CALIFORNIA COASTAL COMMISSION
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W22a

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STAFF REPORT: REGULAR CALENDAR

Application No.: **5-19-0105**

Applicants: **Richard Roger Frank, as Trustee** of the trust for Richard Roger Frank under the Frank Community Property Trust, dated July 26, 1991, as amended, as to an undivided one-third (1/3) interest, **Susan Alice Frank, as trustee** of the Susan A. Frank Living Trust dated January 31, 2003, as to an undivided one-third (1/3) interest, and **Laurie Frank Wilson, as Trustee** of the trust for Laurie Frank Wilson under the Frank Community Property Trust, dated July 26, 1991, as amended, as to an undivided one-third (1/3) interest.

Agent: Jorge Tomas, Associated Pacific Constructors

Location: 113 Bayside Place, Newport Beach, Orange County
APN: 052-013-23

Project Description: Remove an existing pier, pier platform, gangway and boat dock float and related 32 bearing piles and replace with new pier, pier platform, gangway, and boat dock float, and related 15 bearing piles. The five boat dock float guide piles will remain in place and be re-used. The proposed pier and pier platform will be constructed of mini-mesh grating which will allow sunlight to pass through. Also proposed is after-the-fact approval of a 100 foot long, concrete deck cantilevered four feet over the existing bulkhead.

Staff Recommendation: Approval with conditions

SUMMARY OF STAFF RECOMMENDATION

The applicant is requesting approval for replacement of an existing boat dock system with a new boat dock system; and, after-the-fact approval of a 100 foot long concrete deck that cantilevers four feet over the existing bulkhead. No work is proposed to the existing bulkhead. The proposed boat dock system and cantilevered deck are allowable uses within this area of Newport Harbor.

As proposed, the replacement boat dock system will reduce the amount of fill by approximately 3 square feet and the area of overwater coverage by 200 square feet over that of the existing boat dock system. In addition, the proposed pier and pier platform will be constructed of mini-mesh grating which will allow sunlight to pass through, where the existing solid pier and pier platform do not. The lack of light is recognized widely as the primary limiting factor in the photosynthesis, growth, and depth distribution of eelgrass. The proposed replacement of solid pier and gangway materials with material through which light may pass, as well as the reduction in fill and overwater coverage is expected to have positive benefits to eelgrass growth in the immediate area. Nevertheless, even with the proposed mesh grating, reduced fill (piles), and reduced overwater coverage, due to the extensive presence of eelgrass in the project area, the proposed project is expected to have some adverse impacts on eelgrass, possibly only temporarily due to construction impacts, but also, if unmitigated, possibly permanently. To address the adverse impact to eelgrass, **Special Condition 2** requires preparation and implementation of an eelgrass mitigation plan consistent with National Marine Fisheries California Eelgrass Mitigation Plan (CEMP). The required mitigation plan will need to identify the extent of eelgrass prior to construction and after construction based surveys consistent with CEMP protocol. Depending on the results these surveys, the mitigation plan will require an eelgrass planting plan to offset any loss of eelgrass at a 1.38:1 ratio (mitigation:impact).

Also, as proposed the pier platform would be supported by four piles, one in each corner of the pier platform. However, the remainder of the 5 foot wide pier is proposed to be supported by 11 piles, each single pile centered beneath the width of the pier along the length of the pier. Typically, the Commission approves pier platforms in Newport Harbor only when no additional fill is required. **Special Condition 1** requires the proposed project to be modified such that no additional fill/piles are needed to support the additional width of the pier platform (compared to the 5 foot width of the pier). This requires that the pier platform be revised such that it no longer includes the four separate piles. It may require that the platform is reduced in area or eliminated entirely.

Staff is recommending **APPROVAL** of the proposed project with seven (7) special conditions regarding: 1) revised project plans regarding the pier platform in order to limit fill solely to allowable uses; 2) Approval from the County of Orange, holder of the tidelands grant, for the portion of the project that extends into the area seaward of the private property line; 3) submittal and implementation of an eelgrass mitigation plan to address any impacts to eelgrass resulting from the proposed project; 4) a caluerpa taxfolia survey to be conducted by the applicant prior to construction; 5) Best Management Practices to be implemented by the applicant related to long term berthing of boats; 6) appropriate storage of construction materials, mechanized equipment and removal of construction debris; and, 7) protection of any public rights that exist or may exist

at the subject site and that if any development approved by this permit is determined to extend over or on public trust lands, development inconsistent with the public trust shall be removed.

The **motion** and resolution to carry out the staff recommendation is found on **page 5**.

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Appendix A – Substantive File Documents

EXHIBITS
1. Vicinity Map
2. Project Plans
3. Newport Beach Land Use Plan Map
4. Lower Newport Bay Ownership Map, County of Orange
5. Topographic Survey of Site
6. Eelgrass Map
7. Map Depicting Bulkhead & Pierhead Lines
8. Newport Beach Approval in Concept/CEQA

I. MOTION AND RESOLUTION

Motion:

*I move that the Commission **approve** Coastal Development Permit Application 5-19-0105 subject to the conditions set forth in the staff recommendation.*

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

Resolution:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned 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 permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.

2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.

4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.

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

III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. Revised Plans

A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for the review and approval of the Executive Director, revised project plans, prepared by a qualified professional and drawn to scale, indicating the project has been revised as described below. The revised plans shall include evidence of review and approval by an appropriately licensed engineer with expertise in pier and dock construction.

