

CALIFORNIA COASTAL COMMISSION

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W12b

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STAFF REPORT: REGULAR CALENDAR

Application No.: 5-20-0067

Applicant: Mark L. Conzelman

Agents: Shellmaker, Inc. (attn: Lisa Miller), Sherman Stacey

Location: Newport Bay waters adjacent to 939 Via Lido Soud, Newport Beach, Orange County.

Project Description: Demolition of an existing 1,270 sq. ft. dock, gangway, and pier and construction of new 1,279 sq. ft. dock, gangway, and pier with seven 14-16-in. wide piles.

Staff Recommendation: Approval with conditions.

SUMMARY OF STAFF RECOMMENDATION

The proposed project is the demolition of an existing residential-use boat dock, gangway, and pier; and construction of a new boat dock, gangway, and pier located at 939 Via Lido Soud, Newport Beach, Orange County, including removal of five existing piles and installation of seven new piles. The subject dock is a privately-owned single slip intended for recreational use.

The proposed project is located within the Commission's retained permit jurisdiction over the waters of Newport Bay. The standard of review for proposed development within the Commission's retained 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 existing dock float, gangway, and landing on-site consists of 1,270 sq. ft. of overwater material. The proposed dock system would cover 1,279 sq. ft., resulting in a total 9 sq. ft. of increased water coverage. The project originally proposed a total 285 sq. ft. increase in water coverage, but the applicant revised the project to reduce dock finger widths from 7 ft. to 5 ft. The project also includes removal of five existing piles and installation of seven new piles, resulting in a 7.9 sq. ft. total increase in existing fill on-site. The most recent survey conducted during an active growth period found no eelgrass within the immediate project area, but identified an existing bed on the neighboring parcel within 15-20 ft. of the proposed dock. 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.

Commission staff asked the applicant to analyze alternatives 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 a donation to the Orange County Coastkeeper eelgrass restoration program in Upper Newport Bay as mitigation of habitat impacts—however, even with this mitigation, the proposed project is not the least environmentally impactful 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 is elimination of the proposed portion of dock and two piles that would extend up to 16 ft. beyond the U.S. pierhead line (PHL), as well as removal of the existing non-conforming pier platform. These revisions would ensure the project is the least environmentally-damaging alternative that still satisfies project goals to provide a recreational boat dock in the same general footprint, in compliance with Newport Beach Harbor Design Guidelines and Coastal Act Chapter 3 policies. It would also ensure the project adheres to Policy H-1 of the City's uncertified Harbor Permit Policy, which has served as guidance in past Commission actions on the scope and location of private recreational boat docks in Newport Harbor.

Therefore, staff recommends the Commission impose **Special Condition 1**, which requires the applicant to submit revised project plans removing the existing pier platform and eliminating all portions of dock which extend past the PHL. 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 2** requires a new eelgrass survey and identifies the procedures that must be completed both prior to beginning construction and following construction. The submitted *Caulerpa Taxifolia* survey is also outdated, and thus **Special Condition 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 often dispersed through marine habitat by construction activities).

In order to ensure that future development on the site does not adversely impact biological resources and public access(or any other protected resource), staff recommends the Commission impose **Special Condition 4**, which informs the applicant that future development at the site requires a permit amendment or a new coastal development permit (CDP).

During construction and post-construction, the proposed project has potential for adverse impacts to water quality and marine resources. Therefore, several special conditions are recommended to minimize any such impacts: **Special Condition 5** outlines construction responsibilities and debris removal requirements, and **Special Condition 6** requires the applicant to implement post-construction operational 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 7** requires that the applicant comply with all the requirements, requests, and mitigation measures of these agencies.

Finally, the public tidelands over which the dock is proposed are managed by the City of Newport Beach. Since these are Public Trust Lands, the public maintains a right to access these navigable bay waters for navigation and recreational purposes. In order to preserve and maintain access to the Public Trust Tidelands, **Special Condition 8** 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.

Staff is recommending **APPROVAL** of the proposed dock with **eight (8) special conditions**. 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.

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EXHIBITS

[Exhibit 1 – Vicinity Map](#)

[Exhibit 2 – Project Location](#)

[Exhibit 3 – Project Plans](#)

[Exhibit 4 – Figure 6 from Eelgrass and Caulerpa Survey](#)

I. MOTION AND RESOLUTION

Motion: I move that the Commission approve Coastal Development Permit 5-20-0067 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. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. STANDARD CONDITIONS

- 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. **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 July 15, 2020, except as modified as required below:
 - A. The revised plans shall include the removal of all portions of dock and piles located beyond the harbor pierhead line as indicated by City of Newport Beach Geographic Information Systems (GIS) maps.
 - B. The revised plans shall include demolition of the existing nonconforming pier platform. If construction of a new pier is required to access the gangway, it shall be the minimum size allowed by the City of Newport Beach Harbor Design Standards and shall not include a platform.
 - 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.

