

CALIFORNIA COASTAL COMMISSION

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Staff: L. Roman-LB
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Hearing Date: November 15, 2012

STAFF REPORT: REGULAR CALENDAR

Application No.: 5-12-124

Applicants: Dennis and Joanne Schwary

Agent: Swift Slip Dock and Pier Builders

Project Location: 755 Via Lido Soud, Newport Beach (Orange County)

Project Description: Reconfiguration and repositioning of an existing 10'x14' pier platform from its present location 18' seaward of the existing bulkhead to adjacent to the bulkhead/seawall requiring removal of two existing 14" diameter T-piles and installation of three new piles (one new 14" diameter T-pile and two new 12" diameter anchor piles) and requiring a new 4'x4' pier extension to accommodate the new layout resulting in a 16 sq. ft. increase of water coverage. No changes are proposed to the existing gangway or floating dock.

Staff Recommendation: Denial

SUMMARY OF STAFF RECOMMENDATION

The subject application requests approval to reposition an existing 10'x14' wood pier platform from its current location 18 feet from the bulkhead to a new location directly adjacent to the existing bulkhead, repositioned so that the 14' long side is parallel to the bulkhead. Currently, the shorter 10' long side of the pier platform is parallel to the bulkhead and the proposed repositioning would require a new 4'x4' extension to the pier approach in order for pier to meet up to the existing gangway and dock float. Furthermore, moving the existing pier platform adjacent to the bulkhead would result in additional fill of coastal waters/increased loss of soft bottom habitat due to additional piles required to accommodate this new pier platform location.

The proposed work does not involve any repair, replacement or enhancement necessary to repair/restore the function of the existing residential dock system.

Staff recommends that the Commission **DENY** the proposed project as the proposed new dock configuration would result in a greater number of piles than the existing dock configuration resulting in additional unnecessary fill of coastal waters. Furthermore, the repositioned platform would place it immediately adjacent to the applicant's backyard patio, on public tidelands, which would essentially serve to expand private patio space and serve no clear boating-related use. Coastal Act Section 30233 places strict limits on the types of uses for which fill is allowed. In this case, fill of coastal waters would only be allowed for boating related purposes; there is no allowance for fill of coastal waters to expand private residential patio space. The proposed additional fill for the platform and increase in water coverage is also inconsistent with Section 30250 which requires that new development be located where it will not have cumulative adverse effects on coastal resources. The proposed piles added to support the proposed platform would add to the cumulative adverse effects of unallowable fill of coastal waters. The proposal would also increase the amount of tidelands subject to shading, which reduces biological productivity. Finally, there would be potential for cumulative adverse impacts if similar 10'x14' patios are relocated to proliferate along the bulkhead creating greater impediments to access to and along public tidelands.

Section 30600(c) of the Coastal Act provides for the issuance of coastal development permits directly by the Commission on tidelands, submerged lands and public trust lands such as the subject site. Therefore, the Coastal Commission is the permit issuing entity and the standard of review is Chapter 3 of the Coastal Act with the certified City of Newport Beach LCP Land Use Plan used as guidance.

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APPENDICES

Appendix A – Substantive File Documents

EXHIBITS

Exhibit 1 – Location Map

Exhibit 2 – Existing Dock Configuration

Exhibit 3 – Applicant Response to Notice of Incomplete Application including Proposed New Pier Platform Configuration

Exhibit 4 – Aerial Photo

Exhibit 5 - Site Photos

I. MOTION AND RESOLUTION

Motion:

I move that the Commission approve Coastal Development Permit No. 5-12-124 for the development proposed by the applicant.

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution to Deny the Permit:

The Commission hereby denies a Coastal Development Permit for the proposed development on the ground that the development will not conform with the policies of Chapter 3 of the Coastal Act and will 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. Approval of the permit 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. FINDINGS AND DECLARATIONS:

A. PROJECT LOCATION AND DESCRIPTION

The proposed project involves an existing private residential dock over public tidelands in front of a single-family residence located at 755 Via Lido Soud on Lido Isle in the City of Newport Beach (Exhibits #1).

