

CALIFORNIA COASTAL COMMISSION

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W12d

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STAFF REPORT: REGULAR CALENDAR

Application No.: 5-20-0428

Applicant: City of Newport Beach

Agent: Moffat & Nichol, Attention Kim Garvey

Location: 2804 & 2806 Lafayette Avenue, Newport Beach, Orange County (APN: 047-023-07 & 047-023-11)

Project Description: Follow-up work to Emergency Permit G-5-19-0043 to remove portions of the public walkway on the waterside of the property that were structurally unstable and replace (like-for-like) the walkway, handrail, and two piles located at 2806 Lafayette Avenue. In addition, the project will remove and replace (like for like) approximately 50 ft. of public walkway on the waterside of the adjacent property located at 2804 Lafayette Avenue. Also, the existing piles supporting the public walkway will be re-used and new handrails will be installed at the top of the proposed replacement walkway.

Staff Recommendation: Approval with conditions.

SUMMARY OF STAFF RECOMMENDATION

The proposed project includes follow-up work to Emergency Permit G-5-19-0043-(City of Newport Beach) to remove portions of the lateral public walkway on the submerged portion of the property located at 2806 Lafayette Avenue that were deemed structurally unstable and like-for-like replacement of the concrete walkway decking with composite decking and wood material, handrail, and two 12-inch diameter concrete piles. The

project also includes the removal and like-for-like replacement of approximately 50 ft. of concrete decking with composite decking and wood material of the adjacent lateral public walkway located on the submerged portion of the adjacent property at 2804 Lafayette Avenue. In addition, the existing seven 12-inch diameter concrete piles supporting the lateral public walkway will be re-used in place and new handrails will be installed at the top of the proposed replacement walkway.

Violations of the Coastal Act and LCP exist on the subject property, including, but not necessarily limited to, including installation of an unpermitted gate across the entrance to the pier platform/vertical segment that precluded public access to the pier (a fence also exists nearby blocking access to the lateral public walkway on a neighboring site, such that there is no opportunity for the public to access this portion of the lateral walkway, nor the pier platform). On June 26, 2019, Commission staff sent the property owner of 2806 Lafayette Ave. a Notice of Violation (“NOV”) letter that identified the unpermitted development described above and requested the immediate removal of the barrier gate. However, the property owner of 2806 Lafayette Ave. declined to do so, indicating that the City closed the public pier for public safety reasons. In the NOV letter, Commission staff requested that the applicant provide evidence (red tag, letters, resolution, etc.) that the City found the pier to be unsafe and that the City closed the pier to public access because of unsafe conditions. Indeed, the pier was proven to be unsafe, as determined by the City’s structural engineer, and as described in more detail below, after it was deemed unsafe the pier collapsed into the water. To that end, as required by Emergency Permit G-5-19-0043 the City must submit a complete CDP application to repair or replace the public pier and restore the public walkway for public use. Therefore, the staff recommends the Commission impose Special Condition No. 1, which requires the applicant to submit Revised Project Plans, which include the like-for-like reconstruction of the pier platform/vertical segment of the lateral public walkway located at 2806 Lafayette Avenue.

Additionally, on July 12, 2019 Commission enforcement staff sent Notice of Violation letters to the property owners of 2800 and 2804 Lafayette Ave., respectively, for the erection of a chain-link fence across the public walkway on the seaward side of 2800 and 2804 Lafayette Ave., which blocks public access to the walkway and placement of “Private Property – No Trespassing” signs along and adjacent to the public walkway. The chain-link fence blocking access to the walkway in between 2800 and 2804 Avenue will be removed once the subject site is repaired and reopened to public access. Furthermore, pursuant to Special Condition 3.C no “Public Access Disruption” is allowed and “private use” signs are prohibited. Therefore, all unpermitted signage should be removed by the City before the new public access signage is installed.

The proposed project is located within submerged lands in the Commission’s retained jurisdiction. Thus, the standard of review for this development is Chapter 3 of the Coastal Act, although the City’s certified Local Coastal Plan (LCP) may provide guidance.

Commission staff is recommending **approval** of the coastal development permit application with **ten (10) special conditions**. The major issues raised by this proposed development concern consistency with the public access and recreation, marine resources, and the water quality policies of the Coastal Act.

The proposed project includes follow-up work to Emergency Permit G-5-19-0043-(City of Newport Beach) for the property located at 2806 Lafayette Avenue, which requires like-for-like reconstruction of the lateral public walkway, including the pier platform/vertical segment. However, the applicant has not included the reconstruction of the pier platform/vertical segment. The City does not agree that the emergency permit requires the reconstruction of the pier platform/vertical segment. Not reconstructing the pier platform/vertical segment would be inconsistent with the requirement of the emergency permit and the City's certified LCP that envisions the construction of a lateral public walkway along the Rhine Channel. Thus, staff recommends the Commission impose **Special Condition No. 1**, which requires the applicant to submit Revised Project Plans, which includes the like-for-like reconstruction of the pier platform/vertical segment of the lateral public walkway located at 2806 Lafayette Avenue. Potential future development, such as the extinguishment or elimination of the public access easement over the lateral public walkway, could adversely impact the availability of public access. Thus, staff recommends the Commission impose **Special Condition No. 7** which requires the applicant to obtain a permit amendment or a new permit for any future improvements.

The City's certified LCP contains policies that envision a lateral public walkway along the Rhine Channel. The Commission imposes **Special Condition No. 2**, which requires the applicant to submit an Access Plan that dictates how the City plans to create the Lateral public walkway along the Rhine Channel as required by the City's certified LCP.

To ensure the seamless integration of all the lateral public walkway elements of the project and to identify how these elements will be operated and maintained, staff recommends the Commission impose **Special Condition No. 3**, which requires the applicant to submit a Public Access Management Plan for Executive Director approval.

As conditioned, the project is consistent with the public access policies of the Coastal Act and the City's certified LCP. However, Coastal Commission approval of this project cannot waive any public rights that may exist on the property. Therefore, the Commission imposes **Special Condition No. 4**, which 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, and that if any portion of the development approved by this project is subsequently determined to be located on or over public trust lands, then development approved by this coastal development not compatible with the public trust must be removed.

Eelgrass is not known to exist in the area and has not been identified in the most recent City surveys and as such, the proposed project does not anticipate any eelgrass impacts. However, the eelgrass survey is over a year old. Thus, to minimize potential adverse impacts to biological resources and to ensure that there will not be negative cumulative impacts to the Newport Bay ecosystem, staff recommends the Commission impose **Special Condition No. 5**, which requires the applicant to prepare a new eelgrass survey prior to beginning construction. Staff also recommends the Commission impose **Special Condition No. 6**, which requires the applicant, prior to commencement of development, to survey the project area for the presence of *Caulerpa Taxifolia*, an invasive, non-native aquatic species that can be further dispersed in coastal waters as a result of construction activities.

