

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
301 E. Ocean Boulevard, Suite 300
Long Beach, CA 90802-4302
(562) 590-5071



W22b

Filed: 6/4/19
180th Day: 12/11/19
Staff: F. Sy-LB
Staff Report: 10/30/19
Hearing Date: 11/13/19

STAFF REPORT: REGULAR CALENDAR

Application No.: 5-19-0374

Applicant: Kevin Kaberna

Agent: Swift Slip Dock and Pier Builders

Location: 1012 W. Bay Avenue, City of Newport Beach, (Orange County)

Project Description: Removal of a 430 square foot dock float, 3-foot x 20-foot gangway, 10-foot x 14-foot pier platform, 8-foot x 4-foot pier approach (662 square feet of total water coverage), three 18-inch square concrete marina guide piles and two 14-inch concrete T piles; and installation of a 518.5 square foot dock float, 3-foot x 24-foot gangway, 10-foot x 14-foot pier platform, 4-foot x 4-foot pier approach (746.5 square feet of total water coverage), three 18-inch square concrete marina guide piles and two 14-inch concrete T piles.

Staff Recommendation: Approval with conditions

SUMMARY OF STAFF RECOMMENDATION

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

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

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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.

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 430 square feet and the project description submitted with the subject application proposed a 518.5 square foot dock float, which would result in an increase of 88.5 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 8 feet to 7 feet, resulting in a 472.5 square foot dock float. While the applicant has proposed to revise the project to reduce the amount of water coverage, revised project plans have not yet been submitted. 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's private boat dock system is located on State Tidelands that are administered by the City of Newport Beach pursuant to a Tidelands Grant (City of Newport Beach Tidelands and Submerged Lands in Newport Bay – Statutes of 1919, Chapter 494, Page 1011 and Statutes of 1927, Chapter 70, Page 125). The placement of private boat dock systems on public tidelands has been found by the City and the Commission to be consistent with the Tidelands Grant because it is an allowable recreational boating use. However, 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. Thus, **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**.

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APPENDICES

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EXHIBITS

[Exhibit No. 1 – Location Map](#)

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

I. MOTION AND RESOLUTION

Motion:

*I move that the Commission **approve** Coastal Development Permit No. 5-19-0374 pursuant to the staff recommendation.*

Staff recommends a **YES** vote. Failure of the motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution:

The Commission hereby 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. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that will substantially lessen any significant adverse impacts of the development on the environment.

II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the 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 fingers and the number of piles shall be in substantial conformance with the plans submitted on May 15, 2019. The revised project plans shall reflect the following changes:
 - A. The proposed dock float width shall be reduced to 7 feet for the 46 foot 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 revised plans submitted to the Executive Director shall bear evidence of Approval-in-Concept of the revised design 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. 5-19-0374. 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. 5-19-0374, including the proposed dock system. 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. 5-19-0374 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.

IV. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION, LOCATION AND PREVIOUS PERMITS

The proposed project includes the removal of a 430 square foot dock float, 3-foot x 20-foot gangway, 10-foot x 14-foot pier platform, 8-foot x 4-foot pier approach (662 square feet of total water coverage), three 18-inch square concrete marina guide piles and two 14-inch concrete T piles; and installation of a 518.5 square foot dock float, 3-foot x 24-foot gangway, 10-foot x 14-foot pier platform, 4-foot x 4-foot pier approach (746.5 square feet of total water coverage), three 18-inch square concrete marina guide piles and two 14-inch concrete T piles associated with a single-family residence on a bayfronting lot ([Exhibit No. 2](#)). 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 88.5 square feet of water coverage (518.5 square feet – 430 square feet = 88.5 square feet); however, the applicant has revised the project by reducing the width of the dock to 7 feet, which will result in an increase of 42.5 square feet of water coverage. The proposed project will not result in any *additional* fill as the project would replace the existing pile with piles of the same size. The proposed dock float

will not extend past the U.S. Pierhead Line consistent with the City of Newport Beach Harbor Permit Policy.

The subject site is a bulkheaded property fronting Newport Bay located at 1012 W. Bay Avenue in the City of Newport Beach, Orange County ([Exhibit No. 1](#)). Single-family residences and associated private dock systems characterize the subject site and the surrounding area. The applicant's private boat dock system is located on State Tidelands that are administered by the City of Newport Beach pursuant to a Tidelands Grant (City of Newport Beach Tidelands and Submerged Lands in Newport Bay – Statutes of 1919, Chapter 494, Page 1011 and Statutes of 1927, Chapter 70, Page 125).