The revised plans shall demonstrate that the proposed project has been revised such that no additional piles are required to support the area of the proposed pier platform beyond those necessary to support the same length of five (5) foot wide pier; that is, no more than two (2) piles to support the area of the pier platform. This may require reduction in size or elimination of the pier platform. However, in no case shall a pier platform be allowed larger than twelve (12) feet along one dimension and fourteen (14) feet along the second dimension.

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

2. **Approval from County of Orange**

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for the review and approval of the Executive Director, written evidence that the proposed project has received approval from the County of Orange, holder of the tidelands grant, for the portion of the project that extends into the area seaward of the private property line.

3. Final Eelgrass Mitigation Plan

A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit for review and written approval of the Executive Director, two (2) copies of a final eelgrass mitigation plan for the replacement of eelgrass adversely impacted by the project. The plan shall be prepared in consultation with the California Department of Fish and Wildlife (CDFW) and the National Marine Fisheries Service (NMFS). The plan shall be prepared consistent with the requirements identified below, and otherwise following the guidelines of the California Eelgrass Mitigation Policy and Implementing Guidelines dated October 2014 (CEMP). (See https://archive.fisheries.noaa.gov/wcr/publications/habitat/california_eelgrass_mitigation/Final%20CEMP%20October%202014/cemp_oct_2014_final.pdf)

The latter includes but is not limited to those guidelines focused on: eelgrass mapping; surveying; impact determinations; mitigation site selection, size, and methods; and, monitoring and success criteria. The plan shall provide that:

1. All direct impacts to eelgrass and indirect impacts to eelgrass (*e.g.*, shading or scour) shall be mitigated at a minimum final ratio of 1.38:1 (mitigation: impact);
2. All direct impacts to eelgrass and indirect impacts to eelgrass (*e.g.*, shading or scour) shall be mitigated at a minimum final ratio of 1.38:1 (mitigation: impact);
3. Adverse impacts to eelgrass shall be mitigated in-kind, on-site to the maximum extent feasible and, for any portion that cannot feasibly be mitigated on-site, off-site mitigation shall be required. The final location(s) of all on-site and off-site mitigation shall be specifically identified;
4. Inventories of existing and historical information (including maps) shall accompany detailed descriptions for each of the following sites:
    a. Eelgrass beds within the approved construction site plus a 10m buffer area, including the areas identified as susceptible to potential eelgrass disturbance, and which should also be clearly indicated on the maps;
    b. Eelgrass beds, if any, within the mitigation site(s);
    c. Eelgrass beds selected as the reference site(s);
5. The proposed mitigation methods shall be described in detail, including specification of the mitigation approach (*e.g.*, recolonization, transplant via bare-root bundles, seed buoys, or transplant frames); whether the mitigation site requires any sort of preparation; sources, quantities, spacing, *etc*. of donor eelgrass material; and, time estimates for recolonization or transplant activities to be completed.
6. Prior to commencement of construction of the portions of the approved project that would have unavoidable direct impacts on eelgrass, the eelgrass that would be directly impacted shall be transplanted to the mitigation site(s). Any additional mitigation necessary to achieve the milestones described in (8) below should also be considered for implementation prior to the commencement of construction, in order to minimize temporal loss of eelgrass ecosystem function.
7. At minimum, a monitoring plan for the mitigation and reference sites shall follow CEMP guidelines, and specify: the criteria and process for reference site selection; sampling and/or census methods to be used including frameworks, spatial resolutions, frequencies, and error; methods for statistical assessment; and, any other relevant details such that a specialist unfamiliar with the sites could readily interpret and carryout the plan. Additional metrics (*e.g.*, epifaunal load, blade height or width, qualitative photography) may also be employed and should be thoroughly described.
8. Construction schedules shall be provided, including specific commencement and completion dates for all work, with attention to the regional eelgrass growing seasons as described in the CEMP.
9. The CEMP-recommended annual performance milestones shall guide achievement towards the minimum final mitigation goal (*i.e.*, attainment of 100 percent coverage of eelgrass and at least 85 percent density of reference site(s) over not less than 1.2 times the area of the impact site) within three years of completion of the initial mitigation activities, and sustain that goal for an additional two years thereafter. If achievement of this performance milestone schedule is delayed for any reason, monitoring shall continue until the minimum final mitigation goal has been sustained for an additional two years.
10. Reports shall be submitted to the Executive Director, as follows:

a. Annually, with description of the results of the 0, 12, 24, 36, 48, and 60-month (post-planting) performance evaluations at the mitigation site(s), including the areal extent, percent coverage, and density of eelgrass at the mitigation and reference site(s), and any relevant observations, recommended maintenance (including replanting measures), or other adaptive management strategies recommended for consideration;
b. At the end of the proposed five-year period, a comprehensive report describing the results of the plan in detail, similar to that described above for the annual reports but with reference to the overall success of the mitigation effort;

11. A follow-up mitigation program shall be proposed if the original program is wholly or partially unsuccessful. Prior to implementation, this follow-up program shall be at least reviewed and approved by the Executive Director in writing, and may require an amendment to this permit.

The permittee shall undertake development in conformance with the approved final plans unless the Commission amends this permit or the Executive Director provides a written determination that no amendment is legally-required for any proposed minor deviations.

