

CALIFORNIA COASTAL COMMISSION

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**F11j**

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STAFF REPORT: REGULAR CALENDAR

Application No.: 5-18-1091

Applicant: Randy Davis

Agent: Swift Slip Dock and Pier Builders, Attention: Jacquelyn Chung

Location: 88 Linda Isle, City of Newport Beach (Orange County)

Project Description: Demolition of one 232.5 square foot deck and one 101 square foot deck both cantilevered from the bulkhead over the water (Newport Harbor) and construction of a single 464 square foot concrete deck cantilevered from the bulkhead associated with a single-family residence on a bayfronting lot.

Staff Recommendation: Approval

SUMMARY OF STAFF RECOMMENDATION

The proposed project is located within the Commission's original permit jurisdiction (over the waters of Newport Harbor) in the City of Newport Beach, a certified 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 Local Coastal Program (LCP) is advisory in nature and may provide guidance for development.

The proposed project is the removal of two decks cantilevered from the bulkhead over the water (Newport Harbor) and construction of a new single deck cantilevered from the bulkhead associated with a single-family residence on a bayfronting lot in Newport Harbor.

Commission 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 public access, water quality and biological resource policies of the Coastal Act.

The areas of the bay over which the proposed deck would be cantilevered consist of two submerged parcels of land, one owned by the City of Newport Beach and the other owned by the Irvine Company. Currently available information indicates that the parcels are located landward of the mean high tide line and are not, therefore, subject to the public trust, although the lands would be subject to a navigational easement. The proposed cantilevered deck does not prevent use of the channel or waters seaward of the bulkhead at the subject site for navigational purposes and the public may access the waters by watercraft or by swimming. In addition, a private dock for this residence is located farther out in the water and there are two existing cantilevered decks in this location already that are proposed to be removed; thus, the proposed cantilevered deck is unlikely to impair the navigational easement or have additional impacts on public access in this area.

Finally, the proposed cantilevered deck is consistent with the patio deck standards of Section 21.30C.050(G)(5) of the certified Implementation Plan (IP), and would be located outside of the tidelands trust, which are mapped State tidelands administered by the City. Thus, the proposed deck is not inconsistent with the prohibition in Section 21.30C.050(G)(5) of patios that extend over waters of Newport Harbor “unless the waters are adjacent to the upland property *and outside the areas described in the tidelands trust*”.

Thus, the proposed deck cantilevered from the bulkhead would be consistent with the public access policies of the Coastal Act and the City’s certified LCP. However, Coastal Commission approval of this project cannot waive any public rights that may exist on the property. Therefore the Commission imposes **Special Condition No. 1**, 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.

To minimize adverse impacts to biological resources and to ensure that there will not be negative cumulative impacts to the Newport Harbor ecosystem, two special conditions have been imposed: **Special Condition No. 2** requires the applicant to prepare a new eelgrass survey prior to beginning construction, as the submitted survey is from September 14, 2018. **Special Condition No. 3** 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, the Commission imposes **Special Condition No. 4**, which requires the applicant to obtain a permit amendment or a new permit for any repair or maintenance of the proposed 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, a special condition has been imposed in order 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.

As conditioned, the proposed project will conform with Coastal Act Sections 30230, 30231, 30232, 30233, 30250, 30210, 30211, and 30212, 30220 and 30221 of the Coastal Act.

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

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APPENDICES

[Appendix A – Substantive File Documents](#)

EXHIBITS

[Exhibit No. 1 – Location Maps](#)

[Exhibit No. 2 – Project Plans](#)

I. MOTION AND RESOLUTION

Motion:

*I move that the Commission **approve** Coastal Development Permit No. 5-18-1091 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. 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.
- 2. Pre-Construction Eelgrass Survey.** By acceptance of this permit, the applicant agrees to submit evidence that a valid pre-construction eelgrass (*Zostera marina*) survey was completed during the period of active growth of eelgrass (March through October). The pre-construction survey shall be completed prior to the beginning of construction and shall be valid until the next period of active growth. If any portion of the project commences in a previously undisturbed area after the last valid eelgrass survey expires, a new survey is required prior to commencement of work in that area. The survey shall be prepared in full compliance with the "Southern California Eelgrass Mitigation Policy" Revision 8 (except as modified by this special condition) adopted by the National Marine Fisheries Service and shall be prepared in consultation with the California Department of Fish and Game. The applicant shall submit the eelgrass survey for the 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 the eelgrass survey identifies any eelgrass within the project area, which would be impacted by the proposed project, the development shall require an amendment to this permit from the Coastal Commission or a new Coastal Development Permit.

