

CALIFORNIA COASTAL COMMISSION

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W10b

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STAFF REPORT: CONSENT CALENDAR

Application No.: 5-19-0266

Applicant: Jeffrey Frieden

Agent: Marine Taxonomic Services, LTD

Location: Waterside parcel adjacent to 86 Linda Isle, City of Newport Beach, Orange County (APN 050-461-01)

Project Description: Removal of an 884 square foot U shaped dock float and four 14-inch square concrete marina guide; installation of a 951 square foot dock float and four 18-inch square concrete guide piles; relocation of existing 4-foot x 24-foot gangway; and after-the-fact approval of an approximately 555 square foot cantilevered deck.

Staff Recommendation: Approval with conditions

SUMMARY OF STAFF RECOMMENDATION

The proposed project is located within the Commission's original permit jurisdiction because it is proposed to be located on and over 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 Local Coastal Plan (LCP) is advisory in nature and may provide guidance for development.

The proposed project is the removal of an existing dock and construction of a new dock system and after-the-fact approval of a deck cantilevered from the bulkhead over the water (Newport Harbor) both associated with a single-family residence on a bayfronting lot in Newport Beach.

Staff is recommending **APPROVAL** of the coastal development permit application with special conditions. The major issues raised by this proposed development concern consistency with the marine resources, water quality, public access and recreation policies of the Coastal Act.

The existing dock float on this site consists of 884 square feet and the project description submitted with the subject application proposed a 951 square foot dock float, which would result in an increase of 67 square feet of water coverage. In order to reduce the amount of water coverage and the impact upon biological productivity of the area, the applicant has proposed to revise the project to reduce the width of the dock float from 10 feet to 9 feet, resulting in an 871 square foot dock float, a decrease in water coverage compared to the existing dock float. While the applicant has provided revised plans showing this reduced water coverage, it has not yet obtained approval from the City of Newport Beach Harbor Resources Division for this dock float revision. Therefore, staff recommends the Commission imposes **Special Condition No. 1**, which requires submittal of revised project plans approved by the City of Newport Beach Harbor Resources Division.

The applicant has also proposed after-the-fact approval of a 555 square foot deck (5 feet wide x 111 feet long) cantilevered from the bulkhead over the water (Newport Harbor). The City's certified LCP (which may be used as guidance for development in the Commission's jurisdiction) includes Implementation Plan (IP) Policy 21.30C.050(G) regarding the location of proposed decks over the waters of Newport Harbor. While the cantilevered deck appears to be consistent with the development standards of the IP and with the development pattern in the area which includes other cantilevered decks, the applicant has not yet obtained approval from the City of Newport Beach Harbor Resources Division for this cantilevered deck. Therefore, staff recommends the Commission imposes **Special Condition No. 1**, which requires the applicant to submit revised project plans including the cantilevered deck approved by the City of Newport Beach Harbor Resources Division. To ensure that this unpermitted development is resolved in a timely manner, staff recommends the Commission imposes **Special Condition No. 9** which requires the applicant prior to issuance of the permit to satisfy all conditions of this permit within 90 days of Commission action.

The areas of the bay over which the proposed deck would be cantilevered consist of a submerged parcel of land owned by the Lido Isle Community Association. Current available information indicates that the parcel is located landward of the mean high tide line and is not, therefore, subject to the public trust, although the lands would be subject to a navigational easement. The proposed after-the-fact cantilevered deck does not prevent use of the channel or waters seaward of the bulkhead at the subject site for navigational purposes and the public may access the waters by watercraft or by swimming. In addition, the proposed private dock for this residence is located farther out in the water; thus, the proposed cantilevered deck is unlikely to impair the navigational easement or have additional impacts on public access in this area.

However, Coastal Commission approval of this project cannot waive any public rights that may exist on the property. Therefore staff recommends the Commission imposes **Special Condition No. 8**, which states that approval of a coastal development permit for the project does not waive any public rights or interest that exist or may exist on the property, and that if any portion of the development approved by this project is subsequently determined to be located on or over public

trust lands, then development approved by this coastal development not compatible with the public trust must be removed.

Staff has determined that the dock, as conditioned, has been designed in a manner that largely avoids adverse impacts to marine resources while still maintaining a usable dock and enabling recreational boating. However, to minimize potential adverse impacts to biological resources and to ensure that there will not be negative cumulative impacts to the Newport Bay ecosystem; **Special Condition No. 2** requires the applicant to prepare a new eelgrass survey prior to beginning construction. Staff recommends the Commission also impose **Special Condition No. 3**, which requires the applicant, prior to commencement of development, to survey the project area for the presence of *Caulerpa Taxifolia*, an invasive, non-native aquatic species that can be further dispersed in coastal waters as a result of construction activities.

