

## CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA  
7575 METROPOLITAN DRIVE, SUITE 103  
SAN DIEGO, CA 92108-4421  
(619) 767-2370



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March 23, 2007

TO: COMMISSIONERS AND INTERESTED PERSONS

FROM: SHERILYN SARB, DEPUTY DIRECTOR  
DEBORAH N. LEE, DISTRICT MANAGER, SAN DIEGO DISTRICT  
DIANA LILLY, COASTAL PLANNER, SAN DIEGO DISTRICT

SUBJECT: **Staff Recommendation on San Diego Unified Port District Port Master Plan Amendment No. 37 (Woodfin Suites Timeshare/Hotel).** For Commission consideration and possible action at the meeting of April 10-13, 2007.

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## SUMMARY OF STAFF RECOMMENDATION:

Staff is recommending denial of the Port Master Plan Amendment (PMPA) as submitted, because of the impacts the proposed development would have on public access and recreation, the provision of lower-cost recreational facilities, traffic and circulation, environmental resources, and water quality.

The proposed PMPA would allow for the redevelopment of a 3.79-acre site with a new 140-suite, hotel/timeshare facility with a restaurant, spa, and meeting space; a new marina sales and services building, parking, and a new seawall and shoreline promenade on the west side of Harbor Island. Forty of the 140 suites would be sold as timeshares.

The subject site is a prime location adjacent to the shoreline and a variety of public amenities. The California State Lands Commission has reviewed the timeshare portion of the PMPA, and ruled that the proposed development of timeshares on public tidelands would be inconsistent with the Public Trust Doctrine and an inappropriate use of filled sovereign tide and submerged lands, because it would significantly impair the public's right to these trust lands which have been historically set aside for the benefit of the statewide public. The proposed timeshares would only be available to a small segment of the population who can afford the high cost of the initial purchase and who would then own personal rights to the rooms, thereby preventing other use of these public lands. The site could be developed with legitimate public-serving uses. Allowing timeshares on this site would not protect and promote visitor accommodations, and could set an adverse precedent regarding the preservation of public access and visitor-serving public accommodations in the Coastal Zone.

Furthermore, the hotel as proposed is inconsistent with the Coastal Act requirements to provide and protect lower cost visitor and recreational facilities. The proposed hotel would not be affordable to the majority of the general population. This structure would

occupy waterfront tidelands that could be developed to accommodate the general public with commercial or public recreational uses such as restaurants, retail shops, affordable hotels and open space. Or, a program to require in-lieu fees or other measures to offset the impact of this hotel on more affordable visitor accommodations could have been incorporated into the plan. However, the PMPA does not contain any policies to protect, encourage or provide lower cost visitor and recreational facilities, or to mitigate for the loss of land specifically reserved for these uses.

The PMPA would result in an increased demand for parking and result in additional traffic on the roads in the Harbor Drive vicinity. However, the PMPA does not include any traffic demand reduction strategies or any support of public transit to help offset the public access and energy impacts of the project. The project does not provide any parking to accommodate public use of the site.

The PMPA includes construction of a new public promenade along the entire water frontage of the existing marina, but no details on the design, minimum width, or amenities associated with the project have been provided. As proposed, the Commission cannot be assured the promenade will be publicly available and useable. In addition, the promenade would be supported by construction of an approximately 1,200 linear foot seawall that would be constructed out into the water in order to reclaim land area for the promenade. As a result, 1,090 sq.ft. of mud flats would be encroached upon, impacting this habitat. The seawall has not been designed to be pulled back as far inland as possible, and as such, is not the least environmentally damaging feasible alternative.

The project would remove an existing, (currently non-operating) sanitary sewage pump-out station at the marina. The Commission's water quality staff have reviewed the proposed project and believe that for a marina this size (523 slips), having an on-site pump-out station is appropriate and likely to significantly increase compliance with sewage disposal standards. Redevelopment of the site may bring new boaters and boat traffic to the site. The PMPA must ensure that water quality on the site will improve, not degrade, as a result of the redevelopment. The pump-out station could be reactivated, or the Port could ensure that marina users have access to alternative pump-out facilities at no additional cost to the users. As proposed, the project cannot be found consistent with the water quality protection policies of the Coastal Act

In summary, approval of the PMPA would have wide-ranging, substantial adverse impacts on public access, recreation, and biological resources. The amendment would allow the project site to be developed in a manner that is exclusive of the general public and would discourage public access and recreational use of this prime shoreline location. Thus, the port master plan amendment as proposed must be denied.

The appropriate motion and resolution can be found on Page 3. The main findings for denial of the PMPA begin on Page 5.

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**Port Master Plan Amendment Procedure.** California Code of Regulations, Title 14, Section 13636 calls for port master plan amendments to be certified in the same manner as provided in Section 30714 of the Coastal Act for certification of port master plans. Section 13628 of the Regulations states that, upon the determination of the Executive Director that the master plan amendment and accompanying materials required by Section 13628(a) are sufficient, the master plan amendment shall be deemed submitted to the Commission for purposes of Section 30714 of the Coastal Act.

The subject PMPA was deemed submitted on January 23, 2007. Within 90 days after this submittal date, the Commission, after public hearing, shall certify or reject the amendment, in whole or in part. If the Commission fails to take action on the amendment submittal within the 90-day period, the proposed amendment is deemed certified. The Commission must take action by April 23, 2007.

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**STAFF RECOMMENDATION:**

**I. PORT MASTER PLAN SUBMITTAL - RESOLUTION**

Following a public hearing, staff recommends the Commission adopt the following resolution and findings. The appropriate motion to introduce the resolution and a staff recommendation are provided just prior to the resolution.

**RESOLUTION** (Resolution to deny certification of Port of San Diego Master Plan Amendment No. 37)

**MOTION**

I move that the Commission certify the San Diego Unified Port District Master Plan Amendment No. 37 as submitted by the port.

**Staff Recommendation**

Staff recommends a **NO** vote. Failure of this motion will result in rejection of the port master plan amendment and adoption of the following resolution and findings. The motion to certify passes only upon an affirmative vote of a majority of the Commissioners present.

Resolution

Deny Certification of Amendment

The Commission hereby denies certification to San Diego Unified Port District Master Plan Amendment No. 37, and finds, for the reasons discussed below, that the amended Port Master Plan does not conform with or carry out the policies of Chapter 3 and Chapter 8 of the Coastal Act. Nor would certification of the amendment meet the requirements of the California Environmental Quality Act, as there are feasible alternatives and mitigation measures that would substantially lessen the significant adverse impacts on the environment that will result from certification of the amendment.

**II. FINDINGS AND DECLARATIONS.**

The Commission finds and declares as follows:

**A. Previous Commission Action.** The Commission certified the San Diego Unified Port District Master Plan on October 14, 1980. The Commission has reviewed approximately thirty-seven amendments since that date.

