

CALIFORNIA COASTAL COMMISSION

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W26a

Filed:	3/22/18
180th Day:	Waived
270th Day:	12/17/18
Staff:	F. Sy-LB
Staff Report:	11/30/18
Hearing Date:	12/12/18

STAFF REPORT: REGULAR CALENDAR

Application No.: 5-18-0221

Applicant: Douglas Wong

Agent: John T. Morgan Jr. - Architect

Location: 1316 W. Bay Avenue, City of Newport Beach, (Orange County)

Project Description: Construction of a 25-foot by 5-foot concrete deck cantilevered from the bulkhead over the wet sand/water (Newport Bay) associated with a single-family residence on a bayfronting lot.

Staff Recommendation: Denial

SUMMARY OF STAFF RECOMMENDATION

The proposed project is located within the Commission's original permit jurisdiction because it is proposed to be located above the waters of Newport Bay. The standard of review for development within the Commission's original permit jurisdiction is Chapter 3 of the Coastal Act, although the City's certified LCP is advisory in nature and may provide guidance for development.

The proposed project was previously agendized for the October 2018 Commission Hearing in San Diego and the staff report was published, but at the request of the applicant the project was postponed and the project did not go before the Commission.

The proposed project is the construction of a deck that would extend from the yard and bulkhead of a single-family residence on a bay fronting lot in Newport Bay. Commission staff is recommending **DENIAL** of the proposed deck because of its adverse impacts to public access to navigable waters.

A 35-foot wide by 8-foot deep portion of the applicant's property is situated bayward of the existing bulkhead on the lot. The area is not part of the mapped State Tidelands held in trust by the City, and this portion of the applicant's lot has not been officially deemed to be public tidelands because it has historically been part of the property deed for the landside lot. The only development situated bayward of the applicant's bulkhead is a small stairway and a recreational boating facility (private boat dock). Because the property seaward of the bulkhead gets inundated by bay waters, the area is often submerged; therefore, even though the submerged and/or tidelands are in private ownership, the public maintains a right to access the navigable bay waters for navigation and recreation.

Construction of the proposed 25-foot by 5-foot deck cantilevered over the bay would in effect privatize the use of this portion of the bay, as the general public will be unable or unwilling to access the area beneath the cantilevered deck for recreational purposes. Construction of the cantilevered deck would result in adverse impacts to public access inconsistent with Sections 30210, 30211, 3012, 30220 and 30221 of the Coastal Act. The City of Newport Beach Local Coastal Program (LCP) includes policies (3.1.1-1, 3.1.1-9, 3.1.1-11, and 3.1.4-3) protecting public access and approval of the project would be inconsistent with those policies. In addition, Section 30250 of the Coastal Act requires that new development be located where it will not have cumulative adverse effects on coastal resources. Allowing the project could result in cumulative adverse effects on public access, due to the likelihood of similar development proposals throughout Newport Bay.

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EXHIBITS

- [Exhibit No. 1 – Location Map](#)
- [Exhibit No. 2 – Site Plan and Section Plan](#)
- [Exhibit No. 3 – March 2011 Aerial](#)
- [Exhibit No. 4 – Photo of Project Site](#)

I. MOTION AND RESOLUTION

Motion:

*I move that the Commission **approve** Coastal Development Permit No. 5-18-0221 pursuant to the staff recommendation.*

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

Resolution:

The Commission hereby denies a Coastal Development Permit for the proposed development on the ground that the development will not conform to the policies of Chapter 3 of the Coastal Act. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

II. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION

The proposed project is the construction of a 25-foot by 5-foot concrete deck cantilevered from the bulkhead over the wet sand/water of Newport Bay ([Exhibit No. 2](#)). The proposed project would result in the extension of a single-family residence on a bayfronting lot. A stairway next to the bulkhead leading down from the existing dock system leading to the sand/water below is proposed to be demolished so the cantilevered deck can be constructed ([Exhibit No. 4](#)).

