

**CALIFORNIA COASTAL COMMISSION**

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# W14b

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## STAFF REPORT: REGULAR CALENDAR

**Application No.:** 5-19-0907

**Applicant:** Palmo Investments

**Agent:** Anchor QEA, LLC, Attention Adam Gale

**Location:** Newport Bay waters adjacent to 2888 Bayshore Drive, Newport Beach, Orange County.

**Project Description:** Demolition of an existing 53-slip marina and construction of a 50-slip marina, and installation of harbor camel with four 16-inch diameter piles.

**Staff Recommendation:** Approval with conditions.

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## SUMMARY OF STAFF RECOMMENDATION

The proposed project is the demolition of an existing marina and construction of a new marina located at 2888 Bay Shores Drive, Newport Beach, Orange County, including docks, piles, utilities, pier platform and gangway. The project will reduce the number of boat slips from 53 to 50. The marina is privately owned but the boat slips are leased to the public for recreational use.

The proposed project is located within the Commission's original permit jurisdiction over the waters of Newport Bay. The standard of review for proposed development within the Commission's original permit jurisdiction is Chapter 3 of the Coastal Act. The City's certified Local Coastal Plan ("LCP") is advisory in nature and may provide guidance.

The proposed project was previously agendized for the March 2020 Commission meeting in Monterey and a staff report was published, but due to discrepancies in the project description and alternatives analysis, and also due to public noticing deficiencies, the hearing was postponed. A special condition had previously been recommended requiring the proposed marina to be revised to be consistent with an alternative plan, identified in the staff report as the 2018 Plan, which would have reduced the amount of water coverage and eelgrass shading from the proposed marina. However, the applicant and an interested party have recently submitted evidence that the proposed marina would actually result in less water coverage than the 2018 Plan. Thus, Commission staff no longer recommend that the proposed marina be revised to be consistent with the 2018 Plan - although in order to minimize impacts to biological productivity, Commission staff recommend the proposed marina be developed without a harbor camel and associated pile fill, as detailed in the findings and recommended conditions.

Staff is recommending **APPROVAL** of the redevelopment of the existing marina with **ten (10) special conditions**. The major issues raised by this proposed project are consistency with the marine resources, water quality, public access, and recreation policies of the Coastal Act.

The marina is in a section of Newport Bay identified as Newport Harbor which is managed by Orange County. A "Newport Tidelands Encroachment Permit" is required from the County, but the applicant has not obtained that encroachment permit. Staff therefore recommends the Commission impose **Special Condition No. 1**, which requires the applicant to submit a copy of a letter of permission or approval from Orange County, or evidence that no permit or permission is required, prior to the issuance of the coastal development permit.

The existing dock system on this site consists of 12,534 square feet of overwater material (dock floats) and the proposed dock system would cover 13,805 square feet. The proposed dock system would result in an increase of 1,271 square feet of increased water coverage. The proposed project originally would result in approximately 785 square feet of shading in areas where eelgrass was identified in the most recent survey conducted during the active growth period. The increased water coverage in this area may impact the biological productivity of the area by reducing or eliminating photosynthesis in the covered water areas, impacting the growth of eelgrass, and reducing water area for avian foraging opportunities.

The proposed plan also includes the installation of a harbor camel, a physical barrier located in and above the water, supported by piles, that prevents vessels entering or exiting the marina from coming into contact with vessels tied to the adjacent southern dock, like an elevated bumper, resulting in 98 square feet of water coverage and 7.2 square feet of fill. The harbor camel and associated four 16-inch diameter support piles are proposed in the waters of Newport Bay, 25 feet south of the south end of the marina. The applicant states that the harbor camel and piles would allow tenants to

safely navigate from the bay to the backside (landward side) of the marina and also eliminate potential property damage and personal injury to the adjacent property and property owner located at 2782 Bayshore Drive. However, the harbor camel and piles raise concerns regarding the installation of physical barriers in and over the public waters of Newport Bay. While the harbor camel and piles do not result in eelgrass shading, they do result in additional water coverage and fill inconsistent with the Coastal Act leading to diminished public access and recreational opportunities. Different from the dock float, the harbor camel and piles are not necessary to develop the marina or enable recreational boating; they are proposed to demarcate an imaginary side property line from the land into the public waters of the bay and minimize legal disputes over potential boat collisions. Approval of the harbor camel and piles would set an adverse precedent where other private dock and marina owners might seek to fill public waters to demarcate imaginary property lines and attempt to absolve themselves of liability associated with owning and operating a recreational boat.

Commission staff asked the applicant to analyze a project alternative that would reduce the adverse impacts of the proposed project, but the applicant is intent on going forth with the proposed design. The applicant has proposed an eelgrass mitigation plan in order to mitigate the adverse impacts to eelgrass, but even with this plan, the proposed project is not the least environmentally feasible alternative. The increased water coverage and fill may be further reduced, while enabling recreational boating to be supported consistent with the Coastal Act. An alternative that would reduce water coverage and fill and also avoid setting a precedent for installing physical barriers in Newport Bay would be to eliminate the proposed harbor camel from the project. As a result, the proposed project would be the least environmentally damaging alternative that still satisfies project goals to provide recreational boat docks in the same general footprint in compliance with Newport Beach Harbor Design Guidelines and Coastal Act Chapter 3 policies. Therefore, staff recommends the Commission impose **Special Condition No. 2**, which requires the applicant to submit revised marina plans eliminating the harbor camel and associated piles. This condition would also protect marine resources and water quality by requiring the applicant to submit revised plans identifying the revised structural dock float decking construction material that does not use a chemical preservative treatment or a preservative treatment that does not result in the potential release of adverse materials into the water.

Additionally, the surveys stating that eelgrass was located at the project site are outdated and no longer valid. Thus, **Special Condition No. 3** requires a new eelgrass survey and identifies the procedures which must be completed prior to beginning construction. Due to the identified eelgrass shading area and the potential difficulties of the proposed mitigation areas, the eelgrass mitigation plan must be revised to correlate with the identified amount of eelgrass impacts based on an updated survey. Therefore, **Special Condition No. 4** requires the applicant to submit a revised Eelgrass Mitigation Plan. The eelgrass plan will be required to mitigate for all actual impacts to eelgrass, which will be minimized to the smallest amount necessary to support recreational boating but still meet project goals based on the required revision to the project design.

In addition, since the submitted *Caulerpa Taxifolia* survey is outdated, **Special Condition No. 5** 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 the proposed slip mix results in an increase of small, small-medium, and large boat slips, and a decrease in medium boat slips, the proposal, which also includes kayak and stand up paddleboard racks and the use of a side tie area, provides a good mix of slip sizes, with an increase in smaller boat slips that enhance public access opportunities.