While conditions have been imposed to minimize impacts to eelgrass and *Caulerpa Taxifolia*, impacts to other biological resources may occur if future development occurs without first being reviewed by the Commission. **Special Condition No. 4** requires the applicant to obtain a permit amendment or a new permit for any repair or maintenance of the proposed dock system or the deck cantilevered over the bulkhead.

During construction and post construction, the proposed project has potential for adverse impacts to water quality and marine resources. Therefore, as a result, several standard special conditions are recommended to minimize any impacts that the proposed project may have on water quality and marine resources: **Special Condition No. 5** states requirements for the applicant regarding construction responsibilities and debris removal and **Special Condition No. 6** requires the applicant to implement construction Best Management Practices (BMPs) to protect water quality.

To ensure that the applicant complies with all requirements, requests and mitigation measures from the California Department of Fish and Wildlife, the Regional Water Quality Control Board, the U.S. Army Corps of Engineers, and the U.S. Fish and Wildlife Service with respect to preservation and protection of water quality and the marine environment, **Special Condition No. 7** requires that the applicant comply with all their requirements, requests and mitigation measures.

As conditioned, the proposed project will conform with Chapter 3 of the Coastal Act.

The motion to approve the coastal development permit application is on **Page Four**. The special conditions begin on **Page Five**.

TABLE OF CONTENTS

I. MOTION AND RESOLUTION	5
II. STANDARD CONDITIONS	5
III. SPECIAL CONDITIONS	6
IV. FINDINGS AND DECLARATIONS	10
A. PROJECT DESCRIPTION, LOCATION AND PREVIOUS PERMITS	10
B. MARINE RESOURCES	16
C. WATER QUALITY	16
D. PUBLIC ACCESS	16
E. LOCAL COASTAL PROGRAM (LCP)	16
F. UNPERMITTED DEVELOPMENT	17
G. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)	17

APPENDICES

[Appendix A – Substantive File Documents](#)

EXHIBITS

[Exhibit No. 1 – Location Map](#)

[Exhibit No. 2 – Existing and Revised Proposed Site Plan](#)

I. MOTION AND RESOLUTION

Motion:

I move that the Commission approve the Coastal Development Permit applications included on the consent calendar in accordance with the staff recommendations.

Staff recommends a **YES** vote. Passage of this motion will result in approval of all the permits included on the consent calendar. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution:

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

II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

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

III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Revised Project Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for the review and approval of the Executive Director, two (2) sets of revised project plans. The length of the dock float and the number of piles shall be in substantial conformance with the plans submitted on March 28, 2019 and October 29, 2019. The revised project plans shall reflect the following changes:
 - A. The proposed dock float width shall be reduced to 9 feet for the 80-foot, 6 ½-inch long berth.
 - B. The final revised plans shall be designed to avoid all direct and indirect impacts to Eelgrass, and the plans shall be overlaid upon the known locations of Eelgrass patches in order to demonstrate that the new dock system will have no impacts to the habitat.
 - C. The proposed after-the-fact cantilevered deck shall be in conformance with the patio deck standards of the City of Newport Beach certified Local Coastal Program Implementation Plan Section 21.30C.050(G)(5).
 - D. The revised plans submitted to the Executive Director shall bear evidence of Approval-in-Concept of the revised design of both the dock and the deck from the City of Newport Beach Harbor Resources Division.

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

2. **Pre-Construction Eelgrass Survey.** A valid pre-construction eelgrass survey (whether for *Zostera marina* or *Z. pacifica*) shall be completed for the project site and a 10m buffer area. The pre-construction survey shall be completed no more than 60 days prior to the beginning of construction and shall be valid until the next period of active growth. If any portion of the project is subsequently proposed to occur in a previously unsurveyed area, a new survey is required during the active growth period for eelgrass in that region and no more than 60 days prior to commencement of work in that area. The eelgrass survey and mapping shall be prepared in full compliance with the California Eelgrass Mitigation Policy (CEMP), and in consultation with the National Marine Fisheries Service (NMFS) and California Department of Fish and Wildlife (CDFW). If side-scan sonar methods will be used, evidence of a permit issued by the California State Lands Commission (CSLC) for such activities shall also be provided prior to the commencement of survey work. The applicant shall submit the pre-construction eelgrass surveys for review and approval by the Executive Director within five (5) business days of completion of each eelgrass survey and in any event, no later than fifteen (15) business days prior to commencement of any development. If eelgrass surveys identify any eelgrass within the project area, which may be potentially impacted by the proposed project, the Permittees are required to complete post-project eelgrass surveys consistent with the section below.