The subject site is a bulkheaded property fronting Newport Bay located at 1316 W. Bay Avenue in the City of Newport Beach, Orange County ([Exhibit No. 1](#)). Single-family residences and associated private boat dock systems characterize the subject site and the surrounding area. The area of the bay over which the proposed deck would be cantilevered is a 35-foot wide by 8-foot deep portion of the applicant's property that is situated bayward of the existing bulkhead. This portion of the applicant's lot has not been officially deemed to be public tidelands because it has historically been part of the property deed for the landside lot. The only development situated bayward of the applicant's bulkhead is a small stairway and a recreational boating facility (private boat dock). Because the property seaward of the bulkhead gets inundated by bay waters, as evidenced by a March 2011 aerial photograph ([Exhibit No. 3](#)), the area is often submerged and, therefore, the public maintains a right to access the navigable bay waters for navigation and recreational purposes.

The City of Newport Beach LCP was effectively certified on January 13, 2017. The landside portion of the development is located within the City's permit jurisdiction, while the area of the applicant's lot that exists beyond the bulkhead is located bayward of the high tide and is thus within the Commission's original permit jurisdiction. The standard of review for development within the City's permit jurisdiction is the City's certified LCP. The standard of review for

development within the Commission's original permit jurisdiction is Chapter 3 of the Coastal Act, although the City's certified LCP is advisory in nature and may provide guidance.

On February 27, 2018, the applicant obtained Local Coastal Development Permit No. 5-NPB-18-0299 from the City of Newport Beach Zoning Administrator for landside development at the project site consisting of the demolition of a two-story single-family dwelling and the construction of a 4,311 square-foot, three-story single-family residence with a 475 square-foot two-car garage. The City-approved project also includes hardscape, drainage, landscaping improvements, and a reinforced bulkhead involving new landside caissons and tiebacks. A Bulkhead Conditions Report states that the bulkhead is in good condition. While in good condition, the applicant is proposing to reinforce the bulkhead via landside caissons and tiebacks to support the cantilevered deck that includes a curb with a height of 10 feet NAVD88, which exceeds the City's Harbor Design Criteria standard of 9.82 feet NAVD88 (10 feet MLLW).

The City also determined that the proposed cantilevered concrete deck falls under the jurisdiction of the California Coastal Commission because it projects beyond the bulkhead and over the bay waters. The City states that the proposed deck has been designed in compliance with the patio deck standards of Municipal Code Section 21.30C.050(G)(5). Specifically, the deck would project a maximum of 5 feet beyond the bulkhead, maintains minimum setbacks of 5 feet from the prolongations of the side property lines, and would be located outside Tidelands Trust, which are mapped State tidelands administered by the City. Furthermore, the City stated that since the proposed deck includes an integrated raised curb needed to protect the development against future sea level rise, the City imposed a condition of approval requiring the applicant to apply for and obtain approval of a coastal development permit from the California Coastal Commission prior to the issuance of a building permit.

B. PUBLIC ACCESS AND RECREATION

Article X, Section 4 of the California Constitution provides:

No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purpose... and the Legislature shall enact such law as will give the most liberal construction to this provision so that access to the navigable waters of this state shall always be attainable for the people thereof.

Section 30210 of the Coastal Act, Access; recreational opportunities; states:

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

Section 30211 of the Coastal Act, Development not to interfere with access, states:

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

Section 30212 of the Coastal Act, New development projects (in part), states:

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

Section 30220 of the Coastal Act, Protection of certain water-oriented activities, states:

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

Section 30221 of the Coastal Act, Oceanfront land; protection for recreational use and development, states:

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 30250 of the Coastal Act, Location, existing developed areas, states:

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

Coastal Land Use Plan Policy, Shoreline Access, 3.1.1-1 states,

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

Coastal Land Use Plan Policy, Shoreline Access, 3.1.1-9 states,

Protect, expand, and enhance a system of public coastal access that achieves the following:

Maximizes public access to and along the shoreline;

Coastal Land Use Plan Policy, Shoreline Access, 3.1.1-11 states,

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

Coastal Land Use Plan Policy, Bay/Harbor Encroachments, 3.1.4-3 states,

Design and site piers, including remodels of and additions to existing piers so as not to obstruct public lateral access and to minimize impacts to coastal views and coastal resources.