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.

The survey protocol shall be prepared in consultation with the Regional Water Quality Control Board (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.

4. **Future Development.** This permit is only for the development described in CDP No. 5-20-0067. 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. 5-20-0067, including the proposed dock. 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. 5-20-0067 from the Commission or shall require an additional CDP from the Commission or from the applicable certified local government.
5. **Construction Responsibilities and Debris Removal.** By acceptance of this permit, the applicant agrees to comply with the following construction related requirements:
 - A. No demolition or construction materials, equipment, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain, or tidal erosion and dispersion;

- B. Any and all debris resulting from demolition or construction activities, and any remaining construction material, shall be removed from the project site within 24 hours of completion of the project;
- C. Demolition or construction debris and sediment shall be removed from work areas each day that demolition or construction occurs to prevent the accumulation of sediment and other debris that may be discharged into coastal waters;
- D. Machinery or construction materials not essential for project improvements will not be allowed at any time in the intertidal zone;
- E. If turbid conditions are generated during construction a silt curtain will be utilized to control turbidity;
- F. Floating booms will be used to contain debris discharged into coastal waters and any debris discharged will be removed as soon as possible but no later than the end of each day;
- G. Non buoyant debris discharged into coastal waters will be recovered by divers as soon as possible after loss;
- H. All trash and debris shall be disposed in the proper trash and recycling receptacles at the end of every construction day;
- I. The applicant shall provide adequate disposal facilities for solid waste, including excess concrete, produced during demolition or construction;
- J. Debris shall be disposed of at a legal disposal site or recycled at a recycling facility. If the disposal site is located in the coastal zone, a Coastal Development Permit or an amendment to this permit shall be required before disposal can take place unless the Executive Director determines that no amendment or new permit is legally required;
- K. All stock piles and construction materials shall be covered, enclosed on all sides, shall be located as far away as possible from drain inlets and any waterway, and shall not be stored in contact with the soil;
- L. Machinery and equipment shall be maintained and washed in confined areas specifically designed to control runoff. Thinners or solvents shall not be discharged into sanitary or storm sewer systems;
- M. The discharge of any hazardous materials into any receiving waters shall be prohibited;
- N. Spill prevention and control measures shall be implemented to ensure the proper handling and storage of petroleum products and other construction materials. Measures shall include a designated fueling and vehicle

maintenance area with appropriate berms and protection to prevent any spillage of gasoline or related petroleum products or contact with runoff. The area shall be located as far away from the receiving waters and storm drain inlets as possible;

O. Best Management Practices (BMPs) and Good Housekeeping Practices (GHPs) designed to prevent spillage and/or runoff of demolition or construction-related materials, and to contain sediment or contaminants associated with demolition or construction activity, shall be implemented prior to the on-set of such activity; and

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

6. Best Management Practices (BMPs) Program. By acceptance of this permit the applicant agrees that the long-term water-borne berthing of boat(s) in the approved dock and/or boat slip will be managed in a manner that protects water quality pursuant to the implementation of the following BMPs.

A. Boat Cleaning and Maintenance Measures:

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

B. Solid and Liquid Waste Management Measures:

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

C. Petroleum Control Management Measures:

1. Boaters will practice preventive engine maintenance and will use oil absorbents in the bilge and under the engine to prevent oil and fuel discharges. Oil absorbent materials shall be examined at least once a year and replaced as necessary. Used oil absorbents are hazardous waste in California. Used oil absorbents must therefore be disposed in accordance with hazardous waste disposal regulations. The boaters shall regularly inspect and maintain engines, seals, gaskets, lines and

hoses in order to prevent oil and fuel spills. The use of soaps that can be discharged by bilge pumps is prohibited;

2. If the bilge needs more extensive cleaning (e.g., due to spills of engine fuels, lubricants or other liquid materials), the boaters will use a bilge pump-out facility or steam cleaning services that recover and properly dispose or recycle all contaminated liquids; and
 3. Bilge cleaners which contain detergents or emulsifiers will not be used for bilge cleaning since they may be discharged to surface waters by the bilge pumps.
7. **Resource Agencies.** The permittee shall comply with all requirements, requests and mitigation measures from the California Department of Fish and Wildlife (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 any of the above-stated agencies shall be submitted to the Executive Director in order to determine if the proposed change shall require a permit amendment pursuant to the requirements of the Coastal Act and the California Code of Regulations.
8. **Public Rights and Public Trust.** The Coastal Commission's approval of this permit shall not constitute a waiver of any public rights that exist or may exist on the property. The permittee shall not use this permit as evidence of a waiver of any public rights that may exist on the property now or in the future.