**B. Contents of Port Master Plan Amendments.** California Code of Regulations Title 14, Section 13656 calls for port master plan amendments to be certified in the same manner as port master plans. Section 30711 of the Coastal Act states, in part, that a port master plan shall include all the following:

- (1) The proposed uses of land and water areas, where known.
- (2) The proposed design and location of port land areas, water areas, berthing, and navigation ways and systems intended to serve commercial traffic within the area of jurisdiction of the port governing body.
- (3) An estimate of the effect of development on habitat areas and the marine environment, a review of existing water quality, habitat areas, and quantitative and qualitative biological inventories, and proposals to minimize and mitigate any substantial adverse impact.
- (4) Proposed projects listed as appealable in Section 30715 in sufficient detail to be able to determine their consistency with the policies of Chapter 3 (commencing with Section 30200) of this division.
- (5) Provisions for adequate public hearings and public participation in port planning and development decisions.

The Commission finds that the proposed port master plan amendment does not conform to the provisions of Section 30711 of the Coastal Act. The proposed changes in land uses and proposed projects are not outlined in sufficient detail in the port master plan submittal for the Commission to make a determination of the proposed amendment's consistency with the Chapter 3 and Chapter 8 policies of the Coastal Act.

The proposed amendment was the subject of an Environmental Impact Report under the California Environmental Quality Act. The Environmental Impact Report associated with the plan amendment was subject to public review and hearing and was adopted by the Board of Port Commissioners on July 11, 2006 as Resolution #2006-121. A public hearing on the proposed master plan amendment was held and the amendment was adopted by the Board of Port Commissioners on July 11, 2006 as Resolution # 2006-122.

**C. Standard of Review.** Proposed projects listed as appealable in Section 30715 must be consistent with the policies of Chapter 3 of the Coastal Act. As noted above, the proposed amendment would allow for construction of a hotel and associated facilities, a seawall/public promenade, and a marina services building and removal of a sanitary sewage pumpout station, all of which are appealable projects. Therefore, the policies of Chapter 3 and Chapter 8 of the Coastal Act are the standard of review for the proposed amendment.

**D. Summary of Proposed Plan Amendment.** The proposed Port Master Plan (PMP) Amendment would allow for the redevelopment of a 3.79-acre site with a new 140-suite, 95-foot tall hotel/timeshare facility with a restaurant, lobby, spa, and meeting space; a new marina sales and services building, parking, and a new seawall and shoreline promenade on the west side of Harbor Island, north of Harbor Island Drive (see Exhibit #5).

The subject site is within the West Harbor Island Subarea (22) of the Harbor Island/Lindbergh Field Planning District 2 in the PMP. The project site is located at the approximate mid-point of the western peninsula of Harbor Island, between a Sheraton Hotel to the east and a Hilton Hotel to the west. The site currently consists of a marina sales and services building, a closed restaurant, and asphalt parking lots south of existing marina docks. The entire site is currently designed "Commercial Recreation." An approximately 523-slip marina is located on the bayward side of the site. Redevelopment of the site would consist of demolition of all existing structures on the site, including removal of fueling facilities associated with the boat fueling dock and removal of a pump-out station, both of which have been inactive for several years. The actual fuel dock would not be demolished, and no portions of the marina boat berths would be altered as part of the proposed project. A total of 401 on-site parking spaces would be provided, including 205 parking spaces in an eastern lot, 137 in a western lot, and 59 in a subsurface area beneath the proposed hotel.

The PMPA would add the following language to the text of the Plan:

The entire Marina Cortez site shall be redeveloped with an up to 140-room hotel and supporting facilities including restaurant, lounge, meeting room space, swimming pool, and parking. A new and separate marina services building shall be constructed. Shoreline protection and a new public promenade shall be extended along the entire water frontage of the existing marina.

In addition, detailed language would be added to plan allowing the use of timeshares in 40 of the proposed 140 hotel rooms. The new language would state:

A non-residential timeshare option for a portion of hotel units may be included. No more than 40 of the 140 hotel rooms shall operate as timeshares. All timeshare units shall be designed to function in appearance and location as a normal hotel room. Timeshares may be created by sublease, consistent with tidelands trust restrictions. Timeshare intervals shall be limited to sale in increments of one week on a floating week/floating unit basis, and may include intervals of lesser duration, including split-week intervals. Use restrictions shall limit ownership to a maximum of two weeks per year. A portion of the timeshare units shall be marketed to the general public as low to moderately priced units to promote lower cost visitor-serving uses. Each timeshare unit, when not occupied by a timeshare owner, shall be included as part of the overall inventory of hotel rooms to ensure that all vacant units are made available to the general public as a transient accommodation. The hotel operator shall manage timeshare units as part of the hotel inventory, and management shall include the booking of reservations through the hotel, mandatory front desk check-in and check-out, maintenance, cleaning services and unit preparation for use by guests/owners. The overall development shall incorporate improvements that substantially enhance public access, public benefits and recreational opportunities.

The proposed demolition and new construction would be added to the project list in the Plan as an appealable project. The land use acreage tables within the Port Master Plan would be revised to reflect increased promenade acreage and reduced commercial recreation acreage, and to delete the existing fuel facilities and pump out station icons on the Precise Plan.

### Detailed Project Description

#### **Hotel/Timeshare**

The new 140-unit hotel/timeshare building would be approximately 133,000 sq.ft., 8-stories (95-feet) high, with an approximately 12,500 sq.ft. clubhouse including a spa and restaurant. The first story of the hotel would consist of 59 subterranean parking spaces. The 140-suite hotel would be approximately 95 feet high and consists of a mix of one and

two bedroom suites, with kitchen facilities. The three-story clubhouse and spa would be attached to the eastern end of the main hotel structure, where features such as the Porte Cochere, patio, and swimming pool would also be located. Restaurant and bar facilities would be open to hotel guests and the general public, and directly accessible from the proposed promenade.

The amendment would allow up to 40 hotel rooms (29% of the total rooms) to be marketed and operated as timeshares. The timeshares would be conveyed to tenants pursuant to a sublease. No fee simple interest would be conveyed to a timeshare participant.

### **Marina Services Building**

A new, approximately 11,200 square foot two-story marina services building would be constructed to the east of the hotel, clubhouse, and hotel pool, west of the eastern parking lot, and adjacent to the northern limit of the tidelands. The 30-foot high marina services building would contain operations rooms, women's and men's changing facilities and restrooms, a yacht sales office and club room, an exercise room, sales and services offices, a boat display, and a deli.

### **Seawall/Promenade**

Currently, the shoreline alongside the project site next to the marina consists of unarmored tidal mud flats. The project includes construction of an approximately 1,200 linear foot seawall along the entire length of the marina. The seawall would be constructed by overexcavating (i.e., go beyond the excavation necessary to reach finish grade, so that more suitable fill material can be brought in) out from the face of the embankment to a depth of approximately four feet below Mean High High Water (MHHW). Portions of the seawall would be constructed up to two feet beyond MHHW; as a result, a total of 1,090 sq.ft. of mud flats beyond MHHW would be encroached upon. As proposed, construction would create (excavate) an additional area of approximately 1,090 sq.ft. above MHHW, such that there would be no *net* loss of tidal area.