Implementation Plan, Development Standards, Harbor Development Regulations, 21.30C.050(G) states,

G. Piers.

1. Limits on Use. Only piers, floats and patio decks and their appurtenances pursuant to subsection (G)(5) of this section shall be permitted bayward of the bulkhead.

2. Street Ends. No private piers shall be permitted at street ends.

3. Setbacks.

a. All piers and slips for residential properties shall be set back a minimum of five feet from the prolongation of the property line.

b. With the prior approval of the City, piers and slips for commercial properties may extend past the prolongation of the property line.

c. The prolongation of the property line bayward of the same bearing from the bulkhead shall generally be used in determining the allowable setbacks for piers and slips. Because there are certain physical conditions which preclude the strict application of this policy without prejudice to adjoining properties, special consideration will be given to areas where precise prolongation of the property line has not been determined and the following conditions exist:

i. Where property lines are not approximately perpendicular to the bulkhead line;

ii. Where curves or angles exist in the bulkhead line;

iii. Where bridges, topography, street ends or publicly owned facilities adjoin the property.

d. Setbacks apply to joint ownership piers with the exception that the slips, floats and piers may extend over the common property line.

4. Joint Ownership. Permits may be granted for joint ownership piers at the prolongation of common lot lines. The permit for joint ownership piers shall provide that all parties shall have equal rights under the permit and shall be held jointly responsible for compliance with all rules, regulations, and conditions set forth in the permit.

5. Patio Decks. [Emphasis added] Patios are not permitted to extend over the waters of Newport Harbor unless the waters are adjacent to the upland property and outside the areas described in the tidelands trust, and provided the patio complies with the following conditions:

a. The maximum projection of patio decks encroachments beyond the bulkhead line shall be limited to five feet.

b. The minimum setbacks from the prolongations of the side property lines shall be five feet.

c. No float shall be permitted within one foot of the decks.

d. No permanent structure shall be permitted on the projecting portion of the patios except:

i. Planters and benches not over sixteen (16) inches in height;

ii. Railings not over forty-two (42) inches in height with approximately ninety-five (95) percent open area.

e. A harbor and building permit has been obtained.

6. Storage Lockers. Storage lockers and boat boxes may be installed on shore-connected piers and floats subject to the following limitations:

a. The overall height shall not exceed thirty (30) inches when located bayward of residential property zones.

b. The overall height shall not exceed thirty (30) inches when located bayward of commercial and industrial property zones where the piers and floats are used primarily for the mooring of pleasure boats.

c. The overall height shall not exceed sixty (60) inches when located on facilities bayward of commercial and industrial zoned property where the use is not primarily for the mooring of pleasure boats.

d. The overall height shall be measured from the deck of the pier or float to the top of the storage locker and overall height to include the enclosed portion of the locker or box.

Coastal Act Section 30210 and Coastal Act Section 30211 mandate that maximum public access and recreational opportunities be provided and that development not interfere with the public's right to access the coast. Section 30212(a) of the Coastal Act provides that adequate public access to the sea be provided in new development projects. Additionally, Sections 30220 and 30221 of the Coastal Act protect coastal areas suited for water-oriented recreational activities and oceanfront land for recreational uses. Section 30250 of the Coastal Act requires new development to not have significant adverse effects, individually or cumulatively, on coastal resources.

The waters of Newport Bay are a very popular recreational boating area. Sandy shoreline areas along the bay are also used for access/recreation. The applicant has an existing private dock system including a pier platform and float over the water. No work is proposed to this dock system except for demolishing the stairway next to the bulkhead leading down from the existing dock system leading to the sand/water below so the cantilevered deck can be constructed and then reconnecting the dock system to the proposed cantilevered deck once completed.