IV. FINDINGS AND DECLARATIONS

A. Project Description

Project Location and Local Approval

The subject site is located in the waters of Newport Bay adjacent to 939 Via Lido Soud in Newport Beach, Orange County ([Exhibit 1](#)). It is located on Lido Isle and is a privately-owned dock intended to berth a 70-ft. long recreational vessel.

The subject dock is located on public tidelands managed by the City of Newport Beach and is within the Coastal Commission's retained permit jurisdiction. Thus, the City would be the local permit issuing authority for development (i.e. a dock system) within the public tidelands area, and the permits issued for such development are entitled "City of Newport Beach Harbor Permits."

The findings for City Council Resolution No. 2019-48 indicate that on December 11, 2018, the Public Works Director determined that the applicant's proposed project did not comply with Newport Beach Municipal Code 17.35.030(A) and Council Policy H-1, due to the proposed demolition of an existing dock extending less than 5 ft. beyond the PHL and construction of a new dock extending 16 ft. beyond the PHL. On December 13,

2018, Swift Slip Dock and Pier Builders, Inc. filed a timely appeal on behalf of the applicant, contending that the dock length was necessary to accommodate the applicant's 70-ft. long vessel and the majority of surrounding docks were of similar length. The Newport Beach Harbor Commission voted to uphold the Public Works Director's decision to deny the project on February 13, 2019.

On February 26, 2019, the appellant filed a timely appeal of the Harbor Commission's decision on the basis of the project having no impact on navigation, adjacent property owners, or existing harbor uses. The City Council voted to approve the project without the restriction on the dock length on May 28, 2019, but subject to a condition that any vessel berthed at the float shall not extend past the float length by more than 50% of the overall vessel length. This effectively allowed the subject 70-ft. long vessel to extend beyond the dock length by up to 35 ft., despite Policy 2(b)(1) of the City's certified Harbor Design Guidelines and Standards prohibiting vessels from exceeding berth lengths by more than 3 ft.

Project Description

In 1983, the Commission approved CDP No. 5-83-92 for construction of a private boat slip on the subject site. The existing dock system currently extends less than five feet beyond the PHL and includes a 28-ft. by 9.5-ft. pier platform, located bayward of the bulkhead over public tidelands, which exceeds the minimum 10-ft. by 14-ft. platform dimensions typically approved by the Commission. As such, the existing pier platform is legally nonconforming in regard to certified LCP Policy 3.1.4-4 (which limits structures located bayward of the bulkhead to piers and floats). The applicant has provided a structural evaluation conducted by PMA Consulting, Inc. which confirms the existing dock components were constructed at the same time with the same materials and there is no evidence that any unpermitted improvements have been conducted on the dock in recent years.

The proposed project includes demolition of the existing 897 sq. ft. dock float, 63 sq. ft. gangway, and 44 sq. ft. pier (the approximately 266 sq. ft. platform is proposed to remain); and construction of a new 927 sq. ft. dock float, 70 sq. ft. gangway, and 16 sq. ft. landing. The project also includes removal of four 12-in. wide square piles and one 12-in. wide T-shaped pile, and new installation of four 16-in. wide square piles, two 18-in. wide square piles, and one 14-in. wide square pile ([Exhibit 3](#)). As approved by the City Council, the proposed dock would extend 16 ft. past the U.S. PHL; additionally, the applicant's vessel would extend approximately 7.5 ft. beyond the dock berth. No dredging is currently proposed. The applicant has indicated the use of timber for the new dock float and concrete for all proposed piles. It is unclear from the most recently submitted plans whether the wood will require treatment with chemical preservatives often used to reduce the rate of wood rot, such as Ammoniacal Copper Zinc Arsenate (ACZA), Copper Azole Type C (CA-C), or Alkaline Copper Quaternary (ACQ).

The proposed project would result in a coverage increase of 9 total sq. ft., as well as the addition of two new piles resulting in a total 7.9 sq. ft. increase in fill. The applicant has stated that the proposed number of piles is the minimum necessary to support the dock floats and pier platform to meet current harbor design codes, and to safely anchor the

dock float. The applicant has also indicated that the increase in water coverage is largely a result of adhering to the City's Harbor Design Guidelines and Standards regarding headwalk, gangway, and dock dimensions, and that the proposed design occupies the minimum surface area necessary to accommodate the applicant's vessel. As mitigation for shading and impacts to soft-bottom habitat, the applicant has proposed a \$10,000 donation to the Orange County Coastkeeper ("OC Coastkeeper") eelgrass restoration program in Upper Newport Bay. OC Coastkeeper has described the program as follows:

"With this contribution we can expand upon our successful eelgrass restoration efforts to monitor and replant eelgrass in our UNB restoration sites originally installed in 2015-2016. This contribution will support our annual spring monitoring efforts. In each of four restoration areas in UNB we are assessing eelgrass percent cover. If the original target planted area has fallen below our target percent cover (%60 cover or higher) we will replant additional plants in these areas. One of the most effective techniques found to work in varied site conditions in Newport Bay is the bundling method. This method involves the bundling of 10-15 eelgrass blades or shoots into a planting unit which is then transplanted to the restoration site. Mature plants are carefully collected by hand by divers and separated in seawater trays on land into planting units which are attached to biodegradable anchors (a tongue depressor and hemp string). Volunteers prepare the bundles on shore, then divers plant the bundles by hand, making small holes within the restoration site and burying the biodegradable anchors in the sediment."