B. **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 by the Permittees during the period of active eelgrass growth (this period varies in different regions; consult the CEMP for the relevant season in the project 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 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 subsection C (below).

C. **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 1.2:1 (mitigation:impact) ratio on-site, or at another location, in accordance with the CEMP. Any exceptions to the required 1.2:1 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 (1.2:1) 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.

4. Pre-Construction *Caulerpa taxifolia* Survey

A. Not more than 90 days nor less than 30 days prior to commencement or recommencement 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 green alga, *Caulerpa taxifoli*a. 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 Wildlife, and the National Marine Fisheries Service (see http://www.westcoast.fisheries.noaa.gov/habitat/aquatic_invasives/caulerpa_taxifolia.html).

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

   i. for the review and written approval of the Executive Director; and
   ii. to the Surveillance Subcommittee to the Southern California Caulerpa Action Team (SCCAT). The SCCAT Surveillance Subcommittee may be contacted through William Paznokas, California Department of Fish & Wildlife (858-467-4218/William.Paznokas@wildlife.ca.gov) or Bryant Chesney, National Marine Fisheries Service (562-980-4037/Bryant.Chesney@noaa.gov).

2. If *C. taxifolia* is found within the project or buffer areas, the applicant shall not proceed with the project until 1) the applicant provides evidence to the Executive Director that all *C. taxifolia* discovered within the project and/or buffer area has been eliminated in a manner that complies with all applicable governmental approval requirements, including but not limited to those of the California Coastal Act, or 2) the applicant has revised the project to avoid any contact with *C. taxifolia*. No revisions to the project shall occur without a Coastal Commission approved amendment to this coastal development permit

unless the Executive Director provides a written determination that no amendment is legally required.

5. 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 boat 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:
   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.

6. Storage of Construction Materials, Mechanized Equipment and Removal of Construction Debris. The permittee shall comply with the following construction-related requirements:

(a) No demolition or construction materials, debris, or waste shall be placed or stored on the beach or anywhere it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain, or tidal erosion and dispersion.

(b) No demolition or construction equipment, materials, or activity shall be placed in or occur in any location that would result in impacts to environmentally sensitive habitat areas, streams, wetlands or their buffers.

(c) Any and all debris resulting from demolition or construction activities shall be removed from the project site within 24 hours of completion of the project.

(d) 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.

(e) All trash and debris shall be disposed in the proper trash and recycling receptacles at the end of every construction day.

(f) The applicant shall provide adequate disposal facilities for solid waste, including excess concrete, produced during demolition or construction.

(g) 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.

(h) 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.

(i) 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.

(j) The discharge of any hazardous materials into any receiving waters shall be prohibited.

(k) 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.

(l) 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.

(m) All BMPs shall be maintained in a functional condition throughout the duration of construction activity.

(n) During construction of the project, no runoff, site drainage or dewatering shall be directed from the site into any street, alley or stormdrain, unless specifically authorized by the California Regional Water Quality Control Board.

7. Public Rights. The approval of this permit shall not constitute a waiver of any public rights that exist or may exist on the property now or in the future. The permittee shall not

use this permit as evidence of a waiver of any public rights that may exist on the property now or in the future. If any development approved by this permit is determined to extend over or on public trust lands, development inconsistent with the public trust shall be removed.

IV. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION

The applicant is proposing the replacement of an existing pier, pier platform, gangway, and boat dock float with a new pier, pier platform, gangway, and new boat dock float. The existing thirty-two (32) bearing piles will be replaced with fifteen (15) bearing piles. The subject boat dock system serves three neighboring properties, including the applicant's. The applicant is also requesting after-the-fact approval of a 100 foot long concrete deck that cantilevers 4 feet over the existing bulkhead. No work is proposed to the existing bulkhead. The proposed cantilevered deck provides access to the boat dock system from the adjacent properties. The subject site is a bulkheaded property fronting Newport Harbor located at 113 Bayside Place, in the Corona del Mar area of the City of Newport Beach, Orange County (**Exhibit 1**). Project plans are included as **Exhibit 2**. Single-family residences and associated private dock systems are the typical pattern of development for harbor-fronting properties in Newport Beach.

The net fill amount resulting from the proposed project will be a reduction of approximately 3 square feet compared to fill from the existing dock system, due to the reduced number of piles (from 32 to 15 bearing piles). The proposed project will also result in a 200 square foot reduction in overwater coverage, from 2,545 square feet (existing) to 2,345 square feet (proposed). In addition, the proposed pier and pier platform (totaling 1268 square feet) will be constructed of mini-mesh grating which will allow sunlight to pass through, where it currently cannot. The lack of light is recognized widely as the primary limiting factor in the photosynthesis, growth, and depth distribution of seagrasses[1] such as eelgrass. The proposed replacement of solid pier and pier platform materials with material through which sunlight may pass is expected to have positive benefits to eelgrass growth in the project area.

Piles: The thirty-two (32), 10.375-inch diameter, steel pipe, bearing piles are proposed to be replaced with fifteen (15), 12.75-inch diameter steel pipe, bearing piles. The bearing piles support the pier and pier platform. The net fill amount will be reduced from 8.371 square feet to 5.301 square feet. The five boat dock float guide piles will remain in place and be re-used.

