

**CALIFORNIA COASTAL COMMISSION**

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# W21a

Staff: D. Lilly-SD  
Staff Report: 8/2913  
Hearing Date: 9/11/13

## REVISED FINDINGS

**Appeal No.:** A-6-PSD-13-005

**Applicant:** Sunroad Enterprises

**Local Government:** San Diego Unified Port District

**Decision:** Exempted

**Location:** 880 Harbor Island Drive, Port District, San Diego, San Diego County

**Approved Project Description:** Demolition of an existing 4-deck, approximately 20,000 sq.ft. restaurant located on a floating barge, relocation of the barge to entirely within the pierhead line, reconstruction of 4,800 sq.ft. of primarily unenclosed event space on the barge; construction of a new one-story restaurant building on land adjacent to the barge consisting of approximately 12,220 sq.ft. of enclosed floor area, and 15,285 sq.ft. of exterior spaces and decks for outside dining venues and lounge space; reconfiguration of existing 308 space parking lot to 306 spaces, including 10 tandem spaces; removal and replacement of parking lot trees.

**Appellants:** Commissioners Esther Sanchez and Brian Brennan; Unite Here Local 30

**Staff Recommendation:** Substantial Issue; Approval with Conditions on de novo

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STAFF NOTES:

Staff recommends the Commission adopt the following revised findings in support of the Commission's action on June 12, 2013. In its action, the Commission approved the permit with a modification to Special Condition #13 that required a public access plan for the proposed replacement floating dock restaurant/event space. The Commission required that the public be allowed to access the barge whenever the barge is open for business, except when otherwise reserved for private events, with public access signage posted at the entry to the barge. The amended motion begins on Page 9. The modifications to Special Condition #13 is on Page 40. Findings to support these modifications can be found starting on Page 41.

Date of Commission Action: June 12, 2013

Commissioners on Prevailing Side: Wickett, Bocho, Brennan, Garcia, Groom, Kinsey, McClure, Mitchell, Sanchez, Vargas, and Shallenberger.

**SUMMARY OF COMMISSION ACTION**

**SUMMARY OF STAFF RECOMMENDATION:**

~~The staff recommends that the Commission, after public hearing, determine that a substantial issue exists with respect to the grounds on which the appeal has been filed.~~

~~Staff also recommends that the Commission APPROVE the de novo permit with special conditions.~~

The subject project is for demolition and reconstruction of an existing restaurant located on a floating barge located offshore of the East Harbor Island peninsula, and construction of new restaurant facilities on the land adjacent to the barge. The project also includes relocating the existing barge closer to land to entirely within the Port District's permit jurisdiction, instead of mostly within the Commission's jurisdiction, as it was originally.

The primary issues raised by the subject development are the project's inconsistency with the certified Port Master Plan (PMP) regulations regarding exclusions from coastal development permit requirements; and the public access, recreation, and visual impacts associated with siting a new restaurant facility immediately adjacent to the shoreline, without providing public access along the shoreline.

The subject appeal is unusual in that it is an appeal of the Port's decision to allow development to proceed without requiring a coastal development permit. In 2009, the Port District issued a determination that the project was excluded (exempt) from coastal development permit requirements as both an addition to an existing structure, and as a demolition and reconstruction project. The Commission did not receive notification of this action until it was brought to staff's attention in January 2013 by a member of the public. The Port forwarded a copy of the exemption to Commission staff on January 23,

2013. However, the subject project is not an addition to an existing structure, as the entire existing structure would be demolished, nor does it qualify as an exempt reconstruction project, as only reconstruction projects in the same location potentially qualify for exemption, and the new restaurant building will be located on the land in an existing parking lot, not on the same site as the existing floating barge.

In addition, the new restaurant facility as exempted by the Port would have had significant public access, recreation, and visual impacts. The restaurant was originally proposed to be located immediately adjacent to the shoreline, with new decks located over the existing revetment around the peninsula. Public access overlooks were proposed on both sides of the structure, but not along the shoreline. This design and siting was in direct conflict with PMP policies requiring that access be provided along the waterfront wherever possible with promenades and paths. The public access and recreation policies of the Coastal Act clearly support designing new development with shoreline physical and visual access, not relegating public access and views to narrow corridors adjacent to or behind private development. The new facility could also potentially impact water quality and does not provide adequate protection against the introduction of non-native invasive species.

The absence of the project on the list of proposed development in the Harbor Island/Lindbergh Field Planning District in the Port Master Plan is also a serious concern. A new restaurant adjacent to the water is not considered or contemplated in the certified Port Master Plan. The Port Master Plan for the Harbor Island/Lindbergh Field Planning Area 2 designates the land area at the eastern end of the East Harbor Island peninsula as commercial recreation, but the only development contemplated in that subarea is a new hotel complex with restaurant and retail uses specifically associated with the hotel development. Because the proposed project will result in a new development not considered or approved in the certified PMP, a substantial issue is raised with regard to conformity with the PMP.

One issue raised by the appellants, UNITE HERE Local 30, that has been determined to not raise a substantial issue is geologic stability. The Commission's geologist has reviewed the appellant's contention that the site is not consistent with the certified Port Master Plan policies that require development to facilitate a tideland environment free of hazards to the health and welfare of the people of California resulting from seismic risk. The appellants contend that the restaurant would be located in a fault zone and that there is insufficient data to accurately determine the location and width of faulting on the project site. However, the Commission's geologist, Dr. Mark Johnsson, has reviewed the appeal and substantive file documents and has determined that, in his opinion, the information provided regarding faulting on the site is adequate and a substantial issue does not exist with respect to the grounds on which the appeal was raised relative to geologic stability of the proposed structure.

On May 28, 2013, as this staff report was being completed, staff received a review letter from the appellants and Earth Consultants International dated May 23, 2013 raising concerns with the 2011 and 2012 Geocon reports and the adequacy of those reports in locating potential fault strands underlying the site. A preliminary review by the

Commission's staff geologist concludes that these concerns are not warranted and that no substantial issue exists with regard to the grounds on which the appeal was filed. A more detailed review of this May 23, 2013 letter will be forthcoming in an addendum to this staff report.

Because of the above-described inconsistencies with the PMP and the Coastal Act, staff recommends that the Commission determine that the project raises a substantial issue regarding conformance with the certified PMP and the Chapter 3 policies of the Coastal Act.

Staff further recommends approval of the project on de novo as conditioned. In consultation with Commission staff, the applicant has made substantial revisions to the proposed project to provide public access along the shoreline. The project now includes a public deck/path around the east (water side) of the project, between the proposed new restaurant structure and the barge. This will allow the public continuous access to and along the shoreline, as well as access to views of the water and the downtown skyline.

Special Conditions have been placed on the project addressing public access, public recreation, parking, and the protection of biological resources. Specifically, Special Conditions #1, #2, #4, and #6 requires the submittal of final project plans showing the proposed public walkways, signage, drainage, and landscaping. Special Condition #3 requires a parking management program that requires the public be allowed to use the parking lot when the restaurants are not open, and that a minimum of 10 spaces on the site be designated specifically for public parking only from dawn to dusk. Special Condition #5 requires submittal of a tsunami information plan. Special Condition #7 requires that the applicant participate in and contribute a fair share to the implementation the Port District's on-going bayside shuttle system, as required by the Port District. Special Condition #8 requires that the applicant seek an amendment to this permit to retain the public accessway if it is threatened by sea level rise in the future. Special Condition #9 requires the applicant to waive any rights to future shoreline protection in the future. Special Condition #10 requires the applicant to assume all risks associated with construction in a hazard location. Special Condition #11 requires that project liability and any future attorney fees shall be paid by the applicant. Special Condition #13 requires the applicant to ~~prepare and implement a public access plan for the barge portion of the development that include a design for the barge that allows the public access onto some portion of the barge from the public accessway for strolling and observation when the barge is not being used by the restaurant for events~~ allow public access to the barge whenever the barge is open for business, except when otherwise reserved for private events. Signage to such effect must be posted at the entry to the barge. Finally, Special Condition #12 requires the applicant to provide evidence that dredging of San Diego Bay can occur without the risk of spreading the invasive green alga *Caulerpa taxifolia*.

With regard to the requirement that new development be included in the Port Master Plan, staff is recommending that Commission determine that in this particular case, approval of the project will not impact coastal resources, or prejudice the ability of the San Diego Unified Port District to implement its certified Port Master Plan consistent with Chapter 3 of the Coastal Act. Because the Port did not process as a Port Master Plan

Amendment to include the project in the PMP, the Commission could deny the de novo permit and send the applicant back to the Port District to have the Port process either a project specific Port Master Plan Amendment or a broader PMPA that includes the subject project. Assuming the Commission found that PMPA consistent with Chapter 3 of the Coastal Act, the Port would then be able to issue an appealable coastal development permit for the project.

However, this could put the applicant in a difficult position, as the Port District may not be willing to process the necessary approvals, putting the applicant at risk of violating the Coastal Act if he were to proceed with the development per the Port's exemption. As discussed herein, the applicant has made substantial revisions and improvements to the project to increase public access and recreational opportunities on the site, and the project can be conditioned as described herein to be consistent with the Chapter 3 policies of the Coastal Act, which is the same standard of review as that which the Commission uses when it reviews a Port Master Plan Amendment. Even if a Port Master Plan and appealable Port coastal development permit was issued for the project, it is highly likely that the project would be appealed to the Commission, putting the development in precisely the same place it is now before the Commission. As a result of the Commission's appeal of the Port's exemption, the project has now been the subject of much the same level of public participation and scrutiny under the policies of the Coastal Act as it would be were to undergo additional review through the Port Master Plan process. At this point, approval of the project as conditioned will allow construction of the proposed high-priority commercial recreation and public access improvements to proceed, without any adverse impacts to coastal resources.

However, it should be clear that approval of this project in no way sanctions or endorses the manner in which the subject project was excluded from the PMPA and coastal permit process. Future projects should be incorporated into the PMP as mandated by the Coastal Act, and categorized as appealable or non-appealable developments per the standards of Section 30715.

Standard of Review: The certified San Diego Unified Port District Port Master Plan incorporated Chapter 3 of the Coastal Act as its standard of review for appealed permits.

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Appendix A – Substantive File Documents

## EXHIBITS

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Exhibit 2 – Jurisdictional Boundaries

Exhibit 3 – Approved Restaurant & Viewpoints

Exhibit 4 – Proposed Restaurant & Walkway

Exhibit 5 – Proposed vs. Approved Deck

Exhibit 6 – Public Deck Cross-Sections

Exhibit 7 – Cross-Section of Deck and Barge

Exhibit 8 – Rendering of West Side of Proposed Project

Exhibit 9 – Rendering of East Side of Proposed Project

Exhibit 10 – Commission Appeals

Exhibit 11 – Unite Here Local 30 Appeal & Correspondence

Exhibit 12 – Port Approval

Exhibit 13 – Comments from Applicant

Exhibit 14 – Past Restaurant Permits from Port  
Exhibit 15 – Ex Parte

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**I. APPELLANTS CONTEND THAT:** The project, as exempted by the Port, is inconsistent with the certified PMP and Chapter 3 policies of the Coastal Act with respect to the allowable exemptions under the PMP; the requirement for a Port Master Plan Amendment, protection of public access; public recreation; visual quality; biological resources; water quality; and geotechnical hazards.

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**II. LOCAL GOVERNMENT ACTION.** The project was given a categorical exclusion (exemption) from coastal development permit requirements by Port staff on February 24, 2009. On March 22, 2012, Port granted conditional “Project Review and Approval” of the development. The Port transmitted notification of these actions to the Commission on January 23, 2013. The Project Review and Approval contains conditions addressing the construction of public view points, signage requirements, and building and engineering requirements.

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**III. APPEAL PROCEDURES.** After certification of a Port Master Plan (PMP), the Coastal Act provides for limited appeals to the Coastal Commission of certain port governing body’s actions on coastal development permit applications. The types of appealable projects are outlined in section 30715 of the Coastal Act. In addition to appealable projects listed in section 30715 of the Coastal Act, section 30625(a) provides that an action on a claim of exemption for any development by a port governing body may be appealed. Section 30625(a) also states that the Commission “may approve, modify or deny such proposed development....” Finally, the Port Master Plan also lists excluded (exempted) development as appealable to the Commission.<sup>1</sup>

After the port governing body has taken final action on an appealable project, it must send a notice of that approval to the Commission. Cal. Pub. Res. Code § 30717; 14 C.C.R. § 13641. This notice must indicate how the approved project is “consistent with the certified port master plan and the California Coastal Act” 14 C.C.R. § 13641(a); Cal. Pub. Res. Code § 30717. Upon proper receipt of a valid notice of appealable development, the Commission establishes an appeal period, which runs for 10 working days. Cal. Pub. Res. Code § 30717; 14 C.C.R. § 13641(b). If an appeal is filed during the appeal period, the effectiveness of the port governing body’s approval of the CDP is suspended until the Commission takes final action on the appeal. 14 C.C.R. §13641(c). The Commission will process the appeal in the same manner that it processes appeals from local government actions approving CDPs. *Id.*

Section 30625(b)(3) of the Coastal Act requires the Commission to hear an appeal of a port decision after certification of a PMP unless the Commission determines that no substantial issue exists as to conformity with the certified PMP. If the staff recommends “substantial issue” and no Commissioner objects, the Commission may proceed directly

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<sup>1</sup> “Non-appealable developments are those **not classified in these regulations in section 7.a.(1) as “Excluded,”** in 7.a.(2) as “Emergency,” or in 7.a.(4) as “Appealable.” (emphasis added) In other words, the Port’s action that a proposed development is excluded development is an action that is appealable to the Commission under the Port’s regulations.

to the de novo portion of the hearing on the merits of the project then, or at a later date. In the context of an appeal of the Port's action to exclude development, pursuant to section 30625(a) of the Coastal Act, the Commission may approve such a determination, deny it or modify it, including a modification where the Commission determines that the development is not excluded and requires a permit and then approving a conditional permit to mitigate for impacts associated with the proposed development.

If the staff recommends "no substantial issue," or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project either immediately or at a subsequent meeting. If the Commission conducts the de novo portion of the hearing on the permit application, the applicable legal standard of review for the Commission to consider is whether the proposed development is in conformity with the certified Port Master Plan and the Chapter 3 policies of the Coastal Act.

The Commission will not take public testimony during this phase of the appeal hearing unless at least three Commissioners request it. The only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. However, in this particular case, because there was no public hearing or public review given at the Port District when the project was issued an exclusion, all parties may be considered qualified to speak at the substantial issue stage of this project should the Commission vote to hold a public hearing at this stage in the appeal process. At the time of the de novo portion of the hearing, any person may testify.

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#### **IV. MOTION AND RESOLUTION**

The staff recommends the Commission adopt the following resolution:

**I. MOTION:**            ***I move that the Commission adopt the revised findings in support of the Commission's action on June 12, 2013 concerning approval of Coastal Development Permit No. A-6-PSD-13-005***

#### **STAFF RECOMMENDATION OF APPROVAL:**

Staff recommends a YES vote on the motion. Passage of this motion will result in the adoption of revised findings as set forth in this staff report. The motion requires a majority vote of the members from the prevailing side present at the revised findings hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings. The Commissioners eligible to vote are:

Commissioners Wickett, Bocho, Brennan, Garcia, Groom, Kinsey, McClure, Mitchell, Sanchez, Vargas, and Shallenberger.

**RESOLUTION TO ADOPT REVISED FINDINGS:**

The Commission hereby adopts the findings set forth below for *Coastal Development Permit No. A-6-PSD-13-005* on the ground that the findings support the Commission's decision made on June 12, 2013 and accurately reflect the reasons for it.

**Motion:**

*~~I move that the Commission determine that Appeal No. A-6-PSD-13-005 raises NO substantial issue as to conformity with the certified Port Master Plan.~~*

~~Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.~~

**Resolution:**

*~~The Commission hereby finds that Appeal No. A-6-PSD-13-005 presents a substantial issue as to conformity with the Certified Port Master Plan and/or the Chapter 3 policies of the Coastal Act.~~*

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**V. FINDINGS AND DECLARATIONS.**

The Commission finds and declares as follows:

**A. PROJECT DESCRIPTION AND HISTORY**

The subject project has been revised since the project was appealed. The following description applies to the project as it was approved by the Port. A description of the current revised project is located in the de novo portion of this report.

The Reuben E. Lee was a 4-deck, approximately 20,000 sq.ft. restaurant built on a floating barge tethered in the water on the east end of the Harbor Island peninsula on tidelands in San Diego Bay. The majority of the barge was located outside the pierhead line, and thus within the Commission's original permit jurisdiction, with a smaller portion within the Port's coastal permit jurisdiction. The land area next to the barge is developed with existing, approximately 300 space parking lot serving both the Reuben E. Lee, and the Island Prime restaurant located on the waterfront on the southern side of the peninsula, just west of the Reuben E. Lee site.

On February 24, 2009, the Port of San Diego issued a Categorical Determination of Proposed Coastal Development for the Reuben E. Lee Restaurant Replacement that found the project to be excluded (exempted) from coastal development permit requirements. At that time, the proposed project consisted of 1) demolition of the entire restaurant, with the exception of the existing barge hull, and accessory structures including mooring piles and an adjacent breakwater; 2) construction of a new 1-story galley, restrooms, covered and open food and beverage service areas totaling approximately 9,000 sq.ft. on the barge; 3) construction of an approximately 16,500 sq.ft., single-story restaurant, lounge, and banquet facility on the land adjacent to the barge; 4) reconfiguration of the existing approximately 308 space parking lot to 306 parking spaces, including 10 tandem employee/valet spaces, resulting in the removal and replacement up to 10 existing trees in the parking lot. Total restaurant seating would decrease from 900 seats to 809 seats.

The new landside restaurant and outdoor dining was to be located immediately adjacent to the water. A public sidewalk would be constructed on the inland side of the restaurant, with two new public viewpoints created on either side of the proposed building, and one new public viewpoint created next to the Island Prime restaurant.