The 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 October 1986, the Commission approved Coastal Development Permit (CDP) No. 5-86-780 (Titus) for the removal of an existing dock system and construction of a new dock system. No special conditions were imposed.

B. MARINE RESOURCES/WATER QUALITY

Section 30230 of the Coastal Act, Marine Resources; maintenance, 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.

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.

Section 30233 of the Coastal Act states in part:

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

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launch areas.

(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.

(6) Restoration purposes.

Section 30250 of the Coastal Act states in part:

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

Coastal Land Use Plan, Eelgrass Meadows, Policy 4.1.4-4 states,

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

Coastal Land Use Plan, Eelgrass Meadows, Policy 4.1.4-5 states,

*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.*

Coastal Land Use Plan, Dredging, Diking and Filling, Policy 4.2.3-1 states,

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. Construction or expansion of port/marine facilities.*
- B. Construction or expansion of coastal-dependent industrial facilities, including commercial fishing facilities, and commercial ferry facilities.*
- C. 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.

- D. Maintenance of existing and restoration of previously dredged depths in navigational channels, turning basins, vessel berthing, anchorage, and mooring areas, and boat launching ramps. The most recently updated U.S. Army Corps of Engineers maps shall be used to establish existing Newport Bay depths.*
- E. Incidental public service purposes which temporarily impact the resources of the area, such as burying cables and pipes, inspection of piers, and maintenance of existing intake and outfall lines.*
- F. Sand extraction for restoring beaches, except in environmentally sensitive areas.*
- G. Restoration purposes.*
- H. Nature study, aquaculture, or similar resource-dependent activities.*
- I. In the Upper Newport Bay Marine Park, permit dredging, diking, or filling only for the purposes of wetland restoration, nature study, or to enhance the habitat values of environmentally sensitive areas.*

Coastal Land Use Plan, Dredging, Diking and Filling, Policy 4.2.3-2 states,

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

Coastal Land Use Plan, Dredging, Eelgrass Protection and Restoration, Policy 4.2.5-1 states,

*Avoid impacts to eelgrass (*Zostera marina*) to the greatest extent possible. Mitigate losses of eelgrass at a 1.2 to 1 mitigation ratio and in accordance with the Southern California Eelgrass Mitigation Policy. Encourage the restoration of eelgrass throughout Newport Harbor where feasible.*

Coastal Land Use Plan, TMDLs, Policy 4.3.1-8 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.

Coastal Land Use Plan, NPDES, Policy 4.3.2-1 states,

Promote pollution prevention and elimination methods that minimize the introduction of pollutants into coastal waters, as well as the generation and impacts of dry weather and polluted runoff.

Coastal Land Use Plan, NPDES, Policy 4.3.2-6 states,

Implement and improve upon best management practices (BMPs) for residences, businesses, new development and significant redevelopment, and City operations.

Coastal Land Use Plan, NPDES, Policy 4.3.2-7 states,

Incorporate BMPs into the project design in the following progression:

Site Design BMPs.

Source Control BMPs.

Treatment Control BMPs.

Include site design and source control BMPs in all developments. When the combination of site design and source control BMPs are not sufficient to protect water quality as required by the LCP or Coastal Act, structural treatment BMPs will be implemented along with site design and source control measures.

Coastal Land Use Plan, NPDES, Policy 4.3.2-22 states,

Require beachfront and waterfront development to incorporate BMPs designed to prevent or minimize polluted runoff to beach and coastal waters.

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 430 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 8 foot dock finger (east finger) to 7 feet, resulting in a 472.5 square foot dock float and a minimal increase of 42.5 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. For fingers of 6 feet in width the minimum length of the berth is 71 feet and for fingers of 8 feet in width the minimum length of the berth is 85 feet and as proposed to be revised, the proposed 46 foot berth length is significantly less than that allowed for finger widths of 6 feet and 8 feet. The proposed dock system is also similar to docks in the area approved by the Commission. While the applicant has proposed to revise the project to reduce the amount of water coverage, revised project plans have not yet been submitted. 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 not discovered at the project site and the eelgrass survey that determined that eelgrass was not located at the project site took place on March 17, 2019; 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 17, 2019, 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 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 three 18 inch square concrete marina guide piles and two 14 inch concrete T piles and installation of the same. The proposed project will not result in any *additional* fill as the project would replace the existing pile with piles of the same size. The piles will support the proposed dock system; therefore, this associated fill would be consistent with Section 30233(a)(3) of the Coastal Act, as it is for a boating-related use.