Pier: The 218' x 6' pier (1308 square feet) will be replaced with a new 220' by 5' pier (1100 square feet). The additional two feet of pier length is due to the reduction in the size of the proposed pier platform. The new pier will be constructed of 1 1/5-inch thick *globalgrid* mini-mesh grating which allows sunlight to pass through, whereas the existing pier is solid.

Pier Platform: The 12' x 16' pier platform (192 square feet) is proposed to be replaced with a 12' x 14' pier platform (168 square feet). The proposed pier platform will be constructed of 1 1/5

[1] https://www.jstor.org/stable/1353073?seq=1#page_scan_tab_contents

inch thick *globalgrid* mini-mesh grating which allows sunlight to pass through, whereas the existing pier platform is solid.

Boat Dock Float: The existing "W" shaped boat dock float is proposed to be replaced with a new "W" shaped boat dock float of the same dimensions: outside dimensions of 53' long by 50' wide including an 8' wide headwalk and three, 4' wide fingers. The boat dock float is proposed in same location and configuration; like for like.

Gangway: The 4' x 24'gangway will be replaced with a new gangway that will also be 4' by 24'.

Cantilevered Deck: The proposed 100' long concrete deck will cantilever 4' over the existing bulkhead and includes a 12" high brick wall atop the perimeter of the cantilevered deck.

The subject site fronts on Newport Harbor near the harbor entrance (**Exhibit 1**). The landward portion of the subject site is land use designated Single Unit Residential Detached (RSD-A) on the City's certified LCP Land Use Plan map (Exhibit 3). The area bayward of the residentially designated property is land use designated Tidelands Submerged Lands (TS). These tidelands are administered by the County of Orange (Exhibit 4). However, no evidence of approval of the proposed portion of the boat dock replacement located over these County waters has been provided. Therefore **Special Condition 2** requires that written evidence of County approval be provided prior to issuance of the coastal development permit.

The area of the bay over which the proposed deck would be cantilevered consists of a submerged portion of the parcel of land owned by the applicant. The applicant has provided information indicating that the area approximately +/- 110 feet bayward of the bulkhead at the site, including the area of a portion of the pier and of the cantilevered deck, is located landward of the ordinary high tide line; which would mean the submerged lands under the proposed cantilevered deck and a portion of the pier would be privately owned and not public trust lands. The topographic survey of the subject site (**Exhibit 5**) includes a line depicting the waterward-most location of the subject site property line. The line is labeled: "*line of the ordinary high tide line of the Pacific Ocean in Newport Bay per Orange County Superior Court Case No. 40024.*"

Thus, currently available information indicates that the parcel, including the submerged area, is located landward of the mean high tide line. Based on the information available to the Commission at this time, it appears that the submerged area of the parcel is not subject to the public trust because the mean high tide line (MHTL) was adjudicated in this area in 1942 in Orange County Superior Court Case No. 40024. The court determined that the MHTL in this area is located west/bayward of the subject property. Determinations about the Public Trust boundary are ultimately the jurisdiction of the California State Lands Commission (CSLC). In any case, although the proposed cantilevered deck does not appear to be located on public tidelands, because the property seaward of the bulkhead is fully submerged bay waters at all times, the question of the presence of a navigational easement arises.

Assuming the applicant's information concerning the history of the submerged land is 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 west of the site because pierhead lines are established to ensure that docks and piers do not interfere with navigation. Moreover, the private submerged lands are shallow (hence the need for the long pier), and likely not suitable for navigation except by small watercraft. 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 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.

The replacement boat dock system is similar in function to the many boat docks within Newport Harbor associated with residential development. The City of Newport Beach Harbor Resources Division reviewed the proposed plans and issued an Approval-in-Concept/CEQA Exemption dated 11/9/18.

The remaining portion of the pier, and the entire pier platform, gangway, and boat dock float are all located seaward of the line of ordinary high tide depicted on the site survey, on public tide and submerged lands. The boat dock system is an allowable use.

Standard of Review
The City of Newport Beach LCP was recently certified on January 13, 2017. The proposed project consists of development located on submerged lands and is therefore within the Commission's jurisdiction and the Commission is the permit-issuing authority. The standard of review for development within the Commission's jurisdiction is Chapter 3 of the Coastal Act and the City's certified LCP may be used as guidance. (Pub. Res. Code § 30519(b).)

B. BIOLOGICAL RESOURCES
Coastal Act Section 30233(a) states (in pertinent part):

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

(3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

Relevant City of Newport Beach LCP Land Use Plan Policies

4.2.3-1. *Permit the diking, filling, or dredging of open coastal waters, wetlands, estuaries,*

and lakes in accordance with other applicable provisions of the LCP, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects and limited to the following:

…

A. In open coastal waters, other than wetlands, including estuaries and streams, new or expanded boating facilities, including slips, access ramps, piers, marinas, recreational boating, launching ramps, and pleasure ferries, and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

4.2.3-2. Continue to permit recreational docks and piers as an allowable use within intertidal areas in Newport Harbor.

