contact with *C. taxifolia*. No revisions to the project shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

14. SUBMITTAL OF FINAL REVISED BENTHIC ENHANCEMENT & MONITORING PLAN

- A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall develop, in consultation with the CA Department of Fish and Game and the U.S. Fish and Wildlife Service and National Marine Fisheries Service, as appropriate, and submit for review and written approval of the Executive Director, a final detailed plan designed by a qualified benthic ecologist for restoration and monitoring 0.071 acres of new subtidal habitat in substantial conformance with the *Bay Island Subtidal Habitat Compensatory Mitigation Plan for the Bay Island Bulkhead and Bridge Project*...prepared by Coastal Resources

Management dated November 2006, except that the program shall be revised to, at a minimum, include the following:

- (1). In addition to the subtidal bathymetry, slope and sediment success criteria that will be based on pre-construction surveys of the reference area, success criteria shall also include epifaunal and infaunal community structure. Epifaunal and infaunal community structure criteria shall be based on pre-construction surveys of the in the reference area. That is, the compensatory site shall meet the success criteria if it is similar (with less than or equal to a 10% difference) to the reference area in terms of subtidal bathymetry, slope, and sediment characteristics and epifaunal and infaunal community structure.
 - (2). Provisions for monitoring and remediation of the benthic enhancement site in accordance with the approved final benthic enhancement, monitoring and management program for a period of five years or until it has been determined that success criteria have been met, whichever comes first.
 - (3). Provisions for submission of annual reports of monitoring results to the Executive Director for the duration of the required monitoring period, beginning the first year after submission of the "as-built" assessment. Each report shall include copies of all previous reports as appendices. Each report shall be a cumulative report that summarizes all previous reports. Each report shall also include a "Performance Evaluation" section where information and results from the monitoring program are used to evaluate the status of the benthic enhancement project in relation to the success criteria.
 - (4). Provisions for submission of a final monitoring report to the benthic enhancement site conforms to the goals, objectives, and success criteria set forth in the approved final benthic enhancement program. The report must address all of the monitoring data collected over the monitoring period.
 - (5). The permittee shall implement a long term perpetual management, maintenance and monitoring plan for the benthic enhancement area. The goal of the long term plan shall be to preserve the enhanced benthic area in its enhanced condition. The plan shall include a description of the perpetual management, maintenance and monitoring actions. The landowner(s) shall provide funding adequate to achieve the goal of the plan.
- B. If the final report indicates that the benthic enhancement has been unsuccessful, in part, or in whole, based on the approved success criteria, the applicant shall submit within 90 days a revised or supplemental benthic enhancement program to compensate for those portions of the original program which did not meet the approved success criteria. The revised benthic enhancement program, if necessary, shall be processed as an amendment to this coastal development permit.
- C. The permittee shall enhance, monitor and manage the benthic enhancement area in accordance with the approved program, including any revised program approved by the Commission or its staff. Any proposed changes to the approved program shall be reported to the Executive Director. No changes to the approved program shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

15. NO FUTURE SEAWARD EXTENSION OF SHORELINE PROTECTIVE DEVICE

- A. By acceptance of this Permit, the applicant agrees, on behalf of itself and all successors and assigns, that no future repair or maintenance, enhancement, reinforcement, modifications to address rising sea level, increased risk of flooding or other hazards, or any other activity affecting the shoreline protective device approved pursuant to Coastal Development Permit No. 5-09-055, as described and depicted on an Exhibit attached to the Notice of Intent to Issue Permit (NOI) that the Executive Director issues for this permit, shall be undertaken if such activity extends the footprint seaward of the subject shoreline protective device. By acceptance of this Permit, the applicant waives, on behalf of itself (or himself or herself, as applicable) and all successors and assigns, any rights to such activity that may exist under Public Resources Code Section 30235.
- B. Prior to the issuance by the Executive Director of the NOI FOR THIS PERMIT, the applicant shall submit for the review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal legal description and graphic depiction of the shoreline protective device approved by this permit, as generally described above and shown on Exhibit 5 attached to this staff report, showing the footprint of the device and the elevation of the device referenced to NGVD (National Geodetic Vertical Datum).

16. FUTURE DEVELOPMENT RESTRICTION

This permit is only for the development described in coastal development permit No. 5-09-055. Pursuant to Title 14 California Code of Regulations section 13253(b)(6), the exemptions otherwise provided in Public Resources Code section 30610 (b) shall not apply to the development governed by the coastal development permit No. 5-09-055. Accordingly, any future improvements to the structure authorized by this permit, including but not limited to repair and maintenance identified as requiring a permit in Public Resources section 30610(d) and Title 14 California Code of Regulations sections 13252(a)-(b), shall require an amendment to Permit No. 5-09-055 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government.

17. INSPECTION

The permittee shall allow the Executive Director of the Commission, and/or his/her designees to inspect the subject property to assess compliance with the requirements of the permit, subject to twenty-four hours advance notice.

18. ASSUMPTION OF RISK, WAIVER OF LIABILITY AND INDEMNIFY

By acceptance of this permit, the applicants acknowledge and agree (i) that the site may be subject to hazards from liquefaction, erosion, tidal action, flooding, and sea level rise; (ii) to assume the risks to the applicants and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages,

costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

19. CITY OF NEWPORT BEACH APPROVAL

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, applicant shall provide to the Executive Director a copy of a permit issued by the City of Newport Beach, or letter of permission, or evidence that no permit or permission is required. The applicant shall inform the Executive Director of any changes to the project required by the City of Newport Beach. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this coastal development permit, unless the Executive Director determines that no amendment is legally required.

20. PUBLIC RIGHTS

The Coastal Commission's approval of this permit shall not constitute a waiver of any public rights that may exist on the property. The permittee shall not use this permit as evidence of a waiver of any public rights that may exist on the property.

21. LANDSCAPING PLAN

A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, in a form and content acceptable to the Executive Director, two (2) full size sets of final landscaping plans prepared by an appropriately licensed professional which demonstrates the following:

(1) The plan shall demonstrate that:

- (a) All planting shall provide 90 percent coverage within 90 days and shall be repeated if necessary to provide such coverage;
- (b) All plantings shall be maintained in good growing condition throughout the life of the project, and whenever necessary, shall be replaced with new plant materials to ensure continued compliance with the landscape plan;
- (c) Landscaped areas not occupied by hardscape within the project limits shall be planted and maintained for erosion control, water quality protection, and public use and enjoyment of publicly owned lands. To minimize the need for irrigation and minimize encroachment of non-native plant species into adjacent or nearby native plant areas, all landscaping shall consist of native and/or drought tolerant non-invasive plant species. No plant species listed as problematic and/or invasive by the California Native Plant Society (<http://www.CNPS.org/>), the California Invasive Plant Council (formerly the California Exotic Pest Plant Council) (<http://www.cal-ipc.org/>), or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as a 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized within the property. All plants shall be low water use plants as identified by California Department of Water Resources (See: <http://www.owue.water.ca.gov/docs/wucols00.pdf>). Any existing landscaping

within the project limits that doesn't meet the above requirements shall be removed.

(d) Irrigation to allow the establishment and maintenance of the plantings is allowed. The landscaping plan shall show all the existing vegetation and any existing irrigation system along with notations regarding all changes necessary thereto to comply with the requirements of this special condition.

(e) Landscaping shall be designed and maintained to invite and encourage public use of the publicly owned land on the mainland side of the bridge terminus, including use of the area for viewing and fishing. All aspects of the plantings (e.g. plant type, size, location, density of distribution, etc.) shall be designed in a manner that does not obstruct or interfere with public views or public use and enjoyment of the publicly owned land located around the mainland terminus of the bridge.

(2) The plan shall include, at a minimum, the following components:

- (a) A map showing the type, size, and location of all plant materials that will be on the developed site, the irrigation system, topography of the developed site, and all other landscape features, and
- (b) a schedule for installation of plants.

B. The permittees shall undertake development in accordance with the approved plan. Any proposed changes to the approved final plan shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

22. DEED RESTRICTION

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the landowner has executed and recorded against the parcel(s) owned by the applicant that are governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the special conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description of the entire parcel or parcels governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

IV. FINDINGS AND DECLARATIONS:

The Commission hereby finds and declares as follows:

A. PROJECT LOCATION & DESCRIPTION

1. Project Location

The proposed project is located in Newport Beach, Orange County, at Bay Island in Lower Newport Bay, on the mainland at the intersection of Island Avenue and East Edgewater Avenue (a paper street developed with a public walkway), and the waterway between the island and mainland (Exhibit 1). The island is privately owned and developed with 24 single family residences. A gated pedestrian bridge links the island to the mainland (Balboa Peninsula). No public access across the bridge or on the island is presently available. No motor vehicles (e.g. cars, trucks) are allowed on the island. Residents of the island park their vehicles in a garage on the mainland and walk, bicycle or use other small personal transit (e.g. golf cart) to cross the bridge to the island. The private island is protected on three of its four sides by a bulkhead system. A wide sandy beach is present on the fourth (easterly) side.

The project site also includes the waterway underneath the bridge, and the mainland landing point of the bridge that is located at the street end of Island Avenue. The waterway and the mainland area is publicly owned land. East of the bridge landing there is a sandy beach backed by a bulkhead. West of the bridge landing is a bulkhead-front area of land with bare dirt, a few trees inside brick planters, and various above-ground pipes and valves related to the Bay Island utilities. This area of land is popular for fishing from the bulkhead.

2. Project Description

The proposed project consists of three main components: 1) reinforcement, in part, and replacement, in part, of the entire bulkhead system 2) demolition of the existing gated private pedestrian bridge and construction of a new gated, private pedestrian bridge in a slightly different alignment; and 3) construction of a 'sand retention wall' offshore of a small private beach on the western side of the island. The entire project will take approximately 6 to 9 months to construct.

Bulkheads are located on the northern, western and southerly side of the island. According to the applicant, these bulkheads were constructed in the late 1920's. Two types of bulkheads are present. On the southern and north eastern sides of the island the bulkheads consist of steel sheetpiles with a concrete cap and tiebacks to timber pile anchors. On the western side the bulkhead is constructed of concrete soldier piles with tiebacks to timber pile anchors and concrete panels between the soldier piles. There is a concrete cap on top of the entire bulkhead system. These bulkheads are cracking, spalling and weakening due to corrosion; in some locations the bulkheads are beginning to fail.

Two approaches are proposed to fix the bulkhead system (Exhibits 5, 7, 8). On the southern, southwestern and southeastern areas a new approximately 600 linear foot long bulkhead will be installed within or landward of the existing footprint of the existing bulkhead. Once the new bulkhead is installed, the existing bulkhead will be removed creating new subtidal habitat. This new habitat will be used as mitigation to offset fill impacts caused by the second approach to fixing the bulkhead, as well as other fill caused by other components of the project. In the second approach, a new bulkhead will be constructed seaward of the existing bulkhead. This segment is

also about 600 linear feet long. The space between the existing and new bulkhead will be filled with gravel or concrete. This approach results in fill of coastal waters and is being used in those areas where there is not sufficient room landward of the bulkhead to use the first approach described above due to the location of the homes along the bulkhead.

In total, approximately 1200 linear feet of bulkhead will be reinforced or replaced. The new bulkhead will be composed of steel. No steel coating is proposed. A new concrete cap will be constructed on top of the new bulkhead. The top elevation of the cap will be +9 feet Mean Lower Low Water (MLLW) which brings the project into compliance with City bulkhead height requirements. A new drainage system with Tideflex valves will be installed as well to allow for drainage of dry weather and storm runoff.

Most of the construction will occur from a floating barge. However, some on-land storage of materials will be required. Existing docks and gangways will need to be temporarily removed during construction and will be replaced upon completion with minor adjustments to account for the new bulkhead design.

The existing private, gated pedestrian bridge which was constructed in the 1950's will also be replaced with a new bridge. The existing bridge is approximately 140 feet long and 11 feet wide, spanning a 60 foot wide channel. The channel over which the bridge crosses is used by small recreational boats (Duffy boats, kayaks, rowboats); however, larger boats can't navigate under the bridge due to the low bridge deck. An assessment prepared by the applicant's consultant states the existing bridge is in 'fair' condition, but is not compliant with ADA requirements and does not meet seismic requirements. The applicant indicates the existing bridge would likely be severely compromised or would collapse during an earthquake. The existing bridge carries all utilities over to the island (water, sewer, gas, electrical, communications). Loss of the bridge would also result in loss of utilities to the island.

The proposed bridge would be constructed just north of and adjacent to the existing bridge (Exhibit 2a). The bridge would be 130 feet long and about 10 feet wide. Utilities will be relocated from the existing to the replacement bridge. The bridge will be a 'truss' type bridge that spans the waterway without use of pilings (Exhibit 2b, 3). A new drainage system will be constructed to direct runoff to trench drains and the storm drain system on land. The existing bridge will be demolished upon completion of the new bridge.