A public promenade would be provided on top of the seawall. The south side of the promenade would be landscaped. The Port District has stated that there will be no restrictions on the hours of access or usage of the promenade. No minimum width of the promenade has been specified in the PMPA or EIR for the amendment. At this time, the proposed promenade would not connect to continuous accessways to the north or south sides of the subject site, because of the current lack of a continuous public accessways on adjacent properties.

**E. Conformance with the Coastal Act.** The proposed amendment would result in changes to the text and Precise Plan map in Planning District 2 (Lindbergh Field/Harbor Island). In order for the Commission to certify the proposed master plan amendment, the

Commission must determine that the amendment conforms to the following applicable Chapter 3 and Chapter 8 policies of the Act:

**1. Applicable Policies**

**Section 30210**

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 30211**

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

**Section 30212**

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby, or,

[...]

**Section 30213**

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

**Section 30220**

Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.



**Section 30221**

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

**Section 30223**

Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.

**Section 30230**

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 30224**

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 for long-term commercial, recreational, scientific, and educational purposes.

**Section 30231**

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**

(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 or 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 [...]

(4) 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 [...].

(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable long shore current systems.

[...]

### **Section 30234**

Facilities serving the commercial fishing and recreational boating industries shall be protected and, where feasible, upgraded. Existing commercial fishing and recreational boating harbor space shall not be reduced unless the demand for those facilities no longer exists or adequate substitute space has been provided. Proposed recreational boating facilities shall, where feasible, be designed and located in such a fashion as not to interfere with the needs of the commercial fishing industry.

### **Section 30234.5**

The economic, commercial, and recreational importance of fishing activities shall be recognized and protected.

### **Section 30235**

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 30240(b)**

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

**Section 30251**

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

**Section 30252**

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing non-automobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings.

**Section 30253**

New development shall: [...]

(4) Minimize energy consumption and vehicle miles traveled.

**Section 30255**

Coastal-dependent developments shall have priority over other developments on or near the shoreline. Except as provided elsewhere in this division, coastal-dependent developments shall not be sited in a wetland. When appropriate, coastal-related developments should be accommodated within reasonable proximity to the coastal-dependent uses they support.

## **Section 30708**

All port-related developments shall be located, designed, and constructed so as to:

- (a) Minimize substantial adverse environmental impacts.
- (b) Minimize potential traffic conflicts between vessels.
- (c) Give highest priority to the use of existing land space within harbors for port purposes, including, but not limited to, navigational facilities, shipping industries, and necessary support and access facilities.
- (d) Provide for other beneficial uses consistent with the public trust, including, but not limited to, recreation and wildlife habitat uses, to the extent feasible.
- (e) Encourage rail service to port areas and multicompany use of facilities.

### **2. Findings for Denial as Submitted.**

#### **A. Public Access/Lower-Cost Visitor-Serving Commercial Recreation.**

1. Timeshares. The proposed project would allow for the operation of 40 timeshare units in a hotel on public trust lands held by the San Diego Port District. The subject project is the first time the Commission has reviewed a timeshare proposal on public trust lands. Unlike a condo-hotel, the proposed timeshare does not involve granting fee title to land or airspace to private owners; rather, the timeshares would be conveyed to tenants pursuant to a sublease.

Although not included in the proposed PMPA or project EIR, the applicant has indicated that the following requirements would apply to operation of the hotel/timeshares:

1. The project will have an on-site hotel operator to manage reservations of all guestrooms, which management will include the booking of reservations for the timeshare units, mandatory front desk check-in and check-out for both the hotel guests and timeshare users, maintenance, cleaning services and preparing the units for use by guests/timeshare owners. The keys will be electronic and created upon each new occupancy to control the use of the timeshare units. Timeshare owners will get first priority on timeshare units. However, guidelines will be incorporated in to the timeshare ownership documents which will outline that whenever a timeshare unit is not occupied by a timeshare owner, that unit shall be available for hotel rental by the general public on the same basis as a traditional hotel room.

2. Woodfin, as the hotel operator/owner, will market and advertise all 140 units to the general public. Timeshare owners may also market and advertise their timeshare interests but all reservations must be confirmed through the hotel operator. A portion of the timeshare units will be marketed to the general public as low to moderately priced units to promote lower cost visitor serving uses. Specifically, an option available to a timeshare buyer will be an "every-other year" interval, which will be sold at approximately one-half the cost of an annual week.
3. All timeshare units rented as hotel units will be charged at rates comparable to those charged by the hotel operator for the traditional hotel rooms of a similar class or amenity level. The forty timeshare units will be located throughout the project and usage will be "floating", based upon the availability of a timeshare unit by type and not by a specific unit number (such as #301, or #504, etc.).
4. Woodfin will maintain records of usage by timeshare owners and renters and rates charged for all units, which will be encompassed in an annual audit for review and approval by the Port Director, and will be responsible for reporting Transient Occupancy Taxes based on records of use for all units. The Port will properly regulate and enforce any conditions in this annual audit.
5. Other than the designated 40 timeshare units, no portion of the project will be converted to timeshare. None of the units in the project will be converted into full-time occupancy condominium, apartment, or any other type of product that differs from the 140-unit hotel project, including its 40-unit timeshare component.

The Commission has always been concerned with assuring the preservation and promotion of high-priority lower-cost, overnight visitor-serving accommodations in prime shoreline locations in San Diego County. Proposals that would reduce the supply of visitor-serving accommodations or land designated for visitor-serving uses have received strict scrutiny. The Commission has recently begun to examine in depth the issues surrounding various types of limited use/fractional ownership hotel developments, and how these uses affect public access and recreation. Condominium hotels and timeshare hotels generally have the outward appearance and amenities of a traditional hotel but have rooms ("units") that may be sold as individual condominium ownerships or timeshare subleases. Owners of these units can use them for varying lengths of time or allow hotel management to rent the units to the general public.

Concerns have been raised by the Commission and others that allowing these quasi-residential uses in prime visitor-serving areas usurps land area necessary to support the demand for traditional hotels, which provide more public availability at a lower cost than condominiums or timeshares. To address these concerns, the Commission has placed restrictions on the provision of time-shares and condo-hotels. For example, the Cities of Encinitas and Oceanside have provisions in their Local Coastal Programs requiring that timeshare projects develop a plan that demonstrates how a reasonable number of units

within the time-share resort project will be made available to the general public for reasonably priced transient overnight accommodations during the course of each calendar year. The plan must include an aggressive marketing program to maximize exposure of rental possibilities to a broad spectrum of the public. For properties located in all visitor serving commercial zones within the coastal zone, the specific criteria for the aggressive marketing program would be related to the specific project and would be reviewed and conditioned as part of any Coastal Development Permit application to ensure 25% of the units are made available for the general public at all times, and that all vacant units are made available to the general public.

Similarly, the Commission has recently placed strict limitations and monitoring requirements on the development of condo-hotels in areas designated for visitor-serving uses (ref 6-92-203-A4/Encinitas Resort; A-6-COR-06-046/Hotel Del Coronado).