Post-Construction Eelgrass Survey. If any eelgrass is identified in the project site or the 10m buffer area by surveys required in subsection B of this condition (above), within 30 days of completion of construction, or within the first 30 days of the next active growth period following completion of construction that occurs outside of the active growth period, the applicant shall survey the project site and the 10m buffer area to determine if any eelgrass was adversely impacted. The survey shall be prepared in full compliance with the CEMP adopted by the NMFS (except as modified by this special condition), and in consultation with the CDFW. If side-scan sonar methods are to be used, evidence of a valid permit from CSLC must also be provided prior to the commencement of each survey period. The applicant shall submit the post-construction eelgrass survey for the review and approval of the Executive Director within thirty (30) days after completion of the survey. If any eelgrass has been adversely impacted, the applicant shall replace the impacted eelgrass at a minimum final 1.38:1 (mitigation:impact) ratio on-site, or at another location, in accordance with the CEMP. Any exceptions to the required 1.38:1 minimum final mitigation ratio found within the CEMP shall not apply. Based on past performance of eelgrass mitigation efforts, in order to achieve this minimum, the appropriate regional initial planting ratio provided in the CEMP should be used. Implementation of mitigation to ensure success in achieving the minimum final mitigation ratio (1.38:1) shall require an amendment to this permit or a new coastal development permit unless the Executive Director provides a written determination that no amendment or new permit is required.

- 3. Pre-Construction *Caulerpa Taxifolia* Survey.** By acceptance of this permit, the applicant agrees to: not earlier than 90 days nor later than 30 days prior to commencement or re-commencement of any development authorized under this Coastal Development Permit (the “*project*”), the applicant shall undertake a survey of the project area and a buffer area at least 10 meters beyond the project area to determine the presence of the invasive alga *Caulerpa Taxifolia*. The survey shall include a visual examination of the substrate. If any portion of the project commences in a previously undisturbed area after the last valid *Caulerpa Taxifolia* survey expires, a new survey is required prior to commencement of work in that area.

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. Within five (5) business days of completion of the survey, the applicant shall submit the survey:

- (1) for the review and approval by the Executive Director; and
- (2) to the Surveillance Subcommittee of the Southern California Caulerpa Action Team (SCCAT). The SCCAT Surveillance Subcommittee may be contacted through William Paznokas, California Department of Fish & Game (858/467-4218) or Robert Hoffman, National Marine Fisheries Service (562/980-4043), or their successors.

If *Caulerpa Taxifolia* is found within the project or buffer areas, the applicant shall not proceed with the project until 1) the applicant provides evidence to the Executive Director that all *Caulerpa Taxifolia* discovered within the project and buffer area has been eliminated in a manner that complies with all applicable governmental approval requirements, including but not limited to those of the California Coastal Act, or 2) the applicant has revised the

project to avoid any contact with *Caulerpa Taxifolia*. No revisions to the project shall occur without a Coastal Commission approved amendment to this Coastal Development Permit unless the Executive Director determines that no amendment is legally required.

- 4. Future Development.** This permit is only for the development described in Coastal Development Permit No. 5-19-0266. Pursuant to Title 14 California Code of Regulations Section 13250(b)(6), the exemptions otherwise provided in Public Resources Code Section 30610(a) shall not apply to the development governed by Coastal Development Permit No. 5-19-0266, including the proposed dock system or the after-the-fact deck cantilevered over the bulkhead. Accordingly, any future improvements to the development authorized by this permit, including but not limited to repair and maintenance identified as requiring a permit in Public Resources Section 30610(d) and Title 14 California Code of Regulations Sections 13252(a)-(b), shall require an amendment to Permit No. 5-19-0266 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government.
- 5. Construction Responsibilities and Debris Removal.** By acceptance of this permit, the applicant agrees to comply with the following construction related requirements:
 - A.** No demolition or construction materials, equipment, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain or tidal erosion and dispersion.
 - B.** Any and all debris resulting from demolition or construction activities, and any remaining construction material, shall be removed from the project site within 24 hours of completion of the project.
 - C.** Demolition or construction debris and sediment shall be removed from work areas each day that demolition or construction occurs to prevent the accumulation of sediment and other debris that may be discharged into coastal waters.
 - D.** Machinery or construction materials not essential for project improvements will not be allowed at any time in the intertidal zone.
 - E.** If turbid conditions are generated during construction a silt curtain will be utilized to control turbidity.
 - F.** Floating booms will be used to contain debris discharged into coastal waters and any debris discharged will be removed as soon as possible but no later than the end of each day.
 - G.** Non buoyant debris discharged into coastal waters will be recovered by divers as soon as possible after loss.
 - H.** All trash and debris shall be disposed in the proper trash and recycling receptacles at the end of every construction day.
 - I.** The applicant shall provide adequate disposal facilities for solid waste, including excess concrete, produced during demolition or construction.
 - J.** Debris shall be disposed of at a legal disposal site or recycled at a recycling facility. If the disposal site is located in the coastal zone, a Coastal Development Permit or an amendment to this permit shall be required before disposal can take place unless the Executive Director determines that no amendment or new permit is legally required.