The Port does not typically transmit exemption determinations to the Commission, and no work has taken place on the site; thus, Commission staff was unaware of the Port's 2009 action until a member of the public inquired about the status of approvals granted for the Reuben E. Lee. In response to Commission staff's request for information, on January 23, 2013, Port staff emailed a copy of the February 24, 2009 Categorical Determination to Commission staff. The Port also transmitted a copy of the Port's "Project Review and Approval" dated March 22, 2012, granting conditional approval of the Reuben E. Lee (now known as 880 Harbor Island Restaurant) Renovation Project (but this is not a coastal development permit).

The project given approval with conditions on March 22, 2012 varies somewhat from the project approved in the Categorical Determination in 2009. As approved in March 2012, the existing facility on the floating barge would be demolished and reconstructed as a 4,800 sq.ft. primarily unenclosed function space. The barge would be relocated slightly landward to be entirely within the pierhead line, so as to be completely within the Port District's jurisdiction. Exterior deck areas on both the floating barge and the landside structure would be increased by creating cantilevered decks over the existing rock revetment along the shoreline side of the site. This additional space would be used for outside dining venues and lounge space. In total, the land-based restaurant would have approximately 12,220 sq.ft. of enclosed floor area, and 15,285 sq.ft. of exterior space, for a total new area of 27,505 sq.ft. Total seating capacity is expected to be between 600 and 800 seats, including the barge. At least one existing coral tree would be removed and replaced with a new tree.

Sometime around April 2012, the barge with the restaurant structure was towed to a shipyard to initiate demolition and reconstruction activities. However, on or around December 12, 2012, the structure took on water and partially sank, and may not be salvageable.

The appeal period was opened on January 24, 2013, and the Commissioner and public appeals were received on February 6, 2013. Therefore, the appellants submitted timely appeals.

## **B. CATEGORICAL EXCLUSION DETERMINATION**

The San Diego Unified Port District Coastal Development Permit Regulations govern the issuance of Port permits, exemptions (referred to as “exclusions” in the Port regulations), and appeals. The Port District determined that the proposed project is exempt from issuance of a coastal development permit under the following sections of the Permit Regulations:

### 8. Excluded Developments

- a. **Existing Facilities:** The operation, repair, maintenance, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that previously existing, including but not limited to:
  - (3) Streets, sidewalks, gutters, bicycle and pedestrian paths, and similar facilities; [...]
  - (5) Additions to existing structures, provided the addition will not result in an increase of more than 50 percent of the floor area, or 2,500 sq.ft., whichever is less; or additions to existing structures of not more than 10,000 sq.ft. of floor area, if the project is in an area where all public services and facilities are available to allow for the maximum development permissible in the Port Master Plan, and where the area in which the project is located is not environmentally sensitive; [...]
- b. **Replacement or Reconstruction:** Replacement or reconstruction of existing structures and facilities where the new structure will be located essentially on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to:
  - (1) Replacement of a commercial structure with a new structure of substantially the same size, purpose and capacity.
  - (2) Water main, sewer, electrical, gas, or other utility extensions of reasonable length to serve such construction. [...]
- d. **Minor Alterations to Land:** Minor public or private alterations in the condition of land, water, and/or vegetation which do not involve the removal of mature, scenic trees, including but not limited to:
  - (1) Land Grading, except where located in a waterway, wetland, officially designated scenic area, or in officially mapped areas of severe geologic hazard;
  - (2) New gardening or landscaping;

- (7) Minor trenching or back filling where the surface is restored.

The March 2012 Project Review and Approval cites Section 8.b., “Replacement or Reconstruction”, as the reason the project was found to be an Excluded Development under the District’s Coastal Development Permit Regulations.

None of the above exclusion language used to exempt the development from coastal permit requirements applies to the proposed project. The exclusion for “Existing Facilities” in Section 8.a. applies to “minor alteration[s]...involving negligible or no expansion of use beyond that previously existing...,” including additions to existing structures. However, the proposed development includes demolishing the entire existing restaurant structure, leaving only the foundation (the barge hull) and several minor accessory improvements. Thus, the proposed work on the barge is demolition and reconstruction, not an addition. The new restaurant structure proposed on the land is not an addition to an existing structure, both because the existing structure is being demolished, and because a new unattached structure, separated in space and by water, is not an addition to an existing structure, but a stand-alone new structure.

The “Minor Alterations to Land” exclusion in Section 8.d. covers projects limited to minor alterations to land, water, and/or vegetation such as grading, landscaping, and minor trenching, which does not involve the removal of mature, scenic trees. As noted, the project is considerably larger in scope and scale than minor alternations to land, and a development cannot be segmented into components that might be exempt if taken individually. In addition, the original exemption included the removal of mature scenic tree(s), the revised proposal still includes the removal of at least one mature coral tree and the proposed parking lot revisions will reduce the number of parking spaces, which is typically not considered exempt from permit requirements. Thus, this section of the Port’s regulations is not applicable to the proposed development.

The project clearly involves both demolition and reconstruction of an existing structure (the barge), and construction of a separate new structure (the landside restaurant). The project applicant’s attorney has suggested that the Port District appropriately excluded the proposed development from coastal development permit requirements for three reasons, the first of which is that the reconstructed restaurant is located on the same site as the demolished restaurant. The other two arguments are that a restaurant is not an appealable development under the Coastal Act, and the development is not required to be included on the project list in the Port Master Plan, because only appealable projects are required to be on the project list. None of these points is accurate or applicable to the proposed development; the first point is discussed below, and the second two points are discussed in the following section of the staff report.

#### Project Site and Location

The Port’s “Replacement or Reconstruction” exclusion in Section 8.b. is very specific. As described above, Port District regulations allow the exclusion of “replacement or reconstruction of existing structures and facilities where the new structure will be located essentially on the same site as the structure replaced...” The applicant’s attorney has

stated that the existing Reuben E. Lee restaurant (prior to the barge being towed away and demolished) consisted of both land and water facilities, with approximately 1/3 of the facilities on land, and 2/3 on water. Thus, the proposed project “site,” with approximately 2/3 of the facilities on land, and 2/3 on water, is “essentially on the same site as the structure being replaced.”

However, this characterization of the existing project site is not accurate, nor does it correctly portray the relevant distinctions between the existing subject site and the proposed site. The Port regulations appropriately draw a distinction between replacing a development in the same location and rebuilding in a different location, because different locations have different site needs, constraints, and impacts. The Reuben E. Lee restaurant has always been a restaurant located on the water. As Exhibit #2 shows, the only landside facilities associated with the restaurant are walkways leading to the barge and a covered gazebo used on occasion to direct patrons to the barge. Other than these minor hardscape improvements, 100% of the existing restaurant facility—seating, kitchen, storage, front of the house, back of the house, restrooms, etc.—are located in the water on the barge. The proposed project, by contrast, would result in approximately 12,220 sq.ft. of enclosed floor area, and 15,285 sq.ft. of exterior seating space, for a total new area of 27,505 sq.ft. located directly on the shoreline, in an area that is currently an unenclosed parking area.

The proposed landside development in no way resembles or replicates the existing floating restaurant, in fact or in impact to coastal resources. A permanent land location cannot by any reasonable interpretation be considered essentially the same site as a floating barge on the water. Water and land development sites have different physical requirements and different impacts on coastal resources and are not interchangeable.

The Port’s interpretation of the excluded development determination as it relates to the proposed development raises a substantial issue. Controlling statutes are used to interpret administrative regulations, like the certified San Diego Port District’s PMP regulations, adopted pursuant to the controlling statutes which in the case of adoption of the PMP, is the Coastal Act. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Board* (2003) 109 Cal.App.4<sup>th</sup> 1687, 1695-1696.) If the words of a regulation are unclear and ambiguous, courts “examine the context in which the language appears using the interpretation that best harmonizes the statute internally....” (*Id.* at p. 1696.) Further, “[r]egulations are not interpreted in a manner that results in absurd consequences or defeats the core purpose of their adoption.” (*Ibid.*) Thus, relevant Coastal Act provisions provide interpretive tools for interpreting administrative regulations adopted thereunder, like port master plan regulations.

In the present case, section 30610(g)(1) provides support for the interpretation that replacement of a structure on a different part of the affected property than the site where the replaced structure once stood is not exempt development. In the context of siting replacement structures exempt from CDP requirements, section 30610(g)(1) provides that the replacement of any structure (aside from public works facilities) destroyed by a disaster is exempt from CDP requirements only if the new structure is “for the same use as the destroyed structure, shall not exceed either the floor area, height or bulk of the

destroyed structure by more than 10 percent, and shall be sited **in the same location on the affected property** as the destroyed structure.” (emphasis added) The applicant relies on section 8.b.(1) of the PMP, which provides that a replacement structure is excluded development if it is “located essentially on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to: (1) [r]eplacement of a commercial structure with a new structure of substantially the same size, purpose, and capacity.” While the trigger for exempt replacement structures is different (Coastal Act requiring a disaster while the PMP allows replacement without a disaster), the requirements of section 8.b.(1) of the PMP had to be consistent with the language with its controlling statute and, more particularly, section 30610(g)(1) of the Coastal Act when the Commission certified the port’s CDP regulations. Given this context of the controlling statute in interpreting the excluded development provision in the PMP, it is clear that the intent of the PMP provision is that the replacement structure is exempt only if it is placed in the same location on the affected property, not if it is placed anywhere on the affected property not in the same location.

The applicant has cited an October 2007 email from Commission staff to Port Staff providing direction to the Port District regarding the Reuben E. Lee barge, as evidence that the current project is exempt from permit requirements (see Exhibit #13). However, the email in question was in response to Port Staff’s inquiry about permit requirements for redevelopment of the existing barge, as that barge was located mostly within the Commission’s jurisdiction and partially within the Port’s jurisdiction. Commission staff correctly advised the Port that “when a development that requires a coastal development permit straddles both the Port and the State’s jurisdiction, both agencies have to issue a CDP for their portions of the project.” Commission staff’s reference to the “particular development that raised the question in this case [that] may end up being deemed exempt from permit requirements” is clearly referencing potential work on the existing barge that straddles two jurisdictions and was the subject of the email. At no time during that 2007 exchange (or any subsequent time until Commission’s staff 2013 inquiry) did the Port suggest or inform Commission staff that any new structures would be constructed on the land. Despite Commission’s staff request in 2007 that the Port advise the applicant to send redevelopment plans to Commission staff for review and a determination of permit requirements, no such plans were ever received by Commission staff. Thus, there has never been any suggestion or conclusion by Commission staff that construction of a new restaurant building on the land next to an existing barge would be exempt from coastal development permit requirements.

It is worth noting that at the time the Categorical Determination was made, the waterside portion of the project was located largely in the Commission’s permit jurisdiction, and was proposed to remain in that location. Even having made a determination that the portion of the project within the Port’s jurisdiction was exempt from permit requirements, only the Commission can make a decision on permit requirements for the development proposed on the rest of the barge lying in the Commission’s jurisdiction; this determination could not have been made by the Port.

The applicant's attorney has stated that because the Port approved the renovation of Tom Ham's Lighthouse restaurant on the western end of Harbor Drive and revisions to Sun Harbor Marina's improvements as "Excluded Developments," both of which include some land and some water components, that the proposed project should be similarly excluded. The Port did not send notice of this projects to the Commission, and therefore, Commission staff did not have the opportunity to review this project at the time it was exempted. However, review of the Port's "Project Review and Approval," for the restaurant, indicates that this project consisted of "a comprehensive renovation and upgrade of the existing facilities...within the existing building footprint." New decks, new outdoor terrace dining, and new public shoreline promenade were also part of the project, with an increase in building square footage was approximately 1,500 sq.ft. The Port did not do an analysis of the amount of demolition involved; thus, it is unclear if the extent of the demolition was such that the project should have been characterized as "demolition and reconstruction" rather than a "minor alteration of an existing structure." However in any case, in contrast to the subject project, the Tom Ham's Lighthouse renovation was clearly renovation of an existing structure in the same location. Thus, there is nothing in the Port's exclusion of Tom Ham's Lighthouse that suggests the subject project should be similarly excluded. Commission staff have not yet received a copy of or been able to review the Port's exclusion of development at Sun Road Harbor. If this project included demolishing an in-water structure and constructing a new, non-attached building in a currently vacant area, then this project should likely also not have been granted an exclusion under the certified Port regulations.

The Port District has submitted examples of five other restaurants projects approved by the Port (see Exhibit #14). Four of the projects were granted coastal development permit exemptions, including the San Diego Seafood Market Restaurant in 1993; the Elephant and Castle Pub at the Holiday Inn on the Bay's in 1995; Anthony's Star of the Sea Restaurant in 1998; and Roy's Restaurant at the Marriott Hotel and Marina in 2006. Again, none of these projects were reported to or reviewed by Commission staff at the time of approval; however, subsequent review of the project description indicates that each exempted development was renovation of an existing restaurant at the same site as the existing restaurant. In contrast, the two projects involving substantial changes—demolition and reconstruction of the Fish Market Restaurant in 1988, and restoration of the vacant San Diego Rowing Club structure for use as a restaurant in July 1980—were both granted coastal development permits. (However, the permits were not categorized as appealable, which is discussed in further detail below). Thus, based on the information provided by the Port, it appears that the Port's general practice has been to exempt only minor renovations of existing structures, and require coastal development permits for significant revisions. The subject exemption of complete demolition and then construction of a new separate structure in a new location as proposed in the Reuben E. Lee project is not consistent with the Port's historic practice.

To allow the interpretation that excluded development under the Port's certified PMP includes replacing a structure anywhere on a lot, leased or otherwise, would result in absurd consequences and defeat the core purpose of the adoption of the regulations, to further the protection of coastal resources. (See, Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Board, *supra*, 109 Cal.App.4<sup>th</sup> at p. 1696-1698 [narrowly

construing alcohol control board regulations involving face-to-face identification of cited sellers by decoy minors on the seller's premises would defeat the core rationale of regulations concerning decoy buy operations].) Section 30009 of the Coastal Act provides that the Coastal Act "shall be liberally construed to accomplish its purposes and objectives." In interpreting section 30009, courts have found that "[w]hen a provision of the Coastal Act is at issue, [they] are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations." (McAllister v. California Coastal Commission (2008) 169 Cal.App.4<sup>th</sup> 912, 928.) Section 30001.5(a) of the Coastal Act provides that one of the basic goals of the state for the coastal zone are to "[p]rotect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources." As a point of emphasis, if a property owner on a 5 acre parcel claims an exemption to replace his or her 5000 square foot home from one side of the property to the opposite side, while on the same property (or "site" as the applicant alleges), the purpose and objectives of the Coastal Act would be violated since there would be no evaluation of the impacts of the proposed development on a building location where no building previously existed. To exempt such development from CDP regulations would be inconsistent with underlying goals of the Coastal Act and does not give the highest priority to environmental considerations that are raised by the proposed development's location on a completely new building site on the affected property. Furthermore, there is no Commission precedent that establishes that practice of exempting a replacement structure on a completely different building site within the confines of a lot's property lines when such a replacement structure would have significant adverse impacts on coastal resources, like the proposed structure. Thus, the only reasonable interpretation of the port's CDP regulations relating to excluded development under section 7.b.(1) is that a replacement commercial structure is only excluded if it is sited in the same location on the affected property. Therefore, the proposed project is not an excluded development because it does not constitute the construction of a replacement structure on the same site, which would be on the Reuben E. Lee floating barge in this case, on the affected property.

The applicant's attorney's interpretation that an in-water site is essentially the same as a land-based site would set a significant adverse precedent for future development in the Port, and create a PMP prejudice situation. The Port of San Diego has restaurants located throughout the tidelands trust. If land and water sites were considered interchangeable, a shoreline restaurant could be rebuilt in or on the water and be considered the "same" site, even though in-water construction can obviously have numerous impacts on environmental and public resources that land-side construction does not. Other potentially significant impacts from constructing a new structure are relevant only to land-based structures, such as the presence of a major earthquake fault on Shelter Island (discussed in greater detail, below). This issue would not be relevant to redevelopment of a structure on a floating barge. The subject project is a prime example of how different sites have different impacts, and why the Port regulations do not exempt new construction in a different location.

Because the project is not an addition, is not located on the same site, and is not a minor alteration of land, the project cannot be excluded from permit requirements. Therefore,

the project is inconsistent with the certified Port Master Plan regulations, and the appeal raises a substantial issue with regards to the appellants' contentions.

**C. APPEALABLE DEVELOPMENTS UNDER THE COASTAL ACT**

Restaurants Are Appealable Development

Section 30715 of the Coastal Act states:

Section 30715 Permit authority; appealable approvals

(a) Until such time as a port master plan or any portion thereof has been certified, the commission shall permit developments within ports as provided for in Chapter 7 (commencing with Section 30600). After a port master plan or any portion thereof has been certified, the permit authority of the commission provided in Chapter 7 (commencing with Section 30600) shall no longer be exercised by the commission over any new development contained in the certified plan or any portion thereof and shall at that time be delegated to the appropriate port governing body, except that approvals of any of the following categories of development by the port governing body may be appealed to the commission:

(1) Developments for the storage, transmission, and processing of liquefied natural gas and crude oil in such quantities as would have a significant impact upon the oil and gas supply of the state or nation or both the state and nation. A development which has a significant impact shall be defined in the master plans.

(2) Waste water treatment facilities, except for those facilities which process waste water discharged incidental to normal port activities or by vessels.

(3) Roads or highways which are not principally for internal circulation within the port boundaries.

(4) Office and residential buildings not principally devoted to the administration of activities within the port; hotels, motels, and shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes; commercial fishing facilities; and recreational small craft marina related facilities.

(5) Oil refineries.

(6) Petrochemical production plants.

(b) If maintenance dredging is part of, or is associated with, any category of development specified in paragraphs (1) to (6), inclusive, of subdivision (a), the commission shall not consider that maintenance dredging in its review and approval of those categories.

Unlike many of California's commercial-oriented ports, the San Diego Unified Port District tidelands has a large visitor-serving, public access and recreation component that includes public parks, public accessways, hotels, restaurants, retail shopping districts, and recreational boating facilities, as well as more traditional industrial and commercial fishing facilities. The certified Port Master Plan categorizes restaurants under two commercial recreation land uses, "Hotels and Restaurants," which obviously describes uses commonly associated with hotels, and "Specialty Shopping," which includes stores and restaurants that are not specifically associated with boating and marine services (those uses are categorized as "Marine Sales and Services"). There are currently eleven new restaurants proposed and listed on the project lists for various districts in the PMP; some are part of proposed hotel developments, others are within shopping districts such as Seaport Village. Several restaurants, such as proposed restaurants on new piers at Grape Street (PMPA #27) and on the existing Imperial Beach pier (PMPA #24), and in the Chula Vista Harbor District (PMPA #41), are *not* associated with either hotel or shopping facilities. However, in every case, each restaurant proposed in the PMP is categorized as an appealable development.