However, as noted, the subject project is the first time the Commission has reviewed a timeshare proposal on public trust lands. On December 14, 2006, the California State Lands Commission (SLC) held a public hearing to consider the consistency of the timeshare component of the PMPA with the Public Trust Doctrine. The SLC performed an extensive analysis of the history of timeshare proposals on public trust lands, the impact that a timeshare development would have on the public's rights, and the public's ability to use the shoreline (see Exhibit #10). The SLC determined that the development of the proposed timeshare would be inconsistent with the Public Trust Doctrine and the trust under which the San Diego Unified Port District holds title to the public trust lands involved.

Since the public access and recreation policies of the Coastal Act such as Sections 30210 and 30213 are expressions of the public trust doctrine, it important that the Commission interpret them in a manner that is most protective of the public trust. In addition, Section 30708 requires port-related development to provide for beneficial uses consistent with the public trust to the extent feasible. The SLC has been given the responsibility to manage the Public Trust lands of the state, and they represent the state's and the public's residual interest and rights in tide and submerged lands legislatively granted in trust to local jurisdictions; in the case of the proposed project, the Port District. Because of the direct relevance of the SLC findings to the PMPA's consistency with the Coastal Act, the findings of the SLC regarding the Woodfin timeshare are excerpted extensively below. The following discussion is taken from the State Lands Commission staff report attached as Exhibit #10:

**[State Lands] Commission staff has taken the position that a timeshare development is an inappropriate use of filled sovereign tide and submerged lands, as it is not a water-dependent use, nor does it enhance or facilitate the general public's enjoyment of trust lands, nor is a timeshare development necessary or incidental to accomplish or promote such uses. A project that**

cannot meet one or more of these criteria is not an acceptable use of Public Trust lands.

...the public trust is an affirmation of the duty of the state to protect the people's common heritage of tide and submerged lands for their common use." While uses of commerce, navigation and fisheries have expanded to other public trust uses since the 19<sup>th</sup> century, the essence of the duty to protect the public's rights for their common use remains constant.

It is important to note that while timeshare developments have been around for decades and from time to time have changed their methods of operations, these developments have been located almost exclusively on private property; only a handful have been approved in the California Coastal Zone and none has been constructed, or even approved, on Public Trust lands in California... Furthermore, while hotels, restaurants and other visitor-serving support facilities incidental to public access and use may exist in federal, state and local parks, and on Public Trust lands, timeshare developments do not. [...]

In addressing what constitutes an appropriate use to which Public Trust lands may be dedicated, California courts have made it clear that water dependent uses related to commerce, navigation, fisheries, and other water-related uses or activities, such as public access, recreation, and ecological preservation for scientific study and wildlife habitat (Marks v. Whitney (1971) 6 Cal.3<sup>rd</sup> 151), as well as those uses that are necessary and incidental to accomplish or promote those uses (Haggerty v. City of Oakland (1958) 161 C.A.2d 404), are consistent with the land use requirement of the trust. Ancillary visitor serving facilities, such as restaurants and hotels, have also received judicial approval because they enhance and facilitate the public's enjoyment of trust lands, by providing public accommodation (Martin v. Smith (1960) 184 Cal. App. 2d 571).

A timeshare development is not a use consistent with the Public Trust Doctrine, as interpreted by the judicial decisions described above, and is an inappropriate use of filled sovereign tide and submerged lands because it significantly impairs the public's right to these trust lands which have been historically set apart for the benefit of the statewide public. In contrast, timeshare accommodations are only available to a small segment of the population who can afford the tens of thousands of dollars for the initial purchase and who would own personal rights to the rooms and thereby prevent other use of these public lands.

While there has been an increase in timeshare owners and a greater opportunity for an "exchange of time" since the inception of the timeshare concept, a timeshare unit remains available only to a limited and distinct class of people, not to the general public. A timeshare by its very nature is inherently more restrictive of access to the general public than a hotel. Further, the

opportunities to trade occupancy rights have increased since the Attorney General's 1996 opinion was written, decreasing the vacancy rate and making timeshares even less available to the general public today. Availability to the public due to vacancy rates was one of the factors cited by the 1996 Attorney General's opinion as justifying possible limited use of timeshares. A timeshare development is not a water dependent use, nor does it enhance or facilitate the general public's enjoyment of trust lands, nor is a timeshare development necessary and incidental to accomplish or promote such uses. [...]

While 66 years [the maximum time the Port District can sublease land for] is not a permanent dedication to a particular use, 66 years is a significant amount of time to impair the general public's right to enjoy its trust lands, while allowing a distinct class of people the right to access the trust lands....The [State Lands] Commission has adopted a maximum term of 49 years on its own authority to lease property, even to other public agencies. [...]

Allowing a timeshare development on trust lands provides no benefit to the public beyond that which already is guaranteed by existing laws - in fact it impairs it. The test should not be whether some proffered mitigation justifies public rights being impaired for up to 66 years, but whether the existing Public Trust and Constitutional rights are being protected. Providing trust-consistent amenities, such as public access, does not make a non-trust use, such as a timeshare development, a trust-consistent use. [...]

The concept of allowing a wealthy group of individuals or families to tie-up the right to occupy prime visitor serving public property for scores of years into the future is antithetical to public rights protected by the Public Trust Doctrine. [...]

...having a multiplicity of private owners (potentially thousands for a single facility) with private property rights on public lands for in excess of half a century has the potential for an unduly burdensome complexity of business dealings for the State or its trustee landlord. The potential benefits of such an arrangement flow to the developers/sellers of the units and not to the public. [...]

Finally, after following the industry for nearly three decades, [State Lands Commission] staff believes that a primary rationale that leads to the promotion of timeshare developments is the desire of private developers to reduce their economic risk and maximize their financial return – by getting willing buyers to purchase the right to occupy a timeshare unit for many decades into the future. This method of private financing can work well for developers in a tight financial market, when a large enough class of well-to-do buyers can be found that are willing to lay down many thousands of dollars for their future vacation



plans or as an investment. However, as pointed out in the Commission's "Public Trust Policy" statement and the accompanying document "The Public Trust Doctrine," prepared for the [State Lands] Commission by the Attorney General's Office, a water-related benefit to the statewide public, not private financial attractiveness is the *sine quo non* of trust consistency. [...]

According to the Woodfin project proponent's consultant, Ragatz Associates, only 4.4 percent of the [timeshare] units are currently rented to the general public, while 9.5 percent go unused. Similarly, 35.8 percent are used by their owners, while 47.4 percent are used by persons owning other timeshares through exchanges. A number of conclusions may be drawn from these statistics. First, the percentage of rental units currently available to the general public is only 13.9 percent, 4.1 percent less than what the 1996 opinion contemplated. Second, the timeshare industry has changed in that the number of units available to the public is not translating into actual use by the public because only 4.4 percent of the units are actually rented by the general public. Third, over 83 percent of timeshare developments are occupied by persons owning timeshares, a limited, distinct class of people; together with un-rented units, 92.6% are not rented to the public.

The ultimate conclusion to be drawn is that the timeshare element of the Woodfin project would not provide for significant use by members of the general public because modern usage trends point to more timeshare use by those persons owning timeshares and less use by the general public, resulting in fewer opportunities for the general public to use trust property.