- K.** All stock piles and construction materials shall be covered, enclosed on all sides, shall be located as far away as possible from drain inlets and any waterway, and shall not be stored in contact with the soil.
- L.** Machinery and equipment shall be maintained and washed in confined areas specifically designed to control runoff. Thinners or solvents shall not be discharged into sanitary or storm sewer systems.
- M.** The discharge of any hazardous materials into any receiving waters shall be prohibited.
- N.** Spill prevention and control measures shall be implemented to ensure the proper handling and storage of petroleum products and other construction materials. Measures shall include a designated fueling and vehicle maintenance area with appropriate berms and protection to prevent any spillage of gasoline or related petroleum products or contact with runoff. The area shall be located as far away from the receiving waters and storm drain inlets as possible.
- O.** Best Management Practices (BMPs) and Good Housekeeping Practices (GHPs) designed to prevent spillage and/or runoff of demolition or construction-related materials, and to contain sediment or contaminants associated with demolition or construction activity, shall be implemented prior to the on-set of such activity.
- P.** All BMPs shall be maintained in a functional condition throughout the duration of construction activity.

6. Best Management Practices (BMPs) Program. By acceptance of this permit the applicant agrees that the long-term water-borne berthing of boat(s) in the approved dock and/or boat slip will be managed in a manner that protects water quality pursuant to the implementation of the following BMPs.

A. Boat Cleaning and Maintenance Measures:

1. In-water top-side and bottom-side boat cleaning shall minimize the discharge of soaps, paints, and debris;
2. In-the-water hull scraping or any process that occurs under water that results in the removal of paint from boat hulls shall be prohibited. Only detergents and cleaning components that are designated by the manufacturer as phosphate-free and biodegradable shall be used, and the amounts used minimized; and
3. The applicant shall minimize the use of detergents and boat cleaning and maintenance products containing ammonia, sodium hypochlorite, chlorinated solvents, petroleum distillates or lye.

B. Solid and Liquid Waste Management Measures:

1. All trash, recyclables, and hazardous wastes or potential water contaminants, including old gasoline or gasoline with water, absorbent materials, oily rags, lead acid batteries, anti-freeze, waste diesel, kerosene and mineral spirits shall not at any time be disposed of in the water or gutter but, rather be disposed of in a manner consistent with state and/or federal regulations.

C. Petroleum Control Management Measures:

1. Boaters will practice preventive engine maintenance and will use oil absorbents in the bilge and under the engine to prevent oil and fuel discharges. Oil absorbent materials shall be examined at least once a year and replaced as necessary. Used oil absorbents are hazardous waste in California. Used oil absorbents must therefore be disposed in accordance with hazardous waste disposal regulations. The boaters shall regularly inspect and maintain engines, seals, gaskets, lines and hoses in order to prevent oil and fuel spills. The use of soaps that can be discharged by bilge pumps is prohibited;
2. If the bilge needs more extensive cleaning (e.g., due to spills of engine fuels, lubricants or other liquid materials), the boaters will use a bilge pump-out facility or steam cleaning services that recover and properly dispose or recycle all contaminated liquids; and
3. Bilge cleaners which contain detergents or emulsifiers will not be used for bilge cleaning since they may be discharged to surface waters by the bilge pumps.

7. Resource Agencies. The permittee shall comply with all requirements, requests and mitigation measures from the California Department of Fish and Wildlife (CDF&W), the Regional Water Quality Control Board (RWQCB), the U.S. Army Corps of Engineers (USACOE), and the U.S. Fish and Wildlife Service (USF&WS) with respect to preservation and protection of water quality and marine environment. Any change in the approved project that may be required by the above-stated agencies shall be submitted to the Executive Director in order to determine if the proposed change shall require a permit amendment pursuant to the requirements of the Coastal Act and the California Code of Regulations.

8. Public Rights and Public Trust. The Coastal Commission's approval of this permit shall not constitute a waiver of any public rights that exist or may exist on the property. The permittee shall not use this permit as evidence of a waiver of any public rights that may exist on the property. If, at a future date, any portion of the development approved by this permit is determined to be located on or over public trust lands, then any development approved by this coastal development permit not compatible with the public trust shall be removed.

9. Condition Compliance. Within 90 days of issuance of this coastal development permit, or within such additional time as the Executive Director may grant for good cause, the permittee shall satisfy all conditions pursuant to the terms of the coastal development permit.

IV. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION, LOCATION AND PREVIOUS PERMITS

The proposed project includes the removal of an 884 square foot U shaped dock float and four 14-inch square concrete marina guide; installation of a 951 square foot dock float, four 18-inch square concrete guide piles; and relocation of the existing 4-foot x 24-foot gangway associated with a single-family residence on a bayfronting lot. The new dock system will be comprised of wood and composite material, foam, and concrete. The project description submitted with the

subject application would result in an increase of 67 square feet of water coverage (951 square feet – 884 square feet = +67 square feet); however, the applicant has revised the project by reducing the width of the dock to 9 feet resulting in an 871 square foot dock, which will result in a net decrease of 13 square feet of water coverage (871 square feet – 884 square feet = -13 square feet) ([Exhibit No. 2](#)). Current design and building requirements will require wider piles, which will increase fill of soft bottom habitat (9 square feet proposed - 5.44 square feet existing = 3.56 square feet increase in fill). The proposed dock float will be landward of the existing dock float and will not extend past the U.S. Pierhead Line consistent with the City of Newport Beach Harbor Permit Policy.