Notwithstanding the fact that the Port issued an exemption for the proposed development which, alone, constitutes a basis for the Commission's appellate jurisdiction, the applicant's attorney contends that the Commission would also not have appellate jurisdiction over the proposed restaurant development because it is not appealable development under the Port's PMP or the Coastal Act. As noted above, section 30715(a)(4) of the Coastal Act and Section 7d.(4)(d) of the Port Master Plan's CDP Regulations provide that appealable developments are, in relevant part, "shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes." The applicant argues that the type of proposed development, a restaurant, is not a shopping facility under meaning of section 30715(a)(4) of the Coastal Act and its Port Master Plan equivalent provision (CDP regulations, Section 7d.(4)(d).). The applicant contends that since these provisions did not explicitly include restaurants as a type of appealable development, then the legislature intended to exclude that type of development from the reach of the Commission's appellate jurisdiction for port projects. The applicant's legal interpretation of section 30715(a)(4) of the Coastal Act is flawed for the reasons set forth below.

The applicant's attorney's interpretation of section 30715(a)(4) of the Coastal Act and its identical language in section 7d.(4)(d) of the PMP is an impermissibly narrow interpretation of the provision. Further, while this administrative proceeding is quasi-judicial and not a purely judicial proceeding, it is important to note that the applicant's attorney did not cite to any legal authority to support his interpretation of section 30715(a)(4) of the Coastal Act. In situations where an attorney fails to cite legal authority to support his or her legal position, courts treat the legal position "as waived and pass it without consideration." (Consumer Advocacy Group, Inc. v. ExxonMobil Corp. (2008) 168 Cal.App.4<sup>th</sup> 675, 694.) Nonetheless, staff addresses the applicant's attorney's statutory interpretation notwithstanding its lack of citations to legal precedent to support it.

Generally, when interpreting statutory language, courts “construe the language of a statute ‘so as to effectuate the purpose of the law’ and in conformity with a well-settled principle of statutory construction that ‘the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in [the provision’s] interpretation, and where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is thereby enlarged or restricted and especially to avoid absurdity or to prevent injustice.” (Moyer v. Workmen’s Comp. Appeals Bd. (1973) 10 Cal.3d 222, 232.) Further, statutory language is interpreted by giving effect to the statute as the whole statute and every clause thereof, “leaving no part of the provision useless or deprived of meaning.” (California Assn. of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 18.) Additionally, Section 30009 of the Coastal Act provides that the Coastal Act “shall be liberally construed to accomplish its purposes and objectives.” In interpreting section 30009, courts have found that “[w]hen a provision of the Coastal Act is at issue, [they] are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations.” (McAllister v. California Coastal Commission (2008) 169 Cal.App.4th 912, 928.) In consideration of the foregoing legal framework, section 30715(a)(4) of the Coastal Act necessarily includes restaurants as an appealable development for the following reasons.

First, considering the language of section 30715 of the Coastal Act as a whole, the categories of appealable development relate to development that has no water-oriented purpose consistent with typical port-related operations. Subsection (a)(2) calls out wastewater treatment facilities as appealable unless the facility processes waste incidental to normal port activities or by vessels (emphasis added). Subsection (a)(3) calls out roads that are not principally for internal circulation within port boundaries (emphasis added). In other words, roads that are used for port-related operations like Quay Avenue in the City of National City, which solely provides a north-south route between port-related storage facilities. Subsection (a)(4) calls out office and residential buildings as appealable if they are not principally devoted to the administration of activities within the port (emphasis added). Subsection (a)(4) also calls out shopping facilities if they are not principally devoted to the sale of commercial goods utilized for water-oriented purposes (emphasis added). Considering the foregoing, and by giving effect to the statutory section as a whole, the exceptions to appealable development in the relevant subsections of section 30715 of the Coastal Act only apply if there is a water-oriented purpose that is consistent with port-related operations. Key words like “normal port activities,” “internal circulation within port boundaries;” “administration of activities within the port,” and “water-oriented purposes” illustrate the underlying intent of section 30715 that the stated exceptions to appealable developments are those that have a principal interaction with water-oriented and port-related operations. Therefore, since restaurants serve the general public and not just port employees and cargo ship pilots on break as their ships are loaded, the consideration of related provisions in section 30715 of the Coastal Act that have exceptions concerning port-related operations lead to an interpretation that restaurants are appealable development because they are not principally devoted to water-oriented purposes consistent with typical port-related operations.

Second, a restaurant is a type of “shopping facility” and to conclude otherwise would lead to absurd results. As noted above, the meaning of words can be enlarged or restricted to avoid absurdity in the interpretation of statutory language. “Shopping facility” is not defined in the Merriam-Webster Dictionary. “Shopping center,” however, is defined in the Merriam-Webster Dictionary. Facility is defined as “something (as a hospital) that is built, installed, or established to serve a particular purpose.”<sup>2</sup> “Center” is defined as “a facility providing a place for a particular activity or service <a day-care center>.” (emphasis added)<sup>3</sup> Given the synonymous nature of “center” and “facility,” the definition of “shopping center” shall be used to establish that a restaurant is necessarily included as an appealable development under section 30715(a)(4) of the Coastal Act. Merriam-Webster defines “shopping center” as “a group of retail stores and service establishments usually with ample parking facilities and usually designed to serve a community or neighborhood.” (emphasis added)<sup>4</sup> Several dictionary sources define “restaurant” as a place or establishment where people from the public pay to sit and eat meals that are served to them.<sup>56789</sup> Clearly, to interpret “shopping facility” as not necessarily including restaurants as an appealable development given the definition of the “shopping center,” which is synonymous to “shopping facility” and includes service establishments like restaurants, would lead to an absurd result inconsistent with the enlarged meaning of the term “shopping facility.” This plain reading of the term “shopping facility” further bolsters the Commission’s precedent of treating restaurants as appealable development and supports the purpose of section 30715, noted above, which is to retain appellate jurisdiction over development that is not a principally related to water-oriented and port-related operations.

Finally, there is no basis to find that a restaurant is a shopping facility that is principally devoted to the sale of commercial goods utilized for water-oriented purposes, and is thus still non-appealable. As noted above, restaurants are establishments that serve food and drinks to people for consumption within the restaurant. The definition of restaurant does not include a description that a restaurant sells goods utilized for water-oriented purposes.

Over the last 25 years, the Commission has received notice of approximately ten coastal development permits issued by the Port District for restaurant projects, including new restaurants associated with hotels (A-6-PSD-89-352/Kona Kai; A-6-PSD-02-48/Lowes Coronado Bay Resort; A-6-PSD-04-598/Convention Center Hilton; 6-PSD-06-298/Kona Kai; 6-PSD-06-300/Bartell Hotels; A-6-PSD-08-4/Lane Field), two new restaurant buildings at the existing Coronado Ferry Landing (6-PSD-97-186), and construction of a major addition to an existing restaurant (6-PSD-02-002/Jimsair Restaurant). All of these projects were characterized as appealable.

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<sup>2</sup> <http://www.merriam-webster.com/dictionary/facility>

<sup>3</sup> <http://www.merriam-webster.com/dictionary/center>.

<sup>4</sup> <http://www.merriam-webster.com/dictionary/shopping%20center>.

<sup>5</sup> <http://www.thefreedictionary.com/restaurant>

<sup>6</sup> <http://oxforddictionaries.com/definition/english/restaurant>

<sup>7</sup> <http://www.answers.com/topic/restaurant>

<sup>8</sup> <http://dictionary.reference.com/browse/restaurant>

<sup>9</sup> <http://en.wikipedia.org/wiki/Restaurant>

As noted above, the Port has submitted copies of two permits issued for restaurant-related development that were not categorized as appealable. The first, Coastal Project No. 81-367 was approved in 1981 for redevelopment of the San Diego Rowing Club on the Embarcadero Marina South as a restaurant building. The second, Coastal Project No. N87-3-385, was approved in 1988 for demolition of an existing one-story restaurant on the G Street Mole and construction of a new 2-story restaurant, the Fish Market. With regard to the Rowing Club project, the file on this project suggests this project may have been processed atypically. The Port's Categorical Determination for the project states "Although use as a restaurant is not an appropriate use of the area designated in Precise plan Figure 11, a condition for Master Plan certification specifically provided for restoration of the historic Rowing Club boathouse. Thus, the project is in compliance with the certified Port Master Plan." Thus, the permit was approved despite its inconsistency with the PMP, because of a specific clause in the PMP certification.

There is no indication in the 1988 Fish Market project approval of why the development was not classified as appealable. It may have been an oversight on the part of Commission staff; Commission staff were unable to find any Commission file material regarding the project, and there is no evidence that the project was appealed. Nevertheless, despite this past characterization, the vast majority of restaurant projects over the years, and **all** of the recently proposed restaurants, have been listed in the Port Master Plan as appealable. Recategorizing restaurants as non-appealable developments would be inconsistent with the intent of the Coastal Act, and with long-standing Commission precedent. Therefore, for reasons stated above and relying on principles of statutory interpretation, the proposed restaurant is an appealable development under section 30715(a)(4). of the Coastal Act

#### **D. INCLUSION IN THE PORT MASTER PLAN**

The Appellants assert that the project should first be reviewed by the Port through a Port Master Plan amendment. However, the applicant's attorney claims that a Port Master Plan amendment is not required for a restaurant replacement project. The applicant mistakenly relies on the statement in the certified PMP that "the eastern end of the peninsula is anchored by restaurants, which are uniquely sited on the water's edge." The PMP is a planning document that is both descriptive of existing development on the tidelands, and proscriptive regarding future development. There are two existing restaurants located on the eastern end of the peninsula; that statement has been in the PMP since it was originally adopted by the Commission in 1980. That description does not apply to or authorize construction of a new restaurant building 33 years later. The Coastal Act requires that all projects for which the Port exercises its permit issuance authority must be included in the PMP. Section 30715 of the Coastal Act states in relevant part: "After a port master plan or any portion thereof has been certified, the permit authority of the commission ... shall no longer be exercised by the commission over any new development contained in the certified plan or any portion thereof and shall at that time be delegated to the appropriate port governing body ..." (emphasis added). Thus, the commission's permit-issuing authority is delegated to the Port solely for "new development contained in the certified plan." Section 30715 does not distinguish between appealable and non-appealable development when referring to the delegation of

permit-issuing authority over new development if it is contained in the PMP, rather, the only distinction is that the permit-issuing delegation over new development contained in the PMP is that some new development contained in the PMP is subject to appellate review by the Commission. Thus, if such new development is not contained in the certified plan, the Port does not have the authority to approve the project, without first amending the certified plan.

This interpretation of Section 30715 of the Coastal Act is supported by Section 30718 of the Coastal Act, which requires Ports to provide the Commission with CEQA documentation for “developments approved by the commission in a certified master plan” that are not appealable. Section 30718 therefore acknowledges that the Commission must approve, as part of the PMP, the actual developments proposed within a port, even if such developments are non-appealable. In addition, the Commission’s regulations include a section defining the required contents of a master plan for appealable development and procedures for the Commission to review such projects if the proposed development is not well defined at the time of a port’s submittal. *See* 14 CCR §13625(b). Section 13625(c) of the Commission’s regulations allows the procedures outlined for appealable developments to be used for any other proposed developments that are not well defined. Section 13625(c) would be unnecessary if Ports were only required to include appealable developments in their PMPs.

The applicant argues that because Section 30711(a)(4) of the Coastal Act specifies that Ports must submit additional detailed information related to appealable projects, this means that it need not list, or submit to the Commission for review through a PMP Amendment, non-appealable projects. This conclusion cannot be implied from the language of 30711(a)(4), which simply explains that ports must include additional information for the Commission to review appealable projects, not that no information is required to be listed regarding non-appealable projects.

Furthermore, Section 30711(a) of the Coastal Act states “[a] port master plan shall include all of the following: (1) The proposed uses of land and water areas, where known.” Section 30711(b) states that “[a] port master plan shall contain information in sufficient detail to allow the commission to determine its adequacy and conformity with the applicable policies of this division.” Section 30711 therefore requires that **all** proposed uses of land and water areas contain sufficient detail to allow the commission to determine its adequacy and conformity with the applicable policies of Chapter 8 of the Coastal Act.

The certified Port Master Plan itself reflects the fact that all proposed development, whether appealable or not, must be included in the plan. It states “[a] listing of development projects, covering both appealable and non-appealable categories, is provided in the discussion for each of the nine Planning Districts” (PMP pg.2). If the applicant’s interpretation of the Coastal Act were accepted, the Commission would have no review authority over non-appealable developments within the Port’s jurisdiction when the Commission considers whether or not to approve a Port Master Plan and its amendments. As described above, this interpretation is inconsistent with the plain language of the Coastal Act.

Because there is no provision for a restaurant on the land at this site in the Port Master Plan, either in the text of the plan, or on the project list, construction of a new restaurant building on this site should be accompanied by a Port Master Plan Amendment to add the restaurant to the Project List and incorporate the proposal into an integrated public access plan for Harbor Island. There is a pending PMPA for a hotel and restaurant complex by the same lessee immediately to the west of the subject site; however, the proposed landside restaurant was not incorporated into that PMPA.

**E. CONSISTENCY WITH THE PORT MASTER PLAN AND CHAPTER 3 POLICIES OF THE COASTAL ACT**

The proposed development also contains a number of significant inconsistencies with the following Port Master Plan goals and policies:

**VI. THE PORT DISTRICT WILL INTEGRATE THE TIDELANDS INTO A FUNCTIONAL REGIONAL TRANSPORTATION NETWORK**

- Encouraging development of improved major rail, water and air systems linking the San Diego region with the rest of the nation.
- Improved automobile linkages, parking programs and facilities, so as to minimize the use of waterfront for parking purposes
- Providing pedestrian linkages
- Encouraging development of non-automobile linkage systems to bridge the gap between pedestrian and major mass systems.

**VIII. THE PORT DISTRICT WILL ENHANCE AND MAINTAIN THE BAY AND TIDELANDS AS AN ATTRACTIVE PHYSICAL AND BIOLOGICAL ENTITY.**

- Views should be enhanced through view corridors, the preservation of panoramas, accentuation of vistas, and shielding of the incongruous and inconsistent.
- Establish guidelines and standards facilitating the retention and development of an aesthetically pleasing tideland environment free of noxious odors, excessive noise, and hazards to the health and welfare of the people of California.

**IX. THE PORT DISTRICT WILL INSURE PHYSICAL ACCESS TO THE BAY EXCEPT AS NECESSARY TO PROVIDE FOR THE SAFETY AND SECURITY, OR TO AVOID INTERFERENCE WITH WATERFRONT ACTIVITIES.**

- Provide "windows to the water" at frequent and convenient locations around the entire periphery of the bay with public right-of-way, automobile parking and other appropriate facilities.
  - Provide access along the waterfront wherever possible with promenades and paths where appropriate, and elimination of unnecessary barricades which extend into the water.
- X. THE QUALITY OF WATER IN SAN DIEGO BAY WILL BE MAINTAINED AT SUCH A LEVEL AS WILL PERMIT HUMAN WATER CONTACT ACTIVITIES.
- Insure through lease agreements that Port District tenants do not contribute to water pollution.
  - Cooperate with the Regional Water Quality Control Board, the County Health Department, and other public agencies in a continual program of monitoring water quality and identifying source of any pollutant.
  - Adopt ordinances, and take other legal and remedial action to eliminate sources of pollution.
- XI. THE PORT DISTRICT WILL PROTECT, PRESERVE, AND ENHANCE NATURAL RESOURCES, INCLUDING NATURAL PLANT AND ANIMAL LIFE IN THE BAY AS A DESIRABLE AMENITY, AN ECOLOGICAL NECESSITY, AND A VALUABLE AND USABLE RESOURCE.
- Keep apprised of the growing body of knowledge on ecological balance and interrelationships.
  - Administer the natural resources so that impacts upon natural resource values remain compatible with the preservation requirements of the public trust.

The certified Port Master Plan also states:

### **Plan Certification and Appeals**

All Port District tidelands are covered by the Coastal Act; some are regulated by the provisions of Chapter 8 (Ports) and some by Chapter 3 (Coastal Resources Planning and Management Policies). Areas excluded from Chapter 8 are wetlands, estuaries and existing recreational areas, which have been delineated by the Coastal Commission on maps derived from the original Coastal Plan prepared in 1976. Certain developments, which would normally be located in port developments, are specifically designated by the Act as appealable, the appeal

being based on whether the development is in conformance with applicable policies of Chapter 3.

Applicable policies of Chapter 3 include the following:

Section 30210

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

Section 30211

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

Section 30212

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

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

(2) adequate access exists nearby, or,

[...]

Section 30221

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

Section 30223

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

Section 30230.

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or

economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231.

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

Section 30252.

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation....

Section 30230.

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

Section 30231.

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

Section 30235.

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

Section 30251.

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

Section 30252.

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.

Section 30253.

New development shall:

- (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.
- (2) 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.

(3) Be consistent with requirements imposed by an air pollution control district or the State Air Resources Control Board as to each particular development.

(4) Minimize energy consumption and vehicle miles traveled.

(5) Where appropriate, protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses.

1. Contentions that Raise a Substantial Issue.

A. Public Access and Recreation. The appellants assert that the proposed project would be inconsistent with the PMP and Coastal Act policies protecting and enhancing public access and recreation. The proposed restaurant would be located on public trust lands at the end of the Harbor Island peninsula. Both of the two existing restaurants at this location were constructed prior to passage of the Coastal Act, and as such, there is no continuous improved walkway around the end of the peninsula next to the shoreline. There is a formal public access path nearby that is highly utilized by the public for strolling and jogging, but the path terminates adjacent to the Island Prime restaurant, next to the parking lot that serves both restaurants.