Post-Construction Eelgrass Survey. If any eelgrass is identified in the project area by the survey required by this special condition, within one month after the conclusion of construction, the applicant shall survey the project site to determine if any eelgrass was adversely impacted. The survey shall be prepared in full compliance with the "Southern California Eelgrass Mitigation Policy" Revision 8 (SCEMP) adopted by the National Marine Fisheries Service, except as modified by this special condition, and shall be prepared in consultation with the California Department of Fish and Game. The applicant shall submit the post-construction eelgrass survey for review and approval by the Executive Director within thirty (30) days after completion of the survey. If any eelgrass has been impacted, the applicant shall replace the impacted eelgrass at a minimum 1.2:1 ratio on-site, or at another location, in accordance with the SCEMP. All impacts to eelgrass habitat shall be mitigated at a minimum ratio of 1.2:1 (mitigation:impact). The exceptions to the final required 1.2:1 mitigation ratio found within SCEMP shall not apply. Implementation of mitigation shall require an amendment to this permit or a new Coastal Development Permit unless the Executive Director determines that no amendment or new permit is legally 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. 5-18-1091. 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. 5-18-1091, including the new deck cantilevered from the bulkhead. Accordingly, any future improvements to the development authorized by this permit, including but not limited to repair and maintenance identified as requiring a permit in Public Resources Section 30610(d) and Title 14 California Code of Regulations Sections 13252(a)-(b), shall require an amendment to Permit No. 5-18-1091 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government.
5. **Storage of Construction Materials, Mechanized Equipment and Removal of Construction Debris.** By acceptance of this permit, the applicant agrees to comply with the following construction-related requirements:
 - A. No demolition or construction materials, 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. 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; and
- M. All BMPs shall be maintained in a functional condition throughout the duration of construction activity.

IV. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION AND LOCATION AND PRIOR COMMISSION ACTION AT SUBJECT SITE

1. Project Description and Location

The proposed project is the removal of two decks, a 232.5 square foot deck and a 101 square foot deck, both of which are cantilevered from the bulkhead over the water (Newport Harbor), and construction of a single L-shaped 464 square foot concrete deck cantilevered 5-feet from the bulkhead associated with a single-family residence on a bayfronting lot ([Exhibit No. 2](#)). The L-shaped cantilevered deck will consist of two segments: an approximate 62-foot (long) x 5-foot (wide) section and an approximate 35-foot (long) x 5-foot (wide) section ([Exhibit No. 2](#)).

The subject site is located at 88 Linda Isle in the locked gate community of Linda Isle in the City of Newport Beach, Orange County ([Exhibit No. 1](#)). Single-family residences and associated private boat dock systems characterize the subject site and the surrounding area. No public access currently exists through the site. However, public access to the bay exists in the area across the channel from the Linda Isle community along the public walkways on Lido Island and Balboa Island ([Exhibit No. 1](#)). The areas of the bay over which the proposed deck would be cantilevered consists of two water parcels not owned by the applicant and not part of the mapped State Tidelands held in trust by the City. One of those parcels is owned by the City of Newport Beach (APN No. 050-451-11) along the northwest portion of the property facing the bay and the other is owned by the Irvine Company (APN No. 050-4561-10) along the northern portion of the property facing the bay ([Exhibit No. 1, page 2](#)).

The City of Newport Beach LCP was effectively certified on January 13, 2017. The landside portion of the development is located within the City's permit jurisdiction, while the water area bayward of the bulkhead is within the Commission's original permit jurisdiction. The standard of review for development within the City's permit jurisdiction is the City's certified LCP. The standard of review for development within the Commission's original permit jurisdiction is Chapter 3 of the Coastal Act, although the City's certified LCP is advisory in nature and may provide guidance.

The City has issued an Approval-In Concept dated October 9, 2018 for the project and the proposed cantilevered deck has been designed in compliance with the patio deck standards of Municipal Code Section 21.30C.050(G)(5). Specifically, the deck would project a maximum of 5-feet beyond the bulkhead, maintains minimum setbacks of 5 feet from the prolongations of the side property lines, and would be located outside Tidelands Trust, which are mapped State tidelands administered by the City.

