

**CALIFORNIA COASTAL COMMISSION**

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**W 18a****ADDENDUM**

Go to original staff report

March 5, 2013

TO: Coastal Commissioners and Interested Parties

FROM: South Coast District Staff

SUBJECT: **ADDENDUM TO ITEM W18a, COASTAL COMMISSION PERMIT APPLICATION NO. 5-11-178-(CERVANTES-MOREHART) FOR THE COMMISSION MEETING OF WEDNESDAY, MARCH 6, 2013.**

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**I. CHANGES TO STAFF REPORT**

Commission staff recommends modifications to the Exhibits List and Section IV (Findings and Declarations) of the staff report. Deleted language is in ~~strike-through~~ and new language is in **bold underlined italicized text**, as shown below:

A. Page 5 – Add the following exhibits, as follows:

**EXHIBITS**

...

**Exhibit #10 – Applicant's Summary Letter of Opposition Dated 2/25/13**

**Exhibit #11 – Applicant's Letter of Opposition Dated 2/25/13**

**Exhibit #12 – Ex Parte**

B. Page 16 – Revise and add the following to Section II., as follows:

**IVH. FINDINGS AND DECLARATIONS:**

C. Pages 17 and 19 – Revise and add the following to Section IV.A.2., as follows:

2. **PRIOR COMMISSION ACTIONS ON ~~SITE ADJACENT SITES, AND ON~~ SITE AND SURROUNDING SITES**

...

c. SURROUNDING SITES

(1) 2912, 2910, 2908 and 2906 Lafayette Avenue

On May 11, 1989, the Commission approved Coastal Development Permit No. 5-89-286-(Cannery Village Investments) for: the demolition of existing dilapidated boat ramps and construction of a new bulkhead 32-feet bayward and backfilled with sand for an expanded boatyard which expanded across four (4) bayfront properties. Staff recommended approval of the project subject to one (1) Special Condition: SPECIAL CONDITION NO. 1 required wetland mitigation.

The applicant had provided information showing that the proposed bulkhead was for improvement and continued utilization of the site as a boatyard and that without the project as proposed the available area on the site would be insufficient to keep the boatyard, a coastal dependent use, open. Alternatives to the proposed bulkhead were feasible such as moving it in inland, but the applicant stated that the resultant reduced dry land would constrain the ability of the modern boatyard to function so that the project would be infeasible. Thus, it was determined that revising the project so that the bulkhead would be located more landward would render the project unattainable, such that an alternative is in reality a no project alternative.

Additionally, the applicant had stated that the Water Quality Control Board had deemed the existing ramps to be unacceptable by the current standards and a source of adverse impacts to water quality. The proposed project would remove the existing adverse impacts to water quality and replace it with development that would adhere to current water quality standards. Thus, water quality would be improved by the proposed project.

(2) 500-519 30<sup>th</sup> Street and 2910 and 2912 Lafayette Avenue

On May 7, 2002, the Commission approved Coastal Development Permit No. 5-02-096-(Cannery Lofts, L.P.) for: the demolition of buildings and associated parking lots within a 1.4 acre area, including one (1) office building, two (2) residences, one (1) former bar, two (2) warehouses, one (1) industrial building and two (2) boat storage yards. Staff recommended approval of the project subject to four (4) Special Conditions: SPECIAL CONDITION NO. 1 dealt with future development. SPECIAL CONDITION NO. 2 dealt with storage of materials, mechanized equipment and removal of demolition debris. SPECIAL CONDITION NO. 3 dealt with the location of the debris disposal site. SPECIAL CONDITION NO. 4 dealt with interim erosion

control measures. The major issues of the staff report included water quality and future development at the subject site.

This permit was only for the demolition of development on the subject sites. A separate Coastal Development Permit (CDP NO. 5-02-093) was reviewed concurrently for the construction of twenty-two (22) new mixed-use structures with professional offices or retail uses on the ground floor and residential units above at the subject sites. The applicant had separated the demolition activities from the proposed construction activities in order to expedite development at the subject sites. SPECIAL CONDITION NO. 1 informed the applicant that the approval of CDP NO. 5-02-096 in no way ensured approval of CDP NO. 5-02-093. Several water quality conditions were imposed in order to avoid any adverse impacts to water quality. The proposed demolition project did not adversely affect existing public access that was available at the corner of Lido Park Drive and Lafayette Avenue.

(2) 500-519 30<sup>th</sup> Street and 2912, 2910, 2908 and 2906 Lafayette Avenue

On July 8, 2002, the Commission approved Coastal Development Permit No. 5-02-093-(Cannery Lofts, L.P.) for: the construction of twenty-two (22) new mixed-use structures with professional offices or retail uses on the ground floor and residential units above. Staff recommended approval of the project subject to six (6) Special Conditions: SPECIAL CONDITION NO. 1 required acknowledgement of land use restriction through a future improvements Special Condition. SPECIAL CONDITION NO. 2 required submittal of a revised parking management plan. SPECIAL CONDITION NO. 3 required submittal of a construction best management practices plan. SPECIAL CONDITION NO. 4 required submittal of a water quality management plan. SPECIAL CONDITION NO. 5 required submittal of a preservation of public views document. SPECIAL CONDITION NO. 6 required submittal of a public improvements signage plan. The major issues of the staff report included parking, land use, public access, community character and water quality.

The project included a dedication of a 6-foot wide public walkway along the Rhine Channel bulkhead and improvements to the street end at 30<sup>th</sup> Street. The walkway aids in the City's efforts to create a public walkway along the Rhine Channel waterfront. In order to inform the public of the public access opportunities via the street end at 30<sup>th</sup> Street, a Special Condition was imposed which required submittal of a public improvements signage plan.

D. Pages 25 – Add the following to Section IV.B., as follows:

CONCLUSION

...

**SPECIAL CONDITION NO. 9** requires that any future maintenance or work to address changing sea level, increased flooding or other coastal hazards be undertaken on or inland of the proposed development and that there not be any seaward encroachment beyond the identified and recorded line of development. **The requirement to limit seaward encroachment relates to the need to avoid future encroachment on public tidelands as addressed in the following public access findings.** Only as conditioned does the Commission find that the proposed project is consistent with Section 30235 and 30253 of the Coastal Act.

E. Page 29 – Add the following to Section IV.D., as follows:

The subject site is located on the bayfront/Rhine Channel, between the street ends at 28<sup>th</sup> Street and 29<sup>th</sup> Street. There is presently bayfront lateral access from the 28<sup>th</sup> Street, street end to the subject site (Exhibit #6). There is also **a walkable surface that appears to provide some** lateral bayfront access **along the property at 2820 and 2818 Lafayette** from the 29<sup>th</sup> Street, street end, but that access ends at 2816 Lafayette Avenue due to an existing building that obstructs continuous access. **The applicant asserts that there is no formal lateral access along 2818/2820 Lafayette, but the City's Coastal Access and Recreation Map of the Certified LUP shows continuous lateral public access at that location.** So, continuous public lateral access along the bay front is presently obstructed by several properties ~~at the mid-point~~ between 28<sup>th</sup> and 29<sup>th</sup> Street.

F. Page 34 – Commission staff received letters of opposition from the applicant, through her attorney, Sherman Stacey dated February 25, 2013. One letter (Exhibit #10) was a summary of their points of opposition and another letter (Exhibit #11) was the actual letter. The applicant's attorney, attempts to obfuscate the issue of whether or not the subject property is subject to the public trust doctrine. His letter is filled with inconclusive evidence and non-controlling legal arguments. In response to the letters, add the following to Section IV.D., as follows:

**Before the March 2013 hearing on this application, staff received letters of opposition from the applicant, through her attorney, Sherman Stacey dated February 25, 2013. One letter (Exhibit #10) was a summary of their points of opposition and another letter (Exhibit #11) was the actual letter.**



The Letter (Exhibit #11) argues that the Commission does not have the proper constitutional nexus to impose Special Condition No. 2, requiring the applicant to offer to dedicate an access easement over her property, even if the process between the applicant and the State Lands Commission concludes that the property is subject to the public trust. However, in the event Special Condition No. 2 will be imposed, the constitutional standards referred to by the applicant's attorney would not apply. If the land is subject to the public trust, then the applicant does not have the requisite property rights to exclude the public.

The Commission is not imposing an exaction as a condition of approval for the proposed development. The Takings Clause of the Fifth Amendment of the U.S. Constitution provides that the government shall not take private property for public use without just compensation. In the exaction context when the government imposes a condition of approval that requires dedication of an easement, for example, there must be a nexus between the impact and the mitigation and the mitigation must be roughly proportional to the impact. (Dolan v. City of Tigard (1994) 512 U.S. 374, 386, 391.)

However, the Commission's imposition of Special Condition No. 2 does not impose an exaction on the subject property and therefore Dolan does not apply. As already mentioned throughout this staff report, when the state transfers title of public trust tidelands, the state retains an easement over those public trust lands for the benefit of the public (even if it is unrecorded), unless the legislature expressly removes public trust uses on a certain parcel or a patentee of a Mexican land grant perfected title to his or her land at the time of statehood. (Summa Corp. v. State Lands Commission (1984) 466 U.S. 198,202-206; Marks v. Whitney (1971) 6 Cal.3d 251, 259-261; City of Berkeley v. Superior Court of Alameda (1980) 26 Cal.3d 515, 525, 529.) The applicant's attorney's submittals, both for the March 2013 hearing and the December 2012 hearing, do not dispute the established case law governing the state's retention of a public trust easements on lands transferred to private parties. If in complying with Special Condition No. 2, the applicant submits documentation that the project site is subject the public trust easement, then the applicant took title to the property with a public trust easement against her property. The requirement to provide an accessway on the bulkhead, consistent with the public trust doctrine, is simply implementation of a right that already exists. If, on the other hand, the applicant submits documentation consistent with Special Condition No. 2 that concludes the project site is not subject to a public trust easement, then no pre-existing easement would exist on the subject property and the applicant need not provide public access across the bulkhead. Therefore, the Commission is not requiring a new exaction under Special Condition No. 2 but is simply acknowledging a potentially pre-existing public trust easement (depending on the outcome of the applicant's submittal of evidence in compliance with Special Condition No.2) and requiring the applicant to notify the public, through recordation of an OTD, signage and revised plans including a public pathway, of its right to pass on the public trust easement area for public trust purposes.

The Letter claims that the proposed bulkhead without an access component constitutes a public trust use because it benefits navigation. However, because the bulkhead will protect a private purpose, the applicant's building, rather than a public purpose such as public access, the Letter's position is unsubstantiated.

The Letter cites to the statutory grant of public trust lands for support, but fails to include the controlling provision of his citation, Section 1.(a) of Statute of 1978, Chapter 74<sup>1</sup> which reads:

“The [public trust] lands shall be used by the city and its successors for purposes in which there is a general statewide interest....” (emphasis added)

Further, Section 1.(a)(2) of Statute 1978, Chapter 74 provides that public trust lands shall be used for:

“the establishment, improvement, and conduct of public...recreational facilities open to the general public; and for the construction, reconstruction, repair, maintenance, and operation of all works, buildings, facilities, utilities, structures, and appliances incidental, necessary, or convenient for the promotion and accommodation of any such uses.” (emphasis added)

The Letter, while asserting that the proposed bulkhead is consistent with the public trust doctrine, clearly states in subheading 3.D.1. on page 7 and in the text on page 9 that the bulkhead will protect the applicant’s existing private building. As Statute 1978, Chapter 74, section 1.(a) establishes, public trust lands must be used “for purposes in which there is a general statewide interest,” not used for purposes in which there is only a private interest as in the case of protecting the applicant’s existing private structure from the sea. In consideration of the lack of a statewide interest in a bulkhead that is built to protect a private structure and considering the language of Statute 1978, Chapter 74, section 1.(a)(2), the construction of the bulkhead must be built to promote and accommodate a recreation facility open to the general public which would be a use consistent with the public trust doctrine. Therefore, if the project site is subject to the public trust, the proposed bulkhead without a public access component is not consistent with the public trust doctrine because it will only promote a private interest in protecting the applicant’s private structure.

The Letter relies on Statute of 1978, Chapter 74, Section 1.(a)(1) for the proposition that the proposed bulkhead includes a public trust use because it is necessary for the promotion of commerce and navigation. The Letter is incorrect in stating that bulkheads are necessary for commerce and navigation. Rather, the U.S. Army Corps of Engineers prescribes harbor lines, which include bulkhead and pierhead lines, so that bulkheads and piers do not interfere with the established navigational channels. (33 U.S.C. §§ 403a., 404.) Further, Congress included language in Title 33 U.S.C. , section 403a. that clearly lists bulkheads as an obstruction to navigation if built outside established harbor lines. Title 33 U.S.C., section 403a., entitled in the code as “Obstructions to navigation, misdemeanor offense,” provides, in relevant part:

“The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall

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<sup>1</sup> [http://www.slc.ca.gov/Granted\\_Lands/G09\\_Orange/G09-02\\_Newport\\_Beach/S1978\\_Ch74.pdf](http://www.slc.ca.gov/Granted_Lands/G09_Orange/G09-02_Newport_Beach/S1978_Ch74.pdf).

not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines....”

If Congress had thought that a bulkhead “allows improvement of the waters to benefit navigation” as applicant’s attorney states, then the corollary would be that Congress would have found that bulkheads do not obstruct the navigable capacity of the waters of the United States. As Congress made clear, it found that bulkheads obstruct the navigable capacity of the waters of the United States if built outside harbor lines. Nowhere in the Rivers and Harbors Act does Congress take the position that bulkheads that are built landward of the bulkhead line are necessary for the promotion or accommodation of commerce and navigation, as the Letter alleges. The Letter cites to no legal authority interpreting the Rivers and Harbors Act that concludes that a bulkhead benefits navigation. “Bulkhead,” in a coastal engineering context, is defined as a protective wall along a waterfront for shore protection.<sup>2</sup> There is no definition of bulkhead that describes a bulkhead as a structure that protects a navigable channel and thus promotes commerce and navigation. Rather, bulkheads are regularly built to protect property sited on land. Thus, bulkheads are not “improvement of the waters to benefit navigation.” Therefore, the Letter has not established the claim that the proposed bulkhead somehow benefits navigation and is consistent with the public trust doctrine.

The Letter claims that the Commission does not have the authority to determine the extent of public trust uses on public trust lands or whether or not a proposed development is in conflict with the public trust, citing to two cases for support- Mallon v. City of Long Beach and People v. City of Long Beach. The Letter is incorrect on these grounds because section 30210 of the Coastal Act provides the Commission with the requisite authority to condition projects to mitigate impacts on public trust resources associated with access and recreation to and along the state’s navigable waters.

The Letter’s reliance on the cited cases does not support the claim that the Commission cannot determine whether or not a proposed development is consistent with the public trust. Both cases found that only the legislature may determine whether or not to remove public trust uses from public trust property and the final resolution of whether or not a use is consistent with the legislatively-determined uses rests with the courts. (Mallon v. City of Long Beach (1955) 44 Cal.2d 199, 209; (People v. City of Long Beach (1958) 51 Cal.2d 875, 883.) The Commission agrees that only the legislature may dictate the extent/scope of uses allowed under the public trust doctrine and only the courts can conclusively determine if a proposed use of trust lands is consistent with the legislatively-determined scope of public trust uses. These cases, however, do not establish that the Commission does not have the authority to consider whether or not a proposed development is consistent with the public trust doctrine. In fact, there are no cases that make that conclusion of law. In contrast, the Commission is vested with the authority to assure that it acts in a manner consistent with section 30210 of the

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<sup>2</sup> <http://www.thefreedictionary.com/bulkhead>. <http://www.merriam-webster.com/dictionary/bulkhead>; <http://dictionary.reference.com/browse/bulkhead>;

Coastal Act which requires the Commission to carry “out the requirement of Section 4 of Article X of the California Constitution” and provide for maximum access and recreational opportunities for all people. Section 4 of Article X of the California Constitution provides the following:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof. (emphasis added.)

This section merges the common law public trust doctrine with the California Constitution. (See Personal Watercraft Coalition v. Marin County Board of Supervisors (2002) 100 Cal.App.4<sup>th</sup> 129, 144-145.) The Legislature, in furthering the goals of Article X Section 4 of the Constitution, enacted section 30210 of the Coastal Act to ensure the public can always attain access to navigable waters for recreational purposes. As such, through this legislative mandate, the Commission is charged with the duty of ensuring that proposed development is consistent with Section 30210 of the Coastal Act, and by extension, the public trust doctrine. Therefore, the Commission has the authority to impose a condition requiring a public trust use on proposed development if such development would be inconsistent with section 30210 of the Coastal Act without such a condition.

The Letter mistakenly relies on an assertion that prior Commission and City precedent do not justify the imposition of Special Condition No. 2. The Letter’s position is incorrect because the Commission need only rely on site-specific evidence to support its imposition of Special Condition No. 2. (Surfside Colony, Ltd. v. CCC (1991) 226 Cal.App.3d 1260, 1272.) While the Commission’s precedent on permit actions may inform future Commission actions on development proposals, in this case the Commission finds that site-specific evidence warrants imposition of Special Condition No. 2. The site-specific evidence consists of inconclusive evidence suggesting that either the project site consisted of swamp and overflow lands or submerged and tide lands at the time of statehood. To ensure that the Commission is not approving development that may have an impact on public trust resources, it is imperative that the Commission receive definitive evidence, prior to issuance of the permit, on the issue of whether or not the project site is subject to a public trust easement. Therefore, the Commission is imposing Special Condition No. 2, requiring the applicant to submit evidence that is conclusive on the issue of whether or not the project site is subject to a public trust easement.

The area between proposed...

To ensure that the public is aware that lateral public access is available on site, the Commission imposes **SPECIAL CONDITION NO. 5**, which requires submittal of Public Access Signage Plan, which will indicate the availability of the on-site public amenities.

*When the Commission acts on proposed development at a public hearing, the Commission is required to act in a manner such that it approves a project that is the least environmentally damaging feasible alternative. In this case, staff found that bringing the proposed bulkhead further landward is a feasible alternative that is the least environmentally damaging alternative since the redesigned bulkhead will result in less fill of coastal waters and would reduce impacts on the marine environment. Limiting encroachment will also have a public access benefit should a public trust servitude/easement be verified as outlined in Special Condition No. 2. Limiting encroachment further would ensure the project is consistent with section 30210 in providing maximum access to and along the water consistent with Section 4 of Article X of the California Constitution. Therefore, to ensure that the redesigned bulkhead maintains its approved configuration and doesn't encroach further seaward into the public trust easement over the applicant's property, the Commission is imposing SPECIAL CONDITION NO. 9, requiring that any future repair or maintenance, enhancement, reinforcement, or any other activity affecting the shoreline protective device (seawall/bulkhead) approved pursuant to Coastal Development Permit No. 5-11-178 only occur within the footprint of the approved bulkhead or landward of it so that maximum access is provided consistent with Section 30210 of the Coastal Act.*

Therefore, the Commission finds that the proposed development, as conditioned, would be consistent with Sections 30210, 30212 and 30213 of the Coastal Act regarding public access.

## **II. LETTERS RECEIVED**

Commission staff received two (2) letters on February 25, 2013 from the agent of the project regarding concerns with the staff report and recommendation. They have been attached to this addendum as Exhibit #10 (summary of letter) and Exhibit #11 (actual letter) to the staff report.

## **III. EX PARTE**

An Ex Parte Communication form was received on March 4, 2013 and has been attached to this addendum as Exhibit #12 to the staff report.

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W 18a

February 25, 2012

Commissioners  
California Coastal Commission  
45 Fremont Street, #2000  
San Francisco, California 94105

Re: Application No. 5-11-178 (Morehart)  
Summary of Argument

Dear Commissioners:

On March 6, 2013, I will appear before you on behalf of Lisa Cervantes-Morehart, the Applicant on the Application No. 5-11-178 (Morehart). I have attached an extensive letter with exhibits to explain the Applicant's position on the Staff Recommendation. This letter summarizes the arguments. The Applicant seeks to construct a bulkhead on the Applicant's property at 2808 Lafayette Avenue, Newport Beach. The purpose and design of the bulkhead is similar to those bulkheads that border more than 90% of the shoreline in lower Newport Harbor. The bulkhead secures the upland and permits the water area to be made more useful for mooring, navigation and/or water recreational purposes.

The staff has recommended that you approve the bulkhead with Special Conditions 1, 6, 10, 11 & 12 requiring specific design and construction requirements. The Applicant accepts these Special Conditions. The Applicant also does not object to Special Conditions 7, 8 and 13. However, the Applicant does object to Special Conditions 2, 3, 4 and 5 which require a public access easement across the Applicant's property unless the State Lands Commission determines that the bulkhead does not affect any property subject to a public trust interest. The Applicant also objects to Special Condition 9 which requires a waiver of any further efforts to protect the property. This letter summarizes these objections.

**1. The Applicant Objects to the Public Access Conditions.**

Special Condition 2 requires that the Applicant offer to dedicate a public access easement between the existing building and the bulkhead, a distance of not less than 6 feet. (See Staff Report Exhibit #4.) Special Conditions 3, 4 and 5 requires the Applicant to maintain the access easement, to build all improvements necessary to facilitate public access as a part of the project, and to post signs to direct the public to the use of the Applicant's property.

The Applicant acknowledges that Special Condition No. 2 will not require a public access easement if by adjudication or agreement it is determined that the bulkhead does not interfere with any public trust tidelands. However, the Applicant remains opposed to Special Condition No. 2 because even if public trust tidelands were involved, the bulkhead is a permitted harbor improvement approved by the trustee of the tidelands. Of the 2,500 feet of the Rhine Channel frontage, only the 60 feet on the Applicant's property lacks a bulkhead.

a) The findings on Page 30-31 concerning the 1976 condition by the City for a contingent easement for a public walkway on the approved wharf are inaccurate. There Has Never Been a public access easement on the Applicant's Property. A prior offer to the City expired in 2002.

b) The finding on Page 30 that the Newport Beach LUP supports the condition is inaccurate. LUP Policy 3.1.1-9 includes that the City must act in a manner that "does not violate private property rights". (Staff Report, page 29.)

c) The findings on Page 30 that Newport Beach in the past had required similar conditions on other properties do not support the an access condition here. There is no precedent of requiring access solely for a bulkhead improvement. In fact, the only other new bulkhead approved on the Rhine Channel by the Commission in CDP No. 5-89-286 did not have any public access condition.

d) The finding on Page 30 that the bulkhead would fill tidelands is incorrect in that the bulkhead is located on privately-owned lands. The Applicant's property is not subject to a public trust interest. Just because a property has salt water on it is not conclusive of a public trust interest. This part of Newport Beach was first granted by the State of California to James McFadden in 1892 as "swamp and overflow lands". (See Exhibit C.) The findings on page 32 of the Staff Report that there is no evidence that the Applicant's property was part of the "swamp and overflow lands" is conclusively rebutted by (i) the State Lands Commission admission that the property was part of the grant to Location No. 3089 (see Exhibits A, B, C, G) (ii) by the 1890 Surveyor General survey identifying the swamp and overflow lands (see Exhibits D, E, G), and (iii) by the location of the Applicant's property on the Lancaster's Addition subdivision map at the boundary of two lots granted as S&O Location 3089 (see Exhibit F). Public Resources Code §7552.5 provides that when swamp and overflow lands are dredged to create navigable waters, no public trust interest arises.

e) The finding on Page 31 that the bulkhead would be inconsistent with the public trust interest without a public access requirement is incorrect in that a bulkhead is a navigation improvement normally found on tidelands in Newport Harbor. The Staff Report claims that the existence of a tideland public trust interest alone is sufficient to justify exaction of an easement on private property. The public is excluded from many areas of privately owned lands which may be subject to tidal action. It is a reasonable use of a privately owned land to place a

bulkhead to protect an existing structure from damage. The location where the bulkhead is located was underneath a wharf for 75 years. It has been covered by rubble for the past 12 years. The present condition of the location of the proposed bulkhead can be seen in Exhibit N. The public has never used the area. The land serves no public purpose. The public does not own the land. To the extent that there may be a claim of a public trust interest, the holder of that interest has consented to the bulkhead. Under these facts, the Commission cannot justify an exaction of private property rights as a condition to this permit.

**2. The Applicant Objects to a Waiver of the Right to Protect the Property in the Future.**

Special Condition No. 9 requires the Applicant to permanently waive the right to seek a permit to construct any other type of protection which may prove necessary in the future if that protection is on the bay side of the bulkhead. The justification for this condition is claimed in Public Resources Code §30235 and §30253.

As to §30235, the Staff Report agrees that the Applicant's proposed bulkhead is necessary to protect the existing structures in danger from erosion. Recently, the Rhine Channel dredging project deepened the channel to -19 feet MLLW directly in front of the Applicant's property. The dredging approved by the Commission changed the depth of the bottom in front of the Applicant's property to exceed the 4V:1H slope which was the design criteria of the dredging project. This was likely unavoidable since the contaminated sediments were significant in this location and the Rhine Channel dredging project design standard was to excavate one foot into natural uncontaminated soils.

The Staff Report finds that the Applicant's proposed bulkhead will assure stability and structural integrity as required by Public Resources §30253. On page 23 of the Staff Report, the quotation in italics from §30253 is incomplete. The portion of §30253 which prohibits new development from "*in any way requiring construction of protective devices*" applies only to those protective devices "*that would substantially alter natural landforms along bluffs and cliffs.*" There are no bluffs or cliffs on the Applicant's property. There is no justification for the waiver required by Special Condition No. 9.

**3. Conclusion.**

The Recommended Findings do not support the imposition of an access condition. The cited provisions of the Coastal Act do not support the imposition of the protection waiver condition. The development is necessary to protect an existing building in danger from erosion, the danger of which has increased from a recently completed dredging project approved by the Commission. The Commission should make an amending motion as follows:



Commissioners  
California Coastal Commission  
February 25, 2012  
Page 4

I MOVE TO AMEND THE STAFF RECOMMENDATION TO  
REMOVE SPECIAL CONDITIONS NO. 2, 3, 4, 5 AND 9, AND THE  
REFERENCES TO AN EASEMENT IN SPECIAL CONDITION NO. 1.

The project is the least environmentally damaging alternative and the elimination of Special Conditions 2, 3, 4, 5 and 9 does not affect the environmental impacts of the project.

Sincerely,

SHERMAN L. STACEY

SLS

cc: Lisa & John Morehart  
South Coast District Office  
All Commissioners

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W 18a

February 25, 2012

Commissioners  
California Coastal Commission  
45 Fremont Street, #2000  
San Francisco, California 94105

Re: Application No. 5-11-178 (Morehart)

Dear Commissioners:

On March 6, 2013, I will appear before you on behalf of Lisa Cervantes-Morehart, the Applicant on the Application No. 5-11-178 (Morehart). The Applicant seeks to construct a bulkhead on the Applicant's property at 2808 Lafayette Avenue, Newport Beach. The purpose and design of the bulkhead is similar to those bulkheads that border more than 90% of the shoreline in lower Newport Harbor. The bulkhead secures the upland and permits the water area to be made more useful for mooring, navigation and/or water recreational purposes.

The staff has recommended that you approve the bulkhead with Special Conditions 1, 6, 10, 11 & 12 requiring specific design and construction requirements, including relocating the bulkhead from a distance 10 feet from the existing building to a distance of only 7 feet. The Applicant accepts these Special Conditions. The Applicant also does not object to Special Conditions 7, 8 and 13. However, the Applicant does object to Special Conditions 2, 3, 4 and 5 which require a public access easement across the Applicant's property unless the State Lands Commission determines that the bulkhead does not affect any property subject to a public trust interest. The Applicant also objects to Special Condition 9 which requires a waiver of any further efforts to protect the property.

**1. The Prior Hearing.**

This matter came for hearing on December 12, 2012. At the hearing the Commission received conflicting information from the State Lands Commission regarding whether or not any portion of the Applicant's property was subject to the public trust. The Applicant advised Colin Connor of the State Lands Commission of the need to provide evidence to the Coastal Commission that public tidelands were not on the property. In response, the Applicant received by email at 12:56 p.m., a letter dated December 12, 2012 from Grace Kato, Public Land Manager, State Lands Commission (Exhibit A hereto) stating:

“After review of the information provided and in-house records, staff has determined the Rhine Channel between 28<sup>th</sup> Street and 29<sup>th</sup> Street consists of an artificial cut from lands the State acquired and patented as Swamp and Overflowed lands (S&O Location 3089).

“A portion of the present Rhine Channel may extend onto the natural bed of lower Newport Bay which at this location has been granted to the City of Newport Beach, pursuant to Chapter 74, Statutes of 1978, as amended.”

This language was taken directly from State Lands Commission Status Determination No. SD 2011-07-01.1 which identifies the Rhine Channel as being within Lot 6, Section 28 and Lot 2, Sec 33, Township 6 South, Range 10 West, San Bernardino Meridian. Maps prepared in 1890 identifying these locations are attached as Exhibits C and D and explained below.

The Commission Staff had earlier received a contradictory email on December 12, 2012 at 9:57 a.m. from the State Lands Commission legal staff suggesting that there was evidence that a public trust interest may exist. Finally, the Executive Officer of the State Lands Commission wrote by email at 4:22 p.m. on December 12, 2012 to state that the question of a public trust interest was “unresolved”. Therefore, the Applicant agreed to waive time so that the State Lands Commission could make a definitive statement. On January 28, 2013, the State Lands Commission wrote that the question of any public trust interest in the Applicant’s property remained “unresolved”. A copy of the State Lands Commission January 28, 2013 letter is attached as Exhibit B (and attached to the Staff Report as Exhibit #9).

There is no question that the Applicant is the owner of the entire property which is 60 feet wide and extends for 100 feet from Lafayette Avenue. The property was part of State of California Swamp and Overflow Lands Location No. 3089 (“S&O Location 3089”) issued to James McFadden on May 16, 1892. A copy of the certificate identifying the parcels acquired by James McFadden is attached as Exhibit C. A map prepared in 1890 by the Surveyor General identified the land which McFadden acquired. Exhibit D hereto is a copy of that map produced to me by the State Lands Commission. I have marked the Lots which are described in S&O Location 3089. Exhibit E is an enlargement of the area in which Lot 6 in Section 28 and Lot 2 in Section 33 are found.

In 1907, a portion of the property in S&O Location 3089 was subdivided creating individual lots of which the Applicant is the owner of Lots 5 and 6 of Block 425 of Lancaster’s Addition. A copy of the Lancaster’s Addition Tract Map recorded in 1907 is attached as Exhibit F. I have identified the location of Lots 5 and 6 which are immediately south of the boundary between Lot 6 in Section 28 and Lot 2 in Section 33. Lots 5 and 6 are approximately 400 feet east of the westerly boundary of said Lot 7, 900 feet west of the easterly boundary, and 650 feet north of the southerly boundary.

Exhibit G is another copy of the 1890 survey exactly as I received it from the State Lands Commission. The State Lands Commission staff itself located where the Applicant's property is and wrote the word "SITE" with an arrow to the location that I have described. The State Lands Commission letter of January 28, 2013 (Exhibit B), admits that the Applicant's property was part of the Swamp and Overflow Lands. Despite the overwhelming evidence that the Applicant's property was not tide lands at the time of admission of California to the United States, the State Lands Commission still treats the question of a public trust interest as "unresolved".

The Staff Report correctly concludes that the Coastal Commission cannot resolve this question of public trust interest. Rather, Special Condition No. 2 requires that the Applicant either (i) resolve by agreement or adjudication with the State Lands Commission that no public trust interest is affected, or (ii) make an offer to dedicate a public access easement 7 feet wide across the 60 foot width of the Applicant's property from the bulkhead to the building. The Applicant will seek to resolve this matter with the State Lands Commission. However, the Applicant disagrees that even if the public trust interest applies to the area where the bulkhead is to be located, that the bulkhead would be inconsistent with the public trust interest unless a public access easement is granted.

## **2. The Project.**

As described in the Staff Report, the project is a vertical bulkhead wall set back a distance of 33 feet from boundary of the Applicant's property with the Rhine Channel. The bulkhead will protect an existing building built in 1977. From the 1920's until 1977, there was a different building constructed on a wharf that extended over the water to the boundary between the property and the Rhine Channel. CDP No. P-5-19-76-7903 authorized the removal of the building and the 50 year old wharf, and its replacement with a new wharf with buildings both on the land and on the wharf. A photograph of the buildings approved by the Commission is attached as Exhibit H. In 2000, the new wharf suffered a structural collapse and the City ordered the wharf and building removed. (See Exhibit I.) The structural design of the new wharf and the building on the land was integrated. The wharf constructed in 1977 provided lateral support to the buildings that remain today.

For many years the City of Newport Beach had been planning a dredging project for the Rhine Channel to remove contaminated sediments that had been associated with the canning and other industrial uses along the Rhine Channel. On January 12, 2011, the Coastal Commission approved the dredging project to remove 150,000 cubic yards of contaminated sediment in CDP No. 5-10-162. The dredging project was confined to the area outside of the abutting private property boundaries.

The Applicant was advised that the dredging project would significantly lower depths abutting the Applicant's property. The deeper channel depth could adversely affect the stability of the existing building which now lacks the lateral support of the failed wharf. It was

recommended that the Applicant place a bulkhead on the property to assure stability. In addition, every other property along both sides of the Rhine Channel (a distance of over 2,500 feet) has a bulkhead. Only the 60 feet on the Applicant's property lacks a bulkhead.

Both the project engineer Plamen Petrov and a second opinion from engineer Alexander Robertson attest to the urgency to complete the project. (See Exhibit J.) The consequences from the dredging project pose a higher risk of failure than existed before the dredging. The Staff recommends favorably on the construction of the bulkhead with numerous Special Conditions related to design and construction practices. All of these Special Conditions are acceptable to the Applicant. What is not acceptable is the demand for an easement for public access and a waiver of further construction to protect the existing structure.

### **3. The Applicant's Objections to Public Access Conditions.**

Special Condition 2 requires that the Applicant offer to dedicate a public access easement between the existing building and the bulkhead, a distance of not less than 6 feet. (See Staff Report Exhibit #4.) Special Condition 2 further requires that (i) the access easement be open 24 hours a day, and (ii) the Applicant must maintain the access easement unless the party accepting the easement opts to provide maintenance. Public Resources Code §30212 prohibits the opening of a public access easement unless a public agency or private association assumes maintenance and liability. The party accepting an access easement does not have the option to decline maintenance.

Special Condition 3 requires the Applicant to maintain the access easement. Special Condition 4 requires that the Applicant build all improvements necessary to facilitate public access as a part of the project, even though no offer to dedicate has been accepted. Special Condition 5 requires the Applicant to post signs to direct the public to the use of the Applicant's property.

All of these conditions are unacceptable. The findings on pages 28 to 34 of the Staff Report do not support these conditions. Several of the proposed findings are not supported by the evidence.

- a) The findings on Page 30-31 concerning the 1976 condition by the City for a contingent easement for a public walkway on the approved wharf are inaccurate.
- b) The finding on Page 30 that the Newport Beach LUP supports the condition is inaccurate.
- c) The findings on Page 30 that Newport Beach in the past had required similar conditions on other properties do not support the an access condition here.

- c) The finding on Page 30 that the bulkhead would fill tidelands is incorrect in that the bulkhead is located on privately-owned lands.

**A. There Has Never Been a Public Access Easement on the Applicant's Property.**

The Staff Report claims that the recommended public access easement replaces a public walkway on the Applicant's property that had been required by the City of Newport Beach in the approval of the wharf and building in 1976. (See, CDP No. P-5-19-76-7903 (Ziemer)) In Ziemer's case, a proposed public walkway was placed at the waterside of the wharf to be built. The pier or wharf collapsed in 2000 and was removed as a nuisance. (See, Exhibit I.) Exhibit H hereto is a photograph of the wharf and buildings approved in CDP No. P-5-19-76-7903. Exhibit #3 to the Staff Report and Exhibit K hereto are aerial photographs comparing the wharf before it failed to the present condition.

The City's public walkway condition was a Contingent Offer for Public Access. A copy of the Contingent Offer was obtained from the City files and is attached as Exhibit L. There are two facts in this Contingent Offer that rebut the existence of any public access easement or continuing offer of a public access easement. First, the Contingent Offer does not become an easement until

"such time as the parcel located immediately to the north **and** the parcel located immediately to the south of the property become connected with the pier or wharf adjacent to the property by piers or wharfs or other similar structures to form a continuous walkway." (Page 2, emphasis added.)

Therefore, there was no right for the public to enter the Applicant's wharf until connections on both sides of the wharf had been made. The property to the north was never connected. Second, the Contingent Offer expired 25 years after 1977. (See, Exhibit L, ¶ 2.) Since both connections were never satisfied by 2002, the Contingent Offer expired by its own terms and did not create any easement.

Finally, the wharf is gone. The wharf fell down including the part proposed to be for a public walkway. In substance, the Staff Report asks the Commission to require a public access easement on an 7 foot strip of the Applicant's private property (12% of the usable land) based on the following facts: (1) there was a contemplated public walkway on a wharf, (2) the walkway was never open to the public, (3) the walkway was never connected to adjoining property, (4) the conditions to the creation of an easement were never satisfied, (5) the offer for the easement has expired, and (6) the structure on which the walkway was to be placed collapsed 12 years ago. The Commission cannot base a public access condition on these facts.

**B. Policies in the Newport Beach Certified Land Use Plan Cannot Justify the Exaction of an Easement.**

The Staff Report cites several policies in the Newport Beach Certified Land Use Plan in the justification of the access conditions. Policy 3.1.1-9 includes that the City must act in a manner that “does not violate private property rights”. (Staff Report, page 29.) This is consistent with the Coastal Act provision in Public Resources Code §30010 which states:

“The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor.”

As described in Section 3E on page 12, below, the Commission cannot require that the Applicant grant an easement through the Applicant’s property without violating Public Resources Code §30010, Article 1, §7 of the California Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution.

**C. Prior Decisions of the City of Newport Beach or the Commission do not Support the Present Access Conditions.**

The Staff Report cites several decisions of the City of Newport Beach that required access be provided at 2800 and 2804-2806 Lafayette Avenue. Other property owners may have agreed to grant access for new projects. There is no precedent of requiring access solely for a bulkhead improvement. In fact, the only other new bulkhead approved on the Rhine Channel by the Commission in CDP No. 5-89-286 did not have any public access condition. A copy of the Commission’s findings for CDP No. 5-89-286 are attached as Exhibit M. The Commissioners should also note that CDP No. 5-89-286 approved moving a bulkhead 32 feet to the Rhine Channel boundary and backfill the land. No public access condition was imposed.

On July 8, 2002, after the new bulkhead was constructed at 2906-2912 Lafayette Avenue, the Commission approved four mixed use, 34 foot high residential structures in CDP No. 5-02-093 known as the Cannery Lofts. These structures occupy 22 feet of the new fill permitted by the Commission behind the new bulkhead approved in CDP No. 5-89-286. So the Commission made findings of fact that massive new buildings with residences were consistent with the Coastal Act. These new building are located upon what the Commission now claims to be tidelands which were filled with the approval of the Commission. The findings adopted by the Commission to approve CDP No. 5-89-286 and CDP No. 5-02-093 do not even include the words “public trust” or “public tidelands” even though 3,840 square feet of tidal area was bulkheaded and filled for the ultimate construction of residences. Yet 300 feet away and 10 years later, the Applicant is not only pushed back the 33 feet from the property line, the Applicant is

also told that the bulkhead itself is not consistent with the newly alleged public trust.

Each property owner has their own choice whether or not to assert their Constitutional right to be free of uncompensated taking of property. CDP No. P-5-19-76-7903 and CDP No. P-80-7354 both predated the decision of the United States Supreme Court in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825. The fact that other property owners may have made a grant is not evidence that the Applicant can be compelled to make a grant.

Further, Exhibit 6 to the Staff Report identifies an alleged public access at 2820 Lafayette Avenue. There is no public access at 2820 Lafayette Avenue. There has never been a coastal permit for any development at 2820 Lafayette Avenue and so there can never have been a condition to require public access.