The bridge to be demolished is gated on the mainland side of the bridge (Exhibit 4). The existing gate is about 5 feet tall and constructed of wrought iron with a sign affixed to it. The sign states "Electric Gate, Members, Guests & Deliveries Only, Press Button". The existing wrought iron gate is comprised of widely spaced narrow bars and any approaching pedestrian can see through the gate. Another sign spans the gate entrance, consisting of a horizontal wood beam mounted on four vertical beams (two each side) that rest atop two square brick pilasters (roughly 2 feet by 2 feet diameter) with the community name, "Bay Island" and the statement "Private Members & Guests Only", on it. There is another plate mounted on one of the wood beams, along with gate controls, that says "No Admittance". This existing gate and entry will be demolished and removed. The proposed new gate would be located at the mainland side entry point to the new bridge. The proposed gate with sign mounted on flanking pilasters is designed similar to the existing one. However, the new gate will be taller (estimated 6 feet) than the existing one and appears to be constructed of a solid material that approaching pedestrians cannot see through.

Last, the applicant is proposing a 'sand retention wall' to protect an existing pocket beach located on the western side of the island that exists in between a break in the bulkhead wall (Exhibit 6). The submerged wall to be constructed in the water offshore of the beach is designed to prevent sand from leaving the beach area. The wall will be L-shaped and connect with an existing groin such that the sandy beach will be boxed in on 3 sides. The section of the wall parallel to the shore will be about 80 feet long, and the segment perpendicular to shore would be 23 feet long. The wall is proposed to be constructed of fiberglass. The wall would occupy approximately 100 square feet of subtidal habitat.

B. APPROVAL FINDINGS AND DECLARATIONS

1. PUBLIC ACCESS

Section 30210 of the Coastal Act states:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30212 of the Coastal Act states, in part:

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: . . .(2) Adequate access exists nearby . . . Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

Section 30213 of the Coastal Act states:

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.

Section 30224 of the Coastal Act states:

Increased recreational boating use of coastal waters shall be encouraged, in accordance with this division, by developing dry storage areas, increasing public launching facilities, providing additional berthing space in existing harbors, limiting non-water-dependent land uses that congest access corridors and preclude boating support facilities, providing harbors of refuge, and by providing for new boating facilities in natural harbors, new protected water areas, and in areas dredged from dry land.

The City's recently updated certified Land Use Plan (LUP) also contains the following policies that would apply to the proposed development:

Land Use and Development/Visitor-Serving and Recreational Development, Policy 2.3.2-1.
states,

Continue to use public beaches for public recreational uses and prohibit uses on beaches that interfere with public access and enjoyment of coastal resources.

Land Use and Development/Visitor-Serving and Recreational Development, Policy 2.3.3-5 states,

Continue to provide and protect public beaches and parks as a means of providing free and lower-cost recreational opportunities.

Public Access and Recreation/Shoreline and Bluff Top Access, Policy 3.1.1-1 states,

Protect, and where feasible, expand and enhance public access to and along the shoreline and to beaches, coastal waters, tidelands, coastal parks, and trails.

Public Access and Recreation/Shoreline and Bluff Top Access, Policy 3.1.1-2 states,

Protect and enhance all existing public street ends providing public access to the shoreline, beaches, coastal parks, and trails.

Public Access and Recreation/Shoreline and Bluff Top Access, Policy 3.1.1-4 states,

Identify and remove all unauthorized structures, including signs and fences, which inhibit public access.

Public Access and Recreation/Shoreline and Bluff Top Access, Policy 3.1.1-11 states,

Require new development to minimize impacts to public access to and along the shoreline.

Public Access and Recreation/Shoreline and Bluff Top Access, Policy 3.1.1-16 states:

Require all direct dedications or OTDs for public access to be made to a public agency or other appropriate entity that will operate the accessway on behalf of the public. Require accessways to be opened to the public once an appropriate entity accepts responsibility for maintenance and liability.

Coastal Land Use Plan Policy 3.1.5-1 states:

Prohibit new development that incorporate gates, guardhouses, barriers or other structures designed to regulate or restrict access where they would inhibit public access to and along the shoreline and to beaches, coastal parks, trails, or coastal bluffs.

Coastal Land Use Plan Policy 3.1.5-2 states:

Prohibit new private streets, or the conversion of public streets to private streets, where such a conversion would inhibit public access to and along the shoreline and to beaches, coastal parks, trails, or coastal bluffs.

Coastal Land Use Plan Policy 3.1.5-3 states:

Require public access consistent with public access policies for any new development in private/gated communities causing or contributing to adverse public access impacts.

Gating the Bridge and Public Access to Public Lands

One of the main tenets of the Coastal Act is the preservation and enhancement of coastal access. The City's certified Land Use Plan (used as guidance) also strongly supports protection and enhancement of coastal access. The subject proposed private bridge would span over a publicly owned waterway owned by the City of Newport Beach. Bridges such as the one proposed could be used for fishing, viewing, and passive uses.

The general public currently has access to and along the bulkheaded bayfront on the mainland via public streets and a walkway that runs along the landward side of the bulkhead; however, they don't have access to the bridge at the subject site or to the private island². An existing gate at the mainland side of the bridge prevents public use of the existing bridge. There are public parking spaces on the mainland in the vicinity of the entrance to the bridge upon surrounding public streets.

The bridge to be demolished is gated on the mainland side of the bridge (Exhibit 4). The existing gate is about 5 feet tall and constructed of wrought iron. A sign affixed to the gate states "Electric Gate, Members, Guests & Deliveries Only, Press Button". Another sign affixed to a wood beam spanning the gated entrance, mounted on two heavy wood and brick pilasters flanking the entrance, state "Bay Island". This entry monument is about 15 feet tall. This existing gate and entry monument will be demolished and removed.

A new proposed 'entrance structure' (i.e. gate and entry monument) will then be constructed at the entry point of the new bridge. The gate would be placed on the mainland side of the bridge and would prevent the public from accessing the bridge. Access would be limited to residents and guests of Bay Island. However, if the proposed gate were located on the Bay Island side of the bridge, the public would have access to and over these publicly owned submerged lands.

Although the public doesn't presently have access upon the existing bridge³, public access upon the new bridge would be beneficial. Presently, there is access along the bayfront on this section of the Balboa Peninsula; access to the bridge would tie in to this existing lateral access along the waterfront. It would provide the public opportunity for alternative viewpoints of this scenic waterfront area. Based upon comment letters submitted to the Commission, this area is known to be a popular place for recreational fishing and the bridge would offer additional opportunity for fishing.

The area over which the new bridge will span is submerged lands presently owned by the City of Newport Beach. Although the lands are submerged and publicly owned, the applicant asserts that these were once 'swamp and overflowed lands' that are not subject to the public trust (Exhibit

² The applicant states that some form of entry control to the island (e.g. gate, guard, etc.) has been in place since the establishment of residential uses on the island in the 1920's. Letters submitted by the public indicate that the gate which is present today at the entry to the bridge was placed there sometime since 1976 (after passage of the Coastal Act). Some letters suggest that there was no gate prior to that time. Other letters suggest that a gate was present at the mid-point of the bridge and then was re-located to the mainland terminus of the bridge sometime after passage of the Coastal Act. Commission staff have reviewed photographs of the area from 1972 to present, however, those photographs are inconclusive. There are no coastal development permits for any gate to the bridge.

³ Letters submitted by the public indicate there has been public access to the bridge in the past.

9)⁴. Thus, they assert that they are allowed to gate the bridge and exclude the public from using the bridge. As of the date of this staff report, State Lands Commission staff is still investigating the public trust status of the channel. However, even if the waterway is not subject to the public trust, the applicant still has no right under the Coastal Act to exclude the public from using the bridge spanning this publicly owned waterway. The applicant owns an easement (Exhibit 10) to construct a bridge for pedestrian and vehicular use over these publicly owned submerged lands, but that easement does not contain any provision allowing the applicant to exclude the public from using the easement area (including any bridge constructed in the easement area)⁵. Section 30210 of the Coastal Act requires the maximum public access be provided. Section 30212 of the Coastal Act requires that public access to the shoreline and along the coast be provided in new development project, except where adequate access exists nearby: no access similar to that provided by this proposed bridge exists in the vicinity. Section 30213 of the Coastal Act encourages provision of lower cost visitor and recreational facilities; such facilities would be provided by making the bridge available for public access. The City of Newport Beach's Coastal Land Use Plan includes many similar policies encouraging improvement of public access. Thus, excluding the public from using the bridge is inconsistent with Sections 30210, 30212 and 30213 of the Coastal Act.

The applicant has expressed objection to allowing the public access to and use of the proposed bridge. A variety of concerns have been expressed. In a letter dated May 5, 2009, the applicant has expressed concern about individuals using the bridge for recreational purposes to jump into the water channel below (which the applicant states is shallow). The applicant states that individuals have used the existing bridge in that fashion in the past and they believe there are safety and liability implications. In that letter the applicant states they would be willing to open the bridge for public use so long as an entity is identified that will accept liability and indemnify the Bay Island Club against any lawsuits. The applicant demands that the Commission require at least \$25 million liability coverage. If such liability coverage were needed, the amount requested is much larger than is normally taken out by non-profit organizations that have operated accessways on behalf of the State elsewhere. The California Coastal Conservancy's guidelines suggest that such non-profits have \$1 million liability coverage. Some non-profits have opted to take out larger policies. For example, in an abundance of caution, the Orange County Coastkeeper has taken out policies for around \$3 million liability coverage for accessways that it operates. Non-profit entities have stated that taking liability coverage out in the amount of \$25 million would be cost prohibitive and likely beyond the means of most non-profits. Establishing \$25 million as the minimum for liability coverage would effectively eliminate the possibility of any non-profit organization taking over management of the access. Clearly, the amount of liability coverage the applicant is demanding is excessive.

⁴ The applicant asserts that the island was once attached to the mainland via upland 'swamp and overflowed lands'. Furthermore, they assert that through a patent in 1902 the lands were conveyed to the State of California under authority of the Swamp Lands Act and that via that process the lands were alienated and free of any public trust for navigation. The lands were subsequently conveyed into private ownership. At some point during this period the area between the Balboa Peninsula and the current Bay Island was dredged and the waterway was conveyed back into public ownership to the City of Newport Beach (see Exhibit 9). State Lands Commission staff is currently investigating the public trust status of the waterway.

⁵ The easement states that Bay Island Club has the "...right and easement to construct, maintain, repair and replace a bridge for pedestrian and/or automobile travel over and across that part of the hereinafter described property included within the Northerly extensions of the side lines of either Island Avenue, Anade Avenue or Montero Avenue." (see Exhibit 10)

Moreover, municipal governments usually do not take out liability insurance for public property because they are usually self insured.

The applicant's potential liability for accidents on the bridge is limited. California Civil Code section 846 provides that property owners (including owners of easements) are generally not responsible for keeping their property safe for recreational uses by others except where the owner has expressly invited (rather than merely allowed) the user onto the property, where the user paid the owner in order to enter the property for recreational purposes, or where the owner has willfully or maliciously failed to guard or warn against a dangerous condition.

Because the Commission is simply requiring that the new bridge over public waters be open to the public, it is not requiring formal dedication of an accessway. Although the applicant holds an easement allowing it to construct a bridge over the channel, the easement does not expressly allow the applicant to exclude the public from the bridge. Therefore, the provision of section 30212 that allows accessways to be closed to the public until a third party accepts responsibility for maintenance and liability does not apply.

The existing and proposed bridges span a waterway that is navigable⁶. However, the existing and proposed bridges do not have sufficient clearance under them to allow all classes of watercraft to pass beneath the bridge. The proposed bridge will have an 11.3' above MLLW clearance at the centerpoint of the bridge, with lesser clearance toward the sides of the channel as the bridge slopes downward from its centerpoint. Only small watercraft (e.g. row boats, kayaks, etc.) can navigate under a bridge with this clearance. Thus, the existing and proposed bridges obstruct a significant category of public use of the waterway (e.g. by sail boats). Although this is an existing condition, the proposed project will not resolve the issue and thus will perpetuate an existing limitation on public access and recreational boating use of the waterway. Section 30224 of the Coastal Act encourages increased recreational boating use of coastal waters by, among other means, "...limiting non-water-dependent land uses that congest access corridors...". The existing and proposed bridges provide access to residential development, a non-water dependent land use. The proposed bridge will perpetuate an existing congestion of an access corridor. Opening the proposed bridge to public access will provide a means of alleviating the adverse access impacts of the bridge⁷.

In order to bring the proposed development into conformance with the Coastal Act, the Commission imposes Special Conditions 2, 3, and 4. Special Condition No. 2 requires the applicant to open the bridge for public use concurrent with the commencement of use of the bridge by island residents. The special condition also includes other requirements related to the hours of access (24-hours per day). The hours of access are set at 24-hours per day because the walkways leading to the bridge are also open 24-hours per day. A permanent gate may be established at the Bay Island termination of the bridge. The gate shall replicate (in dimensions, materials, opacity and design) the existing gate that will be demolished when the existing bridge is demolished.

Special Condition No. 3 requires the applicant to prepare a plan identifying all signs that will be placed on the bridge and in the vicinity of the bridge at its mainland terminus. Signs that discourage or prohibit public use of the bridge or surrounding public areas shall be prohibited.

⁶ See letter from the U.S. Department of Homeland Security, United States Coast Guard, to Moffatt & Nichol, dated June 6, 2009 (a substantive file document)

⁷ Although, this won't represent an equivalent offset to the adverse impact on recreational boating and access.