2. Prior Commission Action at Subject Site

On December 12, 2018, the Commission approved Coastal Development Permit (CDP) No. 5-18-0057 (Davis) for the removal of an 845 square foot L-shaped dock float, 3 foot x 22 foot gangway and four 18-inch hexagonal piles, and replacement with a 1,012 square foot L-shaped dock float, 3 foot x 40 foot gangway and eight 18-inch square piles. Six Special Conditions were imposed regarding: 1) Submittal of County of Orange approval; 2) Acknowledgement of public

rights; 3) Pre-and Post-Construction Eelgrass Survey(s); 4) Pre-Construction *Caulerpa Taxifolia* Survey; 5) Water quality; and 6) Compliance with Resource Agencies' requirements.

On January 24, 2018, 5-NPB-18-0021 and Local CDP No. CD2017-035 for the demolition of a single-family residence with an attached garage and construction of a new single-family residence with an attached garage became effective.

In 1996, the Commission approved Coastal Development Permit No. 5-95-193 (Guggeheim) for the removal of an existing dock float and replacement with an 80 foot x 8 foot dock float and four guide pile.

B. PUBLIC ACCESS AND RECREATION

Article X, Section 4 of the California Constitution provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Maximizes public access to and along the shoreline;

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

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

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

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

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

G. Piers.

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

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

3. Setbacks.

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

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

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

- i. Where property lines are not approximately perpendicular to the bulkhead line;*
- ii. Where curves or angles exist in the bulkhead line;*
- iii. Where bridges, topography, street ends or publicly owned facilities adjoin the property.*

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

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

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

- a. The maximum projection of patio decks encroachments beyond the bulkhead line shall be limited to five feet.***
- b. The minimum setbacks from the prolongations of the side property lines shall be five feet.***
- c. No float shall be permitted within one foot of the decks.***
- d. No permanent structure shall be permitted on the projecting portion of the patios except:***
 - i. Planters and benches not over sixteen (16) inches in height;***
 - ii. Railings not over forty-two (42) inches in height with approximately ninety-five (95) percent open area.***
- e. A harbor and building permit has been obtained.***

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

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

Coastal Act Section 30210 and Coastal Act Section 30211 mandate that maximum public access and recreational opportunities be provided and that development not interfere with the public's right to access the coast. Section 30212(a) of the Coastal Act requires that adequate public access to the sea be provided in new development projects. Additionally, Sections 30220 and 30221 of the Coastal Act protect coastal areas suited for water-oriented recreational activities and oceanfront land for recreational uses. Section 30250 of the Coastal Act requires new development to not have significant adverse effects, individually or cumulatively, on coastal resources. The City's certified LCP also includes numerous policies protecting public access, including Implementation Plan Policy 21.30C.050(G) regarding the location of proposed decks over the waters of Newport Harbor.

The waters of Newport Harbor are a very popular recreational boating area. The applicant recently obtained approval from the Coastal Commission for the removal of an existing dock float and replacement with a new dock float over the water. No work is proposed to this dock system with this application.

The City determined that the proposed cantilevered deck falls under the jurisdiction of the California Coastal Commission because it projects beyond the bulkhead and over the bay waters. The City issued an Approval-In-Concept for the new cantilevered deck which is designed in compliance with the patio deck standards of the IP Section 21.30C.050(G)(5). In compliance with this development standard, the cantilevered deck would project a maximum of 5-feet beyond the bulkhead, maintain minimum setbacks of 5-feet from the prolongations of the side property lines, and would be located outside the Tidelands Trust, which are mapped State tidelands administered by the City. Specifically regarding the Tidelands Trust, IP Section 21.30C.050(G)(5) prohibits patios to extend over waters of Newport Harbor "unless the waters are adjacent to the upland property *and outside the areas described in the tidelands trust*".

The areas of the bay over which the proposed deck would be cantilevered consist of two submerged parcels not owned by the applicant and not part of the mapped State Tidelands held in trust by the City. One parcel is owned by the City of Newport Beach (APN No. 050-451-11) along the northwest portion of the property facing the bay, and the other parcel is owned by the Irvine Company (APN No. 050-4561-10) along the northern portion of the property facing the bay ([Exhibit No. 1, page 2](#)).