**D. The Possible Existence of Tidal Action on Private Property Does Not Support an Access Condition.**

**1. A Bulkhead to Protect an Existing Building is Not Inconsistent with a Public Trust Tideland Interest.**

The Staff Report claims that the existence of a tideland public trust interest alone is sufficient to justify exaction of an easement on private property. The public is excluded from many areas of privately owned lands which may be subject to tidal action. It is a reasonable use of privately owned land to place a bulkhead to protect an existing structure from damage. The location where the bulkhead is located was underneath a wharf for 75 years. It has been covered by rubble for the past 12 years. The present condition of the location of the proposed bulkhead can be seen in Exhibit N. The public has never used the area. The land serves no public purpose. The public does not own the land. To the extent that there may be a claim of a public trust interest, the City, as trustee, has consented to the bulkhead. Under these facts, the Commission cannot justify an exaction of private property rights as a condition to this permit.

The Applicant owns the property a distance of 100 feet from the street. This includes approximately 40 feet previously occupied by the wharf. This 40 feet is behind the U.S. Bulkhead Line and is private property, even when covered by water. (See Exhibit O.) Even if the property contains tidelands subject to the public trust, there is no restriction on constructing a bulkhead on tidelands. As explained below, a bulkhead is a normal and common harbor improvement. Harbor improvements are specifically authorized by statute.

The City of Newport Beach is the trustee of the tidelands in Newport Harbor under a grant which originated in 1919 (Ch. 494, Stats. 1919) and was subsequently amended several times. (Chapter 70, Stats. 1927; Ch. 142, Stats. 1929, Ch. 574, Stats. 1929, Ch. 813, Stats. 1929, Ch. 200, Stats. 1931). In 1978, these prior acts were repealed and replaced by Chapter 74 of Statutes of 1978. Section 1 of Chapter 74 grants “all of the right, title, and interest of the State of



California held by the state by virtue of its sovereignty in an to all that portion of the tidelands and submerged lands” within the 1919 boundaries of the City of Newport Beach (which includes the Applicant’s property).

Assuming for purposes of argument that the “right, title, and interest of the State” includes a public trust interest in the portion of the Applicant’s property subject to the tides, the question is whether or not the bulkhead proposed by the Applicant would interfere with this trust interest. Section 1(a)(1) of Chapter 74 defines the public trust uses which are allowed in the tidelands granted to the City. These uses include:

“For the establishment, improvement, and conduct of a public harbor; and for the construction, maintenance, and operation thereon of wharves, docks, piers, slips, quays, ways, and streets, and other utilities, structures, and appliances necessary or convenient for the promotion or accommodation of commerce and navigation.”

The bulkhead is a “structure . . . necessary or convenient for the promotion or accommodation of commerce and navigation”. Bulkheads to accommodate navigation exist on more than 90% of the tidelands in the City of Newport Beach. The bulkhead not only secures the upland property, it allows improvement of the waters to benefit navigation without harming the upland properties. Other than the Applicant’s 60 feet of frontage, all 2,500 feet of the Rhine Channel is protected by bulkheads (including those approved by the Commission). The dredging of the Rhine Channel to greater depths to benefit navigation and to remove contaminants has only contributed to the Applicant’s need to provide a bulkhead on her property. Independent of that need, the bulkhead would still be consistent with the Coastal Act.

The evidence that bulkheads are a normal structure of harbor improvements for navigation is well established under Federal Law. Since 1913, the Federal Government has jurisdiction over navigation improvements in Newport Harbor. (*Newcomb v. City of Newport Beach* (1936) 7 Cal.2d 393, 401; 33 U.S.C. §424.) Congress delegated to the Department of the Army the right to establish harbor and navigational improvements under the Rivers and Harbors Act of 1899. Section 404 of the Rivers and Harbors Act (33 U.S.C. §404) authorized the Secretary of the Army to establish “harbor lines” to protect navigation. Section 424 was enacted in 1913 specifically authorizing the establishment of pierhead and bulkhead lines in Newport Harbor in accordance with a plan dated March 25, 1913. The 1913 plan does not show there to be a “Rhine Channel”. (See Exhibit P) Although shown on the 1907 subdivision map (Exhibit F), the Rhine was not dredged until sometime after 1921 when the Santa Ana River was dammed and diverted so that it no longer flowed into Newport Bay. The original dam and dredging plan did not extend into the Rhine Channel, but stopped farther out in the bay. (See Exhibit P)

Section 424a was enacted in 1925 to authorize the Secretary of the Army to alter the bulkhead and pierhead lines which were established in 1913. In 1936, the Secretary of the Army identified the Rhine Channel as a navigable water in Newport Harbor for the first time. The

limits of the Rhine Channel shown on the April 28, 1936 War Department Harbor Lines map show all of the Applicant's property outside the Rhine Channel. (See Exhibit Q)

In December 1950, the Army Corps of Engineers published a new Harbor Lines map for Newport Harbor which identifies the bulkhead line and pierhead line which exist today. (See Exhibit R) The established U.S. Bulkhead Line at the Applicant's property is located at the Applicant's property line. The 1950 map provides that the U.S. Bulkhead Line is the "channelward limit to which solid fill structures may be built." Both bulkheads and piers are a part of the harbor improvements that are consistent with the public trust as established by Federal Law which dates back to 1899.

The U.S. Bulkhead Line is established by Federal Law as the limit of where a bulkhead can be erected within Newport Bay. The Applicant had agreed to place the bulkhead on the Applicant's property approximately 33 feet landward of the U.S. Bulkhead line. The Applicant has the property interest necessary to carry out the project and the City as trustee of the tidelands, to the extent that there is a claim of tidelands on the property, has given approval to the bulkhead. The proper use of the tidelands is subject to judicial regulation to prevent a breach of the trust. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209.) Even the State Lands Commission must seek judicial intervention to validate its interpretation of the public trust over a local government grantee. (*People v. City of Long Beach* (1958) 51 Cal.2d 875, 883.) The Coastal Commission is not vested with powers to determine the extent of the public trust or to rule that an improvement authorized by the grantee holding in trust (the City) is in conflict with the public trust.

The proposed bulkhead does not block any public use that has been made or reasonably could be made of the area where the bulkhead is located. The Applicant has a building in danger and the Staff recommends that the Applicant cannot protect the building within her own property without giving up all rights in 12% of the property. The public access easement which would be required by Special Conditions 2, 3, 4 and 5 is so broad that it is the equivalent of fee title.

**2. The Property is Subject to a Navigational Easement, Not a Public Trust Interest.**

The Applicant's property is not subject to a public trust interest. Just because a property has salt water on it is not conclusive of a public trust interest. This part of Newport Beach was first granted by the State of California to James McFadden in 1892 as "swamp and overflow lands". (See Exhibit C.) The findings on page 32 of the Staff Report that there is no evidence that the Applicant's property was part of the "swamp and overflow lands" is conclusively rebutted by (i) the State Lands Commission admission that the property was part of the grant to Location 3089 (see Exhibits A, B, C, G) (ii) by the 1890 Surveyor General survey identifying the swamp and overflow lands (see Exhibits D, E, G), and (iii) by the location of the Applicant's property on the Lancaster's Addition subdivision map at the boundary of two lots granted as

S&O Location 3089 (see Exhibit F).

Public Resources Code §7552.5 provides that when swamp and overflow lands which are dredged to create navigable waters, no public trust interest arises. Only a navigational easement arises which can be terminated if it does not interfere with navigation. The project does not interfere with navigation, the limits of which have been conclusively established under Federal Law.

The 1890 survey of the swamp and overflowed lands is the same survey which was described in the Supreme Court decision in *Newcomb v. City of Newport Beach* (1936) 7 Cal.3d 393, 400. The property at issue in *Newcomb* was not swamp and overflowed lands but tide lands which had been subject to a patent to tide lands authorized under the then existing Sections 3440-3443 of the Political Code. In distinguishing between the effect of a patent to tide lands (which did not convey title free of the public trust interest, *Id.* At 399) and a patent to swamp and overflowed lands, Justice Seawell wrote:

“Said official plat of swamp and overflowed lands was prepared for purposes of segregating the lands which passed from the United States to the state of California under the Arkansas Swamp Land Act of 1950 (U.S. Rev. Stats., sec. 2479; 21 Cal.Jur. 681.) The lands which passed under said act were lands other than tide and submerged lands on navigable waters. Title to tide and submerged lands on navigable waters vested in the states not by virtue of grant from the federal government but by virtue of their sovereignty. The lands which passed to the state by grant under the Swamp Land Act were thereafter subject to absolute alienation by the state, free of any public trust for navigation. The official surveys of swamp and overflowed lands are a conclusive determination as to the lands which passed to the state under the act. (Foss v. Johnston, 158 Cal. 119 [110 Pac 294]; Bates v. Halstead, 130 Cal. 62 [62 Pac. 305, 80 Am.St.Rep. 70].)” 7 Cal.2d at 400. (emphasis added)

The City of Newport Beach is holder of the tidelands interests under a grant from the State. The City has mapped its tidelands and other navigational channels. On the map prepared by the City, the Rhine Channel is not shown as tidelands. The Rhine Channel is shown as “Waterways Dedicated or Reserved”. (See Exhibit S) This is consistent with the dedication of a navigational easement over the water under Public Resources Code §7552.5 when the Rhine Channel was dredged from property above the mean high tide line.

The characterization of the Rhine Channel as a waterway dedicated to a navigational easement (as opposed to a tideland) is supported by the City’s mapping of its tidelands over which the City administers the public trust. This can be seen on Exhibit 7, page 4 of the Staff Report. The public trust tidelands are shown in light blue. Waterways that were dedicated to navigation are shown in green. The Rhine Channel is shown in green, a dedicated waterway, not

a public trust tideland.

Staff Report, Exhibit 7, page 4 is printed from the City's website which has a GIS mapping that can be enlarged. Exhibit T attached hereto, is the enlargement of the Rhine Channel to its maximum scale. The Commissioners should take note of three facts. First, based upon the color key for boundaries on Exhibit 7, page 4, the ordinary high tide line is uniformly at the property line for the entire bank of the Rhine. The Applicant's ordinary high tide line is the same as at the Cannery Restaurant (the northernmost block) where the bulkhead is on the property line. The Applicant's ordinary high tide line is at the same location as the bulkhead approved by the Commission in CDP No. 5-89-286 at 2906-2912 Lafayette Avenue. The Applicant's ordinary high tide line is the same as on the southernmost block which the State Lands Commission established in Boundary Line Agreement 54. If the Staff Report were correct that there is a tideland trust issue, then the ordinary high water mark would be shown 33-40 feet west of the location found at the Cannery, the Cannery Lofts and Boundary Line Agreement 54.

Second, in the West Lido Channel, there is another area of "Waterways Dedicated or Reserved" shown in green. The "Ordinary High Tide Line" is specifically identified as the boundary of that green area. This means that land that was east of that Ordinary High Tide Line was dredged to be part of the West Lido Channel and is designated as a "Waterways Dedicated or Reserved" to distinguish that area from the adjoining "Tidelands/Submerged Lands" which make up the balance of the West Lido Channel. Since these dredged lands were previously above the ordinary high water mark, the lands were not tidelands. The identical mapping applies to the Rhine Channel. The light green shows where properties above the ordinary high tide line were dredged for navigation improvements.

Third, on the east bank of the Rhine Channel, boat slips can be seen located on private land which was above the ordinary high water mark, but was dredged to make room for piers and slips for the mooring of boats. All of this area is now deep water separated from the land by a bulkhead. The existence of tidal waters on the acknowledged private lands did not convert the private lands into public tidelands, nor make them part of the waterway subject to a navigational easement.

Finally, the City does not consider the Applicant's property to contain public trust tidelands. By letter dated January 10, 2013, the City Harbor Resources Director Chris Miller confirmed that "[t]he City believes that the water area landward of the property line/Bulkhead line to be private waterways and not City tidelands." (See, Exhibit U)

There are several important distinctions between a public trust interest and a navigational easement. (1) The public trust interest can never be terminated. (California Constitution, Article 10, §3.) The navigational easement can be terminated. (Public Resources Code §7552.5.) (2) Under the public trust doctrine, property uses must not conflict with the public trust. This does not limit the many private uses which can be, and are, made. As burdened only by a navigational

easement, the property owner retains the right to do anything with its property that does not unreasonably interfere with the navigational easement. (*O'Banion v. Borba* (1948) 32 Cal.2d 145, 155.) The Applicant's proposed bulkhead does not interfere with navigation as determined by Federal Law.

The location of the Applicant's bulkhead does not interfere with any navigation. The proposed bulkhead is 33 feet landward of the U.S. Bulkhead line established by the Army Corps of Engineers as the limit necessary for navigation.

**E. The Findings Do Not Support the Access Conditions and the Evidence Will Not Support the Access Conditions.**

No easement exists and no right to an easement exists. There is no justification for exaction of a new easement to replace an easement that does not and never did exist. Any exaction of an easement must comply with the constitutional standards set forth in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374.

As the Commission is well aware, *Nollan* requires that the Commission articulate in specific findings the rational relationship between the burden which the Applicant places upon the public and the exaction of the property owner's rights for the public benefit. *Dolan* requires that there be a rough proportionality between the burdens which the Applicant places on the public and the scope of intended deprivation of the property owner's rights. Construction of the bulkhead to protect existing structures places no burden on public access. The recommended findings do not support the public access easement requirement.

Special Conditions 2, 3, 4 and 5 should be deleted and references to the easement in Special Condition No. 1 should be deleted.

**4. The Applicant Cannot be Required to Waive the Right to Apply to Protect the Property by Any Means which May Prove Necessary in the Future.**

Special Condition No. 9 requires the Applicant to permanently waive the right to seek a permit to construct any other type of protection which may prove necessary in the future if that protection is on the bay side of the bulkhead. The justification for this condition is claimed in Public Resources Code §30235 and §30253.

"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."

“30253. New development shall do all of the following: (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard. (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.”

As to §30235, the Staff Report agrees that the Applicant’s proposed bulkhead is necessary to protect the existing structures in danger from erosion. The building designed to be supported by the wharf and wharf building is no longer supported by a wharf structure. The Rhine Channel dredging project deepened the channel to -19 feet MLLW directly in front of the Applicant’s property. The dredging approved by the Commission changed the depth of the bottom in front of the Applicant’s property to exceed the 4V:1H slope which was the design criteria of the dredging project. This was likely unavoidable since the Rhine Channel dredging project design standard was to excavate one foot into natural uncontaminated soils. However, the approved dredging design standard adversely affected the stability of the Applicant’s property and structures.

Whatever the reason for the deepened channel, it creates a greater concern about the stability of the structure and the urgent need to provide support. The proposed bulkhead has no impact upon local shoreline sand supply. No portion of the Applicant’s property has ever been a source of local shoreline sand supply. Failure of the bulkhead or of bulkhead’s on adjoining properties may cause other protective work to be required in front of the bulkhead.

In CDP 5-89-296 (Exhibit M) a new bulkhead 32 feet into the water area was approved with no finding that the bulkhead was necessary to protect existing structures and no finding that the bulkhead was required to be some maximum distance from the Rhine Channel boundary. No public access easement was required. The property in CDP No. 5-89-286 is at 2906-2912 Lafayette Avenue, less than 300 feet from the Applicant’s property.

In addition, within an established harbor, bulkheads are a coastal dependent use. Bulkheads protect the upland and allow improvements for uses of the adjoining waters for marine purposes. On the east bank of the Rhine Channel, none of the boat slips shown on Exhibit T could exist but for the bulkhead which separates the water from the land. Section 30235 provides no basis to waive the right to protect a structure.

The Staff Report finds that the Applicant’s proposed bulkhead will assure stability and structural integrity as required by Public Resources §30253. There is no evidence that the proposed bulkhead will create or contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area. On page 23 of the Staff Report, the quotation in italics from §30253 is incomplete. The portion of §30253 which prohibits new development from “*in any way requiring construction of protective devices*” applies only to those protective

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devices “*that would substantially alter natural landforms along bluffs and cliffs.*” The Commission’s jurisdiction extends to protecting bluffs and cliffs, not the banks of a boat harbor. There is no basis in §30253 to impose Special Condition No. 9.

Further, as the proposed bulkhead will be 33 feet landward of the established Federal Bulkhead Line, there is no basis on which to compel the Applicant to waive all rights to use the remainder of its property as the law may permit. The Commission approved a bulkhead 33 feet closer to the Rhine Channel in CDP No. 5-89-389 with no claim that it was necessary to protect anything.

**4. Conclusion.**

The Recommended Findings do not support the imposition of an access condition. The cited provisions of the Coastal Act do not support the imposition of the protection waiver condition. The development is necessary to protect an existing building in danger from erosion, the danger of which has increased from a recently completed dredging project approved by the Commission. The Commission should make an amending motion as follows:

I MOVE TO AMEND THE STAFF RECOMMENDATION TO  
REMOVE SPECIAL CONDITIONS NO. 2, 3, 4, 5 AND 9, AND THE  
REFERENCES TO AN EASEMENT IN SPECIAL CONDITION NO. 1.

The project when moved back as required by Special Condition No. 1 is the least environmentally damaging alternative and the elimination of Special Conditions 2, 3, 4, 5 and 9 does not affect the environmental impacts of the project.

Sincerely,

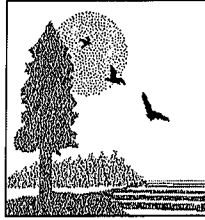
/s/Sherman L. Stacey  
SHERMAN L. STACEY

SLS

cc: Lisa & John Morehart  
South Coast District Office  
All Commissioners

**CALIFORNIA STATE LANDS COMMISSION**

100 Howe Avenue, Suite 100-South  
Sacramento, CA 95825-8202

**JENNIFER LUCCHESI, Executive Officer**

(916) 574-1800 FAX (916) 574-1810

California Relay Service from TDD Phone 1-800-735-2929  
from Voice Phone 1-800-735-2922

**Contact Phone: (916) 574-1227**

**Contact FAX: (916) 574-1835**

December 12, 2012

File Ref: SD 2011-07-01.1

John Moreheart  
126 East 16<sup>th</sup> Street  
Costa Mesa, CA 92627

Via Email: johnmmoreheart@sbcglobal.net

**SUBJECT: Rhine Channel, Newport Bay, CA**

Dear Mr. Moreheart:

This letter is in response to your request for a determination by the California State Lands Commission (CSLC) as to whether it asserts a sovereign title interest within the Rhine Channel in Newport Bay.

As general background, the State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable lakes and waterways upon its admission to the United States in 1850. The State holds these lands for the benefit of all people of the State for statewide Public Trust purposes, which include but are not limited to waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space. On tidal waterways, the State's sovereign fee ownership extends landward to the mean high tide line, except for areas of fill or artificial accretion or where the boundary has been fixed by agreement or a court. On navigable non-tidal waterways, including lakes, the State holds fee ownership of the bed of the waterway landward to the ordinary low water mark and a Public Trust easement landward to the ordinary high water mark, except where the boundary has been fixed by agreement or a court. Such boundaries may not be readily apparent from present day site inspections.

The CSLC has jurisdiction and management authority over all ungranted tidelands, submerged lands, and the beds of navigable lakes and waterways. The CSLC also has certain residual and review authority for tidelands and submerged lands legislatively granted in trust to local jurisdictions (PRC §6301 and §6306). All tidelands



and submerged lands, granted or ungranted, as well as navigable lakes and waterways, are subject to the protections of the Common Law Public Trust.

After review of the information provided and in-house records, staff has determined the Rhine Channel between 28<sup>th</sup> Street and 29<sup>th</sup> Street consists of an artificial cut from lands the State acquired and patented as Swamp and Overflowed lands (S&O Location 3089).

A portion of the present Rhine Channel may extend onto the natural bed of lower Newport Bay which at this location has been granted to the City of Newport Beach, pursuant to Chapter 74, Statutes of 1978, and as amended.

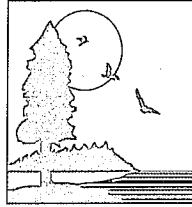
This conclusion is without prejudice to any future assertion of State ownership or public rights, should circumstances change, or should additional information become available. This letter is not intended, nor should it be construed as, a waiver or limitation of any right, title, or interest of the State of California in any lands under its jurisdiction.

If you have any questions, feel free to contact me at the number above, or via email at [grace.kato@slc.ca.gov](mailto:grace.kato@slc.ca.gov). Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Grace Kato".

Grace Kato  
Public Land Manager

**CALIFORNIA STATE  
LANDS COMMISSION**

**EXECUTIVE OFFICE**  
100 Howe Avenue, Suite 100-South  
Sacramento, CA 95825-8202

**JENNIFER LUCCHESI, Executive Officer**  
**(916) 574-1800 Fax (916) 574-1810**  
California Relay Service TDD Phone 1-800-735-2929  
Voice Phone 1-800-735-2922

January 28, 2013

File Ref.: SD 2012-12-13.1

Mr. Sherman Stacey  
Gaines & Stacey LLP  
111 Bayshore Drive, Suite 280  
Corona del Mar, CA 92625

Re: 2808 Lafayette Avenue, Newport Beach

Dear Mr. Stacey:

Thank you for your letter dated January 11, 2013. As you pointed out in your letter, you received a letter on December 12, 2012 from Ms. Kato of the Commission's staff that indicated:

"After review of the information provided and in-house records, staff has determined the Rhine Channel between 28<sup>th</sup> Street and 29<sup>th</sup> Street consists of an artificial cut from lands the State acquired and patented as Swamp and Overflowed lands (S&O Location 3089)."

"A portion of the present Rhine Channel may extend onto the natural bed of lower Newport Bay which at this location has been granted to the City of Newport Beach, pursuant to Chapter 74, Statutes of 1978, as amended."

The following paragraph in Ms. Kato's letter indicated that:

"This conclusion is without prejudice to any future assertion of State ownership or public rights, should circumstances change, or should additional information become available. This letter is not intended, nor should it be construed as, a waiver or limitation of any right, title, or interest of the State of California in any lands under its jurisdiction."

As you indicated in your letter, the Commission's legal staff earlier in the day on December 12<sup>th</sup> had informed Coastal Commission staff that:

"A very rough and preliminary analysis indicates the parcel in question appears to be former tidelands, and is probably subject to the grant to the City of Newport Beach. (Ch. 74 Stat. 1978). As former tidelands, the parcel would be subject to the public trust. Our title unit examined a

U.S. Coastal Survey (T-1032) performed in 1875, and also noted a boundary line agreement (BLA 54) just south of the parcel in question.”

“It was important to us for you to receive a timely answer. As you know, these issues can be complicated, and take some time to sort out. However, based on a brief review of the records at hand, staff have found evidence that the property may be subject to the public trust.”

You indicate that is difficult to understand who the legal staff consulted with in reaching their conclusion, given that Mr. Morehart was referred to Ms. Kato of the Land Management staff. The legal staff consulted with our Title Unit staff. The differences in the responses in the two contacts made resulted from a number of factors. The Commission staff has been undergoing a restructuring of responsibilities in which issues relating to lands granted in trust to a local government (like the City of Newport Beach) were previously handled by the Land Management Division, where Ms. Kato is assigned. That responsibility transitioned late last year to the External Affairs staff. Also since staff of two different divisions were contacted by two separate entities from outside, the two responses that were requested had some differences.

Technically, Ms. Kato’s statements reflect the *record* of acquisition and disposition of the subject lands by the State. The subject area of Rhine Channel was in fact cut (dredged) out of lands that were designated as swamp and overflowed lands on certain early surveys and the State “acquired” a record patent and subsequently “patented” the area with the designation of swamp and overflowed lands. To clarify, in many instances throughout the state, early surveys often identified marsh tidal areas as salt marsh, or swamp and overflowed, or tidelands. This reflected both the difficulty in determining their true legal character, because these areas showed evidence of inundation and marsh vegetation and were clearly of the physical character of swampy or overflowed, even though they may have in fact been located below the elevation of mean high tide and hence factually and legally tidelands, subject to the public trust doctrine. Tidelands by their very character are, or were where man made changes have changed their character, overflowed on a twice daily basis by the tides, and in protected embayments, such as lower Newport Bay, were often also subject to the growth of marsh vegetation.

It should also be acknowledged that other early surveys (such as the 1875 U.S. Coast Survey (T-1032) and 1912 U.S. Army Corps of Engineers hydrographic survey of lower Newport Bay) provide more precise survey data than the township plats of the General Land Office used by the federal government in characterizing lands as swamp or overflowed lands.

In reliance on designations by some early surveyors as swamp and overflowed as indicated above, the United States would sometimes issue a patent to California, transferring any interest the United States might own adjacent to the State’s sovereign tide and submerged lands. Likewise, many of these areas overflowed (by tide waters) were also subsequently patented by the State, based on the belief as indicated on the survey that they were swamp or overflowed. For a period of time in the 19<sup>th</sup> Century, California also sold tidelands in certain areas within embayed waters and some of these lands have been determined to be validly patented into private ownership, but remain

Mr. Sherman Stacey  
January 28, 2013  
Page 3

subject to the public trust easement. Certain lands designated as swamp and overflowed by patent, but in fact tidelands, were confirmed into private ownership, but likewise remain subject to the state's retained easement. Lower Newport Bay lends itself to much such confusion given the difficulty in determining the factual and hence legal character of the lands.

The State Lands Commission has been involved in a number of instances in resolving these issues in Newport Beach, both by litigation and title settlement agreements, including boundary line agreements such as BLA 54 mentioned above. Last year title to just such an area south of the Rhine Channel (Marina Park) located between 16<sup>th</sup> and 19<sup>th</sup> streets was resolved by an agreement between the City of Newport Beach and the Commission.

In your letter, you requested that we send a written communication to the Coastal Commission as to "whether or not the property where the bulkhead is proposed is subject to the public trust" and "that the State Lands Commission has no objection to the erection of the bulkhead in the location recommended by the Staff of the Coastal Commission."

This letter should be considered a determination by the staff of the State Lands Commission that the issues of whether the subject property was or is factually or legally tidelands is unresolved given the present analyses of the evidence. Ultimate resolution of this issue can be determined by either adjudication or agreement among the upland owner, State Lands Commission and City of Newport Beach. You indicated a willingness to discuss this matter further and we are certainly willing to do so as well.

As to the issue of objection to the placement of a bulkhead, we believe the California Coastal Commission and City of Newport Beach are the appropriate agencies representing the State as to permitting development at this site.

Please feel free to contact me at (916) 574-1992 if you have any questions or comments.

Sincerely,



Sheri Pemberton  
Chief of External Affairs

cc: City of Newport Beach  
Matthew Christen, Staff Counsel, California Coastal Commission  
Hope Schmeltzer, Chief Counsel, California Coastal Commission

LOCATION

3089

Swamp and Overflowed

ORANGE

County,

Patent issued May 16, 1892

to

JAMES McFADDEN

Assignee of

Book 10 , Page 239

Patent sent to

JAMES McFADDEN,

SANTA ANA, CALIFORNIA

Certificate of Purchase received

Exhibit C

# SWAMP AND OVERFLOWED LANDS.

State of California, Office of Surveyor-General,

SACRAMENTO, Feb'y 6<sup>th</sup>, 1891

Location No. 3089

I Herby Certify, That, in accordance with the provisions of Title Eight of the Political Code of California, James Mc Fadden has located 420.85 acres of Swamp and Overflowed Land in Orange County. Said land is described as follows:

Lot 1 Sec 19 Lot 1 Sec 20 Lots 2, 3, 6, 7, and 8 Sec 28 Lots 1 and 2 Sec 29 Lots 2, 3, and 4 Sec 33 and Lot 4 of Sec 34 Tp. 6 S. R 10 W. S B M.

This location has been approved by me this 6<sup>th</sup> day of February A. D. 1891, and the same is entered and numbered upon my Register of Swamp Land Locations. The Treasurer of Orange County shall receive in payment therefor, from said James Mc Fadden

One Hundred and Five and <sup>45</sup>/<sub>100</sub> (\$ 105.45) dollars, within fifty days from the date of the Surveyor-General's approval, being twenty per cent of the purchase money, and interest on the balance, in advance, at the rate of seven per cent per annum, from the date of the approval of the location in the Surveyor-General's office to the first day of January, 1892; and unless such payment is made within said fifty days, then the above described land shall revert to the State without suit, and this approval be and become null and void.

Thos Reichert  
Surveyor-General.

By D. M. Angier  
Deputy.

Location No. 3189

CERTIFICATE OF PURCHASE

No. 1128

Orange

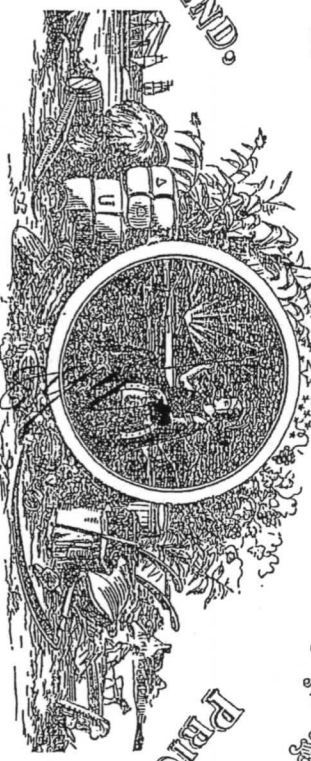
County

Public Domain

Office of the

Register of

California



SWAMP AND OVERFLOWED LAND.

PRICE PER ACRE, ONE DOLLAR

It Appearing from the Report of the County Treasurer,

That on March 26<sup>th</sup> 1891

paid to the State of California the sum of One hundred and four 100 — 1103 45/100 Dollars, being twenty per cent of the purchase money, and interest on the balance up to January 1<sup>st</sup> 1892, for 420.85 Acres of

SWAMP AND OVERFLOWED LAND

described as follows:

Lot 1 of Section 19, Lot 1 of Section 20, Lots 2, 3, 4, 7, 8 of Section 28, Lots 1 and 2 of Section 29, Lots 2, 3, and 4 of Section 33, and Lot 4 of Section 34, in Township No. 6 South, Range No. 1 West, San Bernardino Meridian.

NOW, THEREFORE, BE IT KNOWN, That the said

having made payment of said twenty per cent, and first year's interest for the above described tract of land, is the purchaser of the same, and after having in all other respects complied with the requirements of the law providing for the sale of said lands, and on SURRENDERING THIS CERTIFICATE TO THE STATE OF CALIFORNIA, the said

or his assigns, shall be entitled to receive a Patent for the same.

Balance of Purchase Money due, \$ 336.68

In Witness Whereof, the Register of said Land Office has hereto set his hand and affixed his Seal of Office the day and date above mentioned.

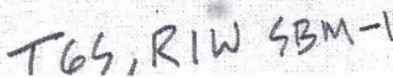




EXHIBIT D

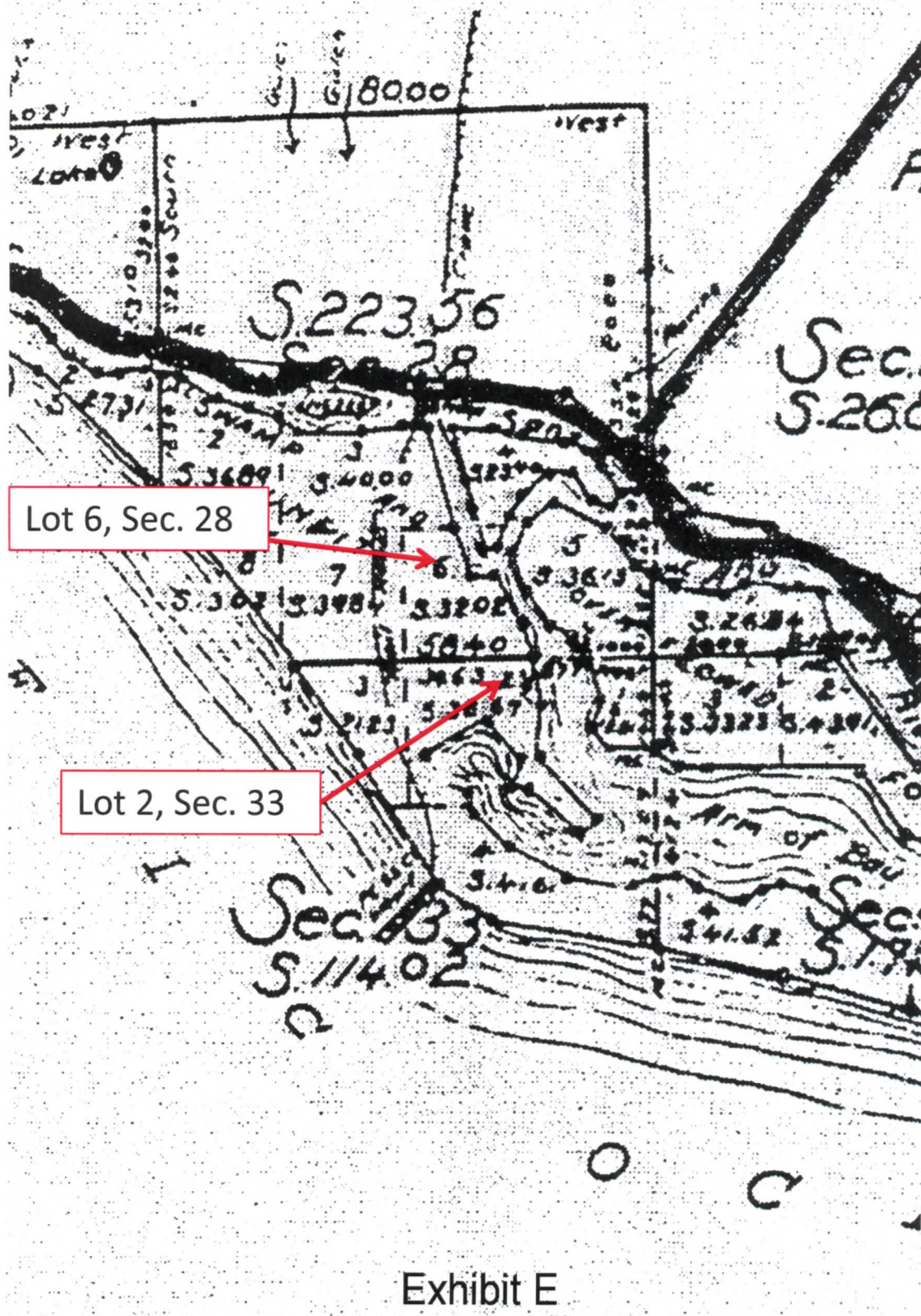
Surveys Designated.	By Whom Surveyed.	Date of Contract.	Amount of Survey's Made, Chain, Links.	When Surveyed.	Meaning
East and part of North and South boundary of Township	Henry Hancock	February 15 <sup>th</sup> 1855		1855	
Boundaries of Rancho Santiago de Santa Ana	William Min To	Instructions		1853	
San Joaquin	H. Hancock	September 1855		1855	
Las Bolsas	Chas. F. Hoffman			1858	
South boundary of Township	J. H. Finley	February 7 <sup>th</sup> 1859	1 34 97	1859	
Section lines			9 61 00	1859	
Meander lines			22 72 21	May 11 <sup>th</sup> 1859	14

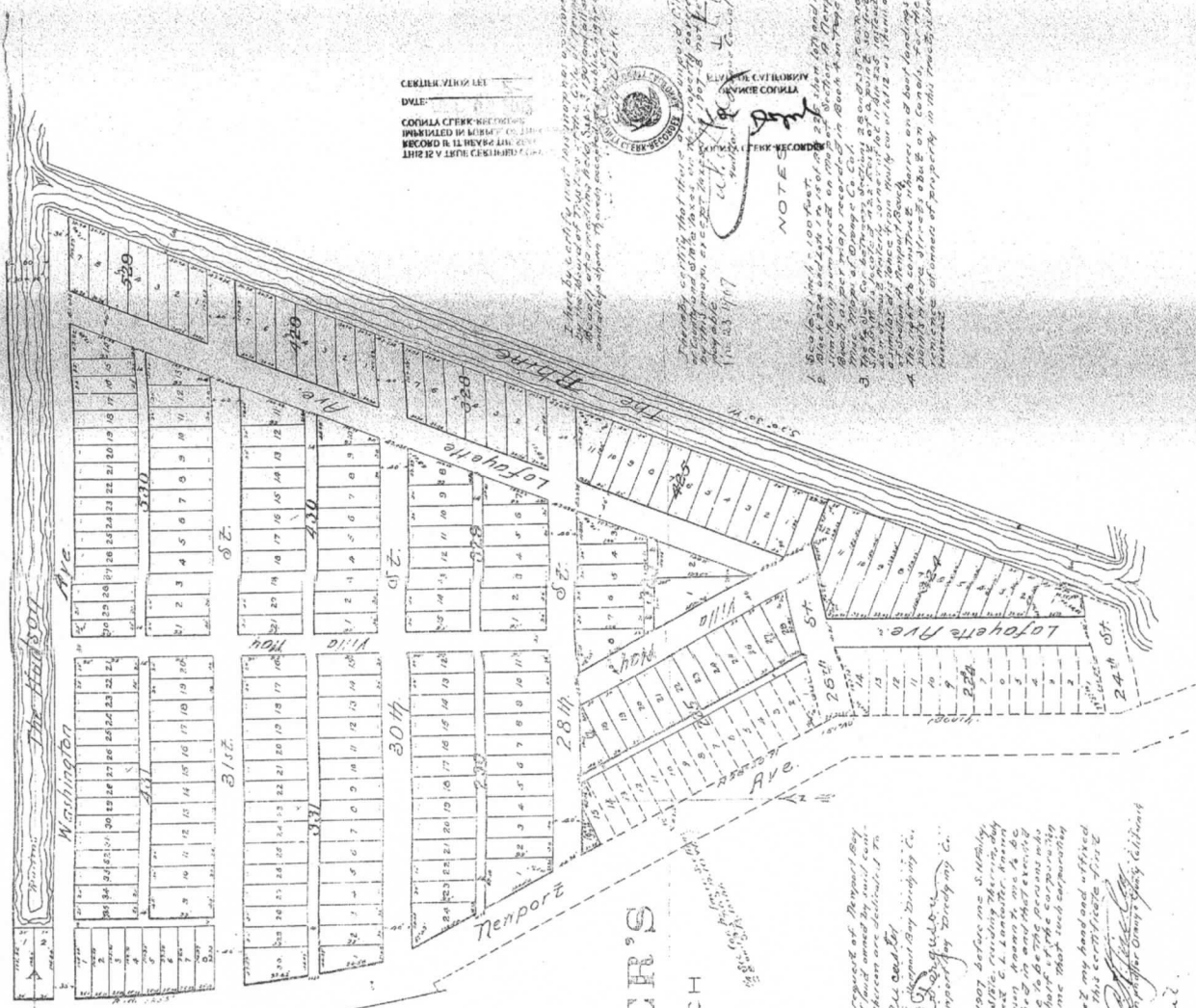






# Blow up of 1890 Swamp and Overflow Land Survey



[illegible]

LANCASTER'S  
ADDITION TO  
NEWPORT BEACH  
BY  
S. H. FINLEY, C.E.

1000 100 1000  
Dunbar  
Geo B. L. L. L.  
and  
m

We hereby certify that this map was made at request of Newport Bay  
Drainage Co. and represents a subdivision of land owned by said com-  
pany, and that the street and alleys shown thereon are dedicated to  
public use.

E. F. Russell  
President of Newport Bay Drainage Co.

State of California  
County of Orange

On this 30 day of August 1967 before me S. N. HARRIS  
Notary Public in and for said County of Orange,  
County of Orange

Witness my hand and seal at the City of Orange,  
California this 30 day of August 1967.