Signs that establish controls on public use of any area (e.g. no jumping or diving from the bridge) may only display language enforcing requirements explicitly established in the Newport Beach Municipal Code. An existing sign affixed to the railing on the existing bridge prohibits diving, jumping and fishing from the bridge, and cites Section 11.12.150 of the Newport Beach municipal code. Section 11.12.150 of the Newport Beach municipal code prohibits people from diving, jumping or entering water from any public bridge (and a variety of other public structures and places). While there are municipal code provisions⁸ that regulate fishing (e.g. no overhead casting), they do not prohibit fishing. Thus, the prohibition on the existing sign relative to fishing is not consistent with the municipal code and would not be consistent with the special condition.

Special Condition No. 4 requires the applicant to submit final project plans for all entry monumentation/community identification markers and gating. Any entry monumentation, community identification markers and/or gating may only be placed at the Bay Island termination of the bridge. Placement of such structures at any other location would present a physical and psychological impediment to use of the bridge by the public. Also, the proposed improvements, including the larger gate and signage, will adversely impact public use of the bridge. When the public sees the new structural improvements and architectural embellishments, they will be given the impression that the bridge does not allow public access. As architectural features and signage can affect the public's perception of access opportunities at a location—particularly at an entry to a private residential neighborhood—the design of any proposed entryway improvements is a significant component of the current project. Imposing, monumental scale architectural features may give the appearance of privatization and deter members of the public. Only the most intrepid members of the public are likely to be inclined to investigate further; others are more likely to avoid the challenge and seek access elsewhere. As proposed, the project will effectively discourage public use. To avoid adverse public access impacts, the Commission imposes Special Condition 4 which requires that any entry monumentation, community identification markers, and gate replicate (in dimensions, materials, opacity and design) the existing structures that will be demolished when the existing bridge is demolished, or be designed to be less imposing.

As conditioned, the Commission finds the project to conform to Sections 30210, 30212 and 30213 of the Coastal Act.

Public Access and Fishing Area Surrounding Mainland Terminus of Bridge

The publicly owned area of land on the mainland side of the existing and proposed bridge terminus is used by the public for viewing, access to the bay, and for fishing. East of the bridge landing there is a sandy beach backed by a bulkhead. West of the bridge landing is a bulkhead-front area of land with bare dirt, a few trees inside brick planters, a few shrubs, and various above-ground pipes and valves related to the Bay Island utilities. Due to the open bulkhead fronting area, the area is quite popular for fishing. In addition, unlike landscaping on adjacent areas, the landscaping in this area does not deter access to the bulkhead and is not landscaped in a fashion that appears to be associated with the nearby residences (i.e. the area looks like public land rather than landscaped privately owned land). The proposed project will cause temporary disturbance in the immediate vicinity of the existing and proposed bridge landing due to construction activity. Since the new bridge is being located in a slightly different alignment than the old one (i.e. just west of the existing bridge), the new bridge will occupy some bulkhead-front land area that is currently used for fishing.

⁸ See City of Newport Beach Municipal Code Section 11.20 (Fishing Regulations).

The applicant asserts that the proposed project will have no long term adverse impacts on the public's ability to fish from the mainland area surrounding the bridge. The applicant states that there is approximately 280 lineal feet of water's edge available for public access / fishing along this length of bulkhead wall adjacent to the bridge terminus. The new bridge will cover only 10 linear feet of this stretch. All of the bulkhead along Edgewater Avenue is on public right-of-way and, according to the applicant, should be available for fishing. However, this is probably an overstatement because a significant stretch of the segment of bulkhead between the Island Avenue and Lindo Avenue street ends is occupied by shrubs (which obstruct access to the bulkhead), and boat docks and boats (which obstruct fishing activities from the bulkhead). This area is also landscaped and contains pavers and a few benches that mimic the design of the hardscape and landscape of the adjacent residences so that it appears as though the area is privately owned. At the western end (near the Lindo Avenue street end), there is a 40'x40' waterfront bulkheaded area with a large shade tree in the middle and a public bench (with Newport Beach logo affixed to it). There are unobstructed opportunities for fishing from this area. Finally, demolition of the existing bridge (over an approximate 10 feet length footprint) will create a new fishing area. According to the applicant, the channel bottom in front of the existing "fishing area" is shallower than the 100 square feet of beach that will be uncovered when the existing bridge is demolished, so the new fishing area should be more conducive to fishing.

Although there are other areas from which to fish in the vicinity of the bridge, and the new project will open up beach area from which to fish, the Commission received many letters from the public objecting to the impacts that the new bridge will cause on fishing. Most of the comments focused on the loss of bulkhead-front area from which to fish to the west of the bridge, which some consider to be a superior fishing area compared with the adjacent beach area (to the east) that would be uncovered by demolition of the existing bridge. In response, the applicant re-evaluated the location of the bridge landing and determined that the new bridge landing could be moved several feet east so that it is closer to the existing bridge (which will ultimately be demolished) than the previously considered alignment. This change would move the bridge so that it covers up a bulkhead front area that already contains several impediments to fishing, such as a groin that extends into the water and the pilings from the existing bridge (both of which would interfere with cast fishing lines), but opens up more of the bulkhead-front area that doesn't have these interferences. Thus, the new design will have lesser impacts upon potential fishing area than the old design did (see Exhibit 12).

In order to minimize and where feasible avoid adverse impacts upon recreational fishing opportunities at the subject site, the Commission imposes Special Condition 5. Special Condition 5 requires the applicant to submit revised final plans that show the proposed bridge will be located as close to the alignment of the existing bridge as is feasible; that upon completion of construction of the new bridge, the existing bridge shall be immediately demolished and removed and the area underneath the demolished bridge restored to be relatively flat, open and unobstructed for public use and fishing therefrom and that removal and restoration shall be completed within 3 months of completion of construction of the new bridge; and that the publicly owned bulkhead-front land at the mainland terminus of the bridge and generally to the west of the bridge shall be made open and unobstructed for public use and fishing therefrom, including but not limited to, removal of the existing planters and landscaping that partially obstruct views and physical access to the area from the Island Avenue street end and sidewalk; installation of pavers or other hardened walking surface from the sidewalk and to and along the bulkhead; installation of landscaping (e.g. trees) to provide shading (but placed so as not to obstruct public views or physical access to the area and tall enough to avoid being an impediment for fishing); and

installation of trash cans and benches (to be designed consistent with such facilities that are present in public parks in the City including with City logo). Special Condition 21 also addresses landscaping which must be designed in a manner that encourages, and does not discourage, interfere with, or obstruct, public use of the area for access and fishing. Therefore, the Commission imposes Special Conditions 5 and 21.

2. SHORELINE PROTECTIVE STRUCTURES

Section 30235 of the Coastal Act states:

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.

Section 30253 of the Coastal Act states in relevant part:

New development shall do all of the following:

- (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
- (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*
- (c)*

Site conditions include an existing, deteriorating bulkhead. The applicant submitted an assessment study of the existing bulkhead and replacement recommendations titled: *Condition Assessment* by Cash & Associates dated June 10, 2004. The investigation determined the following: 1) the existing bulkheads do not meet current seismic loading standards; 2) steel sheet piles show severe corrosion, pitting, reduced thickness, and some spalling. The report recommends reinforcement, in part, and replacement, in part of the bulkhead.

The bulkhead at the subject site is required to protect the structural integrity of the site from tidal activity. If the bulkhead were removed and not replaced, tidal activity would erode and destabilize the residential sites and the development landward of the bulkhead. Therefore, the proposed bulkhead is necessary to protect existing structures. The applicant also provided information indicating that if the bulkhead were to fail, approximately 105 cubic feet of soil per linear foot of failed bulkhead would be discharged into the bay causing adverse water quality impacts and impacts to bay bottom habitat.

The existing bulkhead does not meet present engineering standards and poses a risk to life and property because lot stability may be threatened by failure of the aging, corroding existing bulkhead. The proposed development will protect lot stability and reduce risks to life and

property with a structurally superior bulkhead system. **SPECIAL CONDITION NO. 7** requires final plans incorporating the recommendations in the bulkhead evaluation. In addition, to minimize risks to life and property, the development has been conditioned to require that the landowner and any successor-in-interest assume the risk of undertaking the development, as specified in **SPECIAL CONDITION NO. 18**.

The bulkhead design will conform to the current minimum elevation requirements set by the City of Newport Beach, that the bulkhead elevation be at least +9 foot MLLW. This elevation has been established as a minimum standard and, according to the City of Newport Beach's Harbor Committee Report on Global Warming and Sea Level Rise Effects on Newport Harbor, many of the existing bulkheads are lower than the 9 foot MLLW standard. Bulkhead standards for Dana Point and Huntington harbor require new bulkheads be built to +10 foot MLLW elevation. The City of Newport Beach recommended minimum elevation does not take into account a significant rise in sea level and it is likely that the proposed bulkhead will need to be elevation in the coming decades to provide flood protection from rising sea level. **SPECIAL CONDITIONS NO. 15 and 16** require that any future maintenance or work to address changing sea level, increased flooding or other coastal hazards be undertaken on or inland of the proposed development and that there not be any seaward encroachment beyond the identified and recorded line of development.

Therefore, the Commission finds that the proposed development, as conditioned, conforms with Section 30235 and 30253 of the Coastal Act.

3. MARINE RESOURCES

Section 30230 of the Coastal Act states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231 of the Coastal Act states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30233 of the Coastal Act states in part:

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible

mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

- (1) New expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
- (2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
- (3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
- (4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
- (5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
- (6) Restoration purposes.*
- (7) Nature study, aquaculture, or similar resource dependent activities.*

Fill of Coastal Waters and Loss of Marine Habitat

The proposed project includes replacement of a portion of the existing bulkhead in the same or further inland alignment and that component of the project will not result in new fill of coastal waters. However, another 600 liner foot section would involve retaining the existing bulkhead and constructing a new bulkhead adjacent to but seaward of the existing one resulting in fill of approximately 0.018 acres (784 sq. ft) of coastal waters (Exhibit 5).

Section 30233(a) limits the diking, filling and dredging of open coastal waters to certain specific allowable uses. In order for fill of open coastal waters to be approved, the proposed project must be found to be an allowable use, the project must also be the least environmentally damaging alternative, and the project must have adequate mitigation measures to minimize adverse impacts. Although fill of open coastal waters for a bulkhead to protect existing development is not listed as an allowable use under section 30233(a), section 30235 requires the Commission to permit certain categories of shoreline protective devices. As explained above, the proposed bulkhead meets the requirements of section 30235.

Alternatives to the proposed project include no project, replacement of the bulkhead in precisely the same alignment, replacement of the bulkhead landward of its existing alignment or replacement of the bulkhead seaward of its existing alignment.

Under the no project alternative, the applicant could only pursue simple maintenance activity. However, simple maintenance could not feasibly repair the bulkhead, nor to bring it up to present engineering, seismic and safety standards. Simple maintenance would only prolong the condition of the existing bulkhead. Ultimately, maintenance efforts would be unable to address the deteriorating bulkhead and the bulkhead would fail causing damage to structures and habitat.

A second alternative would involve replacement of the bulkhead on or behind the existing alignment. The applicant has chosen the in-alignment replacement alternative for a 600 linear foot section of the bulkhead because it is feasible to do so for that segment. However, for the remaining 600 linear feet, the applicant has stated that in-alignment replacement or landward installation would not be feasible due to the location of existing homes within a few feet of the bulkhead. Those homes prevent implementation of the in-alignment or landward installation of the bulkhead.

The third alternative would be to retain a portion of the existing bulkhead in place and install a new bulkhead adjacent to but seaward of the existing wall that results in fill of 0.018 acres (784 sq. ft) of soft bottom bay habitat. Due to the site constraints and with mitigation, this element of the project can be considered to be the least environmentally damaging feasible alternative. The applicant is proposing mitigation in the form of creation of 0.071 acres (3093 sq.ft.)⁹ of subtidal bay habitat. This will be created by re-aligning a portion of the existing bulkhead elsewhere on the site slightly landward (where there are no structures inland preventing such realignment). Approximately 760 cubic yards of the private sandy beach area used for private recreational purposes would be excavated. Some additional sub-tidal soft bottom habitat (about 31.5 square feet) will be gained by removal of the existing bridge pilings. Once the re-aligned bulkhead is constructed and the sand excavated, tidal action will be present. No vegetation planting is proposed (the impact area is also not vegetated). The restoration area is expected to be voluntarily colonized by marine benthic organisms within 6 to 12 months. **SPECIAL CONDITION NO. 14** requires the applicant to revise the benthic habitat mitigation plan to include success criteria for epifaunal and infaunal community structure and to include provisions for monitoring and remediation of the benthic enhancement site in accordance with the approved final benthic enhancement, monitoring and management program for a period of five years or until it has been determined that success criteria have been met, whichever comes first. Furthermore, **SPECIAL CONDITION NO. 15** requires no future seaward extension of the bulkhead into coastal waters to avoid future fill of coastal waters. The applicant agrees that installing a new bulkhead in front of the existing bulkhead would facilitate the eventual replacement of the new bulkhead in the future in a more landward location.