In order to ensure that future development on the site does not adversely impact biological resources and public access (for example, relocating boat slips over active eelgrass growth or eliminating small boat slips in favor of larger ones), staff recommends the Commission impose **Special Condition No. 6**, which informs the applicant that future development at the site requires a permit amendment or a new coastal development permit.

During construction and post-construction, the proposed project has potential for adverse impacts to water quality and marine resources. Therefore, several standard special conditions are recommended to minimize any such impacts: **Special Condition No. 7** outlines construction responsibilities and debris removal requirements, and **Special Condition No. 8** requires the applicant to implement construction Best Management Practices (BMPs) to protect water quality.

To ensure that the applicant complies with all requirements, requests and mitigation measures from the California Department of Fish and Wildlife, the Regional Water Quality Control Board, the U.S. Army Corps of Engineers, and the U.S. Fish and Wildlife Service with respect to preservation and protection of water quality and the marine environment, **Special Condition No. 9** requires that the applicant comply with all the requirements, requests, and mitigation measures of these agencies.

Finally, the public tidelands and submerged lands upon which the marina is located and bayward of the site are managed by Orange County. Since these are Public Trust Lands, the public maintains a right to access the navigable bay waters for navigation and recreational purposes. In order to preserve and maintain access to the Public Trust Tidelands, **Special Condition No. 10** states that the approval of a coastal development permit for the project does not waive any public rights or interests that exist or may exist on the property.

If approved with conditions to preserve marine resources, water quality, public access, and recreation, the proposed project will conform with the Chapter 3 policies of the Coastal Act.

5-19-0907

Palmo Investments

The motion to approve the CDP application is on **Page Seven**. The special conditions begin on **Page Eight**.

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## EXHIBITS

[Exhibit 1 – Location Map](#)

[Exhibit 2 – Proposed Project Plans](#)

[Exhibit 3 – Proposed Project Plans with Eelgrass and Mitigation Location](#)

Motion and Resolution

**Motion:**

I move that the Commission approve Coastal Development Permit 5-19-0907 pursuant to the staff recommendation.

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

**I. 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.

## II. SPECIAL CONDITIONS

1. **Orange County Approval.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for the review and written approval of the Executive Director, a copy of a letter of permission or approval from Orange County regarding the proposed project, or evidence that no permit or permission is required. The applicant shall inform the Executive Director of any changes to the project required by the County. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this coastal development permit amendment, unless the Executive Director determines that no amendment is legally required.
2. **Revised Project Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for the review and written approval of the Executive Director, two (2) full size sets of revised project plans that substantially conform with the plans submitted on April 17, 2020, except as modified as required below:
  - A. The revised plans shall remove the harbor camel and associated piles from the plans;
  - B. The revised plans shall be overlaid upon images showing Eelgrass patches identified in the Eelgrass survey required by **Special Condition No. 3** of this coastal development permit;
  - C. The revised plans shall indicate the use of dock float decking material that does not need a chemical preservative treatment or that uses a preservative treatment that does not result in the potential release of adverse materials into the water (e.g., treated wood deck material on which a recognized wood sealant is applied at an approved inland facility prior to arrival at the construction site, and kiln-dried, in order to significantly reduce potential leaching of preservative treatments into the water body);
  - D. All revised plans shall be prepared and certified by a licensed professional or professionals as applicable (e.g., architect, surveyor, geotechnical engineer), based on current information and professional standards, and shall be certified to ensure that they are consistent with the Coastal Commission's approval and with the recommendations of any required technical reports; and



- E. The revised plans submitted to the Executive Director shall bear evidence of Approval-in-Concept of the revised design from the City of Newport Beach Harbor Resources Division.

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

3. **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.

- 4. Revised Eelgrass Mitigation Plan.** Prior to issuance of the coastal development permit, the applicant shall submit, for the review and written approval of the Executive Director, a Revised Eelgrass Mitigation Plan for transplanting and replacement of eelgrass adversely impacted by the project that shall be in substantial conformance with the Newport Marina Redevelopment Project Eelgrass Mitigation Plan (prepared by Marine Taxonomic Services, Ltd dated September 9, 2019), except as required to be modified as described below. The plan shall be prepared in consultation with the CDFW and NMFS. The plan shall be prepared consistent with the requirements identified below and the requirements of the California Eelgrass Mitigation Policy (CEMP), including but not limited to the requirements outlined relative to mapping, and mitigation site, size, techniques, monitoring and success criteria, but excepting the allowed exclusions and timing requirements that conflict with the requirements identified below.

**A.** The plan shall provide that:

1. All direct eelgrass impacts and shading impacts to eelgrass shall be mitigated at a minimum 1.38:1 (mitigation to impact) ratio. A greater ratio may be applied based on the performance of the mitigation site based on the success criteria and guidance from the other resource agencies;
2. Adverse impacts to eelgrass shall be mitigated on-site to the maximum extent feasible and, for the portion that cannot feasibly be mitigated on site, off-site mitigation will take place. The final location of all on-site and off-site mitigation shall be specifically identified;
3. The mitigation site(s) shall be covered with eelgrass at pre-project densities of the impacted site within five years of the initial planting;
4. Prior to commencement of construction of the portions of the approved project that would have direct impacts upon eelgrass beds, the eelgrass that would be directly impacted shall be transplanted, along with any supplementary planting in accordance with subsection (a) above, to the mitigation site(s).
5. A report that describes densities, and recommended maintenance and replanting measures shall be submitted annually to the Executive Director;

6. A comprehensive report describing the results of the plan shall be submitted at the end of the proposed five-year period;
7. A follow-up program shall be implemented if the original program is wholly or partially unsuccessful;
8. A final inventory and map showing the location of existing eel grass beds within the approved construction area and showing the areas of potential eel grass disturbance;
9. An inventory and map showing the location of existing eel grass beds, if any, within the mitigation site(s); and
10. Performance standards that will assure achievement of the mitigation goal (i.e., attainment of pre-project densities at the mitigation site(s) within five years).

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

- 5. 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.

The survey protocol shall be prepared in consultation with the RWQCB, CDFW, and NMFS. Within five (5) business days of completion of the survey, the applicant shall submit the survey:

- 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.