The applicant has also proposed after-the-fact approval of a 555 square foot deck (5 feet wide x 111 feet long) cantilevered from the bulkhead over the water ([Exhibit No. 2](#)).

The subject site is located at 86 Linda Isle in the locked gate community of Linda Isle in the City of Newport Beach, Orange County ([Exhibit No. 1](#)). Single-family residences and associated private boat dock systems and cantilevered decks characterize the subject site and the surrounding area. The area of the harbor over which the proposed dock would be located and the proposed deck would be cantilevered consists of a water parcel owned by the Linda Isle Community Association and the proposed project is similar to numerous adjacent development located within this water parcel allowed by the Linda Isle Community Association.

The City of Newport Beach LCP was effectively certified on January 13, 2017. The proposed project takes place beyond the bulkhead located bayward of the high tide and is thus within the Commission's original permit jurisdiction. 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.

Previous Commission actions on the subject property consist of the following:

On December 10, 2015, the Commission approved Coastal Development Permit (CDP) No. 5-15-1992 (86 Linda Isle, LLC) for the removal of an existing 896 square foot U-shaped dock with 4-14-inch square concrete guide piles and a 4-foot x 24-foot gangway and installation of a new 884 square foot U-shaped dock with new 4-14-inch square concrete piles and 4-foot x 24-foot gangway. Special Conditions were imposed regarding: 1) Pre-and Post-Construction Eelgrass Survey(s); 2) Pre-Construction *Caulerpa Taxifolia* Survey; 3) Construction responsibilities and debris removal; 4) Best management Practices (BMPs) Program; and 5) Acknowledgement of public rights.

The biological productivity of coastal waters is highly dependent on sunlight for photosynthesis by lower order green algae, phytoplankton, and diatoms that form the basis of the marine food chain. In addition to reduced sunlight and decreases in biological productivity of coastal waters, increased coverage of coastal waters is a significant concern since it also impedes avian foraging activities. Larger dock structures decrease foraging habitat for sight foraging marine birds, such as the State and federally listed California brown pelican found throughout Newport Harbor. Although the coverage of bay surface area habitat associated with any one project may not seem significant, the cumulative effect of allowing unnecessarily large dock structures and resulting increases in water coverage throughout Newport Harbor could be significant. It should be noted that there are hundreds of private residential docks in Newport Harbor. If each were permitted to

increase the amount of fill and water coverage beyond that which is consistent with the Coastal Act, the cumulative effect would be a significant loss of coastal waters and soft bottom habitat.

A specific biological resource that can be adversely affected by increased water coverage is eelgrass (*Zostera marina*). Eelgrass is a marine flowering plant that grows in soft sediments within coastal bays and estuaries. Eelgrass canopies consist of shoots and leaves approximately 1 to 3 feet long that typically attract marine invertebrates and fish species. Under normal circumstances, a diverse community of benthic organisms (e.g. clams, crabs, and worms) live within the soft sediments that cover eelgrass root and rhizome mass systems. Eelgrass beds also function as a nursery for many juvenile fishes – including species of commercial and/or sporting value such as California halibut and corbina. Eelgrass beds are also important foraging areas for piscivorous seabirds that seek baitfish attracted to eelgrass cover. Eelgrass is also an important ecological contributor to the detrital (decaying organic material) food web of bays and estuaries as the decaying plant material is consumed by many benthic invertebrates and converted to primary nutrients by bacteria.

The existing dock float on this site consists of 884 square feet. In order to reduce the amount of water coverage and the impact upon biological productivity of the area, the applicant has proposed to revise the project to reduce the width of the dock float from 10 feet to 9 feet, resulting in an 871 square foot dock float and a net decrease of 13 square feet of water coverage.

The City of Newport Beach Harbor Resources Division has developed Harbor Design Criteria Guidelines and Standards which, though not certified by the Coastal Commission, provide criteria for designing dock systems in a way that minimizes water coverage while providing for a usable dock. While the revised dock float will be larger in width than the 6-foot wide minimum identified in the guidelines, it still results in less water coverage and as stated is similar to docks in the area approved by the Commission. While the applicant has provided revised plans showing this reduced water coverage, it has not yet obtained approval from the City of Newport Beach Harbor Resources Division for this dock system revision. Therefore, the Commission imposes **Special Condition No. 1**, which requires the applicant to submit revised project plans approved by the City of Newport Beach Harbor Resources Division.