The applicant's private boat dock system is located on State Tidelands that are administered by the City of Newport Beach pursuant to a Tidelands Grant (City of Newport Beach Tidelands and Submerged Lands in Newport Bay – Statutes of 1919, Chapter 494, Page 1011 and Statutes of 1927, Chapter 70, Page 125). The placement of private boat dock systems on public tidelands has been found by the City and the Commission to be consistent with the Tidelands Grant because it is an allowable recreational boating use. However, the construction of a private cantilevered deck over submerged lands would adversely impact public access to and along the shoreline and public use of navigable bay waters.

There is no direct public pedestrian access to bay waters through the private residential lot at the subject site. Public pedestrian access to the bay is available approximately 136 feet east of the

project site at the 13th Street street end ([Exhibit No. 1 & No. 3](#)). From this access point, members of the public may access bay waters and, for example, launch a kayak or SUP (standup paddle board). Alternatively, at lower tides it is possible for one to walk under the residential piers for strolls down the wet sand. The aerial photograph provided in [Exhibit No. 3](#) clearly shows sandy beach and submerged areas covered by residential dock structures. The public can also access the bay waters seaward of the subject site by watercraft or by swimming to the site.

The proposed project involves the construction of a 25-foot by 5-foot concrete deck cantilevered over the bay associated with a single-family residence on a bayfronting lot. The area of land over which the proposed deck will cantilever is part of the applicant's property that is situated bayward of the existing bulkhead. This portion of the applicant's lot has not been officially deemed to be public tidelands because it has historically been part of the property deed for the landside lot. Because the property seaward of the bulkhead gets inundated by bay waters, as evidenced by a March 2011 aerial photograph ([Exhibit No. 3](#)), the area is often submerged and, therefore, the public maintains a right to use and enjoy the navigable bay waters even though the submerged lands are in private ownership.¹

The area located below the cantilevered deck can be used for boating or, at lower tides, a location for strolls along the wet sand. Placing the proposed 25-foot by 5-foot cantilevered deck adjacent to the bulkhead would in effect privatize navigable bay waters as the general public would be unable or unwilling to access the area beneath the cantilevered deck for recreational purposes, because it would appear to be private residential development. The proposed project would significantly reduce both the headroom clearance as well as the width of that area since no cantilevered deck currently exists. The headroom clearance would be reduced to approximately 4.5 feet, thus adversely impacting public access along the shoreline adjacent to the bulkhead. Construction of the proposed deck would interfere with the public's ability to access this area and result in a private development only enjoyed by the applicant.

Thus, the proposed project is inconsistent with Section 30210, which requires maximization of public access, and Section 30211, which provides that new development shall not interfere with the public's right of access to the sea. Likewise, the proposal to build a deck over the bay—and, essentially privatize this portion of navigable bay waters—prevents use of the area for water-oriented recreational activities that must be preserved in coastal areas (Section 30220) and fails to protect oceanfront land for recreational use and development (required by Section 30221).

While not the standard of review, the City's LCP does contain policies and development standards that protect public access similar to the policies in Chapter 3 of the Coastal Act. Approval of the project would be inconsistent with those policies protecting public access (Land Use Policies 3.1.1-1, 3.1.1-9, 3.1.1-11, and 3.1.4-3). A specific development standard in the Implementation Plan (IP) that allows patio decks in specific circumstances is 21.30C.050(G)(5),

¹ The public trust doctrine provides that tide and submerged lands and the beds of lakes, streams and other navigable waterways are to be held in trust by the State for the benefit of the people of California for uses including the right to swim, boat and engage in other forms of water recreation. However, the public maintains a right to access all navigable water regardless of the ownership interest of the underlying lands. *See Hitchings v. Del Rio Woods Recreation and Parks Dist.*, 55 Cal. App. 3d 560, 571 (1976) ("The ownership of the bed is not determinative of public navigational rights, nor vice-versa."); *Bohn v. Albertson*, 107 Cal.App.2d 738, 749 (1951) (public has right to access navigable waters regardless of the title to the underlying lands unless and until the lands are reclaimed).