However, although not designated in the Port Master Plan as a formal walkway, as seen on Exhibit #2, the public can currently walk up to and along the waterfront in this location, albeit through an existing parking lot, at the location of the proposed new landside restaurant. People can and do walk and jog through the parking lot to get to the end of the peninsula. This access and viewpoint would be eliminated by the proposed project. The approved new landside restaurant and outdoor dining would be located immediately adjacent to the water, with no public access between the building and the shoreline. As approved, a public sidewalk would be constructed on the inland side of the restaurant, with two new public viewpoints created on both sides of the proposed building, and one new public viewpoint next to the existing waterfront restaurant located west of the subject site. However, this design and siting is in direct conflict with the PMP policy requiring that access be provided along the waterfront wherever possible with promenades and paths.

The majority of the public tidelands in the Port of San Diego have been developed to various degrees. Thus, most of the projects that come before the Port District are redevelopment projects. The certified PMP and past Commission action have consistently supported the position that new development and redevelopment of existing leaseholds must provide public shoreline access between the upland development and the waterfront. As various public leaseholds redevelop, the Commission believes it is incumbent upon the Port, under its statutory trust responsibilities, to ensure that public trust lands are redeveloped in a manner that enhances, not reduces, public access opportunities.

The proposed restaurant construction provides a prime opportunity for creating and formalizing continuous public access along the shoreline. Recent examples of this type of action on San Diego County public trust lands include public shoreline lateral accessways improvements incorporated into redevelopment at the Shelter Pointe Hotel and the Island Palms West Hotel on Shelter Island, America's Cup Harbor, the National City Marina, and the draft proposed Harbor Island Sunroad Hotel project, which is located immediately adjacent to the subject site. All of these are redevelopment projects on public trust lands that have, or are planning to, incorporate lateral public access along the waterfront on sites that have historically not provided it. All of the new development included in the recently approved Chula Vista Bayfront Master Plan was designed so that public access is provided along the shoreline. The subject development should not proceed without similarly remedying past oversights in incorporating public access into the project between the upland tenant leasehold and the waterfront.

The subject site is fairly constrained due to the presence of earthquake faults across the parking lot. However, public access must be one of the first priorities when planning and designing for the (re)development of public tidelands. The proposed development is a brand new structure; the building could be designed to accommodate public access, although it might require a reduction in the size of the proposed restaurant, the amount of outdoor seating, or other design revisions. The proposed project is perfectly positioned to incorporate public pedestrian access across the subject site, linking to the sidewalk next to the existing Island Prime restaurant east of the barge, and extending on to the north side of the site. Instead, as approved, the new restaurant eliminates the existing public access that is currently available along the water.

In addition, the proposed new restaurant structure will result in the loss of at least two parking spaces, and 10 spaces out of the existing 308 spaces will be converted to valet/employee parking spaces. A draft parking analysis for the project indicates that a minimum of 310 parking spaces are required to meet the demand for parking at the site. Thus, the proposed 308 spaces, with the addition of valet services (which allows more cars to fit on a site), should result in adequate parking to serve the use. However, recently, the Port has been addressing parking issues and the requirement to develop non-automobile linking systems by requiring tenants to participate in the Port's newly developed and expanding shuttle service. However, no such requirements or mitigation measures have been included in the proposed project.

The proposed overlook points on either side of the restaurant would not preserve or enhance the level or quality of public access that exists on the site currently, while the location of the new landside restaurant structure would significantly reduce existing access to the shoreline. This omission of public shoreline access is inconsistent with the certified PMPA, the Coastal Act, and the public trust mandate that projects promote public access. The proposed removal of public pedestrian shoreline access in conjunction with the subject request raises a significant issue with regard to consistency with the Port Master Plan and the public access and recreation policies of the Coastal Act.

B. Enhancement and Maintenance of Visual Quality. The appellants assert that the proposed development would have an adverse impact on public views and visual quality. The subject site is a highly scenic area, and the two existing restaurants in this area are recognized for providing spectacular views of the water and downtown skyline for their patrons. In addition to the direct public access blockage, the availability of public views of the waterfront from around and near the new restaurant would also be significantly different as a result of the siting of the new restaurant on land, thus raising a substantial issue. From some vantage points, water views could improve, as prior to its demolition, the Reuben E. Lee had four levels of seating, while the proposed restaurant has only one. However from other vantage points, such as adjacent sidewalks, parking areas, and the vehicle cul-de-sac, existing views of the skyline would be permanently blocked, as the new building would block access to the shoreline side of the structure. As with public access, the views from the proposed viewpoints would be no better than existing views from the site, while the approved restaurant building would block the existing expansive views of the bay and downtown from the parking area, and potentially also encroach on views from the east end of Harbor Island Drive. Therefore, the appeal raises a substantial issue with regards to the appellants' contentions.

C. Protection of Natural Resources. The appellants contend that the proposed development would adversely impact on the biological resources of San Diego Bay. The project includes relocating the barge planned for the reconstructed restaurant facilities westward to a location entirely within the Port District's jurisdiction. A 2001 bay wide eelgrass survey determined that there are no eelgrass beds in the new location. However, the approved project does not include conditions requiring measures to prevent the spread of the invasive algae *Caulerpa taxifolia*. Nor does the approval include a landscape plan or condition that prohibits use of non-invasive species. The use of invasive species in the urban environment is inconsistent with the resource protection provisions within the PMP that require the preservation and enhancement of natural resources, and keeping apprised of new information on ecological balance and interrelationships. Therefore, the appeal raises a substantial with regards to the appellants' contentions.

## 2. Contentions That Do Not Raise a Substantial Issue

Geotechnical Hazards/Public Safety. The appellants contend that the project is not consistent with the certified Port Master Plan policies that require development to facilitate a tideland environment free of hazards to the health and welfare of the people of California resulting from seismic risk. The appellants contend that the restaurant would be located in a fault zone and that there is insufficient data to accurately determine the location and width of faulting on the project site. However, the Commission's geologist, Dr. Mark Johnsson, has reviewed the appeal and substantive file documents and has determined that, in his opinion, a substantial issue does not exist with respect to the grounds on which the appeal was raised.

Specifically, the appellants contend that:

...development will occur in a fault zone and there is insufficient data to accurately determine the location and width of the faulting on the project

sites. The REL [Reuben E. Lee] Project is located in an area of active earthquake fault strands, several of which were detected (though not further studied or confirmed to the public) beneath the site. Sunroad's consultant, Geocon, identified only one potential fault splay in between its proposed hotel and restaurant developments. However, Geocon failed to collect sufficient data to accurately locate existing faulting on and around these sites.

Citing a letter by Earth Consultants International (ECI) dated 9 May 2011, the appellants conclude that "there is potential faulting on the REL Project site that was not identified or analyzed by Geocon."

The 2011 ECI letter referred, however, only to the conclusions drawn from a 2006 Geocon report performed for another development (a four-story hotel) lying to the west of the subject site. In fact, that report identified three active strands of the Spanish Bight Fault crossing the site, making use of rather sparse Cone Penetrometer Test (CPT) borings and a geophysical survey (reported in Terra Physics reports dated 2005 and 2006). The 2006 Geocon report concluded that, despite the presence of a number of geologic hazards (in addition to faulting, the site is subject to liquefaction and lateral spread, strong ground shaking, and induction by tsunami and/or seiche), the development was feasible provided that the recommendations contained in the report were adhered to. Another geotechnical investigation and third party review (Ninyo and Moore, 2006) reached the same conclusions.

As pointed out in the 2011 ECI report, these investigations concentrated on a development envelope west of the proposed Reuben E. Lee Project. Dr. Johnsson concurs with their conclusions that the 2006 Geocon report did not contain sufficient data to fully constrain the potential for faulting at the eastern tip of East Harbor Island, the proposed location of the Reuben E. Lee development. However, additional testing, including the advancement of numerous additional CPT borings, was undertaken in preparation for this development. These are reported on in a 2 September 2011 report by Geocon. This report was reviewed by the City of San Diego; responses to the review comments were provided in Geocon reports dated 14 October 2011 and 27 January 2012. The applicants agreed to extend testing to the east, and the results of this additional testing are reported on in Geocon reports dated 28 August 2012 and 11 September 2012. These additional borings much more tightly constrained the location of the eastern splay of the Spanish Bight Fault and eliminated the possibility that a feature encountered in the area of the project footprint on a seismic reflection profile (Terra Physics 2005, 2006) was an additional fault. A third party review by Ninyo and Moore dated 10 July 2012 concurred, and the City approved the project in a footprint outside of a ten foot setback from the eastern edge of the fault zone as mapped in the latest Geocon reports. The Commission's staff geologist has reviewed all of this material submitted by both the applicant and the appellant, UNITE HERE Local 30, and concurs with the data collected, the analysis of the data and the conclusion of the applicant's reports that based on the data analysis, the development will be safe from geologic hazards for the life of the development. The eastern strand of the fault is very well constrained by CPT borings and seismic reflection

profiles, and he concurs that a ten foot wide setback zone is adequate to assure safety from a fault rupture hazard.

On May 28, 2013, staff received a review letter from the appellants and Earth Consultants International, dated May 23, 2013, raising concerns with the 2011 and 2012 Geocon reports and the adequacy of those reports in locating potential fault strands underlying the site. Dr. Johnsson has prepared a memorandum, dated June 4, 2013, responding to these concerns. The memorandum is attached to this staff report as Exhibit #16, and is incorporated herein by reference. As explained in detail in the memorandum, Dr. Johnsson has concluded that the additional information in support of the appeal does not raise a substantial issue with regard to fault surface rupture.

Thus, there is no evidence that the proposed project is not consistent with the certified Port Master Plan regarding health and welfare, and no substantial issue is raised regarding this issue raised by the appellants.

#### **F. CONCLUSION**

In summary, excluding the proposed restaurant redevelopment from coastal development permit requirements is inconsistent with the certified PMP and Chapter 3 of the Coastal Act. Based on the above discussion, it is clear that the development requires review pursuant to a coastal development permit. In addition, the project may have impacts on public access, public recreation, parking, views, and biological quality; thus, the project is potentially inconsistent with many provisions of the certified PMP. Therefore, the appeal raises a substantial issue with regards to the appellants' contentions.

#### **G. SUBSTANTIAL ISSUE FACTORS**

As discussed above, there is inadequate factual and legal support for the Port's determination that the proposed development is consistent with the certified PMP. The other factors that the Commission normally considers when evaluating whether a local government's action raises a substantial issue also support a finding of substantial issue. The objections to the project suggested by the appellants raise substantial issues of regional or statewide significance and the decision creates a poor precedent with respect to the proper interpretation of the Port's PMP, as the Port's determination of when development requires a coastal development permit and a Port Master Plan Amendment are not only incorrect interpretations of the PMP, but they could also set an adverse precedent elsewhere along the coast. In addition, the coastal resources potentially affected by the decision—including blockage of public access and views along the shoreline, water quality, and marine resources, are significant.

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## **V. STAFF RECOMMENDATION ON THE COASTAL PERMIT**

The staff recommends the Commission adopt the following resolutions:

**MOTION:**     *I move that the Commission approve Coastal Development Permit No. A-6-PSD-13-005 pursuant to the staff recommendation.*

### **STAFF RECOMMENDATION OF APPROVAL:**

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 TO APPROVE THE PERMIT:**

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 will be in conformity with the policies of the certified Port Master Plan and Chapter 3 policies of the Coastal Act. 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 would substantially lessen any significant adverse impacts of the development on the environment.

## **VI. 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 of 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.

## VII. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Final Plans. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT,** the applicant shall submit for review and written approval by the Executive Director, final site, building, and parking plans for the proposed development, including the barge, that have first been approved by the Port of San Diego. Said plans shall be in substantial conformance with the plans submitted with this application by Graham Downes Architecture dated April 8, 2013.

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

2. **Final Public Access Program. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT,** the applicant shall submit for review and written approval by the Executive Director, a final Public Access Program. Said plans shall be in substantial conformance with the plans submitted with this application by Graham Downes Architecture dated April 8, 2013, and shall include the following:
  - a. The public accessways shall remain on the subject site for public use for the life of the subject development. Access to the public walkways shall be available at least at all times that the restaurant is open, and from dawn through dusk, whichever provides greater public access.
  - c. Any gates or closure apparatus associated with the public walkway shall be controlled with an automatic unlocking mechanism that ensures the walkway will be opened to the public no later than dawn every day. Said mechanism shall be adjusted as necessary throughout the year in order to ensure the accessway is open during the required hours.
  - b. A signage plan that identifies and directs the public to the public accessways. The plan shall identify the location and message of the signage and shall require the signage to be installed prior to or concurrent with the commencement of the restaurant opening.

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

Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

3. **Final Parking Management Program. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit for review and written approval by the Executive Director, a final Parking Management Program. Said plans shall include the following:
  - a. Parking demand reduction strategies that will be implemented on the site, either permanently, or during periods when parking demand exceeds capacity. Such measures may include, but are not limited to, valet parking, requiring off-site employee parking (at the adjacent Sunroad Marina parking lot); shared parking with Sunroad Marina, and event shuttle services.
  - b. Existing signs on the site restricting parking lot on the site to “customers only” shall be revised to indicate that public parking is permitted when the restaurants on the site are not open.
  - c. A minimum of 10 spaces on the site shall be designated for public parking only from dawn to dusk.
  - d. The program shall identify the location and message of the parking-related signage. Signage shall be installed prior to or concurrent with the commencement of the restaurant opening.

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 Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

4. **Final Drainage Plans. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit to the Executive Director for review and written approval, a final drainage and runoff control plan documenting, graphically and through notes on the plan, that runoff from the roof, parking areas, and other impervious surfaces will be collected and directed into pervious areas on the site (landscaped areas) for infiltration and/or percolation in a non-erosive manner, prior to being conveyed off-site.

The permittee shall undertake the 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 Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

5. **Tsunami Information Plan: PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit, for the review and approval of the Executive Director, a Tsunami Preparedness Plan. The plan shall include, at a minimum:
- a. An education component for both employees and visitors, which may include such efforts as:
    - i. Training and drills for employees
    - ii. Informative maps and signs.
  - b. An evacuation component that covers all at-risk areas on the property, which may include maps, signs, sirens or public address system warnings, and other informative efforts, and provides for coordination with local emergency personnel (Fire Department/lifeguards) for evacuation of public access paths and along the property. The evacuation plan should be coordinated with the local Fire Department as lead agency to insure consistency with plans for the area and other applicable local, state or federal agencies, including, but not limited to the U.S. Federal Emergency Management Administration.
  - a. If any toxic chemicals will be used on the premises, the plan should also include steps to minimize the uncontrolled release of these chemicals, through the use of flood proof storage containers, storage of bulk materials at a more inland location, etc.
  - b. The plan should be reviewed by on-site staff on at least an annual basis, possibly in conjunction with earthquake or fire drills, to insure it can be implemented if needed.

To the extent practicable, the tsunami preparedness plan shall use existing educational materials, if appropriate, and in situations where new materials are necessary, the applicant shall make those materials available to the local Office of Emergency Services and for other users.

The applicant shall undertake the development in accordance with the approved final plan. Any proposed changes to the approved final plan shall be reported to the Executive Director. No change to the final plan shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is required.

6. **Landscape Plans:** By acceptance of this permit, the applicant agrees to the following:
- a. Landscaping on the site shall emphasize the use of drought-tolerant and native species. Use of drought-tolerant, non-invasive ornamental species and lawn area is allowed as a small component. No plant species listed as invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be identified from time to time by the State of California shall be employed or allowed to

naturalize or persist on the site. No plant species listed as ‘noxious weed’ by the State of California or the U.S. Federal Government shall be utilized.

- b. The planting plan shall be implemented within 60 days of completion of construction.
- c. All required plantings shall be maintained in good growing condition, and whenever necessary, shall be replaced with new plant materials to ensure continued compliance with applicable landscape screening requirements.
- d. Rodenticides containing any anticoagulant compounds (including, but not limited to, Warfarin, Brodifacoum, Bromadiolone or Diphacinone) shall not be used.
- e. Five years from the date of issuance of the coastal development permit, the applicant shall submit for review and written approval of the Executive Director, a landscape monitoring report, prepared by a licensed Landscape Architect or qualified Resource Specialist, that certifies the on-site landscaping is in conformance with the landscape plan approved pursuant to this Special Condition. The monitoring report shall include photographic documentation of plant species and plant coverage.

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

- 7. **Parking Management and Transit Opportunity Plan:** By acceptance of the permit, the applicant agrees to participate in and contribute a fair share to the implementation the Port District’s on-going bayside shuttle system that would serve and connect tideland uses along the waterfront, as required by the Port District.
- 8. **Future Response to Sea Level Rise.** By acceptance of this Permit, the applicant agrees that if in the future the approved public access way is threatened by sea level rise, the applicant shall seek an amendment to this coastal development permit to revise the project such that safe continuous public access will be maintained along the shoreline side of the structure. Such revisions could include but are not limited to: redesigning the wall next to the dining area to allow waves to pass through the wall and to minimize reflected wave energy that could be deleterious to the safe use of the adjacent walkway; revisions to the seaward portion of the public accessway wall or foundation; or relocation of the public improvements further inland (but bayward of the private improvements). Alternatives that avoid impacts to scenic visual resources, public access and recreation and shoreline processes shall be given precedence.
- 9. **No Future Shoreline Protective Device:** By acceptance of this Permit, the applicant agrees, on behalf of itself and all successors and assigns, that no shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. A-6-PSD-13-005 including, but not limited to, the

barge, restaurant, and decks, in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, or other natural hazards in the future. By acceptance of this Permit, the applicant hereby waives, on behalf of itself and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code Section 30235.