Water Quality Impacts

The proposed project is located in and over the coastal waters of Lower Newport Bay. Newport Harbor (Lower Newport Bay) is included on the Federal Clean Water Act 303(d) list of "impaired" water bodies. The designation as "impaired" means the quality of the water body cannot support the beneficial uses for which the water body has been designated – in this case secondary contact recreation and aquatic uses. The listing is made by the California Regional Water Quality Control Board, Santa Ana Region (RWQCB), and the State Water Resources Control Board (SWRCB), and confirmed by the U.S. Environmental Protection Agency. Further, the RWQCB has targeted the Newport Bay watershed, which would include the Lower Newport Bay, for increased scrutiny as a higher priority watershed under its Watershed Management Initiative. Consequently, projects which could have an adverse impact on water quality should be examined to assure that potential impacts are minimized. The standard of review for development proposed in coastal waters is the Chapter 3 policies of the Coastal Act, including the following

⁹ This quantity comes from Figure 4 of the document titled Bay Island Habitat Mitigation Plan prepared by Coastal Resources Management dated November 2006. This figure is larger than the figure referenced in earlier proposals submitted by the applicant.

water quality policies. Sections 30230 and 30231 of the Coastal Act require the protection of biological productivity and water quality.

The construction will occur over and in the water. Construction of any kind adjacent to or in coastal waters has the potential to impact marine environment. The Bay provides an opportunity for water oriented recreational activities and also serves as a home for marine habitat. Because of the coastal recreational activities and the sensitivity of the Bay habitat, water quality issues are essential in review of this project

The Regional Water Quality Control Board (RWQCB) oversees impacts upon water quality in the region. Since the proposed project has the potential to affect water quality, the development requires review by the RWQCB. In order to assess impacts upon water quality, the proposed project was submitted to the California Regional Water Quality Control Board (RWQCB). The RWQCB determined that if certain conditions were adhered to, the project should not adversely impact water quality. The RWQCB reviewed the project and issued a Clean Water Act Section 401 Water Quality Standards Certification contingent upon special conditions relating to discharge into coastal waters and turbidity control.

Due to the proposed project's location on the water, demolition and construction activities may have adverse impacts upon water quality and the marine environment. Storage or placement of construction materials, debris, or waste in a location subject to wave erosion and dispersion would result in adverse impacts upon the marine environment that would reduce the biological productivity of coastal waters. For instance, construction debris entering coastal waters may cover and displace soft bottom habitat. In addition, the use of machinery in coastal waters not designed for such use may result in the release of lubricants or oils that are toxic to marine life. Sediment discharged into coastal waters may cause turbidity, which can shade and reduce the productivity of foraging avian and marine species ability to see food in the water column. The applicant has stated that they intend to implement best management practices (BMPs) to reduce impacts to water quality and biological resources, such as use silt curtains to confine sediments during construction activities. In addition to these BMPs, additional best management practices are necessary. Thus, in order to avoid adverse construction-related impacts upon marine resources, **SPECIAL CONDITION NO. 8** has been imposed, which outlines additional construction-related requirements to provide for the safe storage of construction materials and the safe disposal of construction debris. This condition requires the applicant to incorporate silt curtains and/or floating booms when necessary to control turbidity and debris discharge. Divers shall remove any non-floatable debris not contained in such structures that sink to the ocean bottom as soon as possible.

Since the applicant has not identified a disposal site for the construction debris, in order to prevent impacts to coastal waters from construction debris and dredge sediments re-entering coastal waters, the Commission imposes **SPECIAL CONDITION NO. 9**, requiring all construction debris be disposed of at a legal site approved by the Executive Director. Choice of a site for construction debris disposal within the coastal zone shall require an amendment to this permit or a new coastal development permit.

Post-Construction Impacts to Water Quality

The proposed project involves installation of a steel sheetpile bulkhead. No materials are proposed that would treat and coat any steel sheet piles. Were the applicant to include such

materials they would need to be reviewed for water quality impacts because certain substances may have an adverse impact on water quality. In this case, no such coating is proposed.

The applicant is proposing to install one-way Tideflex valves along the bulkhead to allow for discharge of dry weather and storm related runoff from the island. The applicant proposes a 'basket type filtration unit' to prevent debris from being discharged into the bay. In addition, the drainage from the new bridge will be directed to the island-side and mainland-side drainage systems. Although preventing the discharge of debris is appropriate, there would be other pollutants of concern entrained in runoff that need to be addressed. These pollutants include those normally associated with residential development, such as pesticides, herbicides, oil and grease from vehicles, etc. **SPECIAL CONDITION NO. 10** requires the applicant to submit a Water Quality Management Plan (WQMP) that includes appropriate Best Management Practices (BMPs) such as specific details and requirements ensuring that runoff from the project site is appropriately treated to address pollutants of concern before being discharged into Newport Bay.

Eelgrass

Eelgrass (*Zostera marina*) is an aquatic plant consisting of tough cellulose leaves which grows in dense beds in shallow, subtidal or intertidal unconsolidated sediments. Eelgrass is considered worthy of protection because it functions as important habitat and foraging area for a variety of fish and other wildlife, according to the Southern California Eelgrass Mitigation Policy (SCEMP) adopted by the National Marine Fisheries Service (NMFS), the U.S. Fish and Wildlife Service (USFWS), and the California Department of Fish and Game (CDFG). For instance, eelgrass beds provide areas for fish egg laying, juvenile fish rearing, and water fowl foraging. Sensitive species, such as the California least tern, a federally listed endangered species, utilize eelgrass beds as foraging grounds.

An eelgrass habitat surveys were conducted in 2005 and 2006 by a qualified biologist. These surveys determined that eelgrass is present in small patches around the island, but none of the eelgrass occurs within the project footprint. Thus, no adverse impacts to eelgrass are anticipated. However, eelgrass surveys are only valid for a short period of time. Completed during the active growth phase of eelgrass (typically March through October) are valid for 60-days with the exception of surveys completed in August-October. A survey completed in August - October shall be valid until the resumption of active growth (i.e., March 1). The eelgrass surveys are over 2 years old and are no longer valid. Thus, an up-to-date eelgrass survey must be conducted. Therefore, the Commission imposes **SPECIAL CONDITION NO. 12**, which requires the applicant, prior to commencement of development, to survey the project area for the presence of eelgrass. If eelgrass is found in the project area that would be impacted, the applicant must seek an amendment to the coastal development permit to address this issue.

Caulerpa Taxifolia – Invasive Algae

As noted above, eelgrass is a sensitive aquatic plant species which provides important habitat for marine life. Eelgrass grows in shallow sandy aquatic environments which provide plenty of sunlight. In 2000, a non-native and invasive aquatic plant species, *Caulerpa taxifolia* was discovered in parts of Huntington Harbor in Orange County and in Agua Hedionda Lagoon in San Diego County, which both occupy similar habitat. *C. taxifolia* is a tropical green marine alga that was popular in the aquarium trade because of its attractive appearance and hardy nature but possession or release of live *C. taxifolia* is now illegal within California pursuant to Fish and Game Code section 2300. Nevertheless, other infestations are likely. Although a tropical

species, *C. taxifolia* has been shown to tolerate water temperatures down to at least 50°F. Although warmer southern California habitats are most vulnerable, until better information is available, it must be assumed that the whole California coast is at risk. All shallow marine habitats could be impacted.

If *C. taxifolia* is present, any project that disturbs the bottom could cause its spread by dispersing viable tissue fragments. A *C. taxifolia* survey for the site was completed. A NMFS certified *Caulerpa* field biologist did not observe any invasive algae at the project site. However, that survey is now out of date. Thus, **SPECIAL CONDITION NO. 13** requires the applicant conduct a pre-construction *C. taxifolia* survey to protect the shallow marine habitat in the vicinity of the project area from a possible infestation.

4. **DEVELOPMENT**

The development is located within an existing developed area and is compatible with the character and scale of the surrounding area. However, the proposed project raises concerns that future development of the project site potentially may result in a development which is not consistent with the Chapter 3 policies of the Coastal Act. To assure that future development is consistent with the Chapter 3 policies of the Coastal Act with respect to public access, hazards, fill of coastal waters, water quality, and marine life, the Commission finds that a future improvements special condition be imposed. As conditioned the development conforms to the Chapter 3 policies of the Coastal Act.

5. **LOCAL APPROVALS AND PUBLIC RIGHTS**

The City of Newport Beach provided an 'approval in concept' for the proposed project, but no evidence of final approval has been submitted. The City of Newport Beach did not address public trust issues in the approval in concept. Accordingly, the Commission imposes **SPECIAL CONDITION NO. 18**, requiring the applicant to submit proof of any necessary approvals by the City of Newport Beach or that no approvals are required. In addition, because the Commission does not have a definitive determination regarding the public trust status of the channel between Bay Island and the mainland, the Commission imposes **SPECIAL CONDITION NO. 19** to establish that approval of this permit does not constitute a waiver of any public rights that may exist with respect to the channel.

6. **LANDSCAPING**

Use of non-native vegetation that is invasive can have an adverse impact on the existence of native vegetation in nearby dunes (on the beach on the seaward side of the peninsula) and in Upper Newport Bay. Invasive plants are generally those identified by the California Invasive Plant Council (www.cal-ipc.org) and California Native Plant Society (www.CNPS.org) in their publications.

All plants in the landscaping plan should be drought tolerant to minimize the use of water. The term "drought tolerant" is equivalent to the terms 'low water use' and 'ultra low water use' as defined and used by "A Guide to Estimating Irrigation Water Needs of Landscape Plantings in California" prepared by University of California Cooperative Extension and the California Department of Water Resources dated August 2000 available at <http://www.owue.water.ca.gov/landscape/pubs/pubs.cfm>.

Low water use, drought tolerant plants require less water than other types of vegetation, thereby minimizing the amount of water runoff due to irrigation. Therefore, the Commission imposes a special condition which requires that prior to the issuance of this permit, the applicant shall prepare a landscape plan, which shall be submitted for the review and approval of the Executive Director. To minimize the potential for the introduction of non-native invasive species and to minimize runoff, a revised landscaping plan consistent with the requirements in the special condition shall be prepared by a licensed landscape architect.

As conditioned, the landscaping will be consistent with the Chapter 3 policies of the Coastal Act.

7. DEED RESTRICTION

To ensure that any prospective future owners of the property are made aware of the applicability of the conditions of this permit, the Commission imposes one additional condition requiring that the property owner record a deed restriction against the property, referencing all of the above Special Conditions of this permit and imposing them as covenants, conditions and restrictions on the use and enjoyment of the property. Thus, as conditioned, any prospective future owner will receive actual notice of the restrictions and/or obligations imposed on the use and enjoyment of the land including the risks of the development and/or hazards to which the site is subject, and the Commission's immunity from liability.

8. LOCAL COASTAL PROGRAM (LCP)

Section 30604(a) of the Coastal Act provides that the Commission shall issue a coastal development permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program that conforms with the Chapter 3 policies of the Coastal Act.

The City of Newport Beach Land Use Plan (LUP) was certified on May 19, 1982. At the October 2005 Coastal Commission Hearing, the certified LUP was updated. Since Chapter 3 of the Coastal Act is still the standard of review, the policies of the LUP are used only as guidance. The Newport Beach LUP includes the following policies that relate to development at the subject site:

Hazards and Protective Devices, Policy 2.8.1-4 states,

Require new development to assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Artificial Coastal Protection, Policy 2.8.6-5 states,

Permit revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls and other structures altering natural shoreline processes or retaining walls when required to serve coastal-dependent uses or to protect existing principal structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply, unless a waiver of future shoreline protection was required by a previous coastal development permit.

Water Quality, Policy 4.1.2-1 states,
Maintain, enhance, and, where feasible, restore marine resources.

Water Quality, Policy 4.1.2-5 states,
Continue to require Caulerpa protocol surveys as a condition of City approval of projects in the Newport Bay and immediately notify the SCCAT when found.

Eelgrass Meadows, Policy 4.1.4-1 states,
Continue to protect eelgrass meadows for their important ecological function as a nursery and foraging habitat within the Newport Bay ecosystem.

Eelgrass Meadows, Policy 4.1.4-1 states
Where applicable require eelgrass and Caulerpa taxifolia surveys to be conducted as a condition of City approval for projects in Newport Bay in accordance with operative protocols of the Southern California Eelgrass Mitigation Policy and Caulerpa taxifolia Survey protocols.

The proposed development, as conditioned, is consistent with Chapter 3 of the Coastal Act and with the certified Land Use Plan for the area. Approval of the project, as conditioned, will not prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3.

9. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect, which the activity may have on the environment. The City of Newport Beach is the lead agency for CEQA purposes. The City determined that a mitigated negative declaration was appropriate. Mitigation measures were required to address glare from lighting, air quality, fill of coastal waters, cultural resources (the existing bridge could be considered a historic resource due to its age), and noise due to pile driving operations.

The proposed project is located in an urban area. All infrastructure necessary to serve the site exists in the area. As conditioned, the proposed project has been found consistent with the hazard and scenic resource protection policies of Chapter 3 of the Coastal Act. Mitigation measures include Special Conditions addressing gating the new bridge, revised plans, plans to address fishing area impacts, sign requirements, conformance with geotechnical recommendations, water quality protection (during and after construction) protection of access during construction, protection of eelgrass and bay habitat, submittal of a final revised habitat mitigation plan, future prohibition on seaward extension of the bulkhead, future development, inspection requirements, assumption of risk, City of Newport Beach final approval, preservation of existing public rights, and deed restriction.

As conditioned, there are no feasible alternatives or additional feasible mitigation measures available that would substantially lessen any remaining significant adverse effect that the activity may have on the environment. Therefore, the Commission finds that the proposed project, as

conditioned to mitigate the identified impacts, is the least environmentally damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.