- 6. Future Development.** This permit is only for the development described in CDP No. 5-19-0907. Pursuant to Title 14 of the California Code of Regulations Section 13253(b)(6), the exemptions otherwise provided in Public Resources Code Section 30610(b) shall not apply to the development governed by CDP No. 5-19-0907, including the proposed marina. 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. 5-19-0907 from the Commission or shall require an additional CDP from the Commission or from the applicable certified local government.
- 7. Construction Responsibilities and Debris Removal.** By acceptance of this permit, the applicant agrees to comply with the following construction related requirements:

  - A.** No demolition or construction materials, equipment, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain, or tidal erosion and dispersion;
  - B.** Any and all debris resulting from demolition or construction activities, and any remaining construction material, shall be removed from the project site within 24 hours of completion of the project;
  - C.** Demolition or construction debris and sediment shall be removed from work areas each day that demolition or construction occurs to prevent the accumulation of sediment and other debris that may be discharged into coastal waters;
  - D.** Machinery or construction materials not essential for project improvements will not be allowed at any time in the intertidal zone;
  - E.** If turbid conditions are generated during construction a silt curtain will be utilized to control turbidity;
  - F.** Floating booms will be used to contain debris discharged into coastal waters and any debris discharged will be removed as soon as possible but no later than the end of each day;

- G. Non buoyant debris discharged into coastal waters will be recovered by divers as soon as possible after loss;
  - H. All trash and debris shall be disposed in the proper trash and recycling receptacles at the end of every construction day;
  - I. The applicant shall provide adequate disposal facilities for solid waste, including excess concrete, produced during demolition or construction;
  - J. Debris shall be disposed of at a legal disposal site or recycled at a recycling facility. If the disposal site is located in the coastal zone, a Coastal Development Permit or an amendment to this permit shall be required before disposal can take place unless the Executive Director determines that no amendment or new permit is legally required;
  - K. All stock piles and construction materials shall be covered, enclosed on all sides, shall be located as far away as possible from drain inlets and any waterway, and shall not be stored in contact with the soil;
  - L. Machinery and equipment shall be maintained and washed in confined areas specifically designed to control runoff. Thinners or solvents shall not be discharged into sanitary or storm sewer systems;
  - M. The discharge of any hazardous materials into any receiving waters shall be prohibited;
  - N. Spill prevention and control measures shall be implemented to ensure the proper handling and storage of petroleum products and other construction materials. Measures shall include a designated fueling and vehicle maintenance area with appropriate berms and protection to prevent any spillage of gasoline or related petroleum products or contact with runoff. The area shall be located as far away from the receiving waters and storm drain inlets as possible;
  - O. Best Management Practices (BMPs) and Good Housekeeping Practices (GHPs) designed to prevent spillage and/or runoff of demolition or construction-related materials, and to contain sediment or contaminants associated with demolition or construction activity, shall be implemented prior to the on-set of such activity; and
  - P. All BMPs shall be maintained in a functional condition throughout the duration of construction activity.
8. **Best Management Practices (BMPs) Program.** By acceptance of this permit the applicant agrees that the long-term water-borne berthing of boat(s) in the approved dock and/or boat slip will be managed in a manner that protects water quality pursuant to the implementation of the following BMPs.

**A. Boat Cleaning and Maintenance Measures:**

1. In-water top-side and bottom-side boat cleaning shall minimize the discharge of soaps, paints, and debris;
2. In-the-water hull scraping or any process that occurs under water that results in the removal of paint from boat hulls shall be prohibited. Only detergents and cleaning components that are designated by the manufacturer as phosphate-free and biodegradable shall be used, and the amounts used minimized; and

**B. Solid and Liquid Waste Management Measures:**

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

**C. Petroleum Control Management Measures:**

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

- 9. Resource Agencies.** The permittee shall comply with all requirements, requests and mitigation measures from the California Department of Fish and Wildlife (CDFW), the Regional Water Quality Control Board (RWQCB); the U.S. Army Corps of Engineers (USACE), and the U.S. Fish and Wildlife Service (USFWS) with respect to preservation and protection of water quality and marine environment. Any change in the approved project that may be required by the above-stated

agencies shall be submitted to the Executive Director in order to determine if the proposed change shall require a permit amendment pursuant to the requirements of the Coastal Act and the California Code of Regulations.

- 10. 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.

### III. FINDINGS AND DECLARATIONS

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

##### Project Location

The subject site is located in the waters of Newport Bay adjacent to 2888 Bayshore Drive in Newport Beach, Orange County ([Exhibit 1](#)). It is located adjacent to a non-gated residential community of Bayshore and is a privately-owned commercial marina with 53 total boat slips which are available for lease to the public.

The proposed marina is located on public tidelands and submerged lands in Newport Harbor that are managed by the County as identified in a "Tidelands Survey for Newport Harbor for the City of Newport Beach" and is within the Coastal Commission's retained permit jurisdiction. Thus, the County would be the local permit issuing authority for development (i.e. a dock system) within the public tidelands area, and the permits they issue for such development are entitled "Newport Tidelands Encroachment Permits." The applicant has submitted an application to the County but has not yet obtained a "Newport Tidelands Encroachment Permit." Thus, the Commission imposes **Special Condition No. 1**, which requires the applicant to submit a copy of a letter of permission or approval from the County, or evidence that no permit or permission is required prior to the issuance of the coastal development permit.

##### Project Description

The applicant states that the marina was constructed in 1970 and has reached the end of its useful life. The proposed project includes demolition of the existing marina and replacement with a new marina, including docks, piles, utilities, pier platform and gangway, which would reduce the number of boat slips from 53 to 50 ([Exhibit 2](#)). The applicant is proposing adjustments to the existing boat slip mix to accommodate current boater demands and comply with the Americans with Disability Act (ADA) and the California Division of Boating and Waterways' (CDBW) current code and design standards. The applicant is also proposing the installation of a harbor camel and four 16-inch diameter piles in the waters of Newport Bay, 25 feet south of the south end of the marina, where the entrance to the backside (landward side) of the marina exists and will continue to exist post project ([Exhibit 2, Page 2](#)). No work to the existing bulkhead nor any dredging work is proposed. The proposed dock system would extend past the

U.S. Pierhead Line similar to the existing docks system, but not any farther into the bay, consistent with the City of Newport Beach Harbor Permit Policy and as approved by the City of Newport Beach City Council. The table below provides more specific information about the proposed boat slip mix:

**Existing and Proposed Boat Slip Mix**

Boat Slip Length (Feet)	Number of Existing Boat Slips	% Existing Design	Total Proposed Boat Slips	% Proposed Design
22	10	18.87%	8	16.00%
24	1	1.89%		
26			14	28.00%
30	11	20.75%		
32			1	2.00%
38	1	1.89%		
40	1	1.89%	9	18.00%
42	10	18.87%	12	24.00%
48	18	33.96%		
50	1	1.89%		
54			1	2.00%
62			5	10.00%
<b>Total</b>	<b>53</b>	<b>100.00%</b>	<b>50</b>	<b>100.00%</b>

Of the proposed boat slips, 44% (16.0% 22-foot + 28% 26-foot) would remain accessible for boats 26-feet in length or shorter, in comparison with existing 21% (18.8% 22-foot + 1.89% 24-foot) under the current design. If you expand the definition of small boats to include boats 30 feet or shorter, the current configuration accommodates 41%, but there will still be a net increase of small boat slips.