Although the proposed cantilevered deck does not appear to be located on State tidelands administered by the City of Newport Beach pursuant to a tidelands grant, because the properties seaward of the bulkhead are fully submerged bay waters at all times, the question of the public trust doctrine arises. The public trust provides that tide and submerged lands and the beds of lakes, streams and other navigable waterways are to be held in trust by the State for the benefit of the people of California for uses including the right to swim, boat and engage in other forms of water recreation. Based on the information available to the Commission at this time, it appears that these two submerged parcels are not subject to the public trust because the mean high tide line (MHTL) was adjudicated in this area in case no. 20436 in Orange County Superior Court in 1926 (Orange County v. The Irvine Company). The court determined that the MHTL in this area is located westward of the subject property ([Exhibit No. 1, page 2](#)). Further, the areas are part of a subdivision tract that dredged a channel eastward and northward from the MHTL established

in case no. 20436. This dredging changed portions of the property from upland swamp and overflow property to property subject to tidal flow.

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

In addition, Section 30210 of the Coastal Act encourages maximum public access, while also respecting private property rights, and section 30211 requires that development not interfere with the public's right of access to the sea. Although not binding on the Commission, the City's certified LCP includes provisions relating to construction of decks and patios over Newport Harbor waters. Specifically, IP Section 21.30C.050(G)(5) prohibits cantilevered decks *within* Tidelands Trust areas, but allows them to extend over bay waters *outside* of the Tidelands Trust when certain conditions are met.

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

The proposed project involves the removal of two cantilevered decks and construction of a single L-shaped 464 square foot concrete deck cantilevered from the bulkhead over Newport Harbor associated with a single-family residence on a bayfronting lot. As discussed above, the areas of water over which the proposed deck would cantilever that are situated bayward of the existing bulkhead are not within the State Tidelands area administered by the City of Newport Beach. Applying the City's LCP as guidance, the proposed deck is consistent with IP Section 21.30C.050(G)(5), which prohibits cantilevered decks *within* Tidelands Trust areas, but allows them to extend over bay waters *outside* of the Tidelands Trust when certain conditions are met. The proposed project satisfies this IP requirement as the proposed cantilevered deck is outside of the Tidelines Trust areas of Newport Harbor, do not exceed the maximum 5-foot cantilevered

projection, and meets the minimum 5-foot side property line setback requirement. Therefore, the proposed cantilevered deck is consistent with public access policies of the Coastal Act and the certified LCP.

However, Coastal Commission approval of this project cannot waive any public rights that may exist on the property. Thus, **Special Condition No. 1** 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, 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.

CONCLUSION

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

C. 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.

Coastal Act Sections 30230 and 30231 require protection of marine resources and, where feasible, the restoration of marine resources, as well as the maintenance of the biological productivity of coastal waters. Coastal Act Section 30233 limits the allowable fill of open coastal waters, wetlands, estuaries to certain uses only. Coastal Act Section 30250 requires that new residential development be located where it will not have significant individual or cumulative adverse effects on coastal resources. The City's certified LCP also includes a number of similar policies that protect the biological resources in coastal waters, such as Coastal Land Use Plan (CLUP) Policy 4.1.1-4 requiring protection of eelgrass and CLUP Policy 4.3.2-1 requiring the promotion of pollution prevention and elimination methods that minimize the introduction of pollutants into coastal waters.

1. 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 site has been surveyed by the City of Newport Beach Harbor Resources Division for eelgrass and eelgrass was discovered within 15-feet of the project area; however, no adverse impacts to eelgrass are anticipated as the project has been designed to avoid impacts to eelgrass.

The eelgrass survey took place on September 14, 2018 as required by the City of Newport Beach Harbor Resources Division and eelgrass surveys completed during the active growth phase of eelgrass (typically March through October) are valid for 60-days with the exception of surveys completed in August-October. A survey completed in August - October is valid until the resumption of active growth (i.e., March 1). The project is agendaized for the June 2019 Coastal Commission Hearing and the eelgrass survey took place on September 14, 2018 so the eelgrass

survey is no longer continues valid. 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. Therefore, as conditioned, the Commission finds that the proposed development will not result in significant impacts to eelgrass.