C. DENIAL FINDINGS AND DECLARATIONS

1. SAND RETENTION WALL PROTECTIVE DEVICES AND FILL OF COASTAL WATERS

Section 30230 of the Coastal Act states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30233 of the Coastal Act states in part:

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

(1) New expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

(4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(6) Restoration purposes.

(7) Nature study, aquaculture, or similar resource dependent activities.

Section 30235 of the Coastal Act states:

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when

required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.

The applicant is proposing a 'sand retention wall' to protect an existing pocket beach located on the western side of the island that exists in between a break in the bulkhead wall. The partially submerged wall to be constructed in the water offshore of the beach is designed to prevent sand from leaving the beach area. The wall will be L-shaped and connect with an existing groin such that the sandy beach will be boxed in on 3 sides (the 4th open side being the sandy back beach-which, itself, is backed by a bulkhead). The section of the wall parallel to the shore will be about 80 feet long, and the segment perpendicular to shore would be 23 feet long. The wall is proposed to be constructed of fiberglass. The wall would occupy approximately 100 square feet of subtidal habitat. Additional area would be filled by backfilling the walled-in area with sand to form dry beach (estimated to be about 350 cubic yards of sand).

The existing pocket beach is a privately owned beach and is approximately 1000 square feet (115 square yards) in size. According to the applicant, the beach area routinely erodes due to gravity because the slope of the beach is steeper than the natural equilibrium profile for the grain size found on the beach. In effect, the sand slides off the beach into deeper water. The beach would need to be about twice as flat as it is in order to retain sand on it naturally. The applicant states that there is no/very little cross shore sediment transport to move sand naturally onto the beach.

In the past, the erosion issue has been addressed through beach nourishment. There are existing privately used docks flanking the subject beach. Sand shoals within those docks and must be routinely dredged. The sand dredged from the dock areas is placed on the subject beach (usually 100 to 300 cubic yards), and in front of other bulkhead areas flanking the beach. The applicant indicates these activities take place about every five years and that the nourished area usually erodes away within about six months and the sand deposits back within the adjacent dock area.

The applicant's analysis states that the proposed sand retention walls would extend the duration the sandy beach would be present from about 6 months to about 10 years; after which point the area would need to be re-nourished with sand. The applicant does not indicate that the sand retention wall would cause any changes in the need for or timing of dredging of the dock areas.

Section 30235 of the Coastal Act states that shoreline protective devices like the ones proposed in this case can be permitted "...when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply...". The proposed protective device is not necessary to protect existing structures. The bulkhead landward of the beach protects the existing single family residences on the island. Nor is the device necessary to protect a public beach in danger of erosion. The beach at this location is not public (above the mean high tide line) and the applicant has not offered to open up this beach area for public use. Finally, the beach is not newly in danger of erosion. The erosion that is occurring at this site has been occurring since Bay Island was constructed and the issue has been handled since that time through routine beach nourishment projects that do not have significant adverse impacts on marine resources. As noted by the applicant, there is an imbalance between the beach width that

can be maintained naturally through an equilibrium profile and the width that is desired for the private beach. The proposed sand retention wall would have significant impacts in that bay bottom habitat and open water column would be filled displacing the marine organisms that rely on that habitat. There may be other attendant impacts (e.g. erosion, changes to water circulation) on shoreline processes elsewhere in the bay.

Also, the proposed sand retention wall will result in the fill of coastal waters. Section 30231 of the Coastal Act states, in part that, "...[m]arine resources shall be maintained, enhanced, and where feasible, restored..." The sand retention walls would displace soft bay bottom habitat that contains benthic organisms and is suitable for eelgrass (eelgrass grows in the area). Thus, the walls would not maintain, enhance, or restore marine resources. Section 30233 of the Coastal Act regulates the fill of coastal waters and states that such fill is only allowed in seven enumerated circumstances. The proposed project does not comply with any of the allowances in Section 30233. There are two provisions in Section 30233 that some could argue apply in this situation: "...*(5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas..*" and "...*(6) Restoration purposes...*" Although the sand retention wall project is ostensibly being placed to restore a beach, the walls are not "mineral extraction", nor "sand for restoring beaches". In addition, although the proposed walls are being proposed to 'retain' or some might say 'restore' a beach, the Commission has not interpreted "restoration purposes" this way; rather the Commission has interpreted "restoration purposes" as being for environmental/habitat restoration purposes, which is not the purpose in this case.

The applicant has proposed mitigation elsewhere on the island. However, mitigation only becomes a factor when it can be demonstrated that the shoreline protective device requiring the fill of open coastal waters is either consistent with the limitations on fill of coastal waters established in Section 30233 (which, in this case, it is not) and/or the applicant demonstrates that a shoreline protective device is necessary consistent with the terms of Section 30235 and must be approved (despite the fill)(in this case the sand retention wall isn't necessary) and the applicant demonstrates the device is the least environmentally damaging feasible alternative. In this case, the least environmentally damaging feasible alternative is to continue the dredging (which must occur to maintain the docks) and beach nourishment efforts that have been occurring for decades without significant adverse impact. The construction of a shoreline protective device at this location will not lead to the discontinuation of the dredging of docks and nourishment of beaches with the dredged sand because those activities must continue to maintain the docks and other surrounding beaches. The proposed project would only benefit the private owners of the island and would be of no benefit to marine habitat or members of the public.

The conditions and issues the applicant describes with regard to this beach on Bay Island are common throughout the bay. Many of the bay beaches, including many used by the public (e.g. on Balboa Island), are too steep to naturally retain sand. Thus, sand extracted by routine dredging to maintain shoaled docks is used to maintain the beaches. This is the manner in which this issue has been handled for many decades without significant adverse impacts on marine resources or shoreline processes. However, the proposed project would set an adverse precedent with regard to placement of shoreline protection structures to maintain bay beaches because the conditions at the subject site exist throughout the bay. Others may seek to resolve the issue at those other locations in the same manner proposed here. This would lead to a proliferation of groins, jetties, and breakwaters throughout the bay with the attendant impacts on fill of coastal waters, displacement of soft bottom habitat, and adverse impacts on coastal processes on adjacent beaches.

Thus, the proposed project cannot be found consistent with Sections 30231, 30233 or 30235 of the Coastal Act and must be denied.

2. LOCAL COASTAL PROGRAM (LCP)

Section 30604(a) of the Coastal Act provides that the Commission shall issue a coastal development permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program that conforms with the Chapter 3 policies of the Coastal Act.

The City of Newport Beach Land Use Plan (LUP) was certified on May 19, 1982. At the October 2005 Coastal Commission Hearing, the certified LUP was updated. Since the City only has an LUP, the policies of the LUP are used only as guidance. The Newport Beach LUP includes the following policies that relate to development at the subject site:

- 2.8.3-3. Develop and implement shoreline management plans for shoreline areas subject to wave hazards and erosion. Shoreline management plans should provide for the protection of existing development, public improvements, coastal access, public opportunities for coastal recreation, and coastal resources. Plans must evaluate the feasibility of hazard avoidance, restoration of the sand supply, beach nourishment and planned retreat.
- 2.8.3-6. Encourage the use of non-structural methods, such as dune restoration and sand nourishment, as alternatives to shoreline protective structures.
- 2.8.6-3. Develop and implement a comprehensive beach replenishment program to assist in maintaining beach width and elevations. Analyze monitoring data to determine nourishment priorities, and try to use nourishment as shore protection, in lieu of more permanent hard shoreline armoring options.
- 2.8.6-5. Permit revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls and other structures altering natural shoreline processes or retaining walls when required to serve coastal-dependent uses or to protect existing principal structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply, unless a waiver of future shoreline protection was required by a previous coastal development permit.
- 2.8.6-7. Discourage shoreline protective devices on public land to protect private property/development. Site and design any such protective devices as far landward as possible. Such protective devices may be considered only after hazard avoidance, restoration of the sand supply, beach nourishment and planned retreat are exhausted as possible alternatives.
- 2.8.6-8. Limit the use of protective devices to the minimum required to protect existing development and prohibit their use to enlarge or expand areas for new development or for new development. "Existing development" for purposes of this policy shall consist only of a principle structure, e.g. residential dwelling, required garage, or second residential unit, and shall not include accessory or ancillary structures such as decks, patios, pools, tennis courts, cabanas, stairs, landscaping etc.
- 3.1.4-1. Continue to regulate the construction of bay and harbor structures within established Bulkhead Lines, Pierhead Lines, and Project Lines.

- 3.1.4-4. In residential areas, limit structures bayward of the bulkhead line to piers and floats. Limit appurtenances and storage areas to those related to vessel launching and berthing.
- 3.1.4-7. Design and site bulkheads to protect the character of the existing shoreline profiles and avoid encroachment onto public tidelands.
- 3.1.4-8. Limit bulkhead expansion or encroachment into coastal waters to the minimum extent necessary to repair, maintain, or replace an existing bulkhead and do not allow the backfill to create new usable residential land areas.
- 4.2.3-17. Continue to limit residential and commercial structures permitted to encroach beyond the bulkhead line to piers and docks used exclusively for berthing of vessels. However, this policy shall not be construed to allow development that requires the filling of open coastal waters, wetlands or estuaries that would require mitigation for the loss of valuable habitat in order to place structures closer to the bulkhead line or create usable land areas.

The construction of the sand retention walls/shoreline protective devices is inconsistent with the policies in the City's certified LUP. The proposed project does not comply with policy requirements that non-structural methods of addressing erosion (e.g. beach nourishment) be used instead of structural methods wherever feasible. The shoreline protective device isn't necessary to protect existing structures or to prevent erosion of a public beach. The device is being constructed on submerged lands and is not constructed as far landward as possible. The proposed project uses protective devices to expand dry land areas contrary to LUP policies. The protective device is located bayward of the bulkhead line, contrary to City policy.

The proposed development is inconsistent with the policies in the City's certified LUP, as well as the policies in Chapter 3 of the Coastal Act, as indicated above, and would therefore prejudice the City's ability to prepare a Local Coastal Program for Newport Beach that is consistent with the Chapter 3 policies of the Coastal Act as required by Section 30604(a). Therefore, the proposed sand retention wall/shoreline protective device must be denied.

3. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

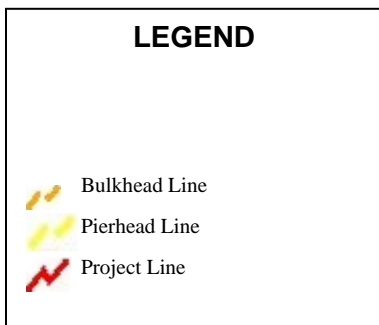
Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect, which the activity may have on the environment.

As described above, the proposed sand retention wall/shoreline protective device would have adverse environmental impacts. There are feasible alternatives or mitigation measures available, such as beach nourishment. Therefore, the proposed project is not consistent with CEQA or the policies of the Coastal Act because there are feasible alternatives, which would lessen significant adverse impacts, which the activity would have on the environment. Therefore, the sand retention wall/shoreline protective device must be denied.

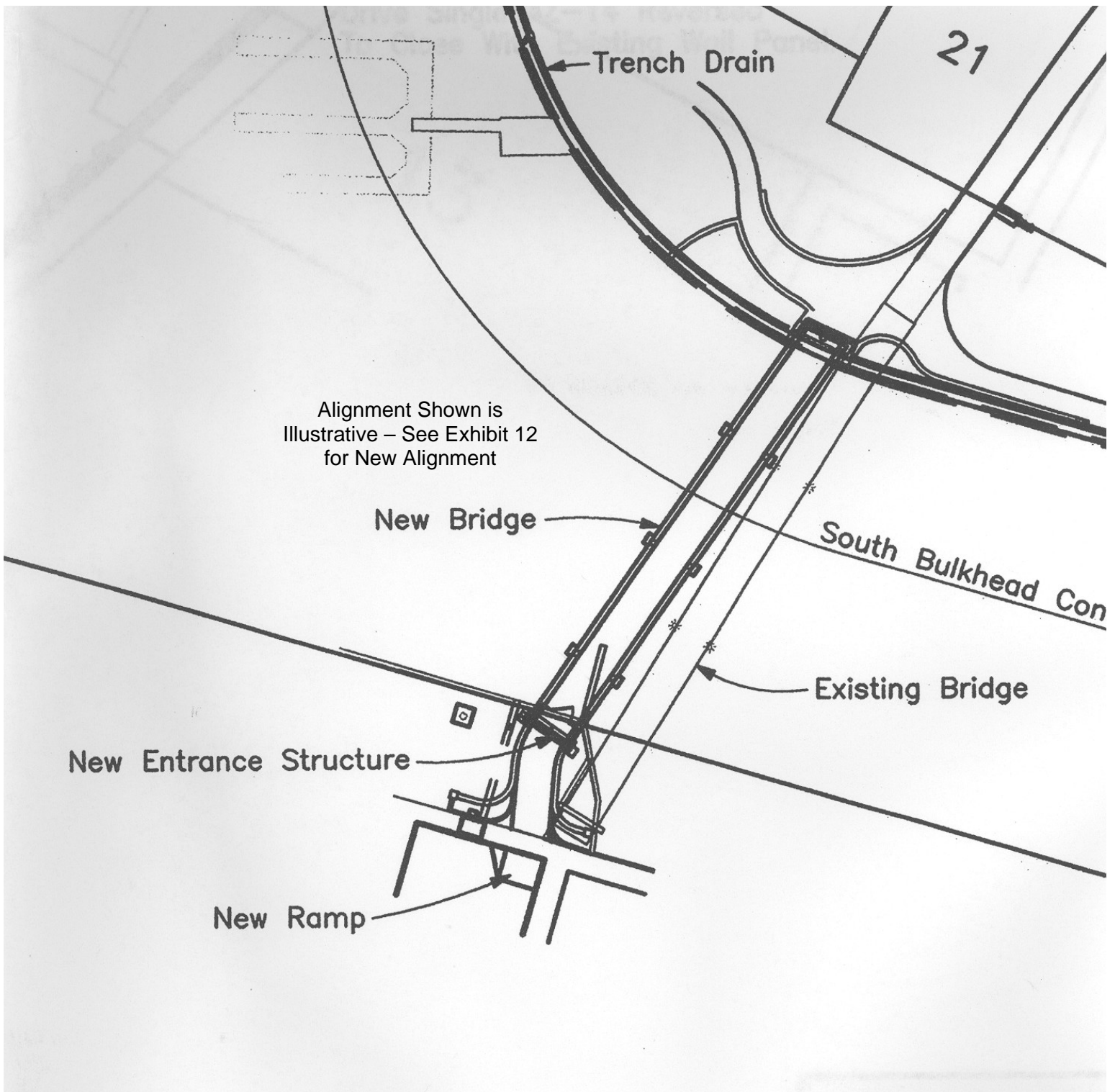
BAY ISLAND, NEWPORT BEACH, ORANGE COUNTY