The second prong of the [Attorney General's 1996] opinion's conclusion assumes that the timeshare development would afford improved access to the waterfront by the general public, thus furthering trust uses by increasing opportunities for public access to the shoreline and water-oriented recreation. According to the Woodfin proposal, the project would include a 140-unit hotel, with a project option in which 40 of the 140 hotel suites would be marketed and operated as timeshares. In addition, the Woodfin proposal includes a replacement of the marina services building, a seawall and 6' public promenade along the shoreline frontage of the marina and the development of approximately 401 on-site parking spaces. According to the Woodfin proponents, these project components, in addition to the hotel component, provide for improved public access to the shoreline and water-oriented recreation. However, these public benefits are equally available in a traditional hotel development. As stated previously, public access along the waterfront is already guaranteed by the Coastal Act, the California Constitution and the Public Trust Doctrine. These additional project components do not provide increased opportunities for public access to the shoreline and water-oriented recreation above and beyond what is already guaranteed by law.

**Finally, a water-related benefit to the statewide public is the ultimate determinate of trust consistency, as opposed to private financial benefits. According to the minutes from the July 11, 2006 Board meeting, however, Woodfin proponents represented that, while including the timeshare component would make the project more financially lucrative, the Woodfin project could be developed as a traditional hotel without the timeshare component.**

**In conclusion, [State Lands] Commission staff believes that a project located on Public Trust lands, which would include a timeshare or a hotel-condo component, is inconsistent with the Public Trust Doctrine because such a use significantly impairs the public's right to these trust lands that have been historically set apart for the benefit of the statewide public.**

To summarize, the SLC analysis concludes that timeshares do not enhance and facilitate the public enjoyment of public the trust lands as do traditional hotels, but instead significantly restrict the ability of the general public to use the shoreline. The substantial financial investment required to purchase a timeshare severely limits the number of people who would be able to use the timeshare units. The Ragatz study referenced in the SLC findings details the demographics of timeshare owners, and how the timeshares are used (see Exhibit #9). The 2006 survey found that the median income of a timeshare owner was \$81,000, with 18.1% under \$50,000, 50.3% between \$50,000 and \$100,000, and 31.6 percent over \$100,000. By comparison, according to SANDAG, the median *household* income in the San Diego region in 2005 was \$52,192. While the proposed project will allow for sales of partial weeks of time, it seems apparent that the timeshares will not be affordable for most people.

In the condo-hotel projects recently approved by the Commission, limits were placed on the amount of time that owners could occupy their units. For the Hotel del Coronado project, for example, the hotel unit owners are restricted to use of their unit for no more than 90 days per year and for no more than 25 days within any preceding 50 day time period. Units not occupied by owners must be available for transient occupancy.

In contrast, the proposed project has no limits on the amount of time which the units can be occupied by timeshare holders. While use restrictions limit ownership of any one individual to a maximum of two weeks per year, there can be as many different owners as weeks available for sale. As noted in the SLC findings, the applicant's study determined that over the course of a year, timeshare units were rented out to the general public only 4.4% of the time. Approximately 86.1% of time, the unit was occupied by the owner, guests of the owner, or a timeshare exchanger; units were vacant the remainder of the time. Thus, the Commission can expect the timeshare units to be occupied by owners or exchangers approximately 314 days out of the year. As there are no limits proposed on

which weeks out of the year will be sold as timeshares, most likely all of the 40 timeshare units will be unavailable to the public during the prime summer months.

The Commission acknowledges that to the extent that new timeshare facilities are developed in general commercial areas, they can provide new public access and recreational opportunities for a certain segment of the population. But they should be considered a very low priority use among the broad range of traditional visitor uses available to the general public, and thus are not appropriately sited on prime, publicly owned shoreline sites subject to the public trust. The data demonstrates that a very narrow, exclusive segment of the population buys timeshares. The ability to buy one of the units would be well out of range for many people, and the timeshare occupancy by owners would be far higher than what has been asserted for condo-hotel proposals reviewed by the Commission. These 40 units would essentially be lost to the public for 66 years.

As noted by the SLC report, enforcing limitations or permit conditions on projects with potentially thousands of owners could be extremely difficult and burdensome. For example, as noted previously, the timeshare developer has indicated: “[t]he forty timeshare units will be located throughout the project and usage will be “floating”, based upon the availability of a timeshare unit by type and not by a specific unit number.” Thus, any of the 140 hotel suites could potentially, for a given week, be sold for a timeshare. The developer has also stated: “[o]ther than the designated 40 timeshare units, no portion of the project will be converted to timeshare.” However, according to the first quote, there will not be any “designated timeshare units.” If 40 timeshare units are sold in two-week increments, up to 1,040 weeks could be sold in any one year. In one week-increments, a maximum of 2,080 weeks could be sold. Given that at any particular time, any of the 140 rooms could be sold in various combinations of one, two or other partial week timeshares numbering in the thousands, it will be very difficult to determine when the “40 unit” limit has been reached.

As proposed, permitting the proposed timeshare units in the subject location would effectively rezone the area to a lower-priority, residential-like use, with little benefit to the public. There are no public benefits to allowing timeshare units on a hotel site, but as described, there are considerable disadvantages and risks. The opportunities for public access and recreation at this timeshare/hotel would be far less than with a traditional hotel property, and certainly less than what is required for a designated commercial recreation site on public trust lands. Placing these limitations on access to and use of publicly-owned prime visitor-serving shorefront is not consistent with the public access and recreation policies of the Coastal Act or with Section 30708, which requires port-related development to provide beneficial uses consistent with the public trust where feasible. Development of a traditional hotel or other affordable public recreational facility would be a feasible alternative to the proposed project. Therefore, as proposed, the amendment must be denied.

2. Hotel. As cited above, Section 30221 requires that “oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.” In addition, as previously stated, Section 30213 requires the provision of lower cost visitor and recreational facilities, where feasible, and that public recreational opportunities are preferred.

The subject PMPA includes the construction of a 140-suite hotel. As discussed above, up to 40 of these units could be sold as timeshares. The rest would be traditional hotel units. The Port has indicated that based on a report made available by the developer, the Average Daily Rate for the Woodfin Hotel would have been \$175 if the hotel had been operating during this past year. Thus, the proposed hotel would be a higher-cost visitor facility located on filled public tidelands. The room rates of the proposed hotel are prohibitive to a large segment of the general public and, thus, represent an exclusive accommodation.

When exclusive visitor accommodations are located on the waterfront, they occupy area that would otherwise be available for lower cost visitor and recreational facilities. The problem with exclusivity of shoreline accommodations is become increasingly acute throughout California. The particular distinction in the subject case is that the site is publicly owned land held in trust by the Port District. The Port District therefore has the ability to ensure the provision of lower-cost overnight facilities in a way that is much more difficult for the Commission or local governments to accomplish when regulating development of privately owned land. Lower-cost overnight facilities *could* be provided and encouraged along San Diego Bay, consistent with the policies of the Coastal Act. However, the Port Master Plan currently does not contain any specific policy statements addressing the provision of lower-cost visitor and recreational facilities in new development. It also does not contain any policies protecting existing or encouraging new lower cost facilities within Port tidelands. As a result, there are no motels, campgrounds, or youth hostels on Port tidelands. Even transient boat mooring rates in San Diego Bay have increased substantially in recent years.