The proposed project would include a new 75-foot-long x 16-inch-wide floating harbor camel, resulting in 98 square feet of water coverage, supported by four 16-inch diameter square concrete piles, resulting in 7.2 square feet of fill ([Exhibit 2, Page 2](#)). The applicant states that the intent of the harbor camel is to establish a physical barrier that is an appurtenance to the proposed marina that will limit or prevent vessels entering



or exiting the marina from coming into contact with the vessel side-tied at the dock located at 2782 Bayshore Drive where a history of contact has occurred. Furthermore, the applicant states it would allow smaller vessels to safely navigate to the backside (landward side) of the herringbone marina design.

The existing pier platform would be replaced with a new fixed pier platform and the top elevation of the new pier would be at the same approximate finished grade elevation as the elevation of the adjacent parking lot. In addition, a new aluminum gangway leading from the new pier platform to the dock system is proposed.

The proposed dock decking material is comprised of wood or synthetic, framed with wood requiring a chemical preservative treatment to reduce the rate of wood rot and corrosion for materials within the water. The timber members will be treated with Ammoniacal Copper Zinc Arsenate (ACZA), Copper Azole Type C (CA-C), or Alkaline Copper Quaternary (ACQ). These treated sections will not be fully submerged in water and will only have contact with water from occasional water splashing, and the water will then run off the decking or wooden framing.

The proposed marina would result in approximately 1,271 square feet of additional water coverage (13,805 square feet proposed - 12,534 square feet existing) compared to the existing design as shown in the table below:

#### Existing and Proposed Dock Components Overwater Coverage

Component	Existing Overwater Coverage (Square Feet)	Proposed Overwater Coverage (Square Feet)	Change (Square Feet)
Dock Shading Area	12,111	13,267	+1,156
Pier and Gangway Over Water	423	440	+17
Harbor Camel	0	98	+98
<b>Total Overwater Coverage</b>	<b>12,534</b>	<b>13,805</b>	<b>+1,271</b>

The applicant states that the increased water coverage is largely a result of adhering to the City of Newport Beach Harbor Design Guidelines and Standards regarding dock, slip, and fairway dimensions and the ADA and CDBW current code and design standards. In addition, the applicant states that the proposed marina layout is designed to occupy the minimum surface area necessary to remain consistent with these current standards while also meeting current boater demand and accommodating recreational boating consistent with the Coastal Act. However, as discussed in subsequent sections of this report, there is an alternative that would reduce water coverage and fill and also avoid setting a precedent for installing physical barriers in Newport Bay. Elimination of the proposed harbor camel from the project would be the least environmentally

damaging alternative that still satisfies project goals to provide recreational boat docks in the same general footprint in compliance with Newport Beach Harbor Design Guidelines and Coastal Act Chapter 3 policies.

The applicant states that there are 785 square feet of eelgrass impacts anticipated as a result from direct shading located in the area between the bulkhead and the proposed marina docks. The largest shading would occur where the main walk (“headwalk”) is being reconfigured and is proposed to be 8-feet wide (consistent with the City of Newport Beach design guidelines) and moved toward the bulkhead to accommodate longer boat slips at the northern end of the marina ([Exhibit 3, Page 1](#)). The applicant states that there will be no direct eelgrass impacts from the proposed piles. To offset the proposed shading impacts to eelgrass, the applicant proposes onsite mitigation at two locations within Newport Bay immediately adjacent to the project site at a ratio of 1.38:1 = 1,378 square feet (Newport Marina Redevelopment Project Eelgrass Mitigation Plan Prepared by Marine Taxonomic Services, Ltd dated September 9, 2019) ([Exhibit 3, Page 2](#)).

The proposed project would remove 22 existing piles and install 46 new concrete piles into the waters of Newport Bay. The table below provides more specific information:

**Existing and Proposed Pile Quantities and Areas**

Component	Existing Piles	Proposed Piles	Change
Pile Quantity	12-inch diameter: 22  TOTAL: 22	18-inch diameter: 2 (to support the pier platform)  16-inch diameter: 4 (to support the harbor camel)  16-inch diameter: 10  14-inch diameter: 30  TOTAL: 46	+24 piles
Pile Area	22 Square Feet	71 Square Feet	+49 Square Feet

The proposed project would result in an increase of 24 new piles, including an increase of 49 square feet of fill as a result. The applicant has stated that the number of piles is the minimum necessary to support the dock floats and pier platform to meet current harbor design codes, ensure consistency with the ADA and the CDBW requirements, and to safely anchor the dock floats.

The proposed configuration of the marina includes 50 boat slips, which would require 38 vehicle parking spaces based upon Table 21.40-1 “Off-Street Parking Requirements” of

Chapter 21.40 “Off-Street Parking” of the Implementation Plan , a component of the City’s Certified LCP that requires 0.75 vehicle parking spaces per boat slip. The Commission may use LCP policies as guidance. Sixty-three (63) vehicle parking spaces (53 unassigned regular parking spaces and five (5) tandem parking spaces) are currently provided on site, which exceeds the number of spaces required per the City's IP for the proposed number of boat slips. In previous Commission actions on marinas in Newport Beach and elsewhere in Orange County, approximately one vehicle parking spaces has been proposed/required for each boat slip. Therefore, even based on the Commission’s previous actions of requiring one vehicle parking space per boat slip, the proposed project results in excess parking.

The applicant anticipates that the construction will take approximately four months. The marina parking lot will be used for staging and equipment storage.

### **Standard of Review**

The City of Newport Beach LCP was effectively certified on January 13, 2017. The proposed project is beyond the bulkhead located bayward of the mean high tide line and is thus within the Commission’s original permit jurisdiction. The standard of review for development within the Commission’s original permit jurisdiction is Chapter 3 of the Coastal Act. The City’s certified LCP is advisory in nature and may provide guidance.