S. N. HARRIS  
Notary Public

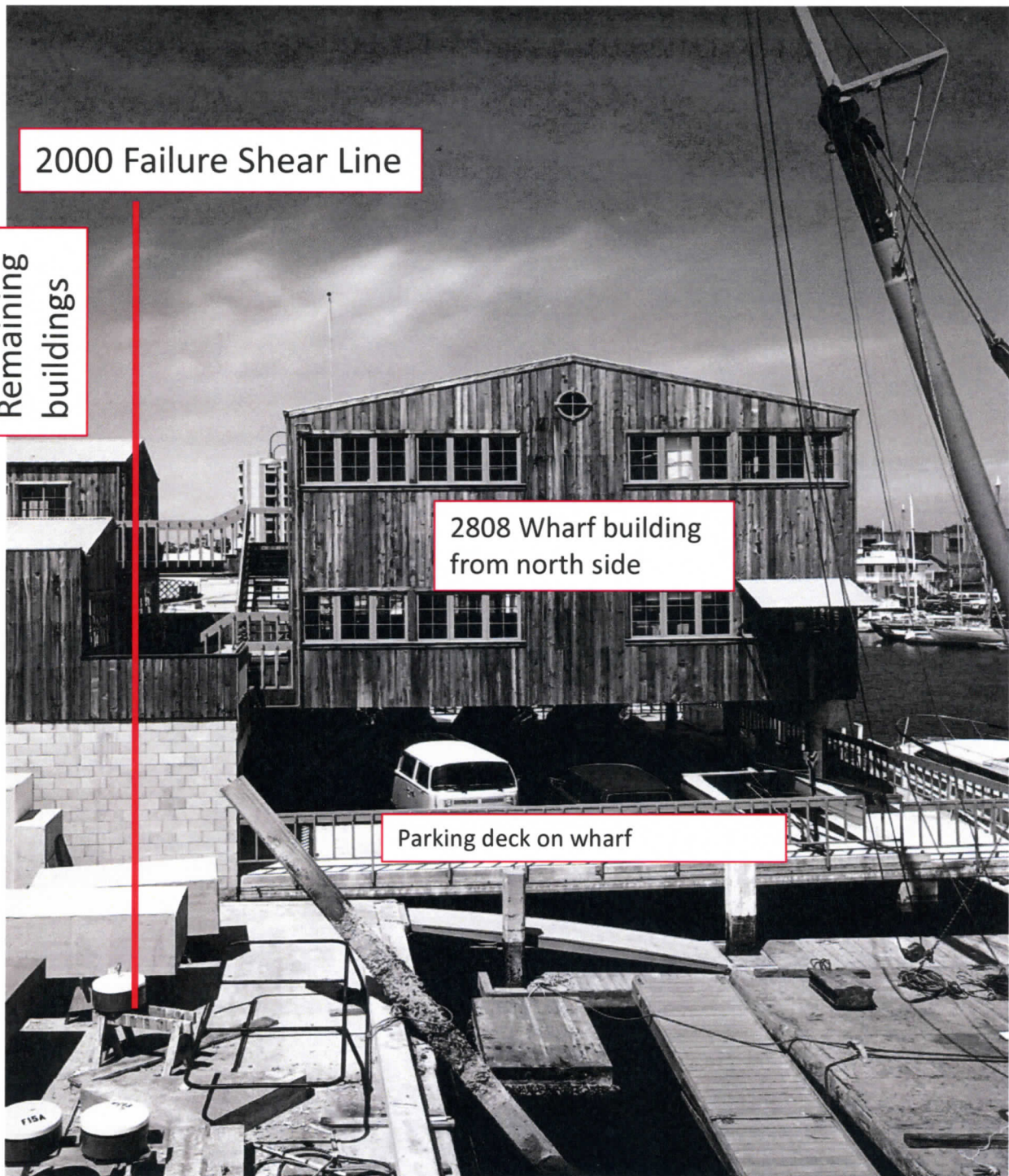
Notary Public for the State of California

reached his fifty-ninth.  
 Wm. Dickinson  
 C. H. H.





Surveys Designated.	By whom surveyed.	Date of Contract.	Amount of Survey Miles Chain Links	When Started
East end, part of North, and South City of Township	Henry Bancroft.	February 15 <sup>th</sup> 1855.		1855.
Boundaries of Rancho Santiago de Santa Ana.	William Meila.	Instructions		1855.
" " " " " "	H. Bancroft.	" Sep 1 <sup>st</sup> 1858.		1858.
" " " " " "	Chas F. La Plante.	" "		1868.
South boundary of Township.	J. H. Finley.	February 7 <sup>th</sup> 1869.	1 34 97	1869.
Section Lines.	" "	" "	9 61 00	1869.
Meander Lines.	" "	" "	22 72 21	May 11 <sup>th</sup> 1869.



Building approved in CDP No. P-5-19-1976-7903 (Ziemer) showing building and wharf which failed in 2000 to right and remaining and existing buildings to the left.

## Exhibit H

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Holy cow! It's the fair  
July 13, 2007

Koll expansion moves closer to  
ballot box  
July 11, 2001

Briefly in the news  
November 8, 2000

## Workers remove cars from collapsed waterfront building

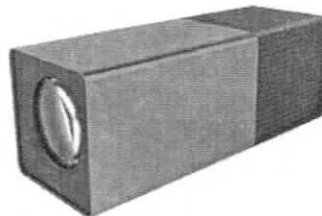
December 02, 2000

Deepa Bharath

Workers used chains Friday to pull out four cars that were trapped in a lower level parking structure of a collapsed building near Rhine Channel in Newport Beach.

The garage of a 23-year-old building on Lafayette Street caved in Nov. 6, when a rusty support beam gave way. The parking structure snapped off the main office building and tipped toward the bay, a portion of it

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resting on the shallow end of the bay.

On the day of the collapse, one car was partially submerged. As days went by, two more cars slipped partially under the water. The cars had slid away from their parked positions after the floor caved in.

Demolition of the building -- which was declared unsafe by the city -- will begin Wednesday, contractor Jeff Tanner said Friday.

It was originally scheduled for Monday, but has been postponed because city staff want to review the demolition plan, he said.

"Originally we were planning to bring in barges to bring down the building," Tanner said. "But now it looks like we may just do it by hand. We don't know yet."

Work has been going on for a week to prepare for the demolition.

Utilities were disconnected, furniture and other things were removed from the building, and shoring work was done. Officials said the demolition that could cost more than \$100,000 is a tricky, challenging and unique project because of the water, tides and the sea wall.

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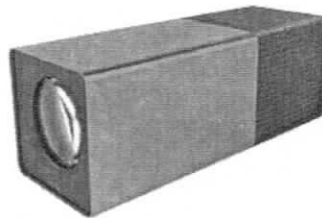
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American Red Cross

June 04, 2012

Anchor QEA  
Attn: Joshua Burnam  
26300 La Alameda, Suite 240  
Mission Viejo, CA 92691

**RE: NOTICE OF INCOMPLETE APPLICATION**  
**Application No. 5-11-178**  
Site Address: 2808 Lafayette Road, Newport Beach, Orange County

**WSA Job #6127-2**

Dear Mr. Burnam,

Pursuant to the request of Mr. & Mrs. Morehart, the following is in response to the questions of the above referenced NOTICE OF INCOMPLETE APPLICATION.

**RESPONSE TO QUESTION 1a:**

To the best of my knowledge, a seawall/bulkhead has never existed onsite. It seems like in the project description in the submitted application, the applicant has referred to the existing concrete beam on piles as an existing bulkhead.

**RESPONSE TO QUESTION 1b:**

Two sets of plans in 11"x17" format as obtained from the City of Newport Beach are a part of this response.

**RESPONSE TO QUESTION 1c:**

The subject concrete beam and piles are a part of the foundation for the existing 3 story structure on the lot. I have personally observed the exposed part of the concrete beam, and did not notice signs of distress. The piles are buried in the ground underneath the concrete beam and slab, thus could not be observed. It is our opinion that at this point the concrete beam and piles are still functional. Due to the recent dredging of Rhine Channel right in front of the subject site though, erosion will remove soil alongside the beam and piles and will jeopardize their structural integrity, if they remain unprotected. Installation of a seawall as proposed in the aforementioned application will protect the subject beam and piles, and the 3 story structure on the lot as a whole. From structural engineering stand point we do not see a need of engineering analysis of the concrete beam and piles at this time.



10 December 2012

Mr. Sherman L. Stacey, Esq  
Gaines & Stacey  
1111 Bayside Drive, #280  
Corona del Mar, CA 92625

Subject: 2808 Lafayette, Newport Beach, CA  
California Coastal Commission Application No. 5-11-178

Mr. Stacey:

At your request, I have reviewed the California Coastal Commission Staff Report dated 29 November 2012 pertaining to the subject property in addition to numerous supporting documents that you provided, including the engineering design plans of the existing structure(s) prepared by Arch+Tekton dated 27 October 1976 and the design plans for proposed new concrete seawall prepared by William Simpson & Associates dated 30 June 2011. I have reviewed the post project report of the City of Newport Beach for the Rhine Channel Remediation dated 23 February 2012. Additionally, I conducted a preliminary visual reconnaissance of the subject property on 30 November 2012 for purposes of familiarizing myself with existing site characteristics.

The existing structure is a three story building with a parking structure located at grade and two-story office building located above. The parking structure is Type I/II construction with masonry bearing/shear wall system, interior concrete columns and beams supporting openings in the masonry walls, and spancrete structural slab supporting the two story structure above. The two story office structure above the parking structure is Type V construction. According to the original design plans, referenced above, the existing structure's foundation system consists of concrete piles and concrete structural grade beam.

Based upon my visual observations of the existing structure, I believe that the existing structure is experiencing some degree of movement. Since the pre-existing structure that collapsed into the Rhine Channel provided lateral support of the remaining structure's foundation system, I am very concerned about possible erosion of the Channel that has occurred and could continue to occur if remedial measures are not implemented to mitigate continued reduction in lateral support of the existing structure's foundation system. The City's Report dated 23 February 2012 identifies that the Rhine Channel was dredged in the immediate vicinity of the property to a depth of -19 MLLW, 5-6 feet deeper than the normal channel. This dredging occurred during the fall/winter 2011-2012. It is my opinion that the proposed concrete seawall (bulkhead) will mitigate against potential further erosion of the adjacent Channel bed and resultant adverse conditions that reduce the lateral support of the existing structure's foundation. The recent dredging makes the need for the immediate installation of the bulkhead more significant.



**Photograph 2. Property prior to failure.**



**Photograph 3. Property after failure.**

The structure caved in when rusty support beams gave way causing extensive structural damage. The collapse required the immediate removal of the three-story structure, but asphalt and concrete debris remains on site and within the channel. Currently, the building's footing is exposed and unstable. The remaining debris and exposed footing are visible in Photograph 1.

AND WHEN RECORDED RETURN TO:

City Clerk  
3300 Newport Boulevard  
Newport Beach, California

Book 12055 Page 115  
Official records of Orange County  
12:05 am Feb. 1, 1977  
Instrument No. 1367  
Npt. Bch Deed No. 1378

Space Above This Line for Recorder's Use Only

CONTINGENT OFFER FOR PUBLIC ACCESS

This Contingent Offer for Public Access is made into this 19 day of January, 1977, by ED ZIEMER, an individual, hereinafter referred to as "Ziemer".

W I T N E S S E T H:

A. The Planning Commission of the City of Newport Beach on April 1, 1976, approved Use Permit No. <sup>1782</sup>~~1779~~ and Resubdivision No. 513 related to the proposed office use on the property owned by Ziemer located at 2808 and 2810 Lafayette Avenue, City of Newport Beach, State of California, hereinafter referred to as "the property".

B. As a condition of approval, Ziemer was required to offer to the City public access rights over a pier or wharf to be constructed and owned by Ziemer, extending across the entire bayside of the property bayward of the bulkhead line, which rights should become effective at the time the property or said pier or wharf become connected with adjacent property on either side of the property to form a continuous walkway.

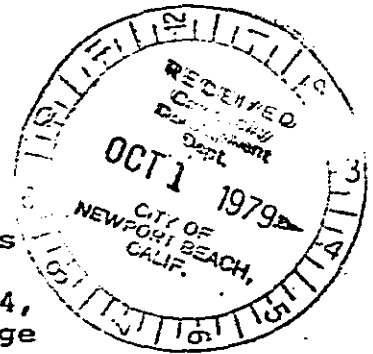
C. This Offer is intended to fulfill said conditions of approval of Use Permit No. 1779 and Resubdivision No. 513.

THEREFORE, in consideration of the covenants and conditions herein contained, and further good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Ziemer hereby:

1. Offers to the City, for the benefit of the general public, a non-exclusive right of access to and the right to use, but not to obstruct, the pier or wharf constructed across the entire bayside of the property, more particularly

described as:

Lots 5 and 6, Block 425, Lancaster's Addition to Newport Beach as shown on a map recorded in Book 5, Page 14, Miscellaneous Maps, Records of Orange County, State of California



Said Offer shall automatically ripen into an easement for public access at such time as the parcel located immediately to the north and the parcel located immediately to the south of the property become connected with the pier or wharf adjacent to the property by piers or wharfs or other similar structures to form a continuous walkway. City may, at its option, connect the pier or wharf adjacent to the property with piers or wharfs on the parcels to the north or south of the property to form the above referenced continuous walkway.

2. This Offer shall be irrevocable by Ziemer for a period of twenty-five (25) years after the date of execution hereof.

3. Ziemer agrees to repair and keep in good and safe condition, and free from obstructions, said pier or wharf adjacent to the property, at his sole cost and expense.

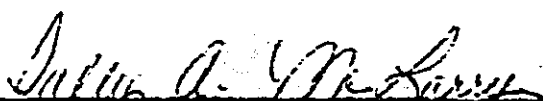
  
ED ZIEMER

STATE OF CALIFORNIA) ) ss:  
COUNTY OF ORANGE )

On January 19, 1977, before me, the undersigned, a Notary Public in and for said state, personally appeared ED ZIEMER known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

WITNESS my hand and official seal.



  
Notary Public in and for said State

Th 4 v.

## CALIFORNIA COASTAL COMMISSION

SOUTH COAST AREA  
245 WEST BROADWAY, SUITE 380  
LONG BEACH, CA 90802  
(213) 590-5071

Page 1 of 6  
Permit Application No. 5-89-286  
Date 19 April 1989

ADMINISTRATIVE PERMIT

APPLICANT: Cannery Village Investments

PROJECT DESCRIPTION: Demolish old boat ramps, construct a new bulkhead 32 ft. bayward, and backfill with sand.

PROJECT LOCATION: 2912 Lafayette  
Newport Beach, Orange County APN 047-22-10 and 9

EXECUTIVE DIRECTOR'S DETERMINATION: The findings for this determination, and for any special conditions, appear on subsequent pages.

NOTE: P.R.C. Section 30624 provides that this permit shall not become effective until it is reported to the Commission at its next meeting. If one-third or more of the appointed membership of the Commission so request, the application will be removed from the administrative calendar and set for public hearing at a subsequent Commission meeting. Our office will notify you if such removal occurs.

This permit will be reported to the Commission at the following time and place:

May 11, 1989 - Thursday: 9:00 A. M. -- Burton Chace Park  
West End of Mindanao Way, Marina del Rey.

IMPORTANT - Before you may proceed with development, the following must occur:

Pursuant to 14 Cal. Admin. Code Sections 13150(b) and 13158, you must sign the enclosed duplicate copy acknowledging the permit's receipt and accepting its contents, including all conditions, and return it to our office. Following the Commission's meeting, and once we have received the signed acknowledgment and evidence of compliance with all special conditions, we will send you a Notice of Administrative Permit Effectiveness.

BEFORE YOU CAN OBTAIN ANY LOCAL PERMITS AND PROCEED WITH DEVELOPMENT, YOU MUST HAVE RECEIVED BOTH YOUR ADMINISTRATIVE PERMIT AND THE NOTICE OF PERMIT EFFECTIVENESS FROM THIS OFFICE.

PETER DOUGLAS  
Executive Director

By: Donald W. Schultz Jr.

Title: Coastal Planning Analyst

B1: 4/88



STANDARD CONDITIONS:

1. Notice of Receipt and Acknowledgment. The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. Expiration. If development has not commenced, the permit will expire two years from the date this permit is reported to the Commission. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. Compliance. All development must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.
4. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
5. Inspections. The Commission staff shall be allowed to inspect the site and the project during its development, subject to 24-hour advance notice.
6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

EXECUTIVE DIRECTOR'S DETERMINATION (continued):

The Executive Director hereby determines that the proposed development is a category of development which, pursuant to PRC Section 30624, qualifies for approval by the Executive Director through the issuance of an administrative permit. Subject to Standard and Special Conditions as attached, said development is in conformity with the provisions of Chapter 3 of the Coastal Act of 1976, will not prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3, and will not have any significant impacts on the environment within the meaning of the California Environmental Quality Act. If located between the nearest public road and the sea, this development is in conformity with the public access and public recreation policies of Chapter 3.

FINDINGS FOR EXECUTIVE DIRECTOR'S DETERMINATION:

A. Project Description

The applicant is proposing the demolition of dilapidated boat haul out ramps, and the construction of of a new bulkhead 32 ft. bayward in their place. The bulkhead would be secured with deadman anchors, and backfilled with clean, non toxic sand. The proposed bulkhead will tie into, and be parallel with, the existing bulkhead to the South of the property. The proposed bulkhead will angle back at 160 degrees to tie into the existing bulkhead to the North of the property(Exhibit #1). The proposed project is located at 2912 Lafayette, in the City of Newport Beach in Orange County (Vicinity Map).

B. Diking, Dredging, Filling, and Shoreline Structures.

Section 30233 (a) of the Coastal Act states in part:

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

(1) New 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.

(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.

(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.

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

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

(7) Restoration purposes.

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

Section 30230 states:

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

Section 30231 states:

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

Section 30235 states:

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

The applicant has submitted written documentation that the proposed bulkhead is for the improvement and continued utilization of the site as a boatyard, and that without the project as proposed the available area on the site will be insufficient to keep the boatyard open (Exhibit #2). The improvement of the boatyard by the construction of the bulkhead is consistent with section 30233 (3)



and (4), in that the boatyard is a coastal dependent use. In addition, the applicant has stated that the Water Quality Control Board has deemed the existing boat launch configuration of concrete and steel ramps which slope into the water to be unacceptable by today's standards, and a source of degradation of water quality. Therefore, the demolition of the ramps and their upgrading by the construction of the bulkhead is consistent with sections 30235, 30230, and 30231 of the Coastal Act.

**C. Feasible Less Environmentally Damaging Alternatives:**

1. **Preferred Alternative.** Alternatives to the presently proposed bulkhead configuration are feasible from an engineering perspective, such as angling back the bulkhead to reduce the area of intertidal prism that will be covered by the construction. However, the applicant has stated that the resulting reduction in available dry land would so constrain the ability of a modern boatyard to function that the project would be infeasible. As the revision of the proposed development by moving the bulkhead inland would render the project unattainable, such an alternative is in reality a no project alternative.

2. **No Project Alternative.** As the proposed project will improve the quality of water in the bay, and its stated objective is to maintain and improve a boatyard which is a priority coastal dependent use, the no project alternative would only contribute to the decline of the habitat in the area and a degradation to coastal recreation opportunities. There is no feasible alternative to the construction of the bulkhead which would improve the water quality and recreation opportunities. Without construction of the bulkhead, the project would not be accomplished. Therefore, a no project alternative is not feasible because the goal of achieving improved water quality and coastal recreation opportunities would not occur.

**D. Mitigation Measures:**

The Executive Director has determined that the project is the least environmentally damaging alternative that is feasible. However, since the project, as proposed, would diminish the estuarine habitat and reduce the tidal prism at the project site, the Executive Director finds that it is necessary to offset these losses through a plan of mitigation. One appropriate method of mitigating the impact of the project is for the project applicant to participate in an offsite restoration and enhancement plan for Upper Newport Bay. This plan, in general, provides that for every square foot of water area filled on the project site, 4 square feet of wetland restoration area (in Upper Newport Bay) shall be provided as mitigation. The Executive Director determines that the project, as conditioned requiring the mitigation measure of wetland restoration in Upper Newport Bay, that the proposed project is consistent with section 30233(a) of the Coastal Act.

SPECIAL CONDITIONS:

#1. WETLAND MITIGATION

PRIOR TO AUTHORIZATION TO PROCEED WITH DEVELOPMENT, the applicant must submit written documentation that they have completed financial arrangements with the California Department of Fish and Game, which allow for the applicant's participation in the Upper Newport Bay mitigation plan. For every square foot of water covered, 4 square feet of wetland restoration shall be provided as mitigation. The mitigation plan, specifying the extent, location, and method of restoration to be carried out in the Upper Newport Bay Ecological Preserve, shall be developed by the California Department of Fish and Game.

ACKNOWLEDGMENT OF PERMIT RECEIPT/ACCEPTANCE OF CONTENTS:

I/We acknowledge that I/we have received a copy of this permit and have accepted its contents including all conditions.

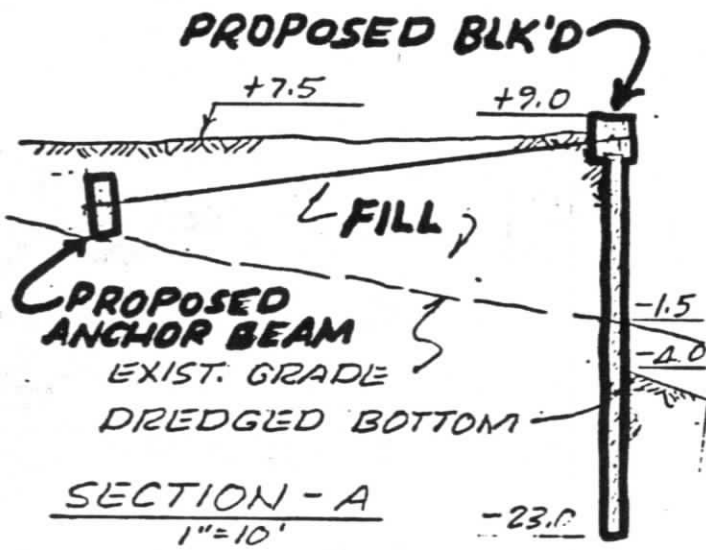
\_\_\_\_\_  
Applicant's Signature

\_\_\_\_\_  
Date of Signing

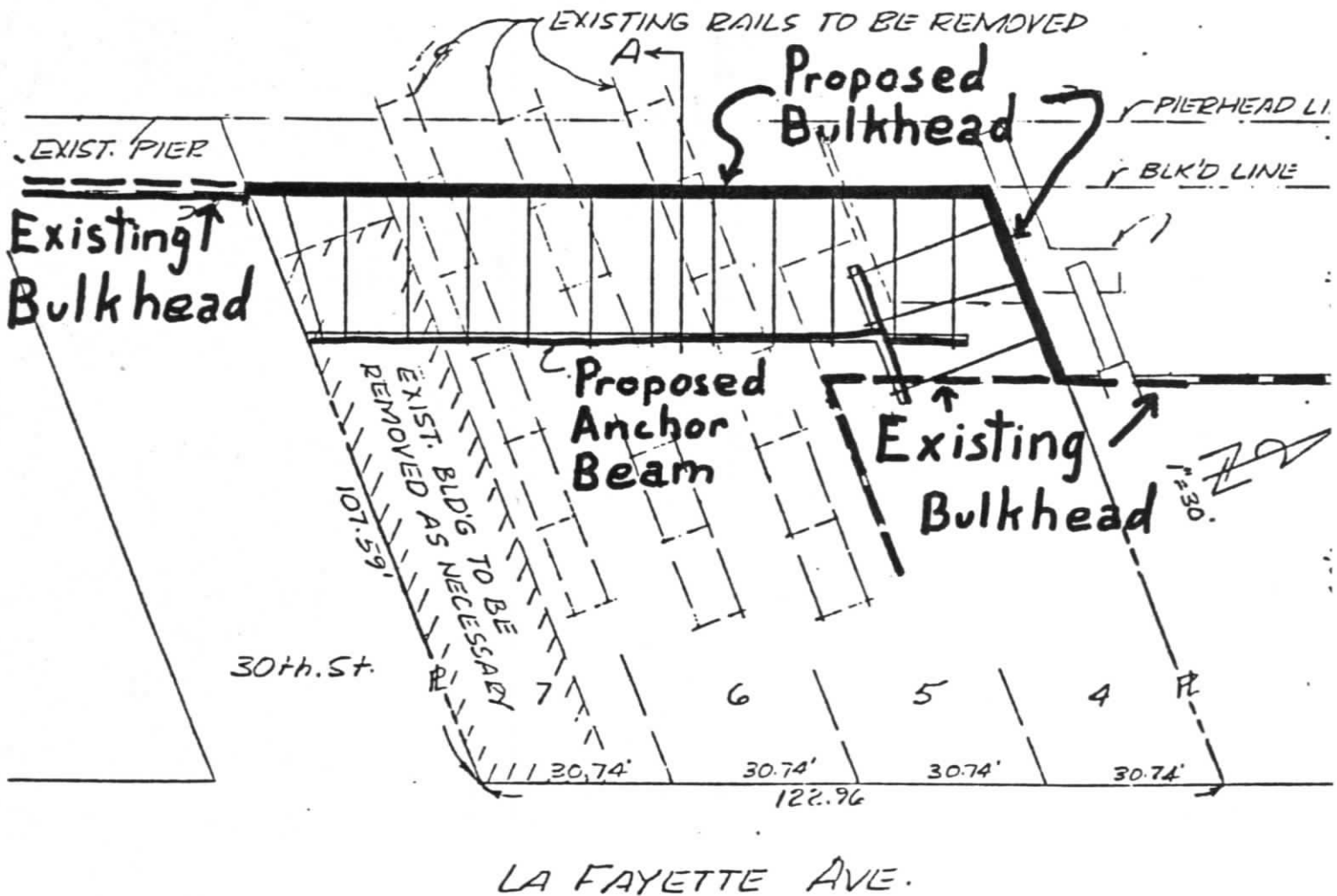
9712A



# Vicinity Map



<b>EXHIBIT NO. 1</b>
APPLICATION NO.
<b>5-89-286</b>
California Coastal Commission



March 16, 1989

California Coastal Commission  
245 W. Broadway, Suite 380  
Long Beach, CA 90801

To whom it may concern:

The purpose of this application is to upgrade an outdated and unusable boatyard. The existing boatyard concrete ramp and ways that goes into the water is no longer allowable by the Water Quality Board.

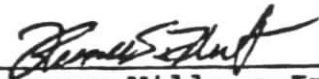
In order to save the old building, which has a lot of character and charm, a new bulkhead must be constructed at the bulkhead line.

Because of the fact that the existing building is built with a bulkhead and fill, the site must be done in the same manner and cannot be wharf supported.

We have a boatyard user tenant who will lease the property once we get the bulkhead constructed.

Please call if you have any questions. (714) 673-3777

EXHIBIT NO. <b>2</b>
APPLICATION NO.
<b>5-89-286</b>
 California Coastal Commission

  
Cannery Village Investment  
Partnership  
Russell E. Fluter, Agent

RECEIVED  
MAR 27 1989

CALIFORNIA  
COASTAL COMMISSION  
SOUTH COAST DISTRICT









# PROJECT FOR ORANGE COUNTY HARBOR NEWPORT BAY, CALIF.

Scale of feet  
1000 0 1000 2000 3000 4000 5000

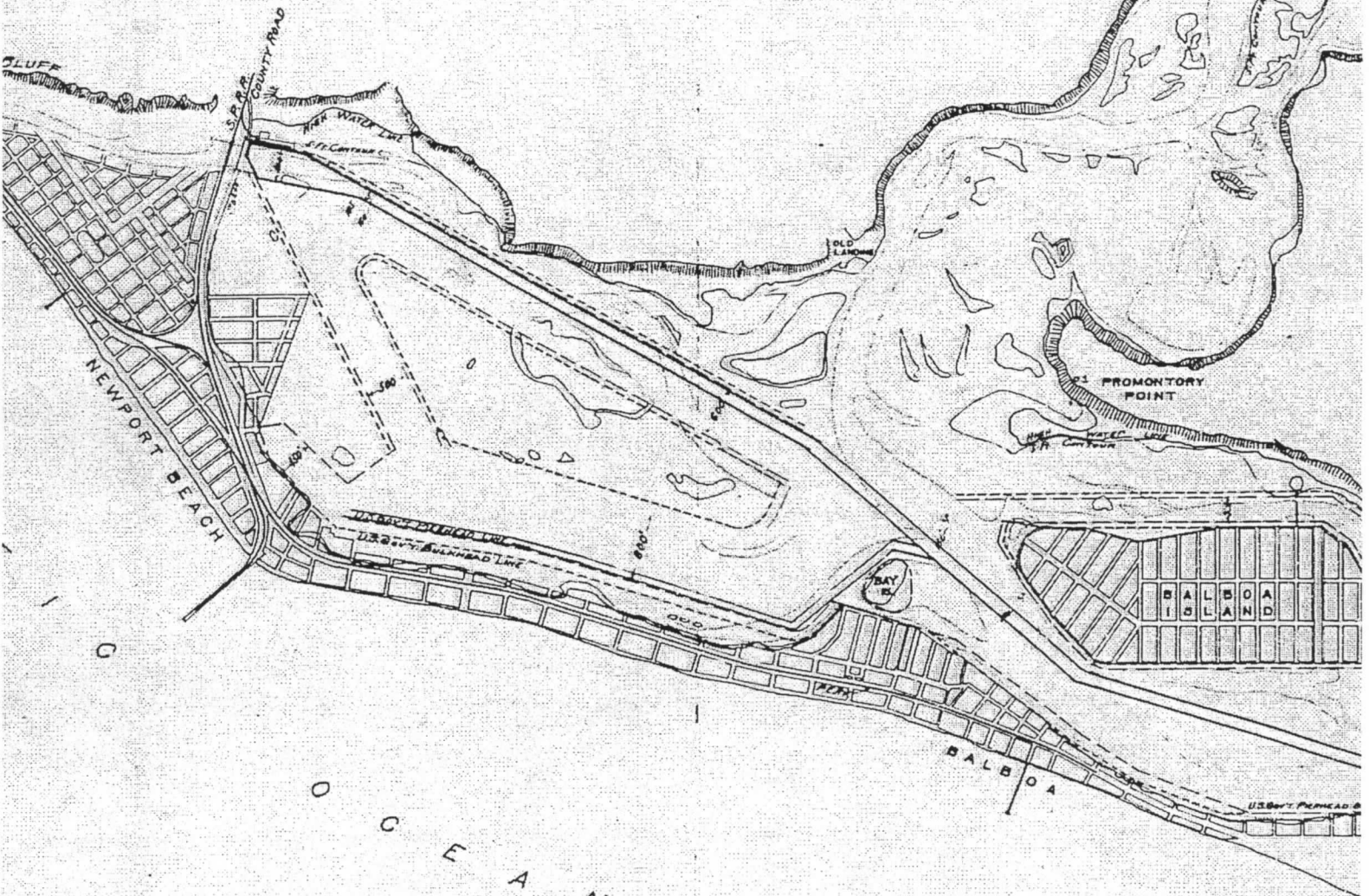
Approved:

*Chas. T. Leeds*  
Engineer, Orange County  
Harbor Commission.

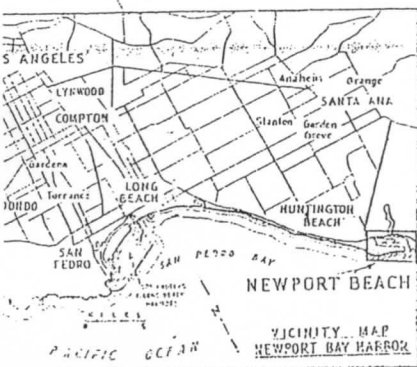
From map made by the  
U.S. Engineer Office,  
Los Angeles, Calif.

## LEGEND:

Channel to be dredged to 20-ft. depth shown in red tint, thus  
16-ft. yellow







# WAR DEPARTMENT

WAR DEPARTMENT  
OFFICE OF THE CHIEF OF ENGINEERS  
WASHINGTON, D. C. 20315

It is recommended that the harbor lines shown and described on this map be established by the Secretary of War by his approval hereof subject to the provisions of Section 11 of the River and Harbor Act approved March 3, 1899, this map to supersede all harbor line maps for these shores previously approved by the Secretary of War.

Major General  
Chief of Engineers

WAR DEPARTMENT  
WASHINGTON, D. C. 20315

Approved:

Secretary of War.

**LEGEND**  
Pierhead line  
Bulkhead line  
Pierhead and bulkhead line  
Subject line

**NOTE**  
Land surveying, the chosen meridian being Promontory Point; hence any azimuths are 6.55 seconds per 1000 feet of demerits according as the location is west or east of Station 1. The geodetic survey stations is given in the Annual Report of 1904, and has been verified by the U. S. Coast and Geodetic Survey Office. The lower low waters by the U. S. Coast and Geodetic Survey Office.

**DEFINITION**  
The solid filling; the pierhead line structures may be built.

## HARBOR LINES NEWPORT BAY HARBOR CALIFORNIA

IN TWO SHEETS. SHEET NO. 2. SCALE: 1:5000  
SCALE IN FEET

U. S. ENGINEER OFFICE, LOS ANGELES, CALIF. 3-20-1914

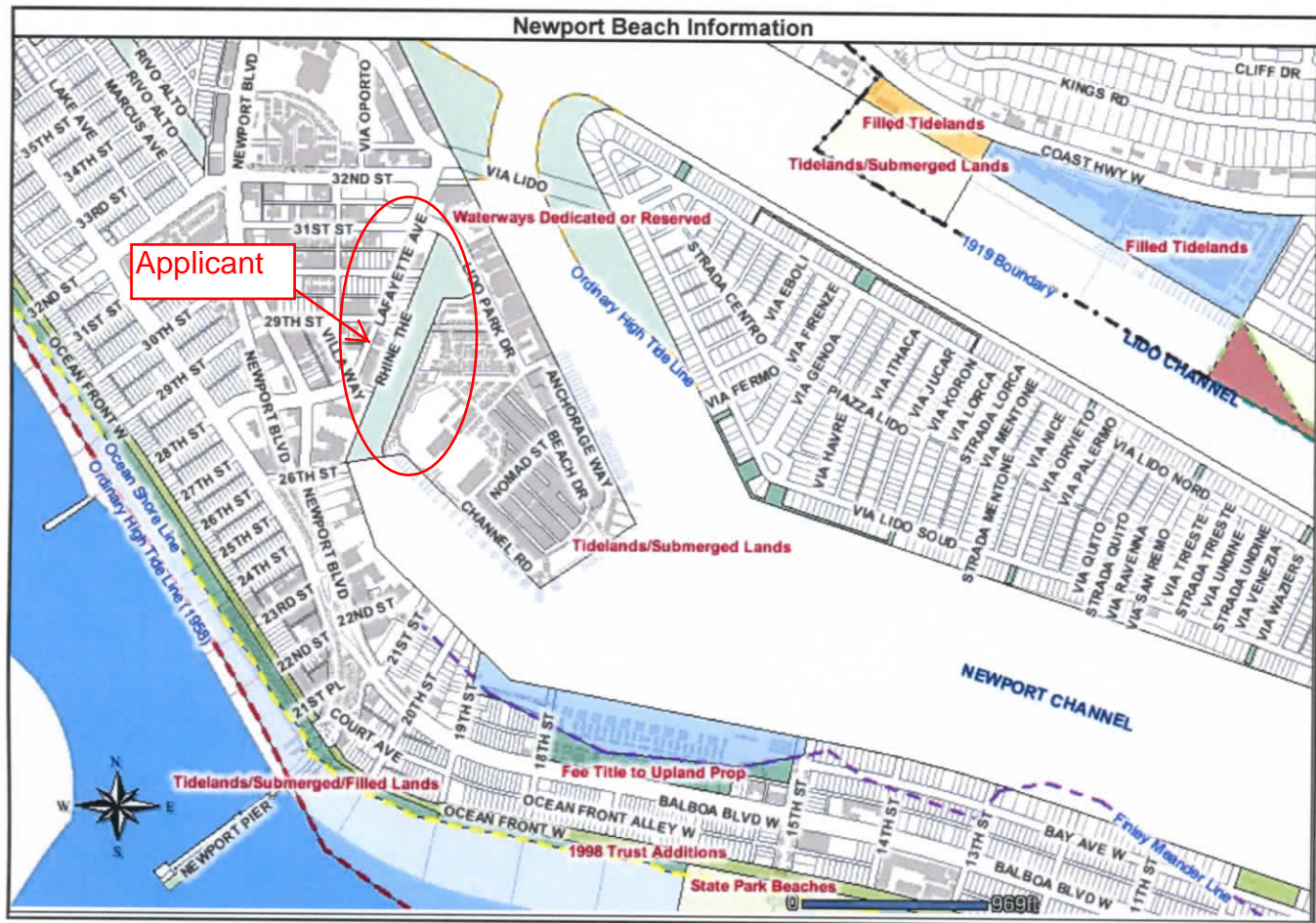
SUBMITTED: *R. E. Carson* SUBMITTED: *W. H. M. M. M.*  
CAPTAIN, CORPS OF ENGINEERS MAJOR, CORPS OF ENGINEERS  
DRAWN BY E. W. B. CHECKED BY R. C. T. FILE NO. 1858

HARBOR LINES, NEWPORT BAY HARBOR, CALIFORNIA



Exhibit R





### Boundaries

- 1919 Boundary
- 1919 Conflicting Boundary
- 1919 Conflicting Boundary
- Ocean Shore Line
- Ordinary High Tide Line
- Ordinary High Tide Line (1958)
- County Tideland Boundary
- Finley Meander Line
- Wildlife Preserve Boundary

### Managing Agency

#### City Maintained

- Tidelands/Submerged Lands
- Tidelands/Submerged/Filled Lands
- Filled Tidelands
- Fee Title to Upland Prop
- Waterways Dedicated or Reserved
- 1998 Trust Additions

#### O.C. Maintained

- Tidelands/Submerged Lands
- Filled Tidelands
- Fee Title to Upland Prop

#### State Maintained

- State Park Beaches
- State Highways

#### Federally Maintained

- Conveyed to US Gov. by City

#### Conflicting Title/Design

- Tidelands, Unclear 1919 Boundary
- Harbor Island Tidelands
- Bay Island Waterway



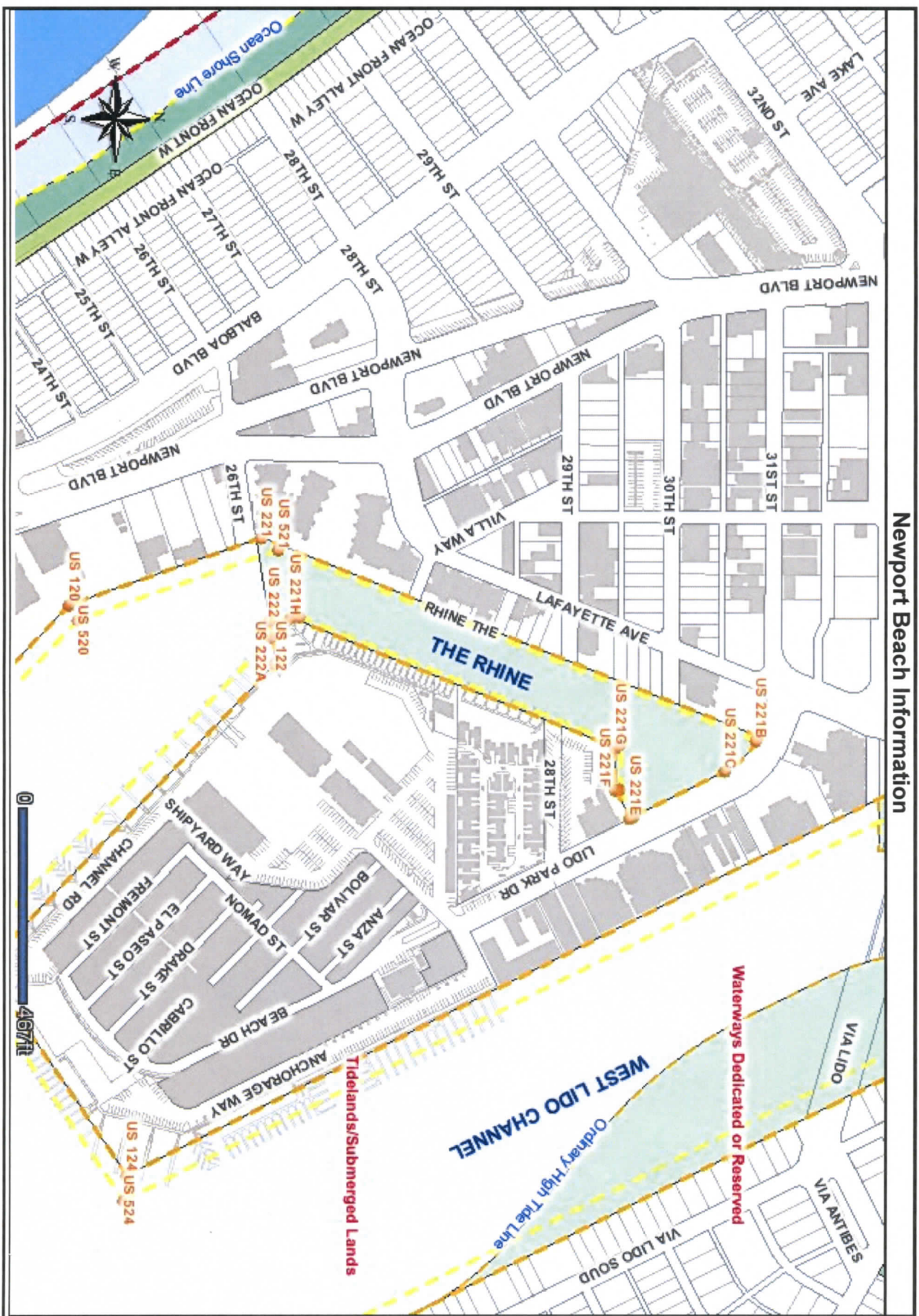


Exhibit T



# CITY OF NEWPORT BEACH

## PUBLIC WORKS DEPARTMENT Harbor Resources

January 10, 2013

Gaines & Stacey, LLP  
Attn: Sherman Stacey  
1111 Bayside Drive, STE 280  
Newport Beach, CA 92625

RE: 2808 Lafayette Avenue

Dear Mr. Stacey,

I am responding to your December 14, 2012 letter in which you requested clarification of the City's interpretation of the water area fronting 2808 Lafayette.