To avoid potential future impacts to biological resources, Staff recommends the Commission impose **Special Condition No. 7**, which requires the applicant to obtain a permit amendment or a new permit for any future improvements to the lateral public walkway. During construction, there is the potential for adverse impacts to water quality and marine resources. Therefore, as a result, staff recommends the Commission impose two special conditions that address and minimize impacts to water quality and marine resources as follows: **Special Condition No. 8** would require construction-related requirements to provide for the safe storage of construction materials and the safe disposal of construction debris, **Special Condition No. 9** requires the applicant to submit a Construction Staging Plan.

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. 10** requires that the applicant comply with all the requirements, requests, and mitigation measures of these agencies.

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

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

PLEASE NOTE THAT THIS WILL BE A VIRTUAL MEETING. As a result of the COVID-19 emergency and the Governor's Executive Orders N-29-20 and N-33-20, this Coastal Commission meeting will occur virtually through video and teleconference. Please see the Coastal Commission's Virtual Hearing Procedures posted on the Coastal Commission's webpage at www.coastal.ca.gov for details on the procedures of this hearing. If you would like to receive a paper copy of the Coastal Commission's Virtual Hearing Procedures, please call 415-904-5202.

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EXHIBITS

Exhibit 1 – Location Map

Exhibit 2 – Site Plan

Exhibit 3 – Elevation and Section Plan

Exhibit 4 – 19th Street Public Pier Improvement Plan

I. MOTION AND RESOLUTION

Motion:

I move that the Commission approve Coastal Development Permit 5-20-0428 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.

- A.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for the Executive Director's review and written approval, two (2) full size sets of Revised Project Plans approved by the City of Newport Beach Community Development Department. The Revised Project Plans shall be in substantial conformance with the plans received August 5, 2020, and October 14, 2020, except they shall be modified according to the following:
1. The pier platform/vertical segment of the lateral public walkway supported by piles located on the submerged portion of the property at 2806 Lafayette Avenue parallel to the Rhine Channel shall be rebuilt like-for-like as required pursuant to Special Condition No. 5 of Emergency Permit No. G-5-19-0043.
 2. Project construction shall include all portions of the proposed project, including the reconstruction of the pier platform/vertical segment of the lateral public walkway, as described in section A(1) of this condition.
- B.** 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 Commission's approval and with the recommendations of any required technical reports.
- C.** The applicant shall undertake development in conformance with the approved final updated plans. Any proposed changes to the approved final plans, such as changes needed to be consistent with the City's certified LCP, Harbor Design Guidelines, or the requirements of other Resource Agencies, shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this Coastal Development Permit unless the Executive Director determines that no amendment is legally required.

2. Access Plan.

- A.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for the Executive Director's review and written approval, two sets of an Access Plan, which will identify the City's plan to create the lateral public walkway along the Rhine Channel as required by the City's certified LCP. The Access Plan shall include, but is not limited to, the following:

1. Identify any pending or proposed easements for a lateral public walkway for public access along the Rhine Channel;
 2. Identify the ownership of the properties that are located along the Rhine Channel;
 3. Identify alternatives to achieving the construction of the lateral public walkway along the Rhine Channel.
- B.** 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 Commission's approval and with the recommendations of any required technical reports.
- C.** The permittee shall undertake development in conformance with the approved final updated 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.
- 3. Public Access Management Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for Executive Director review and written approval, two sets of a Public Access Management Plan. The Public Access Management Plan shall clearly describe the manner in which general public access associated with the approved project is to be provided and managed, and shall at a minimum include the following:
- A.** Clear Depiction of Public Access Areas and Amenities. All public access areas and amenities, including all of the areas and amenities described above, shall be clearly identified as such on the Public Access Management Plan (including with hatching and closed polygons so that it is clear what areas are available for public access use).
 - B.** Public Access Signs/Materials. The Public Access Management Plan shall identify all signs, handouts, brochures, and any other project elements that will be used to facilitate, manage, and provide public access to the approved project, including identification of all public education/interpretation features that will be provided on the site (educational displays, interpretive signage, etc.). Sign details shall include showing the location, materials, design, and text of all public access signs. At a minimum, public access signs shall be placed at the 28th Street/Villa Way, street end and also near the subject area. The signs shall be designed so as to provide clear information without impacting public views and site character. All directional signs shall include the Commission's access program "feet" logo and the California Coastal Trail emblem.

- C. No Public Access Disruption. Development and uses within the public access areas that disrupt and/or degrade public access (including areas set aside for private uses, barriers to public access (furniture, planters, temporary structures, private use signs, ropes, etc.)) shall be prohibited. The public use areas shall be maintained in a manner that maximizes public use and enjoyment.
- D. Public Access Use Hours. The lateral public walkway fronting the Rhine Channel shall be open to the general public 24 hours per day, 365 days per year and shall be available free of charge.
- E. Public Access Areas and Amenities Maintained. The public access components of the project shall be maintained in their approved state in perpetuity.

The applicant shall undertake development in conformance with the approved final updated 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.

- 4. **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.
- 5. **Pre-Construction Eelgrass Survey.** A valid pre-construction eelgrass survey (whether for *Zostera marina* or *Z. pacifica*) shall be completed for the subject 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 subject 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 subject 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. A greater mitigation ratio may be required if the Commission determines that temporal loss of eelgrass habitat will occur or if the success of the proposed mitigation site is uncertain. Implementation of mitigation to ensure success in achieving the minimum final mitigation ratio 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.

6. **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 Loni Adams, California Department of Fish & Wildlife (858/627-3985) or Bryant Chesney, National Marine Fisheries Service (562/980 4037), 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.

- 7, Future Development.** This permit is only for the development described in CDP No. 5-20-0428. 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. 5-20-0428, including the lateral public walkway. 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. 5-20-0428 from the Commission or shall require an additional CDP from the Commission or from the applicable certified local government.
- 8. 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 subject 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 applicants 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.

9. Construction Staging Plan. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT the applicant shall submit, for the review and approval of the Executive Director, two (2) sets of Construction Staging Plans, which indicate that the construction staging area(s) and construction corridor(s) will minimize public access impacts to the coast and minimize water quality impacts to coastal waters.

A. The plan shall demonstrate that:

1. Construction equipment, materials or activity shall not occur outside the staging area and construction corridor identified on the site plan required by this condition;
2. Construction equipment, materials, or activity shall not be placed within any habitat area or within 100-feet of any drainages; and
3. The construction staging area will gradually be reduced as less materials and equipment are necessary.