### **Prior Permits**

On April 14, 2016, the Commission approved CDP No. 5-15-1521-(Presta) for the replacement of the existing marina with a new 11,430 square-foot marina, including 97 square feet of fill associated with new marina guide piles. The design included 48 boat slips, accessed in a similar fashion as the subject proposed project, but the design did not include a harbor camel. Four special conditions were imposed regarding: 1) Construction responsibilities and debris removal; 2) Best Management Practices (BMPs) Program; 3) Eelgrass surveys; and 4) Pre-construction Caulerpa Taxifolia Survey. The CDP was issued on May 5, 2016. However, construction never commenced, and the permit expired on April 14, 2018.

## **B. Marine Resources/Water Quality**

Section 30230 of the Coastal Act, Marine Resources; maintenance, states:

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

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

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

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

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

Section 30233 of the Coastal Act states in part:

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

...

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

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

...

(6) Restoration purposes.

Section 30250 of the Coastal Act states in part:

(a) New residential, commercial...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 4.1.4-5 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:

...

- 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.

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.

Implementation Plan, Site Planning and Development Standards, Harbor and Bay Regulations, Harbor Development Regulations, 21.30C.050(D & F) states,

D. Eelgrass and Marine Habitat.

Pier, pier platform, gangway and dock design shall be designed and sited and make use of materials that will minimize and, where feasible, avoid impacts to eelgrass and marine habitat. Where possible, design structures to avoid any net increase in overall water coverage, and wherever possible reduce the overall water coverage.

F. Pollution Control.

The permittee shall maintain the area delineated on the harbor development permit free and clear from beached or floating rubbish, debris or litter at all times. Adequate safeguards shall be maintained by the permittee to avert any other type of pollution of Newport Harbor from recreational and/or commercial use of the tidelands.

### **Marine Resources/Biological Productivity**

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 effect would be a significant loss of coastal waters and soft bottom habitat.

Eelgrass (*Zostera marina*) can be adversely affected by increased water coverage. 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.

### **Shading Impacts and Eelgrass (*Zostera Marina*)**

The proposed project as originally submitted in the subject CDP application anticipated shading impacts to approximately 999 square feet of eelgrass located underneath the proposed headwalk; however, based on the most recent review of the project design and the most recent eelgrass survey conducted during a period of active growth, the applicant has estimated that 785 square feet of eelgrass shading impacts will occur ([Exhibit 3, Page 1](#)). Increased water coverage will impact the biological productivity of the area, which could be inconsistent with the mandates of Coastal Act Sections 30230

and 30231 to maintain/sustain the biological productivity of coastal waters, reducing photosynthesis, impacting the growth of eelgrass by reducing the amount of sunlight, and reducing water area for avian foraging opportunities. In order to be consistent with the Coastal Act, marine resources shall be maintained, enhanced, and where feasible, restored. Increased water coverage can only be authorized if it is necessary to support public recreation, as stated in the project description, if the impacts are minimized in terms of area, and if the project provides restoration benefits, which the applicant proposes through eelgrass transplant and mitigation on site and near the site.

The City of Newport Beach Harbor Resources Division has developed Harbor Design Criteria Guidelines and Standards, though not certified by the Coastal Commission, that provide criteria for designing dock systems in a way that minimizes water coverage while providing for a usable dock. While the proposed project is consistent with Harbor Design Criteria Guidelines and Standards, the project would result in an increase of 1,271 square feet of water coverage, and shading impacts to approximately 785 square feet of eelgrass.

Commission staff asked the applicant to analyze a project alternative, including a revised project design, that would further minimize or avoid impacts to eelgrass, but the applicant is intent on the proposed design. In order to mitigate the adverse impacts to eelgrass, the applicant has submitted an eelgrass mitigation plan: Newport Marina Redevelopment Project Eelgrass Mitigation Plan (Prepared by Marine Taxonomic Services, Ltd dated September 9, 2019), which is based upon an Eelgrass Survey Prepared by Marine Taxonomic Services, Ltd dated July 25, 2018. The mitigation plan details mitigation for 999 square feet of eelgrass shading, which was the originally anticipated amount of eelgrass impacted by shading from the proposed marina. However, as stated earlier, it has been recently estimated that a reduced amount of shading will occur instead (785 square feet). The plan proposes onsite mitigation at two locations immediately adjacent to the proposed project site for the shading impacts of 999 square feet of eelgrass at a ratio of 1.38:1 = 1,378 square feet ([Exhibit 3, Page 2](#)). There are potential difficulties with this plan, though, since the northern location of proposed mitigation has an outfall pipe located near it and this area has been dredged multiple times to remove accumulated sediment, more recently in the later half of 2018. Thus, successful mitigation at this location may be difficult.

Coastal Act Section 30233 mandates that 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. LUP Policies 4.2.5-1 and 4.3.2-22.D of the City's certified LCP and the California Eelgrass Mitigation Policy require avoidance of impacts. Thus, alternative project designs that avoid or minimize impacts and preserve biological productivity must be analyzed.

The proposed project includes a new floating harbor camel, resulting in 98 square feet of water coverage ([Exhibit 2, Page 2](#)). The applicant states that this device acts as a



physical barrier that will limit or prevent vessels from coming into contact with a large vessel that is sometimes side-tied at the dock located south of the marina entrance at 2782 Bayshore Drive, where there is a recent history of contact. Furthermore, the applicant states it would allow smaller vessels to safely navigate to the backside (landward side) of the herringbone marina design. However, the subject marina has existed in its configuration for 60 years without a harbor camel. The proposed marina extends to almost the same southerly extent as the existing marina, with the same angle and dimension of entry to the backside. The only variable that has recently changed is the adjacent dock and dock owner has berthed a larger vessel, using a side tie that extends closer to the marina. The harbor camel and piles are not necessary to develop the marina or enable recreational boating; they are proposed to demarcate an imaginary side property line from the land into the public waters of the bay and minimize legal disputes over potential future boat collisions.

While the most recent eelgrass survey indicates that the harbor camel will not result in eelgrass shading impacts, there is eelgrass within the vicinity of the proposed harbor camel, and it would result in 98 square feet of water coverage. Additionally, it requires four additional 16-inch diameter square piles, which will fill soft bottom habitat where eelgrass could otherwise grow in the future. Coastal Act Section 30233 declares that fill may only be authorized in open coastal waters... for new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities. The proposed harbor camel is not consistent with those uses in that it is not necessary to support recreational boating or public recreational opportunities. Approval of the harbor camel would risk setting a precedent for projects in Newport Bay, and could encourage future applicants to install physical barriers in and over the public waters of Newport Bay, resulting in more water coverage and diminished public access and recreational opportunities. There are alternatives to this project component that would avoid excess water coverage and fill, while preventing contact to the property located south of the marina. The adjacent private dock could be redesigned so that the large vessel is not at risk of coming into contact with other vessels entering or exiting the marina; the subject marina could be redesigned to allow more space between the entrance to the backside and the adjacent dock; the adjacent dock owner could dock the large private vessel at another offsite location rather than side-tying it on a private dock which is not properly sized to accommodate it; or the adjacent dock owner could dock the large vessel at the proposed marina. Removal of the harbor camel would reduce the proposed project's water coverage from 1,271 square feet to 1,173 square feet, a reduction of 98 square feet and would reduce fill of the bay by 7.2 square feet.