Fill of Coastal Waters

Section 30233(a) of the Coastal Act limits fill of coastal waters to certain allowable uses, the least environmentally damaging alternative, and when feasible mitigation measures to minimize adverse environmental effects are included. The City's certified LCP also includes policies with these same requirements. The proposed development includes fill in the form pier piles. Although the diameter of the proposed piles is larger than the diameter of the existing piles (12.75 inches vs. 10.375 inches), the diameter of the proposed piles allows far fewer piles overall (from 32 existing piles down to 15 proposed piles). This reduction in the number of piles will result in an overall reduction of fill from 8.371 square feet down to 5.301 square feet, an overall reduction of approximately 3 square feet of fill. In addition, the reduction in pier width and pier platform area will result in a 200 square foot reduction in overwater coverage. And the use of mesh grated material for the proposed pier and pier platform will allow sunlight to pass through where currently it cannot. The lack of light is recognized widely as the primary limiting factor in the photosynthesis, growth, and depth distribution of seagrasses[2] such as eelgrass. The proposed reductions in fill and overwater coverage, and the replacement of solid pier and pier platform materials with material through which sunlight may pass are expected to have positive benefits to eelgrass growth in the project area. In addition, the proposed boat dock system will serve three properties. Sharing the pier and boat dock among three properties reduces the fill and overwater coverage compared to separate piers and boat docks to serve each residence (although it must be noted that due to site constraints and the pie shaped configuration of the properties, it would be difficult to accommodate more dock systems at the site). Thus, the proposed project constitutes the least environmentally damaging alternative.

Coastal Act Section 30233(a) also requires that any fill of coastal waters be limited to one of the specifically enumerated uses. One of the allowable uses under Section 30233 is boating facilities. The proposed pier, gangway, and boat dock float allow the applicant and neighbors to dock boats. Thus, the proposed replacement of the boat dock system constitutes a boating facility, an allowable use.

[2] https://www.jstor.org/stable/1353073?seq=1#page_scan_tab_contents

It is not as clear whether the proposed 12' by 14' pier platform constitutes a boating facility. In this case the pier is longer than usual, likely due to the need to bridge the shallow water nearer the bulkhead to reach adequate channel depth for docking boats. The pier platform is proposed at the bayward end of the pier, where the gangway connects to the pier. Thus, based upon the 220 foot length of the pier, the pier platform can be used to store smaller, hand launched watercraft such as kayaks or stand up paddleboards on the platform.

Finally, the project must include mitigation measures to minimize adverse environmental effects to be consistent with Section 30233 of the Coastal Act.

In those cases where it is demonstrated that a pier is necessary for the boat dock to function, the Commission has allowed widened areas of the necessary pier (i.e. pier platform) when: 1) no additional pile(s) (fill) are required to support the widened area (pier platform); 2) the area conforms to the City's Harbor Permit Policies; and 3) when limited to boating related (i.e. allowable) uses. The City's Harbor Permit Policies are not part of the City's LCP, and in any case would not be the standard of review in this area of the Commission's retained jurisdiction, but may be used as guidance[3]. The City's Harbor Permit Policies allow a pier platform up to 170 square feet. In this case, the proposed pier platform would be 168 square feet, consistent with this City requirement.

Typically, with regard to pier platforms, the Commission has found that fill is minimized when a pier platform has been supported by two piles in the center of the platform, rather than four piles, one in each corner of the platform because two piles result in less fill than four piles. Often this is accomplished through the use of "T" piles, where the pile is topped by a wider bar upon which the platform sits. In this case, the proposed 220 foot long pier will be supported by single piles in the center of the pier width, along the length of the pier. If the platform were not proposed, it seems reasonable to assume that this pattern of fewer, center piles (rather than piles at the outer edges of the pier) would continue beneath the area of the proposed platform. However, as currently proposed, the platform would be supported by four individual piles, not two. As proposed, the platform pile support would not minimize fill. However, if the project were modified to reduce the number of piles such that no additional piles are needed to support the pier platform, fill would be minimized. Such a modification may still allow for a pier platform, or may require the platform to be eliminated, depending on what can be supported on two, rather than four piles. It may be necessary to reduce the size of the platform as needed to minimize the number of piles (fill) needed for support.

If the project were so modified, it could be found to be consistent with the Section 30233 of the Coastal Act regarding fill of coastal waters. Therefore, **Special Condition 1** is imposed which requires revised plans demonstrating that the pier platform may only be allowed if it requires no more fill (piles) than the same length of five foot wide pier. This may require elimination of the pier platform. As conditioned, the Commission finds the proposed project is consistent with Section 30233 of the Coastal Act regarding fill of coastal waters.

[3] The limitation of pier platform area to 170 square feet in the City's Harbor Permit Polices is not the standard of review, but is useful as guidance in establishing an upper limit on the size of pier platforms.

The proposed recreational boat dock development and its associated structures represent an allowable and encouraged marine-related use. As conditioned, the project will include the minimum sized pilings and the minimum number of pilings necessary for structural stability. The proposed project will reduce the amount of fill of coastal waters and will reduce the area of overwater coverage. In addition, parts of the boat dock system (pier and pier platform) that are currently opaque and do not allow transmittal of sunlight, will be constructed of mesh material that will allow transmittal of sunlight which is expected would improve habitat and vegetation growth within the area. There are no feasible less environmentally damaging alternatives available. The proposed boat dock system meets the City of Newport Beach Harbor Permit Policies in that it is located landward of both the bulkhead and pierhead lines. The proposed dock system is generally consistent with the size of dock systems in the adjacent area, and is consistent with past Commission issued permits. As conditioned, the project, which is to be used solely for recreational boating purposes, is consistent with Section 30233 of the Coastal Act and the relevant sections of the City's certified LUP regarding fill of coastal waters.