Prior Permits

On February 24, 1983, the Commission approved CDP No. 5-83-92 for "the construction of a private boat slip" at the subject site. That development is now proposed to be removed to construct a new dock system, with the exception of a non-conforming pier platform adjacent to the bulkhead. The pier platform appears to have been constructed as a part of the original dock and a structural evaluation conducted by PMA Consulting, Inc. suggests all existing components of the dock system were constructed together (including the dock float, gangway, and legally nonconforming pier platform). The proposed project includes removal and replacement of almost all features of the existing dock system, retaining only the existing nonconforming platform.

Thus, the current project constitutes new development and requires all elements to be brought into conformance with the certified LCP and Chapter 3 policies of the Coastal Act, as further analyzed in the 'Public Access' subsection below.

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 retained permit jurisdiction. The standard of review for development within the Commission's retained permit jurisdiction is Chapter 3 of the Coastal Act. The City's certified LCP is advisory in nature and may provide guidance.

B. Marine Resources/Water Quality

Section 30230 of the Coastal Act states:

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

Section 30231 of the Coastal Act states:

The biological productivity and 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 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 relevant 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....

Policy 4.1.4-5 of the certified Newport Beach Land Use Plan (LUP) 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.

Policy 4.2.3-1 of the certified LUP states, in relevant part:

Permit the diking, filling, or dredging of open coastal waters...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:...

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.

Policy 4.2.3-2 of the certified LUP states:

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

Policy 4.2.5-1 of the certified LUP 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.

Policy 4.3.1-8 of the certified LUP 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.

Policy 4.3.2-1 of the certified LUP 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.

Policy 4.3.2-6 of the certified LUP states:

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

Policy 4.3.2-7 of the certified LUP 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.

Policy 4.3.2-22 of the certified LUP states:

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

Section 21.30C.050 of the Implementation Plan, Site Planning and Development Standards, Harbor and Bay Regulations, Harbor Development Regulations states, in relevant part:

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 one to three-ft. 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.

Impacts on Soft-Bottom Habitat

As of August 18, 2020 (the date of site surveys conducted by Pi Environmental, LLC), no eelgrass beds were detected within the immediate project area. However, an eelgrass bed of unspecified size was found on the neighboring parcel associated with 933 Via Lido Soud, within 15 to 20 ft. of the proposed dock ([Exhibit 4](#)). Eelgrass is a dynamic species, difficult to predict in regard to established location and future expansion. While the most recent eelgrass survey conducted during a period of active growth doesn't estimate any direct shading impacts to the adjacent eelgrass bed, this may be subject to change with growth of the eelgrass bed over time.

Increased water coverage will impact the biological productivity of the area in a manner inconsistent with Coastal Act sections 30230 and 30231, which require projects to maintain/sustain the biological productivity of coastal waters. As proposed, the project will reduce photosynthesis, impacting the future growth of adjacent 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 must be maintained, enhanced, and, where feasible, restored. Increased water coverage may only be authorized if it is necessary to support public recreation and the impacts have been both minimized and mitigated.

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 ways that minimize water coverage while providing for usable docks. The project meets the majority of these criteria: the new headwalk is the minimum allowable 6-ft. width per Policy 2(b)(1); the new dock fingers are the minimum 5-ft. width for docks 50-69-ft. in length per Policy 2(b)(4); and the new gangway is the minimum 24-ft. length and provides the required 4-ft. headwalk clearance (but no more width than required, which would necessitate an even larger dock area) per Policy 5(c) of the Harbor Design Criteria.

However, the project does not comply with policy H-1 of the City's uncertified Harbor Permit Policy. While this document is not a part of the City's certified LCP, the Commission has used Policy H-1 as guidance in determining which harbor locations may accommodate docks extending beyond the PHL. Prior to November 5, 2019, this policy specified which docks may extend up to 20 ft. beyond the PHL (depending on the location within Newport Harbor, the condition of the surrounding waters, and navigational considerations) and did not allow a dock at the subject site (between bulkhead 171 and 172) to exceed this line.