The applicant considered a revision to the proposed plan that would shift the marina further to the north, and determined it was infeasible due to shallow water depths closer to the Pacific Coast Highway Bridge. Additionally, that alternative would be outside the applicant's leased Tidelands boundary. This option would have increased the ease of access to the backside (landward side) of the marina at the south, and potentially eliminate the harbor camel that divides the south side of the marina from the adjacent southern property lease area. A sub-alternative would increase the area available at

the south end of the marina by eliminating a slip or two boat slips from the end but would not shift the marina north. According to the applicant, this would reduce the number of boat slips by too great a proportion and would not justify the replacement costs of the existing marina.

The applicant has acknowledged that there was an additional alternative plan, referred to as the "2018 Plan" in this staff report, that resulted in 14,096 square feet of water coverage. This plan would shift the marina 25 feet south and introduce a new north entrance for smaller vessels to the docks on the back side of the marina and adjacent to the bulkhead. The applicant states that this design would also address the concerns arising from damage due to vessel contact to the adjacent property and property owner located at 2782 Bayshore Drive. The 2018 Plan though would result in additional water coverage and eelgrass shading impacts. However, while this plan would result in reduced eelgrass shading impacts of 663 square feet (122 square feet less than the proposed plan), it would result in more water coverage than the proposed plan. The 2018 Plan never obtained local approval nor moved forward, as the adjacent property owners appealed this Harbor Commission-approved plan to the Newport Beach City Council because of the proposed marina's proximity to the adjacent property owner at 2782 Bayshore Drive, as well as private view impacts to that and other nearby residences. The City Council ultimately approved a compromise plan between the applicant and the appellants, which is the proposed plan that is currently before the Commission.

In sum, there are five alternatives to the proposed project. First, the no project alternative is to maintain the existing marina. This alternative is not feasible because the marina has reached the end of its useful life. Second, replacing the existing marina in exactly the same footprint is not feasible because the Harbor Design Guidelines and CDBW current code and design standards require wider walkways and more piles. Third, moving the marina north is not feasible because of water depths and extension outside the applicant's leased boundary. The sub-alternative of eliminating some of the boat slips at the southern end is economically infeasible because it reduces the number of boat slips available for lease to the public. Fourth, the 2018 Plan provides the same number of boat slips as the proposed project but includes additional water coverage compared to the proposed plan. Fifth, revision of the proposed plan to remove the harbor camel and associated piles in order to reduce water coverage and fill. The fifth alternative is the least environmentally damaging feasible alternative and would also avoid adverse impacts to public access and recreation associated with the unnecessary extension of a private property boundary into public waters.

If the proposed project were revised to remove the harbor camel, the adverse impacts to biological productivity of coastal waters resulting from increased water coverage, increased shading of soft bottom habitat, habitat displacement, decreases in foraging habitat for sight foraging marine birds, and shading impacts to eelgrass would be minimized. Removal of the harbor camel would reduce the proposed project's water coverage from 1,271 square feet to 1,173 square feet, a reduction of 98 square feet. While the proposed plan would still ultimately result in water coverage, it has been

minimized and would result in minimal eelgrass impacts. With adequate mitigation, the project would not contribute significantly to cumulative adverse impacts from dock shading in Newport Harbor. Therefore, in order to be consistent with Coastal Act Section 30233, the Commission imposes **Special Condition No. 2**, which requires the applicant to submit revised marina plans that eliminates the harbor camel.

In order to ensure that impacts are mitigated, the Commission also imposes **Special Condition No. 3**, which requires a new eelgrass survey and identifies the procedures necessary to be completed prior to beginning construction. The surveys that determined that eelgrass was located at the project site took place on July 25, 2018, and December 14, 2018; however, eelgrass surveys completed during the active growth phase of eelgrass (March through October) are valid for only 60 days. Surveys completed between August and October are only valid until the resumption of active growth (i.e. March 1). The existing eelgrass surveys are no longer valid and thus a new survey is required for project approval.

Due to the identified eelgrass shading area and the potential difficulties of the proposed mitigation areas, the eelgrass mitigation plan will need to be revised to mitigate the actual amount of eelgrass shading impacts at a ratio of at least 1.38:1. Therefore, the Commission imposes **Special Condition No. 4**, which requires the applicant to submit a revised Eelgrass Mitigation Plan based on eelgrass conditions identified at the time of construction, consistent with the California Eelgrass Mitigation Policy. The plan shall be prepared in consultation with the CDFW and NMFS, which may require a ratio in excess of 1.38:1 to account for the uncertainty of the successful implementation of the plan.

### **Caulerpa Taxifolia**

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, including eelgrass. *Caulerpa Taxifolia* is known to grow on rock, sand, or mud substrates in both shallow and deep-water areas. Information available from NMFS indicates that *Caulerpa Taxifolia* can grow in large monotypic stands within which no native aquatic plant species can co-exist. Native seaweeds, seagrasses, and kelp forests can be displaced, which can adversely impact marine biodiversity, causing attendant impacts upon fishing, recreational diving, and tourism.

The applicant has indicated that a pre-construction *Caulerpa Taxifolia* survey was completed in conjunction with the Eelgrass Survey Prepared by Marine Taxonomic Services, Ltd dated July 25, 2018, as required by the City of Newport Beach Harbor Resources Division. None was found in the proposed project area. However, *Caulerpa Taxifolia* surveys are only valid for 90 days. Thus, pursuant to **Special Condition No. 5**, an up to date *Caulerpa Taxifolia* survey must be conducted prior to commencement of the project. 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 biological resources will be minimized. In order to protect these resources and additional biological resources from potential future impacts, **Special Condition No. 6** requires that the applicant must obtain a permit amendment or a new permit for any future repair or maintenance of the proposed marina system.