B. The plan shall include, at a minimum, the following components:

1. A site plan that depicts:
 - (a) limits of the staging area(s);
 - (b) construction corridor(s); and
 - (c) construction site; and
 - (d) location of construction fencing and temporary job trailer(s); and
2. A narrative that describes and explains the plan

The applicant 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.

10. 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.

IV. FINDINGS AND DECLARATIONS

A. Project Location and Description, Permit and Violation History and Standard of Review and Prior

Project Location and Description and Prior Permit and Violation History

The subject sites are two bulkheaded lots located at 2804 and 2806 Lafayette Avenue along the Rhine Channel in Newport Harbor (Lower Newport Bay) in the City of Newport Beach ([Exhibits No. 1-2](#)). The proposed work take place at the rear submerged portions of the two subject private lots that are adjacent to the Rhine Channel. The application includes a request for the required follow-up permit for the emergency work performed pursuant to the emergency permit granted in October 2019, for work to the lateral public walkway at the 2806 Lafayette Avenue property. However, the application also proposes similar repair work to the lateral public walkway at the adjacent 2804 Lafayette Avenue property.

The lateral public walkway on both properties are located over water area located within the ownership of the 2804 and 2806 Lafayette Avenue property owners. The southern waterside property lines of the two properties separate the properties from water area identified by the City as "*Waterways Dedicated or Reserved for the same*" on the City's Tidelands Survey of Newport Harbor dated January 11, 2017, which in this case is the Rhine Channel. These waterside portions are not part of the mapped State Tidelands held in trust by the City.

The applicant is the City of Newport Beach, rather than the property owners of 2804 and 2806 Lafayette Avenue, because the City holds access easements that run along the connected lateral public walkway located at the rear of the submerged portions of both subject private properties, 2804 and 2806 Lafayette Avenue, that are parallel to the adjacent Rhine Channel ([Exhibit No. 1](#)). The 2806 Lafayette Avenue property includes a pier platform/vertical segment of the lateral public walkway ([Exhibit No. 1](#)).

The subject sites are bordered by the Rhine Channel on the south, a business/commercial use (2808 Lafayette Avenue) to the east of the 2806 Lafayette Avenue property, Lafayette Avenue on the north and a commercial use (2800 Lafayette Avenue) to the west of the 2804 Lafayette Avenue property ([Exhibits No. 1-2](#)). On the landside portion of each of the subject properties is a two-story mixed-use building and no work is proposed to either of the buildings. The subject sites are located within the Cannery Village area of Newport Beach, which is the historic center of the City's commercial fishing and boating industry and contains a mix of small shops, art galleries, professional offices, and service establishments. Marine-related commercial (boat sales) and marine-related industrial uses (boat repair) are also found in the area. From

the 1930's through the 1950's, shipyard and cannery operations, boat building activities, and metal plating facilities were located along the Rhine Channel, which fronts the site.

The subject properties are designated Mixed Use-Water Related (Mu-W) in the City of Newport Beach Land Use Plan (LUP), which "...is intended to provide for commercial development on or near the bay in a manner that will encourage the continuation of coastal-dependent and coastal-related uses and visitor-serving uses, as well as allow for the development of mixed-use structures with residential uses above the ground floor..."

In addition, the LUP discusses the importance of and the intent to expand public access opportunities in the Cannery Village area and adjacent areas: "*Waterfront commercial areas also provide vertical and lateral access to Lower Newport Bay. Commercial developments in Lido Village, Cannery Village, McFadden Square, and Balboa Village and on the Lido Peninsula provide public access easements to and along the waterfront. In most cases, these easements have been integrated into the project's design, such as restaurants with outdoor waterfront dining areas and boarding areas for charter and excursion vessels.*

New development will present additional opportunities to extend and enhance waterfront access in these areas. Particular attention should be given to extending the Lido Marina Village boardwalk across all of the waterfront commercial properties in Lido Village and to provide a continuous waterfront walkway along the Rhine Channel to connect the Cannery Village and McFadden Square waterfront commercial areas with Las Arenas Beach at 19th Street. A connection from Lido Village to Mariner's Mile should also be provided, if feasible."

The proposed project includes follow-up work to Emergency Permit G-5-19-0043-(City of Newport Beach) to remove portions of the lateral public walkway over the water on the submerged portion of the property located at 2806 Lafayette Avenue that were deemed structurally unstable and like-for-like replacement of the concrete walkway decking with composite decking and wood material, handrail, and two 12-inch diameter concrete piles ([Exhibits No. 2-3](#)).

Due to deep cracks observed in the surface of the lateral public walkway located on the submerged portion of the property at 2804 Lafayette Avenue and the applicant's concerns that the damage could result in operational use limitations, pose a risk to public safety, or fail completely and discharge concrete debris into the waterway/marine environment, the project also includes the removal and like-for-like replacement of approximately 50 ft. of the lateral public walkway's concrete decking with composite decking and wood material ([Exhibits No. 2-3](#)). The seven existing 12-inch diameter concrete piles supporting the lateral public walkway will be re-used in place and new handrails will be installed at the top of the proposed replacement walkway.

The applicant states that these lateral public walkways are independent structures supported on piers; and while located adjacent to the bulkheads for both the 2804 and

2806 Lafayette Avenue properties, neither of these lateral public walkways is supported or connected to the bulkhead walls.

In this area of Newport Harbor, the LCP requires a continuous lateral public walkway between the development (on the inland side) and the public waters of the Rhine Channel. When properties are redeveloped or improved, the Commission has historically required that the lateral public walkway be built, so that eventually each property in this area will be fronted by the lateral public walkway and the walkway will be continuous along the Rhine Channel.

Prior Commission action has taken place at the subject sites, 2804 and 2806 Lafayette Avenue and the neighboring properties located at 2800 and 2808 Lafayette Avenue. The 2800 Lafayette Avenue property is located to the west of the 2804 Lafayette Avenue property adjacent to the end of 28th Street/Villa Way. The 2808 Lafayette Avenue is located to the east of the 2806 Lafayette Avenue property.

On March 15, 1990, the Commission approved Coastal Development Permit No. 5-90-075 for development at 2804 Lafayette Avenue. Development included a 6 ft. wide lateral public walkway over the water supported by piles that wraps around the property and connects to a landside 5 ft. wide lateral public walkway located on the neighboring west property, 2800 Lafayette Avenue.

The landside lateral public walkway at 2800 Lafayette Avenue was approved by the Commission on December 8, 1980 in Coastal Development Permit No. P-80-7354.

