

CALIFORNIA COASTAL COMMISSION

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



Th12c

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STAFF REPORT: REGULAR CALENDAR

Application No.: 5-19-0689

Applicant: Jeffrey Wong

Agent: Gaines & Stacey, LLP, Attention: Sherman L. Stacey and John T. Morgan Jr. - Architect

Location: 1316 W. Bay Avenue, City of Newport Beach, (Orange County) (APN: 047-231-28)

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

Staff Recommendation: Approval with conditions.

SUMMARY OF STAFF RECOMMENDATION

The proposed project is the construction of a 25-foot by 5-foot concrete deck cantilevered from the bulkhead of a single-family residence on a bay-fronting lot in Newport Beach, Orange County. The deck would cantilever over the wet sand/ water of Newport Bay. A private stairway from the existing dock system leading to the wet sand/water below would be demolished to make room for the cantilevered deck.

The proposed project is within the Commission's original permit jurisdiction because it would be located above the waters of Newport Bay. The standard of review for development proposed 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 in the review process.

Staff is recommending **APPROVAL** of the proposed cantilevered deck with **five (5) special conditions**. The major issues raised by this proposed project are consistency with the public access, recreation, marine resources, and water quality policies of the Coastal Act.

The proposed deck would cantilever over a 35-foot wide by 8-foot deep portion of the applicant's property that is situated bayward of the existing bulkhead. This portion of the applicant's lot has not been officially deemed to be Public Trust Tidelands because it has historically been part of the property deed for the landside lot, although the lands would be subject to a navigational easement. The bayside boundary line that separates private property from Public Trust Tidelands was adjudicated in 1928, via action No. 23678 in Orange County Superior Court. The applicant contends that this land was never, and is not now, subject to the public trust. Ultimately, determinations about public trust boundaries are the jurisdiction of the State Lands Commission. Assuming the applicant is correct, construction of the cantilevered deck may be allowed as long as it does not prevent use of the submerged waters for navigational purposes and is otherwise consistent with Sections 30210, 30212, 30220, 30221 and 30250 of the Coastal Act and the City of Newport Beach LCP policies (3.1.1-1, 3.1.1-9, 3.1.1-11, and 3.1.4-3) protecting public access. Construction of the proposed cantilevered deck may hinder but would not completely obstruct the public's ability to access the water portion of the applicant's lot for navigational purposes. As a practical matter, it is unlikely to have much impact on public access due to the existence of the private dock onsite, as well as docks attached to adjacent residences that extend farther out into the bay. Thus, the proposed cantilevered deck would not be inconsistent with a navigational easement or with Coastal Act public access policies.

Staff's recommended approval of this project is based on a review of available maps, including those found in the City's certified LCP, and the applicant's documentation of the bayside boundary line. However, the Commission cannot waive any public rights that may exist on the property. Therefore, Staff recommends that the Commission impose **Special Condition No. 1**, stating that approval of a coastal development permit ("CDP") for the project does not waive any public rights or interests that exist or may exist on the property. 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 CDP 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 should be imposed. **Special Condition No. 2** requires the applicant to prepare a new eelgrass survey prior to beginning construction, as the submitted survey is outdated, to conduct a follow-up survey if any eelgrass is identified, and to mitigate for any eelgrass adversely affected by the project. **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 dispersed in coastal waters as a result of construction activities, and take appropriate actions if any is identified

During and post-construction, the proposed project has the potential to cause adverse impacts to water quality and marine resources. In order to minimize any such impacts, **Special Condition No. 4** provides requirements regarding construction responsibilities and debris removal.

Impacts to other biological resources may occur if future development occurs without first being reviewed by the Commission. Thus, the Commission should impose **Special Condition No. 5**, requiring the applicant to obtain a permit amendment or a new permit for any repair or maintenance of the proposed deck.

If approved with the conditions recommended by staff, the proposed project will conform with the Chapter 3 policies of the Coastal Act.

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

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EXHIBITS

[Exhibit 1 – Location Map](#)

[Exhibit 2 – Site Plan and Section Plan](#)

[Exhibit 3 – Correspondence from Applicant’s Representative](#)

I. MOTION AND RESOLUTION

Motion:

I move that the Commission approve Coastal Development Permit 5-19-0689 subject to conditions set forth in the staff recommendation specified below.

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

Resolution:

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

II. 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 applicant 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 of 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 that the 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 applicant to bind all future owners and possessors of the subject property to the terms and conditions.