### **Construction and Post-Construction Impacts**

The proposed work will occur on coastal waters. The storage or placement of construction material, debris, or waste in a location where it could be discharged into coastal waters would result in adverse impacts on the marine environment. The applicant is proposing Best Management Practices (BMPs) for reducing or eliminating construction-related impacts to water quality during construction, such as netting, sandbags, tarps, or other forms of barriers to be placed around staging areas to prevent debris from entering the water, and floating booms to be maintained around the project site to capture floating debris. The Commission imposes **Special Condition No. 7**, which requires appropriate storage and handling of construction equipment and materials to minimize the potential for pollutants to enter coastal waters. To reduce the potential for post-construction impacts to water quality, **Special Condition No. 8** requires the continued use and maintenance of post-construction BMPs.

The applicant has indicated that it has a pending permit (Clean Water Act Section 401 Water Quality Standards Certification) under review from the RWQCB. The applicant has also applied for a permit from the USACE, which is pending until coastal development permit approval. To ensure that the proposed project adheres to the requirements from other resource agencies, and to account for changes to other resource agency permits that may be necessary given the design alternative required by the Commission, **Special Condition No. 9** requires the applicant to comply with all requirements, requests and mitigation measures from the CDFW, the RWQCB, the USACE, and the USFWS with respect to preservation and protection of water quality and marine environment.

The applicant has stated that the decks of the dock floats will be constructed out of synthetic material. The structural members will be composed of wood and will require a chemical preservative treatment to limit the rate of rot and corrosion. Following treatment and prior to installation, the treated structural timber members will be sealed with commercial grade water repellent. The applicant has indicated that the wood will be treated with Ammoniacal Copper Zinc Arsenate (ACZA), Copper Azole Type C (CA-C), or Alkaline Copper Quaternary (ACQ), but has not specified which treatment would be used to reduce the rate of rot and corrosion of the wood within the water. Use of Ammoniacal Copper Zinc Arsenate (ACZA) chemical preservative treatment raises concern, as there is potential for measurable amounts of preservatives to be released into the water and thus adversely impact marine resources and water quality. Necessary information has not been provided regarding whether the other remaining

options, Copper Azole Type C (CA-C) or Alkaline Copper Quaternary (ACQ), raise any water quality concerns. An alternative material that does not need a chemical preservative treatment or a preservative treatment that does not result in the potential release of adverse materials into the water must be used. Thus, the Commission imposes **Special Condition No. 2**, which requires the applicant to submit revised plans identifying the revised structural dock float decking construction material that does not use a chemical preservative treatment or a preservative treatment that results in the potential release of adverse materials into the water.

### **Fill of Coastal Waters**

Coastal Act Section 30233 limits the allowable fill of open coastal waters, wetlands, and estuaries to certain uses only, including “new or expanded boating facilities.” However, fill for boating facilities is only allowed “...where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects.” The proposed project includes removal of 22 piles and installation of 46 new piles in coastal waters of Newport Harbor, which will result in fill of open coastal waters. The piles will support the proposed dock floats and pier platform, and, therefore, this associated fill would be consistent with Section 30233(a)(3) of the Coastal Act, as it is for a boating-related use. The proposed project will result in 49 square feet of additional fill.

**Special Condition No. 2** requires the applicant to submit revised marina plans that eliminates the harbor camel, which would reduce water coverage. The proposed marina would still include piles as part of the proposed project, but removal of the harbor camel as required by the condition would eliminate the four 16-inch piles associated with the harbor camel included in the proposed project design, which would have resulted in 7.2 square feet of fill (**Exhibit 2, Page 3**). Approval of the harbor camel and associated piles risks setting a precedent for the installation of physical barriers in Newport Bay. Doing so could encourage future applicants to install similar devices that result in more water coverage, more fill and diminished public access and recreational opportunities.

While the proposed project design increases the number of piles compared to the current marina, the applicant has demonstrated that this is the minimum amount necessary to meet current harbor design codes, consistency with the Americans with Disabilities Act, and to safely anchor the dock floats. Fewer and/or smaller piles would not adequately secure the boat dock floats in this area that has historical been a location for boat docks. By using the least number of piles necessary to accomplish the goal of securing the dock floats and pier platforms, the 46 piles represent the least environmentally damaging feasible alternative that still achieves the project goal of allowing a roughly equivalent amount of recreational boat berthing as compared to the existing marina. Also, as required by **Special Condition No. 2**, for removal of the harbor camel from the proposed project that reduces water coverage and removes fill from four 16-inch diameter concrete piles to support the harbor camel, the project would reduce water coverage and fill and eelgrass impacts and represent the least

environmentally damaging feasible alternative. Therefore, the Commission finds the proposed alternative meets the requirements of Section 30233(a) that any project involving fill of coastal waters be the least environmentally damaging feasible alternative.

## **Conclusion**

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30230, 30231, 30232, 30233 and 30250 of the Coastal Act and with the portions of the City's certified LCP used as guidance that generally require maintaining, protecting, and enhancing the biological productivity and the water quality of coastal waters.

## **C. Public Access and Recreation**

Article X, Section 4 of the California Constitution provides:

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

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

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

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

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

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

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

Section 30224 of the Coastal Act, Recreational boating use; encouragement, facilities, states:

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

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

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

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

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

Maximizes public access to and along the shoreline;

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

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

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

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

Implementation Plan, Site Planning and Development Standards, Harbor and Bay Regulations, 21.30C.050(E & G) states,

E. Docking Facilities.

Docking facilities shall be designed and sited in relationship to the water's depth and accessibility.

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.

### **Parking**

The City's Certified LCP requires 0.75 vehicle parking spaces per boat slip (see Table 21.40-1 "Off-Street Parking Requirements" of Chapter 21.40 "Off-Street Parking" of the Implementation Plan). The proposed marina plan includes 50 boat slips, which would require 38 vehicle parking spaces under the LCP standard. The existing marina parking lot provides 63 vehicle parking spaces (53 unassigned parking spaces and 5 tandem parking spaces) on site. Thus, the existing onsite parking exceeds the number of spaces required per the City's IP. The project would provide in excess of one vehicle parking space per boat slip, which is a standard the Commission has applied in other marinas in Newport Beach and Orange County. Thus, vehicle parking would be adequately provided for the proposed project.

### **Slip Mix**

In prior permit actions, the Commission has been concerned about the trend towards larger boat slips in marinas at the expense of the smaller boat slips. The Commission has heard testimony that a reduction in the availability of smaller boat slips reduces the option for those who want to own smaller boats. As larger boat slips occupy more space in a marina, there is less space for the smaller boat slips, resulting in fewer



overall boat slips and fewer boat slips available for the owners of small vessels. Berthing opportunities for small boat owners will be reduced if this trend continues. *Relatively* speaking, smaller boats are less expensive, and therefore available to a larger segment of the population than larger boats. The Commission has not historically regulated the rates at which marinas rent their boat slips to the public. The Commission has, however, regulated the design of a marina in order to ensure that the redesigned boat slips conform to the public access and recreation policies of the Coastal Act by providing a balance between the size of boat slips, which facilitates increased public access and the boaters' demand for boat slips.