During local review for both projects, the City required an offer to dedicate a public access easement for a lateral public walkway along the Rhine Channel for each property. Thus, when these projects were submitted for Commission approval after obtaining local approval, the lateral public walkways were already incorporated into the projects. For that reason, the Commission approvals did not include a similar requirement.

On July 12, 1990, the Commission approved Coastal Development Permit No. 5-90-0471 for development at 2806 Lafayette Avenue. Development included a 6 ft. wide lateral public walkway over the water supported by piles that includes a public pier platform/vertical segment (approximately 30-feet long by 7-feet wide). Similar to the local approvals for development at 2804 and 2800 Lafayette Avenue discussed above, the City required an offer to dedicate a public access easement for a lateral public walkway along the Rhine Channel for the 2806 Lafayette Avenue property.

The original construction of the public pier platform/vertical segment of the lateral public walkway located at 2806 Lafayette Avenue is to provide lateral access around the bayward encroaching easterly neighboring structure located at 2808 Lafayette Avenue. Because the structure at 2808 Lafayette Avenue encroaches into the bay a significant amount, the public pier platform/vertical segment was constructed to connect to the lateral public walkway seaward of the neighboring 2808 Lafayette Avenue encroaching

structure ([Exhibits No. 2-3](#)). The public pier platform/vertical segment is a vertical extension of the lateral public walkway located at the 2808 Lafayette Avenue property. However, in 2000, the building and accessway at 2808 Lafayette Avenue collapsed into the bay and has since been removed. The Commission has required through a separate permit action that it be reconstructed, as discussed below. The lateral public walkway at the 2806 Lafayette Avenue property remains, though the pier platform/vertical segment collapsed into the bay in 2019.

The lateral accessway around the bayward encroaching structure at 2808 Lafayette Avenue was approved on July 26, 1976 by the Commission through Coastal Development Permit No. P-5-19-76-7903 for development that also consisted of demolition of an existing building and construction of a 3-story marine oriented commercial building with a ground level (1st floor) twenty (20)-space parking garage and construction of a boat dock and deck areas. During local approval review, the City of Newport Beach required a pier to be used as a public walkway that extends across the entire bayside of the property and that the owner grant an easement/agreement for public access. It is this walkway that the pier platform/vertical segment located at 2806 Lafayette Avenue connected to until in 2000 when the development and accessway located at 2808 Lafayette Avenue collapsed into the bay.

On March 6, 2013, the Commission approved Coastal Development Permit No. 5-11-178 for development at 2802 Lafayette Avenue consisting of construction of a new bulkhead. As part of its approval, a lateral public walkway connection to the lateral public walkway including the pier platform/vertical segment located at 2806 Lafayette Avenue was required unless the applicant could demonstrate that the property was not subject to the public trust.

In June 2019, Commission enforcement staff sent a Notice of Violation letter to the property owner of the 2806 Lafayette Avenue property, V-5-19-0076, for the erection of an unpermitted barrier fence on the seaward side of the 2806 Lafayette Avenue property that impeded access to the pier platform/vertical segment of the lateral public walkway. The owner stated that the pier platform was cracking in multiple areas; that the safety railings on the westerly side of the public pier platform had been removed; and, in response, the City had installed the barrier fence to prohibit access due to safety concerns. Commission staff notes that the City's installation of a barrier fence to prevent public access at this location was undertaken without a CDP, but upon request from Commission staff the City provided a report from their structural engineer which proved that the pier platform was structurally compromised and indeed unsafe for public use.

On July 10, 2019, the Commission was scheduled to hear Coastal Development Permit No. 5-18-0705 for the property located at 2806 Lafayette Avenue. The proposed project was for the removal of the public pier platform/vertical segment of the lateral public walkway in order to expand the private boat dock system that serves both the 2806 and 2804 Lafayette Avenue properties. The private owner of the 2806 property stated that the public pier platform/vertical segment located at 2806 Lafayette Avenue was

deteriorating, was not used for activities such as fishing since the water area there is shallow, and that fishing was not recommended at the site due to toxins left from the canning businesses once located in this area of Newport Bay. Furthermore, the owner stated that since the public walkway at the adjacent eastern property, 2808 Lafayette Avenue, no longer existed due to its collapse into the bay along with a portion of a building in 2000, the public pier platform/vertical segment that the adjacent public walkway once connected to was no longer necessary. The owner of the 2806 Lafayette Avenue property stated that while the public pier platform/vertical segment was proposed to be removed, the remaining portion of the lateral public walkway would remain to provide lateral access to the bay.

Staff recommended denial of the CDP No. 5-18-0705 since the project was inconsistent with the public access policies of the Coastal Act and the policies of the City's certified LCP and also would lessen the intent of the original permit (CDP No. 5-90-471) since it would impede vertical access to the Rhine Channel and potentially could impair lateral access along the channel in front of the development along Lafayette Avenue. In addition, staff recommended denial since the removal of the existing vertical public access component (pier platform) would be inconsistent with past Commission and City actions where public access improvements were required through the approval of a CDP. On the day of the hearing, prior to it being heard by the Commission, the applicant withdrew their application.

In August 2019, approximately two months after the project was withdrawn, the pier platform/vertical segment of the lateral public walkway at 2806 Lafayette Avenue collapsed into the bay while the lateral public walkway remained but suffered some damage. In response to the collapse, the Commission on October 14, 2019 approved Emergency Permit No. G-5-19-0043 for the removal of portions of the public walkway that had collapsed into the Bay and also the removal and replacement of portions of the walkway that were structurally unstable. The emergency permit also allowed the installation of temporary protective railings on the remaining portions of the walkway and the replacement of two piles, the walkway and railings. The emergency permit requires through Special Condition No. 5 the like-for-like reconstruction of the public walkway via a follow up coastal development permit. However, the proposed project does not include the re-construction of the pier platform/vertical segment. In lieu of the City rebuilding it, the City has offered to improve the nearby 19th Street Public Pier located at the end of 19th Street. This proposal will be discussed later in the staff report.

On April 5, 1990, the City's Planning Commission approved Site Plan Review No. 57 and Use Permit No. 3377 for development at 2806 Lafayette Avenue consisting of the construction of a mixed use residential/commercial development. In its approval of the project, the Planning Commission imposed a condition that had to be satisfied prior to issuance of the building permit requiring dedication of a public access easement on the bayside portion of the property [The public pier platform along with a lateral public walkway it connects to that fronts the bayside portion of the subject site are part of a required 6 ft. wide lateral public walkway]: *"That prior to the issuance of building permits, the applicant shall dedicate to the City a 6 foot wide public access easement*

along the entire water frontage of the subject property and along a portion of the northeasterly side property line sufficient to make the required physical connection with the public access easement on the adjoining property located at 2808 Lafayette Avenue.” In addition, the City imposed a condition requiring construction of a connection between the proposed access easement and the adjoining access easement on 2808 Lafayette: *“The applicant shall construct a physical connection between the proposed access easement on the subject property and the adjoining access easement at 2808 Lafayette Avenue. The design and improvement of the easement area, including the connection, shall be subject to the approval of the Public Works Department and the Marine Department.”* In June 1990, the City accepted the offer to dedicate.