10. **Assumption of Risk, Waiver of Liability and Indemnity Agreement:** By acceptance of this permit, the applicant acknowledges and agrees (i) that the site may be subject to hazards from wave action and erosion; (ii) to assume the risks to the applicant 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.
11. **Liability for Costs and Attorneys Fees:** The applicant shall reimburse the Coastal Commission in full for all Coastal Commission costs and attorneys fees -- including (1) those charged by the Office of the Attorney General, and (2) any court costs and attorneys fees that the Coastal Commission may be required by a court to pay -- that the Coastal Commission incurs in connection with the defense of any action brought by a party other than the applicant against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval or issuance of this permit, the interpretation and/or enforcement of permit conditions, or any other matter related to this permit. The Coastal Commission retains complete authority to conduct and direct the defense of any such action against the Coastal Commission.
12. **Invasive Species.** PRIOR TO COMMENCEMENT OF ANY IN WATER WORK, the applicant shall provide evidence that dredging of San Diego Bay can occur without the risk of spreading the invasive green alga *Caulerpa taxifolia* as follows.
  - a. Not earlier than 90 days nor later than 30 days prior to commencement or re-commencement of any in-water development authorized under this coastal development permit, the applicant shall undertake a survey of the project area (including any areas where the bottom could be disturbed by project activities) 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 written 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 (DFG) (858-467-4218) or the National Marine Fisheries Service (NMFS) (562-980-4043).
  3. If *Caulerpa* is found, then the NMFS and DFG contacts shall be notified within 24 hours of the discovery.
- d. If *Caulerpa* is found, prior to the commencement of dredging, the applicant shall provide evidence to the Executive Director for review and written approval either that the *Caulerpa* discovered within the project and/or buffer area has been eradicated or that the project has been revised to avoid any contact with *Caulerpa*. No changes 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. **Barge Public Access Plan: ~~PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT~~**, the applicant shall submit, for the review and approval of the Executive Director, a public access plan for the barge portion of the development. ~~The plan shall include a design for the barge that allows the public access onto some portion of the barge from the public accessway for strolling and observation when the barge is not being used by the restaurant for events. Access hours to the barge when not being used for an event shall be the same as those for the walkway itself (that is, from at all times that the restaurant is open, and from dawn through dusk, whichever provides greater public access). Appropriate signage that identified and directs the public to the public use area on the barge shall be included.~~

~~The applicant shall undertake the development in accordance with the approved final plan. Any proposed changes to the approved final plan shall be reported to the Executive Director. No change to the final plan shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is legally required.~~

By acceptance of this permit, the applicant agrees that public access to the barge shall be allowed whenever the barge is open for business, except when otherwise reserved for private events, and shall include signage as so stated posted at the entry to the barge.

#### IV. **Findings and Declarations.**

The Commission finds and declares as follows:

**A. Project Description.** The detailed project description and history is described above under the substantial issue findings on Page 41 of this report and is incorporated herein by reference. However, since the project was appealed, the applicants have made substantial revisions to the proposed project to respond to the issues raised in the appeal.

The proposed landside restaurant has been redesigned and reoriented on the site in order to accommodate a new continuous public walkway on the bayside of the structure (see Exhibit #4). The public path was accommodated by reducing the total amount of outdoor decking as compared to the plans approved by the Port in March 2012, and by shifting the building such that the west wall of the structure is now on the setback line from the mapped earthquake faulting. The new walkway will be 6 feet wide, and located slightly below the level of the proposed restaurant deck, such that views will be available from both levels. The 6-foot wide walkway matches the width of the existing path along the south side of Harbor Island Drive. The bayward side of the walkway would have a glass windscreen to maintain views. The path would be accessible from both sides of the proposed restaurant. Some portions of the path would be constructed on top of the existing riprap, some areas would be above the riprap, and in several locations, the accessway would extend out over the water. The elevated portions of the path will be cantilevered from the existing concrete walls that were constructed with the original Reuben E. Lee, and will not require any in water construction.

Both the restaurant and the floating dock structure have been reconfigured and revised. Exhibit #5 shows a comparison of the plan approved by the Port, and the revised proposal. As with the revised project, the project approved by the Port included restaurant decks that extended over the existing riprap and over the water. The Port approved plan included 1,846 sq.ft. of new deck over riprap, 2,133 sq.ft. of new deck over the water, and 5,030 sq.ft. of new gangway/floating barge area. (Although the plans describe the gangway and floating barge, the existing (now former) Reuben E. Lee was a floating barge with gangways). The proposed plan reduces the amount of each of these categories, and includes 1,372 sq.ft. of new deck over riprap, 1,445 sq.ft. of deck over water, and 5,099 sq.ft. of gangway/floating barge.

The proposed landside restaurant will have approximately 13,541 sq.ft. of enclosed floor area. The project no longer includes any enclosed area on the boat; a shade structure will be the only structure on the barge. Exterior decks on land will comprise approximately 9,309 sq.ft. In total, the project area—including all landside improvements, the floating barge, and the gangways—will be approximately 22,850 sq.ft. This represents an approximately 2,750 sq.ft. reduction from the 25,600 “total project area” in the project approved by the Port in March 2012.

Section 30625(a) of the Coastal Act provides that an action on a claim of exemption for any development by a port governing body may be appealed. Section 30625(a) also states that the Commission “may approve, modify or deny such proposed

development....” In the context of an appeal of the Port’s action to exclude development, the Commission may approve such a determination, deny it or modify it, including a modification where the Commission determines that the development is not excluded and requires a permit and then approving a conditional permit to mitigate for impacts associated with the proposed development. In this case, as discussed further below, the Commission modifies the Port’s exclusion determination by issuing a permit for the proposed development.

For appeals of permits issued by the San Diego Unified Port District the standard of review both for substantial issue and for the merits of an appealable project is consistency with the certified port master plan and Chapter 3 policies as provided for in the port master plan.

## **B. Categorical Exclusion Determination**

The San Diego Unified Port District Coastal Development Permit Regulations govern the issuance of Port permits, exemptions (referred to as “exclusions” in the Port regulations), and appeals. The Port District determined that the proposed project is exempt from issuance of a coastal development permit under the following sections of the Permit Regulations:

### 8. Excluded Developments

- d. Existing Facilities: The operation, repair, maintenance, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that previously existing, including but not limited to:
  - (3) Streets, sidewalks, gutters, bicycle and pedestrian paths, and similar facilities; [...]
  - (5) Additions to existing structures, provided the addition will not result in an increase of more than 50 percent of the floor area, or 2,500 sq.ft., whichever is less; or additions to existing structures of not more than 10,000 sq.ft. of floor area, if the project is in an area where all public services and facilities are available to allow for the maximum development permissible in the Port Master Plan, and where the area in which the project is located is not environmentally sensitive; [...]
- e. Replacement or Reconstruction: Replacement or reconstruction of existing structures and facilities where the new structure will be located essentially on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to:
  - (3) Replacement of a commercial structure with a new structure of substantially the same size, purpose and capacity.
  - (4) Water main, sewer, electrical, gas, or other utility extensions of reasonable length to serve such construction. [...]

- d. Minor Alterations to Land: Minor public or private alterations in the condition of land, water, and/or vegetation which do not involve the removal of mature, scenic trees, including but not limited to:
- (3) Land Grading, except where located in a waterway, wetland, officially designated scenic area, or in officially mapped areas of severe geologic hazard;
  - (4) New gardening or landscaping;
  - (7) Minor trenching or back filling where the surface is restored.

The March 2012 Project Review and Approval cites Section 8.b., “Replacement or Reconstruction”, as the reason the project was found to be an Excluded Development under the District’s Coastal Development Permit Regulations.

None of the above exclusion language used to exempt the development from coastal permit requirements applies to the proposed project. The exclusion for “Existing Facilities” in Section 8.a. applies to “minor alteration[s]...involving negligible or no expansion of use beyond that previously existing...,” including additions to existing structures. However, the proposed development includes demolishing the entire existing restaurant structure, leaving only the foundation (the barge hull) and several minor accessory improvements. Thus, the proposed work on the barge is demolition and reconstruction, not an addition. The new restaurant structure proposed on the land is not an addition to an existing structure, both because the existing structure is being demolished, and because a new unattached structure, separated in space and by water, is not an addition to an existing structure, but a stand-alone new structure.

The “Minor Alterations to Land” exclusion in Section 8.d. covers projects limited to minor alterations to land, water, and/or vegetation such as grading, landscaping, and minor trenching, which does not involve the removal of mature, scenic trees. As noted, the project is considerably larger in scope and scale than minor alternations to land, and a development cannot be segmented into components that might be exempt if taken individually. In addition, the original exemption included the removal of mature scenic tree(s), the revised proposal still includes the removal of at least one mature coral tree and the proposed parking lot revisions will reduce the number of parking spaces, which is typically not considered exempt from permit requirements. Thus, this section of the Port’s regulations is not applicable to the proposed development.

The project clearly involves both demolition and reconstruction of an existing structure (the barge), and construction of a separate new structure (the landside restaurant). The project applicant’s attorney has suggested that the Port District appropriately excluded the proposed development from coastal development permit requirements for three reasons, the first of which is that the reconstructed restaurant is located on the same site as the demolished restaurant. The other two arguments are that a restaurant is not an appealable development under the Coastal Act, and the development is not required to be included on the project list in the Port Master Plan, because only appealable projects are required to be on the project list. None of these points is accurate or applicable to the

proposed development; the first point is discussed below, and the second two points are discussed in the following section of the staff report.

### Project Site and Location

The Port's "Replacement or Reconstruction" exclusion in Section 8.b. is very specific. As described above, Port District regulations allow the exclusion of "replacement or reconstruction of existing structures and facilities where the new structure will be located essentially on the same site as the structure replaced..." The applicant's attorney has stated that the existing Reuben E. Lee restaurant (prior to the barge being towed away and demolished) consisted of both land and water facilities, with approximately 1/3 of the facilities on land, and 2/3 on water. Thus, the proposed project "site," with approximately 2/3 of the facilities on land, and 2/3 on water, is "essentially on the same site as the structure being replaced."

However, this characterization of the existing project site is not accurate, nor does it correctly portray the relevant distinctions between the existing subject site and the proposed site. The Port regulations appropriately draw a distinction between replacing a development in the same location and rebuilding in a different location, because different locations have different site needs, constraints, and impacts. The Reuben E. Lee restaurant has always been a restaurant located on the water. As Exhibit #2 shows, the only landside facilities associated with the restaurant are walkways leading to the barge and a covered gazebo used on occasion to direct patrons to the barge. Other than these minor hardscape improvements, 100% of the existing restaurant facility—seating, kitchen, storage, front of the house, back of the house, restrooms, etc.—are located in the water on the barge. The proposed project, by contrast, would result in approximately 12,220 sq.ft. of enclosed floor area, and 15,285 sq.ft. of exterior seating space, for a total new area of 27,505 sq.ft. located directly on the shoreline, in an area that is currently an unenclosed parking area.

The proposed landside development in no way resembles or replicates the existing floating restaurant, in fact or in impact to coastal resources. A permanent land location cannot by any reasonable interpretation be considered essentially the same site as a floating barge on the water. Water and land development sites have different physical requirements and different impacts on coastal resources and are not interchangeable.

The Port's interpretation of the excluded development determination as it relates to the proposed development raises a substantial issue. Controlling statutes are used to interpret administrative regulations, like the certified San Diego Port District's PMP regulations, adopted pursuant to the controlling statutes which in the case of adoption of the PMP, is the Coastal Act. (Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Board (2003) 109 Cal.App.4<sup>th</sup> 1687, 1695-1696.) If the words of a regulation are unclear and ambiguous, courts "examine the context in which the language appears using the interpretation that best harmonizes the statute internally..." (Id. at p. 1696.) Further, "[r]egulations are not interpreted in a manner that results in absurd consequences or defeats the core purpose of their adoption." (Ibid.) Thus, relevant Coastal Act provisions

provide interpretive tools for interpreting administrative regulations adopted thereunder, like port master plan regulations.

In the present case, section 30610(g)(1) provides support for the interpretation that replacement of a structure on a different part of the affected property than the site where the replaced structure once stood is not exempt development. In the context of siting replacement structures exempt from CDP requirements, section 30610(g)(1) provides that the replacement of any structure (aside from public works facilities) destroyed by a disaster is exempt from CDP requirements only if the new structure is “for the same use as the destroyed structure, shall not exceed either the floor area, height or bulk of the destroyed structure by more than 10 percent, and shall be sited **in the same location on the affected property** as the destroyed structure.” (emphasis added) The applicant relies on section 8.b.(1) of the PMP, which provides that a replacement structure is excluded development if it is “located essentially on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to: (1) [r]eplacement of a commercial structure with a new structure of substantially the same size, purpose, and capacity.” While the trigger for exempt replacement structures is different (Coastal Act requiring a disaster while the PMP allows replacement without a disaster), the requirements of section 8.b.(1) of the PMP had to be consistent with the language with its controlling statute and, more particularly, section 30610(g)(1) of the Coastal Act when the Commission certified the port’s CDP regulations. Given this context of the controlling statute in interpreting the excluded development provision in the PMP, it is clear that the intent of the PMP provision is that the replacement structure is exempt only if it is placed in the same location on the affected property, not if it is placed anywhere on the affected property not in the same location.

The applicant has cited an October 2007 email from Commission staff to Port Staff providing direction to the Port District regarding the Reuben E. Lee barge, as evidence that the current project is exempt from permit requirements (see Exhibit #13). However, the email in question was in response to Port Staff’s inquiry about permit requirements for redevelopment of the existing barge, as that barge was located mostly within the Commission’s jurisdiction and partially within the Port’s jurisdiction. Commission staff correctly advised the Port that “when a development that requires a coastal development permit straddles both the Port and the State’s jurisdiction, both agencies have to issue a CDP for their portions of the project.” Commission staff’s reference to the “particular development that raised the question in this case [that] may end up being deemed exempt from permit requirements” is clearly referencing potential work on the existing barge that straddles two jurisdictions and was the subject of the email. At no time during that 2007 exchange (or any subsequent time until Commission’s staff 2013 inquiry) did the Port suggest or inform Commission staff that any new structures would be constructed on the land. Despite Commission’s staff request in 2007 that the Port advise the applicant to send redevelopment plans to Commission staff for review and a determination of permit requirements, no such plans were ever received by Commission staff. Thus, there has never been any suggestion or conclusion by Commission staff that construction of a new restaurant building on the land next to an existing barge would be exempt from coastal development permit requirements.

It is worth noting that at the time the Categorical Determination was made, the waterside portion of the project was located largely in the Commission's permit jurisdiction, and was proposed to remain in that location. Even having made a determination that the portion of the project within the Port's jurisdiction was exempt from permit requirements, only the Commission can make a decision on permit requirements for the development proposed on the rest of the barge lying in the Commission's jurisdiction; this determination could not have been made by the Port.

The applicant's attorney has stated that because the Port approved the renovation of Tom Ham's Lighthouse restaurant on the western end of Harbor Drive and revisions to Sun Harbor Marina's improvements as "Excluded Developments," both of which include some land and some water components, that the proposed project should be similarly excluded. The Port did not send notice of this projects to the Commission, and therefore, Commission staff did not have the opportunity to review this project at the time it was exempted. However, review of the Port's "Project Review and Approval," for the restaurant, indicates that this project consisted of "a comprehensive renovation and upgrade of the existing facilities...within the existing building footprint." New decks, new outdoor terrace dining, and new public shoreline promenade were also part of the project, with an increase in building square footage was approximately 1,500 sq.ft. The Port did not do an analysis of the amount of demolition involved; thus, it is unclear if the extent of the demolition was such that the project should have been characterized as "demolition and reconstruction" rather than a "minor alteration of an existing structure." However in any case, in contrast to the subject project, the Tom Ham's Lighthouse renovation was clearly renovation of an existing structure in the same location. Thus, there is nothing in the Port's exclusion of Tom Ham's Lighthouse that suggests the subject project should be similarly excluded. Commission staff have not yet received a copy of or been able to review the Port's exclusion of development at Sun Road Harbor. If this project included demolishing an in-water structure and constructing a new, non-attached building in a currently vacant area, then this project should likely also not have been granted an exclusion under the certified Port regulations.

The Port District has submitted examples of five other restaurants projects approved by the Port (see Exhibit #14). Four of the projects were granted coastal development permit exemptions, including the San Diego Seafood Market Restaurant in 1993; the Elephant and Castle Pub at the Holiday Inn on the Bay's in 1995; Anthony's Star of the Sea Restaurant in 1998; and Roy's Restaurant at the Marriott Hotel and Marina in 2006. Again, none of these projects were reported to or reviewed by Commission staff at the time of approval; however, subsequent review of the project description indicates that each exempted development was renovation of an existing restaurant at the same site as the existing restaurant. In contrast, the two projects involving substantial changes—demolition and reconstruction of the Fish Market Restaurant in 1988, and restoration of the vacant San Diego Rowing Club structure for use as a restaurant in July 1980—were both granted coastal development permits. (However, the permits were not categorized as appealable, which is discussed in further detail below). Thus, based on the information provided by the Port, it appears that the Port's general practice has been to exempt only minor renovations of existing structures, and require coastal development permits for

significant revisions. The subject exemption of complete demolition and then construction of a new separate structure in a new location as proposed in the Reuben E. Lee project is not consistent with the Port's historic practice.

To allow the interpretation that excluded development under the Port's certified PMP includes replacing a structure anywhere on a lot, leased or otherwise, would result in absurd consequences and defeat the core purpose of the adoption of the regulations, to further the protection of coastal resources. (See, Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Board, *supra*, 109 Cal.App.4<sup>th</sup> at p. 1696-1698 [narrowly construing alcohol control board regulations involving face-to-face identification of cited sellers by decoy minors on the seller's premises would defeat the core rationale of regulations concerning decoy buy operations].) Section 30009 of the Coastal Act provides that the Coastal Act "shall be liberally construed to accomplish its purposes and objectives." In interpreting section 30009, courts have found that "[w]hen a provision of the Coastal Act is at issue, [they] are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations." (McAllister v. California Coastal Commission (2008) 169 Cal.App.4<sup>th</sup> 912, 928.) Section 30001.5(a) of the Coastal Act provides that one of the basic goals of the state for the coastal zone are to "[p]rotect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources." As a point of emphasis, if a property owner on a 5 acre parcel claims an exemption to replace his or her 5000 square foot home from one side of the property to the opposite side, while on the same property (or "site" as the applicant alleges), the purpose and objectives of the Coastal Act would be violated since there would be no evaluation of the impacts of the proposed development on a building location where no building previously existed. To exempt such development from CDP regulations would be inconsistent with underlying goals of the Coastal Act and does not give the highest priority to environmental considerations that are raised by the proposed development's location on a completely new building site on the affected property. Furthermore, there is no Commission precedent that establishes that practice of exempting a replacement structure on a completely different building site within the confines of a lot's property lines when such a replacement structure would have significant adverse impacts on coastal resources, like the proposed structure. Thus, the only reasonable interpretation of the port's CDP regulations relating to excluded development under section 7.b.(1) is that a replacement commercial structure is only excluded if it is sited in the same location on the affected property. Therefore, the proposed project is not an excluded development because it does not constitute the construction of a replacement structure on the same site, which would be on the Reuben E. Lee floating barge in this case, on the affected property.