As amended by the City Council on November 5, 2019 (after the City Council approved the subject project), Policy H-1 no longer differentiates between specific bulkhead locations and states that "the City Council's general policy is not to approve piers and floats beyond the PHL." The current policy allows the Harbor Commission or City Council to approve exceptions to this rule if all five specified conditions are met, listed in full below:

1. The existing pier or float is currently encroaching bayward beyond the pierhead line;
2. The existing pier or float was previously permitted to encroach bayward beyond the pierhead line;
3. The pier or float will not encroach any further bayward beyond the pierhead line than the existing encroachment beyond the pierhead line;
4. Any vessel utilizing the pier or float will not extend bayward beyond the project line or line at which the vessel would currently be allowed, whichever is greater; and
5. The pier or float will:
 - a) Preserve the diverse uses of the harbor and the waterfront that contribute to the charm and character of Newport Harbor;
 - b) Maintain or enhance public access to the harbor waterways and waterfront areas
 - c) Preserve or enhance the visual character of the harbor; and

- d) Not negatively impact adjacent property owners, navigation and future harbor dredging.

The existing dock extends less than five feet beyond the PHL; thus, the proposed 16-ft. long extension past the PHL does not comply with condition 3 of Policy H-1. The Commission is not constrained by local amendments or uncertified local policies, as uncertified policies and municipal code may change without notice to the Commission, the public, or Commission staff. The Commission does consider its own precedent, and in this case, it has historically observed the limitations of uncertified Policy H-1 as determined by dock location within specific bulkheads.

Figure 1. Past Commission actions on private docks within 600 feet of the project area since Coastal Act certification in 1976.

Address	Commission Action No.	Dock Location in Relation to Pierhead Line (PHL)
823 Via Lido Soud	5-12-311	beyond PHL
835 Via Lido Soud	5-00-177-W	beyond PHL
925 Via Lido Soud	5-01-217-W	beyond PHL
929 Via Lido Soud	5-00-319-W	beyond PHL
933 Via Lido Soud	5-03-480	beyond PHL
941 Via Lido Soud	5-05-445	beyond PHL
949 Via Lido Soud (current project)	current application	beyond PHL
936 Via Lido Nord	5-20-0029	within PHL
932 Via Lido Nord	5-97-422-W	within PHL
930 Via Lido Nord	5-96-267-W	within PHL
928 Via Lido Nord	5-97-365-W	within PHL
924 Via Lido Nord	5-96-196-W	within PHL

To evaluate the Commission’s historic adherence to Policy H-1, staff analyzed all Commission action on docks within the vicinity of the subject site (i.e. within 600 feet of the site) since Coastal Act certification in 1976 ([Exhibit 2](#)). The Commission has

approved a total of six new or substantially remodeled existing docks extending past the PHL within the survey area. Two of these Commission-approved docks (823 and 835 Via Lido Soud) were specifically allowed to extend beyond the PHL by Policy H-1 at the time of CDP issuance, due to the site locations between bulkheads 172 and 174 [\(Exhibit 1\)](#).

The remaining four previously-approved docks extending past the PHL were not allowed to extend past the PHL per Policy H-1. However, one of these approved projects (933 Via Lido Soud) included only the relocation of an existing U-shaped dock, with little to no increase in proposed coverage. Another of the projects (941 Via Lido Soud) included a like-for-like replacement of an existing dock with a decrease in the total number of piles. The remaining two Commission actions (925 and 929 Via Lido Soud) on docks extending past the PHL were de minimis waivers issued 20 years ago, and it remains unclear why these projects were not further reviewed by the Commission for impacts to marine resource and public access. Regardless, the majority of Commission actions in the project vicinity have approved either docks within the PHL or docks specifically allowed to surpass the PHL by Policy H-1 due to their location in the harbor. The subject project could contribute to a shift in the common size and location of docks within the PHL that have been approved by the Commission in the subject area, inconsistent with Coastal Act Section 30250 requiring review of projects for cumulative impacts to coastal resources. A greater number of docks extending farther into the harbor will ultimately impact marine habitat in violation of Chapter 3 policies of the Coastal Act, which require minimization of coverage and fill as described above.

Part of the motivation for Policy H-1 only allowing PHL encroachments in designated areas (prior to the November 2019 amendment, which prohibited all encroachments unless the City Council made specific public access findings) is the location of designated buoys/moorings in the Newport Bay Harbor. The subject dock appears to be located approximately 360 ft. from the nearest buoy/mooring, which is leased out by the City for boat owners to moor their vessels as a more affordable form of vessel storage in the harbor. In areas with high concentrations of buoys/moorings, extending dock fingers past the PHL may impact access and recreational opportunities because the harbor is more congested and larger docks and boats serve to further congest it.

Additionally, the subject project differs from the prior projects discussed above in the already-substantial size of the existing dock (1,270 sq. ft.). The Commission approves new development based on the project merits and the Coastal Act and/or LCP consistency of the proposed structure, rather than the proposal's similarity to the existing structure. The baseline for minimization of coverage and fill should not be the amount of coverage and fill currently on-site; instead, the Commission must consider whether the project proposes the minimum amount of fill and coverage as compared with no new development.