Eelgrass

Section 30230 of the Coastal Act states:

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

Section 30231 of the Coastal Act, Biological productivity, water quality, states:

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

Relevant City of Newport Beach LCP Land Use Plan Policies

4.1.4-1. *Continue to protect eelgrass meadows for their important ecological function as a nursery and foraging habitat within the Newport Bay ecosystem.*

4.1.4-2. *Implement eelgrass restoration and enhancement programs in Newport Harbor.*

4.1.4-3. *Site and design boardwalks, docks, piers, and other structures that extend over the water to avoid impacts to eelgrass meadows. Encourage the use of materials that allow sunlight penetration and the growth of eelgrass.*

4.1.4-4. *Provide for the protection of eelgrass meadows and mitigation of impacts to eelgrass meadows in a comprehensive harbor area management plan for Newport*

Bay.

4.1.4-5. *Where applicable require eelgrass and Caulerpa taxifolia surveys to be conducted as a condition of City approval for projects in Newport Bay in accordance with operative protocols of the Southern California Eelgrass Mitigation Policy and Caulerpa taxifolia Survey protocols.*

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) lives 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 piscivouous 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. Eelgrass (*Zostera marina* and *Z. pacifica*) are seagrasses which serve as critical habitat for many common and protected threatened marine species.

Eelgrass is a highly productive species and is considered to be a "foundation" or habitat forming species. Eelgrass contributes to ecosystem functions at multiple levels as a primary and secondary producer, as a habitat structuring element, as a substrate for epiphytes and epifauna, and as sediment stabilizer and nutrient cycling facilitator. Eelgrass provides important foraging areas and shelter to young fish and invertebrates, food for migratory waterfowl and sea turtles, and spawning surfaces for invertebrates and fish such as the Pacific herring. Eelgrass also provides a significant source of carbon to the detrital pool which provides important organic matter in sometimes food-limited environments (*e.g.*, submarine canyons). In addition, eelgrass has the capacity to sequester carbon in the underlying sediments and may help offset carbon emissions. Given the significance and diversity of the functions and services provided by seagrass, Costanza *et al.* (2007) determined seagrass ecosystems to be one of Earth's most valuable.[4]

A Marine Biological Assessment (MBA) was prepared for the proposed development by Pi Environmental, LLC, dated October 5, 2018[5]. The MBA included Eelgrass and *Caulerpa taxifolia* surveys. The MBA found: "*Significant amounts of eelgrass were observed around the existing docks*." **Exhibit 6** includes the MBA graphic depicting eelgrass in the project area. However, the MBA only surveyed for eelgrass within the footprint of the boat dock float and with the area approximately 20 feet landward of the float, to the bayward end of the pier. Within the area surveyed, the MBA identified 354 square feet of eelgrass, with spatial distribution of 75 – 100 percent cover. The MBA states:

[4] https://archive.fisheries.noaa.gov/wcr/publications/habitat/california_eelgrass_mitigation/Final%20CEMP%20October%202014/cemp_oct_2014_final.pdf

[5] CDP application 5-19-0105 was submitted on 1/30/2019 and so the eelgrass survey was timely at the time of submittal.

> "*Established eelgrass beds covered most of the bottom around and within the APE* [area of potential effect], *which is critical for the development of more complex marine communities.*
>
> *Eelgrass habitats in southern California are considered Habitats of Particular Concern (HAPC) which are a subset of EFH [Essential Fish Habitat]. HAPCs are areas that provide important ecological function with respect to fish habitat, and which may be especially subject to degradation. Overall, 113 Bayside Drive* [sic] *is a good example of the type of habitat worthy of this designation being a well-established eelgrass bed that likely plays a critical function as fish habitat.*"

The MBA recognizes that the proposed project "*does have the potential to impact the benthic substrate and therefore eelgrass and EFH* [Essential Fish Habitat]. *Project activities will likely have some small impact on existing eelgrass communities through direct physical disturbance and/or through indirect mechanisms like shading*." In addition, a barge will be employed during pile driving, and barge anchoring may adversely impact eelgrass. The MBA recommends operational best management practices (BMPs) during construction. The recommended BMPs include the use of a turbidity curtain, and slow start at the beginning of pile driving (allowing time for marine mammals and fish to leave the area). These measures are included as part of the proposed project. In addition, the MBA states:

> "*An ancillary benefit of the dock reconstruction is the new pier structure as proposed includes the use of mini-mesh as the decking of the pier. The mini-mesh will allow sunlight to pass through the overwater structure, increasing the amount of available light under and around the structure, which in turn may help foster re-establishment of impacted area(s). It is possible that the increase in the availability of sunlight, will lead to an increase in available high-quality eelgrass habitat within the APE.*"

In addition, to the benefits to eelgrass habitat that may accrue from the use of mesh grating on the pier, the 200 square foot reduction in overwater area and the 3 square foot reduction in fill resulting from the proposed project are also expected to benefit eelgrass habitat in the project area.

Nevertheless, even with the proposed mesh grating, reduced fill (piles), and reduced overwater coverage, due to the extensive presence of eelgrass in the project area, the proposed project is expected to have some adverse impacts on eelgrass, possibly only temporarily due to construction, but also, if unmitigated, possibly permanently. To address the adverse impact to eelgrass, **Special Condition 2** requires preparation and implementation of an eelgrass mitigation plan consistent with the National Marine Fisheries California Eelgrass Mitigation Policy, October 2014 (CEMP).