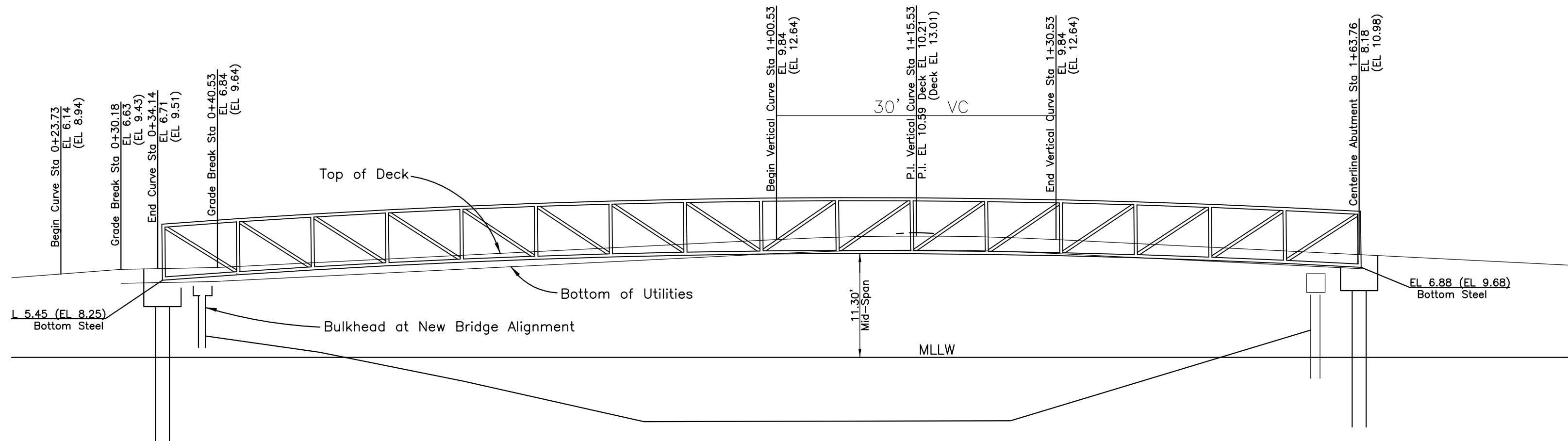
Vicinity Map



EXHIBIT#1
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California Coastal
Commission



GENERAL BRIDGE ALIGNMENT
 With "Entrance Structure"/Gate



EL x.xx Indicates Elevation in NGVD (MSL)
 (EL x.xx) Indicates Elevation in MLLW

PROPOSED TRUSS BRIDGE PROFILE
 1"=10'

- This proposed single span bridge would:
- meet Title 24 accessibility requirements.
 - meet navigational requirements.
 - have the same alignment/location/footprint as the previously proposed pile-supported bridge.
 - have a similar gate/entryway design as the previously proposed pile-supported bridge.
 - be primarily water-based construction, as was the previously proposed pile-supported bridge.

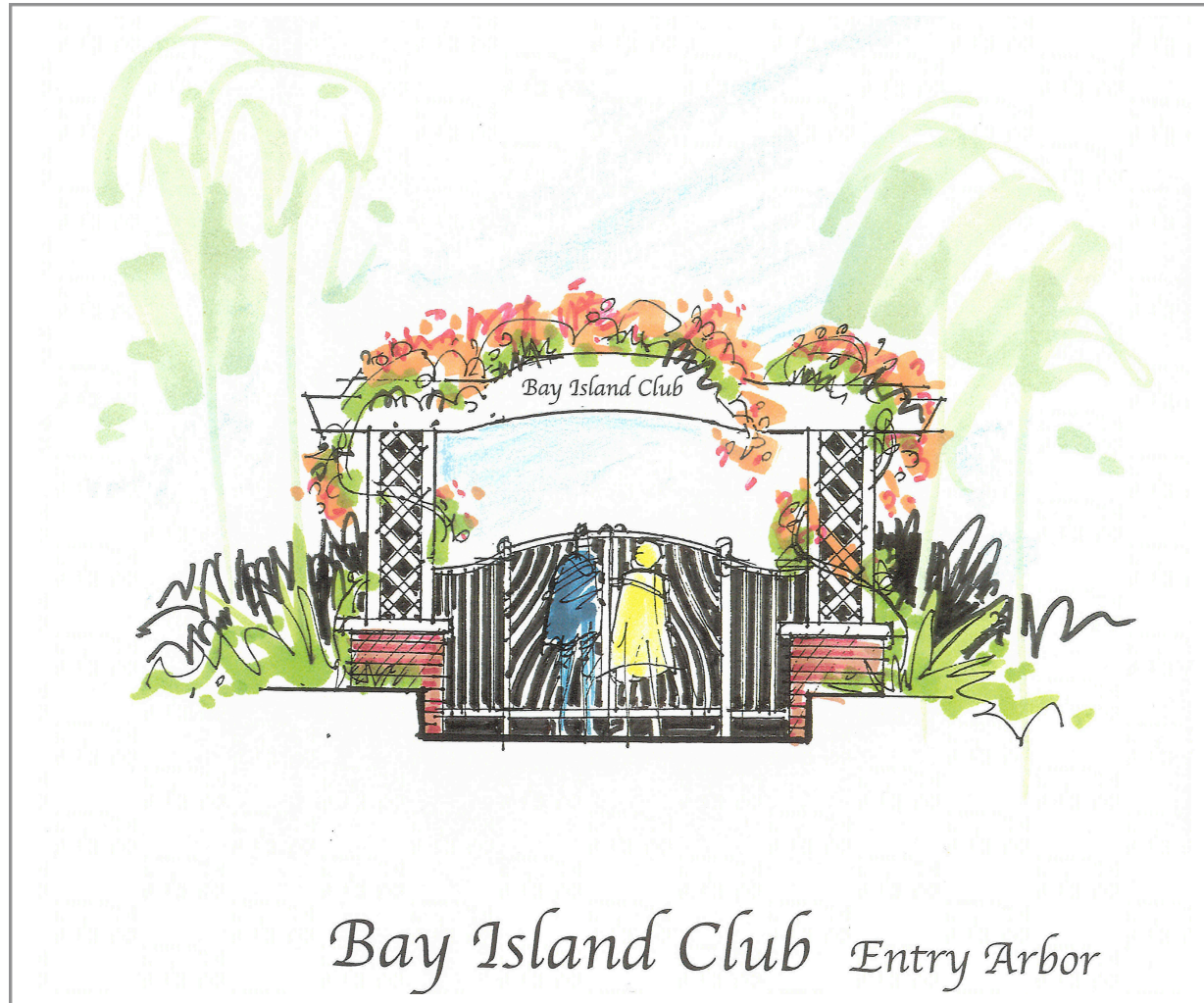


EXISTING BRIDGE



PROPOSED BRIDGE (VISUAL SIMULATION)

PROPOSED & EXISTING ENTRY



Proposed Gate



Existing Gate

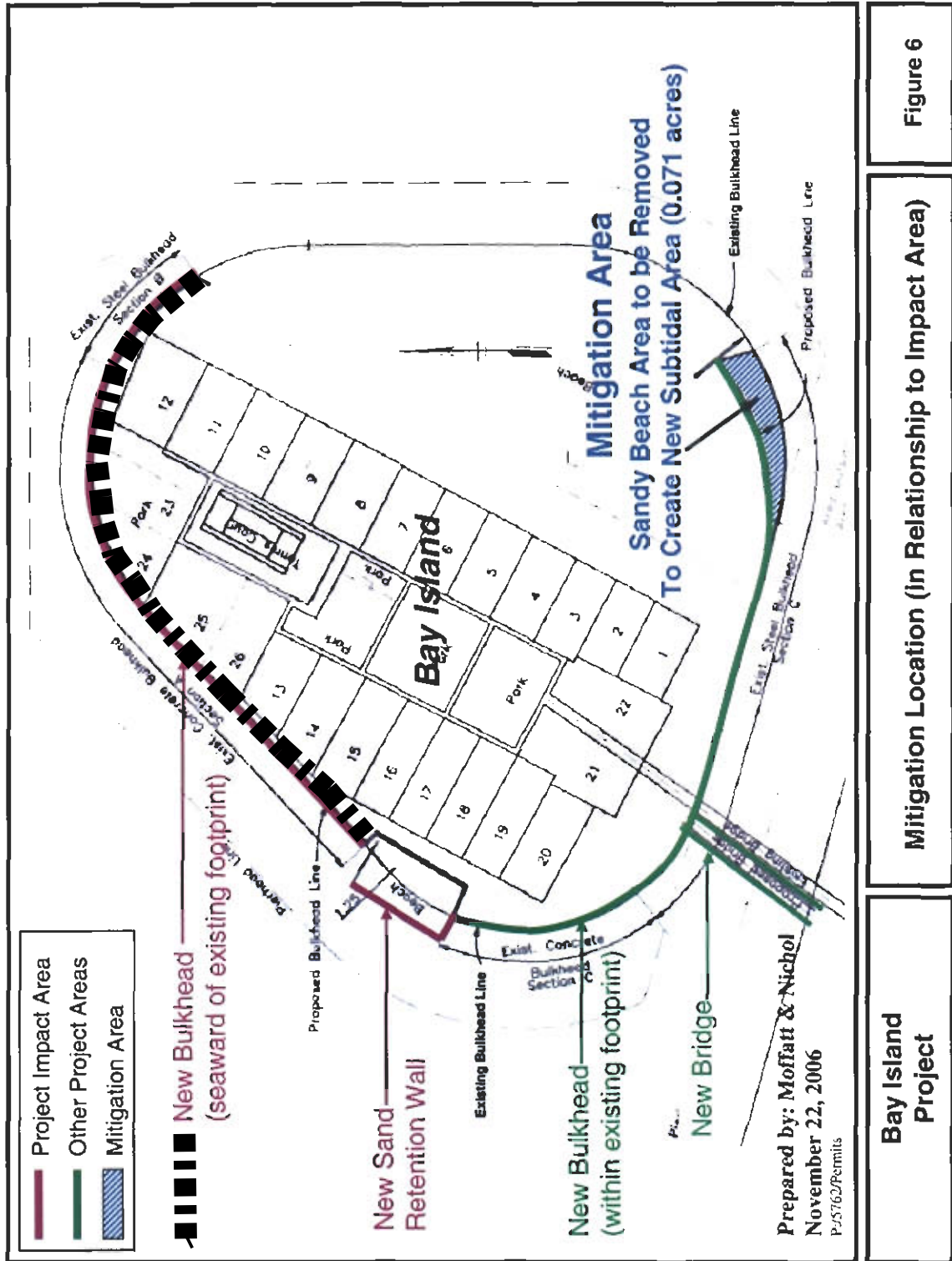


Figure 6

Mitigation Location (In Relationship to Impact Area)