You have noted in your letter that your client has a "60 foot waterside boundary at the established bulkhead line of the Rhine Channel." I have reviewed the aerial photo with the Bulkhead Line shown, and would like to correct your statement by noting that the Bulkhead Line is approximately 40' bayward of the physical bulkhead of the property. In addition, the Pierhead Line is approximately 10' bayward of the Bulkhead Line.

I also note that the property line for 2808 Lafayette exactly follows the Bulkhead Line which is 40' bayward of the physical bulkhead as stated above.

Per your request, and based on the information available, the City believes the water area landward of the property line/Bulkhead Line to be private waterways and not City Tidelands.

Please feel to contact me if you have any additional questions.

Thank you,

A handwritten signature in blue ink that reads "Chris Miller".

Chris Miller  
Harbor Resources Manager  
(949) 644-3043

**Henry, Teresa@Coastal**

---

**Subject:** FW: Cervantes-Morehart Bulkhead, Newport IItem W18a Ex parte

---

**From:** Jana Zimmer [mailto:janazimmer@cox.net]  
**Sent:** Monday, March 04, 2013 9:52 AM  
**To:** Miller, Vanessa@Coastal; Staben, Jeff@Coastal  
**Cc:** Schmeltzer, Hope@Coastal  
**Subject:** Cervantes-Morehart Bulkhead, Newport IItem W18a Ex parte

## FORM FOR DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project, LPC, etc.: **Cervantes- Morehart Bulkhead , Newport W18a**

Date and time of receipt of communication: March 4, 2013 9:30 -9:45 a.m.

Location of communication: Santa Barbara

Type of communication (letter, facsimile, etc.): teleconference

Person(s) initiating communication: Sherman Stacey, attorney for applicant

Detailed substantive description of content of communication:

Two things:

1. Special Condition #2 is a false choice because the bulkhead is not an improvement that interferes with any public access as referenced in his Exh N rubble on the bank, it is not suitable for use by public, and before the rubble there was a wharf. There is not a public access interfered with. The bulkhead is not inconsistent with the public trust; it assists in navigation and commerce assuring adequate depth, and preventing erosion of upland into the water. Therefore, he does not believe the requirement of easement if State Lands finds its public trust is proper. Its only a bulkhead, the minimum distance necessary to protect the building. They have submitted a request for boundary line determination to SLC on 23<sup>rd</sup> of Feb. The City needs to be a party, they must approve a survey, will go through City Council in mid April. Then SLC will consider by their staff counsel. He does not know how long they will take. They did another boundary line agreement some time ago. 1964. There are de facto boundary lines adjacent.

The Commission in 1989 approved a bulkhead a few hundred feet away, to the property line, extending about 32 feet, and building a new bulkhead on the remaining seventy five feet. In that decision the words public trust never appear. No public access was required as condition. Located at 2906-2912 LaFayette Ave to the north of the subject site. There is now public access as a condition of redeveloping the property with four late residential structures.

This owner would grant access, if she were redeveloping, but all she is doing is trying to protect it, because they dredged the channel making her property more vulnerable.

The property is now being used for commercial, one portion being used as residence, sitting on a parking structure with ten spaces in the structure. They used to drive out the parking structure onto the wharf, there was a building on the wharf above the parking level. That is what fell down. It is all part of the same parcel.

2. As to special condition #9 as restricting building any further seaward, staff quotes 30253 incompletely. Stacey claims it applies only to seawalls, retaining walls, etc. that alter bluffs and cliffs. Doesn't apply on an artificial channel in an existing harbor. If his client demonstrates he owns the property, he should not be prohibited from building a bulkhead farther out on the property in the future.

---

Date

---

Signature of Commissioner

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

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

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

**CALIFORNIA COASTAL COMMISSION**

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

**W 18a**

Filed: July 5, 2012  
180th Day: January 1, 2013  
270<sup>th</sup> Day: April 1, 2013  
Staff: F. Sy-LB  
Staff Report: February 15, 2013  
Hearing Date: March 6-8, 2013

**STAFF REPORT: REGULAR CALENDAR**

**Application No.:** 5-11-178

**Applicant:** Lisa Cervantes-Morehart

**Location:** 2808 Lafayette Road, Newport Beach (Corona Del Mar)  
(Orange County)

**Project Description:** Installation of a new concrete seawall/bulkhead to protect an existing business/commercial building on a property fronting Lower Newport Bay (Rhine Channel). The proposed new seawall/bulkhead would be installed 10-feet into the bay from the existing building and would span the 60-foot width of the property, with a return wall at each terminus.

**Staff Recommendation:** Approval with conditions

---

**SUMMARY OF STAFF RECOMMENDATION:**

The applicant is proposing the removal of asphalt/concrete debris left from the failure of the previous structure and the installation of a new seawall/bulkhead, where one did not previously exist. On November 6, 2000, part of an office building and parking structure (approved by the Commission under Coastal Development Permit No. P-5-19-76-7903-(Ziemer)) located at the project site over the Rhine Channel collapsed. The structure caved into the Rhine Channel when rusty support beams gave way causing extensive structural damage to the portion of the building that collapsed and exposing the footing of the remaining building, which was never subsequently stabilized. Remnants of the failed structure were removed, but some of the asphalt/concrete debris that fell into the water was never removed and has since effectively acted as a revetment that protected the foundation of the remaining structure. The property owner seeks approval to install a concrete seawall/bulkhead to protect the site since any further erosion in the channel, or maintenance dredging (i.e., Rhine Channel dredging) near the building's foundation could remove



lateral support provided by the substrate for the foundation which could destabilize it. So, a bulkhead/seawall is required to protect the existing structure.

While the seawall/bulkhead is necessary to protect an existing structure, the proposed seawall/bulkhead is not located as far landward as possible or designed to minimize the amount of fill of coastal waters. There are two (2) alternative wall alignments that would achieve the required stabilization and be located further landward. Thus, the project has been conditioned to submit revised plans showing that the seawall/bulkhead has been moved to be either within the 'stringline' or in alignment with the bulkhead/seawall to the south. As conditioned, the proposed seawall/bulkhead will have no new adverse impacts on the biological productivity of coastal waters because the device will be located as far landward as possible, minimizes fill to the maximum extent feasible and is thus the least environmentally damaging alternative. As part of the bulkhead/seawall installation the applicant is proposing to remove the remaining debris from within the footprint of the seawall/bulkhead installation. However, by only limiting the removal of the debris form within the footprint of the installation, ongoing impact to soft bay bottom habitat would continue. Thus, the project has been conditioned to remove all asphalt/concrete debris. As conditioned, the project will enhance and restore soft bottom habitat that was either previously shaded from sunlight by the previous structures or covered by asphalt/concrete debris.

Another significant issue with the proposed project relates to coastal access along the bay front. The existing development on site is subject to a lateral public access easement/agreement required by the City of Newport Beach when the building was constructed in the 1970's. The easement/agreement required by the City had the following contingency: "*Said easement or agreement shall only become effective at such time as this property is connected to adjacent property to form a continuous walkway.*" When the initial project was proposed to the Commission in 1976, the development included a public accessway (a public boardwalk) along the bay edge. However, it is unclear if the public access was ever open for public use and if the easement/agreement required by the City has become fully effective. The boardwalk on the subject site was built and subsequently destroyed with the partial building collapse in 2000. Although the proposal includes a flat deck/walkway between proposed bulkhead/seawall and the remaining existing building, the applicant is not proposing to open that deck/walkway for public access on site. The potential loss of public access on the subject site creates a new impediment to the City's long term goal of providing continuous public access along the bay front in the subject area. The City's intent and desire to maintain and enhance access along the bay is demonstrated in prior actions by the City to establish, maintain and enhance access on other sites nearby. This goal is also memorialized in the City's certified LUP (in both maps and policies).

Furthermore, the proposed bulkhead/seawall and accompanying deck/walkway may be located on privately-owned submerged lands that are subject to a public trust easement. (See Marks v. Whitney (1971) 6 Cal.3d 251, 261.) The issue of whether or not the public trust servitude exists on submerged or tide lands is not dependent on the private/public property distinction but, rather, it is dependent on the natural state of the subject property at time of California's statehood. If the subject property consisted of swamp and overflow lands, generally called marshland, then the public trust servitude generally did not exist on that type of property when the state took title to public lands at the time of statehood. (People v. California Fish Co. (1913) 166 Cal. 576, 597-599; Zack's, Inc. v. City of Sausalito (2008) 165 Cal.App.4<sup>th</sup> 1163, 1175 fn. 4.) However, if the property

consisted of submerged or tide lands, then the property is subject to the public trust servitude. (Id.) The only way, however, in which the public trust servitude is removed from submerged and tide land property, either private or public, is if the legislature enacts a statute granting public trust lands to a local government or private party and explicitly removes the public trust servitude in the language of the grant or a grantee of a Mexican land grant perfected title of submerged/tide lands during patent proceedings shortly after California joined the union. (Marks v. Whitney, *supra*, 6 Cal.3d at pp. 260-261; Summa Corp. v. California State Lands Commission (1984) 466 U.S. 198.) Staff has not found any evidence indicating that one of these exceptions apply to the subject property and the applicant has not submitted any documentation indicating these exceptions do, in fact, exist on the subject property. Thus, since neither exception applies to the property, the only other way to find that the applicant's property is not subject to the public trust is if the property did not consist of submerged or tide lands at the time of statehood but, rather, consisted of swamp and overflow lands. (People v. California Fish Co., *supra*, 166 Cal. at pp. 597-599; Zack's, Inc. v. City of Sausalito, *supra*, 165 Cal.App.4<sup>th</sup> at p. 1175 fn. 4.) The State Lands Commission (SLC) is responsible for determining the boundary lines between submerged and tidelands and swamp and overflow lands as they existed at the time of statehood. (See Pub. Res. Code section 6201, et seq.) The State Lands Commission has indicated that it and the applicant, and the applicant's predecessors in interest, have not established whether the applicant's property is subject to the public trust. If the applicant's property is subject to the public trust doctrine, such lands must be used consistent with the doctrine, which includes, but is not limited to, the right for the public to use the navigable waters of the state, like the Rhine Channel, for fishing, hunting, bathing, swimming, boating and general recreation purposes and to use the bottom for anchoring, standing, or other purposes. (Marks v. Whitney, *supra*, 6 Cal.3d at p.259.) Since the public has these rights over submerged lands as preserved under the public trust doctrine, any development, such as the current proposal, in potentially submerged lands must provide a public use consistent with the public trust doctrine. Thus, the project has been conditioned to require the applicant to irrevocably offer to dedicate to a public agency or other appropriate entity an easement for public access on the walkway/deck area that is proposed between the existing building and the proposed seawall/bulkhead so that the public may continue to use the public trust easement area of the filled submerged lands to access the navigable waters of the Rhine Channel for public trust purposes. Alternatively, the applicant may provide evidence, through a boundary line agreement, arbitration or adjudication between her and the State Lands Commission and the City of Newport Beach, if necessary, that unequivocally establishes that the project is not subject to the public trust doctrine, thereby relieving the applicant of recording an irrevocable offer to dedicate to a public agency or other appropriate entity an easement for public access on the bulkhead.

The project was previously heard at the December 2012 CCC Hearing in San Francisco. However at the hearing, the applicant decided to postpone the project and submitted a 90-Day waiver to have more time to prepare for the CCC Hearing.

Commission staff is recommending **APPROVAL** of the proposed project with **THIRTEEN (13) SPECIAL CONDITIONS** regarding: 1) submittal of revised final project plans showing: a) the seawall/bulkhead relocated to be either within the 'stringline' or in alignment with the bulkhead/seawall to the south; b) to the maximum extent feasible, the revised location of the seawall/bulkhead will provide connectivity to the existing adjacent lateral public access along the Rhine Channel or, alternatively, if the applicant establishes that her property is not subject to the

public trust; and c) that all asphalt/concrete debris from the collapse of the building be removed from the Rhine Channel and not just that debris located within the footprint of the seawall/bulkhead installation; **2)** either (1) submittal of an irrevocable offer to dedicate to a public agency or non-profit entity acceptable to the Executive Director, an easement for public pedestrian access and passive recreational use of the area between the existing building foundation and the proposed seawall/bulkhead OR (2) submittal of evidence consisting of a boundary line agreement, arbitration decision or adjudication unequivocally establishing that the applicant's property is not subject to the public trust, thereby relieving the applicant of complying with the public access special conditions; **3)** submittal of a Public Access and Recreation Easement Area Management and Maintenance Program for the public access walkway; **4)** construction and development phasing ;**5)** submittal of Public Access Signage Plan; **6)** conformance with geotechnical recommendations; **7)** assumption of risk; **8)** future development; **9)** no future seaward extension of shoreline protection device; **10)** construction responsibilities and debris removal; **11)** identifies the procedures regarding eelgrass surveys that are necessary to be completed prior to beginning any construction; **12)** requires the applicant, prior to commencement of development, to survey the project area for the presence of *Caulerpa taxifolia*; and **13)** a deed restriction against the property, referencing all of the Special Conditions contained in this staff report.

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

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## APPENDICES

Appendix 1 – Substantive File Documents

## EXHIBITS

Exhibit #1 – Vicinity Map

Exhibit #2 – Coastal Land Use Plan Area Map

Exhibit #3 – Before and after aerial pictures of the project site

Exhibit #4 – Project Plans

Exhibit #5 – Plans showing revised seawall/bulkhead located either within the ‘stringline’ drawn between the corners of the seawall/bulkheads on the adjacent sites or in alignment with the bulkhead/seawall to the south

Exhibit #6 – Aerial showing public access

Exhibit #7 – Surveys, aerials, City maps and written documentation relating to public trust lands on subject property

Exhibit #8 – Applicant’s Letter of Opposition Dated 12/10/12

Exhibit #9 – State Lands Commission Letter dated 1/28/13

## I. MOTION AND RESOLUTION

### Motion:

*I move that the Commission approve Coastal Development Permit No. 5-11-178 pursuant to the staff recommendation.*

Staff recommends a **YES** vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

### Resolution:

*The Commission hereby approves a Coastal Development Permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned, located between the first public road and the sea, will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that will substantially lessen any significant adverse impacts of the development on the environment.*

## II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.



5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

### III. SPECIAL CONDITIONS

#### 1. Revised Final Project Plans

- A. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT,** the applicant shall submit, for the Executive Director's review and approval, two (2) full size sets of a revised final project plans, including site, elevation, section, etc. The revised final project plans shall be in substantial conformance with the plans received by South Coast District staff on July 14, 2011, except they shall be modified as follows: 1) the location of the seawall/bulkhead shall be revised, so as to be located either within the 'stringline' drawn between the corners of the seawall/bulkheads on the adjacent sites or in alignment with the bulkhead/seawall to the south as generally depicted in Exhibit #5 to the staff report dated 2/15/2013, and thus will result in a seawall/bulkhead located as far landward as possible that minimizes fill to the maximum extent feasible; 2) the plans for the revised location of the seawall/bulkhead and deck/walkway to be built between it and the existing building foundation shall provide connectivity to the existing adjacent lateral public access along the Rhine Channel at 2806 Lafayette (including removal of any barriers thereto) and be constructed such that continuous public access to 2812 Lafayette can be easily provided in the future or, alternatively, this provision in sub-part 2 of this condition shall not apply if the applicant resolves the public trust issue identified in **SPECIAL CONDITION NO. 2**, below, with a resolution indicating that the applicant's property is not subject to a public trust easement; and 3) all asphalt/concrete debris resulting from the collapse of the building be removed from the Rhine Channel and not just that debris located within the footprint of the seawall/bulkhead installation. The revised final project plans shall be reviewed by the City of Newport Beach and determined to be consistent with City standards prior to submittal to the Executive Director.
- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this Coastal Development Permit unless the Executive Director determines that no amendment is legally required.

## 2. Offer to Dedicate Public Access and Recreational Use Easement

**PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the landowner(s) shall do one of the following:

- A. Execute and record a document in a form and content acceptable to the Executive Director, irrevocably offering to dedicate to a public agency or non-profit entity acceptable to the Executive Director, an easement for public pedestrian access and passive recreational use of the proposed deck/walkway area on the seaward side of the existing building located between the building and the proposed seawall/bulkhead, as generally depicted on Exhibit #4 to the staff report dated February 14, 2013. The easement area shall extend along the full width of the subject property, from one side lot-line to the other. Minor adjustments to the aforementioned alignment may be authorized by the Executive Director to ensure that a continuous minimum 6-foot wide public access and recreation easement is formed which connects with any accessways on adjacent lands.

The recorded irrevocable offer to dedicate a public access and passive recreation easement described above shall reflect the following restrictions: i) The public pedestrian access and passive recreation easement area shall be open to the general public for use 24-hours per day; ii) The landowner(s) shall, or, at the election of the easement holder, the easement holder shall, maintain the easement area in accordance with the Public Access and Recreation Easement Area Management and Maintenance Program approved by the Executive Director in accordance with **SPECIAL CONDITION NO. 3**; iii) Any development, as defined in Section 30106 of the Coastal Act, that acts as an impediment to permanent public pedestrian access and passive recreational use of the easement area is prohibited; iv) No development, as defined in Section 30106 of the Coastal Act, shall occur within the public access and recreation easement area except for the following development: grading and construction necessary to construct the public access walkway/deck and appurtenances (e.g. signs, benches, trash receptacles, safety railing) and the proposed seawall/bulkhead as modified in accordance with the final plans approved by the Executive Director pursuant to **SPECIAL CONDITION NO. 1**, underground utilities, if any, to serve the proposed development on the subject lot in accordance with the final plans approved by the Executive Director pursuant to **SPECIAL CONDITION NO. 1**, and maintenance and repair of the approved development within the easement as identified in the Public Access and Recreation Easement Area Management and Maintenance Program approved by the Executive Director pursuant to **SPECIAL CONDITION NO. 3**.

The recorded irrevocable offer to dedicate a public access and passive recreation easement shall include legal descriptions and graphic depictions, prepared by a licensed surveyor, of both the entire project site and the area of the offered public

access and recreation easement. The offer shall be recorded free of prior liens and encumbrances that the Executive Director determines may affect the interest being conveyed. Subject to the review and approval of the Executive Director, easements for subsurface drainage devices and subsurface or overhead utilities within the offered public access and recreation easement areas may be allowed provided such utility/drainage easements and associated facilities will not adversely impact public use of the public access and recreation easement. The offer shall run with the land in favor of the People of the State of California, binding all successors and assigns, and shall be irrevocable for a period of 21 years, such period running from the date of recording. If the offer is not accepted and expires, the above described easement area shall continue to be made available for public access and recreation subject to the same restrictions identified in this special condition.

OR;

- B.** Submit to the Executive Director, for his review and approval, a recorded boundary line agreement between the applicant and State Lands Commission and other appropriate agencies/entities, a final arbitration decision and/or a final judicial decision (quiet title action or other appropriate relief), after expiration of relevant statutory appeal periods, that demonstrates that the applicant's property is not subject to the public trust servitude/easement, in which case the landowner is not required to dedicate a public access easement or to comply with the associated access condition language in **SPECIAL CONDITIONS NOS. 1, 3, 4 and 5**, and instead shall comply with the applicable revised plans approved under **SPECIAL CONDITION NO. 1**. All other special conditions that do not relate to the public access easement condition shall be unaffected by this Special Condition No. 2.B. and shall remain in full force and effect.

### **3. Public Access and Recreation Easement Area Management and Maintenance Program**

- A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit, for the Executive Director's review and approval, a Management and Maintenance Program for the public access and recreation easement area. The final management and maintenance program shall include the following:
  - (1) IDENTIFY ALL ENTITIES RESPONSIBLE FOR MANAGEMENT AND MAINTENANCE OF THE PUBLIC ACCESS AND RECREATION EASEMENT AREA.** In general, the owner(s) of the land shall maintain the public access and recreation easement area(s) in a manner that ensures the area is at all times in a suitable physical state to comply with the physical public access easement requirements (constructed according to approved plans with no physical impediments that would affect future public access once the easement is accepted) until such time as any easement required to be offered by this permit is accepted and opened to the public. Where an easement is accepted by an entity in accordance with the terms and

conditions of the offer to dedicate required by this permit, the holder of the easement area shall be responsible for management and maintenance of the public access and recreation facilities within the easement area unless the arrangements between the landowner(s) and the easement holder dictate that the landowner(s) shall retain all or part of said management and maintenance responsibility. All management and maintenance shall occur in accordance with the approved Management and Maintenance Program.

- (2) **IDENTIFICATION OF MANAGEMENT AND MAINTENANCE AND ASSOCIATED FUNDING PROGRAM.** The Management and Maintenance Program shall include a) a funding program sufficient to fund the actual cost of maintenance and periodic repair and replacement of the public access walkways and associated appurtenances including, but not limited to, surfaces, landscaping (if any), and signage; and b) maintenance activities include but are not limited to trash collection, repairs or replacement of surfaces due to cracks, spalling, broken concrete, etc., maintenance of gutters, curbs and sidewalks (keep free of debris, wax, gum buildup, etc.), remove and/or trimming of vegetation that is interfering with public use of the easement area, repair/replacement of public access signs, trash receptacles, benches, handrails, stairs, and lighting.

- B.** The landowner(s) or entity assigned to be responsible for management and maintenance shall undertake management and maintenance in accordance with the approved final management and maintenance program. Any proposed changes to the approved final management and maintenance program shall be reported to the Executive Director. No changes to the approved final management and maintenance program shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

#### **4. Construction/Development Phasing**

Construction of the public access improvements depicted on the final plans approved by the Executive Director pursuant to **SPECIAL CONDITION NO. 1** in the public access and recreation easement shall be phased so that they are open and available to the public upon completion of the concurrent construction of the seawall/bulkhead and public access walkway as approved by this Coastal Development Permit.

#### **5. Public Access Sign Plan**

The final plans submitted for review and approval to the Executive Director shall include a detailed signage plan that directs the public to the public access and recreation easement areas on the project site. Some signs shall be included that are located and sized such that they are visible from existing publicly accessible areas (e.g. sidewalks, public roads) adjacent to the site. Signs shall invite and encourage public use of access opportunities and shall identify and direct the public to their locations. Signage shall include facility identification/directional monuments (e.g. location of

amenities); informational signage and circulation; and roadways signs. Signs and displays not explicitly permitted in this document shall require an amendment to this permit unless the Executive Director determines that no amendment is legally required.

## **6. Conformance with Geotechnical Recommendations**

- A.** All final design and construction plans shall be consistent with all recommendations contained in the following documents: *Geotechnical Investigation, Proposed Seawall at 2808 Lafayette, Newport Beach, California* prepared by Petra Geotechnical, Inc., dated January 24, 2011; Letter from William Simpsons & Associates, Inc. Consulting Structural Engineers dated June 4, 2012; and Letter from William Simpsons & Associates, Inc. Consulting Structural Engineers dated July 6, 2012. No changes to the approved final plans shall occur without a Commission amendment to this Coastal Development Permit unless the Executive Director determines that no amendment is legally required.
- B. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit, for the Executive Director's review and approval, evidence that an appropriately licensed professional has reviewed and approved all final design and construction plans and certified that each of those final plans is consistent with all the recommendations specified in the above-referenced geologic engineering report.
- C.** The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment unless the Executive Director determines that no amendment is legally required.

## **7. Assumption of Risk, Waiver of Liability and Indemnity**

By acceptance of this permit, the applicant acknowledges and agrees (i) that the site may be subject to hazards from sea level rise, flooding, wave attack, and erosion; (ii) to assume the risks to the applicants and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

## **8. Future Development**

This permit is only for the development described in Coastal Development Permit No. 5-11-178. Pursuant to Title 14 California Code of Regulations section 13253(b)(6), the exemptions otherwise provided in Public Resources Code section 30610 (b) shall not apply to the development governed



by the Coastal Development Permit No. 5-11-178. Accordingly, any future improvements to the structure authorized by this permit, including but not limited to repair and maintenance identified as requiring a permit in Public Resources section 30610(d) and Title 14 California Code of Regulations sections 13252(a)-(b), shall require an amendment to Permit No. 5-11-178 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government.

**9. No Future Seaward Extension of Shoreline Protective Device**

- A.** By acceptance of this permit, the applicant agrees, on behalf of itself and all successors and assigns, that no future repair or maintenance, enhancement, reinforcement, or any other activity affecting the shoreline protective device (seawall/bulkhead) approved pursuant to Coastal Development Permit No. 5-11-178, as described and depicted on an Exhibit attached to the Notice of Intent to Issue Permit (NOI) that the Executive Director issues for this permit, shall be undertaken if such activity extends the footprint seaward of the subject shoreline protective device (seawall/bulkhead). By acceptance of this permit, the applicant waives, on behalf of itself (or himself or herself, as applicable) and all successors and assigns, any rights to such activity that may exist under Public Resources Code Section 30235.
- B.** Prior to the issuance by the Executive Director of the NOI FOR THIS PERMIT, the applicant shall submit for the review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal legal description and graphic depiction of the shoreline protective device approved by this permit, as generally described in **SPECIAL CONDITION NO. 1.A.1** to be approved by the Executive Director pursuant to that Special Condition; and which shall show the footprint of the device and the elevation of the device referenced to NGVD (National Geodetic Vertical Datum).

**10. Construction Responsibilities and Debris Removal**

The permittee shall comply with the following construction-related requirements:

- A.** No demolition or construction materials, equipment, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain or tidal erosion and dispersion.
- B.** Any and all debris resulting from demolition or construction activities, and any remaining construction material, shall be removed from the project site within 24 hours of completion of the project.
- C.** Demolition or construction debris and sediment shall be removed from work areas each day that demolition or construction occurs to prevent the accumulation of sediment and other debris that may be discharged into coastal waters.

- D.** Machinery or construction materials not essential for project improvements will not be allowed at any time in the intertidal zone.
- E.** If turbid conditions are generated during construction a silt curtain will be utilized to control turbidity.
- F.** Floating booms will be used to contain debris discharged into coastal waters and any debris discharged will be removed as soon as possible but no later than the end of each day.
- G.** Non buoyant debris discharged into coastal waters will be recovered by divers as soon as possible after loss.
- H.** All trash and debris shall be disposed in the proper trash and recycling receptacles at the end of every construction day.
- I.** The applicant shall provide adequate disposal facilities for solid waste, including excess concrete, produced during demolition or construction.
- J.** Debris shall be disposed of at a legal disposal site or recycled at a recycling facility. If the disposal site is located in the Coastal Zone, a Coastal Development Permit or an amendment to this permit shall be required before disposal can take place unless the Executive Director determines that no amendment or new permit is legally required.
- K.** All stock piles and construction materials shall be covered, enclosed on all sides, shall be located as far away as possible from drain inlets and any waterway, and shall not be stored in contact with the soil.
- L.** Machinery and equipment shall be maintained and washed in confined areas specifically designed to control runoff. Thinners or solvents shall not be discharged into sanitary or storm sewer systems.
- M.** The discharge of any hazardous materials into any receiving waters shall be prohibited.
- N.** Spill prevention and control measures shall be implemented to ensure the proper handling and storage of petroleum products and other construction materials. Measures shall include a designated fueling and vehicle maintenance area with appropriate berms and protection to prevent any spillage of gasoline or related petroleum products or contact with runoff. The area shall be located as far away from the receiving waters and storm drain inlets as possible.
- O.** Best Management Practices (BMPs) and Good Housekeeping Practices (GHPs) designed to prevent spillage and/or runoff of demolition or construction-related

materials, and to contain sediment or contaminants associated with demolition or construction activity, shall be implemented prior to the on-set of such activity.

- P. All BMPs shall be maintained in a functional condition throughout the duration of construction activity.

## 11. **Eelgrass Survey(s)**

- A. **Pre Construction Eelgrass Survey.** A valid pre-construction eelgrass (*Zostera marina*) survey shall be completed during the period of active growth of eelgrass (typically March through October). The pre-construction survey shall be completed prior to the beginning of construction and shall be valid until the next period of active growth. The survey shall be prepared in full compliance with the “Southern California Eelgrass Mitigation Policy” Revision 8 (except as modified by this special condition) adopted by the National Marine Fisheries Service and shall be prepared in consultation with the California Department of Fish and Game. The applicant shall submit the eelgrass survey for the review and approval of the Executive Director within five (5) business days of completion of each eelgrass survey and in any event no later than fifteen (15) business days prior to commencement of any development. If the eelgrass survey identifies any eelgrass within the project area which would be impacted by the proposed project, the development shall require an amendment to this permit from the Coastal Commission or a new Coastal Development Permit.
- B. **Post Construction Eelgrass Survey.** If any eelgrass is identified in the project area by the survey required in subsection A of this condition above, within one month after the conclusion of construction, the applicant shall survey the project site to determine if any eelgrass was adversely impacted. The survey shall be prepared in full compliance with the “Southern California Eelgrass Mitigation Policy” Revision 8 (except as modified by this special condition) adopted by the National Marine Fisheries Service and shall be prepared in consultation with the California Department of Fish and Game. The applicant shall submit the post-construction eelgrass survey for the review and approval of the Executive Director within thirty (30) days after completion of the survey. If any eelgrass has been impacted, the applicant shall replace the impacted eelgrass at a minimum 1.2:1 ratio on-site, or at another location, in accordance with the Southern California Eelgrass Mitigation Policy. All impacts to eelgrass habitat shall be mitigated at a minimum ratio of 1.2:1 (mitigation:impact). The exceptions to the required 1.2:1 mitigation ratio found within SCEMP shall not apply. Implementation of mitigation shall require an amendment to this permit or a new Coastal Development Permit unless the Executive Director determines that no amendment or new permit is required.

## 12. **Pre-construction *Caulerpa Taxifolia* Survey**

- A. Not earlier than 90 days nor later than 30 days prior to commencement or re-commencement of any development authorized under this Coastal Development Permit (the “project”), the applicant shall undertake a survey of the project area and a

buffer area at least 10 meters beyond the project area to determine the presence of the invasive alga *Caulerpa taxifolia*. The survey shall include a visual examination of the substrate.

- B.** The survey protocol shall be prepared in consultation with the Regional Water Quality Control Board, the California Department of Fish and Game, and the National Marine Fisheries Service.
- C.** Within five (5) business days of completion of the survey, the applicant shall submit the survey:
  - (1) for the review and approval of the Executive Director; and
  - (2) to the Surveillance Subcommittee of the Southern California Caulerpa Action Team (SCCAT). The SCCAT Surveillance Subcommittee may be contacted through William Paznokas, California Department of Fish & Game (858/467-4218) or Robert Hoffman, National Marine Fisheries Service (562/980-4043), or their successors.
- D.** If *Caulerpa taxifolia* is found within the project or buffer areas, the applicant shall not proceed with the project until 1) the applicant provides evidence to the Executive Director that all *C. taxifolia* discovered within the project and buffer area has been eliminated in a manner that complies with all applicable governmental approval requirements, including but not limited to those of the California Coastal Act, or 2) the applicant has revised the project to avoid any contact with *C. taxifolia*. No revisions to the project shall occur without a Coastal Commission approved amendment to this Coastal Development Permit unless the Executive Director determines that no amendment is legally required.

### **13. Deed Restriction**

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

## **II. FINDINGS AND DECLARATIONS:**

The Commission hereby finds and declares:

### **A. PROJECT LOCATION AND DESCRIPTION, PRIOR COMMISSION ACTIONS ON ADJACENT SITES AND ON SITE AND STANDARD OF REVIEW**

#### **1. PROJECT LOCATION AND DESCRIPTION**

The project site is located at 2808 Lafayette Road along the Rhine Channel in Lower Newport Bay (LNB) in the City of Newport Beach (County of Orange) (Exhibit #1). The project site is bordered by the Rhine Channel on the west, a residential use on the north, Lafayette Avenue on the east and a commercial/residential use on the south. The applicant's property is subject to tidal influence. The property is occupied by an existing business/commercial building. The lot size is 6,000 square feet and the City of Newport Beach Land Use Plan (LUP) designates use of the site for Mixed Use-Water Related (Mu-W), which "...is intended to provide for commercial development on or near the bay in a manner that will encourage the continuation of coastal-dependent and coastal-related uses and visitor-serving uses, as well as allow for the development of mixed-use structures with residential uses above the ground floor..." No changes are proposed to the existing business/commercial building; nevertheless it is unclear as to whether the existing uses in the building conform to the land use designation.

The project site is located within the Cannery Village area of Newport Beach, which is the historic center of the City's commercial fishing and boating industry and contains a mix of small shops, art galleries, professional offices, and service establishments (Exhibit #2). Marine-related commercial (boat sales) and marine-related industrial uses (boat repair) are also found in the area.

The project site fronts the Rhine Channel and from the 1930's through the 1950's, shipyard and cannery operations, boat building activities, and metal plating facilities were located along the Rhine Channel and other portions of LNB.

The applicant states that on November 6, 2000, a three-story structure consisting of an office building and parking structure located on the project site that was constructed partly over the Rhine Channel collapsed into the channel (Exhibit #3). According to the applicant, the structure caved in when rusty support beams gave way causing extensive structural damage and substantial debris in the Rhine Channel. The collapse required the immediate removal of part of the 3-story structure, but the exposed concrete bond beam and piles (footing of the existing structure) supporting the remaining structure were never stabilized. The asphalt/concrete debris that fell into the water during the collapse and subsequent demolition were never removed and has since effectively acted as a revetment. The exposed building foundation (i.e. concrete bond beam and piles) remain unstable.



The proposed project includes installation of a concrete seawall/bulkhead along the (western) side of the property. The new seawall/bulkhead would span the width of the property for 60-feet, with a return wall at each terminus (Exhibit #4). The applicant proposes to install the seawall/bulkhead approximately 10-feet out into the Rhine Channel from the existing seaward terminus of the building (location where the exposed concrete bond beam and piles are located). The seawall/bulkhead would be installed with the aid of a barge-mounted crane operating within the channel. This 10-foot span (currently occupied by asphalt/concrete debris and to be removed by the project, work to be described below) would be backfilled with sand and covered by a new reinforced concrete slab deck extending from the landside terminus of the building to the new seawall/bulkhead, covering an approximate area of 600 square feet of tidelands and submerged lands within the subject parcel. The seawall/bulkhead would be installed at the existing approximate elevation of +2.5 feet mean lower low water (MLLW) and has been designed to be at a height of +9.0 Mean Lower Low Water (MLLW). It would be jetted into place and secured with helical anchors extending into the adjoining subsurface soils that underlie the building.

Prior to installation of the seawall/bulkhead, the remaining asphalt/concrete debris (approximately 100 cubic yards) from the failed structure would be removed from within the footprint of the installation, currently at +2.5 feet MLLW. These activities would take place using a barge-mounted crane operating within the channel. No other dredging or discharge of fill to the Rhine Channel or other waterbodies would occur as a result of the project. Removed asphalt/concrete debris would be transported via truck and disposed of at an appropriate recycling center outside of the Coastal Zone.

## 2. PRIOR COMMISSION ACTIONS ON ADJACENT SITES AND ON SITE

### a. ON ADJACENT SITES

#### (1) 2800 Lafayette Avenue

On December 8, 1980, the Commission approved Coastal Development Permit No. P-80-7354-(Tonti) for: the reconstruction and change in use of an existing 6,000 square foot, 2-story structure being used for wholesale marketing and warehousing of frozen foods on a 6,000 square foot M-1 lot adjacent to the Rhine Channel. Docking facilities existed for commercial fishing boats. The project included the demolition of on site structures consisting of a fashion shop, a storage shed, a single-family residence and a small accessory structure and changed the use to a 6,500 square foot, 2-story restaurant and a 550 square foot retail fish market on the 1<sup>st</sup> floor facing the street. The project also included a provision of a 5-foot wide public walkway along the channel. Additionally, the project included construction of parking facilities on two off-site areas, one a 4,050 square foot M-1 Parcel (2 lots) and the other an 11,500 square foot C-1 parcel (5 lots). The remainder of the parking requirements were met by an existing lot below an office complex (2808 Lafayette Avenue i.e. the subject site) owned by the applicant. Staff recommended approval of the project subject to three (3) Special Conditions:

SPECIAL CONDITION NO. 1 required a deed restriction that provided: a) that the applicant shall retain the same number of boat slips that were then present; and b) that these slips shall be used only by commercial fishing vessels. SPECIAL CONDITION NO. 2 required recording of a document irrevocably offering to dedicate to a public agency or a private association approved by the Executive Director, an easement for a public accessway along the shoreline. Such easement was to be 5-feet wide and located along the 5-foot walkway between the seawall/bulkhead and restaurant. Such easement was to be recorded free of prior encumbrances which the Executive Director determines may affect the interest being conveyed. The offer was to run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The period of dedication was to be irrevocable for a period of 21 years, such period running from the date of recording. The offer was accepted in 2002. SPECIAL CONDITION NO. 3 required that the applicant provide proof that the eighteen (18) parking spaces on off-site Lot #3 2808 Lafayette Avenue), which were to be removed from the project and substituted with other parking, be replaced within 300-feet of the project. Said parking spaces were to be operated at least between the hours of 6:00 pm to 12:00 pm.

At the December 1985 Commission Hearing, the Commission approved De Minimis Waiver No. 5-85-717-(Zimerman) for: the construction of two (2) new commercial docks with three (3) new pilings.

(2) 2804 Lafayette Avenue

On March 15, 1990 the Commission approved Administrative Permit No. 5-90-075-(Fluter) for: the demolition of a storage shed and construction of a 26-foot high, 3,063 square foot mixed-use commercial and residential structure with four (4) parking spaces (each use has two (2) parking spaces). Additionally, the project included construction of a 6-foot wide public walkway on piles on the waterfront side of the parcel. Staff recommended approval of the project with no Special Conditions.

(3) 2806 Lafayette Avenue

On July 25, 1984 the Commission approved Administrative Permit No. 5-84-393-(Barrett) for: the construction of a new private boat dock, ramp and finger float. Staff recommended approval of the project with no Special Conditions.

On July 12, 1990 the Commission approved Coastal Development Permit No. 5-90-471-(701 Lido Park Partnership) for: the demolition of a storage shed and construction of a mixed-use commercial/residential facility consisting of 500 square feet of office space and a 1,656 square foot residential unit on the 2<sup>nd</sup> level with a 402 square foot two (2) car garage for residential use and a

two (2) covered parking spaces for the commercial use. Additionally, the project included construction of a 6-foot wide public walkway on piers abutting the existing seawall/bulkhead. Staff recommended approval of the project with no Special Conditions:

b. ON SITE

(1) 2808 Lafayette Avenue

On July 26, 1976, the Commission approved Coastal Development Permit No. P-5-19-76-7903-(Ziemer) for: the demolition of an existing building and construction of a 3-story marine oriented commercial building with a ground level (1<sup>st</sup> floor) twenty (20)-space parking garage and construction of a boat dock and deck areas. Staff recommended approval of the project subject to one (1) Special Condition: SPECIAL CONDITION NO. 1 required a deed restriction limiting the use of the proposed structure to marine service commercial use.