The proposed dock includes approximately 60 sq. ft. of coverage and 3.5 sq. ft. of fill (two new piles) beyond the PHL. Eliminating this nonconforming portion from the project plans would result in a 51 sq. ft. reduction in existing coverage. The project would still include a 4.4 sq. ft. increase in existing fill, but this is a less environmentally damaging

alternative compared to the currently proposed 7.9 sq. ft. increase in existing fill. Additionally, the existing platform is a legally nonconforming structure located over public tidelands and covers approximately 266 sq. ft. of tidelands. Removal of this structure would reduce the overwater coverage by 266 sq. ft. while also bringing the structure into compliance with certified LCP policies regarding public access. Removal of the platform and construction of a new pier the minimum size necessary to support the gangway could also result in a reduction of piles and associated fill of coastal waters.

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. Furthermore, certified LUP policies 4.2.5-1 and 4.3.2-22.D, as well as 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.

Commission staff asked the applicant to provide project alternatives (including a revised project design) that would minimize adverse impacts to marine resources, but the applicant is intent on applying with the proposed design. The applicant submitted an email dated February 18, 2021 suggesting the length of the dock could be reduced by one foot, which would reduce the amount of water coverage by nine square feet compared to the current proposed design, but would still result in new piles and the same amount of new fill. The applicant has not incorporated this alternative into the project description. In order to mitigate adverse impacts to eelgrass, the applicant has proposed donating \$10,000 to the OC Coastkeeper eelgrass restoration program in Upper Newport Bay. Donation to this program has been accepted as sufficient mitigation for impacts to eelgrass in past Commission action (ref. CDP 5-19-0133); however, this form of mitigation is generally accepted when no less environmentally-damaging alternative is feasible.

While the applicant's proposed mitigation would have positive impacts on the Newport Bay eelgrass population, it does not address the project non-compliance with certified LCP and Coastal Act policies. Section 30233 of the Coastal Act allows for fill of coastal waters for boating facilities, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects. Mitigation for impacts is not the only requirement of the Coastal Act; first, impacts must first be avoided or minimized, then the alternative with the least impacts must be mitigated. As discussed further below, there is a project alternative that would reduce water coverage and fill, thereby minimizing impacts to the natural environment.

In the case where the Commission accepted mitigation in the form of a donation to OC Coastkeeper (ref. CDP 5-19-0133), the project included three small docks on three properties, with cumulatively fewer impacts than the single proposed dock in the subject project. The applicant also provided a detailed alternatives analysis showing there was

not a less environmentally damaging alternative, besides the no project alternative which would not have allowed for recreational boat use for the three property owners.

Here, there are alternatives to the proposed project. First, the 'no-project' alternative is to maintain the existing dock float, gangway, and landing. The applicant has indicated that this is not feasible, as the existing dock has reached the end of its functional design life. The second alternative, replacing the existing dock within the existing footprint, is not feasible while adhering to relevant Harbor Design Guidelines and the certified LUP Policy H-1. However, the applicant indicated by email that "if we are unable to reach any agreement on the fingers extending beyond the PHL as approved by the City Council, we may consider an alternative to rebuild the existing float with some minor modifications but no greater area." This sub-alternative (similar to the second alternative) would be less environmentally damaging than the proposed project; however, the applicant has not provided plans for such an alternative. The third alternative, revision of the project to reduce the dock length and remove the nonconforming platform consistent with uncertified Policy H-1 and certified LCP policies, is the least environmentally damaging alternative. This alternative would not allow the dock to safely accommodate a 70-ft. long vessel, but would allow private recreational boating opportunities for smaller, more commonly-sized recreational vessels. It would also avoid adverse impacts to public access and recreation associated with the unnecessary extension of a private property boundary into public waters, as discussed in greater detail in the section below.

The Commission is not required to approve the dock size necessary to support a 70-ft. long recreational vessel. As earlier stated, the Commission analyzes new development based on the merits and impacts of the proposed project, rather than its similarity to existing development. Current aerial photos from Google Earth, as well as aeriels from prior to 2010, show multiple boats moored to the existing dock which appear much smaller than the applicant's 70-ft. long vessel. This suggests that the currently proposed dock is not the minimum size necessary for recreational boat use on-site.