Bay Island Project

Bulkhead Alignment & Mitigation Area

EXHIBIT 5
 5-09-055

SAND RETENTION WALL

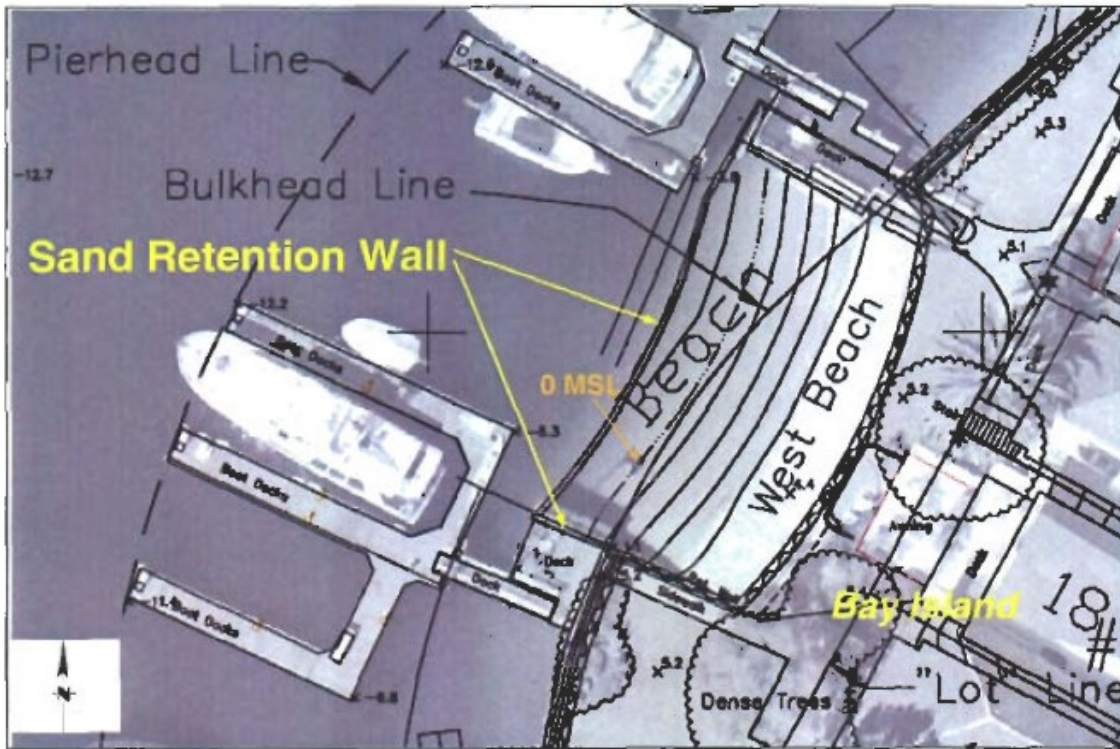


Figure 4. Sand Retention Wall – Plan View

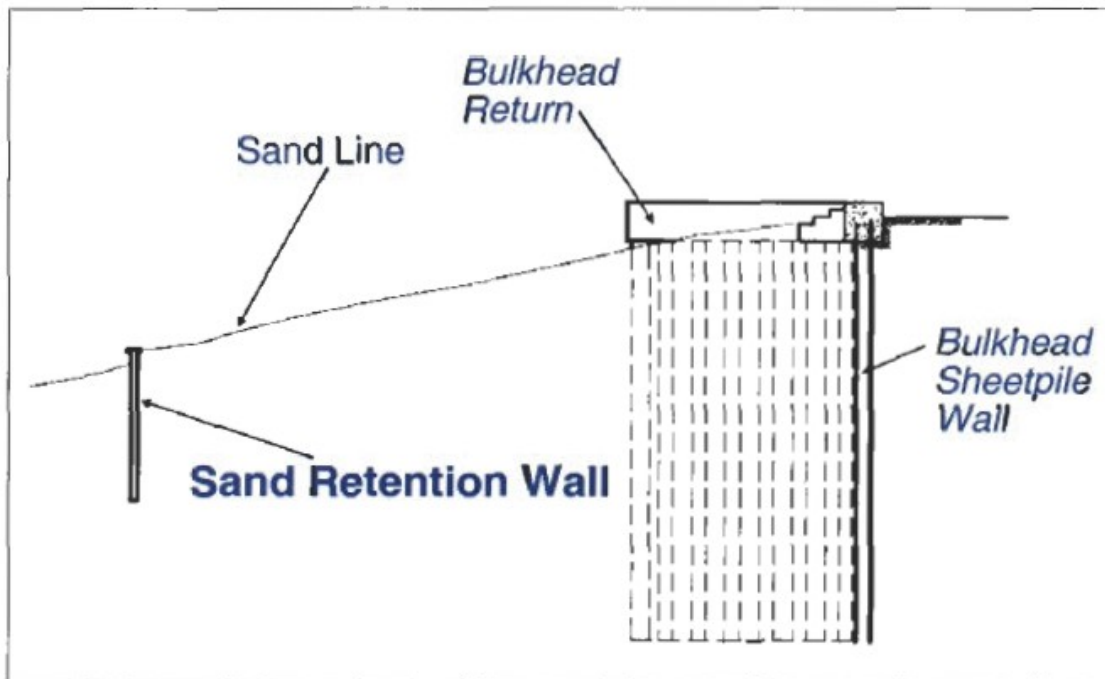


Figure 5. Sand Retention Wall – Representative Cross Section



Photo 9 – Mature Trees and House Immediately Adjacent to Bulkhead Wall Along Western Side (Lot #12 on Map Shown in Figure 5)

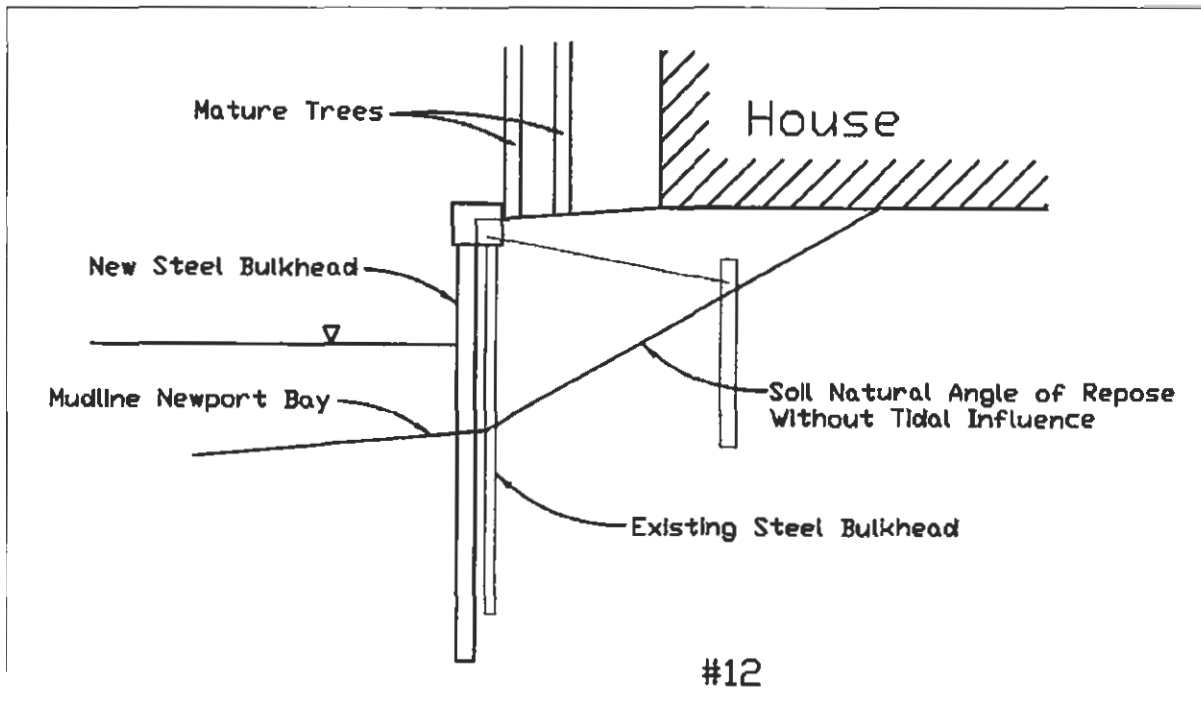
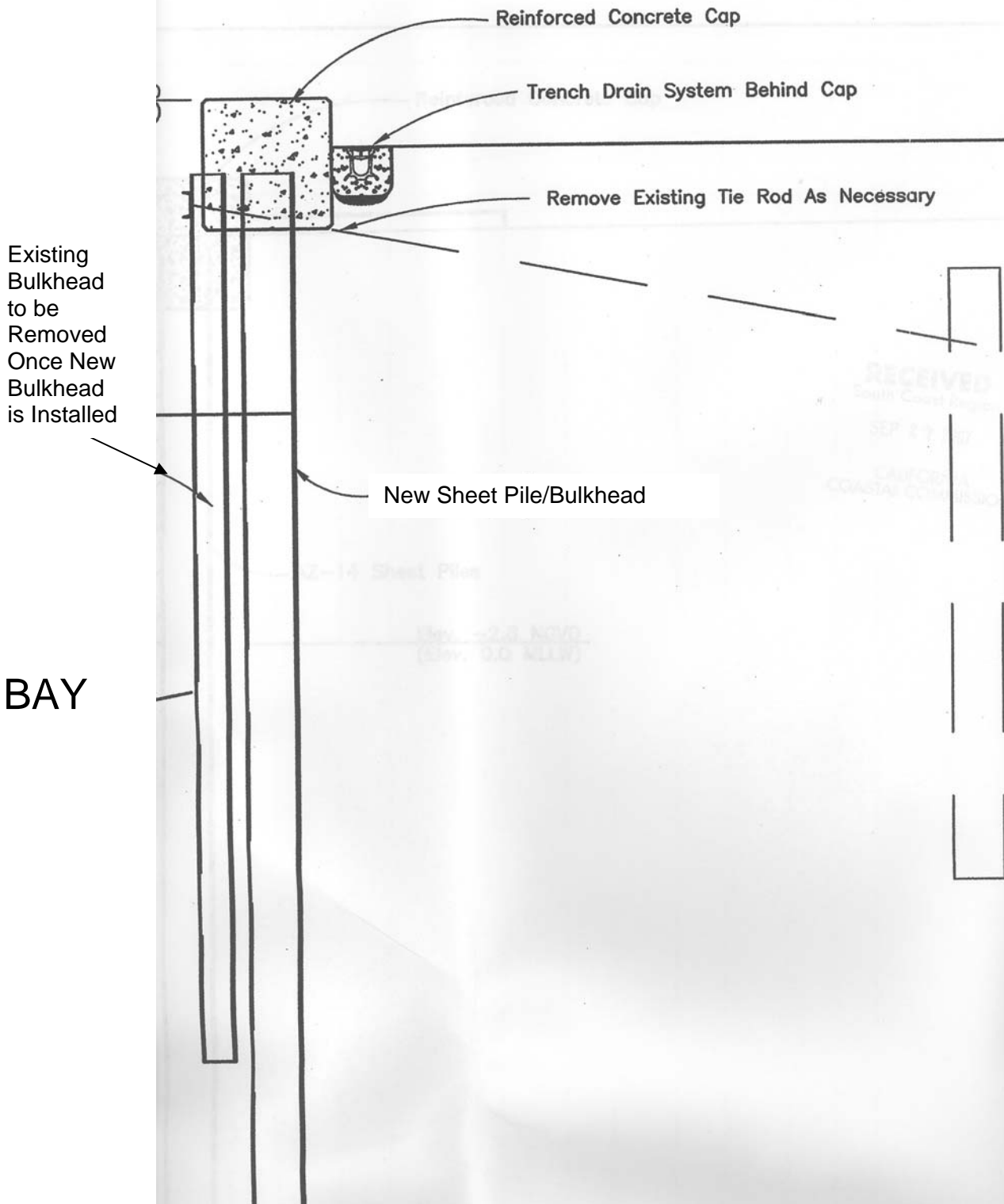


Figure 2 – Proposed New Bulkhead Alignment for Area Depicted in Photo 9

**Bulkhead Reinforcement:
Place New Bulkhead In Exhibit 7
Seaward of Existing Bulkhead 5-09-055**



**Bulkhead Replacement:
Remove Existing Bulkhead
Install New Bulkhead In
Same or Landward Alignment**

The Bay Island Club's Right to Rebuild Its Bridge

Summary: As surveyed in 1889, Bay "Island" was originally part of Balboa Peninsula. The United States patented the property that is now the channel, together with what is now Bay Island and Balboa Peninsula, to California as upland "swamp and overflowed land"—not as tidelands subject to the public trust. California then conveyed this contiguous property into common private ownership as "swamp and overflowed land." The property that is now the channel remained in private ownership until it was conveyed to the City of Newport Beach in 1927. That conveyance to the City, however, was specifically made subject to the bridge easement previously granted to the Bay Island Club. The Bay Island Club thus has the right to rebuild the bridge free of any public trust concerns.