Eelgrass (*Zostera marina*) was discovered at the project site, but the project has been designed to avoid impacts to eelgrass. The eelgrass survey that determined that eelgrass was located at the project site took place on March 18, 2018; however, eelgrass surveys completed during the active growth phase of eelgrass (March through October) are valid for 60-days with the exception of surveys completed between August and October. A survey completed between August-October is valid until the resumption of active growth (i.e., March 1). The project is agendaized for the November 2019 Coastal Commission Hearing, so the existing eelgrass survey will no longer be valid in time for construction of the project. Therefore, the Commission imposes **Special Condition No. 2**, which requires a new eelgrass survey and identifies the procedures necessary to be completed prior to beginning construction, in case the new survey also expires prior to commencement of construction. In addition, the special condition identifies post-construction eelgrass procedures. These conditions will ensure that should impacts to eelgrass occur (though none are expected as conditioned), the impacts will be identified and appropriate mitigation required.

In 1999, a non-native and invasive aquatic plant species, *Caulerpa Taxifolia*, was discovered in parts of Huntington Harbor. *Caulerpa Taxifolia* is a type of seaweed which has been identified as a threat to California's coastal marine environment because it has the ability to displace native aquatic plant species and habitats. Information available from the National Marine Fisheries Service indicates that *Caulerpa Taxifolia* can grow in large monotypic stands within which no native aquatic plant species can co-exist. Therefore, native seaweeds, seagrasses, and kelp forests can be displaced by the invasive *Caulerpa Taxifolia*. This displacement of native aquatic plant species can adversely impact marine biodiversity with associated impacts upon fishing, recreational diving, and tourism. *Caulerpa Taxifolia* is known to grow on rock, sand, or mud substrates in both shallow and deep water areas. Since eelgrass grows within the general project vicinity, *Caulerpa Taxifolia*, if present, could displace eelgrass in the channels.

A pre-construction *Caulerpa Taxifolia* survey was completed on March 18, 2018, as required by the City of Newport Beach Harbor Resources Division and none was found. However, *Caulerpa Taxifolia* surveys are valid for 90 days. The project is agendaized for the November 2019 Coastal Commission Hearing and by this time the *Caulerpa Taxifolia* survey would not continue to be valid since 90-days have passed since the survey was completed. Thus, an up-to-date *Caulerpa Taxifolia* survey must be conducted prior to commencement of the project. In order to assure that the proposed project does not cause the dispersal of *Caulerpa Taxifolia*, **Special Condition No. 3** requires the applicant, prior to commencement of development, to survey the project area for the presence of *Caulerpa Taxifolia*. If *Caulerpa Taxifolia* is present in the project area, no work may commence and the applicant shall seek an amendment or a new permit to address impacts related to the presence of the *Caulerpa Taxifolia*, unless the Executive Director determines that no amendment or new permit is legally required.

As conditioned for eelgrass and *Caulerpa Taxifolia* surveys, impacts to those biological resources will be minimized. In order to protect these resources and additional biological resources from potential future impacts, **Special Condition No. 4** requires the applicant to obtain a permit amendment or a new permit for any repair or maintenance of the proposed dock system or the deck cantilevered over the bulkhead.

The proposed work will be occurring on and over coastal waters. The storage or placement of construction material, debris, or waste in a location where it could be discharged into coastal waters would result in an adverse effect on the marine environment. To assure that all impacts to water quality are minimized and to reduce the potential for construction related impacts on water quality, the Commission imposes **Special Condition No. 5**, which requires, but is not limited to, appropriate storage and handling of construction equipment and materials to minimize the potential of pollutants to enter coastal waters. To reduce the potential for post-construction impacts to water quality, **Special Condition No. 6** requires the continued use and maintenance of post construction BMPs. The Regional Water Quality Control Board has determined that the proposed project will not adversely impact water quality if standard construction methods and materials are used. The applicant has applied for a permit from the U.S. Army Corps of Engineers and the permit is pending coastal development permit approval. To ensure that the proposed project adheres to the requirements from other resource agencies, the Commission imposes **Special Condition No. 7**, which requires the permittee to comply with all requirements, requests and mitigation measures from the California Department of Fish and Wildlife, the Regional Water Quality Control Board, the U.S. Army Corps of Engineers, and the U.S. Fish and

Wildlife Service with respect to preservation and protection of water quality and marine environment.

Coastal Act Section 30233 limits the allowable fill of open coastal waters, wetlands, estuaries to certain uses only, including “new or expanded boating facilities.” However, fill for boating facilities is only allowed *where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects*. The project includes removal of four 14-inch square concrete guide piles and installation of four 18-inch square concrete guide piles. This results in an additional fill of 3.56 square feet. However, this is a minimal increase and the piles proposed are the minimum sized pilings and the minimum number of pilings necessary for structural stability of the project. Also, the piles will support the proposed dock float; therefore, this associated fill would be consistent with Section 30233(a)(3) of the Coastal Act, as it is for a boating-related use.