which prohibits decks within the Tidelands Trust areas. While the proposed project is not inconsistent with this LCP policy since it is not located within Tidelands Trust Areas, it is inconsistent with the public access policies as discussed above. In addition, section 21.30C.050(G)(5) is advisory in nature and is not binding on the Commission, as it relates to development on areas within the Commission's retained jurisdiction (submerged lands), and not within the City's jurisdiction.

Section 30250 of the Coastal Act requires that new development be located where it will not have cumulative adverse effects on coastal resources. Within the project area, the pattern of development does not include private cantilevered decks over the wet sand/water. The property to the west of the project site located at 1324 W. Bay Avenue does appear to have a cantilevered deck similar to what the applicant is proposing. On January 11, 2006, the Commission approved Coastal Development Permit No. 5-05-116-(Finn) at this adjacent location for the following development: demolition of an existing single-family residence and construction of a new bayfronting 5,567 square foot two-story single-family residence with an attached 1,102 square foot three-car garage. In addition, an existing bulkhead/seawall was allowed to be demolished and a new bulkhead/seawall constructed in the same location. Grading consisted of 40 cubic yards of cut, 50 cubic yards of import, and 90 cubic yards of fill. This approval did not include the construction of a cantilevered deck and neither did the approved plans indicate this as part of the project. Therefore, this cantilevered deck located at 1324 W. Bay Avenue may be unpermitted.

While cantilevered decks have been approved in other areas of the City, this was prior to the certification of the City's IP in 2017, which limits development of private decks over the bay. Approval of such development in an area where no such cantilevered decks currently exist will set a precedent for future development in the area, and there are hundreds of private bayfront residences in Newport Bay. Thus, it is reasonably foreseeable that other bayfront residences will seek to develop similar cantilevered decks, resulting in the gradual but inevitable loss of public access to bay waters. Commission staff analyzed potential alternatives to the proposed project. One alternative is to integrate the raised curb above the existing bulkhead to protect the landside development against future sea level rise. However, any revised cantilevered deck locations or sizing would result in similar impacts and remain inconsistent with the Chapter 3 public access policies of the Coastal Act. The project, therefore, is inconsistent with Sections 30210, 30211, 30212, 30220, 30221, and 30250 of the Coastal Act.

C. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of Coastal Development Permit applications to be supported by findings showing the approval, as conditioned, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment. The Commission's regulatory program for reviewing and granting CDPs has been certified by the Resources Secretary to be the functional equivalent of CEQA. (14 CCR § 15251(c).)

The City of Newport Beach determined that the proposed development is ministerial or categorically exempt from CEQA on December 13, 2017.

The Commission has found the project to be inconsistent with the Chapter 3 policies of the Coastal Act. CEQA does not apply to private projects that public agencies deny or disapprove, Pub. Res. Code § 21080(b)(5). Accordingly, because the Commission is denying the proposed project, it is not required to adopt findings regarding mitigation measures or alternatives that would substantially lessen any significant adverse effect the project would have on the environment.

APPENDIX A: Substantive File Documents

Coastal Development Permit No. 5-05-116-(Finn); City of Newport Beach Coastal Development Permit No. 5-NPB-18-0299; City of Newport Beach Harbor Resources Division Approval-In-Concept dated December 13, 2017, 2017Geotechnical Engineering Investigation for Proposed New Residence at 1316 West Bay Avenue Newport Beach, California prepared by Coast Geotechnical, Inc. (W.O. 540717-01) dated October 22, 2017; Coastal Hazards Analysis Report (PMA Job #17871) prepared by PMA Consulting, Inc. dated October 25, 2017; and Bulkhead Conditions Report (PMA Job#17817) prepared by PMA Consulting, Inc. dated October 25, 2017.