- In the Spring of 1889, U.S. Deputy Surveyor Solomon H. Finley of the General Land Office surveyed Newport Bay and depicted what is now Bay Island as a peninsula attached to the mainland Balboa Peninsula.
- Finley designated the entire Balboa Peninsula, including the Bay "Island" peninsula as it then was, as "swamp and overflowed land." In 1902, the "swamp and overflowed land" of Newport Bay was conveyed to the State of California by a patent signed by President Theodore Roosevelt under the authority of the Swamp Land Act of 1850. This patent was effective retroactive to September 28, 1850.
- The designation of lands as being upland "swamp and overflowed" by the General Land Office is, with rare exceptions, deemed conclusive. "The lands which passed to the state by grant under the Swamp Land Act were thereafter subject to absolute alienation by the state, free of any public trust for navigation. The official surveys of swamp and overflowed lands are a conclusive determination as to the lands which passed to the state under the act." (*Newcomb v. City of Newport Beach* (1936) 7 Cal.2d 393, 400.)
- California then patented the "swamp and overflowed land" of Newport Bay into private ownership. On December 5, 1892, California patented to Mr. E.J. Abbott a large tract of land that included the property that is now Bay Island and the contiguous property to the south, including the land that is now the channel and the adjacent Balboa Peninsula, all as "swamp and overflowed" land. Mr. Abbott then conveyed this property to Mr. André.
- Mr. André then created the parcel that now comprises Bay Island. Bay Island Club acquired this land in two separate conveyances in 1903 and 1906. Mr. André conveyed the adjacent property to the south, including what is now the channel, to a Mr. Wilson who, in turn, conveyed that property to the East Newport Town Company in 1904.
- In November 1927 the East Newport Town Company granted a formal bridge easement to Bay Island Club for the bridge over the channel that by then separated Bay Island from Balboa Peninsula, but which remained in the private ownership of the East Newport Town Company. The bridge easement allowed the bridge to be an extension of any of Island Avenue, Anade Avenue, or Montero Avenue. The easement further allowed that, should the bridge ever need to be replaced, the old bridge may be maintained while the new bridge is constructed.
- In December 1927, the East Newport Town Company conveyed the channel property to the City of Newport Beach, but this conveyance to the City was expressly made subject to the bridge easement held by the Bay Island Club.

instrument the undersigned is the owner of said royalty interest hereinbefore described free and clear of incumbrances, and they have not sold, assigned, transferred, pledged, mortgaged, hypothecated or otherwise encumbered the said royalty interest.

This contract shall bind and inure to the benefit of the parties hereto, their successors in interest and assigns respectively.

Executed this 6th day of November, 1927.

T. A. Wilcox

Legal #9

State of California, }
County of Los Angeles, } ss.

On this 6th day of November, 1927 A.D., before me, J. R. Veditz, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared T. A. Wilcox, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

((SEAL))

Jean Robert Veditz Notary Public

in and for the County of Los Angeles, State of California.

My Commission expires March 29, 1931.

Recorded at request of Assignee Nov. 12, 1927 at 5 Min. past 9 A.M. in Book 109, Page 229 Official Records of Orange County. Justine Whitney County Recorder.

Emma Smith COMPARED Ada Robinson

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36546

CORPORATION

GRANT DEED

EAST NEWPORT TOWN COMPANY, a corporation, in consideration of Ten (10.00) Dollars to it in hand paid, the receipt of which is hereby acknowledged, does hereby grant to BAY ISLAND CLUB, a Corporation, all that real property situated in the City of Newport Beach, County of Orange, State of California, described as follows:

The right and easement to construct, maintain, repair and replace a bridge for pedestrian and/or automobile travel over and across that part of the hereinafter described property included within the Northerly extensions of the side lines of either Island Avenue, Anade Avenue or Montero Avenue.

All that portion of the property conveyed by W. W. Wilson and wife to East Newport Town Company by deed dated April 12th, 1904, recorded June 15th, 1904, in Book 104, page 138 of Deeds, records of Orange County, California, lying Northerly of the center line of that portion of Buena Vista Boulevard, 40 feet in width, shown on the Map of Subdivision of Block "A" East Newport, recorded in Book 4, page 51 of Miscellaneous Maps, records of said County, running from the North-east corner of Lot One (1) to the North-west corner of Lot One Hundred Forty-six (146) of said Subdivision.

It is covenanted and agreed that not more than one bridge shall be permanently maintained but that during the course of construction of any new bridge, the old bridge may be maintained.

Easement for Bridge

Exhibit 10
5-09-055

and used.

It is further covenanted and agreed that any new bridge shall not be lower than the present bridge across said property, so that no greater obstruction to the passage of boats than that existing at this time shall be maintained over the waterway and channel now over said property.

The present bridge is built on an arc and it is hereby agreed that the floor of said bridge at the center of the arc is thirteen feet above mean low low water.

To have and to hold to the said grantee its successors and assigns, but without covenant or warranty, express or implied, as to the title to the rights of property herein described.

In Witness Whereof, the East Newport Town Company has hereunto caused its corporate name to be signed and its corporate seal to be affixed by its President and Secretary, thereunto duly authorized by resolution of its Board of Directors, this 13th day of July, 1927.

((CORPORATE SEAL))

EAST NEWPORT TOWN COMPANY,

By W. B. Clancy President.

And C. O. Evans Secretary.

State of California, }
County of Riverside, } ss.

On this 7th day of November, 1927, before me, G. W. Derby, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared W. B. Clancy, known to me to be the President and C. O. Evans, known to me to be the Secretary of the corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

((SEAL))

G. W. Derby Notary Public

in and for said County and State.

Filed for record at the request of Grantee Nov. 12, 1927 at 15 minutes past 9 o'clock A.M. and recorded in Volume 109 of Official Records, page 230 Orange County Records. Justine Whitney Recorder. By Ruby Cameron Deputy.

Emma Smith COMPARED

Ada Robinson

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36547

IN THE SUPERIOR COURT
OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA.

LOUIS CROWE.
Plaintiff.
vs.
J. E. ALLEN,
Defendant

Easement for Bridge

TRIT OF ATTACHMENT.

Exhibit 10
5-09-055



Other Adjacent Available Fishing Areas

Bay Island

***Fishing Area* of concern
- From off bulkhead wall.**

Existing Bridge

Peninsula

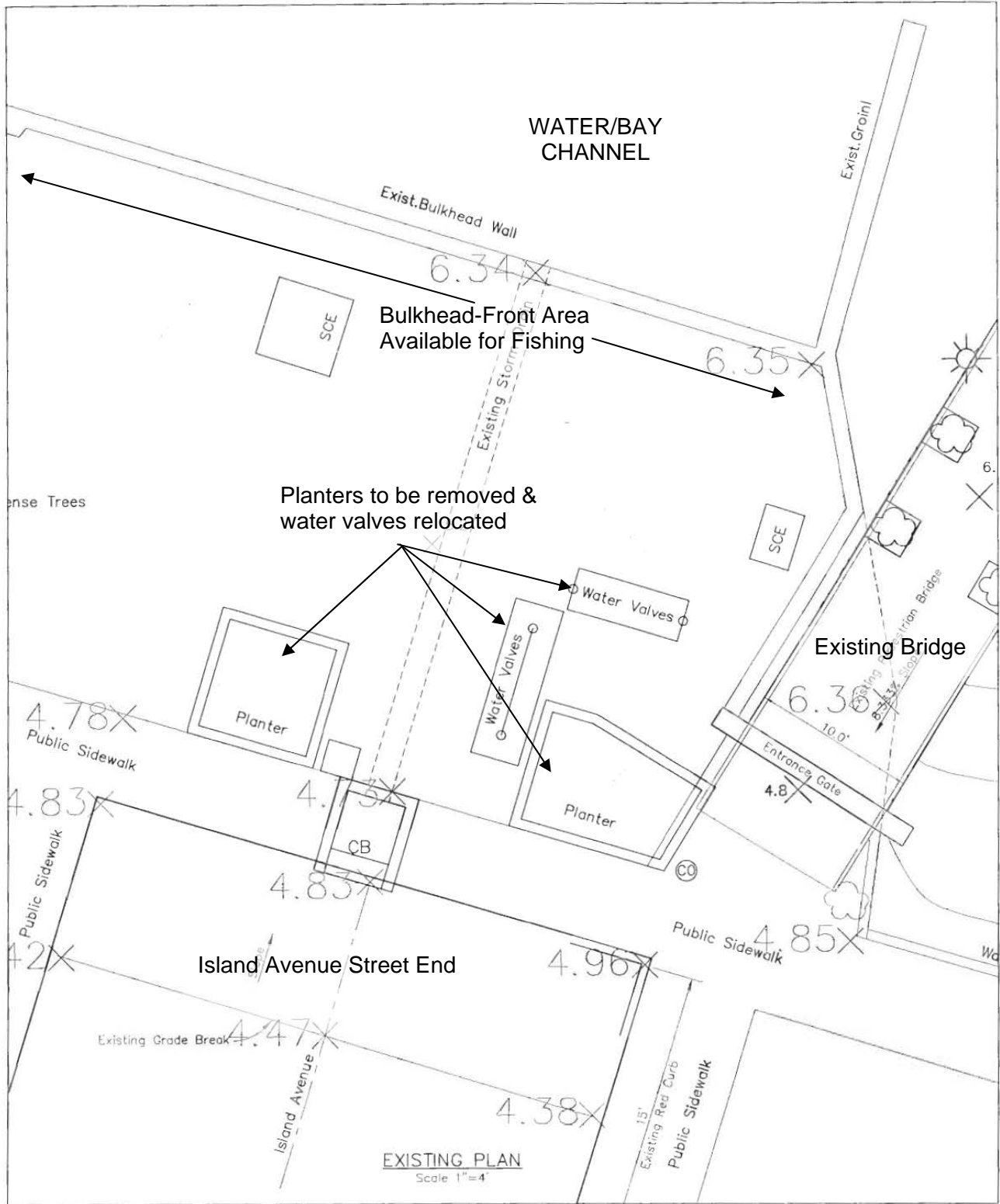
“Fishing Area” to West of Existing Bay Island Bridge

To Be Covered by New
Bridge Landing



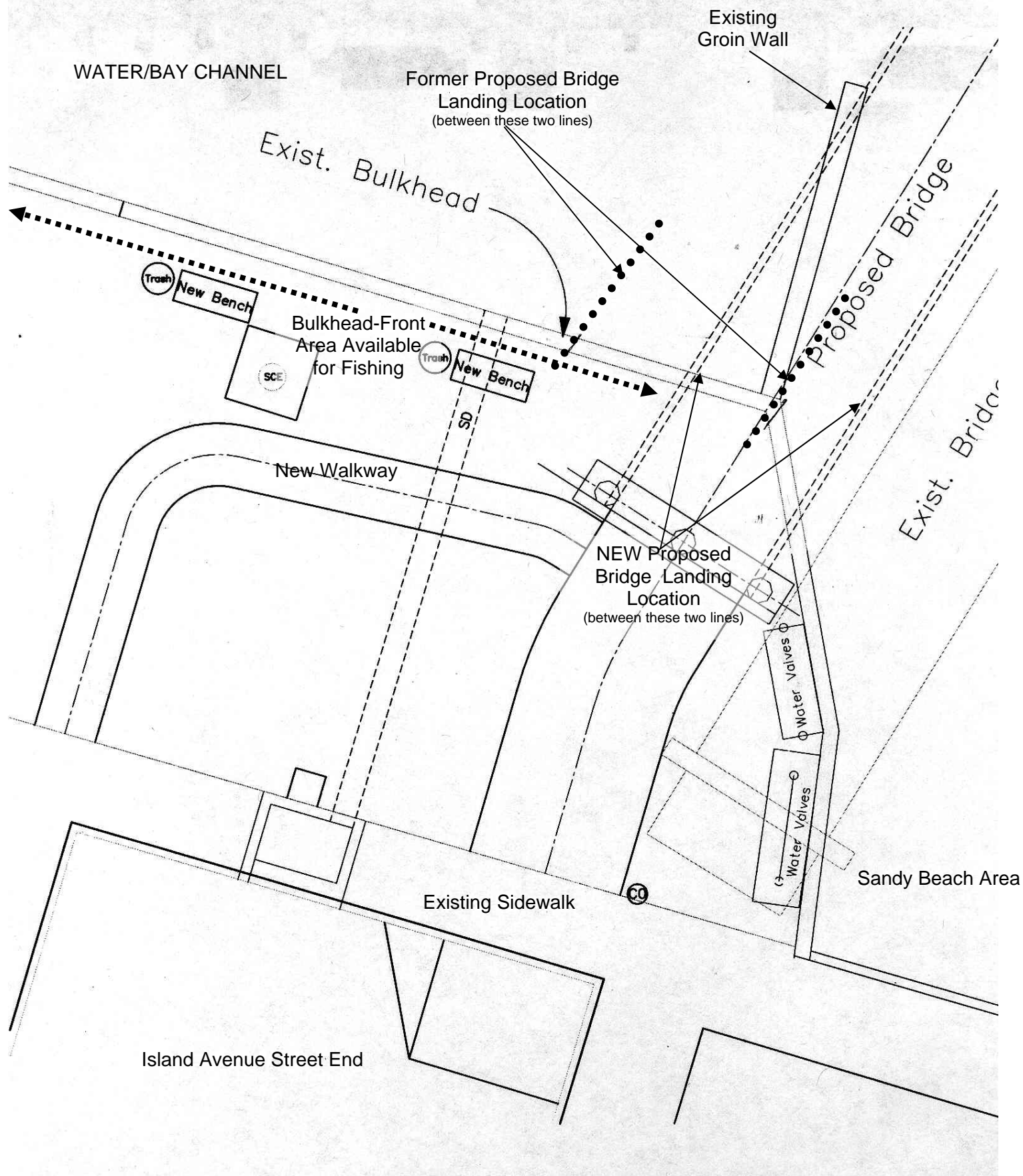
Other Available Fishing Areas – Immediately Adjacent to Bay Island Bridge





EXISTING BRIDGE LANDING (TO BE DEMOLISHED/REMOVED)

EXHIBIT# 12
Page 1 of 2
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 California Coastal Commission



NEW BRIDGE LANDING LOCATION
(MOVED EAST OF PREVIOUSLY PROPOSED LOCATION)

EXHIBIT# 12
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California Coastal Commission