The applicant has also proposed after-the-fact approval of a 555 square foot deck (5 foot wide x 111 foot long) cantilevered from the bulkhead over the water (Newport Harbor) ([Exhibit No. 2](#)). The City’s certified LCP includes Implementation Plan Policy 21.30C.050(G) regarding the location of proposed decks over the waters of Newport Harbor, which is a very popular recreational boating area. To be consistent with this development standard, the cantilevered deck may project a maximum of 5 feet beyond the bulkhead, maintain minimum setbacks of 5 feet from the prolongations of the side property lines, and must be located outside the Tidelands Trust, which are mapped State tidelands administered by the City. Specifically regarding the Tidelands Trust, IP Section 21.30C.050(G)(5) prohibits patios to extend over waters of Newport Harbor “unless the waters are adjacent to the upland property *and outside the areas described in the tidelands trust*”.

While the applicant has proposed to include after-the-fact approval of the cantilevered deck and it appears to be consistent with the development standards of IP Section 21.30C.050(G)(5), the applicant has not yet obtained approval from the City of Newport Beach Harbor Resources Division for this cantilevered deck. Therefore, the Commission imposes **Special Condition No. 1**, which requires the applicant to submit revised project plans including the cantilevered deck approved by the City of Newport Beach Harbor Resources Division and consistent with the City’s certified LCP Implementation Plan Policy 21.30C.050(G) regarding the design and location of proposed decks over the waters of Newport Harbor.

The area of the bay over which the proposed deck would be cantilevered consists of a water parcel owned by the Linda Isle Community Association and is not part of the mapped State Tidelands held in trust by the City.

Although the proposed cantilevered deck does not appear to be located on State tidelands administered by the City of Newport Beach pursuant to a tidelands grant, because the properties seaward of the bulkhead are fully submerged bay waters at all times, the question of the public trust doctrine arises. The public trust 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. Based on the information available to the Commission at this time, it appears that the submerged parcel is not subject to the public trust because the mean high tide line

(MHTL) was adjudicated in this area in case no. 20436 in Orange County Superior Court in 1926 (Orange County v. The Irvine Company). The court determined that the MHTL in this area is located westward of the subject property. Further, the areas are part of a subdivision tract that dredged a channel eastward and northward from the MHTL established in case no. 20436. This dredging changed portions of the property from upland swamp and overflow property to property subject to tidal flow.

Determinations about the Public Trust boundary are ultimately the jurisdiction of the State Lands Commission (SLC). However, assuming the information concerning the history of the submerged lands are correct, pursuant to Public Resources Code section 7552.5, the submerged land is nevertheless subject to a navigational easement that, in general, precludes the owner from preventing the public from using the waters for navigational purposes even if the submerged lands are not public trust lands. The proposed after-the-fact cantilevered deck will be landward of the designated pierhead line in the channel and, therefore, is not expected to interfere with navigation through the channel on the north of Linda Isle because pierhead lines are established to ensure that docks and piers do not interfere with navigation. In addition, construction of the proposed cantilevered deck may hinder but would not completely obstruct the public's ability to access the water areas fronting the applicant's lot for recreational boating purposes and, as a practical matter, is unlikely to have much additional impact on public access due to the adjacent over-water development and the proposed private dock that extends farther out into the bay. Thus, the proposed cantilevered deck would not be inconsistent with the navigational easement over the submerged lands.

There is no direct public pedestrian access to the water through this subject private residential lot, but public access to the bay exists in the area across the channel from the Linda Isle community along the public walkways on Lido Island and Balboa Island ([Exhibit No. 1](#)). From these access points, members of the public may access the bay and, for example, launch a kayak or standup paddle board. The public can access the submerged lands immediately seaward of the bulkhead at the subject site by watercraft or by swimming. However, the existing and proposed dock extend in front (bayward) of the area where the cantilevered deck would be constructed and to some extent limits public use of the waters immediately adjacent to the bulkhead.

The proposed project involves the after-the-fact approval of a deck cantilevered from the bulkhead over Newport Harbor associated with a single-family residence on a bayfronting lot. As discussed above, the areas of water over which the proposed deck would cantilever that are situated bayward of the existing bulkhead are not within the State Tidelands area administered by the City of Newport Beach. Applying the City's LCP as guidance, the proposed deck is consistent with IP Section 21.30C.050(G)(5), which prohibits cantilevered decks *within* Tidelands Trust areas, but allows them to extend over bay waters *outside* of the Tidelands Trust when certain conditions are met. While revised plans for the cantilevered deck approved by the City of Newport Beach Harbor Resources Division are required by **Special Condition No. 1**, preliminary review by staff of the submitted materials indicates that the cantilevered deck satisfies this IP requirement as the proposed cantilevered deck is outside of the Tidelands Trust areas of Newport Harbor, does not exceed the maximum 5-foot cantilevered projection, and meets the minimum 5-foot side property line setback requirement. **Special Condition No. 1** will require City of Newport Beach Harbor Resources Division approval and consistency with the City's certified LCP also includes Implementation Plan Policy 21.30C.050(G) regarding the

design and location of proposed decks over the waters of Newport Harbor. Therefore, the proposed cantilevered deck is consistent with public access policies of the Coastal Act and the certified LCP.