To address whether or not sufficient lower cost overnight accommodations are already provided for in the project area, the Port staff has provided a recent inventory of low to moderate cost accommodations in San Diego’s Harbor Island area. The survey is attached as Exhibit #8. The information is of limited usefulness, because the number of rooms in the listed hotels was not included. The survey does show that all of the accommodations on Harbor Island and nearby Shelter Island are high-end accommodations (the lowest range is \$129-\$279, the highest \$159-\$559). The two existing hotels on Harbor Island are the Hilton San Diego Airport (\$189-349) and the Sheraton San Diego Hotel & Marina (\$199-399). There are a cluster of lower-cost motels approximately two miles driving distance away from Harbor Island in the Point Loma Area. However, none of these motels are on the shoreline or on Port Tidelands.

There is a place for higher-end facilities in the Port District, but it should be as one component of a wide range of facilities available to serve all segments of the population, to ensure the shoreline is available to everyone. There are several ways in which the increasing exclusivity of San Diego shoreline development could have been addressed at the proposed project site. First, the Port could have incorporated policies requiring the provision of lower cost facilities from Port tenants consistent with Section 30213 and 30221. Commission staff has previously suggested to the Port that language such as the following would be appropriate:

Add as new policy statement under Goal IV on Page 11:

Protect, encourage, and, where feasible, provide lower cost visitor and recreational facilities. Developments providing public recreational opportunities are preferred.

Add the following policy statements to be applicable to development within Planning District 2 Harbor Island/Lindbergh Field:

New hotel/motel development within Port tidelands should, where feasible, provide a range of rooms and room prices in order to serve all income ranges. Any removal or conversion of existing lower cost visitor-serving accommodations or uses shall be mitigated by the provision of comparable visitor-serving opportunities within the proposed development or documentation that either there is a sufficient inventory of lower cost accommodations in the project vicinity, or there is no demand for such uses. An in-lieu fee may be considered as an alternative to the actual provision of affordable visitor accommodations and shall be required as a condition of approval of redevelopment of existing units or new development. The fee shall be sufficient to construct a reasonable percentage of affordable accommodations within the project vicinity based on the number of proposed visitor units. Any fee shall include an adjustment factor for inflation until such units are built.

In addition to adding policy language to the PMP, in review of coastal development elsewhere in the coastal zone, the Commission has required either the provision of lower cost visitor accommodations within proposed development or allowed for the payment of a fee in-lieu of actual construction of affordable units (ref. CDP #5-87-675 Marina Del Rey Ritz Carlton; CDP A5-RPV-91-46 Rancho Palos Verdes; CDP #6-92-203 Sport Shinko). These requirements were associated with proposals for new development which precluded development of lower cost facilities. The Marina Del Rey Ritz Carlton and the Sport Shinko developments did not involve loss of existing affordable recreational opportunities. Such fees are used for land acquisition, construction and/or to subsidize the provision of lower cost visitor-serving accommodations within a high-cost facility or off-site in the project vicinity. Provision of low-cost accommodations either directly or through contributions to organizations such as San Diego Hostelling International USA (Hostelling International is a non-profit organization with more than 4,000 hostels in over

60 countries, including two in San Diego), and/or developing campgrounds on public tidelands would also be a suitable means to offset the impact of high-cost hotels on public tidelands otherwise available to serve a larger segment of the population with lower cost visitor facilities.

If the proposed PMPA provided for low-cost overnight accommodations on the subject site, the Commission would likely be able to find that the hotel portion of the amendment provides for the provision of new, lower cost visitor-serving accommodations within Port tidelands consistent with Section 30708(d) which requires all port-related developments to be located, designed and constructed so as to “provide for other beneficial uses consistent with the public trust, including but not limited to, recreation and wildlife habitat uses, to the extent feasible.” Such a program would also meet the requirements of Section 30213 and 30221. If a developer can demonstrate that the provision of lower cost overnight accommodations on the site is infeasible, then the PMP should require the construction of lower cost accommodations elsewhere in the Port District. If actual construction is also currently not feasible, the PMP should establish an in-lieu fee program with appropriate safeguards to ensure that low-cost overnight accommodations are adequately provided for in the area in the near future.

Furthermore, any new commercial recreation development located on public tidelands should be designed to welcome the general public to the assorted hotel facilities, such as the restaurant and retail areas. However, as noted below under Traffic/Parking, the Port did not even address parking demand associated with the restaurant or spa, because “these ancillary uses are primarily intended to service hotel guests.” Nor was the potential demand for public parking on the site addressed in the parking study performed for the site, which further suggests the site is not expected to draw visitors other than hotel guests. As proposed, the development seems designed only to serve the narrow segment of the population able to afford higher-end overnight rates.

In summary, a broader range of the general public would be served by provision of lower cost retail and restaurant uses, affordable hotels, campgrounds or open space than are served by the proposed waterfront hotel. Because more people can afford lower cost, visitor-serving facilities, there is a greater demand for such facilities, particularly close to the water’s edge. Therefore, there is a significant demand for the type of visitor-serving commercial recreational facilities that could be provided on the subject leasehold. Based on the above analysis and general recreational demand, lower cost visitor accommodations are not adequately provided for in the project area. The subject PMPA proposes a high cost visitor facility in a prime waterfront location where lower cost visitor and recreational facilities could be provided. The facility has not been designed to attract visitors other than overnight hotel guests. Absent any provision for offsetting mitigation to address the exclusive nature of the proposed hotel and the adverse impact on public recreational and lower-cost visitor-serving opportunities, the Commission finds that the proposed port master plan amendment is inadequate to meet the requirements of Section 30708 or the public access and recreation policies of the Coastal Act.

3. Traffic/Parking. The subject site is located on Harbor Island, a peninsula with only one street access, Harbor Island Drive. Harbor Island Drive is a four-lane local collector with a 35 mile-per-hour speed limit. The EIR for the project determined that the proposed project would only have one significant impact to traffic, at the intersection of North Harbor Drive/Harbor Island Drive/Terminal 1 during the PM peak hours. The project would include adding several turn lanes at the impacted intersection to reduce traffic impacts to a less than significant impact.

With regard to parking, the subject site currently has 382 parking spaces in four adjacent lots. Three of the lots, with a total of 291 stalls, are reserved for boat owners and are gate controlled. The remaining lot, with 91 stalls, is available to the public. Although there are no commercial or recreational facilities open to the public on the site currently, the spaces are available for people who might wish to jog around Harbor Island, picnic on the nearby grassy lawns, or view the downtown skyline.