Following approval by the City of Newport Beach Planning Commission in April 1990, the owner of the 2806 Lafayette Avenue property applied for a coastal development permit (CDP App. No. 5-90-471) for review by the Coastal Commission. The project included a 6 ft. wide lateral public walkway over the water supported by pilings on the bayside portion of the subject site, which provides lateral public access to the Rhine Channel, to existing lateral public access to the west of the subject site located at 2804 Lafayette Avenue, and to future restored public access to the east of the site at located at 2808 Lafayette Avenue, to be explained later in the staff report. On July 12, 1990, the Coastal Commission approved the proposed development, which consisted of demolition of an existing shed and construction of a mixed use structure (500 sq. ft. office space on the ground floor and a 1,656 sq. ft. apartment on the second floor) with a 402 sq. ft. two car-garage for the residential use and two covered parking spaces for the commercial use, as well as a 6 ft. wide public walkway on piers abutting the existing bulkhead. No work on the existing bulkhead was proposed as part of the project. Since the lateral public walkway over the water was included as part of the project description, which the City required as an offer to dedicate a public access easement as part of its local approval, the Commission did not impose any special conditions, such as requiring an offer to dedicate for the lateral public access.

The Commission staff report for CDP No. 5-90-471 discussed the benefit of placing the walkway in its proposed location instead of relocating the existing bulkhead more bayward and placing a walkway on top of the bulkhead to match the more bayward bulkheads located at 2808 Lafayette Avenue (east of the 2806 subject property) and 2800 Lafayette Avenue (west of the 2804 subject property) as it would not result in fill of open coastal waters.

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. Public Access and Recreation

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 30213 of the Coastal Act, Lower cost visitor and recreational facilities, states in relevant part:

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.

Section 30214 of the Coastal Act, Implementation of public access policies, states in part:

(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:

- (1) Topographic and geologic site characteristics.
- (2) The capacity of the site to sustain use and at what level of intensity.
- (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.
- (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

Coastal Land Use Plan Policy, Shoreline Access, Policy 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, Policy 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, 3.1.1-13 states,

Require a direct dedication or an Offer to Dedicate (OTD) an easement for lateral public access for all new shorefront development causing or contributing to adverse public access impacts. Such dedication or easement shall extend from the limits of public ownership (e.g. mean high tide line) landward to a fixed point seaward of the primary extent of development (e.g. intersection of sand with toe or top of revetment, vertical face of seawall/bulkhead, dripline of deck, or toe of bluff).

Coastal Land Use Plan Policy, Shoreline Access, 3.1.1-14 states,

Require a direct dedication or an Offer to Dedicate (OTD) an easement for vertical access in all new development projects causing or contributing to adverse public access impacts, unless adequate access is available nearby. Vertical accessways shall be a sufficient size to accommodate two-way pedestrian passage and landscape buffer and should be sited along the border or side property line of the project site or away from existing or proposed development to the maximum feasible extent.

Coastal Land Use Plan Policy, Shoreline Access, 3.1.1-15 states,

Encourage the acceptance, improvement and opening of OTDs to the public by the City, a public agency, a private association, or other appropriate entity.

Coastal Land Use Plan Policy, Shoreline Access, 3.1.1-16 states,

Require all direct dedications or OTDs for public access to be made to a public agency or other appropriate entity that will operate the accessway on behalf of the public. Require accessways to be opened to the public once an appropriate entity accepts responsibility for maintenance and liability.

Coastal Land Use Plan Policy, Shoreline Access, 3.1.1-17 states,

Require new development in waterfront commercial areas to provide public access easements to and along the waterfront. Where appropriate, integrate public access easements into the project designs, such as restaurants with outdoor waterfront dining areas and boarding areas for charter and excursion vessels.

Coastal Land Use Plan Policy, Shoreline Access, 3.1.1-21 states,

Provide a continuous waterfront walkway along the Rhine Channel connecting Cannery Village and McFadden Square waterfront commercial areas with Las Arenas Beach at 19th Street.

Coastal Land Use Plan Policy, Shoreline Access, 3.1.1-24 states,

Encourage the creation of new public vertical accessways where feasible, including Corona del Mar and other areas of limited public accessibility.

Coastal Land Use Plan Policy, Shoreline Access, 3.1.1-26 states,

Consistent with the policies above, provide maximum public access from the nearest public roadway to the shoreline and along the shoreline with new development except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources or (2) adequate access exists nearby.

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

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

Implementation Plan, Development Standards, 21.30A.020(C)(4) states,

4. Required Lateral Access. New public accessways for any new development in the segments identified in Section 21.30A.050(A)(7)(b) shall be required unless excepted by subsection (C)(2) of this section or the review authority determines that new public access is not required in pursuant to Section 21.30A.050(J).

Implementation Plan, Development Standards, 21.30A.050(A)(1)(a-b) states,

- a. Maximize public access to and along the shoreline and coastal bluff tops;
- b. Provide new vertical accessways in areas of limited public accessibility;

Implementation Plan, Development Standards, 21.30A.050(A)(7)(b)(i) states in part:

- b. Required Segments. Lateral accessway segments shall be provided in the following areas:
 - ii. Cannery Village and McFadden Square. On all bay front lots in Cannery Village and McFadden Square from 31st Street to 19th Street.

Implementation Plan, Development Standards, 21.30A.050(A)(7)(d)(ii) states,

- d. Minimum Width. Lateral accessways shall be the following minimum widths:
 - ii. Lots with Shoreline Protective Devices. For lots with shoreline protective devices, a lateral accessway shall be a minimum of ten (10) feet in width as measured landward from the shoreline protective device.

Implementation Plan, Vertical Access Design Features, 21.30A.050(A)(8)(a-c) states,

- a. Location. Where feasible, a minimum of one vertical accessway at every street stub, or where there are no street stubs, at every five hundred (500) feet.
- b. Linkage. Where feasible, vertical accessways shall link with lateral accessways.
- c. Minimum Width. A vertical accessway shall be a minimum of six feet in width.

Coastal Act Section 30210 mandates that maximum public access and recreational opportunities be provided. Section 30213 of the Coastal Act states that lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Coastal Act Section 30214 of the Coastal Act states that public access policies shall be implemented in a manner that takes into account the need to regulate the time, place and manner of public access depending on the facts and circumstances of the case. All of these policies suggest that more public access is required and that where public access exists, it should be protected and encouraged to continue to exist. The policies support reconstruction of a public access facility that degrades.