III. 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.** A valid pre-construction eelgrass survey (whether for *Zostera marina* or *Z. pacifica*) shall be completed for the project site and a 10 meter 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 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 10 meter buffer area by the pre-construction survey, 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 10 meter 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 ratio on-site (mitigation: impact), 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 CDP, 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.
 - A. For the review and approval by the Executive Director; and
 - B. 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. **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, 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.** 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.
5. **Future Development.** This permit is only for the development described in CDP No. 5-19-0689. Pursuant to Title 14 of the 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 CDP No. 5-19-0689, including the proposed 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 Code Section 30610(d) and Title 14 of the California Code of Regulations Sections 13252(a)-(b), shall require an amendment to CDP No. 5-19-0689 from the Commission or shall require an additional CDP from the Commission or from the applicable certified local government.

IV. FINDINGS AND DECLARATIONS

A. Project Description, Location, Standard of Review, Local Approval and Prior Permits

Project Description and Location

The proposed project is the construction of a 25-foot by 5-foot concrete deck cantilevered from the bulkhead over the wet sand/water of Newport Bay ([Exhibit 2](#)). A private stairway from the existing dock system leading to the wet sand/water below would be demolished to make room for the cantilevered deck ([Exhibit 2](#)).

The subject site is a bulkheaded property fronting Newport Bay located at 1316 W. Bay Avenue in Newport Beach, Orange County ([Exhibit 1](#)). Single-family residences and associated private boat dock systems characterize the subject site and the surrounding area. The area of the bay over which the proposed deck would be cantilevered is a 35-foot wide by 8-foot deep area situated bayward of the existing bulkhead. Although this area is often submerged, it is also listed on title as part of the applicant's property. This portion of the applicant's lot has not been officially deemed to be Public Trust Tidelands because it has historically been part of the property deed for the landside lot. The bayside boundary line that separates private property from Public Trust Tidelands was adjudicated in 1928 action No. 23678 in Orange County Superior Court. The applicant contends that this land was never, and is not now, subject to the public trust. Ultimately, determinations about public trust boundaries are the jurisdiction of the State Lands Commission. Although the public trust is presumed to apply to most tidelands, in a case

such as this, where the tidelands are privately owned, the opposite presumption applies unless the State Lands Commission determines otherwise. Here, it has not made any determination. Therefore, for purposes of this CDP application, staff assumes that the submerged land below the proposed cantilevered deck is privately owned, submerged land that is *not* subject to the public trust. However, as discussed below, such lands are subject to a navigational easement and the public maintains a right to access the navigable bay waters.

The only development situated bayward of the applicant's bulkhead is a small private stairway leading down from the existing dock system to the wet sand/water below and a private boat dock. A small portion of the pier of the boating facility and the proposed cantilevered deck are and will continue to be located on private property, with the remaining portion of the dock located on State Tidelands, which 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 919, Chapter 494, Page 1011 and Statutes of 1927, Chapter 70, Page 125).

Standard of Review

The City of Newport Beach LCP was effectively certified on January 13, 2017. The landside portion of the development is located within the City's permit jurisdiction, while the area of the applicant's lot that exists beyond the bulkhead is located bayward of the high tide --on submerged lands--and is therefore within the Commission's jurisdiction (Pub. Res. Code § 30519(b)). 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.

Local Approval

On February 27, 2018, the applicant obtained Local CDP No. 5-NPB-18-0299 from the City of Newport Beach Zoning Administrator for landside development at the project site, consisting of the demolition of an approximately 3,200 sq. ft. two-story single-family dwelling and the construction of a 4,311 square-foot, three-story single-family residence with a 475 square-foot two-car garage. The City-approved project also includes hardscape, drainage, landscaping improvements, and a reinforced bulkhead involving new landside caissons and tiebacks. A Bulkhead Conditions Report states that the bulkhead is in good condition. While in good condition, the applicant is proposing to reinforce the bulkhead via landside caissons and tiebacks to support the cantilevered deck that includes a curb for a new height of 10 feet NAVD88, which exceeds the City's Harbor Design Criteria standard of 9.82 feet NAVD88 (10 feet MLLW).