As proposed, the development will provide 401 parking spaces to serve the marina and the hotel and associated meeting space and restaurant. A parking survey was performed in August 2003 to determine the demand for parking associated with the marina. The survey identified occupancy of 306 of the 382 on-site spaces at the peak time, Saturday, 5:00 p.m. Thus, 306 spaces were determined to be the demand for the marina (0.585 spaces per slip).

A parking study was not performed for the hotel uses. The Port District Tidelands Parking Guidelines (which are not part of the certified PMP), call for the provision of 0.6 spaces per hotel room for hotels on Harbor Island. Thus, for the 140 rooms, 84 spaces are required. Therefore, the parking analysis in the EIR determined that the use would generate the demand for a total of 390 parking spaces, or 11 spaces less than the 401 being provided.

The hotel parking demand rate used is lower than typically used within in the Port District and in the coastal zone in San Diego County in general, where hotel parking requirements are usually closer to 1 space per room. In addition, no demand for the restaurant and meeting space associated with the hotel was considered. The Port has stated that because the proposed Woodfin Hotel proposes only 3,700 square feet of meeting space and 1,100 square feet of restaurant space, these ancillary uses are primarily intended to service hotel guests, and thus, were not counted as separate uses in the parking demand study.

Although the required parking ratios may be on the low side, slightly more than the minimum required parking would be provided, and the EIR notes that there are probably opportunities for shared parking on the site, since the peak parking demand for the marina occurs during the day, while the hotel peaks at night. In addition, the site is very near the airport, and the Port has indicated that the hotel would provide a shuttle for hotel

guests that would go to and from the Airport, as well as to near-by locations such Harbor Island restaurants, Liberty Station and downtown.

However, the provision of an airport or other shuttle service has not been included in the PMPA, nor described anywhere in the project EIR. There have been no details provided on how or when the shuttle would operate, where it would go, any fees associated with it, and so forth. There is no indication that the general public would have any access to the hotel's shuttle service. Furthermore, the proposed project would eliminate the 91 parking spaces on the site currently open to the public. The potential demand for public parking on the site has not been accounted for or addressed in the EIR or the PMPA.

With regard to a public shuttle service, unlike the most recent PMPA approved to redevelop the Old Police Station Headquarters in the South Embarcadero area, the subject PMPA does not require that the applicant participate in development of a public shuttle system. The Commission has several times raised concerns that the Port District's stated and laudable goal of developing a bayfront shuttle service will not be implemented unless new development that contributes to an increase in traffic or may reduce existing on-site parking is required to participate in funding it. Even though significant adverse impacts to traffic and circulation were not identified in the EIR, Section 30252 requires that new development facilitate the provision or extension of transit service. Section 30253 requires that new development minimize energy consumption and vehicle miles traveled. The subject project is the first major redevelopment project to occur on Harbor Island in nearly 20 years, but at least one other major new hotel project is currently undergoing review at the Port District. The development requirements for this site and this project will set the standard for future development on Harbor Island. However, no traffic demand reduction strategies or transit promotion measures have been required for the project.

The EIR notes that although no additional mitigation to circulation impacts beyond that described above is deemed necessary, the project "contributes trips to substandard traffic conditions within the study area." As proposed, the development will contribute to an incremental and cumulative increase in traffic and energy usage, and therefore, to a decline in the ability of the public to access the shoreline. Measures such as employee transit incentives, employee shuttles, and contribution into a publicly-accessible shuttle system could potentially mitigate these impacts. Given the absence of such programs, the proposed amendment cannot be found consistent with the Coastal Act's public access and recreation policies or the policies that mandate the promotion of public transit, the minimization of vehicle miles traveled, and the conservation of energy, and must be denied.

4. Promenade. The proposed amendment includes construction of a new public promenade along the entire water frontage of the existing marina. The concerns with how the promenade is being constructed on top of a new revetment are discussed in detail below, under **C. Biological Resources**. However, while the provision of a new public



promenade would be a recreational resource, no details on the designs of the promenade have been provided in the proposed PMPA or in the EIR. There are no detail plans or cross-sections of the promenade. There is no description of the promenade width, the type or amount of landscaping that would be provided, the provision of any amenities such as benches, fountains, educational plaques, artwork or other activating uses, or the provision or location of signage identifying the area as open to the public. The EIR does indicate that the proposed restaurant would be accessible directly from the promenade, which could be an attractive feature for passers-by, but there needs to be assurances that private uses will not encroach upon the public space, such by mandating a minimum width of the promenade. Not all of these details need necessarily be included in the text of the Master Plan. But without basic information defining the minimum characteristics of the design, the Commission cannot be assured that the proposed PMPA adequately promotes and protects public access and recreation. Therefore, the amendment must be denied.

**B. Water Quality.**

The subject site includes 523 boat slips, a fuel dock, and a sanitary pump-out station. The proposed project includes removal of the existing pump-out station. Because the pump-out station served a recreational small craft marina, its removal is an appealable project subject to Chapter 3. According to the Port District, the pump-out station ceased operation in 2003 when it was determined that this service was no longer needed because of the close proximity of other pump-out stations. The Port notes that West Harbor Island features two pump-out stations that are in close proximity to the project site. One station is located next door to the project site to the east, at Cabrillo Island Marina, and the other station is located approximately 0.75 miles west of the project site at the Harbor Island West Marina. The Cabrillo Island Marina accommodates approximately 425 vessels, while the Harbor Island West Marina can accommodate over 600 vessels. The Port has stated that boat owners at the subject site can use either of these stations for a small fee.

In addition, the Port notes that boat owners are provided with the information for portable pump-out services that pull alongside the boats for offshore sewage removal. The Port states “[t]he management at Marina Cortez highly encourages the use of this option during the boat owner’s orientation to the marina by providing company information and brochures. Port staff believes that these alternatives make the need for a new onshore pump-out system unnecessary at this time.”

The proposed project would not directly affect the intensity of use at the marina by, for instance, increasing the number of docks or moorings. But the project does involve upgrading the site as a whole, and the upland marina facilities in particular, by creating a new marina services building.

A 2004 report to the State Water Resources Control Board from the Department of Boating and Waterways looked at the impacts from the improper disposal of human waste by boaters (*Report and Recommendations for Vessel Waste Disposal Facilities for Region 2 Marinas and Harbors, Excluding Tomales Bay*, July 23, 2004). The report states:

The Clean Vessel Act of 1992 found that sewage discharged by recreational vessels because of an inadequate number of pumpout stations was a substantial contributor to localized degradation of water quality. The Act establishes a grant program to increase the number of pumpout and dump stations. In California, the grant program is administered by the Department of Boating and Waterways. Although the number of sewage disposal facilities has increased under the Clean Vessel Act, there are still an inadequate number of pumpout and dump stations. In issuing Clean Vessel Act grants, the Department of Boating and Waterways uses the criterion of one dump station for every 300 vessels of between 16 and 26 feet, and one pumpout station for every 300 vessels 26 feet or greater (Department of Boating and Waterways State Vessel Waste Disposal Plan). The federal guidelines for pumpout and dump stations is one station for every 300 to 600 vessels over 16 feet length overall (Clean Vessel Act: Pumpout Station and Dump Station Technical Guidelines, April 11, 1994). In addition to the Federal requirements, the California Harbors and Navigation Code (Chapter 6, section 776), states that “every vessel terminal shall, as required by the regional board for the protection of the quality of the waters of this state, be equipped with vessel pumpout facilities for the transfer and disposal of sewage from marine sanitation devices.” A vessel terminal is defined as “any private or public shoreside installation on any waters of this state which provides mooring, docking, berthing, and other facilities for the use of vessels.