Additionally, the City of Newport Beach's Certified LCP contains policies protecting, encouraging and providing coastal public access, such as Coastal Land Use Plan (CLUP) Policy 3.1.1-1 that states that public access to and along the shoreline will be protected and where feasible expanded and enhanced, and 3.1.1-9 that states that public access shall be maximized to and along the shoreline. Some of these LCP policies are specific to the subject area, such as Coastal Land Use Plan (CLUP) Policy 3.1.1-21, which states that a continuous waterfront walkway along the Rhine Channel in the Cannery Village area will be provided, and Policy 3.1.1-24, encouraging the creation of new public vertical access where feasible in areas of limited accessibility. The policies in the Implementation Plan (IP) include 21.30A.050(A)(7)(b)(i), which states that lateral access along the bayfront lots in the cannery Village area shall be provided, and 21.30A.050(A)(7)(d)(ii), which requires that lateral access ways on lots with shoreline protective devices "shall be a minimum of ten (10) feet in width." The existing lateral public walkways at 2804 Lafayette Avenue and at 2806 Lafayette Avenue, including the pier platform/vertical segment at 2806 Lafayette Avenue, are only 6 ft. wide, and therefore are existing non-conforming structures. The LCP policies require that public access be expanded and enhanced, not shrunken and abandoned.

The proposed development includes follow-up work associated with Emergency Permit No. G-5-19-0043 for the removal of portions of the lateral public walkway that collapsed into the bay and the removal and replacement of portions of the lateral public walkway that were structurally unstable. The emergency permit also allowed the installation of temporary protective railings on the remaining portions of the walkway and the replacement of two piles, the walkway and railings.

The proposed project also includes similar repair work to the lateral public walkway located in the submerged portion of the property at 2804 Lafayette Avenue, consisting of the like-for-like removal and replacement of approximately 50 ft. of concrete decking with composite decking and wood material. In addition, seven existing 12-inch diameter

concrete piles supporting the lateral public walkway will be re-used and new handrails will be installed at the top of the proposed replacement walkway.

Both the Coastal Act and the City's LCP include policies to create, protect, and enhance public access along the shoreline where feasible. In addition, the City's certified LCP Policies 3.1.1-21 and 21.30A.050(A)(7)(b)(i) envision a continuous public waterfront walkway along the Rhine Channel connecting Cannery Village and McFadden Square waterfront commercial areas with Las Arenas Beach at 19th Street. The Coastal Access and Recreation Map of the Certified Land Use Plan (LUP) shows continuous lateral public access as a goal along this block fronting the Rhine Channel. Lateral public access is currently provided at the subject sites, 2806 and 2804 Lafayette Avenue and along the property west of the subject site, 2800 Lafayette Avenue, ending at 28th Street/Villa Way. Existing impediments to continuous lateral access along the block are east of the subject site at the properties located at 2808, 2812, 2814, 2816 and 2820 Lafayette Avenue, which is adjacent to the 29th Street, street end.

While the lateral public walkway along the bayfront of the property located at 2808 Lafayette Avenue, to the east of the subject site, collapsed in the bay in 2000, CDP No. 5-11-178-(Cervantes-Moreheart) was approved by the Coastal Commission in 2013 requiring an easement for public access to the area on the seaward side of the existing building. This easement was required to restore a link to the existing lateral public access walkway located in the submerged portion of the 2806 Lafayette Avenue property. Currently, lateral public access is available across the 2806, 2804 and 2800 Lafayette Avenue properties concluding at the end of 28th Street/Villa Way. Continuous public access along all of the properties for the block located between the 28th Street/Villa Way and 29th Street is anticipated as these sites redevelop. Emergency Permit No. G-5-19-0043, pursuant to Special Condition No. 5, requires the like-for-like reconstruction of the public walkway via a follow up coastal development permit. However, the proposed project does not include the re-construction of the pier platform/vertical segment of the lateral public walkway at 2806 Lafayette Avenue. The City contends that Special Condition No. 5 of the emergency permit does not require it to rebuild the pier platform/vertical segment of the lateral public walkway. Public access would be adversely impacted if this pier platform/vertical segment is not reconstructed. Public access to the shoreline would not be protected or enhanced as required by the Coastal Act. In addition, the proposed project would not be consistent with the City's certified LCP policies envisioning public access along the Rhine Channel.

While the pier platform/vertical segment may not provide lateral access in the same way that it used to since the collapse of the building and accessway at 2808 Lafayette Avenue, it still provided public access benefits. Its function as a vertical element into the bay provides an opportunity for the public to access the channel in an area where access is fairly limited. It also provided enhanced public views of the bay beyond what can be seen from the existing lateral public walkway. The City's IP Section 21.30A.050(A)(1)(b) calls for "new vertical accessways in areas of limited public accessibility," such as this area. Furthermore, depending on the exact location of the yet-to-be constructed neighboring lateral access at 2808 Lafayette Avenue, it would

continue to be part of the existing lateral walkway in the future. Once this connection is restored between these two properties, progress will be made toward uninterrupted lateral access along the Rhine Channel. Hence the reconstruction of the pier platform/vertical segment of the lateral public walkway at 2806 Lafayette Avenue is necessary to protect and enhance public access as required by the Coastal Act and the City's certified LCP.

As shown by the City's requirements for public access easements and offers to dedicate for public access on the subject sites and at 2808 and 2800 Lafayette Avenue, the City has invested effort to provide contiguous public access along the channel, consistent with its certified LCP. Not reconstructing the pier platform/vertical segment would be inconsistent with the public access policies of the Coastal Act and LCP, particularly as they relate to the Rhine Channel. Maximum public access and recreational opportunities, as required by Section 30210 of the Coastal Act, would not be provided by the City's decision to not rebuild the pier platform/vertical segment of the lateral public walkway. The pier platform is located in an ideal location that would provide a low-cost visitor and recreational facility for the public to enjoy Newport Harbor and the Rhine Channel as required per Section 30213 and 30214 of the Coastal Act. However, without its inclusion as part of the proposed project, a low-cost visitor and recreational opportunity would be lost. The pier platform/vertical segment's ideal location for access to the bay and the Rhine Channel is exhibited in the City's policies envisioning a lateral public walkway at this location. In addition to its inconsistencies with policies of the Coastal Act and the City's certified LCP, not reconstructing the pier platform/vertical segment would undermine the Commission's permit, CDP No. 5-90-471, which authorized development at 2806 Lafayette based on the project's inclusion of a 6 ft. wide lateral public walkway along the Rhine Channel.