The applicant's attorney's interpretation that an in-water site is essentially the same as a land-based site would set a significant adverse precedent for future development in the Port, and create a PMP prejudice situation. The Port of San Diego has restaurants located throughout the tidelands trust. If land and water sites were considered interchangeable, a shoreline restaurant could be rebuilt in or on the water and be considered the "same" site, even though in-water construction can obviously have numerous impacts on environmental and public resources that land-side construction does not. Other potentially significant impacts from constructing a new structure are relevant only to

land-based structures, such as the presence of a major earthquake fault on Shelter Island (discussed in greater detail, below). This issue would not be relevant to redevelopment of a structure on a floating barge. The subject project is a prime example of how different sites have different impacts, and why the Port regulations do not exempt new construction in a different location.

Because the project is not an addition, is not located on the same site, and is not a minor alteration of land, the project cannot be excluded from permit requirements. Thus, the proposed development requires a coastal development permit. Therefore, the Commission modifies the Port's exclusion determination by issuing a coastal development permit and provides the following findings to support the issuance of the permit.

**C. Public Access/Recreation/Visitor-Serving Use Priority.** Relevant Coastal Act policies include Sections 30210, 30211, 30212, 30221, 30223, cited above.

The proposed project consists of demolition of an existing restaurant on a floating barge, construction of a new restaurant building on the land adjacent to the barge, and redevelopment of the barge as a function/event space for the restaurant.

The existing floating restaurant at the end of Harbor Island has been closed for several years. The proposed development will provide a new and upgraded visitor-serving use for the area. Visitor-serving commercial recreational uses are a high priority use under the Coastal Act. However, although restaurants are a high-priority use, as originally proposed, the structure would have been located immediately along the shoreline, blocking visual and physical access to the waterfront. Currently, the public can walk all along the shoreline in this location, albeit in an existing parking lot.

Thus, the project was revised as described above to provide a public walkway on decks along the shoreline side of the restaurant. This walkway will be open and available to the public whenever the restaurant is open. Outside of restaurant hours, the walkway will be open between dawn and dusk, reflecting the same operating hours as other Port public parks and piers. In addition, the project will include a continuous pathway in front of the restaurant, for joggers or other pedestrians who may not wish to use the path around the far side of the restaurant. Thus, as revised, the project will maintain and improve public access to the shoreline. **Special Condition #2** requires that the applicant submit a final public access program documenting the location of the public accessway, signage directing the public to the walkway, and hours of operation. Because the hours that the walkway will be open including some times when the restaurant will not be open for business (for example, early morning hours), the condition requires that any gates or closure apparatus associated with the public walkway be controlled with an automatic unlocking mechanism that ensures the walkway will be opened to the public no later than dawn every day, without having to rely on an employee opening the accessway. As the required hours of operation are at a minimum, dawn to dusk, this will require that the mechanism be adjusted as necessary throughout the year in order to ensure the accessway is open during the required daylight hours.

As described above, in some areas the proposed new public walkway will partially extend over the existing riprap, and in some spots, over the water. As described above, the current proposal actually involves less over-water decking than the approved project. Nevertheless, the Commission typically discourages the construction of any new development over the water, to minimize potential adverse impacts on biological resources and conflicts with use of public waterways for water-dependent uses such as boating related activities. Thus whenever possible, development should be sited and designed on the land so as not to extend out over the water.

However, the subject site is unusually constrained due to the presence of an earthquake fault that runs through the eastern peninsula of Harbor Island (discussed in detailed below, under Geologic and Shoreline Hazards). The proposed restaurant has been located as far away from the shoreline as possible while still maintaining a safe setback from the earthquake fault. The structure could, of course, be reduced in size to avoid constructing any portion of the public accessway over the water. However, the applicant has submitted an analysis documenting that the restaurant size is the minimum necessary to create a feasible business given the market requirements of a project in this location (such as the costs associated with the leasing and developing the site). Compared to the Reuben E. Lee, which had 21,000 sq.ft., the proposed project will have approximately 13,650 sq.ft. to provide the same three functions of banquet, bar lounge, and restaurant. According to the applicant's analysis, it would be financially infeasible to reduce the size of the facility any more than it has been and still have a functional operation.

In addition, the shoreline side of the proposed restaurant, where the deck will be located, is adjacent to the former and proposed barge location. This area is current partially enclosed by an existing concrete pile breakwater that has historically protected the Reuben E. Lee and is proposed to remain in place to protect the barge event space. This area is not available for recreation or other water uses, regardless of whether or not any development extends over the water. As discussed below, under Biology/Water Quality, there is no eelgrass in this location. Thus, given the physical and economic constraints on the site, the absence of impacts to coastal resources associated with the over-water deck, and the benefit to the public from the improved public accessway, allowing a small portion of the proposed project to extend out over the water can be found consistent with the public access and priority use policies of the Coastal Act.

Although not actually built in the water, the newly reconstructed event facility on the barge will be a private structure continuously moored for private use over public tidelands or waters subject to the public trust. Typically, the Commission does not allow private structures to be built on public waters unless there is a public access component built into the development, such as piers and other docks that allow public access. The proposed barge is to be used for private events and periodic restaurant dining associated with the new restaurant located on the adjacent land area; however, it is not expected to be used for restaurant events every day, year round. In this particular case, the new smaller barge would replace the previously existing Reuben E. Lee restaurant that was located on a larger barge and was open to the general public for restaurant dining. ~~The proposed new barge, because it would not be used on a daily basis, and would most often be used for private events, would not be open for use by the general public when the~~

restaurant is open similar to the ~~proposed and~~ pre-existing restaurant. When not being used for a function, the barge would be an excellent viewing point for the public for observing the harbor and the downtown skyline.

The applicant has stated there would be security concerns with allowing the public onto the barge when restaurant employees are not actively managing the space, both for the public, and for the restaurant property. ~~However, there are numerous docks and piers, some with commercial facilities on them, which are publically accessible without constant on-site oversight. A limited portion of the barge, such as a deck or platform that could be also be used for the private restaurant functions, could be designed to allow public access during the time period when the restaurant is not using it. Therefore, t~~To mitigate for the adverse impacts of a private structure over public trust lands, thereby preventing the public from using the public trust tidelands occupied by the private structure for public trust uses, like swimming, fishing, and boating, **Special Condition #13** requires the applicant ~~to submit a public access plan for the barge that includes a design that will allow the public access onto some portion of the barge from the public accessway for strolling and observation when the barge is not being used by the restaurant for events. Access hours to the barge when not being used for an event shall be the same as those for the walkway itself (that is, from at all times that the restaurant is open, and from dawn through dusk, whichever provides greater public access). to~~ acknowledge that public access to the barge shall be allowed whenever the barge is open for business, except when otherwise reserved for private events. Appropriate signage that identifies and directs the ~~public to the public use area on~~ public use area on of the barge shall be included. Such a requirement serves to maximize public access opportunities for all persons on public trust lands consistent with Section 30210 of the Coastal Act.

As noted previously, a parking analysis for the project indicates that the approximately 308 proposed parking spaces, plus valet services, should ensure that adequate parking is available on the site to serve both the proposed restaurant and the existing Island Prime restaurant. However, the entire parking area at the end of Harbor Island is current signed as restricted to “customer parking only.” As noted, this scenic area is a very popular and highly used destination for the public for strolling and jogging, but the only public parking spaces in the area are a limited number of spaces in pull-outs on the bayward side of Harbor Island Drive. In addition, several years ago, the Port District delineated specific spaces in these pull-out areas to prevent large-size vehicles from using the spaces, which substantially reduced the capacity of public parking.

Particularly since the Reuben E. Lee closed, the existing parking lot on the site has been underutilized the majority of the day, especially when Island Prime is closed. This area represents a potential public parking reservoir in a high-demand location that is currently underserved. In 2007, when the applicant was initially working with the Port to redevelop the site, a Draft Parking Management Plan was prepared for the site (see Exhibit #12). This plan included potential parking demand reduction strategies for the project , including implementing valet parking for either or both of the restaurants; directing restaurant employees to park at the adjacent Sunroad Marina parking lot (which the applicant indicates is never fully occupied by marina tenants); sharing parking with Sunroad Marina; and providing special event shuttle service. The subject site is public

tidelands, and use of these and other parking management strategies should allow the parking on the site to be jointly utilized by both patrons of the restaurant and the public at least to a limited extent, thereby increasing public access and recreational opportunities on the site.

Therefore, **Special Condition #3** requires the applicant to prepare and submit a final parking management program that requires implementation of parking demand reduction strategies, permit public parking in the lot when the restaurants on the site are not open. Most of the demand for public parking at the subject site is expected to occur during daylight hours. Thus, the condition also requires that a minimum of 10 spaces on the site be designated for public parking only, from dawn to dusk.

To further maximize public access to coastal waters consistent with section 30210 of the Coastal Act, alternative forms of transit must be developed to serve the waterfront. In recent approvals of new Port projects that increase the intensity of development, the Port and the Commission have required that lessees provide alternative parking programs and facilities in order to maintain and promote public access to the coast. The Port has an on-going downtown summer shuttle service that has just begun its second year of operation, and projects such as the Lane Field hotel development (A-6-PSD-08-4-A1) and the Marriott Expansion (PMPA #43), have been required to either contribute to the operation of a shuttle that must be operating prior to occupancy of the project (Marriott) and/or provide an alternative shuttle if the Port's shuttle does not continue operations (Lane Field). The closest shuttle stop to the project site is at the Sheraton San Diego Hotel and Marina on Harbor Island, which is approximately ½ mile from the proposed development. The Port has indicated it hopes to extend shuttle service in the future to additional locations.

The subject project is considerably smaller in scope and scale than past projects that have been required to ensure a shuttle serves the project site prior to commencement of these projects, and the subject project is not expected to significantly intensify use of the site beyond what existed when the Reuben E. Lee was in operation. Thus, requiring extension of the shuttle to the project site at this time is not essential to provide maximum access to the waterfront. However, all Port tenant development/redevelopment projects should participate in the Port's public transit programs to encourage development of non-automobile linkage systems to bridge the gap between pedestrian and major mass systems, and minimize energy consumption and vehicle miles traveled. Therefore, **Special Condition #7** requires that the applicant participate in and contribute a fair share to the implementation the Port District's on-going bayside shuttle system that would serve and connect tideland uses along the waterfront, as required by the Port District.

Thus, as conditioned, the project will have a positive impact on public access and recreation, by creating a new high-priority commercial recreational use, and an improved public access and viewing area. Public parking and public transit opportunities will be expanded and supported. Therefore, the project will be consistent with the public access, public recreation, and priority use policies of the Coastal Act.

D. **Visual Quality.** Relevant Coastal Act policies include Section 30251, cited above.

The proposed redevelopment of the existing barge is not expected to have any adverse impact on the visual quality of the area. The Reuben E. Lee was previously a 4-story structure, and the proposed new event facilities on the barge will be mostly open, with the shaded structure a maximum of 18 feet in height. The proposed restaurant structure will result in some blockage of existing public views of the skyline and water from the eastern portion of Harbor Island, as seen from the existing parking lot and the vehicular cul-de-sac at the end of Harbor Island Drive.

However, the public access improvements proposed on the shoreline side of the restaurant will provide formalized pedestrian access to the views beyond the building, which when combined with the smaller structure on the barge, should improve views overall for pedestrians. There will also be two new formalized public viewing areas on both sides of the proposed new structure. New lighting, landscaping, and pedestrian walkways on the inland side of the restaurant should also provide a pleasant visual environment. Compared to the original project approved by the Port, the current proposal creates a wider opening between the existing Island Prime restaurant and the proposed new restaurant and shifts the angle of the proposed south restaurant wall further to the north, to open views in this area. The proposed project also includes more expansive hardscape between the existing and new restaurants to make the area more inviting to the public. Therefore, the proposed project can be found consistent with the visual protection policies of the Coastal Act.

E. **Biology/Water Quality.** Relevant Coastal Act policies include Section 30231, cited above.

The applicant has submitted a 2001 bay wide eelgrass survey determined that there are no eelgrass beds in the location where the barge is proposed to be relocated. Thus, the barge relocation should not adversely impact eelgrass. However, the approved project does not include conditions requiring measures to prevent the spread of the invasive algae *Caulerpa taxifolia*.

A relatively recent issue around the world and specifically in San Diego waterbodies is the presence of the invasive green alga, *Caulerpa taxifolia* that has been discovered within Agua Hedionda Lagoon in north San Diego County. *Caulerpa* is a tropical green marine alga that is popular in the aquarium trade because of its attractive appearance and hardy nature. In 1984, this seaweed was introduced into the northern Mediterranean. From an initial infestation of about 1 square yard it grew to cover about 2 acres by 1989, and by 1997 blanketed about 10,000 acres along the coasts of France and Italy. Genetic studies demonstrated that those populations were from the same clone, possibly originating from a single introduction. This seaweed spreads asexually from fragments and creates a dense monoculture displacing native plant and animal species. In the Mediterranean, it grows on sand, mud and rock surfaces from the very shallow subtidal to about 250-ft depth. Because of toxins in its tissues, *Caulerpa* is not eaten by herbivores in areas where it has invaded. The infestation in the Mediterranean has had serious negative

economic and social consequences because of impacts to tourism, recreational diving, and commercial fishing.

Because of the grave risk to native habitats, in 1999 *Caulerpa* was designated a prohibited species in the United States under the Federal Noxious Weed Act. AB 1334, enacted in 2001 and codified at California Fish and Game Code Section 2300, forbids possession of *Caulerpa*. In June 2000, *Caulerpa* was discovered in Aqua Hedionda Lagoon, and in August of that year an infestation was discovered in Huntington Harbor in Orange County. Genetic studies show that this is the same clone as that released in the Mediterranean. Other infestations are likely. Although a tropical species, *Caulerpa* has been shown to tolerate water temperatures down to at least 50° F. Although warmer southern California habitats are most vulnerable, until better information is available, it must be assumed that the whole California coast is at risk. All shallow marine habitats could be impacted.

In response to the threat that *Caulerpa* poses to California's marine environment, the Southern California *Caulerpa* Action Team, SCCAT, was established to respond quickly and effectively to the discovery of *Caulerpa* infestations in Southern California. The group consists of representatives from several state, federal, local and private entities. The goal of SCCAT is to completely eradicate all *Caulerpa* infestations.

If *Caulerpa* is present, any project that disturbs the bottom could cause its spread by dispersing viable tissue fragments. Thus, the Commission typically requires that prior to commencement of any in water development that involves disturbance of the water bottom, surveys must be done of the project area and a buffer area to determine the presence of the invasive alga *Caulerpa taxifolia*. The survey protocol must be prepared in consultation with the Regional Water Quality Control Board, the California Department of Fish and Game, and the National Marine Fisheries Service.

The proposed project will require anchoring of the barge in a new location, which will result in disturbance of the water bottom. Therefore, in order to assure that the proposed project does not cause the dispersal of *Caulerpa*, and adverse impacts to the biological productivity of the bay, **Special Condition #12** has been attached. **Special Condition #12** requires the applicant, prior to commencement of any in water activities, to survey the project area and any other areas where the bottom could be disturbed by project activities, for the presence of *Caulerpa*. If *Caulerpa* is found to be present in the project area, then prior to commencement of any dredging, the applicant must provide evidence that the *Caulerpa* within the project site has been eradicated (the applicant could seek an emergency permit from the Executive Director to authorize the eradication) or that the project has been revised to avoid any disturbance of *Caulerpa*. If revisions to the project are proposed to avoid contact with *Caulerpa*, then the applicant shall consult with the local Coastal Commission office to determine if an amendment to this permit is required.

In order to insure that invasive plant species are not brought onto the site, **Special Condition #6** prohibits the use of any invasive plant species on the site. The condition also prohibits the use of rodenticides containing any anticoagulant compounds.

In order to reduce the potential for adverse impacts to water quality resulting from drainage runoff from the proposed development, **Special Condition #4** requires that runoff from the roof and other impervious surfaces be directed into the landscaped areas on the site for infiltration and/or percolation, prior to being conveyed off-site. Directing runoff through landscaping for filtration of on-site runoff in this fashion is a well-established Best Management Practice for treating runoff from relatively small developments such as the subject proposal.

Therefore, as conditioned, the project is consistent with the resource protection policies of the Coastal Act.

**F. Shoreline and Geologic Hazards.** Relevant Coastal Act policies include Section 30235 and 30253, cited above.

#### Shoreline Hazards

The project is located immediately adjacent to the shoreline of San Diego Bay. The location is potentially at risk from wind waves that could be generated within San Diego Bay, from boat wake and, in rare cases, from tsunami inundation. The new restaurant will be at about elevation +15' MLLW and the shoreline is currently protected by a riprap revetment. The event deck and dock will be at least partially protected by the existing concrete pile breakwater that previously protected the Reuben E. Lee. No changes are proposed to the existing shoreline improvements. Due to the potential for flooding and wave impacts, the applicant has provided a wave uprush study (TerraCosta Consulting Group, May 24, 2013).

The report from TCG states that given the current wave environment within the bay, "the proposed restaurant and outside dining will not be exposed to any wave uprush either from wind waves or boat wakes." In addition, by the year 2050 or near the end of the project lease, "the median MSLR [Mean Sea Level Rise], projection would still not result in any overtopping, with the upper bound projection in 2050 just starting to experience wave overtopping the Harbor Island revetment." With regard to the lifespan of the structure, which the Commission typically estimates at 75 years for this area, the report goes on to note that "clearly, by the year 2100, most projections suggest that overtopping will be more prevalent." The TCG reports further acknowledges that even given today's existing wave environment, "overtopping will occasionally occur...the perimeter public walkway would be closed during periods of high waves combined with King Tides." Thus, there may be times, even during time period of the lease, that access and use of the proposed project will not be safe due to flooding of adjacent areas. Likewise, use of the access and walkway seaward of the proposed restaurant could be compromised before the project site experiences wave overtopping or flooding.