On March 24, 2006, an application for Coastal Development Permit No. 5-06-119-(Morehart) was submitted for dock work consisting of the removal and replacement of the existing dock with a new dock, gangway and pile. On April 29, 2008, due to inactivity, the file was returned to the applicant.

3. STANDARD OF REVIEW

The City of Newport Beach has a certified Land Use Plan (LUP) but the Commission has not certified a Local Coastal Program (LCP) for the City. As such, the Coastal Act polices are the standard of review with the certified LUP providing guidance.

**B. PROTECTIVE STRUCTURES AND HAZARDS**

Section 30235 of the Coastal Act states:

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

Section 30253 of the Coastal Act states in relevant part:

*New development shall do all of the following:*

- (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*

*(b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area...*

## **1. Seawall/Bulkhead Required to Protect Existing Development**

Section 30235 of the Coastal Act states that seawalls/bulkheads shall be permitted when required to protect existing structures in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Section 30253 of the Coastal Act states that new development shall minimize risks to life and property in areas of high flood hazard and assure stability and structural integrity, and neither create nor contribute significantly to erosion or destruction of the site or surrounding area.

The purpose and need for this project is to install a new seawall/bulkhead to stabilize the exposed footing of an existing bayfront commercial building that has become unstable following the collapse of part of the building into the bay and to allow the removal of the remaining asphalt/concrete debris from the failed structure.

The existing concrete bond beam and piles compose the eastern (shoreward) footing of the existing structure. The footing supports the existing building. The footing was exposed when the 3-story structure consisting of an office and parking structure collapsed into the bay. The concrete bond beam and piles were never stabilized, and the adjoining structural elements (the former parking structure slab) have not been replaced, nor has the lateral support that these elements originally provided. The asphalt/concrete debris was never removed and has since effectively acted as a revetment. Any further erosion in the channel, or maintenance dredging immediately along the footing/beam and piles, would remove additional materials from alongside these elements and would have the effect of further reducing lateral support to this important structural element. According to the applicant, it is crucial that some degree of lateral support be returned to the waterward edge of the building to offset the loss of lateral support that occurred when the parking structure was lost. The applicant states that the installation of a properly designed seawall/bulkhead would provide this stability.

In order to analyze and fully assess the situation, several studies were conducted. In the letter from William Simpson & Associates, Inc. Consulting Structural Engineers dated June 4, 2012, the engineer asserts that the existing concrete bond beam and piles are still functional; however, due to the recent dredging of the Rhine Channel (CDP No. 5-10-162) in front of the site, erosion would remove soil alongside the concrete bond beam and piles and would jeopardize their structural integrity, if they remain unprotected. Installation of the seawall/bulkhead as proposed would protect the concrete bond beam and piles and the existing structure from erosion. In order to ensure that the work does not adversely affect adjacent properties, that they minimize risks to life and property, and to assure stability and structural integrity, the Commission imposes **SPECIAL CONDITION NO. 6** which requires the applicant to submit, prior to issuance of the permit, evidence of conformance with geotechnical recommendations.

The proposed project involves the fill of coastal waters with a new seawall/bulkhead. The purpose of the proposed fill is to protect existing structures in danger from erosion, which is not one of the eight allowable uses enumerated under section 30233 of the Coastal Act. However, as stated in the policy above, section 30235 of the Coastal Act requires the Commission to approve revetments and other similar structures provided that such structures are for the purpose of protecting existing structures in danger from erosion and provided that the structures are designed to eliminate or mitigate adverse impacts on local shoreline sand supply. The proposed structure is for the purpose of protecting existing structures. In addition, the proposed project is occurring within an urban harbor at a location isolated from the nearest open coastal shoreline and longshore littoral sand transport mechanisms.

## **2. Wall Alignment**

Typically, the Commission's approach has been to require protective devices to be located as far landward as feasible in order to mitigate adverse effects that protective devices typically have (e.g. public access impediment, adverse visual impacts, etc.). The proposed seawall/bulkhead would be installed approximately 10-feet out into the Rhine Channel seaward of the existing landside terminus of the building's foundation (location where the exposed concrete bond beam and piles are located). The applicant has not provided any written structural/engineering justification for placing the seawall/bulkhead 10 feet away from the foundation the seawall/bulkhead is designed to protect. However, in a telephone call with Commission staff, on November 19, 2012, the applicant explained that additional construction-phase shoring would be required in order to place the bulkhead/seawall immediately adjacent to the building or a short distance from it. Such shoring would involve additional expense and increased construction-phase risk to destabilizing the building. The proposed alignment would avoid any need for additional shoring and it would be in alignment with the wall to the north. While it has been determined that the seawall/bulkhead is necessary to protect an existing structure, the seawall/bulkhead is not located as far landward as possible or designed to minimize the amount of fill of coastal waters so alternatives must be considered in order to identify the option that is least environmentally damaging feasible alternative.

Section 30108 of the Coastal Act states that "feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors. However, as proposed, the currently designed project is not the least environmentally damaging feasible alternative. The following alternatives were considered for the proposed project:

### **a. No work**

This option would leave the building and slope in a continuously exposed state. The exposed concrete bond beam and piles would remain unprotected and subsequent natural erosion would jeopardize the structural integrity of the existing structure. Additionally, this alternative would not result in a final condition that is far better from a habitat stand point from the prior or existing condition. This alternative would not restore soft bottom habitat that was either previously shaded from sunlight or covered by asphalt/concrete debris. Therefore, this alternative is not a feasible solution to the present problem nor is it the least environmentally damaging feasible alternative.

**b. Installation of a seawall/bulkhead at the location of the existing building foundation (i.e. concrete bond beam and piles)**

The applicant states that while this alternative is conceptually advantageous, this solution proves to be technically infeasible because there would be no room for installation of the new seawall/bulkhead (a driving hammer is envisioned and would require a few feet of space over the line of installation) nor for installation of the tieback elements that would be needed to support the wall. Additionally, the applicant states that there are geotechnical and constructability concerns if placed this close to the landside terminus of the property.

**c. Installation of a seawall/bulkhead aligned with the adjacent seawalls/bulkheads located to the north (10 ft. encroachment into bay)(current proposal)**

The bulkhead/seawalls located on the adjacent properties are not in alignment with one another. The wall to the north is about 3-feet more seaward than the wall to the south. With the location of adjacent bulkhead to the north as a guide the applicant chose the most seaward possible alignment to place the bulkhead for the subject site. The applicant considers this concept the most feasible and has chosen it because the applicant states that this alternative allows an adequate amount of space for seawall/bulkhead installation equipment (i.e., a driving hammer) and provides room for tieback anchor rods to extend into the subsurface behind the wall without interfering with the existing piles and concrete bond beam that form the building's eastern foundation. However, the applicant does not provide any written justification as to the need to choose the most seaward possible alignment (which is 10-feet into the channel) instead of using the bulkhead alignment that is 3-feet further landward and would result in less fill of the channel (i.e. a 7-foot encroachment). The applicant is also proposing to remove concrete debris from within the footprint of the proposed structure and cites this as a habitat benefit. However, the benefit would not be significant in this case because the debris would be replaced with the proposed structure and backfill.

**d. Installation of a seawall/bulkhead aligned with the adjacent seawalls/bulkheads located to the south (7 ft. encroachment into bay) or using a 'stringline'**

The bulkhead on the adjacent property to the south is about 3-feet further landward than the wall to the north. Aligning the bulkhead here would still provide adequate space to build the seawall without construction phase shoring, and would reduce the amount of encroachment into the bay. Similarly, aligning the wall in accordance with a 'stringline' drawn between the two adjacent bulkheads would render an alignment that is more landward than the one proposed. The existing structure would be protected and the proposed seawall/bulkhead would be located as far landward as possible. As noted above, the applicant is only proposing to remove debris within the footprint of the proposed work. However, the debris field extends beyond this footprint. If the entirety of the debris from the building collapse were removed there would be a net increase in soft bay bottom habitat exposed as a result of the project. Removal of that debris would increase the environmental benefits of the



proposed project. Thus, this alternative would result in the least amount of fill and be the least environmentally damaging feasible alternative.

The current proposal results in the seawall/bulkhead being installed approximately 10-feet out into the Rhine Channel from the existing building foundation and is not the least environmentally damaging alternative. In order to minimize the encroachment of the seawall/bulkhead into the channel while taking into account the difficulties that the applicant has stated and thus resulting in the least environmentally damaging feasible alternative, a revised location for the proposed seawall/bulkhead is necessary. Part of the bulkhead/seawall installation includes the applicant's proposal to remove the remaining debris from within the footprint of the seawall/bulkhead installation. However, this raises concerns since limiting the removal of the debris to only within the footprint of the installation results in ongoing impact to soft bay bottom habitat. Therefore, all the asphalt/concrete debris should be removed. Thus, the Commission imposes **SPECIAL CONDITION NO. 1**, which requires the applicant to submit revised plans showing that the seawall/bulkhead has been moved to be either within the 'stringline' or in alignment with the bulkhead/seawall to the south (Exhibit #5) and that all asphalt/concrete debris be removed and not just within the footprint of the seawall/bulkhead installation. The revised final project plans shall be reviewed by the City of Newport Beach and determined to be consistent with City standards.

The proposed seawall/bulkhead is necessary to protect an existing structure. As conditioned, the proposed development is the least environmentally damaging feasible alternative. Therefore, the Commission finds that the proposed project is consistent with Section 30235 of the Coastal Act.

### 3. Flooding Hazards

The project site is a seawall/bulkhead lot adjacent to and within Newport Bay. Due to its location, the property may be subject to wave and flooding hazards. The seawall/bulkhead has been designed to be at a height of +9.0 Mean Lower Low Water (MLLW) in order to withstand the anticipated water levels from future sea level rise, a minimum standard the City of Newport Beach Harbor Resources has been using for some time now. The Commission Staff Engineer has reviewed the design of the seawall/bulkhead and concluded that the seawall/bulkhead has been designed to adequately deal with wave and flooding hazards and is safe from these hazards at this time. Therefore, the proposed development can be allowed under Section 30253 of the Coastal Act, which requires new development to "*assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices...*"

Although it has been determined that the site is safe for development at this time, shoreline areas are dynamic environments, which may be subject to unforeseen changes. Such changes may affect shoreline processes, including sand regimes. The mechanisms of sand replenishment are complex and may change over time, especially as shoreline process altering structures, such as jetties, are modified, either through damage or deliberate design. The effects of sea level rise also adds some uncertainty. In order to address this situation with respect to Coastal Act policy, **THREE (3) SPECIAL CONDITIONS** are necessary.

1. Assumption of Risk

Given that the applicant has chosen to implement the project despite potential risks from sea level rise, wave attack, erosion, or flooding, the applicant must assume the risks. Therefore, the Commission imposes **SPECIAL CONDITION NO. 7** for an assumption-of-risk agreement. In this way, the applicant is notified that the Commission is not liable for damage as a result of approving the permit for development. The condition also requires the applicant to indemnify the Commission in the event that third parties bring an action against the Commission as a result of the failure of the development to withstand the hazards. In addition, the condition ensures that future owners of the property will be informed of the risks and the Commission's immunity from liability. As conditioned, the Commission finds the proposed project is consistent with Section 30253 of the Coastal Act.

2. Future Development

As discussed previously, the project site is a bayfront property where no seawall/bulkhead currently exists and it may be subject to future flooding and wave attack as coastal conditions change. Since coastal processes are dynamic and structural development may alter the natural environment, future development adjacent to the beach could adversely affect future shoreline conditions if not properly evaluated. For this reason, the Commission is imposing **SPECIAL CONDITION NO. 8**, which states that any future development or additions on the property, including but not limited to any future improvements to the seawall/bulkhead, requires a Coastal Development Permit from the Commission or its successor agency. Section 13253 (b) of Title 14 of the California Code of Regulations specifically authorizes the Commission to require a permit for improvements that could involve a risk of adverse environmental effect. This condition ensures that any future development on this site that may affect shoreline processes receives review by the Commission.

3. No seaward placement of seawall/bulkhead

The seawall/bulkhead design will conform to the current minimum elevation requirements set by the City of Newport Beach, that the seawall/bulkhead elevation be at least +9 foot MLLW. This elevation has been established as a minimum standard and, according to the City of Newport Beach's Harbor Committee Report on Global Warming and Sea Level Rise Effects on Newport Harbor, many of the existing seawalls/bulkheads are lower than the +9 foot MLLW standard. Seawall/Bulkhead standards for Dana Point and Huntington harbor require new seawalls/bulkheads be built to +10 foot MLLW elevation. The City of Newport Beach recommended minimum elevation does not take into account a significant rise in sea level. The proposed seawall/bulkhead reinforcement results in a wall height that will provide protection against flooding from some forecasted sea level rise. However, if the water level or waves exceed the design condition, the current wall will then have to be raised. **SPECIAL CONDITION NO. 9** requires that any future maintenance or work to address changing sea level, increased flooding or other coastal hazards be undertaken on or

inland of the proposed development and that there not be any seaward encroachment beyond the identified and recorded line of development.

## CONCLUSION

To assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area and to make sure the proposed project does not result in future adverse effects to coastal processes, **FIVE (5) SPECIAL CONDITIONS** have been imposed. **SPECIAL CONDITION NO. 1** requires the applicant to submit revised plans showing that the seawall/bulkhead has been moved to be either within the 'stringline' or in alignment with the bulkhead/seawall to the south and that all asphalt/concrete debris be removed and not just within the footprint of the seawall/bulkhead installation. **SPECIAL CONDITION NO. 6** requires incorporation of the recommendations in the seawall/bulkhead evaluation. **SPECIAL CONDITION NO. 7** require an assumption-of-risk agreement. **SPECIAL CONDITION NO. 8** states that any future development or additions on the property, including but not limited to hardscape improvements, grading, landscaping, vegetation removal and structural improvements requires a Coastal Development Permit from the Commission or its successor agency. **SPECIAL CONDITION NO. 9** requires that any future maintenance or work to address changing sea level, increased flooding or other coastal hazards be undertaken on or inland of the proposed development and that there not be any seaward encroachment beyond the identified and recorded line of development. Only as conditioned does the Commission finds that the proposed project is consistent with Section 30235 and 30253 of the Coastal Act.

## **C. WATER QUALITY AND THE MARINE ENVIRONMENT**

Section 30230 of the Coastal Act states:

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

Section 30231 of the Coastal Act states:

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

Section 30230 of the Coastal Act requires that marine resources be maintained, enhanced, and where feasible, restored and that the use of the marine environment be carried out in a manner that will sustain the biological productivity of coastal waters. Section 30231 of the Coastal Act requires that biological productivity and the quality of coastal waters to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and where feasible, restored.

A biological survey of the project site was conducted and a report completed (Marine Biological Resources Assessment for the Rhine Channel, Ca prepared by Ecomarine, Consulting LLC for Anchor QEA, LLC received July 14, 2011) that stated that the project site was devoid of any Eelgrass and *Caulerpa taxifolia*. Additionally, no fish were observed in the water column and only very few invertebrates were found. What was abundantly found on site though, were the asphalt/concrete debris from the failed structure were found in the project site. Prior to the failure of the structure, part of the building was located over the channel and sunlight was prevented from reaching the channel floor (soft bottom habitat). This situation continued with the failure of the structure, but in this case the channel floor became littered with the failure debris. The proposed project would change this situation, as it would include some removal of the asphalt/concrete debris (within the footprint of the proposed seawall/bulkhead and walkway/deck).

As noted in the findings above, the least environmentally damaging feasible alternative would include removing the entire debris field that remains from the collapse of the building. With such removal the final condition would be far better from a habitat stand point compared with the prior or existing condition. As conditioned, the project would restore soft bottom habitat that was either previously shaded from sunlight or covered by asphalt/concrete debris. Thus, the project would enhance the marine environment.

Therefore, to ensure that the approved project maintains, enhances, and where feasible, restores marine resources such as soft bottom habitat, the Commission imposes **SPECIAL CONDITION 9** which prohibits any future repair or maintenance, enhancement, reinforcement, or any other activity affecting the shoreline protective device (seawall/bulkhead) approved pursuant to Coastal Development Permit No. 5-11-178, seaward of the approved bulkhead. Prohibiting such activities will ensure that the proposed bulkhead is the least environmentally damaging alternative because no repair or maintenance activities will be allowed seaward of the approved bulkhead which may impact newly enhanced and restored marine resources, like the soft bottom habitat that will be restored once the asphalt/concrete debris is removed from the property and the bulkhead is redesigned by bringing the bulkhead further landward to open up more bay bottom for the reestablishment of soft-bottom habitat on the site.

The site has been surveyed for eelgrass and no eelgrass was discovered within the project area. The eelgrass survey took place on October 24, 2010 as required by the City of Newport Beach Harbor Resources Division and eelgrass surveys completed during the active growth phase of eelgrass (typically March through October) are valid for 60-days with the exception of surveys completed in August-October. A survey completed in August - October shall be valid until the resumption of active growth (i.e., March 1). The project is agendaized for the January 2012 Coastal Commission Hearing and by this time the eelgrass survey would not continue to be valid since it is now during the period of eelgrass active growth. Thus, an up-to-date eelgrass survey must be conducted. In

addition, a pre-construction *Caulerpa taxifolia* survey was completed on October 24, 2010 by the City of Newport Beach Harbor Resources Division. *Caulerpa taxifolia* surveys are valid for 90 days. The project is agendaized for the January 2012 Coastal Commission Hearing and by this time the *Caulerpa taxifolia* survey would not continue to be valid since 90-days have passed since the survey was completed. Thus, an up-to-date *Caulerpa taxifolia* survey must be conducted prior to commencement of the project. Therefore, the Commission imposes **SPECIAL CONDITION NO. 11** and **12**, which identifies the procedures necessary to be completed prior to beginning any construction. Also, if any *Caulerpa taxifolia* is found on the project site, **SPECIAL CONDITION NO. 12** also identifies the procedures necessary to be completed prior to beginning any construction.

The proposed development will occur adjacent to and within Newport Bay, specifically Lower Newport Bay. Construction of any kind adjacent to or in coastal waters has the potential to impact marine resources. The bay provides an opportunity for water oriented recreational activities and also serves as a home for marine habitat. Because of the coastal recreational activities and the sensitivity of the harbor habitat, potential water quality issues must be examined as part of the review of this project. The applicant has stated that the project will adhere to established best management practices (BMPs) throughout construction to minimize or eliminate environmental impacts. Additionally, a silt curtain/debris boom will be employed to ensure no debris enters the Rhine Channel. However, additional water quality measures are necessary in order to minimize any adverse water quality impacts. Thus, in order to avoid adverse construction-related impacts upon marine resources, **SPECIAL CONDITION NO. 10** outlines construction-related requirements to provide for appropriate construction methods as well as the safe storage of construction materials and the safe disposal of construction debris.

## CONCLUSION

To minimize the adverse impacts upon the marine environment, **FOUR (4) SPECIAL CONDITIONS** have been imposed. **SPECIAL CONDITION NO. 9** ensures that any future repair or maintenance, enhancement, reinforcement, or any other activity affecting the shoreline protective device (seawall/bulkhead) approved pursuant to Coastal Development Permit No. 5-11-178 only occur within the footprint or landward of the approved bulkhead so that the enhanced and restored soft bottom habitat seaward of the approved bulkhead is not disturbed in the future. **SPECIAL CONDITION NO. 10** outlines construction-related requirements to provide for appropriate construction methods as well as the safe storage of construction materials and the safe disposal of construction debris. **SPECIAL CONDITION NO. 11** identifies the procedures regarding eelgrass surveys that are necessary to be completed prior to beginning any construction. **SPECIAL CONDITION NO. 12** requires the applicant, prior to commencement of development, to survey the project area for the presence of *Caulerpa taxifolia*. Only as conditioned does the Commission find that the proposed project is consistent with Section 30230 and 30231 of the Coastal Act.

## **D. PUBLIC ACCESS**

Section 30210 of the Coastal Act states:

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

Section 30212 of the Coastal Act states in relevant part:

*(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or, (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.*

Section 30213 of the Coastal Act states in relevant part:

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

City of Newport Beach Coastal Land Use Plan (CLUP)

***Policy 3.1.1-9. Protect, expand, and enhance a system of public coastal access that achieves the following:***

- *Maximizes public access to and along the shoreline;*
- *Includes pedestrian, hiking, bicycle, and equestrian trails;*
- *Provides connections to beaches, parks, and recreational facilities;*
- *Provides connections with trail systems of adjacent jurisdictions;*
- *Provides access to coastal view corridors;*
- *Facilitates alternative modes of transportation;*
- *Minimizes alterations to natural landforms;*
- *Protects environmentally sensitive habitat areas;*



- *Does not violate private property rights.*

***Policy 3.1.1-11.*** *Require new development to minimize impacts to public access to and along the shoreline.*

***Policy 3.1.1-14.*** *Require a direct dedication or an Offer to Dedicate (OTD) an easement for vertical access in all new development projects causing or contributing to adverse public access impacts, unless adequate access is available nearby. Vertical accessways shall be a sufficient size to accommodate two-way pedestrian passage and landscape buffer and should be sited along the border or side property line of the project site or away from existing or proposed development to the maximum feasible extent.*

***Policy 3.1.1-15.*** *Encourage the acceptance, improvement and opening of OTDs to the public by the City, a public agency, a private association, or other appropriate entity.*

***Policy 3.1.1-16.*** *Require all direct dedications or OTDs for public access to be made to a public agency or other appropriate entity that will operate the accessway on behalf of the public. Require accessways to be opened to the public once an appropriate entity accepts responsibility for maintenance and liability.*

***Policy 3.1.1-17.*** *Require new development in waterfront commercial areas to provide public access easements to and along the waterfront. Where appropriate, integrate public access easements into the project designs, such as restaurants with outdoor waterfront dining areas and boarding areas for charter and excursion vessels.*

***Policy 3.1.1-21.*** *Provide a continuous waterfront walkway along the Rhine Channel connecting Cannery Village and McFadden Square waterfront commercial areas with Las Arenas Beach at 19<sup>th</sup> Street.*

***Policy 3.1.1-26.*** *Consistent with the policies above, provide maximum public access from the nearest public roadway to the shoreline and along the shoreline with new development except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources or (2) adequate access exists nearby.*

The subject site is located on the bayfront/Rhine Channel, between the street ends at 28<sup>th</sup> Street and 29<sup>th</sup> Street. There is presently bayfront lateral access from the 28<sup>th</sup> Street, street end to the subject site (Exhibit #6). There is also lateral bayfront access from the 29<sup>th</sup> Street, street end, but that access ends at 2816 Lafayette Avenue due to an existing building that obstructs continuous access. So, continuous public lateral access along the bay front is presently obstructed by several properties at the mid-point between 28<sup>th</sup> and 29<sup>th</sup> Street.

Section 30210 of the Coastal Act provides that maximum access and recreational opportunities shall be provided to carry out the requirement of Section 4 of Article X of the California Constitution, which states the following:

*No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.*

Section 30212 of the Coastal Act requires public access from the nearest public roadway to the shoreline. Section 30213 of the Coastal Act states that lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Additionally, the City of Newport Beach's Certified Land Use Plan also contains several policies regarding protecting, encouraging and providing public access. Some of these LUP policies are even specific to the area of the project site.

On July 26, 1976, the Commission approved Coastal Development Permit No. P-5-19-76-7903- (Ziemer) for development on the project site; a portion of that development is what failed on site and collapsed into the channel in 2000. The development approved in 1976 was for the demolition of an existing building and construction of a 3-story marine oriented commercial building with a ground level (1<sup>st</sup> floor) twenty (20)-space parking garage and construction of a boat dock and deck areas. The City of Newport Beach in its approval required that a pier extend across the entire bayside of the property and that the owner grant an easement/agreement for public access. When the initial project was proposed to the Commission in 1976, the development included a public accessway (a public boardwalk) along the bay edge. However, it is unclear if the public access was ever open for public use and if the easement/agreement required by the City has become fully effective. The boardwalk on the subject site was built and subsequently destroyed with the partial building collapse in 2000. The applicant is not proposing to establish connectivity on site to the existing public walkway adjacent to the site. The City's intent and desire to maintain and enhance access along the bay is demonstrated in prior actions by the City to establish maintain and enhance access on other sites nearby.

Lateral public access along the Rhine Channel in the project area is highlighted in the City's Certified LUP with some policies requiring that new development along waterfront commercial areas provide public access to and along the waterfront; and also that a continuous waterfront walkway along the Rhine Channel connecting Cannery Village and McFadden Square waterfront commercial areas with Las Arenas Beach at 19<sup>th</sup> Street be established. Additionally, the Coastal Access and Recreation Map of the Certified LUP shows continuous lateral public access as a goal along this block fronting the Rhine Channel. The existing impediments to continuous lateral access are between 2812 and 2816 Lafayette Avenue which are to the north of, and adjacent to, the project site, and at the subject site due to the collapse of the accessway connection in 2000. Continuous public access along all of the properties between the 28<sup>th</sup> Street and 29<sup>th</sup> Street, street ends is anticipated as these sites redevelop.

As shown by the City's requirements for public access easements/agreements or offers to dedicate for public access on adjacent properties in prior approvals, the City has invested time and effort to provide public access along the channel, consistent with its Certified LUP. For the properties (2804 & 2806 Lafayette Road) to the south of the project site, the City required that each property owner

dedicate to the City a 6-foot wide public access easement along the entire water frontage as a condition for development (Exhibit #6). Additionally, for the property located at 2806 Lafayette Road, the City required that the dedication also include a portion of the southwesterly side property line sufficient to make the required physical connection with the public access easement on the adjoining property located at 2808 Lafayette Avenue (the project site and this easement was described previously). Subsequently, these two properties applied for Coastal Development Permits (CDP NO. 5-90-075 for development at 2804 Lafayette Road and CDP No. 5-90-471 for development at 2806 Lafayette Road) from the Commission and both proposals included a 6-foot wide public walkway along the waterfront side of the parcel and were approved by the Commission. On the property south of 2806 & 2804 Lafayette Road, located at 2800 Lafayette Road (Exhibit #6) which is adjacent to the 28<sup>th</sup> Street, street end, the Commission approved development (CDP NO. P-80-7354) with a Special Condition requiring an offer to dedicate a 5-foot wide public access easement along the 5-foot wide walkway between the existing bulkhead and the proposed restaurant along the channel. That easement was accepted in 2002. Therefore, these four (4) properties together establish a lateral public access walkway along the Rhine Channel consistent with the City's Certified LUP and the Coastal Act.

As stated previously, the applicant is not currently proposing to establish public access along the shoreline at the subject site. Thus resulting in a loss for an opportunity to establish lateral public access on site that currently continues to exist along the Rhine Channel along the adjacent properties, as described above. Sections 30210 and 30213 of the Coastal Act requires that maximum access to navigable waters be provided for all people and it further provides that lower cost visitor and recreational facilities be protected, encouraged and where feasible, provided. Section 30212 of the Coastal Act requires public access from the nearest public roadway to the shoreline and along the shoreline. The proposed new development provides an opportunity to provide that public access. Additionally, the City's certified LUP provides a number of policies that require public access along the bayfront, including the bayfront at the subject site. The project would be consistent with the City's Certified LUP and prior actions the City has taken on adjacent sites if public access were provided at the subject site.

Furthermore, the proposed bulkhead/seawall and accompanying deck/walkway may be located on privately-owned submerged lands that would be subject to the public trust doctrine, (*People v. California Fish Co.* (1913) 166 Cal. 576, 598-599; *Marks v. Whitney* (1971) 6 Cal.3d 251, 261.) The public trust doctrine requires that such lands be used consistent with the doctrine, which includes, but is not limited to, the right for the public to use the navigable waters of the state, like the Rhine Channel, for fishing, hunting, bathing, swimming, boating and general recreation purposes and to use the bottom for anchoring, standing, or other purposes. (*Id.* at p. 259.) Since the public has these rights over submerged lands as preserved under public trust doctrine, any development, such as the current proposal, in potentially submerged lands must provide a public use consistent with the public trust doctrine. Thus, placing a private structure on public trust lands without a public trust use associated with the structure, as is the case with the current proposal, is inconsistent the public trust doctrine and Section 30210 of the Coastal Act because the public trust doctrine dictates that public trust lands must be used in a manner that promotes public trust uses. (*Ibid.*) Therefore, requiring public access on a private structure in private submerged/tide lands subject to the public trust mitigates for the impact of privatizing (building a private bulkhead) public

trust lands and is roughly proportional to the impact because but for the bulkhead's existence, the public would have the right to access the undeveloped public trust lands on the applicant's property.

Before the December 2012 hearing on this application, staff has received a letter of opposition from the applicant, through her attorney, Sherman Stacey. Generally, the applicant opposes the special condition requiring her to offer to dedicate a public access easement over the bulkhead fill, and special conditions associated with the access condition. Citing Public Resources Code, section 7552.5, the applicant claims that since the predecessor-in-interest, James McFadden, acquired title to the subject property as swamp and overflow lands from the state in 1892, then the property is not subject to the public trust doctrine, but only a navigation servitude (requiring free navigation over the submerged lands should the swamp and overflow lands be dredged to a level that allows navigable waters to flow over them). Beyond a statement made in a City publication about the history of Newport Beach which noted this transfer to James McFadden in 1892 (See Exhibit #8), the applicant did not submit any further evidence to support her position that the subject property was actually included in the McFadden conveyance. Further, the historical note on the City's website, cited by applicant, indicates that the transfer to McFadden included "title to [sic] peninsula from 40th St. to 9th St., purchased for a dollar an acre as government swamp and overflow land. McFadden has town site laid out near the wharf, where lots are leased by the year." This historical reference to the grant includes several acres of land, and is vague enough that it is impossible to know if the subject property, a lot of a mere 6000 square feet, is included in the grant of the peninsula, especially given the dramatic changes to the bay shoreline of the peninsula since the late 1800s. (See Exhibit #7) Public Resources Code section 7552.5 also requires a showing that the transfer was executed pursuant to an adopted act by the legislature and that the subject property was in fact part of "lands above the ordinary high-water mark, granted to the state by the Arkansas Swamp Lands Act, Act of September 28, 1850." The applicant has not submitted evidence that the subject property was part of such a grant consistent with Public Resources Code, section 7552.5.

City documentation may indicate that the submerged/tide lands at issue here are subject to the public trust. The City of Newport Beach includes Rhine Channel in its Tidelands Map as a reserved and dedicated waterway (See Exhibit #7) Further, a 2010 Initial Study and Mitigated Negative Declaration (MND) for a dredging project in Rhine Channel, adopted by the City in Resolution No. 2010-91 in its entirety, includes a figure depicting the project area which includes the full breadth and length of Rhine Channel (See Exhibit #7), and text in the MND unequivocally states that the project area land use designations are submerged and tide lands subject to the public trust, citing the City's zoning code for support. (Relying on General Plan 2006; General Plan Figure LU1; and Coastal Land Use Plan 2009; see Exhibit #7.) The applicant also appears to concede that the subject property is privately owned tideland, stating that "use of a privately owned tideland to place a structure to protect an existing structure from damage" is a reasonable use of that property. (Applicant's letter of opposition (Exhibit #8), dated 12/10/2012, page 7) The applicant, nonetheless, argues that the subject lot is not subject to the public trust servitude because the submerged/tide land area has had private development on it for over 75 years and no one has complained that it is inconsistent with public trust principles. The applicant claims that this constitutes consent of using public trust resources for private purposes. The only way, however, in which the public trust servitude is removed from submerged and tide land property, either private or public, is if the legislature enacts a statute granting public trust lands to a local government or private party and explicitly removes the public trust servitude in the language of the grant or a grantee of a Mexican

land grant perfected title of submerged/tide lands during patent proceedings shortly after California joined the union. (*Marks v. Whitney*, *supra*, 6 Cal.3d at pp. 260-261; *Summa Corp. v. California State Lands Commission* (1984) 466 U.S. 198.) Staff has not found any evidence indicating that one of these exceptions applies to the subject property and the applicant has not submitted any documentation indicating these exceptions do, in fact, exist on the subject property.

In a letter dated January 23, 2013, the applicant, through her attorney, contends that there are no public trust submerged or tide lands on the property because the subject property is private property. However, the issue of whether or not the public trust servitude exists on submerged or tide lands is not dependent on the private/public property distinction but, rather, it is dependent on the natural state of the subject property at time of California's statehood. If the subject property consisted of swamp and overflow lands, generally called marshland, then the public trust servitude generally did not exist on that type of property. (*People v. California Fish Co.*, *supra*, 166 Cal. at pp. 597-599; *Zack's, Inc. v. City of Sausalito*, *supra*, 165 Cal.App.4<sup>th</sup> at p. 1175 fn. 4.) However, if the property consisted of submerged or tide lands, then the property is subject to the public trust servitude. (*Ibid.*) The State Lands Commission is responsible for determining establishing the boundary lines between submerged/tide lands and swamp and overflow lands as they existed at the time of statehood. (See Pub. Res. Code section 6201, et seq.) As noted above, there are only two ways in which the public trust servitude could be removed from submerged or tide lands—through a legislative grant doing so or if a patentee perfected title of a Mexican land grant at the time of statehood. Thus, since neither exception applies to the property, the only other way to find that the applicant's property is not subject to the public trust is if the property did not consist of submerged or tide lands at the time of statehood but, rather, consisted of swamp and overflow lands. (*People v. California Fish Co.*, *supra*, 166 Cal. at pp. 597-599; *Zack's, Inc. v. City of Sausalito*, *supra*, 165 Cal.App.4<sup>th</sup> at p. 1175 fn. 4.)

Prior to the December 2012 hearing, both the applicant and Commission staff solicited advice from the State Lands Commission (SLC) on the issue of whether or not the subject property was submerged or tide lands at the time of statehood and thus subject to the public trust servitude. The applicant received a letter from SLC indicating that the property was swamp and overflow lands while Commission staff received an email from SLC concluding that the evidence supported a finding that the subject property was former tidelands at the time of statehood and thus subject to the public trust.

Subsequent to the December 2012 hearing, both Commission staff and the applicant, again, sought the input from staff at the SLC to resolve the discrepancy between SLC's earlier correspondences to staff and the applicant. On January 28, 2013, staff and the applicant received a letter from Sheri Pemberton, the Chief of External Affairs at SLC, responding to our inquiry. (Exhibit #9) Ms. Pemberton found that there was evidence indicating that the subject property could be considered either swamp and overflowed lands or tidelands. Given the conflicting evidence, Ms. Pemberton concluded "*that the issues of whether the subject property was or is factually or legally tidelands is unresolved given the present analysis of the evidence. Ultimately resolution of this issue can be determined by either adjudication or agreement among the upland owner, State Lands Commission and the City of Newport Beach.*"

The area between the proposed seawall/bulkhead and the existing building, where a walkway/deck is to be constructed, offers an ideal location for public access and recreation that can be provided on site and also can be linked to the existing public access walkway along the Rhine Channel at 2806 Lafayette Avenue, and linked in the future to access at 2812 Lafayette Ave., whenever that access is provided. To ensure that the requirement to provide public access is consistent with the public trust doctrine, the Commission is imposing **SPECIAL CONDITION NO. 2**, which requires the applicant to irrevocably offer to dedicate to a public agency or other appropriate entity an easement for public access to the area on the seaward side of the existing building located between the building and the proposed seawall/bulkhead, as generally depicted on Exhibit #4 to the staff report dated February 15, 2013. Alternatively, **SPECIAL CONDITION NO. 2** provides that the applicant may submit evidence to the Executive Director, prior to issuance of the permit, that demonstrates that the applicant has resolved the unresolved public trust status for the subject property identified in Ms. Pemberton's letter through a boundary line agreement, arbitration or adjudication (quiet title action or other appropriate relief) that demonstrates that the applicant's property is not subject to the public trust, in which case the applicant is relieved from offering to dedicate a public access easement and special condition language in **SPECIAL CONDITIONS NO. 1, 3, 4 and 5**, related to the access easement requirement and instead shall comply with the revised plans in **SPECIAL CONDITION NO. 1** without the inclusion of the public accessway. All other special conditions would be unaffected should the applicant succeed in establishing that her property is not subject to the public trust. According to City standards, public access easements along the bay shall be a minimum of 6-feet in width. Thus, as stated in **SPECIAL CONDITION NO. 1**, the revised plans shall be reviewed by the City of Newport Beach in order to determine that the revised design for the public access easement is consistent with City standards, including that the width of the public access walkway is consistent with City standards.

If the landowner/applicant records the dedication of an access easement, **SPECIAL CONDITION NO. 1** is imposed to ensure that the public access walkway is maintained and kept in operating order consistent with the Commission's requirements, the Commission imposes **SPECIAL CONDITION NO. 3**, which requires the applicant to submit a Public Access and Recreation Easement Area Management and Maintenance Program for the public access walkway. Further, should the landowner/applicant choose to record the dedication of an access easement, to ensure that the lateral public access walkway is made available on site, the Commission imposes **SPECIAL CONDITION NO. 4**, which requires that the public access walkway and seawall/bulkhead be constructed concurrently and shall be made available for public use immediately upon completion.

To ensure that the public is aware that lateral public access is available on site, the Commission imposes **SPECIAL CONDITION NO. 5**, which requires submittal of Public Access Signage Plan, which will indicate the availability of the on-site public amenities.

Therefore, the Commission finds that the proposed development, as conditioned, would be consistent with Sections 30210, 30212 and 30213 of the Coastal Act regarding public access.

#### **E. DEED RESTRICTION**

To ensure that any prospective future owners of the property are made aware of the applicability of the conditions of this permit, the Commission imposes **SPECIAL CONDITION NO. 13**, which



requires that the property owner record a deed restriction against the property, referencing all of the above Special Conditions of this permit and imposing them as covenants, conditions and restrictions on the use and enjoyment of the property. Thus, as conditioned, any prospective future owner will receive actual notice of the restrictions and/or obligations imposed on the use and enjoyment of the land including the risks of the development and/or hazards to which the site is subject, and the Commission's immunity from liability and the requirements related to public access.

#### **F. LOCAL COASTAL PROGRAM (LCP)**

The LUP for the City of Newport Beach was effectively certified on May 19, 1982. The certified LUP was updated on October 8, 2009. As conditioned, the proposed development is consistent with Chapter 3 of the Coastal Act and with the certified Land Use Plan for the area. Approval of the project, as conditioned, will not prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3.

#### **G. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

The City of Newport Beach Harbor Resources Division is the lead agency responsible for certifying that the proposed project is in conformance with the California Environmentally Quality Act (CEQA). The City determined that in accordance with CEQA, the project is Categorically Exempt from Provisions of CEQA for the construction. Section 13096(a) of the Commission's administrative regulations requires Commission approval of Coastal Development Permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA).

Although the proposed development is categorically exempt from CEQA, the Commission has imposed conditions to ensure conformity with Coastal Act requirements, as follows: **1)** submittal of revised final project plans showing: a) the seawall/bulkhead relocated to be either within the 'stringline' or in alignment with the bulkhead/seawall to the south; b) to the maximum extent feasible, the revised location of the seawall/bulkhead will provide connectivity to the existing adjacent lateral public access along the Rhine Channel; and c) and that all asphalt/concrete debris be removed and not just within the footprint of the seawall/bulkhead installation; **2)** submittal of an irrevocably offering to dedicate to a public agency or non-profit entity acceptable to the Executive Director, an easement for public pedestrian access and passive recreational use of: 1) the area between the proposed seawall/bulkhead and the existing building; **3)** submittal of a Public Access and Recreation Easement Area Management and Maintenance Program for the public access walkway; **4)** construction and development phasing ;**5)** submittal of Public Access Signage Plan; **6)** conformance with geotechnical recommendations; **7)** assumption of risk; **8)** future development; **9)** no future seaward extension of shoreline protection device; **10)** construction responsibilities and debris removal; **11)** identifies the procedures regarding eelgrass surveys that are necessary to be completed prior to beginning any construction; **12)** requires the applicant, prior to commencement of development, to survey the project area for the presence of *Caulerpa taxifolia*; and **13)** a deed restriction against the property, referencing all of the Special Conditions contained in this staff report.