However, Coastal Commission approval of this project cannot waive any public rights that may exist on the property. Thus, the Commission impose **Special Condition No. 8**, which states that the approval of a coastal development permit for the project does not waive any public rights or interest that exist or may exist on the property, and that if any portion of the development approved by this project is subsequently determined to be located on or over public trust lands, then development approved by this coastal development not compatible with the public trust must be removed.

B. MARINE RESOURCES

The proposed recreational boat dock development and its associated structures are an allowable and encouraged marine related use. The project design includes the minimum sized pilings and the minimum number of pilings necessary for structural stability. There are no feasible less environmentally damaging alternatives available. As conditioned, the project will not significantly adversely impact eelgrass beds and will not contribute to the dispersal of the invasive aquatic algae, *Caulerpa taxifolia*. Further, as proposed and conditioned, the project, which is to be used solely for recreational boating purposes, conforms to Sections 30224 and 30233 of the Coastal Act.

C. WATER QUALITY

The proposed work will be occurring on, within, or adjacent to coastal waters. The storage or placement of construction material, debris, or waste in a location where it could be discharged into coastal waters would result in an adverse effect on the marine environment. To reduce the potential for construction related impacts on water quality, the Commission imposes special conditions requiring, but not limited to, the appropriate storage and handling of construction equipment and materials to minimize the potential of pollutants to enter coastal waters. To reduce the potential for post-construction impacts to water quality the Commission requires the continued use and maintenance of post construction BMPs. As conditioned, the Commission finds that the development conforms to Sections 30230 and 30231 of the Coastal Act.

D. PUBLIC ACCESS

The proposed development will not affect the public's ability to gain access to, and/or to make use of, the coast and nearby recreational facilities. Therefore, as proposed the development conforms with Sections 30210 through 30214, Sections 30220 through 30224, and 30252 of the Coastal Act.

E. LOCAL COASTAL PROGRAM (LCP)

On January 13, 2017, the City of Newport Beach Local Coastal Program (LCP) was effectively certified. Development proposed bayward of the property line is located within the Commission's jurisdiction and consequently, the standard of review is the Chapter 3 of the Coastal Act and the certified LCP serves as guidance. As conditioned, the proposed development within the Commission's original jurisdiction consistent with Chapter 3 of the Coastal Act.

F. UNPERMITTED DEVELOPMENT

Violation of the Coastal Act that is associated with the proposed development has occurred on the project site, including installation of an unpermitted deck cantilevered from the bulkhead. The applicant has proposed to include the unpermitted cantilevered deck as part of this current submittal, which includes the removal and construction of a dock system. To ensure that the unpermitted development is resolved in a timely manner, the Commission imposes **Special Condition No. 9** which requires the applicant to satisfy all conditions of this permit, which are prerequisite to the issuance of this permit within 90 days of Commission action. Failure to comply with this requirement will constitute a violation of the Coastal Act.

Consideration of the permit application by the Commission has been based solely on the consistency of the proposed development with the policies of Chapter 3 of the Coastal Act. Approval of this permit does not constitute a waiver of any legal action with regard to the alleged unpermitted development, nor does it constitute admission as to the legality of any development undertaken on the subject site without a coastal development permit.

G. 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).)

In this case, the City of Newport Beach Harbor Resources Division is the lead agency and the Commission is a responsible agency for the purposes of CEQA. The City of Newport Beach determined that the proposed development is ministerial or categorically exempt from CEQA (Class 1, CEQA Guidelines Sections 15301) on January 31, 2019.

The proposed project is located in an urban area. Infrastructure necessary to serve the project exists in the area. The proposed project has been conditioned in order to be found consistent with the resource protection policies of the Coastal Act. As conditioned, the proposed project has been found consistent with the marine resources, water quality, public access and recreation policies of the Coastal Act.

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

APPENDIX A: Substantive File Documents

City of Newport Beach Harbor Resources Division Harbor Design Criteria Guidelines and Standards; Coastal Development Permit No. 5-15-1992 (86 Linda Isle, LLC); City of Newport Beach Harbor Resources Division Approval-In-Concept dated January 31, 2019; and Pre Construction Eelgrass (*Zoestra marina*) and Caulerpa Taxifolia Survey, 86 Linda Isle, Newport Beach, CA prepared by Dive Works dated March 18, 2018; Letter from Commission staff to Marine Taxonomic Services, Ltd. Dated April 25, 2019, and Letter from Swift Slip Dock and Pier Builders to Commission received June 4, 2019.