The proposed development is to reposition an existing 10'x14' wood pier platform from its current location 18 feet seaward of the bulkhead to a new location directly adjacent to the existing bulkhead, positioned so that the 14' long side is parallel to the bulkhead. Currently, the shorter 10' long side of the pier platform is parallel to the bulkhead; therefore, the proposed repositioning would require a 4'x4' extension to the pier approach in order for it to meet up to the existing gangway and dock float. The pier approach extension results in a 16 sq. ft. increase in water coverage.

Additionally, the applicant proposes to remove the two existing 14" diameter "T" piles that currently support the pier platform. Two new 12" diameter piles are proposed to support the pier platform at the proposed new location and support a portion of the pier approach; an additional new 14" diameter "T" pile is required to support the pier approach at its far (seaward) end at the gangway connection. Exhibit #3, page 4 depicts the proposed pier platform repositioning and Exhibit #2 depicts the existing pier configuration.

The proposed work does not involve any repair, replacement or enhancement necessary to repair/restore the function of the existing dock system. No work is proposed to the existing bulkhead located along the seaward property line. The existing 10'x14' pier platform is simply proposed to be moved from its location 18 feet from the bulkhead to be adjacent to the bulkhead and would require installation of an additional support pile and a 4'x4' extension to the pier approach in order to accommodate the new configuration.

C. 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 30211 of the Coastal Act states:

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.

The City of Newport Beach Coastal Land Use Plan contains the following policies:

- 3.1.4-3 *Design and site piers, including remodels of and additions to existing piers so as not to obstruct public lateral access and to minimize impacts to coastal views and coastal resources.*
- 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.*
- 3.1.4-5 *Encourage the joint ownership of piers at the prolongation of common lot lines as a means of reducing the number of piers along the shoreline.*
- 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 subject site is located on Lido Isle within Newport Harbor in the City of Newport Beach. Lido Isle is not a private gated community. Access to the island is via a single public road/bridge. There are approximately 850 single family residences on the island, the majority of which also have private boat docks which extend into public land and waters managed by the City. The island is exclusively residential; there are no commercial areas on the island. On-street parking is available along Via Lido Soud and Via Lido Nord, however, there are no parking lots on the island dedicated for public access to bay waters or bay beaches.

In areas where the Lido Isle Community Association maintains a public walkway between the single family residences and public tidelands, instead of private dock structures, the City has approved boat moorings in the bay. Bay waters come up to the property line of most single family residences on both the north and south sides of the island during high tide. On the south side of the island, where the subject site is located, the bulkhead is located at the property line which is approximately 20 feet landward of the established US Bulkhead Line.

There is no direct public pedestrian access to public tidelands through the private residential lot at the subject site. Public pedestrian access to public tidelands is available approximately 30 feet downcoast of the subject site via a vertical public access easement through a Lido Isle Homeowners Association pocket park at Via Waziers (See Exhibit #1, page #2). From this access point, members of the public may access tidelands and, for example, launch a kayak, or during low tide, it is possible to walk under the residential piers for strolls down the beach. The aerial photographs provided in Exhibit #4 clearly show sandy beach areas covered by residential dock structures. Exhibit #5 provides photos of the site and vicinity during low and high tides. The public can also access the public beach area seaward of the subject site by watercraft or by swimming to the site.

The proposed change in configuration of the existing pier platform would create a greater impediment to public access of public tidelands than the current pier configuration. Placing the 10'x14' platform with the longer 14' side parallel to the seawall would in effect privatize the use of these public tidelands as the general public will be unable to access the area beneath the pier platform for recreational purposes. Furthermore, placement of piles to support the 10'x14' platform adjacent to the bulkhead at this particular site would be an impediment to lateral pedestrian access across these public tidelands, because, as the tide comes in, only the areas closest to the bulkhead are still dry and walkable. Due to the sand/beach elevation, further landward, the platform would be more of a direct impact to pedestrian lateral access. The current platform location farther away from the bulkhead is preferred because the platform and the beach are at an elevation and location where the public is more likely to be able to walk underneath it, thereby presenting less of an impediment to lateral pedestrian access.

Therefore, the Commission finds that the proposed project would interfere with the public's right of access to the sea and interfere with recreational opportunities on public tidelands and is, therefore, inconsistent with City of Newport Beach Coastal Land Use Plan Policy 3.1.4-3 and Sections 30210 and 30211 of the Coastal Act.