CONCLUSION

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30230, 30231, 30232, 30233 and 30250 of the Coastal Act and the City’s certified LCP regarding maintaining and enhancing the biological productivity and the water quality.

C. PUBLIC ACCESS AND RECREATION

Article X, Section 4 of the California Constitution provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 30224 of the Coastal Act, Recreational boating use; encouragement, facilities, 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, Shoreline Access, 3.1.1-9 states,

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

Maximizes public access to and along the shoreline;

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

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

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

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

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

G. Piers.

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

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

3. Setbacks.

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

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

 - i. Where property lines are not approximately perpendicular to the bulkhead line;*
 - ii. Where curves or angles exist in the bulkhead line;*
 - iii. Where bridges, topography, street ends or publicly owned facilities adjoin the property.**
- d. Setbacks apply to joint ownership piers with the exception that the slips, floats and piers may extend over the common property line.*
- 4. Joint Ownership. Permits may be granted for joint ownership piers at the prolongation of common lot lines. The permit for joint ownership piers shall provide that all parties shall have equal rights under the permit and shall be held jointly responsible for compliance with all rules, regulations, and conditions set forth in the permit.*
- 5. Patio Decks. Patios are not permitted to extend over the waters of Newport Harbor unless the waters are adjacent to the upland property and outside the areas described in the tidelands trust, and provided the patio complies with the following conditions:

 - a. The maximum projection of patio decks encroachments beyond the bulkhead line shall be limited to five feet.*
 - b. The minimum setbacks from the prolongations of the side property lines shall be five feet.*
 - c. No float shall be permitted within one foot of the decks.*
 - d. No permanent structure shall be permitted on the projecting portion of the patios except:

 - i. Planters and benches not over sixteen (16) inches in height;*
 - ii. Railings not over forty-two (42) inches in height with approximately ninety-five (95) percent open area.**
 - e. A harbor and building permit has been obtained.**
- 6. Storage Lockers. Storage lockers and boat boxes may be installed on shore-connected piers and floats subject to the following limitations:

 - a. The overall height shall not exceed thirty (30) inches when located bayward of residential property zones.*
 - b. The overall height shall not exceed thirty (30) inches when located bayward of commercial and industrial property zones where the piers and floats are used primarily for the mooring of pleasure boats.*
 - c. The overall height shall not exceed sixty (60) inches when located on facilities bayward of commercial and industrial zoned property where the use is not primarily for the mooring of pleasure boats.*
 - d. The overall height shall be measured from the deck of the pier or float to the top of the storage locker and overall height to include the enclosed portion of the locker or box.**

The waters of Newport Bay are a very popular recreational boating area. Sandy shoreline areas along the bay are also used for access/recreation. The proposed project includes the removal and

replacement of an existing private dock system associated with residential development located over State Tidelands managed by the City. Private docks are an allowable use on State Tidelands and post project, the dock would still remain a private use.

There is no direct public pedestrian access to public tidelands through the private residential lot at the subject site. The State Tidelands administered by the City bayward of the site can be accessed approximately 118 feet east of the project site at the 10th Street, street end ([Exhibit No. 1](#)). From every street end along the Balboa Peninsula, the public can access the State Tidelands area seaward of the subject site by watercraft or by swimming to the site. Therefore, the public maintains a right to access the navigable bay waters for navigation and recreational purposes. In order to preserve and maintain access to the Public Trust Tidelands, **Special Condition No. 8** 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.

CONCLUSION

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30210, 30211, 30212, 30220, 30221 and 30250 of the Coastal Act and the City's certified LCP regarding the public's right of access to the sea and does not interfere with recreational opportunities on public tidelands and would avoid cumulative impacts.

D. 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.

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 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 April 8, 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. 5-86-780 (Titus); City of Newport Beach Harbor Resources Division Approval-In-Concept dated April 8, 2019; and Pre Construction Eelgrass (*Zoetra marina*) and Caulerpa Taxifolia Survey, 1012 W. Bay Avenue, Newport Beach, CA prepared by Dive Works dated March 17, 2019; Letter from Swift Slip Dock and Pier Builders to Commission staff dated July 11, 2019; Letter from PMA Consulting dated September 18, 2019; Letter from Swift Slip Dock and Pier Builders to Commission staff dated September 19, 2019; and Email from Swift Slip Dock and Pier Builders to Commission staff dated October 23, 2019.