Therefore, in order to be consistent with Coastal Act Section 30233, the Commission imposes **Special Condition 1**, which requires the applicant to submit revised project plans eliminating all portions of the proposed dock extending beyond the PHL and removing, or revising, the existing nonconforming platform. **Special Condition 1** also requires revisions to identify the use of a structural dock float decking material that does not use a chemical preservative treatment or a preservative treatment resulting in the potential release of adverse materials into the water. If the applicant wishes to construct a new pier platform (extending outward from the pier), the proposed structure would require an amendment to the subject CDP and must comply with past Commission action on docks in the surrounding area. Specifically, the Commission has required new pier platforms to: 1) include a total size no more than 10-ft. by 14-ft., with the 'short' side (i.e. the 10-ft. side) of the platform oriented parallel to the bulkhead; 2) be located as far away from the existing bulkhead as feasible and physically separated from the landside private rear-yard area by at least 4 ft.; 3) include a pier approach landward of the pier platform; and 4) utilize no more than two T-piles for support, with a minimum clearance of 6-ft. underneath the pier platform.

The subject site was surveyed for eelgrass and *Caulerpa taxifolia* ("Caulerpa") by Pi Environmental, LLC on August 18, 2020. No eelgrass nor Caulerpa were found present in the project vicinity. Eelgrass surveys completed during the active growth phase (typically March through October) are valid for 60 days with the exception of surveys completed in August through October, such as the subject survey. A survey completed in August in October is valid until the resumption of the following active growth phase (i.e., March 1). Thus, the project eelgrass survey will have expired by the scheduled hearing date on March 11, 2021. *Caluerpa taxifolia* surveys are valid for 90 days, rendering the project Caulerpa survey expired on November 16, 2020.

Thus, pursuant to **Special Conditions 2 and 3**, an updated eelgrass survey and Caulerpa survey must be completed prior to the beginning of construction per the specified instructions. **Special Condition 3** mandates that 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. In order to protect the biological resources on-site from potential future impacts, **Special Condition 4** requires that the applicant must obtain a permit amendment or a new permit for any future repair or maintenance of the proposed dock 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 5**, 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 6** requires the continued use and maintenance of post-construction operational BMPs.

The applicant provided project information to the RWQCB on January 21, 2020 and did not receive objection or request for further consultation. 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 7** 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.

Thus, as conditioned, the Commission finds that the proposed project is consistent with Coastal Act sections 30230 through 30233 and 30250, as well relevant certified LCP policies mandating preservation of marine resources and water quality.

C. Public Access and Recreation

Article X, Section 4 of the California Constitution provides:

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

Section 30210 of the Coastal Act 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 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 states:

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

Section 30224 of the Coastal Act states:

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

Section 21.30.015 of the certified Newport Beach Implementation Plan (IP) states, in relevant part:

D. Waterfront Development

1. Applicability. This subsection applies to coastal development permit applications for development on residential and nonresidential properties fronting on the waterfront of Newport Bay...

2. Considerations. In reviewing a coastal development permit application for development along the waterfront, the review authority shall consider the following:...

f. Whether any boating facilities (e.g., piers, pier platforms, gangways and dock floats) associated with waterfront development are so sited and designed to protect, and where feasible, expand and enhance public access to and along shoreline areas;

g. Whether the structure is nonconforming with regard to setbacks from the shoreline, bluff and/or bulkhead; and

h. For improvements to existing structures, whether the proposed improvements increase the degree of nonconformity or result in replacement of more than fifty (50) percent of the existing structure.

Section 21.30.050 of the IP states, in relevant part:

A. Protection of Coastal Access and Resources. All harbor structures, including remodels of, additions to, or replacement of existing structures, and new structures, shall be designed and sited so as not to obstruct public access and to minimize impacts to coastal views and coastal resources...

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...

Section 21.38.040 of the IP states, in relevant part:

A. Maintenance and Repairs. Routine maintenance and repairs may be made to nonconforming principal and accessory structures. The replacement of fifty (50) percent or more of a structure is not repair and maintenance but instead constitutes a replacement structure...

Policy 3.1.1-1 of the certified LUP 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.

Policy 3.1.1-9 of the certified LUP states:

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

Maximizes public access to and along the shoreline;

Policy 3.1.1-11 of the certified LUP states:

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

Policy 3.1.4-3 of the certified LUP 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.

Policy 3.1.4-4 of the certified LUP states:

In residential areas, limit structures bayward of the bulkhead line to piers and floats. Limit appurtenances and storage areas to those related to vessel launching and berthing.

Policy 4.2.3-17 of the certified LUP states, in relevant part:

Continue to limit residential and commercial structures permitted to encroach beyond the bulkhead line to piers and docks used exclusively for berthing of vessels...

As proposed, the new dock will exceed the U.S. PHL by 16 ft. and effectively extend past the private property boundary into public waters. The local approval issued by the City Council per Resolution No. 2019-48 states that the project will not affect surrounding property owners, navigation of the harbor, or existing harbor uses. This finding allows the City Council the discretion to approve exceptions to certified LCP Policy H-1 when certain criteria are met. However, the Commission must additionally analyze the project for consistency with Coastal Act sections 30210, 30220, 30221, and 30224 relating to public access and recreational use in the coastal zone.