The proposed marina plan would reduce the existing 53-boat slips to 50-boat slips ([Exhibit 2, Pages 2-3](#)). There would be an increase in the number of small boat slips ranging from 22-feet to 26-feet in length from 11 to 22; a decrease in small-medium boat slips and an increase of large boat slips ranging from 54-feet to 62-feet in length.

Below is a table that shows the existing and proposed boat slip mixes:

**Existing and Proposed Boat Slip Mix**

Boat Slip Length (Feet)	Total Existing Boat Slips	% Existing Design	Total Proposed Boat Slips	% Proposed Design
20				
22	10	18.87%	8	16.00%
24	1	1.89%		
26			14	28.00%
30	11	20.75%		
32			1	2.00%
37				
38	1	1.89%		
40	1	1.89%	9	18.00%
42	10	18.87%	12	24.00%
48	18	33.96%		
50	1	1.89%		
54			1	2.00%
62			5	10.00%

<b>Total</b>	<b>53</b>	<b>100.00%</b>	<b>50</b>	<b>100.00%</b>
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While the proposed slip mix results in an increase of small, small-medium, and large boat slips, and a decrease in medium boat slips, the proposal provides a mix of boat slip sizes with an increase in smaller boat slips. Thus, when balanced against the overall demand for larger boat slips, the need to meet new standards, and the fact that small boat owners are moving toward trailering their boats and using dry storage, the Commission finds that both slip mix is adequate to support the recreational boating policies of the Coastal Act and the LCP.

The proposed marina plan proposes kayak and stand up paddleboard racks and a side tie area for approximately 8 small boats (i.e., Duffy boats). Boat slips and side tie areas are offered for lease to the general public at this marina. Thus, public access to Newport Harbor is not only improved by the proposed slip mix, but also by kayak and stand up paddleboard racks and the use of a side tie area.

As conditioned, there is no significant potential for adverse impacts to public access. However, future development which could result in a different mix of slip sizes may potentially result in adverse impacts to public access (e.g., overabundance of large-size boat slips). To ensure that future development is consistent with the Chapter 3 policies of the Coastal Act, the Commission imposes **Special Condition No. 6**, which requires a coastal development permit for future development. This condition will allow the Commission to evaluate public access impacts associated with any future development proposing a change to the mix of boat slip sizes at that time.

The entrance to the backside (landward side) of the existing and proposed marina is from the south end. The width of the entrance is 25-feet and will remain the same with the proposed marina. Thereby continuing to allow continued access to the marina for the public.

Other than access to the marina for boating purposes, no public access currently exists through the site. The public tidelands and submerged lands where the marina is located and bayward of the site are managed by the County as identified in a "Tidelands Survey for Newport Harbor for the City of Newport Beach" and access to Newport Harbor exists approximately 200 feet north of the site, across Pacific Coast Highway at Castaways Park. Because these are Public Trust Lands, the public maintains a right to access the navigable bay waters for navigation and recreational purposes. In order to preserve and maintain access to the Public Trust Tidelands, **Special Condition No. 10** is imposed stating that the approval of a coastal development permit for the project does not waive any public rights or interest that exist or may exist on the property.

## Conclusion

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30210, 30220, 30221 and 30250 of the Coastal Act and the City's certified

LCP used as guidance regarding the public's right of access to the sea and does not interfere with recreational opportunities on public tidelands.

## **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 Chapter 3 of the Coastal Act, and the certified LCP serves as guidance. As conditioned, the proposed development within the Commission's original jurisdiction is consistent with Chapter 3 of the Coastal Act.

## **E. California Environmental Quality Act (CEQA)**

Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of Coastal Development Permit applications to be supported by findings showing the approval, as conditioned, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment. The Commission's regulatory program for reviewing and granting CDPs has been certified by the Resources Secretary to be the functional equivalent of CEQA. (14 CCR § 15251(c).)

In this case, the City of Newport Beach Harbor Resources Division is the lead agency and the Commission is a responsible agency for the purposes of CEQA. The City of Newport Beach determined on April 2, 2019, that the proposed project is categorically exempt from CEQA pursuant to CEQA Guidelines Class 1 (Section 15301), Existing Facilities, and Class 2 (Section 15302), Replacement and Reconstruction. The Commission finds that the project design must be modified to be consistent with Coastal Act requirements, but the change to the design will not cause new adverse impacts to the environment. In fact, the project has been conditioned to reduce environmental impacts associated with water coverage and to require construction and post-construction best management practices which will avoid impacts to water quality.

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

Therefore, as conditioned, the Commission finds that there are no feasible alternatives or additional feasible mitigation measures available that would substantially lessen any significant adverse effect that the activity may have on the environment. The Commission finds that the proposed project, as conditioned, is the least environmentally

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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.

CDP No. 5-15-1521-(Presta).

Eelgrass Survey Prepared by Marine Taxonomic Services, Ltd dated July 25, 2018.

Presta Marina Dock Redevelopment Project Baseline Eelgrass Survey Prepared by Marine Taxonomic Services, Ltd dated December 14, 2018

City of Newport Beach Harbor Resources Division Approval-In-Concept dated May 1, 2019.

City of Newport Beach City Council Resolution No. 2019-30 Modifying the Harbor Commissions Approval of an “Approval in Concept” (Project File No. 1502-2018) dated March 26, 2019.

Letter from Commission staff to Anchor QEA dated June 17, 2019.

Newport Marina Redevelopment Project Eelgrass Mitigation Plan Prepared by Marine Taxonomic Services, Ltd dated September 9, 2019 (Based upon Eelgrass Survey Prepared by Marine Taxonomic Services, Ltd dated July 25, 2018).

Letter from Anchor QEA to Commission staff dated September 23, 2019.

Letter from Michael C. Hewitt to Commission staff dated January 22, 2020.

Letter from the City of Newport Beach dated March 20, 2020.

Letter from PMA Consulting, Inc. to CAA Planning, Inc. dated March 27, 2020.

An Analysis of the Newport Marina Plans and Effects on Eelgrass prepared by Coastal Resources Management received April 10, 2020.

Response to Water Coverage and Eelgrass Shading of Existing and Proposed Layouts for the Marina at 2888 Bayshore Drive in Newport Beach, CA 92663 prepared by Bellingham Marine Industries dated April 17, 2020.