B. MARINE ENVIRONMENT AND MARINE RESOURCES

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:

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

(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.

(6) Restoration purposes.

Section 30250 of the Coastal Act states in part:

(a) New residential...development...shall be located...where it will not have significant adverse effects, either individually or cumulatively, on coastal resources....

The proposed work does not involve any repair, replacement or enhancement necessary to repair/restore the function of the existing dock system. No work is proposed to the existing bulkhead located along the seaward property line. The existing 10'x14' pier platform is simply proposed to be moved from its location 18 feet from the bulkhead to be adjacent to the bulkhead.

In response to staff request for further information regarding the nature of the request to modify the existing dock layout, the applicants' agent, Swift Slip Dock and Pier Builders, Inc. responded:

"The homeowner at 755 Via Lido Soud would like to move the pier platform closer to the bulkhead line and further away from the water and marine life. They have designed the 14' length of the platform to sit parallel with the seawall. This will further assist in keeping the platform from shading the water and marine life. Currently, the 14' length sits perpendicular to the seawall. In turning the platform 90 degrees we lose the 4' necessary to reach the gangway and floating dock which are not being altered. Although it will be necessary to add 16 sq. ft. this will allow us to move the larger 10'x14' platform up and away from the water and marine life."

A Preliminary Eelgrass Survey Report and Caulerpa taxifolia Survey was conducted at the project site and vicinity by Dive Works, on March 29, 2012. No other marine biological impact assessment, survey, or study was submitted describing other marine life in the project area. No eelgrass was mapped to exist in the vicinity of the proposed development during the March 2012

survey. Although abundant in other areas of Newport Bay, historically, eelgrass has not been found in the vicinity of the subject site by the bay wide eelgrass surveys conducted by the City in 2004, 2007, and 2010. Those surveys only mapped small eelgrass patches on the north and eastern end of Lido Isle. Water depth and sediment grain sizes at the subject site are within those that will support eelgrass, however, lack of eelgrass growth in the project vicinity may have to do with inadequate tidal flow and water quality necessary to support eelgrass. Therefore, moving the 10' x 14' platform further inland would not benefit any known marine resources in the vicinity.

The full response to staff's Notice of Incomplete Application is included as Exhibit #3. Furthermore, the applicant modified the project in response to staff's request for alternative configurations that would avoid or minimize increased fill.

The original proposed design (Exhibit #3, page #3) to reposition the existing 10' x 14' pier platform adjacent to the bulkhead also included the removal and repositioning of the two existing 14" diameter "T" piles that currently support the platform and move those closer to the bulkhead to support the platform. The 4' x 18' pier approach would be extended to 4' x 22' and would require two new 14" diameter 3' wide "T" piles for support. The 4' x 22' pier would then attach to the gangway and dock float. This proposed design would result in two new 14" diameter 3' wide "T" piles.

In response to staff's request for alternatives resulting in reduced or no new fill, the applicant revised their project to the current proposal to discard the existing two 14" diameter piles and use of two new 12" diameter piles and one 14" diameter 3' wide "T" (Exhibit #,3 page #4). However, the proposed project would still result in additional fill of coastal waters/increased loss of soft bottom habitat due to an additional 14" diameter "T" pile required to accommodate this new pier platform location.

The City's Harbor Resources Design Standards allow for pier platforms not to exceed 170 sq. ft. which is a change from previous guidelines that set the maximum at 140 ft. or typically 10' x 14' like the subject platform. The Harbor Resources harbor permits contain the following special conditions: *"Only marine oriented uses are allowed on the pier, pier platform, gangway and float. Patio furniture, plants etc...are not permitted."* However, it would appear from staff field observations that these 10' x 14' type of pier platforms, especially those located adjacent to a residence's bulkhead, serve as an extension of their private property. Exhibit #5 contains photographs from Lido Isle depicting pier platforms with patio lounges, tables, barbeques, planters, etc.

When proposing fill in coastal waters to build a new or expanded boating facility, the proposed project must be tailored to exclusively accommodate boating related uses. The proposed "re-tailoring" of the existing private pier from residential property to a private boat dock and subsequent associated fill, is not for the purposes of accessing the dock. The pier structure must be strictly limited to boating-related uses, to provide a means for travelling by foot, or other means if disabled, from shore to the boat dock, and nothing more.