The City also determined that the proposed cantilevered concrete deck falls under the jurisdiction of the Coastal Commission because it projects beyond the bulkhead and over the bay waters. The City states that the proposed deck has been designed in compliance with the patio deck standards of Municipal Code Section 21.30C.050(G)(5). Specifically, the deck would project a maximum of 5 feet beyond the bulkhead,

maintains minimum setbacks of 5 feet from the prolongations of the side property lines, and would be located outside Tidelands Trust, which are mapped State Tidelands administered by the City. Furthermore, the City stated that since the proposed deck includes an integrated raised curb needed to protect the development against future sea level rise, the City imposed a condition of approval requiring the applicant to apply for and obtain approval of a CDP from the Coastal Commission prior to the issuance of a building permit.

Prior Permits

On December 12, 2018, CDP No. 5-18-0221 (Wong) was scheduled to be heard by the Commission, describing the same project at the same location. Prior to the hearing but after publication of the staff report, the project was withdrawn. Commission staff had been recommending denial of the proposed deck because of its adverse impacts to public access to navigable waters. The applicant has provided additional information about the location of the Tidelands grant and the privately owned submerged lands, including the adjudicated property line. This information leads Staff to recommend approval subject to special conditions.

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 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.

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.

...

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.

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

A majority of the applicant's private boat dock system is located on State Tidelands that are administered by the City of Newport Beach. The stairway to be demolished and a small portion of the pier and the proposed cantilevered deck would be located over a 35-foot by 8-foot deep submerged area of private property. 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.

The City determined that the proposed cantilevered deck falls under the jurisdiction of the Coastal Commission. The City issued an approval-in-concept for the proposed deck which is designed in compliance with the patio deck standards of the City's Implementation Plan (IP) 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.

Although the proposed deck does not appear to be located on State Tidelands, because the property seaward of the bulkhead is submerged bay waters some of the time, the question of the Public Trust Doctrine arises. The Public Trust Doctrine provides that tide and submerged lands and the beds of lakes, streams, and other navigable waterways are to be held in trust by the State for the benefit of the people of California for uses including the right to swim, boat, and engage in other forms of water recreation. However, the applicant has provided information indicating that the submerged land at issue is private property and was never subject to the public trust ([Exhibit 3](#)). As such, the applicant contends that the deck may be authorized because it is consistent with LCP policies related to decks over Harbor waters, including IP Section 21.30C.050(G)(5) which states 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.

Determinations about the public trust boundary are ultimately the jurisdiction of the State Lands Commission, which in this case has not been done. However, even assuming the applicant's information concerning the history of the submerged portion of its property is correct, so that this area is not subject to the public trust, pursuant to Public Resources Code section 7552.5, the submerged waters 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.¹

In addition, the standard of review for this project is Chapter 3 of the Coastal Act, and the City's LCP may provide guidance but is not binding on the Commission. 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.

There is no direct public pedestrian access to bay waters through the private residential lot at the subject site. Public pedestrian access to the bay is available approximately 136 feet east of the project site at the 13th Street street end ([Exhibit 1](#)). From this access point, members of the public may access bay waters and, for example, launch a kayak or SUP (standup paddle board). Alternatively, at lower tides it is possible for one to walk under the residential piers for strolls down the wet sand. However, the existing dock for the residence – as well as docks associated with adjacent residences – extend

¹ The public's right to access navigable waters regardless of the title to the underlying lands has been recognized in numerous court cases. See, e.g., *Hitchings v. Del Rio Woods Recreation and Parks Dist.*, 55 Cal. App. 3d 560, 571 (1976) ("The ownership of the bed is not determinative of public navigational rights, nor vice-versa."); *Bohn v. Albertson*, 107 Cal.App.2d 738, 749 (1951) (public has right to access navigable waters regardless of the title to the underlying lands unless and until the lands are reclaimed).

bayward of the area where the cantilevered deck would be constructed and limit public use of the waters immediately adjacent to the bulkhead. The proposed cantilevered deck would similarly restrict (but not altogether deny) public access immediately adjacent to the bulkhead. The potential public access impact is minimized by the applicant's proposed compliance with LCP policy 21.30C.050(G)(5), specific to cantilevered patio deck designs.

Thus, the proposed cantilevered deck would not be inconsistent with a navigational easement or with Coastal Act public access policies.

The Coastal Commission's approval of this project is based on a review of available maps (including those in the City's certified LCP) and the applicant's documentation of the bayside boundary line that separates private property from Public Trust Tidelands, which was adjudicated in 1928, via action No. 23678 in Orange County Superior Court. However, the Commission cannot waive any public rights that may exist on the property. Thus, **Special Condition No. 1** is imposed, stating that the approval of a CDP for the project does not waive any public rights or interests 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 CDP not compatible with the public trust must be removed.