When reviewing a development in a hazardous location, the Commission is concerned both with the future need for additional shoreline protection, which can have adverse impacts on public access, recreation, biologic resources, and visual quality, and with the risk to the proposed public improvements. The public walkway is located nearest to and partially over the shoreline, which is appropriate for providing the best views and public access, but also puts it at greatest risk for damage from wave action. While occasional

closure of the walkway during the relatively infrequent concurrence of storms and high tides may be reasonable, the public improvements must not be considered expendable should they be threatened by rising tides in the future. Adaptation plans must be developed to ensure safe use of the public access over the full lease or project life of the restaurant, whichever is longer.

The TCG report states that with regard to adaptive strategies for accommodating the potential for sea level rise and the associated more frequent wave overtopping and wave-induced impact forces:

...the contemplated design of this project is ideally suited to accommodate even relatively large increases in MSLR...a 20-inch-tall perimeter structural wall exists around the entire outside dining area, essentially providing a very effective flood wall protecting the entire restaurant and outside dining area. After 1.8 feet of MSLR, when waves start to overtop the Harbor Island rock revetment, the northwesterly and southwesterly ends of the structural perimeter wall could be slightly redesigned to accommodate flood gates and, as necessary, a relatively short attractive flood wall incorporated into the westerly face of the restaurant to provide an additional 20± inches of flood protection to mitigate the potential for future MSLR. If necessary at that time, the 20-inch-tall structural perimeter flood wall could be elevated a small amount and an additional wave deflector incorporated into this perimeter flood wall to provide even more effective mitigation for any future MSLR.

Thus, the site is expected to be reasonably safe, and there are potential alternatives to ensure the public improvements remain accessible. However, there is a risk that the anticipated future changes to storm waves, erosion and sea level could be larger than what has been used in the siting and design of the proposed structure. As such, **Special Condition #9** requires that the applicant waive any rights to construct shoreline protection under 30235 of the Coastal Act. Only with this waiver can the project be found to be consistent with Section 30235, which prohibits new development that requires future shoreline protection.

If the public improvements are threatened in the future, **Special Condition #8** requires that the applicant apply for an amendment to this permit to revise the project to such that safe continuous public access will be maintained along the shoreline side of the structure. For example, as noted, the proposed low wall between the dining area and the walkway could function as a floodwall. However, this wall could also exacerbate the wave impacts to the walkway, augmenting the flood and wave impacts experienced along the public access area. An alternative could be to redesigning the wall next to the dining to allow waves to pass through the wall and to minimize reflected wave energy that could be deleterious to the safe use of the walkway. Other potential alternatives could include the flood wall noted in the report; revisions to the seaward portion of the public accessway wall or foundation; or relocation of the public improvements further inland (but bayward of the private improvements). In all cases, alternatives that avoid impacts to scenic visual resources, public access and recreation and shoreline processes must be given precedence.

Based on examination of the CalEMA tsunami inundation maps, this site may experience overtopping, fast moving water and flooding during a tsunami. The proposed project is intended to attract people and, at times, large groups of people might congregate at this location. Tsunamis have a low occurrence frequency, but when they occur they can be very destructive, and they cannot be ignored due to their rarity. **Special Condition #5** requires that the applicant, in conjunction with the local Office of Emergency Services, prepare a tsunami preparedness plan. This plan should include the development of an evacuation plan which will identify the manner in which the facility will be notified about tsunami watches and warnings, how this information will be provided to the patrons and nearby public, and routes for safe evacuation. If any toxic chemicals will be used on the premises, the plan should also include steps to minimize the uncontrolled release of these chemicals, through the use of flood proof storage containers, storage of bulk materials at a more inland location, etc. The plan should be reviewed by on-site staff on at least an annual basis, possibly in conjunction with earthquake or fire drills, to insure it can be implemented if needed.

Given that the applicant has chosen to construct a structure in this location despite these risks, the applicant must assume the risks. Accordingly, **Special Condition #10** requires the applicant to acknowledge the risks and indemnify the Commission against claims for damages that may occur as a result of its approval of this permit.

### Geologic Hazards

The appellants contend that the project is not consistent with the certified Port Master Plan policies that require development to facilitate a tideland environment free of hazards to the health and welfare of the people of California resulting from seismic risk. The appellants contend that the restaurant would be located in a fault zone and that there is insufficient data to accurately determine the location and width of faulting on the project site. However, the Commission's geologist, Dr. Mark Johnsson, has reviewed the appeal and substantive file documents and has determined that, in his opinion, that the project will be free of hazards to the health and welfare of the public.

Specifically, the appellants contend that:

...development will occur in a fault zone and there is insufficient data to accurately determine the location and width of the faulting on the project sites. The REL [Reuben E. Lee] Project is located in an area of active earthquake fault strands, several of which were detected (though not further studied or confirmed to the public) beneath the site. Sunroad's consultant, Geocon, identified only one potential fault splay in between its proposed hotel and restaurant developments. However, Geocon failed to collect sufficient data to accurately locate existing faulting on and around these sites.

Citing a letter by Earth Consultants International (ECI) dated 9 May 2011, the appellants conclude that “there is potential faulting on the REL Project site that was not identified or analyzed by Geocon.”

The 2011 ECI letter referred, however, only to the conclusions drawn from a 2006 Geocon report performed for another development (a four-story hotel) lying to the west of the subject site. In fact, that report identified three active strands of the Spanish Bight Fault crossing the site, making use of rather sparse Cone Penetrometer Test (CPT) borings and a geophysical survey (reported in Terra Physics reports dated 2005 and 2006). The 2006 Geocon report concluded that, despite the presence of a number of geologic hazards (in addition to faulting, the site is subject to liquefaction and lateral spread, strong ground shaking, and induction by tsunami and/or seiche), the development was feasible provided that the recommendations contained in the report were adhered to. Another geotechnical investigation and third party review (Ninyo and Moore, 2006) reached the same conclusions.

As pointed out in the 2011 ECI report, these investigations concentrated on a development envelope west of the proposed Reuben E. Lee Project. Dr. Johnsson concurs with their conclusions that the 2006 Geocon report did not contain sufficient data to fully constrain the potential for faulting at the eastern tip of East Harbor Island, the proposed location of the Reuben E. Lee development. However, additional testing, including the advancement of numerous additional CPT borings, was undertaken in preparation for this development. These are reported on in a 2 September 2011 report by Geocon. This report was reviewed by the City of San Diego; responses to the review comments were provided in Geocon reports dated 14 October 2011 and 27 January 2012. The applicants agreed to extend testing to the east, and the results of this additional testing are reported on in Geocon reports dated 28 August 2012 and 11 September 2012. These additional borings much more tightly constrained the location of the eastern splay of the Spanish Bight Fault and eliminated the possibility that a feature encountered in the area of the project footprint on a seismic reflection profile (Terra Physics 2005, 2006) was an additional fault. A third party review by Ninyo and Moore dated 10 July 2012 concurred, and the City approved the project in a footprint outside of a ten foot setback from the eastern edge of the fault zone as mapped in the latest Geocon reports. The Commission’s staff geologist has reviewed all of this material submitted by both the applicant and the appellant, UNITE HERE Local 30, and concurs with the data collected, the analysis of the data and the conclusion of the applicant’s reports that based on the data analysis, the development will be safe from geologic hazards for the life of the development. The eastern strand of the fault is very well constrained by CPT borings and seismic reflection profiles, and he concurs that a ten foot wide setback zone is adequate to assure safety from a fault rupture hazard. Thus, there is substantial evidence to support a finding that the project is consistent with the certified port master plan and section 30253 of the Coastal Act.

On May 28, 2013, staff received a review letter from the appellants and Earth Consultants International, dated May 23, 2013, raising concerns with the 2011 and 2012 Geocon reports and the adequacy of those reports in locating potential fault strands underlying the site. Dr. Johnsson has prepared a memorandum, dated June 4, 2013, responding to these

concerns. The memorandum is attached to this staff report as Exhibit #16, and is incorporated herein by reference. As explained in detail in the memorandum, Dr. Johnsson has concluded that the project is not expected to be at risk with regard to fault surface rupture. He further notes that utility lines crossing faults or in areas susceptible to liquefaction always carry risk of rupture during a major earthquake. The applicant has incorporated into their project description an acknowledgment and agreement that these utilities must conform to best current practices, including flexible joints, to accommodate lateral movement and/or differential settlement/flotation due to liquefaction.

As long as the applicant complies with the recommendations of the geotechnical reports associated with the project, the project is not expected to be at risk from faulting. The subject site is subject to additional hazards that were addressed in the geologic reports performed for the project. These include: liquefaction and lateral spread accompanied by strong ground shaking during a major earthquake, and inundation either during major wave events (particularly as sea level continues to rise in the future) or during a major tsunami or seiche. Mitigation measures for liquefaction and lateral spread are recommended in the 2006 and August 2012 Geocon reports and include soil improvements (stone columns), deep foundations (helical piles) and/or a mat foundation. Seismic design parameters to mitigate for ground shaking are provided in these reports, consistent with the California Building Code. Again, the Commission's staff geologist, Dr. Mark Johnsson, has reviewed these measures and agrees that they are adequate to assure geologic stability as required under section 30253 of the Coastal Act and provide a tideland environment free of geologic hazards to the health and welfare by the Port Master Plan.

Therefore, as conditioned, the proposed project will assure stability and structural integrity, and is not expected to require the construction of shoreline protective devices, consistent with the hazard protection policies of the Coastal Act.

**G. Local Coastal Planning.** As discussed in the substantial issue portion of this report, construction of a new restaurant building on the landside portion of Harbor Island is a project that is neither discussed in the text of the certified Port Master Plan nor included on the PMP project list. Thus, one way for the Commission to proceed on de novo review of the development would be to deny the permit, and send the applicant back to the Port District to have the Port to process either a project specific Port Master Plan Amendment or a broader PMPA that includes the subject project. Assuming the Commission found that PMPA consistent with Chapter 3 of the Coastal Act, the Port would then be able to issue an appealable coastal development permit for the project.

However, the circumstances of this particular development are unusual. The project was exempted over four years ago by the Port District, which continues to maintain that no Port Master Plan Amendment or permit is required for the project. This could put the applicant in a difficult position, as the Port District may not be willing to process the necessary approvals, putting the applicant at risk of violating the Coastal Act if he were to proceed with the development per the Port's exemption. As discussed above, the applicant has made substantial revisions and improvements to the project to increase

public access and recreational opportunities on the site, and the project can be conditioned as described herein to be consistent with the Chapter 3 policies of the Coastal Act, which is the same standard of review as a Port Master Plan Amendment receives. Even if a Port Master Plan and appealable Port coastal development permit was issued for the project, it is highly likely that the project would be appealed to the Commission, putting the development in precisely the same place it is now before the Commission. As a result of the Commission's appeal of the Port's exemption, the project has now been the subject of much the same level of public participation and scrutiny under the policies of the Coastal Act as it would be were to undergo additional review through the Port Master Plan process.

Nevertheless, the lack of strict conformance to the procedural regulations of the Coastal Act has also placed the Commission in a difficult position. The subject approval in no way sanctions or endorses the manner in which the subject project was excluded from the PMPA and coastal permit process. The public and the Commission rely on the Port Master Plan to set forth a comprehensive long-range plan and policies for the various Port Districts, and that includes evaluating new shoreline structures such as the proposed project. As discussed herein, the subject project does not fall under the exemptions set forth in the adopted Port District Coastal Development Permit Regulations and should have been reviewed as an appealable coastal development permit. Non-port related uses such as the proposed restaurant are given extra scrutiny under the Coastal Act as appealable projects because they often have more direct impacts on the general public than uses that are principally related to water-oriented and port-related operations. Only as revised and conditioned in this permit can the project be found consistent with the coastal resource protection policies of the Coastal Act.

Pursuant to section 13056(g) of the Commission's regulations, the Commission may require an applicant to reimburse it for any additional reasonable expenses incurred in processing permit applications including litigation costs or fees that the Commission may incur in defending a judicial challenge to the Commission's approval of the permit. Therefore, the Commission, in approving this permit, imposes **Special Condition #12**, requiring the applicant to reimburse the Commission in full for all Coastal Commission costs and attorneys fees in connection with defending any action brought by a party, other than the applicant, challenging the Commission's approval or issuance of this permit.

Since the proposed project has been redesigned and conditioned to avoid impacts on public access, public recreation, biological resources, water quality, views, and hazards and is consistent with Chapter 3 of the Coastal Act, the Commission finds that approval of the project, in this particular case, will not prejudice the ability of the San Diego Unified Port District to continue to implement its certified Port Master Plan.

#### H. Consistency with the California Environmental Quality Act (CEQA).

Section 13096 of the Commission's administrative regulations requires Commission approval of a coastal development permit or amendment to be supported by a finding showing the permit or permit amendment, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if

there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

As described above, the proposed project has been conditioned to avoid adverse environmental impacts. Mitigation measures include submittal of final public access plans, drainage plans, and a tsunami plan will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project is the least environmentally-damaging feasible alternative and is consistent with the requirements of the Coastal Act to conform to CEQA.

Appendix A – Substantive File Documents

SUBSTANTIVE FILE DOCUMENTS: Appeal by Commissioners Sanchez and Brennan filed 2/6/13; Appeal by Unite Here Local 30 filed 2/6/13; Certified San Diego Unified Port District Port Master Plan. In addition, the following documents were reviewed in the geotechnical analysis contained herein:

- Terra Physics, 2005, "Final report, Seismic reflection survey to detect the Spanish Bight Fault Zone, Proposed East Harbor Island hotel site, San Diego Bay, California", p. geophysics report dated 5 October 2005 and signed by K. Hennon (RGP 886).
- Terra Physics, 2006, "Final report, Seismic reflection survey to detect the Spanish Bight Fault Zone, (Trip #2 - Westward extension from original survey area\_ Proposed East Harbor Island hotel site, San Diego Bay, California", p. geophysics report dated 8 February 2006 and signed by K. Hennon (RGP 886).
- Geocon, 2006, "Geotechnical investigation and geologic fault investigation, East Harbor Island Hotel, San Diego, California", 20 p. geotechnical report dated 3 March 2006 and signed by J. J. Vettel (GE 2401), F. Khatib and M. S. Chapin (CEG 1149).
- Ninyo and Moore, 2006, "Preliminary geotechnical evaluation and third-party review, proposed East Harbor Island Development Project, San Diego, California", 12 p. geotechnical review report dated 21 June 2006 and signed by R. D. Hallum (CEG 1484) and R. L. Irwin (CEG 1521).
- Earth Consultants International, 2011, "Review of May 6, 2011 staff report on the Sunroad Harbor Island Hotel project, Agenda Item 23 of the San Diego Unified District Board Meeting to be held on May 10, 2011", 3 p. geotechnical review letter dated 9 May 2011 and signed by T. Gonzalez (CEG 1859).
- Geocon, 2011, "Geotechnical investigation, East Harbor Island restaurant, 880 Harbor Island Drive, San Diego, California", 26 p. geotechnical report dated 2 September 2011 and signed by S. F. Weedon (GE 2714) and G. W. Cannon (CEG 2201 PE C058468).
- Geocon, 2011, "Response to geotechnical review comments, East Harbor Island restaurant, 880 Harbor Island Drive, San Diego, California", 5 p. geotechnical response letter dated 14 October 2011 and signed by S. F. Weedon (GE 2714) and A. Sadr (CEG 1778).
- Geocon, 2012, "Second response to geotechnical review comments, East Harbor Island restaurant, 880 Harbor Island Drive, San Diego, California", 6 p. geotechnical response letter dated 27 January 2012 (revised 19 March 2012) and signed by G. W. Cannon (CEG 2201 PE C058468) and S. F. Weedon (GE 2714).

A-6-PSD-13-005 (Sunroad Enterprises)

Geocon, 2012, "Fault study addendum No. 1, East Harbor Island restaurant, 880 Harbor Island Drive, San Diego, California", 2 p. fault study addendum report dated 28 August 2012 and signed by G. W. Cannon (CEG 2201 PE C058468) and S. F. Weedon (GE 2714).

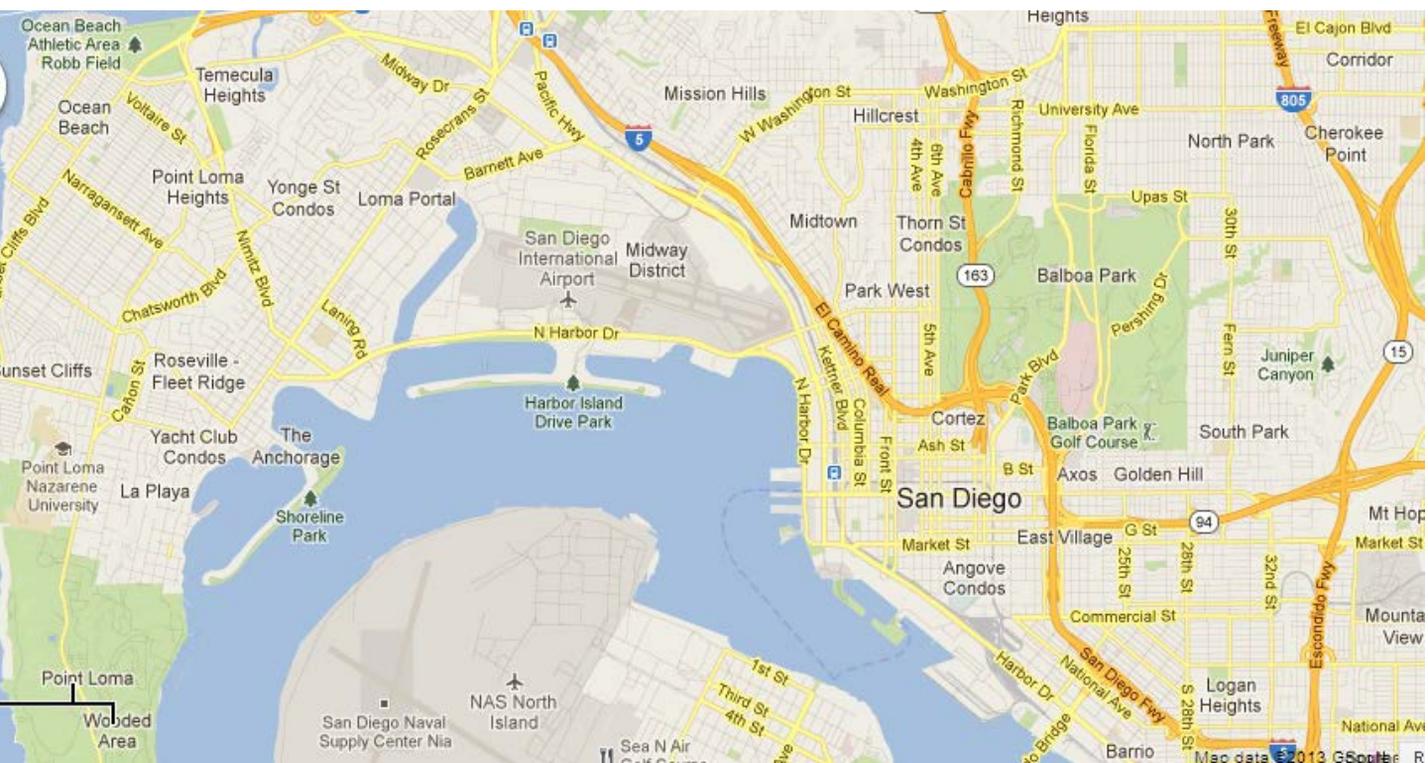
Geocon, 2012, "Fault study addendum No. 2, East Harbor Island restaurant, 880 Harbor Island Drive, San Diego, California", 2 p. fault study addendum report dated 11 September 2012 and signed by G. W. Cannon (CEG 2201 PE C058468).