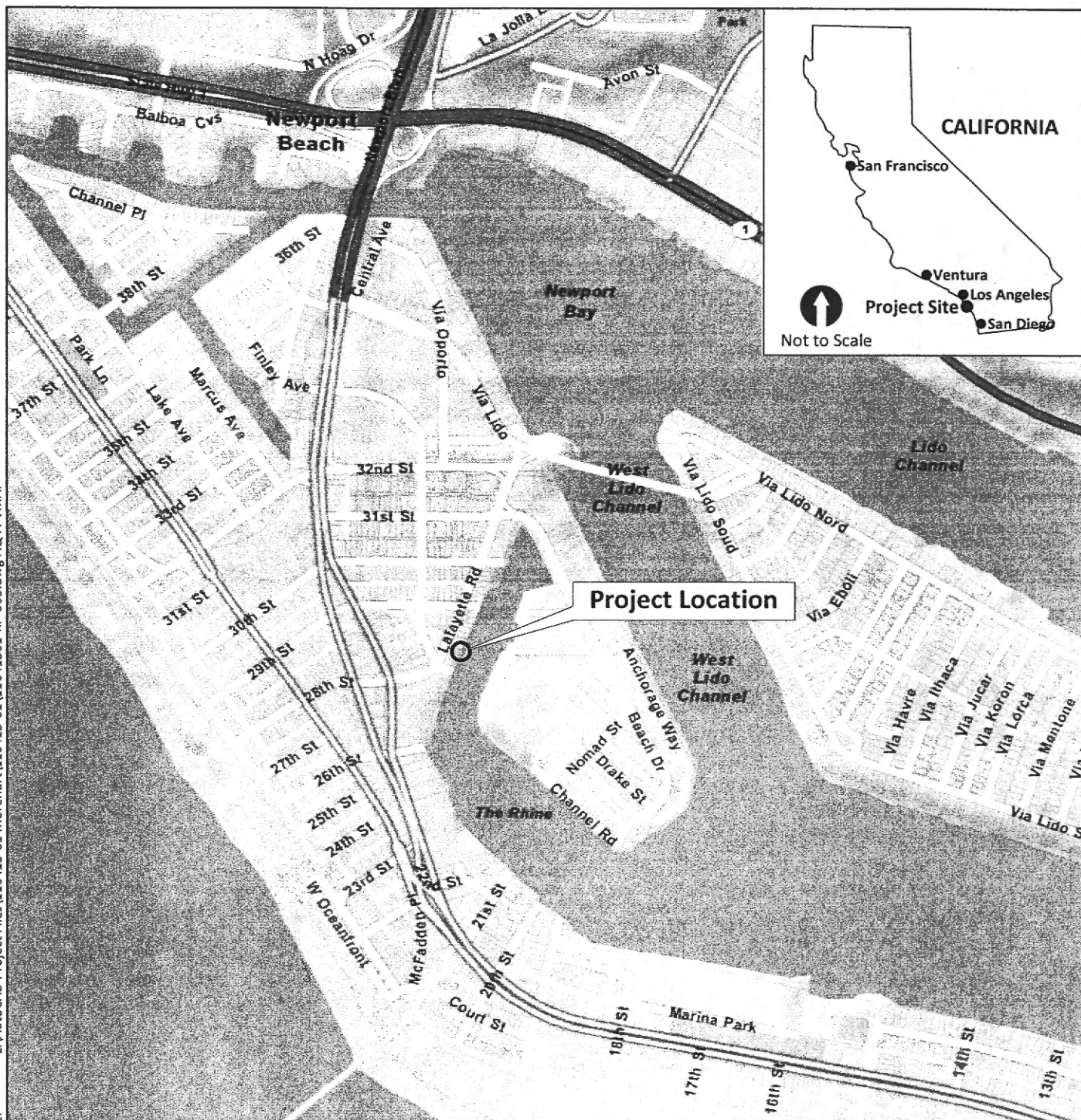
Therefore, as conditioned, the Commission finds that there are no feasible alternatives or additional feasible mitigation measures available that would substantially lessen any significant adverse effect that the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified impacts, is the least environmentally damaging feasible alternative and consistent with the requirements of the Coastal Act and CEQA.

## APPENDIX 1

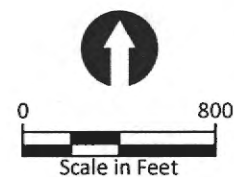
**SUBSTANTIVE FILE DOCUMENTS:** Coastal Development Permit No. P-80-7354-(Tonti); De Minimis Waiver No. 5-85-717-(Zimmerman); Administrative Permit No. 5-90-075-(Fluter); Administrative Permit No. 5-84-393-(Barrett); Coastal Development Permit No. 5-90-471-(701 Lido Park Partnership); Coastal Development Permit No. P-5-19-76-7903-(Ziemer); Coastal Development Permit No. 5-06-119-(Morehart); Approval in Concept from the City of Newport Beach Harbor Resources Division dated July 15, 2011; City of Newport Beach Certified Land Use Plan; Marine Biological Resources Assessment for the Rhine Channel, Ca prepared by Ecomarine, Consulting LLC for Anchor QEA, LLC received July 14, 2011; Letter from Commission Staff to the applicant dated August 12, 2011; Letter from the applicant to Commission Staff dated March 23, 2012; Clean Water Act Section 401 Water Quality Standards Certification for the Lafayette Seawall Project, City of Newport Beach from the Regional Water Quality Control Board (RWQCB) dated August 25, 2012; Letter from Commission Staff to the applicant dated April 20, 2012; Letter from the applicant to Commission Staff dated May 23, 2012; Letter from William Simpsons & Associates, Inc. Consulting Structural Engineers dated June 4, 2012; Supplemental Geotechnical Recommendations for Structural Design of Proposed Seawall, 2808 Lafayette, Newport Beach, California prepared by Petra Geotechnical, Inc., dated June 23, 2011; *Geotechnical Investigation, Proposed Seawall at 2808 Lafayette, Newport Beach, California* prepared by Petra Geotechnical, Inc., dated January 24, 2011; and Letter from Commission Staff to the applicant dated June 22, 2012; and Letter from William Simpsons & Associates, Inc. Consulting Structural Engineers dated July 6, 2012.

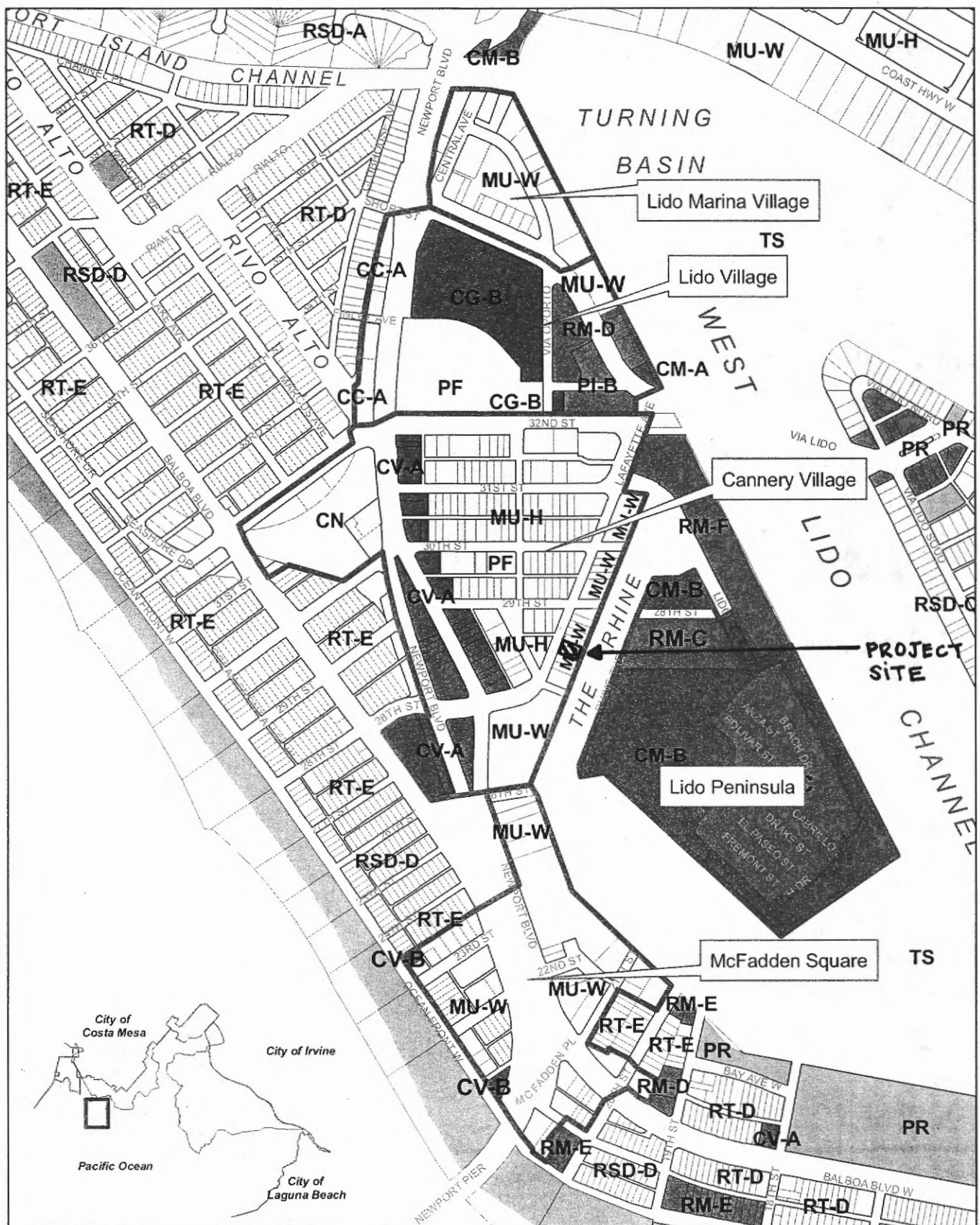
L:\AutoCAD Project Files\110413-01 Morehart\110413-01\11041301-01-003.dwg AQ-A-VMAP

Jul 12, 2011 10:58am mpratschner



SOURCE: Drawing prepared from ESRI GIS data.  
HORIZONTAL DATUM: California State Plane, Zone VI, NAD83.  
VERTICAL DATUM: Mean Lower Low Water (MLLW).





# **Lido Village / Cannery** **Lido Peninsula / McFadden** **Figure 2.1.5-1**

Local Coastal Program  
Coastal Land Use Plan

lcp\_lu\_amend\_Figure2.1.5-1.mxd July/2009



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Feet

2-84





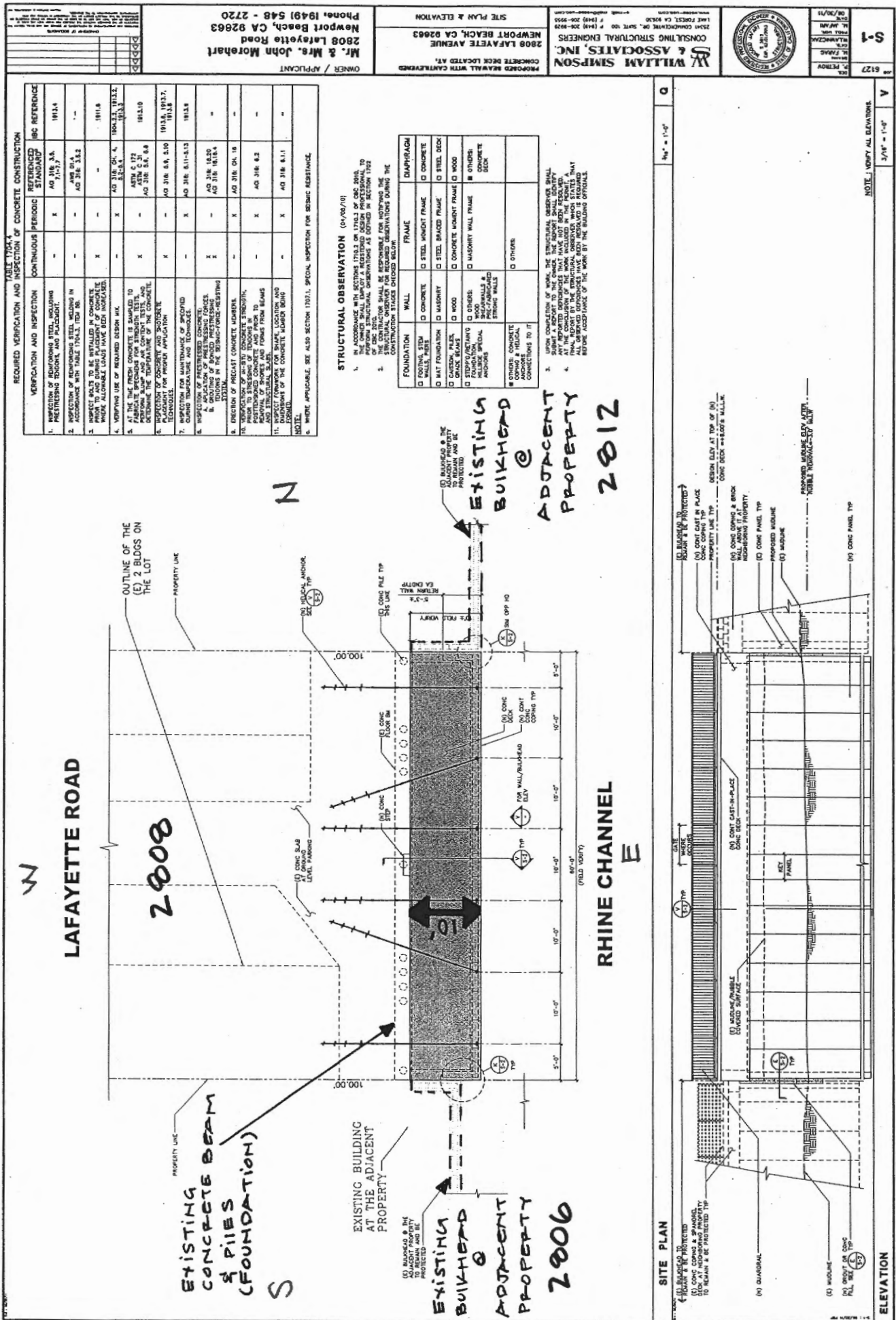
Structure that failed

Photograph 2. Property prior to failure.



Photograph 3. Property after failure.







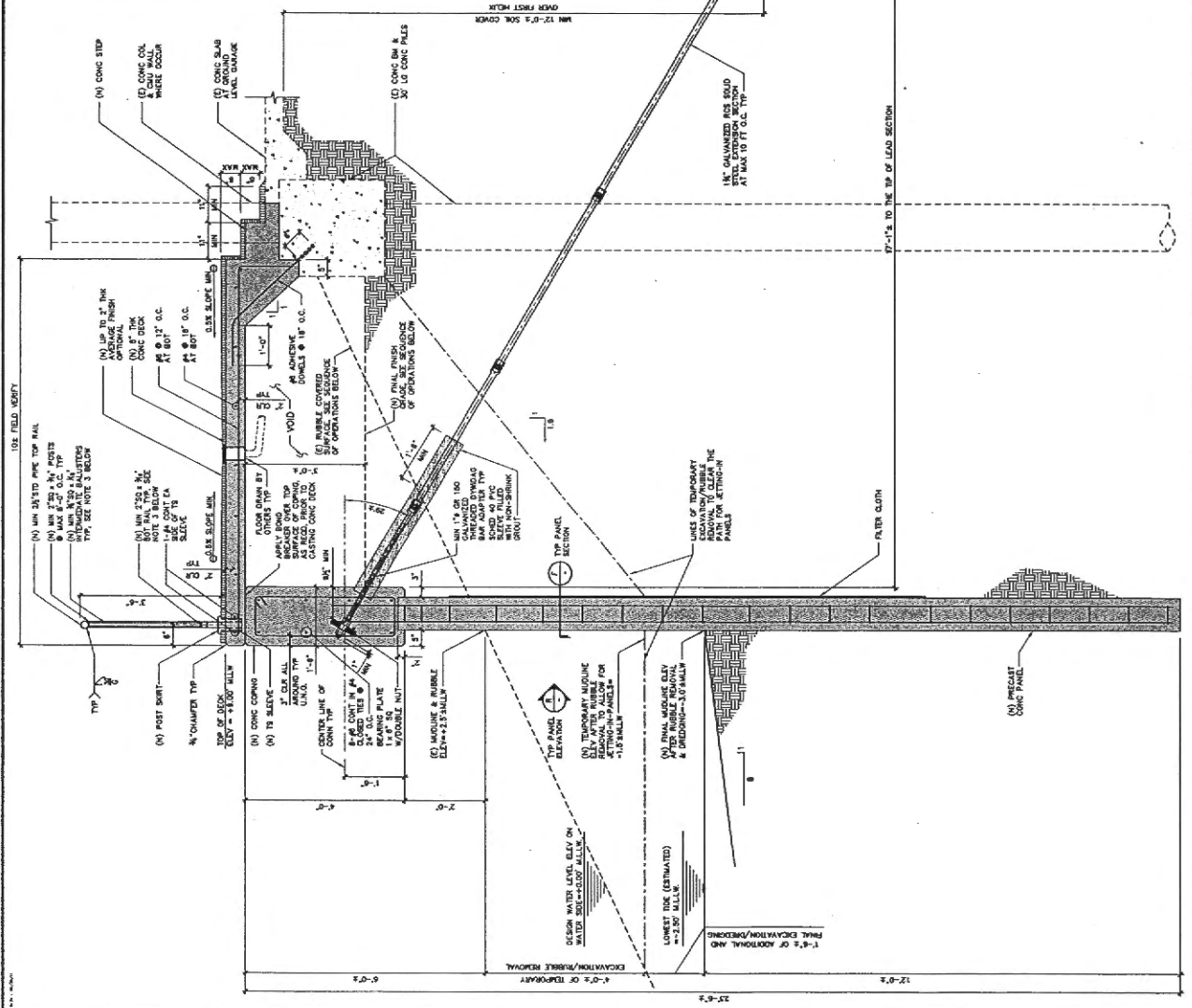
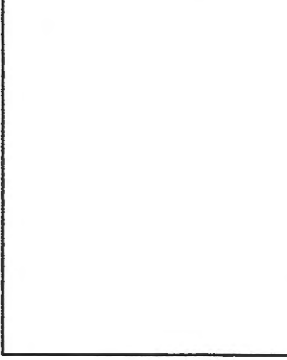
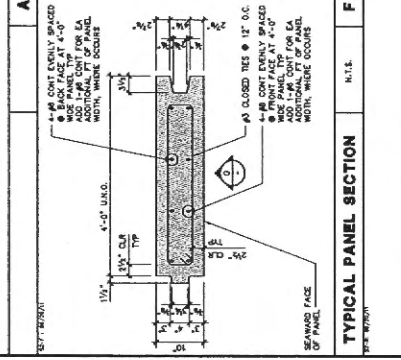
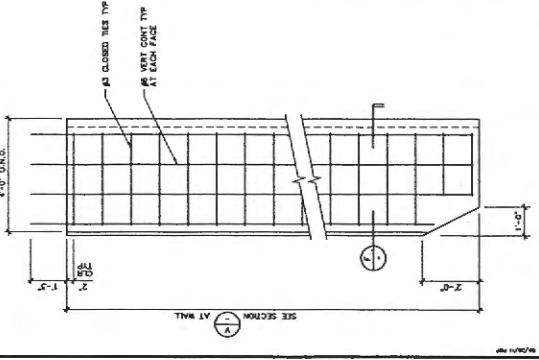
**WILLIAM SIMPSON & ASSOCIATES, INC.**  
CONSULTING STRUCTURAL ENGINEERS  
2808 LAFAYETTE AVENUE  
NEWPORT BEACH, CA 92663  
Phone: 949.548-2720  
Fax: 949.548-2720  
www.williamsimpson.com

**DETAILS**  
PROPOSED SEAWALL WITH CANTILEVERED  
CONCRETE DECK LOCATED AT  
2808 LAFAYETTE AVENUE  
NEWPORT BEACH, CA 92663

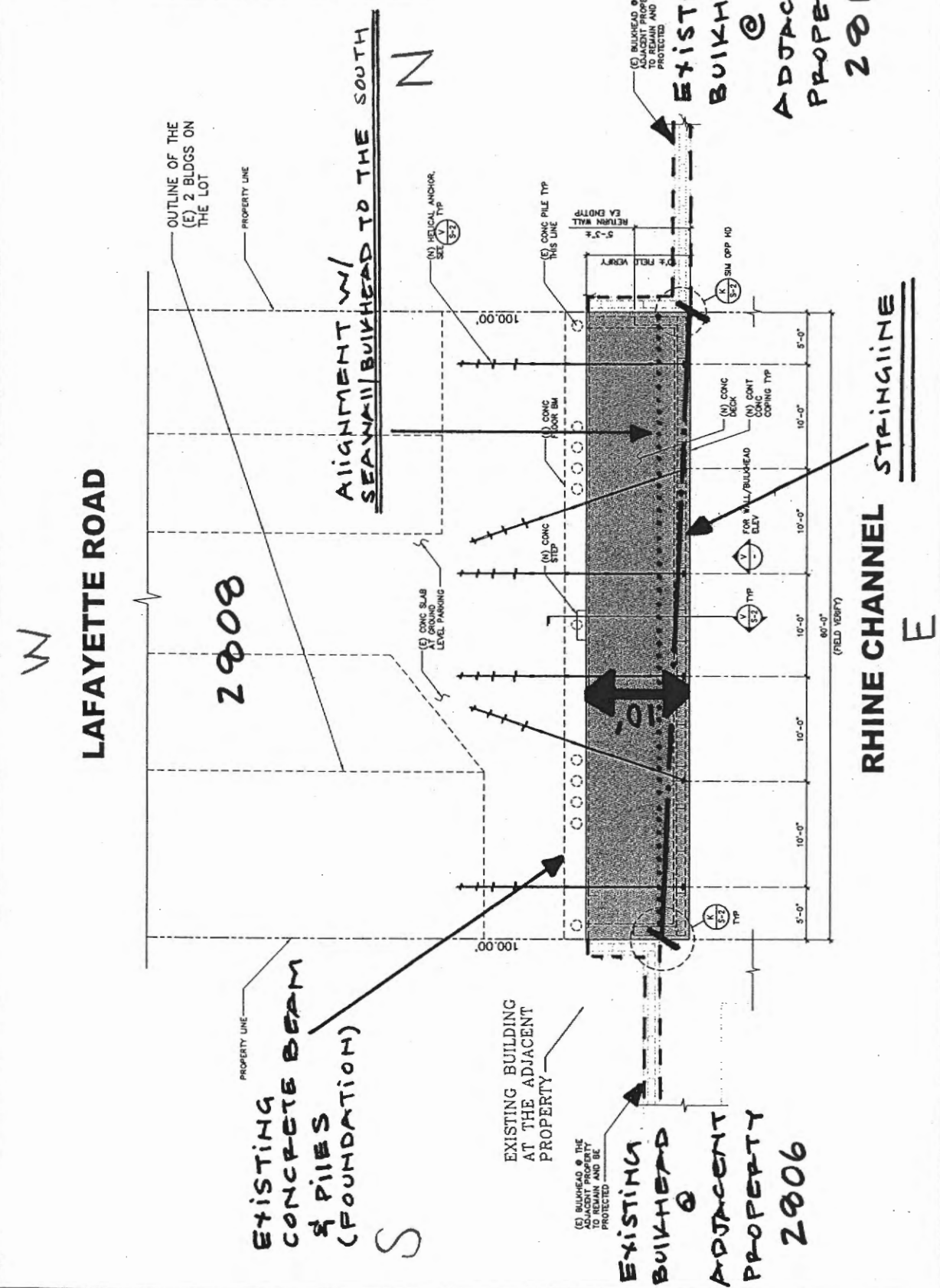
**OWNER / APPLICANT**  
Mr. & Mrs. John Morehart  
2808 Lafayette Road  
Newport Beach, CA 92663  
Phone: 949.548-2720

**DATE** 08/20/18  
**BY** W.S.  
**CHKD** W.S.  
**APP'D** W.S.  
**REV** 1.0  
**DESCRIPTION** SEAWALL  
**PROJECT** SEAWALL  
**LOCATION** 2808 LAFAYETTE AVENUE  
**SCALE** AS SHOWN

SECTION AT SEAWALL TYP	
R	N.T.S.
TYPICAL BULKHEAD PANEL	
F	N.T.S.
TYPICAL PANEL SECTION	
K	N.T.S.
DETAIL	
E	N.T.S.
TYPICAL CORNER DETAIL	
V	N.T.S.



- NOTES:**
1. REMOVE RUBBLE AND EXCAVATE IN FRONT & BEHIND THE EXISTING SEAWALL TO AN ELEVATION 15' A.S.D. AS SHOWN ABOVE.
  2. INSTALL REINFORCING AS SHOWN ABOVE AND ON SITE PLAN.
  3. AFTER REMOVAL OF EXISTING SEAWALL, THE NEW SEAWALL SHALL BE CONSTRUCTED AT THE SAME LOCATION AND TO THE SAME ELEVATION AS THE EXISTING SEAWALL.
  4. AFTER CONSTRUCTION OF SEAWALL, THE EXISTING SEAWALL SHALL BE DEMOLISHED AND THE RUBBLE SHALL BE REMOVED TO AN ELEVATION 15' A.S.D. AS SHOWN ABOVE.
  5. SHOW EXISTING SEAWALL WITH SAND TO LEVEL FINISH GRADE AS SHOWN ABOVE.
  6. CAST-IN-PLACE CONCRETE DECK AS SHOWN ABOVE.
  7. CAST-IN-PLACE CONCRETE DECK AS SHOWN ABOVE.
- PROPOSED SEQUENCE OF OPERATIONS RELATED TO THE SEAWALL CONSTRUCTION:**
1. REMOVE RUBBLE AND EXCAVATE IN FRONT & BEHIND THE EXISTING SEAWALL TO AN ELEVATION 15' A.S.D. AS SHOWN ABOVE.
  2. INSTALL REINFORCING AS SHOWN ABOVE AND ON SITE PLAN.
  3. AFTER REMOVAL OF EXISTING SEAWALL, THE NEW SEAWALL SHALL BE CONSTRUCTED AT THE SAME LOCATION AND TO THE SAME ELEVATION AS THE EXISTING SEAWALL.
  4. AFTER CONSTRUCTION OF SEAWALL, THE EXISTING SEAWALL SHALL BE DEMOLISHED AND THE RUBBLE SHALL BE REMOVED TO AN ELEVATION 15' A.S.D. AS SHOWN ABOVE.
  5. SHOW EXISTING SEAWALL WITH SAND TO LEVEL FINISH GRADE AS SHOWN ABOVE.
  6. CAST-IN-PLACE CONCRETE DECK AS SHOWN ABOVE.
  7. CAST-IN-PLACE CONCRETE DECK AS SHOWN ABOVE.









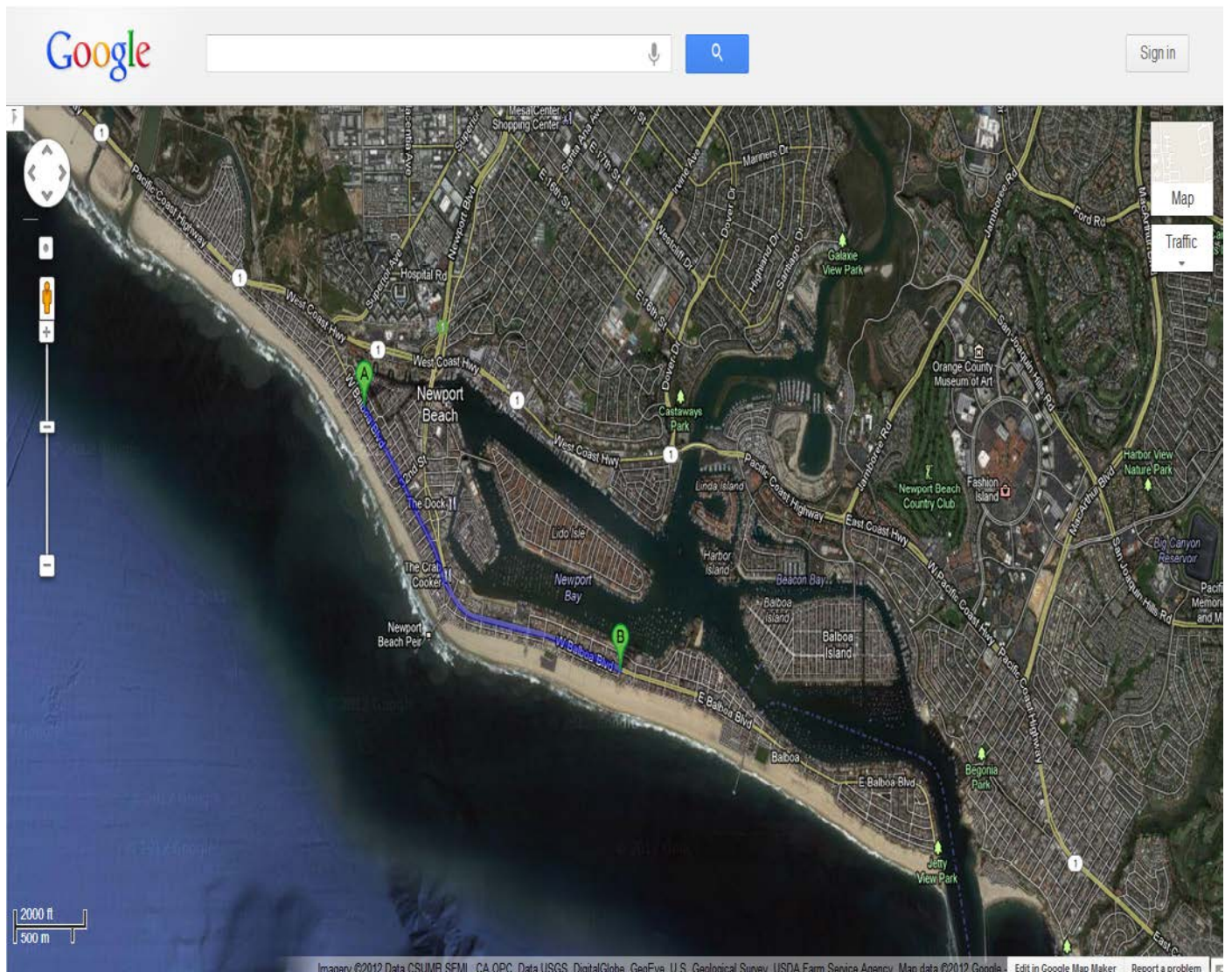
1875 US Coast Survey of Newport Bay- Balboa Peninsula is at the bottom of the image, following, generally, the black outlined area.

(Source- Coastal Land Use

Plan, [http://www.newportbeachca.gov/PLN/LCP/Internet%20PDFs/CLUP\\_Part%201\\_Introducti  
on.pdf](http://www.newportbeachca.gov/PLN/LCP/Internet%20PDFs/CLUP_Part%201_Introducti%20on.pdf), page 5.)

Exhibit # 7  
Page 1 of 7

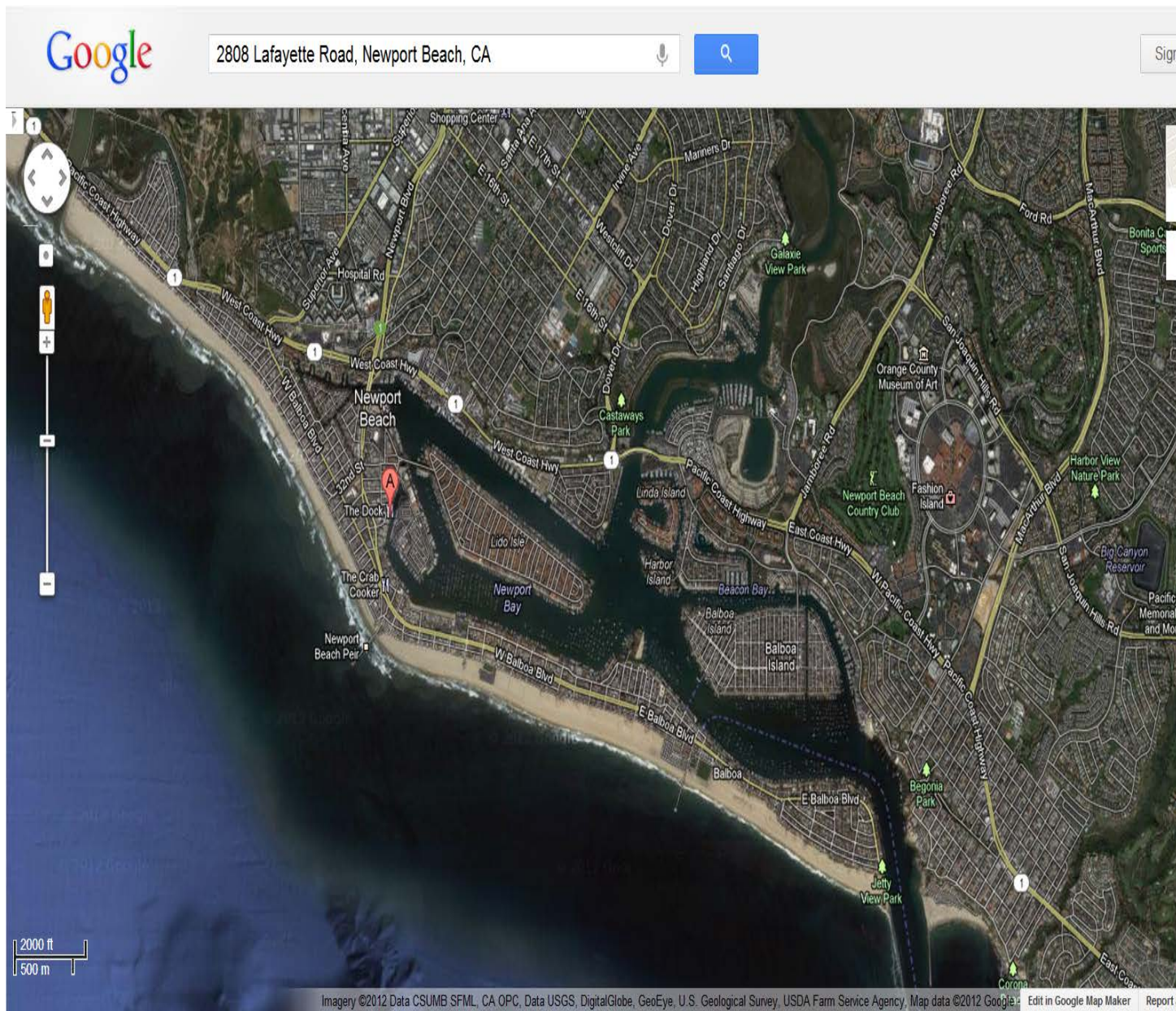




Pins indicate the distance between 40<sup>th</sup> Street and 9<sup>th</sup> Street along the Newport Beach Peninsula to provide the scale of the land granted to James McFadden in 1892, using 2012 aerial image of the Peninsula.

Exhibit #7  
Page 2 of 7





Pin Marking Applicant's Property as Newport Beach appears in 2012.

(Source- <https://maps.google.com/maps?q=rhine+channel&hl=en&ie=UTF-8&mid=1355269358>.)

Exhibit #7  
Page 3 of 7



**Tidelands Survey**  
Newport Harbor  
City of Newport Beach

Rhine Channel

**Boundaries**

- 1919 Boundary (Statutes of 1919, pg 1133)
- 1919 Conflicting Boundary (Per Patterson Map - July 9, 1968)
- 1919 Conflicting Boundary (Per Aerialson Documents / SCC 95376)
- Ocean Shore Line (Per Record Maps)
- Ordinary High Tide Line
- Ordinary High Tide Line (1956)
- County Tideland Boundary
- Finley Meander Line (1885)
- Wildlife Preserve boundary
- Bulkhead (1950 USACE Harbor Survey)
- Pierhead (1950 USACE Harbor Survey)

**Managing Agency**

**City of Newport Beach**

- Tidelands & Submerged Lands in Newport Bay (Statutes of 1919, Ch 494 pg 1011 & Statutes of 1927, Ch 79 pg 125)
- Tidelands, Submerged Lands & Filled Lands bordering upon, in and under the Pacific Ocean (Statutes of 1929, Ch 813 pg 1704)
- Filled Tidelands
- Fee Title to Upland Property
- Waterways Dedicated or Reserved for some
- 1968 Trust Additions (SB 673, 1997)

**County of Orange**

- Tidelands & Submerged Lands in Newport Bay
- Filled Tidelands
- Fee Title to Upland Property

**State of California**

- State Park Beaches
- State Highways

**Federally Owned**

- Property Conveyed by City to US Government

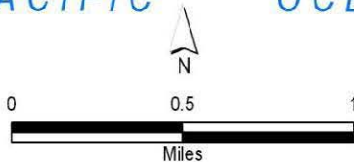
**Conflicting Title/Designation**

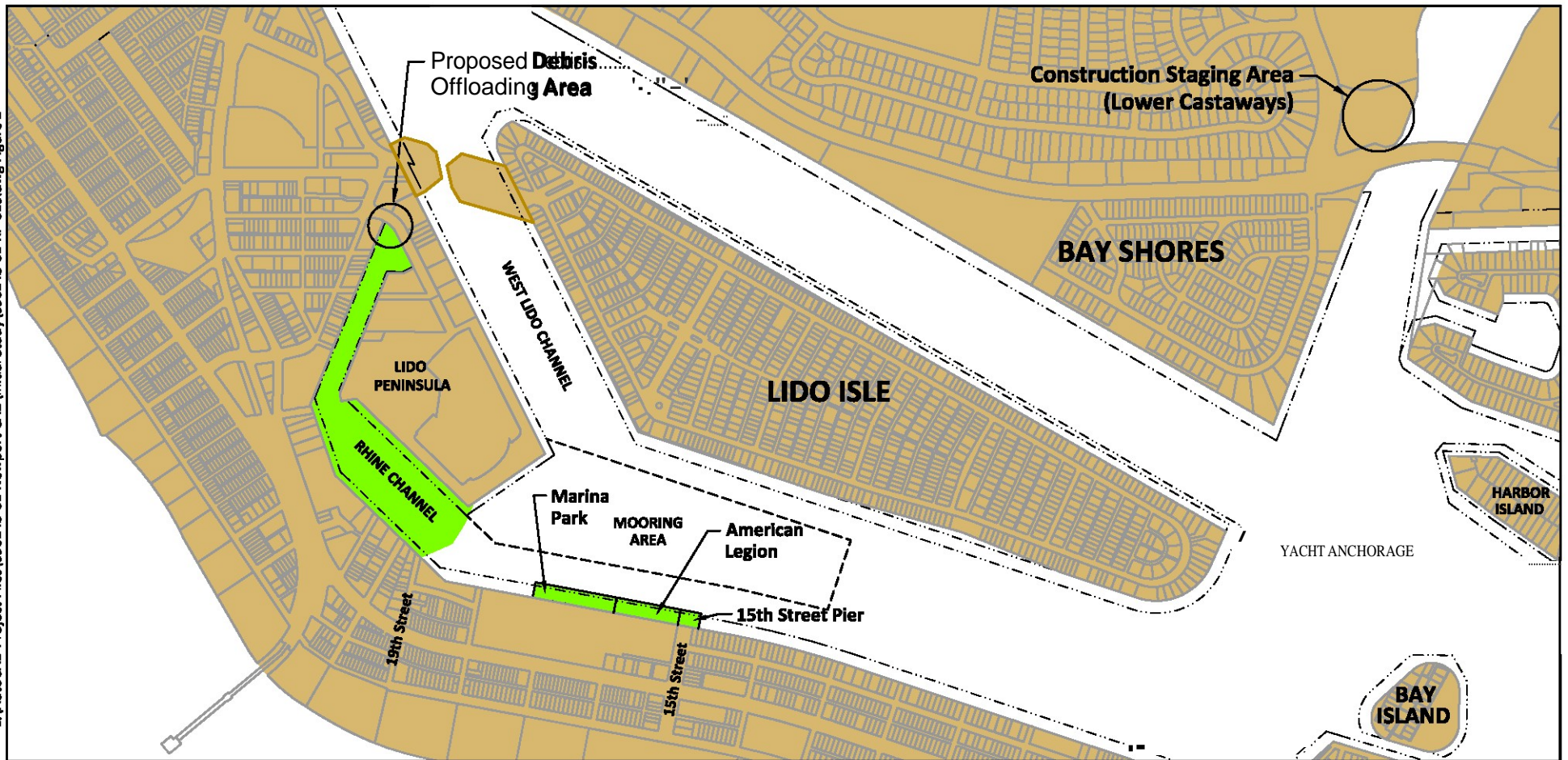
- (1) Tidelands in area of unclear 1919 Boundary definition
- (2) Harbor Island Tidelands
- (3) Bay Island Waterway

Key noting that the Rhine Channel is a waterway dedicated or reserved for same

Exhibit #7  
page 4 of 7

PACIFIC OCEAN





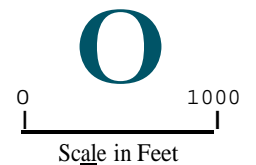


**SOURCE:** Basemap prepared from City of Newport Beach GIS files.

**NOTE:** Temporary moorage areas are located throughout Lower Newport Bay.




**LEGEND:**

-  Proposed Project Area
-  Pierhead Lines (Approximate)





## X. LAND USE AND PLANNING

Would the project:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact
a) Physically divide an established community?	⑤	⑤	⑤	
b) Conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect?	⑤	⑤	⑤	
c) Conflict with any applicable habitat conservation plan or natural community conservation plan?	⑤	⑤	⑤	

### Environmental Setting

The General Plan (2006) and the Coastal Land Use Plan (CLUP; 2009) designations for land use within the Project Area are tidelands and submerged lands (General Plan 2006; General Plan Figure LU1; CLUP 2009). This designation is intended to address the use, management, and protection of tidelands and submerged lands of Newport Bay and the Pacific Ocean immediately adjacent to Newport Beach. The designation is generally not applied to historic tidelands and submerged lands that are presently filled or reclaimed. Tidelands and submerged lands are subject to a public trust that, among other things, limits their use to

navigation, fishing, commerce, public access, water-oriented recreation, open space, and environmental protection. The vast majority of tidelands and submerged lands in Newport Beach have been granted to the City or the County of Orange to administer in a manner consistent with the public trust limitations relative to use of the property and revenue derived from that use.