The proposed work to the lateral public walkway in the submerged portion of the 2804 Lafayette Avenue will not result in adverse impacts to the lateral public walkway. Once work is completed on this segment, it will continue to provide public access along the Rhine consistent with policies of the Coastal Act, the City's LCP, and as required through the offer to dedicate a public access easement over the walkway that the City has accepted.

In lieu of the City rebuilding the pier platform/vertical element at the 2806 Lafayette Avenue property, the City has offered to improve the nearby 19th Street Public Pier located at the end of 19th Street, which is approximately 0.3 miles southeast from the subject sites ([Exhibit No. 4](#)). The proposed improvements would consist of reconfiguring the pier to provide additional docking space for vessels on the frontside (channel side) of the public pier and better navigation and additional docking space for dinghy boats on the backside (landward side) of the public pier. In addition, the City says that this reconfiguration will also provide better viewing area of the bay for the public. The City has also proposed installing a public wayfinding sign along the lateral public walkway at 2804 and 2806 Lafayette Avenue showing where public viewing is located in the area: Rhine Wharf public pier and 19th Street public pier as well as the entire boardwalk area between 28th and 26th Street.

However, Commission staff does not consider the proposal to improve the 19th Street Public Pier appropriate. The proposed in-lieu project would not result in the reconstruction of the pier platform/vertical segment of the lateral public walkway required by the emergency permit. The proposal would also be inconsistent with Policies 3.1.1-21 and 21.30A.050(A)(7)(b)(i) of the City's certified LCP that envisions a lateral public walkway along the Rhine Channel. Reconstruction of the pier element/vertical segment would be consistent with the requirement of the emergency permit and would be a step forward in accomplishing the lateral public walkway along the Rhine Channel consistent with the goals of the LCP.

Thus, the Commission imposes **Special Condition No. 1**, which requires the applicant to submit Revised Project Plans, which include the like-for-like reconstruction of the pier platform/vertical segment of the lateral public walkway located at 2806 Lafayette Avenue. If the width of the pier platform/vertical segment of the lateral public walkway needs to be increased from 6 ft. to 10 ft. consistent with the City's certified LCP or Harbor Design Guidelines pursuant to **Special Condition No. 1**, it will have to be consistent with the requirements of Coastal Act Sections 30210, 30213 and 30214 and with the corresponding portions of the City's certified LCP, that is used as guidance.

Potential future development, such as the extinguishment or elimination of the public access easement over the lateral public walkway, could adversely impact the availability of public. Therefore, staff recommends the Commission impose **Special Condition No. 7** which requires the applicant to obtain a permit amendment or a new permit for any future improvements.

The City's certified LCP contains policies that envision a lateral public walkway along the Rhine Channel. The Commission imposes **Special Condition No. 2**, which requires the applicant to submit an Access Plan that identifies how the City plans to create the lateral public walkway along the Rhine Channel as required by the City's certified LCP.

While the City has proposed improvements to the lateral public walkways, the City has not identified how the public amenity would be operated and maintained, such as hours of operation and verification that no gates shall be installed that would impact public access. Also, in order to ensure that the public is aware of the lateral public walkway and pier platform/vertical segment at the subject sites, a Public Access Management Plan is necessary to make the public aware of the public opportunity at the subject sites. Thus, the Commission imposes **Special Condition No. 3**, which requires the applicant to submit a Public Access Management Plan.

The lateral public walkway and the area where the pier platform/vertical segment existed is located on and in water area owned by the 2806 and 2804 Lafayette Avenue property owners. The southern waterside property lines of these two properties separate these areas from water area identified by the City as "*Waterways Dedicated or Reserved for the same*" on the City's Tidelands Survey of Newport Harbor dated

January 11, 2017, and is not part of the mapped State Tidelands held in trust by the City, which in this case is also the Rhine Channel.

Pursuant to Public Resources Code section 7552.5, the submerged lands are subject to a navigational easement that, in general, precludes the owners from preventing the public from using the waters for navigational purposes even if the submerged lands are not public trust lands. No work is proposed to the lateral public walkways and the area where the pier platform/vertical segment existed on the submerged lands that would encroach bayward and into the Rhine Channel resulting in interference with navigation through the channel. Thus, the proposed project would not be inconsistent with the navigational easement. However, Coastal Commission approval of this project cannot waive any public rights that may exist on the property. Thus, **Special Condition No. 4** is imposed, stating 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, and that if any portion of the development approved by this project is subsequently determined to be located on or over public trust lands, then development approved by this coastal development not compatible with the public trust must be removed.

Staging of construction projects may result in impacts to public access impacts, such as impacts to the public right-of-ways in the area that lead to public access opportunities. The applicant has not identified where the construction staging area will be located. Thus, the Commission imposes **Special Condition No. 9**, which requires the applicant to submit a Construction Staging Plan for the Executive Director's review and approval.

Conclusion

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30210, 30213 and 30214 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.

C. Marine Resources/Water Quality

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

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

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

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine

organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

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

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

Section 30233 of the Coastal Act, Diking, filling or dredging; continued movement of sediment and nutrients, 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, Location, existing developed areas, states:

(a) New ...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:

...

- 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.

Coastal Act Section 30230 states that marine resources shall be maintained, enhanced and where feasible, restored. Coastal Act Section 30231 states that the biological productivity and the quality of coastal waters shall be maintained and where feasible restored. Coastal Act Section 30233 states that the filling of open coastal waters shall be permitted where there is no feasible less environmentally damaging alternative and where feasible mitigation measures have been provided to minimize adverse environmental effects. Coastal Act Section 30250 requires that new development will be located where it will not have cumulative adverse impacts to coastal resources.

Additionally, the City of Newport Beach's Certified LCP contains policies regarding the protection of marine resources/water quality, such as Coastal Land Use Plan (CLUP) Policy 4.3.1-8 that states protection against the spillage of crude, oil, gas, petroleum products or hazardous substances will take place, and Policy 4.3.2-6 that states that best management practices (BMPs) for new development will be implemented. Also, there is LCP Policy 4.2.5-1 that requires avoidance of impacts to eelgrass to the greatest extent possible. The Implementation Plan (IP) includes 21.30C.050(D&F) that requires avoidance of impacts to eelgrass and the implementation of pollution control safeguards.

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 causing 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 or pier 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 or pier structures and resulting increases in water coverage throughout Newport Harbor could be significant. It should be noted that there are hundreds of private docks and piers 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.

The project, as submitted, does not result in increased water coverage, and should not impact eelgrass, as the plant has historically not been located on this site, based on eelgrass surveys dating to 2004. The applicant states that there is currently no eelgrass, although the most recent survey was completed one year ago. Thus, the applicant will be required to conduct an additional survey prior to construction of the development.