Geocon, 2012, "Foundation plan review, East Harbor Island restaurant, 880 Harbor Island Drive, San Diego, California", 2 p. review letter dated 15 May 2012 and signed by S. F. Weedon (GE 2714).

Ninyo and Moore, 2012, "Review of referenced geotechnical documents, East Harbor Island restaurant, 880 Harbor Island Drive, San Diego, California", 4 p. geotechnical review letter dated 10 July 2012 and signed by J. T. Kent (PE GE) and J. Goodmacher (CEG).

TerraCosta Consulting Group, 2013, "Wave uprush and sea level rise discussion, 880 Harbor Island Drive, San Diego, California", 5 p. letter report dated 3 May 2013 and signed by W. F. Crampton (GE 245).

Earth Consultants International, 2013, "Review of fault studies conducted for the restaurant proposed at the east end of East Harbor Island (880 Harbor Island Drive), in San Diego, California", 5 p. geotechnical review letter dated 23 May 2013 and signed by T. Gonzalez (CEG 1859).



United States • CA • San Diego Co. • San Diego

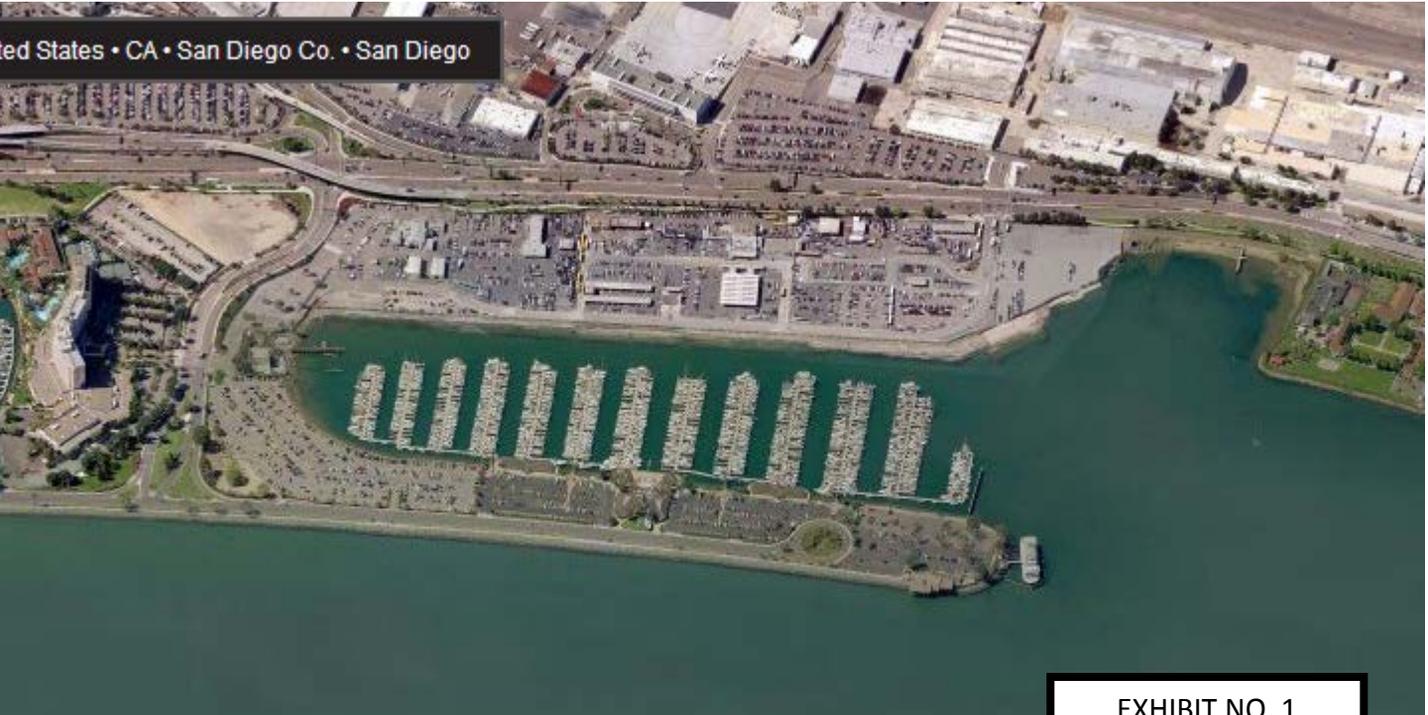


EXHIBIT NO. 1
APPLICATION NO. <b>A-6-PSD-13-5</b>
Location Map
 California Coastal Commission



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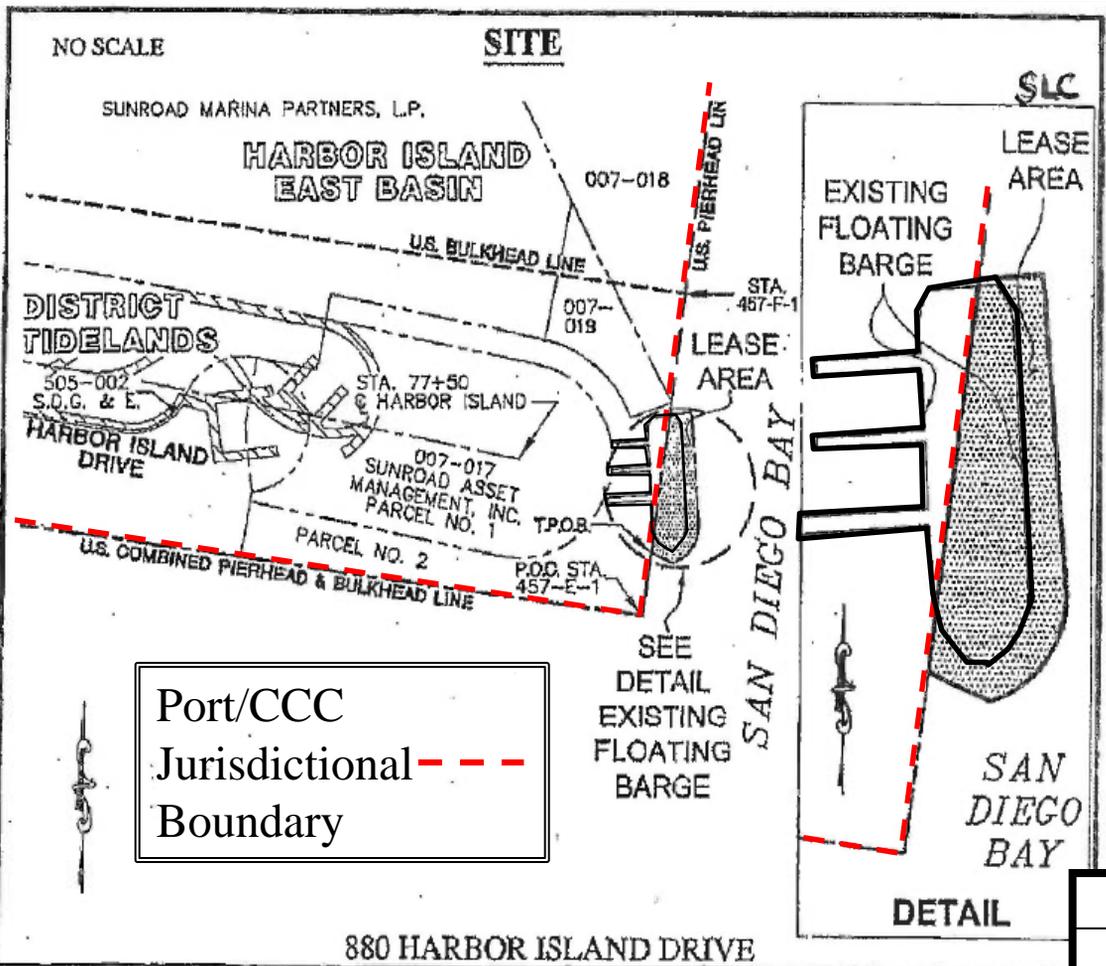


EXHIBIT NO. 2
APPLICATION NO. <b>A-6-PSD-13-5</b>
Jurisdictional Boundaries
 California Coastal Commission



Proposed  
New  
Restaurant  
Structure

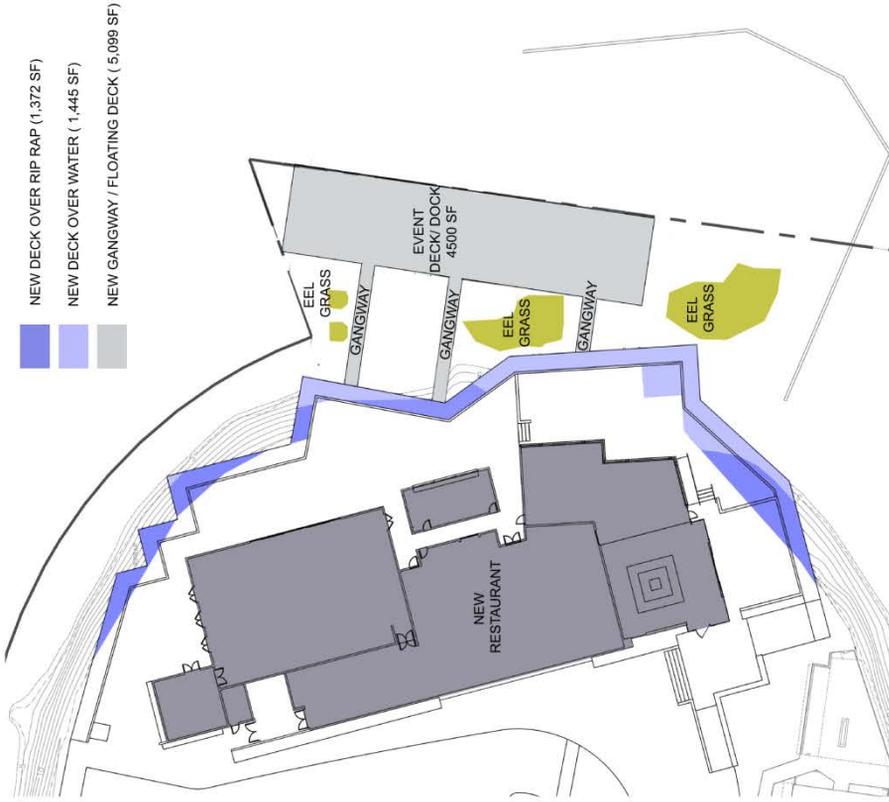
Existing

EXHIBIT NO. 3
APPLICATION NO.
<b>A-6-PSD-13-5</b>
Approved Restaurant
& Viewpoints
 California Coastal Commission





PORT APPROVED PLAN

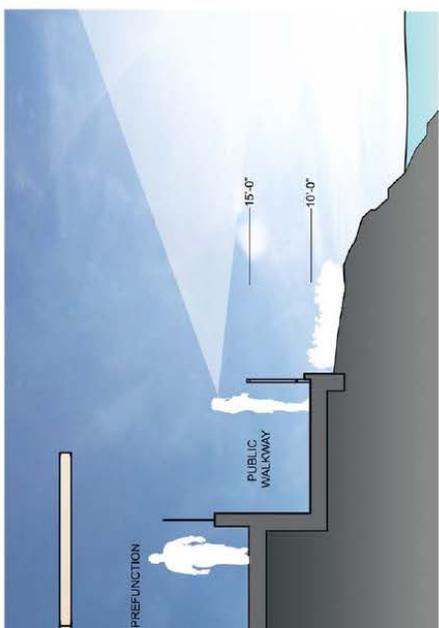


CURRENT PROPOSED PLAN

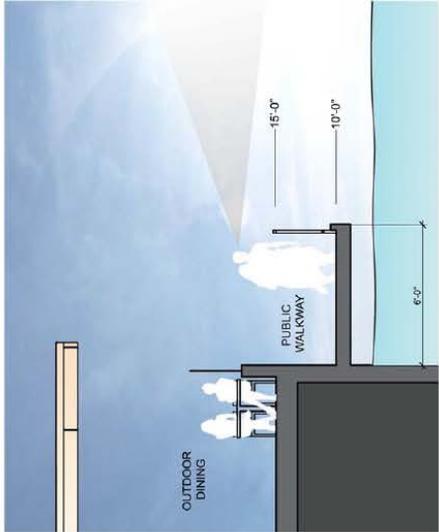
04.08.13

FIGURE 2 - HARBOR ISLAND EAST- COMPARISON OF PROPOSED NEW DECK AREAS

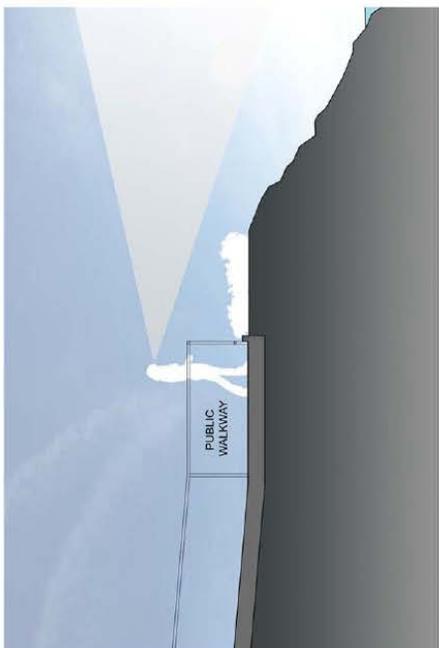
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<b>EXHIBIT NO. 5</b>
APPLICATION NO. <b>A-6-PSD-13-5</b>
Proposed vs. Approved
Deck
 California Coastal Commission



C



B

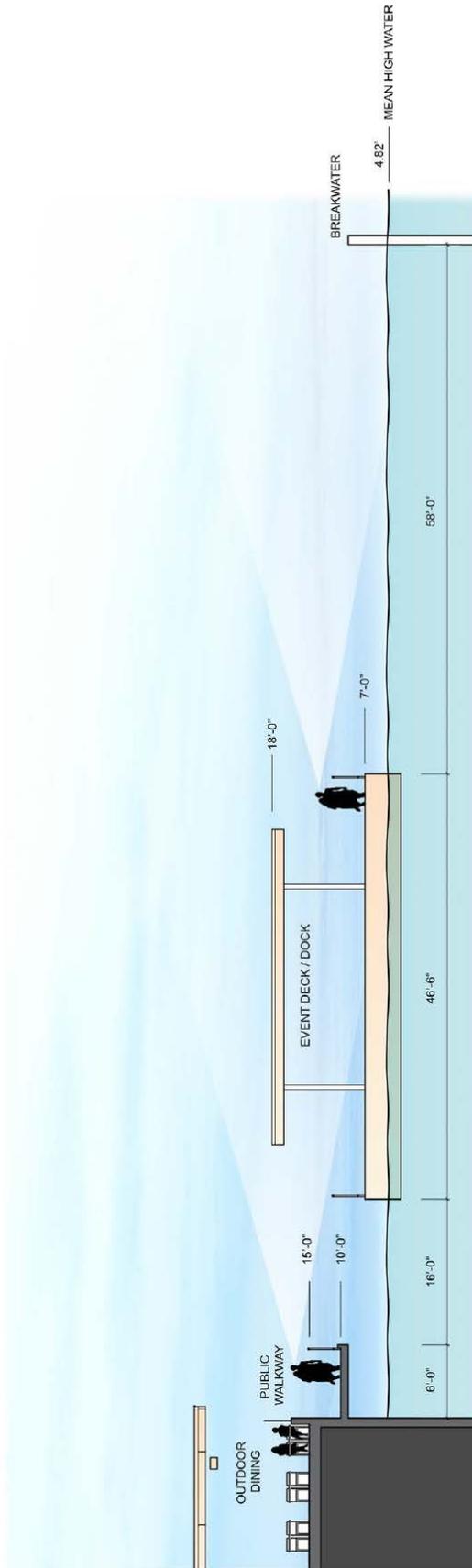


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04.08.13

HARBOR ISLAND SECTIONS AT PUBLIC WALKWAYS

EXHIBIT NO. 6
APPLICATION NO. <b>A-6-PSD-13-5</b>
Public Deck
Cross-Sections California Coastal Commission



04.08.13

SECTION B

EXHIBIT NO. 7
APPLICATION NO. <b>A-6-PSD-13-5</b>
Cross-Section of Deck and Barge
 California Coastal Commission



04.08.13

VIEW 1

EXHIBIT NO. 8
APPLICATION NO.
<b>A-6-PSD-13-5</b>
Rendering of west side
of proposed project
 California Coastal Commission



04.08.13

VIEW 2

EXHIBIT NO. 9
APPLICATION NO. <b>A-6-PSD-13-5</b>
Rendering of east side of proposed project
 California Coastal Commission