Local Land Use Planning. Determination of consistency with the relevant goals and policies stated in the adopted General Plan, Land Use Element, Harbor and Bay Element, Natural Resource Element, and Noise Element, as well as the Coastal Land Use Policy, are provided as Tables LU1 through LU5. Some aspects of these elements that address public access, water quality, the environment, and plan administration are also covered in other elements. These overlapping policies or goals are parenthetically noted within each element. Redundancy is avoided by not repeating each overlapping element.

Exhibit #7  
Page 7 of 7

FRED GAINES  
SHERMAN L. STACEY  
LISA A. WEINBERG  
REBECCA A. THOMPSON  
NANCI S. STACEY  
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December 10, 2012



Commissioners  
California Coastal Commission  
45 Fremont Street, #2000  
San Francisco, California 94105

W 18a

Re: Application No. 5-11-178 (Morehart)

Dear Commissioners:

The undersigned represents Lisa Cervantes-Morehart, the Applicant on the Application No. 5-11-178 (Morehart). The Applicant seeks to construct a bulkhead on the Applicant's property at 2808 Lafayette Avenue, Newport Beach. The property is a bay front property on the Rhine Channel, the former fish cannery and industrial part of Newport Harbor. Every property on both sides of the Rhine Channel has a bulkhead except the Applicant's property. The staff has recommended that you approve the bulkhead with Special Conditions 1, 6, 10, 11 & 12 requiring specific design and construction requirements. The Applicant accepts these Special Conditions. The Applicant also does not object to Special Conditions 7, 8 and 13. (The Applicant asks the Commission to note that the Staff Report appears to have reversed north and south in its recommendation and findings. The Applicant has notified Staff of this problem.)

However, the Applicant does object to Special Conditions 2, 3, 4 and 5 which require a public access easement across the Applicant's property, and to Special Condition 9 which requires a waiver of further efforts to protect the property.

**1. The Project.**

As described in the staff report, the project is a vertical bulkhead wall in a body of water called the Rhine Channel. The bulkhead protects an existing building built in 1977. From the 1920's until 1977, there was building on a wharf that extended to the property line over the water. The 1976 permit authorized the removal of a 50 year old wharf over the water and its replacement with a new wharf over the water. The new wharf extended 5 feet past the property line. A two story building on the new wharf was also approved. A photograph of the building approved by the Commission is attached as Exhibit A. In 2000, the new wharf suffered a structural collapse and the City ordered the wharf and building removed. (See Exhibit B.) The



structural design of the new wharf and the building on the land was integrated. The wharf constructed in 1977 provided lateral support to the buildings that remain today.

The Rhine Channel was the historical location of fish canneries and other industrial uses in Newport Beach. In 1966, canneries, fishing boats and other industrial uses lined both sides of the Rhine Channel. A wharf and building had first been constructed on the Applicant's property in the 1920's. This wharf and building remained until 1977 when the new wharf and building approved by the Commission was constructed. A 1966 photograph showing the previously existing building is attached hereto as Exhibit C.

For many years the City of Newport Beach had been planning a dredging project for the Rhine Channel to remove contaminated sediments that had been associated with the canning and other industrial uses along the Channel. This Commission approved the dredging project to remove 150,000 cubic yards of sediment on January 12, 2011 in CDP No. 5-10-162. The Applicant was advised that the dredging project would significantly lower depths abutting the Applicant's property. The deeper channel depth could adversely affect the stability of the existing building which now lacks the lateral support of the failed wharf. It was recommended that the Applicant place a bulkhead on the property to assure stability. Almost all property in western Newport Harbor is improved with a bulkhead. Along five blocks on both sides of the north end of the Rhine Channel (a distance of more than 1,600 feet) only the 60 feet on the Applicant's property lacks a bulkhead. Two structural engineers have stated that a bulkhead is needed to stabilize the footings of the existing buildings. (See Exhibit D.)

The Applicant had anticipated that permits for the bulkhead could be obtained and the bulkhead constructed before the City dredging project in the Rhine Channel was commenced. The Applicant began design in 2010. The City approved the project in July 2011. A CDP permit application was submitted on July 14, 2011. The Commission Staff made three separate requests for additional documents and for additional governmental review before accepting the application on July 1, 2012. The dredging project was started in the fall of 2011 and completed by February 2012.

Although accepted on July 1, 2012, the Application was not placed before the Commission for hearing until this meeting in December 2012. The Applicant had been notified by Staff in writing that the Application would be heard in November 2012. That commitment was not met. December 2012 was promised. On November 20, 2012, the Staff notified the Applicant that the matter would not be considered in December 2012. Staff requested that the Applicant sign a time waiver because of the permit streamlining act. The Applicant was also notified for the first time that the Staff intended to recommend a public access condition. Frustrated at the delay and anxious for the stability of the building, the Applicant declined to

waive time. The Staff Report was issued on November 29, 2012, a few days after I was retained.

Both the project engineer Plamen Petrov and a second opinion from engineer Alexander Robertson attest to the urgency to complete the project. (See Exhibit D) The consequences from the dredging project pose a higher risk of failure than existed before the dredging. The Staff recommends favorably on the construction of the bulkhead with numerous Special Conditions related to design and construction practices. All of these Special Conditions are acceptable to the Applicant. What is not acceptable is the demand for an easement for public access and a waiver of further construction to protect the existing structure.

**2. The Applicant's Objections to Public Access Conditions.**

Special Condition 2 requires that the Applicant offer to dedicate a public access easement between the existing building and the bulkhead, a distance of 7-10 feet. (See Staff Report Exhibit #4.) Special Condition 2 further requires that (i) the access easement be open 24 hours a day, and (ii) the Applicant must maintain the access easement unless the party accepting the easement opts to provide maintenance (which is inconsistent with Public Resources Code §30212).

Special Condition 3 requires the Applicant to maintain the access easement. Special Condition 4 requires that the Applicant build all improvements necessary to facilitate public access as a part of the project, even though no offer to dedicate has been accepted. Special Condition 5 requires the Applicant to post signs to direct the public to the use of the Applicant's property.

All of these conditions are unacceptable. The findings on pages 25 to 30 of the Staff Report do not support these conditions. Several of the proposed findings are not supported by the evidence.

- a) The findings on Page 27-28 concerning the 1976 condition by the City for a contingent easement for a public walkway on the approved wharf are inaccurate.
- b) The finding on Page 28 that the Newport Beach LUP supports the condition is inaccurate.
- c) The findings on Page 28 that Newport Beach in the past had required similar conditions on other properties do not support the an access condition here.
- c) The finding on Page 29 that the bulkhead would fill tidelands is incorrect in that the bulkhead is located on privately-owned lands.

**A. There Has Never Been a Public Access Easement on the Applicant's Property.**

The Staff Report claims that the recommended public access easement replaces a public walkway on the Applicant's property that had been required by the City of Newport Beach in the approval of the wharf and building in 1976. (See, CDP No. P-5-19-76-7903 (Ziemer)) In Ziemer's case, a proposed public walkway was placed at the waterside of the wharf to be built. The Staff Report on page 28 states that the pier on which the access was located still exists today. This is not true. The pier or wharf collapsed in 2000 and was removed as a nuisance. (See, Exhibit B.) The Staff Report confuses the float to which a boat is moored with the former wharf. Exhibit #3 to the Staff Report and Exhibit E hereto are aerial photograph comparing the wharf before it failed to the present condition. The walkway along the end of the wharf is clearly shown distinct and separate from the float.

Second, the plans in the Coastal Commission file for CDP No. P-5-19-76-7903 clearly show the proposed public walkway at the wharf level, not on a float. (See Exhibit G.) The proposed public walkway is also shown beyond the Applicant's property line, overhanging the Rhine Channel, and not on the Applicant's property. The walkway is also shown beyond the property line on the construction drawing sheet A-1 dated 10-27-76 submitted to the City for a building permit and assigned plan check PC 202-76. (See Exhibit H.) An easement was necessary because the structure was owned by the property owner.

Consequently, the proposed public walkway was never on the Applicant's real property, only on an improvement over the water attached to a structure on the Applicant's property. The photograph attached as Exhibit A shows the wharf and building constructed in 1977. The location of the proposed public walkway is identified.

Third, the minutes of the Newport Beach Planning Commission for April 1, 1976 show that although the access condition in the City staff report read "boat dock", it was changed to "pier or wharf". (See, Exhibit F, page 8.) The final condition read:

"That the pier or wharf extend across the entire bayside of the property and that the owner grant an easement or enter into an agreement with the City to grant an easement for public access. Said easement or agreement shall only become effective at such time as this property is connected to adjacent property to form a continuous walkway." (Exhibit F, page 10, condition 6.)

Fourth, the City's public walkway condition was a Contingent Offer for Public Access. A copy of the Contingent Offer was obtained from the City files and is attached as Exhibit I. The Contingent Offer satisfied the public walkway condition and expired by its own terms in 2002. There are two facts in this Contingent Offer that rebut the existence of any public access

easement or continuing offer of a public access easement. First, the Contingent Offer does not become an easement until

“such time as the parcel located immediately to the north **and** the parcel located immediately to the south of the property become connected with the pier or wharf adjacent to the property by piers or wharfs or other similar structures to form a continuous walkway.” (Page 2, emphasis added.)

Therefore, there was no right for the public to enter the Applicant’s wharf until connections on both sides of the wharf had been made. Although a structure was built to form the connection from 2806 Lafayette Avenue, no physical connection was ever made. The railing seen on the wharf in Exhibit A remained in place. Nor was there any structure ever constructed on the north side of the wharf which would provide access to the proposed walkway.

Fifth, the Contingent Offer expired 25 years after 1977. (See, Exhibit I, ¶ 2.) Since both connections were never satisfied by 2002, the Contingent Offer expired and did not create any alleged easement.

Sixth, the Staff Report states on page 28 that there was a public access connection from an adjacent pier built at 2806 Lafayette Avenue. This adjacent pier was a permit condition required by the City. The project was approved by the Commission in CDP 5-90-471, but no access condition was imposed by the Commission. Although the pier was built, it was never connected to the wharf on the Applicant’s property. No connection was ever made because the City condition required connections on both sides of the wharf. There was not yet, and is not now, a structure to connect to the property further north.

Finally, the wharf is gone. The wharf fell down including the part proposed for public walkway. In substance, the Staff Report asks the Commission to require a public access easement on an 7-10 foot strip of the Applicant’s private property (12-15% of the usable land) based on the following facts: (1) there was a contemplated public walkway on a wharf bayward of the Applicant’s property line, (2) the walkway was never open to the public, (3) the walkway was never connected to adjoining property, (4) the conditions to the creation of an easement were not satisfied, (5) the offer for the easement has expired, and (6) the structure on which the walkway was placed collapsed 12 years ago. The Commission cannot base a public access condition on these facts.

**B. Policies in the Newport Beach Certified Land Use Plan Cannot Justify the Exaction of an Easement.**

The Staff Report cites several policies in the Newport Beach Certified Land Use Plan in the justification of the access conditions. Policy 3.1.1-9 includes that the City must act in a manner that does not violate private property rights. (Staff Report, page 26.) This is consistent with the Coastal Act provision in Public Resources Code §30010 which states:

“The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor.”

As described in Section E, below, the Commission cannot require that the Applicant grant to the state an easement through the Applicant’s property without violating Public Resources Code §30010, Article 1, §7 of the California Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution.

**C. Prior Decisions of the City of Newport Beach or the Commission do not Support the Present Access Conditions.**

The Staff Report cites several decisions of the City of Newport Beach that required access be provided at 2800 and 2804-2806 Lafayette Avenue. Other property owners may have agreed to grant access for projects that were not so limited as a bulkhead to protect an existing building. Each property owner has their own choice whether or not to assert their Constitutional right to be free of uncompensated taking of property. Most permits cited predated 1987. The fact that other property owners may have made a grant is not evidence that the Applicant can be compelled to make a grant.

**D. THE POSSIBLE EXISTENCE OF TIDELANDS ON PRIVATE PROPERTY DOES NOT SUPPORT AN ACCESS CONDITION.**

**1. A Bulkhead to Protect and Existing Building is Not Inconsistent with a Public Trust Tideland Interest.**

The Applicant owns the property a distance of 100 feet from the street. This includes approximately 37 feet previously occupied by the wharf over the water. This 37 feet is behind the U.S. Bulkhead Line and is private property, even when covered by water. (See Exhibit J.) Even if the property contains tidelands, there is no restriction on constructing a bulkhead on private tidelands. The City is the owner and administrator of the tidelands within its jurisdiction. The City has given the approval for the bulkhead. Numerous bulkheads have been approved by the Commission over the years protecting private homes and other commercial businesses without a requirement for access. This bulkhead is no different.

Since 1913, the Federal Government has jurisdiction over navigation improvements in Newport Harbor. (*Newcomb v. City of Newport Beach* (1936) 7 Cal.2d 393, 401; 33 U.S.C. §424.) The U.S. Bulkhead Line is established by the Army Corps of Engineers as the limit of where a bulkhead can be erected within Newport Bay. The Applicant proposes to place the bulkhead approximately 27 feet landward of the U.S. Bulkhead line. Special Condition No. 1 will move it back to 30 feet. The Applicant has the property interest necessary to carry out the project and the City as administrator of the tidelands, to the extent that there are tidelands on the property, has given approval to the bulkhead.

The bulkhead does not block any public use that has been made or reasonably could be made of the area where the bulkhead is located. The Applicant has a building in danger and the Staff recommends that the Applicant cannot protect the building within her own property without giving up all rights in 12-15% of the property. The public access easement which would be required by Special Conditions 2, 3, 4 and 5 is so broad that it is the equivalent of fee title.

The Staff Report claims that the existence of a tideland public trust interest alone is sufficient to justify exaction of an easement on private property. The public is excluded from many areas of privately owned tidelands. It is a reasonable use of a privately owned tideland to place a structure to protect an existing structure from damage. The location where the bulkhead is located was underneath a wharf for 75 years. It has been covered by rubble for the past 12 years. The present condition of the location of the proposed bulkhead can be seen in Exhibit K. The public has never used the area. The land serves no public purpose. The public does not own the land. To the extent that there may be a public trust interest, the holder of that interest has consented to the bulkhead. Under these facts, the Commission cannot justify an exaction of private property rights as a condition to this permit.

**2. The Property is Subject to a Navigational Easement, Not a Public Trust Interest.**

The Applicant's property is not subject to a public trust interest. Just because a property has salt water on it is not conclusive of a public trust interest. This part of Newport Beach was first granted by the State of California to James McFadden in 1892 as "swamp and overflow lands". (See Exhibit L.) Public Resources Code §7552.5 provides that swamp and overflow lands which are dredged to create navigable waters, no public trust interest arises. Only a navigational easement arises. The project does not interfere with navigation.

The City of Newport Beach is holder of the tidelands interests under a grant from the State Lands Commission. The City has mapped its tidelands and other navigational channels. On the map prepared by the City, the Rhine Channel is not shown as tidelands. The Rhine channel is shown as "Waterways Dedicated or Reserved". (See Exhibit M) This is consistent with the dedication of a navigational easement over the water when the Rhine Channel was



dredged from property above the mean high tide line.

The characterization of the Rhine Channel as a waterway dedicated to a navigational easement (as opposed to a tideland) is supported by the City's mapping of its tidelands over which the City administers the public trust. The public trust property is shown in light blue. Waterways that were dedicated to navigation are shown in green. The Rhine Channel is shown in green, a dedicated waterway, not a tideland trust. There are several important distinctions between a public trust interest and a navigational easement. (1) The public trust interest can never be terminated. (California Constitution, Article 10, §3.) The navigational easement can be terminated. (Public Resources Code §7552.5.) (2) Under the public trust doctrine, property uses must not conflict with the public trust. This does not limit the many private uses which can be, and are, made. As burdened only by a navigational easement, the property owner retains the right to do anything with its property that does not unreasonably interfere with the navigational easement. (*O'Banion v. Borba* (1948) 32 Cal.2d 145, 155.) The Applicant's proposed bulkhead does not interfere with navigation.

The location of the Applicant's bulkhead does not interfere with any navigation. The proposed bulkhead is 30 feet landward of the U.S. Bulkhead line established by the Army Corps of Engineers as the maximum extent to which a bulkhead may be built,

**E. The Findings Do Not Support the Access Conditions and the Evidence Will Not Support the Access Conditions.**

No easement exists and no right to an easement exists. Therefore, the Commission cannot justify exaction of a new easement to replace an easement that does not and never did exist. Any exaction of an easement must now comply with the constitutional standards set forth in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374.

As the Commission is well aware, *Nollan* requires that the Commission articulate in specific findings the rational relationship between the burden which the Applicant places upon the public and the exaction of the property owner's rights for the public benefit. *Dolan* requires that there be a rough proportionality between the burdens which the Applicant places on the public and the scope of intended deprivation of the property owner's rights. Construction of the bulkhead to protect existing structures places no burden on public access. The recommended findings do not support the public access easement requirement.

Special Conditions 2, 3, 4 and 5 should be deleted.

**3. The Applicant Cannot be Required to Waive the Right to Apply to Protect the Property by Any Means which May Prove Necessary in the Future.**

Special Condition No. 9 requires the Applicant to permanently waive the right to seek a permit to construct any other type of protection which may prove necessary in the future if that protection is on the bay side of the bulkhead. The justification for this condition is claimed in Public Resources Code §30235 and §30253.

“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.”

“30253. New development shall do all of the following: (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard. (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.”

As to §30235, the Staff Report agrees that the Applicant's proposed bulkhead is necessary to protect the existing structures in danger from erosion. The building foundation used to rely upon adjacent support from the failed wharf structure. Recently, the Rhine Channel dredging project deepened the channel to -19 feet MLLW directly in front of the Applicant's property. (Exhibit N.) The dredging approved by the Commission changed the depth of the bottom in front of the Applicant's property to exceed the 4V:1H slope which was the design criteria of the dredging project. This was likely unavoidable since the contaminated sediments were significant in this location and the Rhine Channel dredging project design standard was to excavate one foot into natural uncontaminated soils.

Whatever the reason for the deepened channel, it creates a greater concern about the stability of the structure and the urgent need to provide support. (See, Exhibit D.) The proposed bulkhead has no impact upon local shoreline sand supply. No portion of the Applicant's property has ever been a source of local shoreline sand supply. If in the future there were to be a failure of the bulkhead or of bulkhead's on adjoining properties, the Applicant may be required to do other work in front of the bulkhead to protect the structures. The Applicant is not in control of all of the factors that could affect the future stability of the property. Section 30235 provides no basis to waive the right to protect a structure as a condition of approving one particular form of protection.

The Staff Report finds that the Applicant's proposed bulkhead will assure stability and structural integrity as required by Public Resources §30253. There is no evidence that the proposed bulkhead will create or contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area. The portion of §30253 which prohibits new development from "in any way requiring construction of protective devices" applies only to those protective devices that "would substantially alter natural landforms along bluffs and cliffs." The Applicant's proposed bulkhead would not affect any bluffs or cliffs. There is no basis in §30253 to impose Special Condition No. 9.

**3. Conclusion.**

The Recommended Findings do not support the imposition of an access condition. The cited provisions of the Coastal Act do not support the imposition of the protection waiver condition. The development is necessary to protect an existing building in danger from erosion, the danger of which has increased from a recently completed dredging project approved by the Commission. The Commission should make an amending motion as follows:

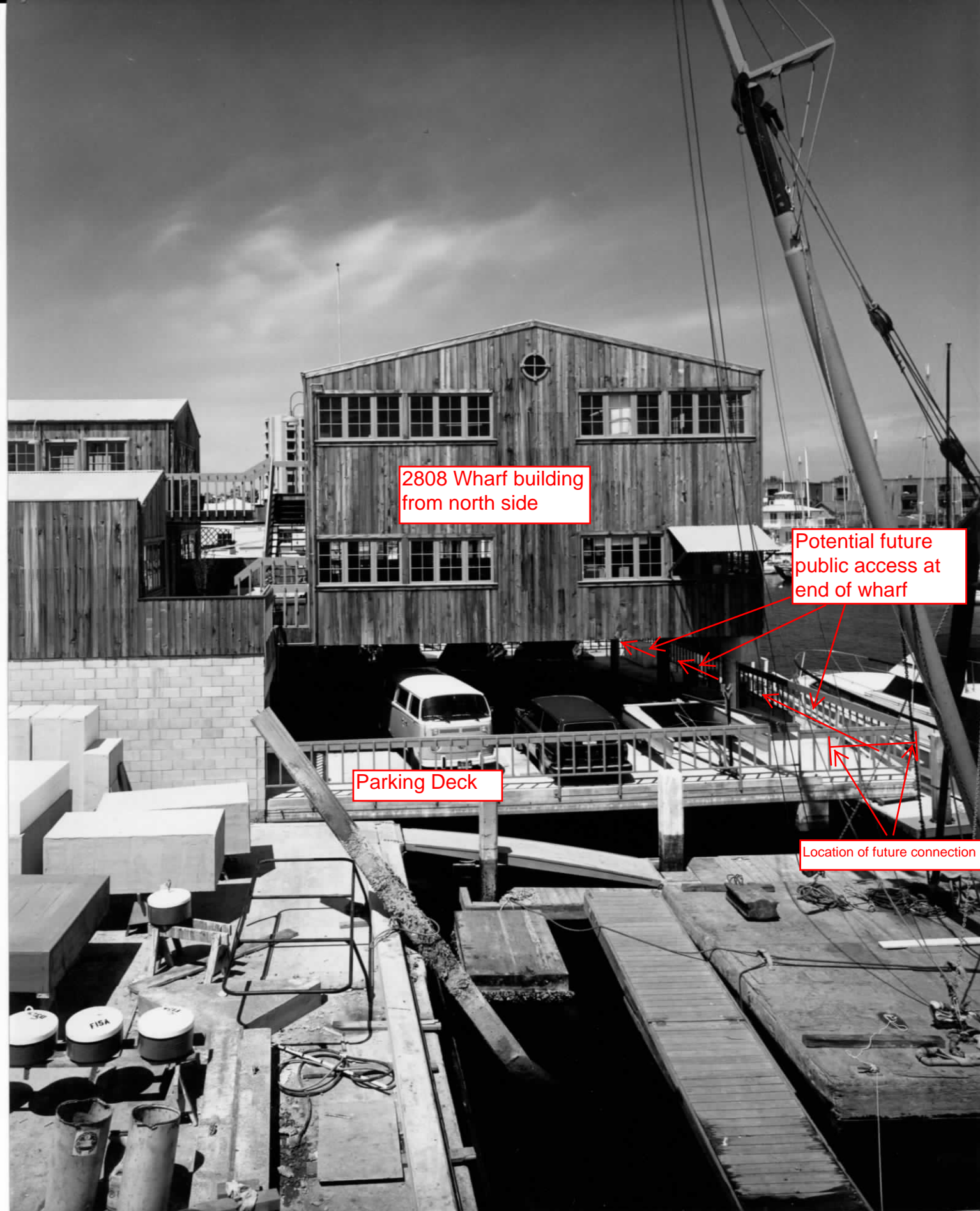
I MOVE TO AMEND THE STAFF RECOMMENDATION TO  
REMOVE SPECIAL CONDITIONS NO. 2, 3, 4, 5 AND 9.

The project when moved back as required by Special Condition No. 1 is the least environmentally damaging alternative and the elimination of Special Conditions 2, 3, 4, 5 and 9 does not affect the environmental impacts of the project.

Sincerely,  
  
SHERMAN L. STACEY

SLS

cc: Lisa & John Morehart



2808 Wharf building  
from north side

Potential future  
public access at  
end of wharf

Parking Deck

Location of future connection

# The Rhine Channel in 1966

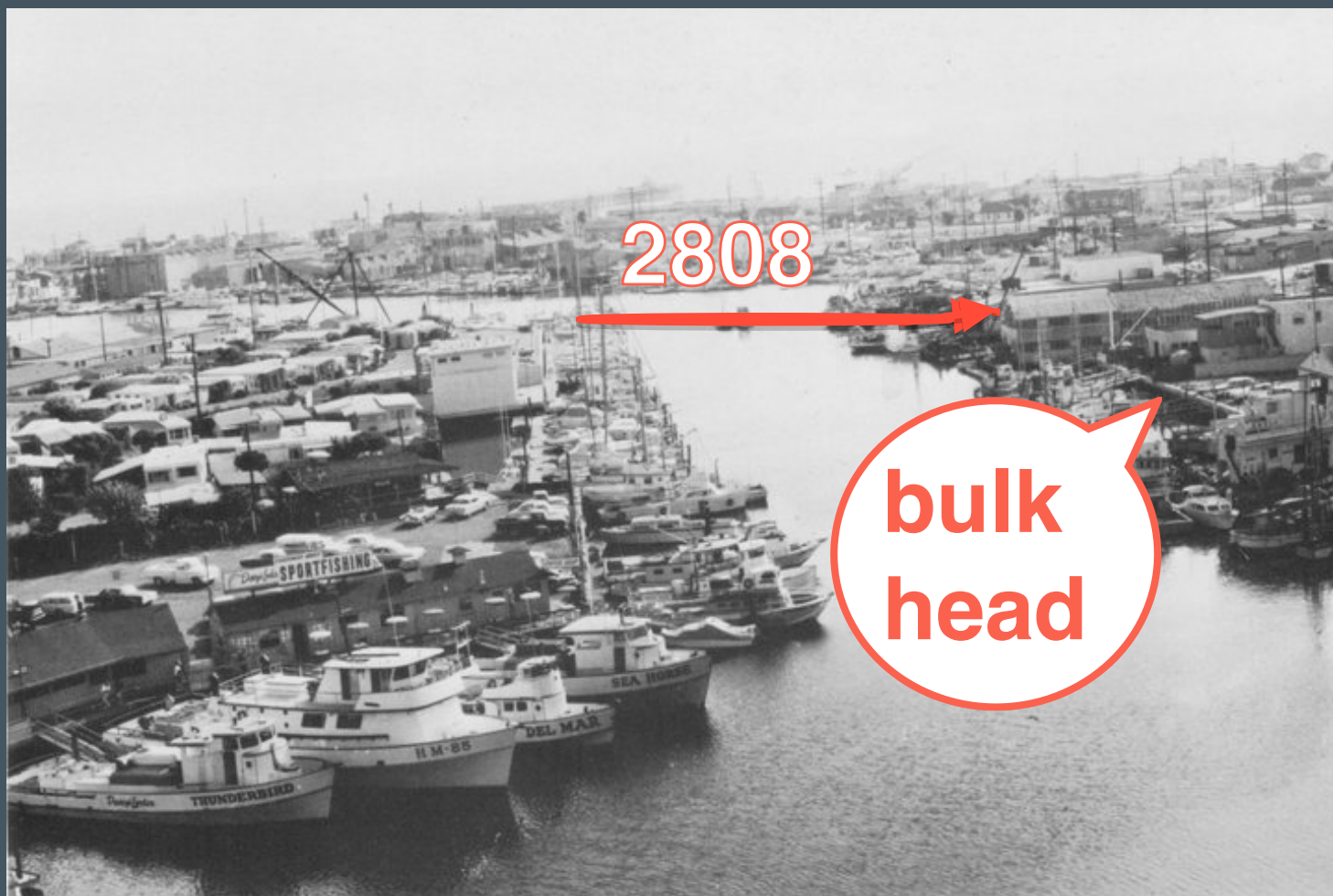


Exhibit C



10 December 2012

Mr. Sherman L. Stacey, Esq  
Gaines & Stacey  
1111 Bayside Drive, #280  
Corona del Mar, CA 92625

Subject: 2808 Lafayette, Newport Beach, CA  
California Coastal Commission Application No. 5-11-178

Mr. Stacey:

At your request, I have reviewed the California Coastal Commission Staff Report dated 29 November 2012 pertaining to the subject property in addition to numerous supporting documents that you provided, including the engineering design plans of the existing structure(s) prepared by Arch+Tekton dated 27 October 1976 and the design plans for proposed new concrete seawall prepared by William Simpson & Associates dated 30 June 2011. I have reviewed the post project report of the City of Newport Beach for the Rhine Channel Remediation dated 23 February 2012. Additionally, I conducted a preliminary visual reconnaissance of the subject property on 30 November 2012 for purposes of familiarizing myself with existing site characteristics.

The existing structure is a three story building with a parking structure located at grade and two-story office building located above. The parking structure is Type I/II construction with masonry bearing/shear wall system, interior concrete columns and beams supporting openings in the masonry walls, and spancrete structural slab supporting the two story structure above. The two story office structure above the parking structure is Type V construction. According to the original design plans, referenced above, the existing structure's foundation system consists of concrete piles and concrete structural grade beam.

Based upon my visual observations of the existing structure, I believe that the existing structure is experiencing some degree of movement. Since the pre-existing structure that collapsed into the Rhine Channel provided lateral support of the remaining structure's foundation system, I am very concerned about possible erosion of the Channel that has occurred and could continue to occur if remedial measures are not implemented to mitigate continued reduction in lateral support of the existing structure's foundation system. The City's Report dated 23 February 2012 identifies that the Rhine Channel was dredged in the immediate vicinity of the property to a depth of -19 MLLW, 5-6 feet deeper than the normal channel. This dredging occurred during the fall/winter 2011-2012. It is my opinion that the proposed concrete seawall (bulkhead) will mitigate against potential further erosion of the adjacent Channel bed and resultant adverse conditions that reduce the lateral support of the existing structure's foundation. The recent dredging makes the need for the immediate installation of the bulkhead more significant.



I hope that the material presented above adequately responds to your request. If you require additional information, please let me know. If you any questions please contact me at 714-504-3984.

Sincerely,

A. A. Robertson  
Professional Engineer  
State of California No. 26368

Enclosure: Resume

*MEMBER STRUCTURAL ENGINEERS ASSOCIATION OF SOUTHERN CALIFORNIA, STRUCTURAL ENGINEERING INSTITUTE, AMERICAN SOCIETY OF CIVIL ENGINEERS, AMERICAN INSTITUTE OF STEEL CONSTRUCTION, AMERICAN CONCRETE INSTITUTE, AMERICAN WELDING SOCIETY, SOCIETY OF AMERICAN MILITARY ENGINEERS AND NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS*

June 04, 2012

Anchor QEA  
Attn: Joshua Burnam  
26300 La Alameda, Suite 240  
Mission Viejo, CA 92691

**RE: NOTICE OF INCOMPLETE APPLICATION**  
**Application No. 5-11-178**  
Site Address: 2808 Lafayette Road, Newport Beach, Orange County

**WSA Job #6127-2**

Dear Mr. Burnam,

Pursuant to the request of Mr. & Mrs. Morehart, the following is in response to the questions of the above referenced NOTICE OF INCOMPLETE APPLICATION.

**RESPONSE TO QUESTION 1a:**

To the best of my knowledge, a seawall/bulkhead has never existed onsite. It seems like in the project description in the submitted application, the applicant has referred to the existing concrete beam on piles as an existing bulkhead.

**RESPONSE TO QUESTION 1b:**

Two sets of plans in 11"x17" format as obtained from the City of Newport Beach are a part of this response.

**RESPONSE TO QUESTION 1c:**

The subject concrete beam and piles are a part of the foundation for the existing 3 story structure on the lot. I have personally observed the exposed part of the concrete beam, and did not notice signs of distress. The piles are buried in the ground underneath the concrete beam and slab, thus could not be observed. It is our opinion that at this point the concrete beam and piles are still functional. Due to the recent dredging of Rhine Channel right in front of the subject site though, erosion will remove soil alongside the beam and piles and will jeopardize their structural integrity, if they remain unprotected. Installation of a seawall as proposed in the aforementioned application will protect the subject beam and piles, and the 3 story structure on the lot as a whole. From structural engineering stand point we do not see a need of engineering analysis of the concrete beam and piles at this time.

**RESPONSE TO QUESTION 2:**

The plans have been revised and the originally proposed fill has been omitted. Thus, currently there is no fill proposed on this project. The existing mudline/rubble covered surface is to remain unchanged.

**RESPONSE TO QUESTION 3:**

Two sets of plans in format 24"x36" signed by the City of Newport Beach Harbor Resources Division are a part of this submittal.

**RESPONSE TO QUESTION 4:**

Two sets of reduced plans by William Simpson & Associates in format 11"x17" are a part of this submittal.

**RESPONSE TO QUESTION 5:**

Two copies of the requested soils report are a part of this submittal.

The above answers were prepared based on the existing conditions, and within the inherent limitations of this study, in accordance with generally acceptable engineering principles and practices. We make no further warranty, either expressed or implied.

William Simpson & Associates, Inc. appreciates the opportunity to work with you towards the successful completion of your project.

If we can be in further assistance, please contact us.

Respectfully submitted,



Plamen Petrov, P.E.  
Senior Project Manager

Masoud Jafari, S.E.  
Principal

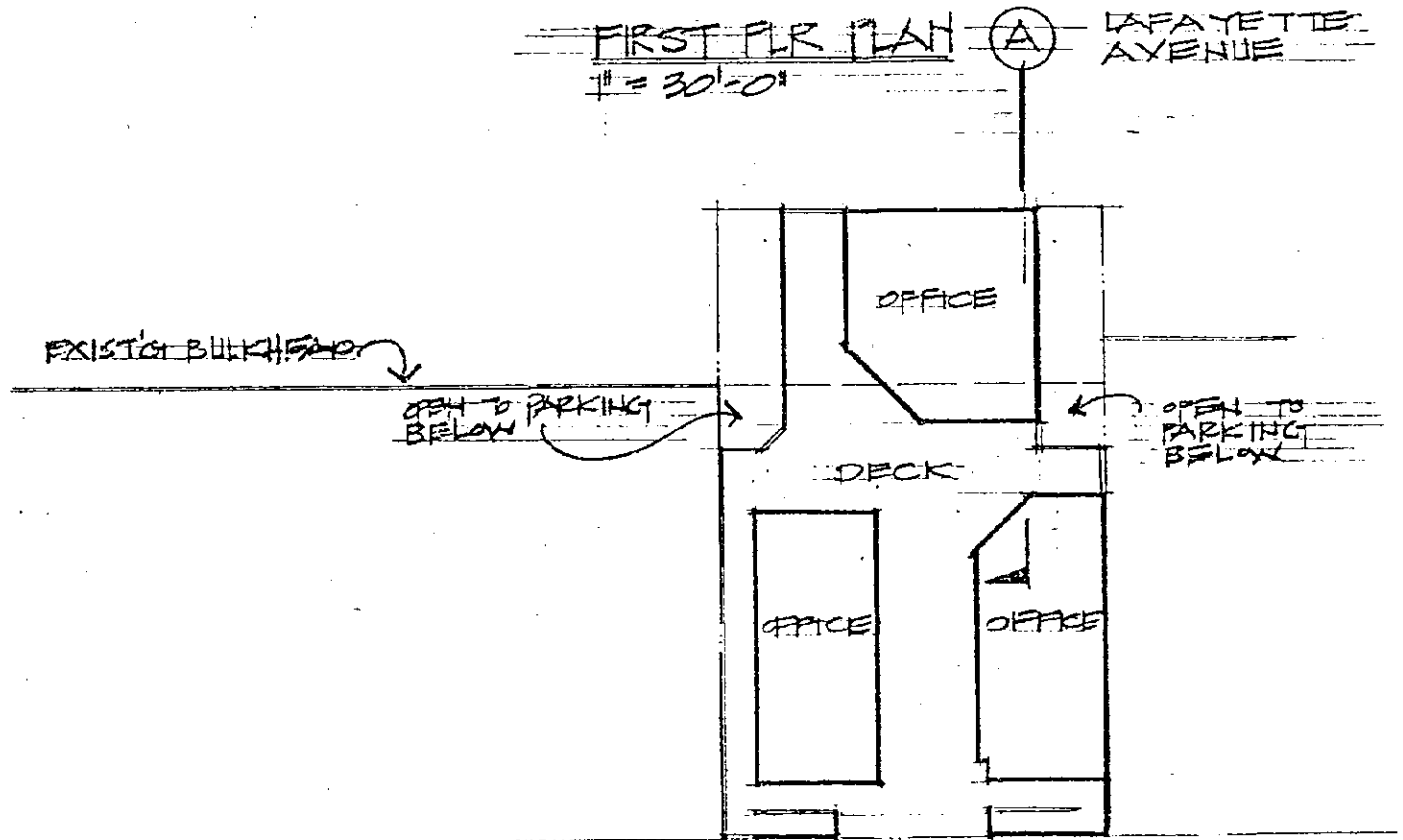
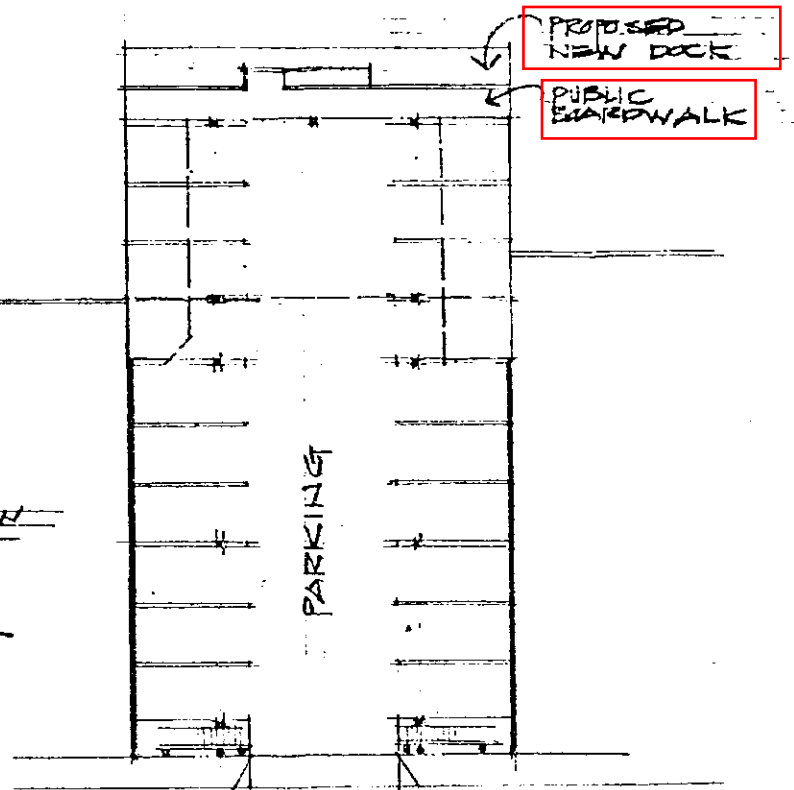
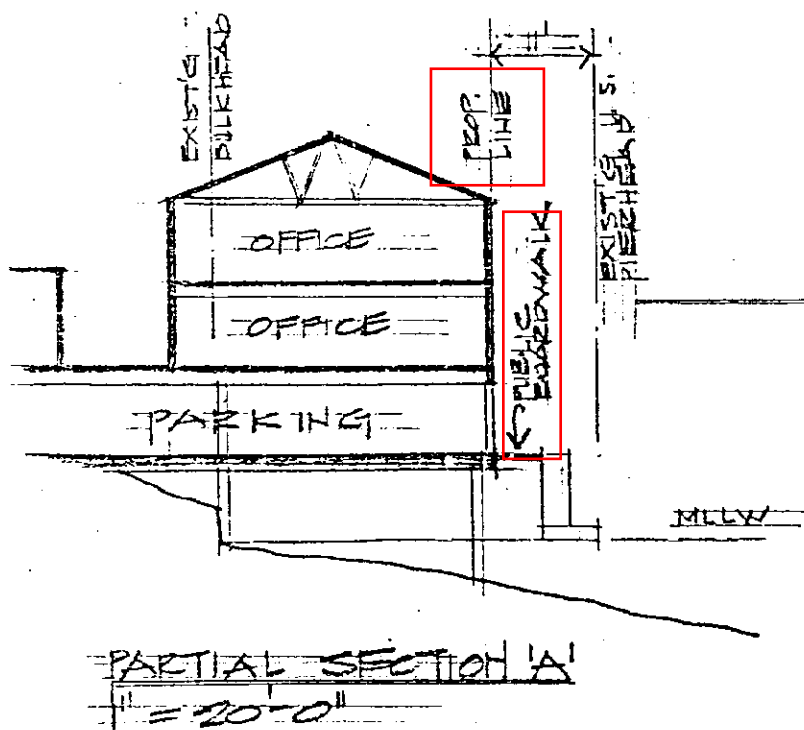


**Photograph 2. Property prior to failure.**



**Photograph 3. Property after failure.**

The structure caved in when rusty support beams gave way causing extensive structural damage. The collapse required the immediate removal of the three-story structure, but asphalt and concrete debris remains on site and within the canal. Currently, the building's footing is exposed and unstable. The remaining debris and exposed footing are visible in Photograph 1.