CONCLUSION

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30210, 30212, 30220, 30221 and 30250 of the Coastal Act and the City's certified LCP used as guidance regarding public access, recreational opportunities, and 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 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 4.2.3-2 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 the 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 effects would constitute a significant loss of coastal waters and soft bottom habitat.

Eelgrass (*Zostera Marina*) and *Caulerpa Taxifolia*

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.

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 NMFS indicates that *Caulerpa Taxifolia* can grow in large monotypic stands within which no native aquatic plant species can co-exist. Therefore, native seaweeds, seagrasses, and kelp forests can be displaced by the invasive *Caulerpa Taxifolia*. This displacement of native aquatic plant species can adversely impact marine biodiversity with associated impacts upon fishing, recreational diving, and tourism. *Caulerpa Taxifolia* is known to grow on rock, sand, or mud substrates in both shallow and deep water areas. Since eelgrass grows within the general project vicinity, *Caulerpa Taxifolia*, if present, could displace eelgrass in the channels.

The project site was surveyed between July 2 and October 3, 2018, and eelgrass was discovered within the project area. Eelgrass surveys completed during the active growth phase (typically March through October) are valid for 60 days, with the exception of surveys completed between August and October. The 2018 eelgrass survey is no longer valid. Therefore, a subsequent eelgrass survey will be required prior to beginning any construction. A pre-construction *Caulerpa taxifolia* survey was completed between July 2 and October 3, 2018, as required by the City of Newport Beach Harbor Resources Division, and no *Caulerpa taxifolia* was discovered in the project area. *Caulerpa taxifolia* surveys are valid for 90 days. The *Caulerpa taxifolia* survey is no longer 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. Therefore, the Commission imposes **Special Conditions No. 2 and No. 3**, which identify the necessary procedures prior to construction. Also, if any *Caulerpa taxifolia* is found on the project site, **Special Condition No. 3** identifies the necessary procedures prior to construction.

Construction Impacts to Water Quality

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 to 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. 4**, 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.

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 runoff associated with additional development. As part of the Local Coastal Development Permit No. 5-NPB-18-0299, 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.

As conditioned, impacts to biological resources will be minimized. However, 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. 5**, requiring the applicant to obtain a permit amendment or a new permit for any repair or maintenance of the proposed deck.

CONCLUSION

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

D. Local Coastal Program (LCP)

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

E. California Environmental Quality Act (CEQA)

The City of Newport Beach is the lead agency responsible for certifying that the proposed project conforms with the California Environmentally Quality Act (CEQA). The City determined that the proposed development is ministerial or categorically exempt from CEQA on April 15, 2019.

Section 13096(a) of the Commission's administrative regulations requires Commission approval of CDP applications to be supported by a finding showing that the application, as conditioned by any conditions of approval, is consistent with any applicable requirements of CEQA. 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. 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 proposed project has been conditioned to be found consistent with the public access, resource protection, and water quality 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. The Commission finds that the proposed project, as conditioned to mitigate the identified impacts, is the least environmentally damaging feasible alternative and is 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.

Newport Harbor Shallow Water Eelgrass Survey 2018, Marine Taxonomic Services, Ltd.; Geotechnical Engineering Investigation for Proposed New Residence at 1316 West Bay Avenue Newport Beach, California prepared by Coast Geotechnical, Inc. (W.O. 540717-01) dated October 22, 2017.

Bulkhead Conditions Report (PMA Job#17817) prepared by PMA Consulting, Inc. dated October 25, 2017.

Coastal Hazards Analysis Report (PMA Job #17871) prepared by PMA Consulting, Inc. dated February 12, 2018.

City of Newport Beach Coastal Development Permit No. 5-NPB-18-0299

City of Newport Beach Harbor Resources Division Approval-In-Concept dated April 15, 2019.

Letter from Commercial Development Resources to Commission staff dated May 2, 2019.

Letter from Sherman L. Stacey to Commission staff dated June 26, 2019.

Letter from Commission staff to John T. Morgan dated July 24, 2019.

Letter from Sherman L. Stacey to Commission staff dated July 30, 2019.

Letter from Commission staff to John T. Morgan dated August 19, 2019.

Letter from Sherman L. Stacey to Commission staff dated September 11, 2019.