2. *Caulerpa Taxifolia*

In 1999, a non-native and invasive aquatic plant species, *Caulerpa Taxifolia*, was discovered in parts of Huntington Harbor, while none has been discovered in Newport Bay. *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 September 14, 2018, as required by the City of Newport Beach Harbor Resources Division and none was found. However, *Caulerpa Taxifolia* surveys are valid for 90 days. The project is agendized for the June 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*, the Commission imposes **Special Condition No. 3**, which 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, the Commission imposes **Special Condition No. 4**, which requires the applicant to obtain a permit amendment or a new permit for any repair or maintenance of the proposed deck cantilevered over the bulkhead.

3. Construction Impacts to Water Quality

Section 30230 of the Coastal Act requires that marine resources including biological productivity be protected. Section 30231 of the Coastal Act requires that the biological productivity of coastal waters be maintained, and where feasible, restored. In addition, Sections 30230 and

30231 require that the quality of coastal waters be maintained and protected from adverse impacts. Section 30232 of the Coastal Act requires protection against the spillage of crude oil, gas, petroleum products, or hazardous materials in relation to any development.

Storage or placement of construction materials, debris, or waste in a location subject to erosion and dispersion or which may be discharged into coastal water via rain or wind would result in adverse impacts upon the marine environment that would reduce the biological productivity of coastal waters. For instance, construction debris entering coastal waters may cover and displace soft bottom habitat. Sediment discharged into coastal waters may cause turbidity, which can shade and reduce the productivity of foraging avian and marine species' ability to see food in the water column. In order to avoid adverse construction-related impacts upon marine resources, the Commission imposes **Special Condition No. 5**, which outlines construction-related best management practices to provide for the safe storage of construction materials and the safe disposal of construction debris. This condition requires, among other things, the applicant to remove any and all debris resulting from construction activities within 24 hours of completion of the project. In addition, all construction materials, excluding lumber, shall be covered and enclosed on all sides, and as far away from a storm drain inlet and receiving waters as possible.

4. Post-Construction Impacts to Water Quality

The proposed project is considered development and there is an opportunity to improve water quality. Much of the pollutants entering the ocean come from land-based development. The Commission finds that it is necessary to minimize to the extent feasible within its jurisdiction the cumulative adverse impacts on water quality resulting from incremental increases in impervious surface associated with additional development. As part of the City CDP (CDP2017-035), a water retention basin was approved in the rear yard to address post-construction water quality. To minimize any impacts to water quality the proposed project may have after construction; water runoff from the cantilevered deck will be directed to the rear yard water retention basin. Thus, the project addresses post construction water quality impacts.

CONCLUSION

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

D. LOCAL COASTAL PROGRAM (LCP)

On January 13, 2017, the Commission effectively certified the City of Newport Beach LCP. The proposed cantilevered deck occurs on or over submerged lands that are within the Commission's jurisdiction and, consequently, the standard of review is Chapter 3 of the Coastal Act, and the certified LCP serves as guidance. As conditioned, the proposed development is consistent with Chapter 3 of the Coastal Act.

E. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The City of Newport Beach is the lead agency responsible for certifying that the proposed project is in conformance with the California Environmentally Quality Act (CEQA). The City determined that in accordance with CEQA, the project is Categorical Exempt development from Provisions of CEQA for new construction. Section 13096(a) of the Commission's

administrative regulations requires Commission approval of coastal development permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of 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.

Under Section 15251(c) of Title 14 of the California Code of Regulations, the Commission's CDP regulatory process has been certified as the functional equivalent to the CEQA process. The proposed project has been conditioned in order to be found consistent with the public access and resource protection policies of the Coastal Act and the LCP, as applicable. As conditioned, the proposed project has been found consistent with the public access, water quality and biological resources policies of the Coastal Act and the LCP, as applicable.

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

Coastal Development Permit No. 5-18-0057-(Davis); Eelgrass and *Caulerpa Taxifolia* Survey Reports prepared by Dive Works dated September 14, 2018; City of Newport Beach Harbor Resources Division Approval-In-Concept dated October 9, 2018, Letter from Commission staff to Swift Slip Dock and Pier Builders, Inc. dated November 30, 2018; and Letter from Swift Slip Dock and Pier Builders to Commission staff dated December 12, 2018.