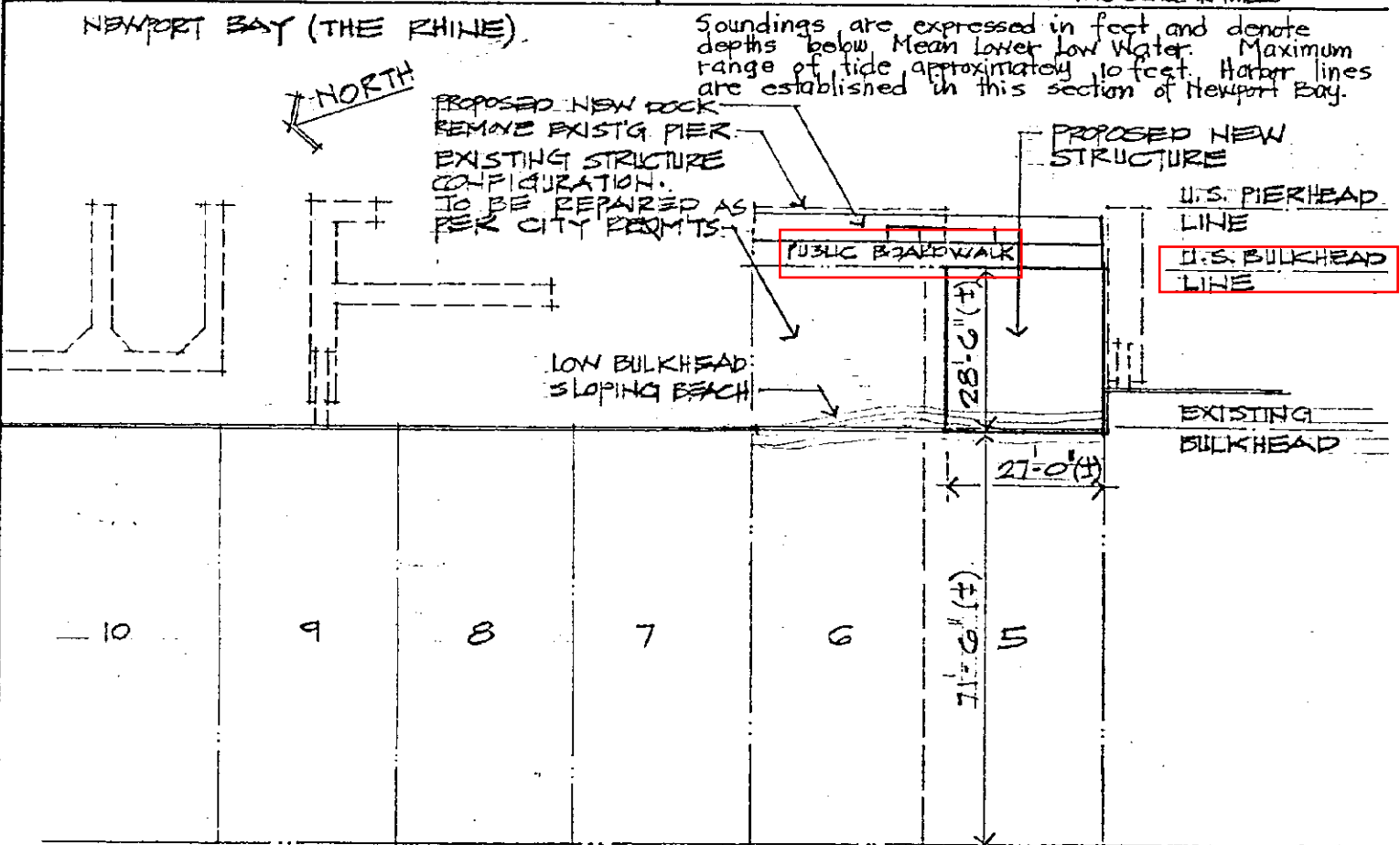
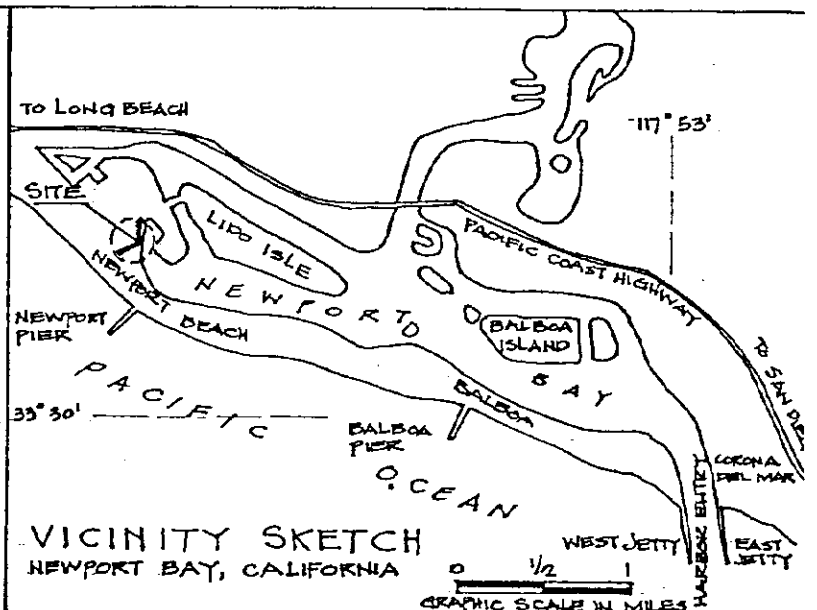
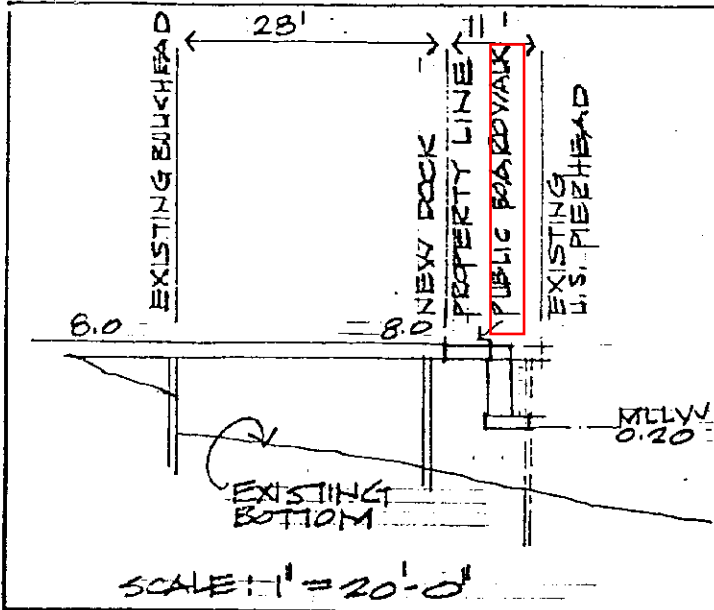


APPROVAL

714/420-5060  
359 San Mateo Ave.  
Neenah Beach, CA 92660

2808 & 2810 LAFAYETTE AVE.  
NEENAH BEACH, CA  
Exhibit #8  
APPLICATION NO. 70 Page 18 of 29

# CITY OF NEWPORT BEACH HARBOR APPLICATION NO. \_\_\_\_\_



Soundings are expressed in feet and denote depths below Mean Lower Low Water. Maximum range of tide approximately 10 feet. Harbor lines are established in this section of Newport Bay.

ARCHIT-TEKTON, INC. (WM.C. CLAPET)		
APPLICANT'S NAME		
2808 & 2810 LAFAYETTE AVE.		
JOB ADDRESS		
LANCASTER ADDITION	425	5 & 6
TRACT	BLOCK	LOT
ARCHIT-TEKTON, INC.		Exhibit #8
DRAWN BY		Page 19 of 29
		DATE

Exhibit G





AND WHEN RECORDED RETURN TO:

City Clerk  
3300 Newport Boulevard  
Newport Beach, California

Book 12055 Page 115  
Official records of Orange County  
12:05 am Feb. 1, 1977  
Instrument No. 1367  
Npt. Bch Deed No. 1378

Space Above This Line for Recorder's Use Only

CONTINGENT OFFER FOR PUBLIC ACCESS

This Contingent Offer for Public Access is made into this 19 day of January, 1977, by ED ZIEMER, an individual, hereinafter referred to as "Ziemer".

W I T N E S S E T H:

A. The Planning Commission of the City of Newport Beach on April 1, 1976, approved Use Permit No. <sup>1782</sup>~~1779~~ and Resubdivision No. 513 related to the proposed office use on the property owned by Ziemer located at 2808 and 2810 Lafayette Avenue, City of Newport Beach, State of California, hereinafter referred to as "the property".

B. As a condition of approval, Ziemer was required to offer to the City public access rights over a pier or wharf to be constructed and owned by Ziemer, extending across the entire bayside of the property bayward of the bulkhead line, which rights should become effective at the time the property or said pier or wharf become connected with adjacent property on either side of the property to form a continuous walkway.

C. This Offer is intended to fulfill said conditions of approval of Use Permit No. 1779 and Resubdivision No. 513.

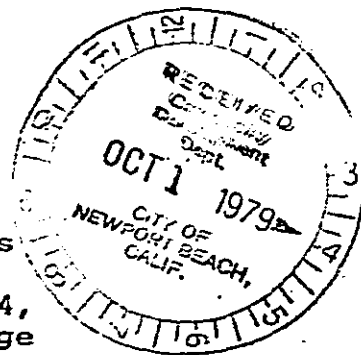
THEREFORE, in consideration of the covenants and conditions herein contained, and further good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Ziemer hereby:

1. Offers to the City, for the benefit of the general public, a non-exclusive right of access to and the right to use, but not to obstruct, the pier or wharf constructed across the entire bayside of the property, more particularly



described as:

Lots 5 and 6, Block 425, Lancaster's Addition to Newport Beach as shown on a map recorded in Book 5, Page 14, Miscellaneous Maps, Records of Orange County, State of California



Said Offer shall automatically ripen into an easement for public access at such time as the parcel located immediately to the north and the parcel located immediately to the south of the property become connected with the pier or wharf adjacent to the property by piers or wharfs or other similar structures to form a continuous walkway. City may, at its option, connect the pier or wharf adjacent to the property with piers or wharfs on the parcels to the north or south of the property to form the above referenced continuous walkway.

2. This Offer shall be irrevocable by Ziemer for a period of twenty-five (25) years after the date of execution hereof.

3. Ziemer agrees to repair and keep in good and safe condition, and free from obstructions, said pier or wharf adjacent to the property, at his sole cost and expense.

  
ED ZIEMER

STATE OF CALIFORNIA) ) ss:  
COUNTY OF ORANGE )

On January 19, 1977, before me, the undersigned, a Notary Public in and for said state, personally appeared ED ZIEMER known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

WITNESS my hand and official seal.



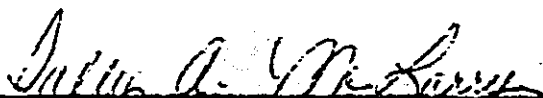
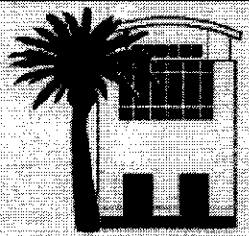
  
Notary Public in and for said State







Exhibit K



NEWPORT BEACH  
PUBLIC LIBRARY

NEWPORT

PUBLIC

## Newport Beach Chronological Timeline

**1776** Franciscan fathers of San Juan Capistrano Mission began administration of Newport Bay area.

**1810** Spanish land grant of Rancho Santiago de Santa Ana (including the Newport mesa and western mainland shoreline of Newport Bay) made to Jose Antonio Yorba and Juan Pablo Peralta.

**1842** Mexican land grant of Rancho San Joaquin (including the Newport Upper Bay and most of the mainland shoreline of lower bay) made to Jose Andres Sepulveda.

**1860** First attempt by U.S. Coast Survey to make a preliminary examination of the Santa Ana River estuary (lower bay).

**1864** Newport Bay holdings of Joss Sepulveda are sold to Flint, Bixby, and Irvine. James Irvine obtains partners' interests in 1876.

**1868** Rancho Santiago de Santa Ana partitioned, its holdings bordering Newport Bay going to Flint, Bixby, and Irvine, and to attorneys Andrew Classell and Albert B. Chapman.

**1870** The steamer Vaquero enters Newport Bay; Newport Landing established on the inner shores. "The name 'Newport' was suggested by a Mrs. Perkins," according to Ellen Lee.

**1870** Vaquero is sold; little if any activity on Newport Bay for three years.

**1878** Steamer Newport sold to Pacific Coast Steamship Co., but continues on San Francisco-Newport run until 1889.

**1887** Survey made by W.H.H. Benyuard of U.S. Army Corps of Engineers to determine feasibility of U.S. government-financed improvements to Newport Bay. Estimated cost: \$1.2 million. Failing to get a federal appropriation for this work, the McFaddens build an ocean wharf in the summer and fall of 1888.

**1889** McFadden brothers move their shipping business from inside the bay to new "outside landing" on peninsula oceanfront.

**1891** Completion of the Santa Ana and Newport Railway. Wharf damaged when outer 600 feet are washed away by storm on Feb. 22, but repairs soon made.

**1892** James McFadden receives title to peninsula from 40th St. to 9th St., purchased for a dollar an acre as government swamp and overflow land. McFadden has town site laid out near the wharf, where lots are leased by the year.

**1896** James McFadden buys marsh island in the bay (later dredged) and filled to create Balboa, Lido, and Harbor islands.

**1899** Santa Ana and Newport Railroad and wharf sold to the Southern Pacific.

**1902** Remaining McFadden Newport Bay holdings sold to W.S. Collins and A.C. Hanson.

**1903-07** Establishment of subdivisions of West Newport, East Newport, Bay Island, Balboa, Corona del Mar, Balboa Islands, and Port Orange.

### Events Calendar

### Reference Services

### Children's Services

teens@nbpl

### Literacy

### Cultural Arts Division

### Support NBPL

### About NBPL

### About Newport Beach

### News & Press

### Contact Us



**1904** Pacific Electric trolley lines reach Orange County, first at Seal Beach.

**1905** Pacific Electric Railroad reaches Newport in 1905, connecting city by rail with Los Angeles - the start of rapid transit.

**1906** Pacific Electric rails extended to Balboa. Balboa Pavilion completed at cost of \$15,000. Newport Beach becomes a city. Newport annexes Balboa. Balboa Ferry starts.

**1907** West Newport canals dredged, creating Newport Island.

**1908** Gondolier G. Scarpa launches idea for Tournament of Lights.

**1909** Famed actress and cosmopolite Madame Helena Modjeska dies at her home on Bay Island.

**1910** McFadden brothers sell Newport, Lido, and Balboa Island for \$35,000.

**1911** Glenn Martin flies from Newport Bay to Catalina in 37 minutes setting longest over-water record in aviation history Newport Harbor lines established, ratified by Congress in 1917.

**1914** County Hospital opens in Orange. Storm inundates Newport.

**1915** Bond issue brings 108 miles of good roads to county, including Newport Beach.

**1916** Balboa Island annexed to city of Newport Beach. Flood inundates county when Santa Ana River and Santiago Creek burst banks.

**1917-21** Harbor work done by city of Newport Beach and Orange County, including construction of 1,900-foot-long west jetty, construction of Bitter Point Dam, diversion of Santa Ana River from bay, and dredging of city and county channels. Cost to city: \$290,000; to county, \$500,000.

**1917** Barge scene for silent movie spectacle, Cleopatra, starring Theda Bara, filmed in Newport Harbor. Newporters register for draft as war is declared on Germany.

**1918** Spanish influenza hits county. 12 dead in one day at Delhi.

**1919** City of Newport Beach receives title to tidelands adjacent to its boundaries. First Tournament of Lights.

**1920** Santa Ana River rechanneled by building Bitter Point dam.

**1921** Santa Ana River rechanneled from Newport Bay, to the sea. Madam Larue, The Green Dragon, and Soto's curio shop thrive in Balboa.

**1922** First Newport Yacht Regatta. Duke Kahanamoku introduces surfboarding to the western United States at Newport Beach. First sanitary sewers installed under supervision of Paul Kressley, city engineer.

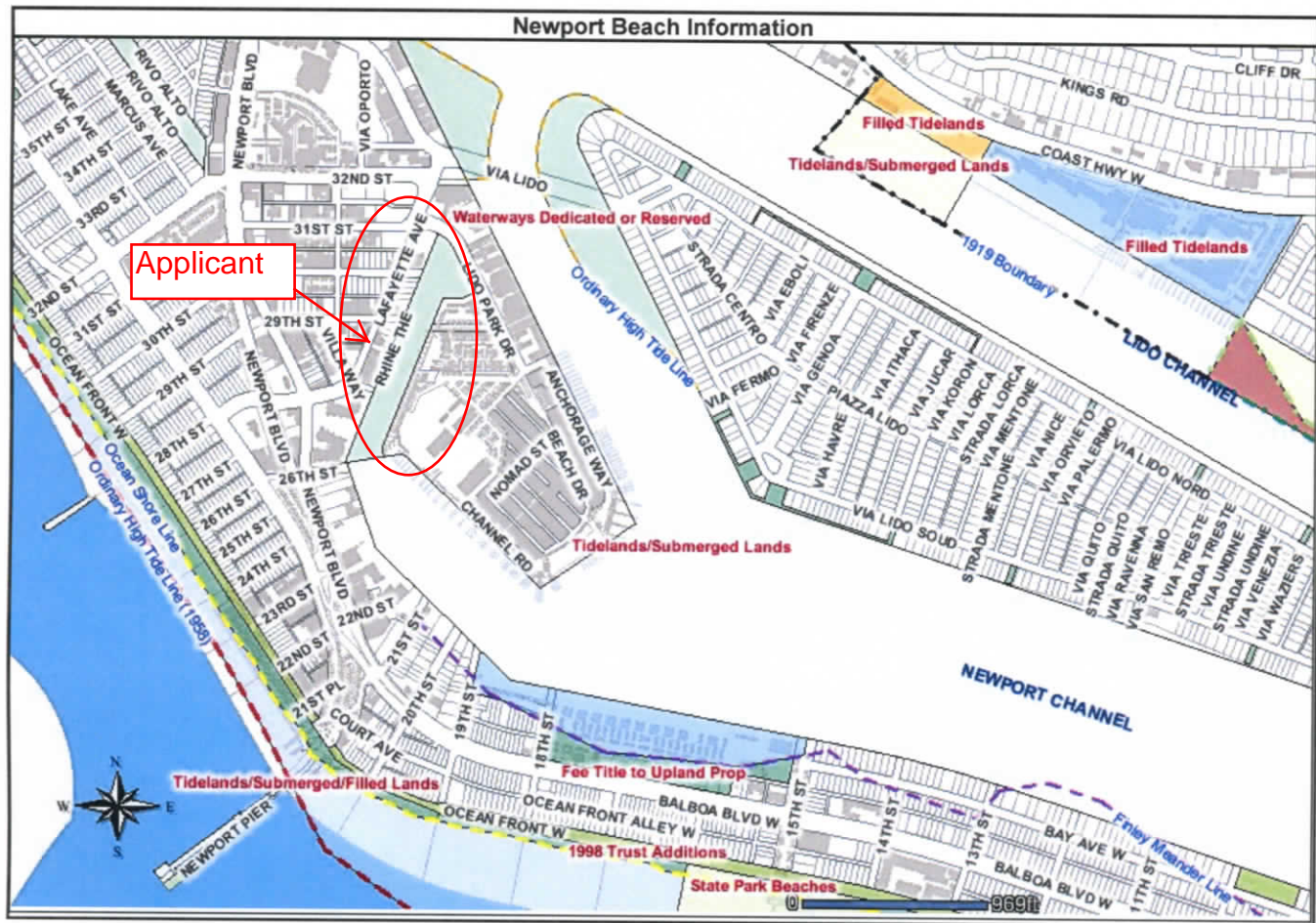
**1923** Corona del Mar annexed to city of Newport Beach. The Eddie Martin Airport opens, later to become Orange County Airport, the nation's second busiest. Old McFadden area cleaned up. First public restrooms built at McFadden place.

**1924** General Lansing Beach, retired chief of the U.S. Army Corps of Engineers, conducts survey and recommends expenditure of \$1.2 million for Newport Harbor improvements. Eight drown at Newport when launch Adieu capsizes. Balboa Yacht Club founded.

**1925** Dr. Albert A. Michelson establishes speed of light with mile-long experimental tube on Irvine Beach.

**1926** County voters defeat bond issues to finance \$1.2 million in Harbor improvements. Coast Highway opened by Douglas Fairbanks and Mary Pickford.

**1927** City of Newport Beach votes \$500,000 to extend west jetty and build new east jetty. Metropolitan Water District organized, eventually to bring Colorado River water to Southern California. Typhoid epidemic hits area.



### Boundaries

- 1919 Boundary
- 1919 Conflicting Boundary
- 1919 Conflicting Boundary
- Ocean Shore Line
- Ordinary High Tide Line
- Ordinary High Tide Line (1958)
- County Tideland Boundary
- Finley Meander Line
- Wildlife Preserve Boundary

### Managing Agency

#### City Maintained

- Tidelands/Submerged Lands
- Tidelands/Submerged/Filled Lands
- Filled Tidelands
- Fee Title to Upland Prop
- Waterways Dedicated or Reserved
- 1998 Trust Additions

### O.C. Maintained

- Tidelands/Submerged Lands
- Filled Tidelands
- Fee Title to Upland Prop

### State Maintained

- State Park Beaches
- State Highways

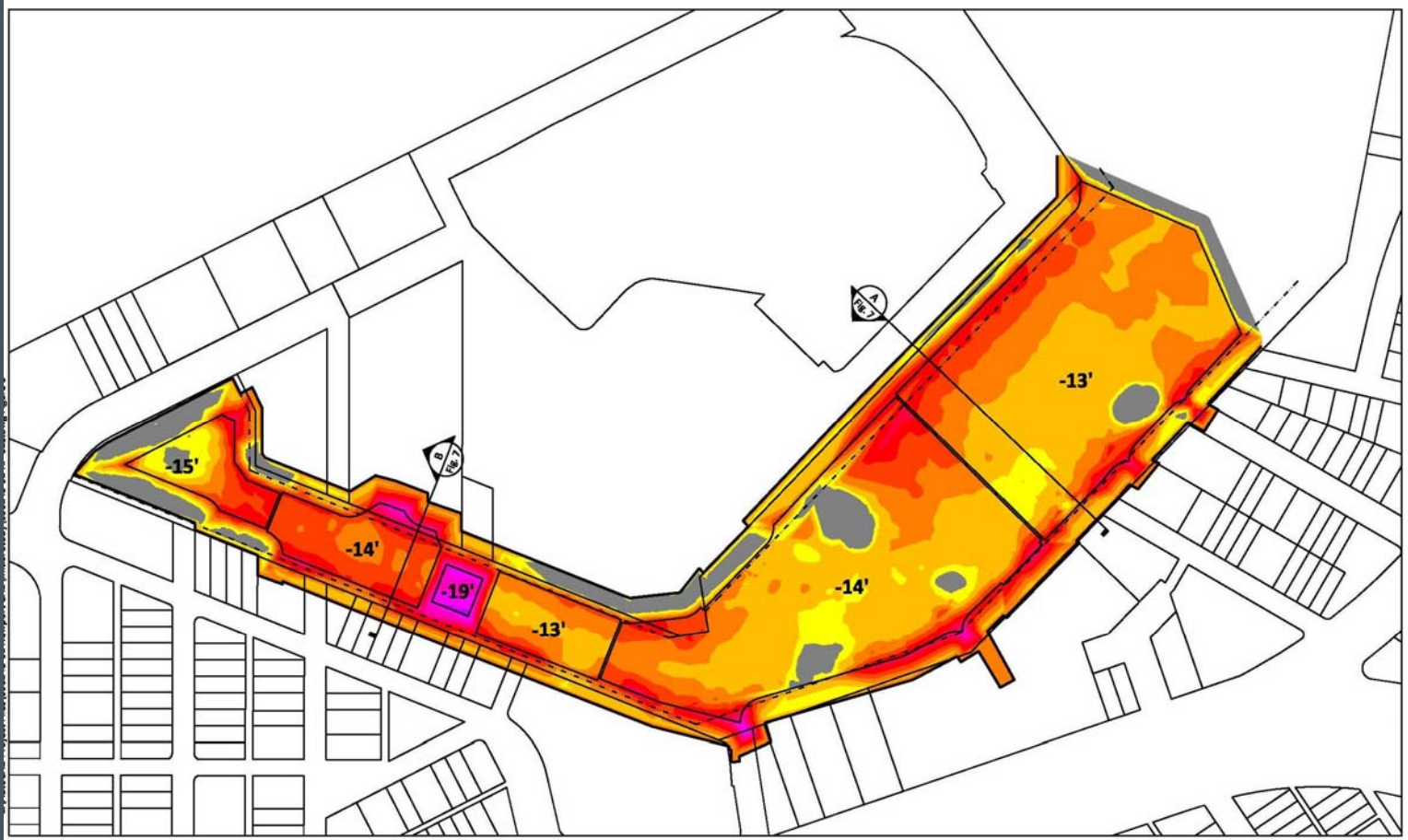
### Federally Maintained

- Conveyed to US Gov. by City

### Conflicting Title/Design

- Tidelands, Unclear 1919 Boundary
- Harbor Island Tidelands
- Bay Island Waterway

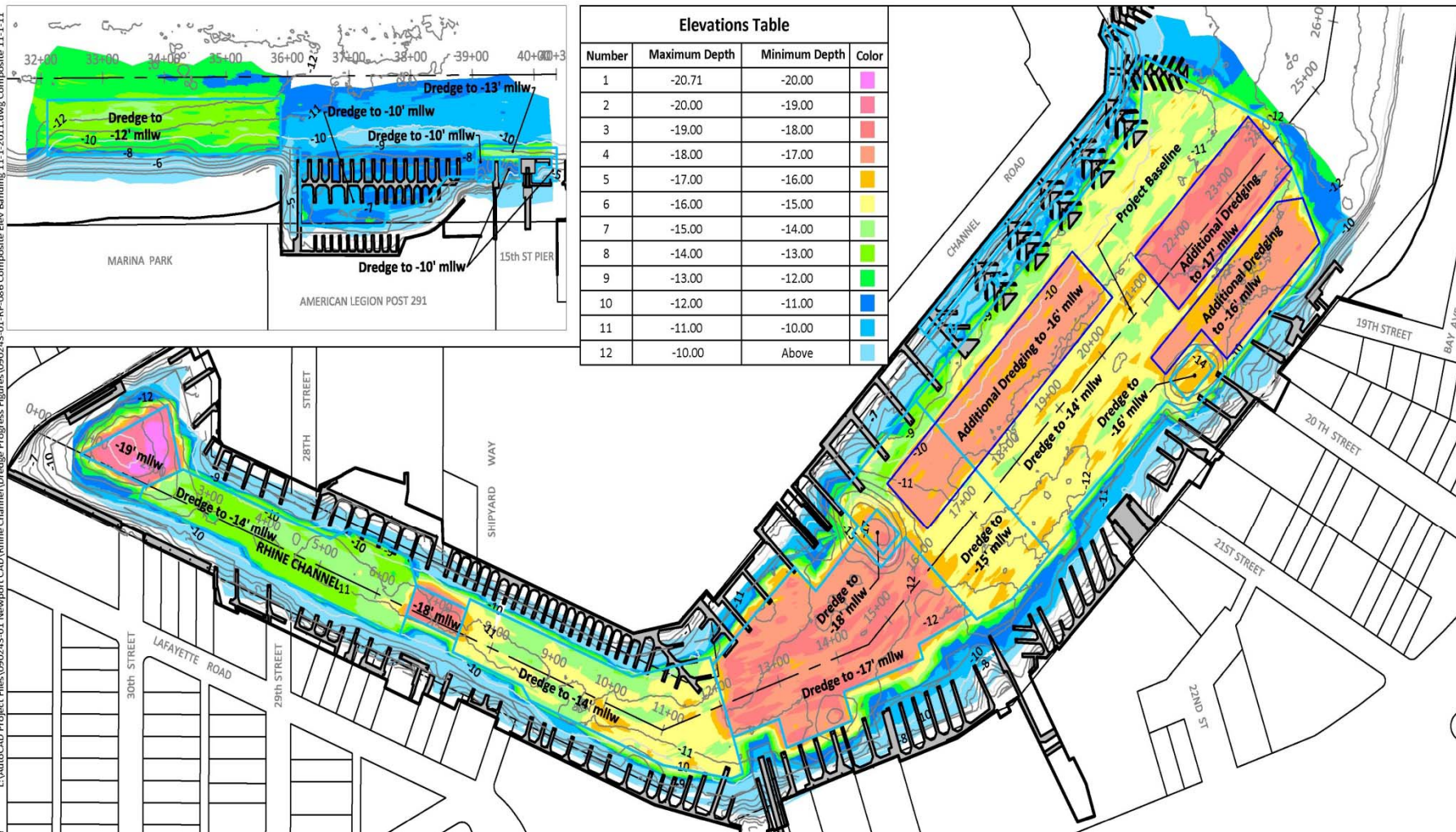
# Depth of Dredging





L:\AutoCAD Project Files\090243-01 Newport CAD\Rhine Channel\Dredge Progress Figures\090243-01\_RP-086 Composite Elev. Banding 11-1-2011.dwg Composite 11-1-11-1

Nov 01, 2011 3:21pm mpratschner



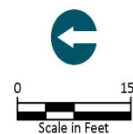
Elevations Table			
Number	Maximum Depth	Minimum Depth	Color
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2	-20.00	-19.00	
3	-19.00	-18.00	
4	-18.00	-17.00	
5	-17.00	-16.00	
6	-16.00	-15.00	
7	-15.00	-14.00	
8	-14.00	-13.00	
9	-13.00	-12.00	
10	-12.00	-11.00	
11	-11.00	-10.00	
12	-10.00	Above	

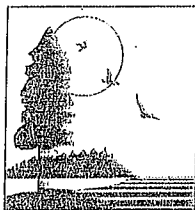
**SOURCE:** Drawing prepared from City of Newport Beach and ESRI basemaps, and all Dutra Surveys performed as of November 1, 2011.  
**HORIZONTAL DATUM:** California State Plane, Zone 6, NAD83, feet.  
**VERTICAL DATUM:** Mean Lower Low Water (MLLW).

**NOTES:**  
 Contours shown are from pre-dredge bathymetric survey conducted by Gahagan and Bryant Associates, Inc., on July 1, 2011.

- LEGEND:**
- Dredge Footprint
  - Additional Dredging
  - Limits of Work (Top of Slope)

Existing Docks



CALIFORNIA STATE  
LANDS COMMISSIONEXECUTIVE OFFICE  
100 Howe Avenue, Suite 100-South  
Sacramento, CA 95825-8202JENNIFER LUCCHESI, Executive Officer  
(916) 574-1800 Fax (916) 574-1810  
California Relay Service TDD Phone 1-800-735-2929  
Voice Phone 1-800-735-2922

January 28, 2013

File Ref.: SD 2012-12-13.1

Mr. Sherman Stacey  
Gaines & Stacey LLP  
111 Bayshore Drive, Suite 280  
Corona del Mar, CA 92625

Re: 2808 Lafayette Avenue, Newport Beach

Dear Mr. Stacey:

Thank you for your letter dated January 11, 2013. As you pointed out in your letter, you received a letter on December 12, 2012 from Ms. Kato of the Commission's staff that indicated:

"After review of the information provided and in-house records, staff has determined the Rhine Channel between 28<sup>th</sup> Street and 29<sup>th</sup> Street consists of an artificial cut from lands the State acquired and patented as Swamp and Overflowed lands (S&O Location 3089)."

"A portion of the present Rhine Channel may extend onto the natural bed of lower Newport Bay which at this location has been granted to the City of Newport Beach, pursuant to Chapter 74, Statutes of 1978, as amended."

The following paragraph in Ms. Kato's letter indicated that:

"This conclusion is without prejudice to any future assertion of State ownership or public rights, should circumstances change, or should additional information become available. This letter is not intended, nor should it be construed as, a waiver or limitation of any right, title, or interest of the State of California in any lands under its jurisdiction."

As you indicated in your letter, the Commission's legal staff earlier in the day on December 12<sup>th</sup> had informed Coastal Commission staff that:

"A very rough and preliminary analysis indicates the parcel in question appears to be former tidelands, and is probably subject to the grant to the City of Newport Beach. (Ch. 74 Stat. 1978). As former tidelands, the parcel would be subject to the public trust. Our title unit examined a



U.S. Coastal Survey (T-1032) performed in 1875, and also noted a boundary line agreement (BLA 54) just south of the parcel in question."

"It was important to us for you to receive a timely answer. As you know, these issues can be complicated, and take some time to sort out. However, based on a brief review of the records at hand, staff have found evidence that the property may be subject to the public trust."

You indicate that is difficult to understand who the legal staff consulted with in reaching their conclusion, given that Mr. Morehart was referred to Ms. Kato of the Land Management staff. The legal staff consulted with our Title Unit staff. The differences in the responses in the two contacts made resulted from a number of factors. The Commission staff has been undergoing a restructuring of responsibilities in which issues relating to lands granted in trust to a local government (like the City of Newport Beach) were previously handled by the Land Management Division, where Ms. Kato is assigned. That responsibility transitioned late last year to the External Affairs staff. Also since staff of two different divisions were contacted by two separate entities from outside, the two responses that were requested had some differences.

Technically, Ms. Kato's statements reflect the *record* of acquisition and disposition of the subject lands by the State. The subject area of Rhine Channel was in fact cut (dredged) out of lands that were designated as swamp and overflowed lands on certain early surveys and the State "acquired" a record patent and subsequently "patented" the area with the designation of swamp and overflowed lands. To clarify, in many instances throughout the state, early surveys often identified marsh tidal areas as salt marsh, or swamp and overflowed, or tidelands. This reflected both the difficulty in determining their true legal character, because these areas showed evidence of inundation and marsh vegetation and were clearly of the physical character of swampy or overflowed, even though they may have in fact been located below the elevation of mean high tide and hence factually and legally tidelands, subject to the public trust doctrine. Tidelands by their very character are, or were where man made changes have changed their character, overflowed on a twice daily basis by the tides, and in protected embayments, such as lower Newport Bay, were often also subject to the growth of marsh vegetation.

It should also be acknowledged that other early surveys (such as the 1875 U.S. Coast Survey (T-1032) and 1912 U.S. Army Corps of Engineers hydrographic survey of lower Newport Bay) provide more precise survey data than the township plats of the General Land Office used by the federal government in characterizing lands as swamp or overflowed lands.

In reliance on designations by some early surveyors as swamp and overflowed as indicated above, the United States would sometimes issue a patent to California, transferring any interest the United States might own adjacent to the State's sovereign tide and submerged lands. Likewise, many of these areas overflowed (by tide waters) were also subsequently patented by the State, based on the belief as indicated on the survey that they were swamp or overflowed. For a period of time in the 19<sup>th</sup> Century, California also sold tidelands in certain areas within embayed waters and some of these lands have been determined to be validly patented into private ownership, but remain

Mr. Sherman Stacey  
January 28, 2013  
Page 3

subject to the public trust easement. Certain lands designated as swamp and overflowed by patent, but in fact tidelands, were confirmed into private ownership, but likewise remain subject to the state's retained easement. Lower Newport Bay lends itself to much such confusion given the difficulty in determining the factual and hence legal character of the lands.

The State Lands Commission has been involved in a number of instances in resolving these issues in Newport Beach, both by litigation and title settlement agreements, including boundary line agreements such as BLA 54 mentioned above. Last year title to just such an area south of the Rhine Channel (Marina Park) located between 16<sup>th</sup> and 19<sup>th</sup> streets was resolved by an agreement between the City of Newport Beach and the Commission.

In your letter, you requested that we send a written communication to the Coastal Commission as to "whether or not the property where the bulkhead is proposed is subject to the public trust" and "that the State Lands Commission has no objection to the erection of the bulkhead in the location recommended by the Staff of the Coastal Commission."

This letter should be considered a determination by the staff of the State Lands Commission that the issues of whether the subject property was or is factually or legally tidelands is unresolved given the present analyses of the evidence. Ultimate resolution of this issue can be determined by either adjudication or agreement among the upland owner, State Lands Commission and City of Newport Beach. You indicated a willingness to discuss this matter further and we are certainly willing to do so as well.

As to the issue of objection to the placement of a bulkhead, we believe the California Coastal Commission and City of Newport Beach are the appropriate agencies representing the State as to permitting development at this site.

Please feel free to contact me at (916) 574-1992 if you have any questions or comments.

Sincerely,



Sheri Pemberton  
Chief of External Affairs

cc: City of Newport Beach  
Matthew Christen, Staff Counsel, California Coastal Commission  
Hope Schmeltzer, Chief Counsel, California Coastal Commission