The CEMP describes methods for surveying and mapping eelgrass, identifies the time frame during which surveys should be conducted (typically March through October for southern California), the methods for selecting a reference site, methods to avoid and minimize eelgrass impacts, methods for assessing eelgrass impacts (generally using pre- and post-construction surveys), and identifies mitigation options. The CEMP mitigation plan requires that the extent of

eelgrass prior to construction and after construction be surveyed. Based upon these results, an eelgrass planting plan is required to offset any loss of eelgrass at a 1.38:1 ratio (mitigation:impact). The 1.38:1 eelgrass mitigation ratio is the ratio applicable to southern California eelgrass beds.

Whether the proposed project will ultimately be beneficial to eelgrass habitat due to the reduction in fill, the reduction in overwater coverage, and the introduction of mesh grating that allows sunlight to penetrate along the 220 foot long pier and the pier platform, will not be known unless and until a survey of the entire project area, including inland along the pier and generally in the wider area within 10 meters of the proposed project, is conducted in order to know the baseline amount of eelgrass. Such a survey must be conducted during the active growth season for eelgrass, in order to get an accurate assessment. Once such a survey is conducted, a post-construction survey, also during the active growth season is necessary. Comparison of these surveys will inform the question of whether impacts occur or not. It is important that the methods and standards outlined in the CEMP be employed when conducting the eelgrass surveys and when determining the eelgrass impacts from the project. Moreover, monitoring of the site is required to understand how eelgrass will react to the proposed project over the longer term. Therefore, the Commission imposes **Special Condition 2**, which requires completion of an eelgrass mitigation plan, consistent with the requirements of the National Marine Fisheries Service CEMP for the replacement of any eelgrass adversely impacted by the project.

Caulerpa Taxifolia

In 1999, a non-native and invasive aquatic plant species, *Caulerpa Taxifolia,* was discovered in parts of Huntington Harbor and in 2000 in Agua Hedionda lagoon in Carlsbad. *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.

The MBA found: "*The invasive species Caulerpa taxifolia was not observed in or around the APE* [area of potential effect]." This finding was based upon a survey conducted on May 22, 2018. *Caulerpa taxifolia* surveys are valid for 90 days, so the *Caulerpa taxifolia* survey is no longer valid. A valid *Caulerpa taxifolia* survey will be required prior to beginning any construction. Therefore, the Commission imposes **Special Condition 3**, which requires completion of a Caulerpa taxifolia survey prior to commencement of construction and identifies the procedures necessary should it be found in the project area.

C. WATER QUALITY

Section 30230 of the Coastal Act states:

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

Section 30231 of the Coastal Act states:

The biological productivity and 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 waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30232 of the Coastal Act, Oil and hazardous substance spills, states:

Protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials. Effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.

The City of Newport Beach certified LCP Land Use Plan contains the following policy:

Policy 4.3.2-22: *Require beachfront and waterfront development to incorporate BMPs designed to prevent or minimize polluted runoff to beach and coastal waters.*

The proposed work will be occurring on, over and within coastal waters. The proposed development has the potential for construction and post-construction discharge of polluted runoff from the project site into coastal waters. The storage or placement of construction material, debris, or waste in a location where it could be discharged into coastal waters could result in an adverse effect on the marine environment. The applicant is proposing measures to address water quality concerns, including: the use of a turbidity curtain during construction; trash and construction debris will not be allowed to fall into the harbor waters, and if it does, it will be retrieved immediately; all trash and construction debris will be collected and disposed of properly on land; and pile installation will start slowly to minimize turbidity and to allow fish and marine mammals to leave the construction area early in the process.

To further protect water quality, the Commission imposes **Special Condition 4**, which identifies construction related measures to be incorporated into the project during construction including, but not limited to, appropriate storage and handling of construction equipment and materials to minimize the potential of pollutants to enter coastal waters. In addition, to reduce the potential for post-construction impacts to water quality, the Commission imposes **Special Condition No. 5**, which requires the continued use and maintenance of post construction BMPs related to the long term berthing of boats. By incorporating these water quality protection measures into the

proposed development, as conditioned, the project minimizes the effect of construction and post-construction activities on the marine environment. Therefore, the Commission finds that the proposed development, as conditioned, conforms to Sections 30230, 30231 and 30232 of the Coastal Act and related LCP policies regarding the protection of water quality to promote the biological productivity of coastal waters and to protect human health.

D. PUBLIC ACCESS AND RECREATION

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 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 30224 of the Coastal Act states:

> *Increased recreational boating use of coastal waters shall be encouraged, in accordance with this division, by developing dry storage areas, increasing public launching facilities, providing additional berthing space in existing harbors, limiting non-water-dependent land uses that congest access corridors and preclude boating support facilities, providing harbors of refuge, and by providing for new boating facilities in natural harbors, new protected water areas, and in areas dredged from dry land.*

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, 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.*

Newport Beach certified Implementation Plan Section 21.30.C.050(G)(5) states:

> *5. Patio Decks. 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*

Coastal Act Section 30210 requires that maximum public access and recreational opportunities be provided, and that development not interfere with the public's right to access the coast. Additionally, Sections 30220 and 30221 of the Coastal Act protect coastal areas suited for water-oriented recreational activities and oceanfront land for recreational uses, such as boating. The City's certified LCP also includes a number of similar policies that protect public access. Newport Harbor is well known as a popular spot for recreational boating. Numerous private boat docks and public marinas line the shores of the harbor. Sandy shoreline areas along the bay are also used for access/recreation, including swimming and hand launching of small watercraft such as kayaks and stand up paddleboards.