The Upper Newport Bay area is used by a significant number of vessels for both recreational and commercial purposes. In the past, the Commission has analyzed dock projects for potential impacts to navigable harbor waters, as well as the marine environment as addressed in the preceding section. The City Council's findings indicate that the navigable channel between "the Property and the anchorage" is 256-ft. wide, suggesting that the proposed dock will not significantly impact the navigable width of the channel. The findings also reference correspondence between the applicant and adjacent property owners, as well as the former Harbor 20 Fleet Captain, indicating no opposition to the project or predicted impact on sailboat racing in the area of Newport

Bay east of Lido Isle.¹ Overall, the City states that the project is unlikely to have a significant impact on public access or recreational use of Newport Bay.

However, in previous actions and through its review of the LCP, the Commission has generally only allowed expansions of private docks beyond the PHL in specific areas of Newport Harbor (between specific identified bulkheads of which the subject project is not between). The Commission has approved four docks within the subject area (bulkheads 171 and 172)—approval of the current application as proposed may contribute to a potential trend in increasing dock lengths and establish a stronger basis for future approval of over-sized docks.

As previously noted, there are hundreds of private residential docks in Newport Harbor. If each were permitted to extend beyond the PHL, even if navigation were not significantly affected, the cumulative effect would be a significant loss of area available for public recreation such as sailing and kayaking, in addition to cumulative impacts to soft bottom habitat. The proposed project may be improved for consistency with certified LCP policies and Chapter 3 Coastal Act policies relating to public access with the elimination of the 16-ft. encroachment into public waters.

Additionally, the applicant seeks to retain the existing 28-ft. by 9-ft. platform located bayward of the nearest bulkhead and extending over public tidelands. Certified LUP Policy 3.1.4-3 requires that pier platforms to be sited and designed for enhancement of public access, while Policy 3.1.4-4 specifically limits structures bayward of the bulkhead to piers and floats. The existing platform is legally nonconforming in regard to these policies. Furthermore, the Commission has typically approved the construction of 10-ft. by 14-ft. platforms with a minimum of 6-ft. clearance below, to preserve public access to the public tidelands and sandy beach immediately below the structure. The Commission approves these structures only when there is no feasible alternative that may better comply with certified LCP policies regarding dock design. The existing platform exceeds the typically-approved minimum 10-ft. by 14-ft. dimensions and does not provide a minimum 6-ft. clearance below, as indicated by the elevation figure in the project plans.

Certified IP Section 21.38.040 acknowledges the need for routine maintenance and repairs to nonconforming principal and accessory structures. However, the replacement of more than 50% of a structure is considered new development that must comply with all relevant LCP policies. The current project proposes the removal of the existing dock float, gangway, and pier—as such, it exceeds the threshold for repairs and must correct all nonconformities in order to comply with public access policies of the certified LCP and Coastal Act.

To ensure that public access and use of the harbor is improved to the maximum extent feasible, the Commission imposes **Special Condition 1** requiring the submittal of

¹ The applicant did not include this correspondence in the CDP application. Commission staff refers solely to the findings included in City Council Resolution No. 2019-48.

revised project plans prior to issuance of the CDP which reduce the dock finger lengths to remain within the PHL, and which eliminate the nonconforming pier platform currently located bayward of the bulkhead line. Special Condition 1 would allow the applicant to construct a new pier if required to access the gangway, but it shall be the minimum size allowed by the City of Newport Beach Harbor Design Standards and shall not include a platform. If the applicant wishes to construct a new pier platform, the proposed structure would require an amendment to the subject CDP and must comply with past Commission action on docks in the surrounding area.

In addition, **Special Condition 6** requires a new CDP or an amendment to the current CDP for any future development. This condition will allow the Commission to evaluate public access impacts associated with any future development proposing a change to the dock finger length, adding other structural elements to the dock, or developing a pier platform.

The public tidelands over which the dock is proposed are managed by the City of Newport Beach. 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 8** is imposed stating that the approval of a coastal development permit for the project does not waive any public rights or interest that exist or may exist on the property.

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30210, 30220, 30221 and 30250 of the Coastal Act, as well as the certified LCP used as guidance, regarding the public's right of access to the sea. As conditioned, the project 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 June 25, 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 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. 5-19-0133 and associated materials.

Eelgrass Survey Prepared by Pi Environmental, LLC dated October 5, 2020.

City of Newport Beach Harbor Resources Division Approval-In-Concept dated December 17, 2019.

City of Newport Beach City Council Resolution No. 2019-48, Approving the Residential Dock Reconstruction Project (File No. 2585-2018) dated June 25, 2019.

Visual Observation of the Existing Pier and Platform, prepared by PMA Consulting, Inc. dated February 12, 2021.