The dock plans approved under CDP 5-04-030 for 801 Via Lido Soud clearly identify a "14' x 10' small boat and equipment pier" adjacent to the bulkhead. However, an aerial photograph of the

site (Exhibit #4) shows that the 14'x10' platform incorporated into the backyard patio and appears to be more a part of the backyard and not a part of the dock system. Current photos of the 10'x14' platform at the subject site, 755 Via Lido Soud included in Exhibit #5, clearly show a large planter with a tree, a wicker couch and ottoman, an umbrella, deck lights and what appear to be audio speakers. No boating equipment is currently stored on the deck platform. The proposed project to relocate the existing deck platform to be adjacent to the bulkhead/property line would, in effect, cause the structure which is intended for boating related purposes but currently used as a patio, to instead function even more fully as an extension of their private backyard patio.

Coastal Act Section 30233 clearly limits the allowable fill of open coastal waters, wetlands, estuaries to certain uses only. It allows fill for boating facilities where there is no feasible less environmentally damaging alternative. The Commission finds the proposed relocation of the existing 10'x14' pier platform, as proposed, would not function strictly for boating related purposes and the subsequent associated fill would be unallowable under Section 30233.

Moreover, Section 30250 requires that new development be located where it will not have cumulative adverse effects on coastal resources. The additional 14-inch diameter pile that would be necessary to support the proposed platform in its revised location would add to the cumulative adverse effects of unallowable fill of coastal waters. Although a single additional 14 inch diameter pile may not seem to create significant adverse impacts, the cumulative effect of allowing additional piles will add up over time, especially when the piles are not necessary to support an allowable use under Section 30233 such as a boating related use. It should be remembered that there are hundreds of private residential boat docks in Newport Harbor. If each were permitted to increase the amount of fill beyond that which is consistent with the Section 30233, the overall effect would be a significant loss of coastal waters and soft bottom habitat.

The existing pier approach, pier platform, gangway and floating dock in their current configuration provide less water coverage and fewer piles (i.e., less fill). Compared to the proposed project, the existing dock pier approach is the least damaging environmental alternative and the proposed one is not. Therefore, the Commission finds that the proposed project is inconsistent with Section 30233 and 30250 of the Coastal Act.

C. LOCAL COASTAL PROGRAM

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. In addition, the certified LUP was updated at the October 2009 Coastal Commission Hearing. Since the City only has an LUP, the policies of the LUP are used only as guidance. The following Newport Beach LUP policies relate to development at the subject site: 3.1.4-3, 3.1.4-4, 3.1.4-5, 3.1.4-7, 3.1.4-8, and 4.2.3-17.

The construction of the proposed project is inconsistent with the policies in the City's certified LUP. The proposed remodel of a residential pier would further obstruct public lateral access to public tidelands and would result in unnecessary additional fill of coastal waters. 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 project must be denied.

D. 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). The City of Newport Beach Harbor Resources Division is the lead agency and has determined that in accordance with CEQA, the project is Categorically Exempt from Provisions of CEQA for the construction. However, 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.

While the City of Newport Beach Harbor Resources Division found that the development was Categorically Exempt, the Commission, pursuant to its certified regulatory program under CEQA, finds that the proposed development would have adverse public access and environmental impacts. There are feasible alternatives or mitigation measures available that would alleviate the impact upon public access within public tidelands and avoid unnecessary fill of coastal waters. Therefore, the proposed project is not consistent with CEQA or the policies of the Coastal Act as the project would result in significant adverse impacts to public access and marine resources. Therefore, the project must be denied.

APPENDIX A

SUNSTANTIVE FILE DOCUMENTS

The City of Newport Beach harbor Resources Division issued a Harbor Permit/Approval-in-Concept on April 11, 2012

Preliminary Eelgrass (*Zostera marina*) Survey Report and *Caulerpa taxifolia* Survey 755 Via Lido Soud, Newport Beach, March 29, 2012, prepared by Dive Works, 429-0 Shoreline Village Drive, Long Beach CA 90802

CDP 5-00-313-W(Schwary), 5-00-298(Schwary)