The proposed project includes the removal and replacement of an existing private boat dock system associated with residential development. In addition, the project includes construction of a 100 foot long concrete deck cantilevered four feet over the bulkhead. The subject boat dock system serves three neighboring properties, including the applicant's. The proposed cantilevered deck provides access from the adjoining properties to the pier and boat dock. The proposed cantilevered deck will replace the wooden deck previously present at the site[6], which allowed for neighbor's access to the boat dock. The wooden deck was supported by piles. Replacing the deck supported on piles with a cantilevered deck is preferable because it eliminates fill of coastal waters. Sharing one boat dock system among three neighboring properties is preferable to individual systems for each property. This reduces the area of impact to public access. (Although, it must be noted that due to site constraints and orientation of the pie-shaped properties, additional boat docks would be difficult to accommodate).

As described earlier, the applicant has provided information indicating that the submerged lands approximately 110 feet bayward of the bulkhead at the subject site is landward of the mean high line, meaning this area is privately-owned, submerged lands. In addition, a *Tidelands Ownership Map of Lower Newport Bay* supports the information submitted by the applicant (Exhibit 4). The proposed cantilevered deck and the inland portion of the proposed pier fall within this privately

[6] The previous wooden deck was destroyed by the El Nino storms of 1982/83. The cantilevered deck was constructed in 1983. The applicant is requesting after-the-fact approval of the deck constructed in 1983.

owned submerged area. As described earlier, the proposed deck would not interfere with the navigational easement that exists over privately-owned submerged lands. As also described previously, determinations about the public trust boundary are ultimately the jurisdiction of the State Lands Commission. Assuming the information provided by the applicant is correct, construction of the cantilevered deck may be allowed as long as it complies with Section 21.30C.50G.5 of the City of Newport Beach certified LCP Implementation Plan. Section 21.30C.50G.5 allows rear patio decks to extend over the waters of Newport Harbor only when the waters are adjacent to the upland residential property and outside the areas described as tidelands trust, as is the case here. Such decks are also limited to a maximum of five feet beyond the bulkhead (the proposed deck would be four feet beyond the bulkhead). Also allowed on these decks are planters and benches that do not exceed 16 inches in height, and railings not over forty-two inches in height with approximately ninety-five percent open area. The proposed brick wall on the cantilevered deck is 12-inches high. In this area of Newport Beach, limited private decks associated with adjacent residential development, such as the subject deck, are allowed to cantilever over the water.

However, in order to assure that public access is maximized as required by the Coastal Act policies cited above, **Special Condition 7** is imposed which recognizes that approval of this permit shall not constitute a waiver of any public rights that exist or may exist on the property now or in the future and that if any development approved by this permit is determined to extend over or on public trust lands, development inconsistent with the public trust shall be removed.

There is no direct public pedestrian access to public tidelands through the private residential lot at the subject site. The waters of Newport Harbor bayward of the site can be accessed near the site via the public sandy harbor-fronting beaches located at 1901 Bayside Drive (which is also a public launch site for small, hand launched watercraft), approximately 1,000 feet northwest of the subject site; and at the base of Fernleaf Drive and Cove Way, approximately 900 feet south. A small public park is present on the harbor near the intersection of Bayside Drive and Bayside Place that offers views of the water. This park is located approximately 150 feet north of the subject site. Public access is also available at Corona del Mar State Beach approximately 2,000 feet south of the subject site. In addition, the public can access the waters of Newport Harbor from street ends along the Balboa Peninsula, across the harbor from the subject site. The proposed development will not create any new impediments to existing public access. Public access to the harbor waters will be unchanged with proposed development. In order to preserve and maintain access to the waters of Newport Harbor, **Special Condition 6** is imposed stating 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.

Thus, as conditioned, the Commission finds that the proposed project is consistent with the City's certified LCP and Sections 30210, 30220, and 30221 of the Coastal Act and with related LUP policies with regard to public coastal access and recreational opportunities.

E. UNPERMITTED DEVELOPMENT

Violations of the Coastal Act that are associated with the subject site have been undertaken by the applicant over coastal waters adjacent to the bulkhead, including construction of a cantilevered deck. The cantilevered deck at the subject site was constructed in 1983 without

benefit of a coastal development permit. When Commission staff notified the applicant that no coastal development permit appeared to have been obtained for the cantilevered deck, the applicant agreed to resolve the violation by requesting after-the-fact approval in conjunction with the proposed boat dock replacement project.

Consideration of the permit application by the Commission has been based solely on consistency of the proposed development with the policies of Chapter 3 of the Coastal Act. Approval of this application pursuant to the staff recommendation, issuance of the permit, and the applicant's subsequent compliance with all terms and conditions of the permit will result in resolution of the above described violations going forward.

F. 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 is consistent with Chapter 3 of the Coastal Act.

E. 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 (Planning Department and 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 11/9/ 2018.

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, and public access and recreation policies of the Coastal Act. 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

1) City of Newport Beach Local Coastal Program

2) Marine Biological Assessment, Pi Environmental, LLC, 10/5/2018