In addition to providing an adequate number of pumpouts for boats with sewage retention devices at a marina, it is critical to consider the cost and location of the pumpout facility. Free or inexpensive pumpouts, conveniently located, increase their use by boaters. A study conducted in Maryland determined that the availability of a pump-out facility at a boater’s marina increased the likelihood of pumping by two-fold (Strand and Gibson, 1990). This study also found that vessels in transition are less likely to use marina facilities. Strand and Gibson (1990) also determined that a higher price for using pumpout facilities negatively influenced pumpout use. Although this study took place in Maryland, similar trends are found throughout the U.S. In summary, when assessing the need for additional sewage disposal units at marinas in an area, it is important to consider the number of boats that will be serviced along with a pumpout’s convenience and cost.

Based on these guidelines and studies, a working pump-out station should be provided at the subject marina, which has 523 slip spaces. The Commission feels strongly that upgrading existing facilities should include upgrading the environmental protections and services associated with the facilities, not reducing them. The Port has not indicated who determined in 2003 that the existing pump-out station was no longer needed. The Commission's water quality staff have reviewed the proposed project and, believe that for a marina this size, having an on-site pump-out station is appropriate and likely to significantly increase compliance with sewage disposal standards. Having nearby and mobile facilities are certainly helpful, but are no substitute for on-site pump-out facilities, which are frequently provided for marina tenants at no cost. If reestablishing the pump-out facility on-site is truly infeasible, the Port could look into establishing a program where boaters at the subject site could use adjacent pump-out stations for free, or where boaters could be reimbursed for using off-site or mobile facilities. As proposed, the project cannot be found consistent with the water quality protection policies of the Coastal Act, and must be denied.

### **C. Biological Resources.**

The project includes construction of an approximately 1,200 linear foot seawall along the entire length of the marina. Portions of the seawall would be constructed up to two feet beyond Mean High High Water (MHHW). A total of 1,090 sq.ft. of mud flats beyond MHHW would be encroached upon. As proposed, construction would create an additional area of approximately 1,090 sq.ft. which would be above MHHW, such that there would be no *net* loss of tidal area. A public promenade would be constructed on top of the seawall. The seawall would be related to the recreational small craft marina, and is therefore an appealable project subject to Chapter 3.

As cited above, under the Coastal Act, dredging and/or filling wetlands are severely constrained. Coastal Act Section 30233(a) sets forth a three-part test for all projects involving the fill of coastal waters and wetlands. These are:

- 1) That the project is limited to one of the eight stated allowable uses;
- 2) That the project has no feasible less environmentally damaging alternative; and,
- 3) That adequate mitigation measures have been provided to minimize adverse environmental effects.

The proposed project is intended to limit erosion from wave action on the site, and would maintain the existing navigational corridor adjacent to the subject site, which is a permitted use under Section 30233. However, the Commission's ecologist has reviewed the project and determined that the proposed fill of the intertidal zone would have an adverse environmental impact on benthic invertebrates such as polychaete worms and burrowing clams. Exhibit #7 shows a cross-section of the proposed seawall demonstrating how land area would be filled in behind the seawall, creating new land area that would be used for the proposed promenade. However, the seawall could have been

set back against the existing shoreline slope, reducing the encroachment on mudflats and into open water. The promenade could then be provided inland of the seawall, on existing land area. It is possible that this would require redesigning the proposed parking area, and even potentially reducing the size or requiring redesign of the proposed hotel and marina services building. Even if the seawall were redesigned to avoid most of the impacts to intertidal habitat, mitigation would be required for any remaining impacts. Alternatively, the EIR identified construction of a 10-foot high vertical seawall as an alternative that as designed would be placed further inland, thus avoiding the need for any fill below MHHW, while still accommodating a public promenade in the same configuration. This alternative was rejected by the Port as less aesthetically pleasing, and construction would potentially have greater noise impacts.

Nevertheless, extending the seawall into the water in order to maximize the developable area on the lot is not the least environmentally damaging feasible alternative. Even the portions of the PMPA that might, by themselves, be found consistent with the Coastal Act, such as the marina services building, are dependent on construction of the seawall, which cannot be found consistent with the Coastal Act. Revisions to the wall to reduce or eliminate the impacts may require redesigns affecting the marina services building and the parking necessary to serve that use. Therefore, as proposed, the PMPA cannot be found consistent with the resource protection policies of the Coastal Act, and must be denied.

#### **D. Visual Quality**

The proposed hotel tower would be approximately 95 feet high and 320 feet wide with a three-story clubhouse and spa attached to the eastern end of the main hotel structure. A 30-foot high marina services building would be located on the east side of the site.

A view analysis performed by the Port determined that the proposed buildings would be clearly visible from Spanish Landing Park, a public park adjacent to Harbor Drive. However, the existing view from the park is of the open bay waters north of the Harbor Island peninsula and yachts at the marinas, with the existing Hilton and Sheraton hotels in the background. The proposed tower would be visible as a backdrop, as are the existing hotels. The proposed buildings would not be as tall as the 140-foot tall Sheraton Hotel to the east of the subject site, or the 114-foot tall Hilton Hotel to the west. The quality of the existing viewshed as seen from the park is not anticipated to be significantly degraded.

The proposed tower would be highly visible from eastbound Harbor Drive, while crossing over the Harbor Drive Bridge and moving towards downtown San Diego. The construction of a new tower on the project site will be an obstruction in the existing views of downtown as viewed from this street. However, the views of the open water and boats will remain. Views of the skyline would remain on either side of the new tower, between the two existing hotel buildings. The area is a highly urbanized location where views of

high-rises are not incompatible with the character of surrounding areas. Therefore, the PMPA can be found consistent with the visual resource policies of the Coastal Act. The recommendation of denial is based on the project's impact to public access, recreation, sensitive habitat, and water quality.

**F. Consistency with the California Environmental Quality Act (CEQA).**

The Port District is the lead agency and the Commission a responsible agency for the purposes of CEQA review. As described above, the proposed PMPA does have the potential to result in resource damage in the form of individual or cumulative impacts to public access and recreation, sensitive resources, and water quality. The proposed amendment was the subject of an Environmental Impact Report under CEQA. The EIR was subject to public review and hearing and was adopted by the Board of Port Commissioners. Overriding considerations were adopted by the Board because the EIR determined that the project would contribute considerably to a cumulatively significant effect with respect to noise in the vicinity from traffic, for which no feasible mitigation measures exist. However, the Commission has found that the PMPA cannot be found in conformance with Chapter 3 and Chapter 8 policies of the Coastal Act due to the potential for significant adverse impacts to public access and recreation, water quality, and biological resources.

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