While no additional water coverage is proposed as part of the originally submitted project, approximately 210 square feet of water coverage is anticipated as a result of the staff recommended **Special Condition No. 1**, which requires the reconstruction of the approximately 7 ft. long by 30 ft. wide pier platform/vertical segment of the lateral public walkway at the 2806 Lafayette Avenue property. This amount of water coverage would be similar to the water coverage of the pier platform/vertical segment of the lateral public walkway located at 2806 Lafayette Avenue prior to its collapse into the bay in 2000. While water coverage would increase as a result of the rebuilding of the pier platform/vertical segment required by **Special Condition No.1**, it will not result in impacts to eelgrass as eelgrass has historically not been present at the site based on eelgrass surveys dating back to 2004. However, as stated above, the eelgrass survey is a year old, so an additional eelgrass survey is required prior to construction of the development. If additional water coverage is necessary to be consistent with the City's certified LCP or Harbor Design Guidelines pursuant to **Special Condition No. 1**, which requires reconstruction of the pier platform/vertical segment of the lateral public walkway, the water coverage will have to meet the requirements of Coastal Act Sections 30230 and 30231 and the corresponding portions of the City's certified LCP, that is used as guidance.

Eelgrass surveys completed during the active growth phase of eelgrass (March through October) are valid for 60 days, except for surveys completed between August and October. A survey completed between August-October is valid until the resumption of active growth (i.e., March 1). The project is agenda'd for the March 2021 Coastal Commission Hearing, so the existing eelgrass survey will no longer be valid in time for construction of the project. Therefore, the Commission imposes **Special Condition No. 5**, which requires a new eelgrass survey and identifies the procedures necessary to be completed prior to beginning construction, in case the new survey also expires prior to commencement of construction. In addition, the special condition identifies post-construction eelgrass procedures. These conditions will ensure that should impacts to eelgrass occur (though none are expected as conditioned), the impacts will be identified, and appropriate mitigation required. Therefore, as conditioned, the Commission finds that the proposed development will not result in significant impacts to eelgrass.

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 the City's biennial eelgrass surveys from 2004 to 2020 found no *Caulerpa Taxifolia* at the subject site. However, *Caulerpa Taxifolia* surveys are only valid for 90 days. Thus, pursuant to **Special Condition No. 6**, the Commission requires that an up-to-date *Caulerpa Taxifolia* survey 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, the Commission imposes **Special Condition No. 7**, which requires the applicant to obtain a permit amendment or a new permit for any future repair or maintenance of the public walkway.

Construction Impacts

Construction will occur over and in coastal waters. As such, there is a possibility that construction phase activities could result in adverse water quality impacts. In addition, there is a possibility that improper staging and storage of equipment could have impacts on water quality.

Potential construction phase impacts include discharges into Newport Bay and coastal waters via rain or urban runoff due to improper storage or placement of construction materials, debris, or waste. These potential adverse impacts upon the marine environment could reduce the biological productivity of coastal waters. For instance, construction debris entering coastal waters may cover and displace soft bottom habitat. In addition, the use of machinery in coastal waters not designed for such use may result in the release of lubricants or oils that are toxic to marine life. Sediment discharged into coastal waters may cause turbidity, which can shade and reduce the productivity of foraging avian and marine species ability to see food in the water column.

In order to assure that the proposed project does not result in any accidental or unanticipated discharges, spills or other activities that could harm marine resources and

water quality, the Commission imposes **Special Condition No. 8**, which requires appropriate storage and handling of construction equipment and materials to minimize the potential for pollutants to enter coastal waters.

Construction staging areas have the potential to adversely impact marine resources and water quality. In this case, the applicant has not stated where the construction staging area will be for the proposed project. Thus, the Commission imposes **Special Condition No. 9**, which requires the applicant to submit a Construction Staging Plan for the Executive Director's review and approval.

The applicant has applied to the Regional Water Quality Control Board (RWQCB) for review and the permit is pending. In addition, the applicant has applied for a permit from the U.S. Army Corps of Engineers and the permit is pending coastal development permit approval. To ensure that the proposed project adheres to the requirements from these resource agencies, as well as others as applicable, the Commission imposes **Special Condition No. 10**, which 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.

Section 30230, 30231 and 30232 of the Coastal Act protect water quality and biological productivity. Section 30250 of the Coastal act requires that new development will be located where it will not have cumulative adverse impacts to coastal resources. Conditioning the project for eelgrass and *Caulerpa Taxifolia* surveys ensures that that these marine resources are protected. Without these surveys to identify if they were present at the project location, potential adverse impacts to these resources during construction could occur inconsistent with Sections 30230, 30231 and 30232 of the Coastal Act. Also, due to the location of the proposed project located over and in coastal waters, there is potential that water quality and marine resources may be adversely impacted during construction. For example, the handling and storage location of construction equipment could adversely impact water quality and marine resources. However, as conditioned for construction related requirements and for submittal of a construction staging plan, the proposed project would be consistent with the water quality and marine resource protection policies of the Coastal Act. The City's certified LCP also contains policies, CLUP Policies 4.1.4-5, 4.2.3-1, 4.2.3-2, 4.2.5-1, 4.3.1-8, 4.3.2-1, 4.3.2-6, 4.2.3-7, 4.3.2-22, and IP Policy 21.30.C.050(D&F), that mirror the Coastal Act policies identified above and as conditioned, the project would also be consistent with those certified LCP policies.

Fill of Coastal Waters

Coastal Act Section 30233 limits the allowable fill of open coastal waters, wetlands, and estuaries to certain uses only, including "public recreational piers that provide public access and recreational opportunities." However, fill for public recreational piers 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 City's certified LCP also has a policy that mirrors this Coastal Act policy.

As submitted, the proposed project includes the replacement of two 12-inch diameter concrete piles like-for-like and the re-use of seven 12-inch diameter concrete piles. Thus, the project, as submitted, does not result in any additional fill. In past actions, the Commission has found that re-use of existing piles is desirable because it avoids impacts to the benthic sediment and water column associated with pile driving. New piles must be analyzed with a baseline condition of no development, and only the minimum number of new piles necessary to support recreational boating uses may be authorized.

However, as conditioned by **Special Condition No. 1** to require the reconstruction of the approximately 7 ft. long by 30 ft. wide pier platform/vertical segment of the lateral public walkway at the 2806 Lafayette Avenue property, it is anticipated that four 14-inch diameter square concrete piles will be needed to support it and that results in fill. This is based on the fact that prior to collapse of the pier platform/vertical segment, four 14-inch diameter square concrete piles supported it. When the collapsed pier platform/vertical segment was removed from the bay, the piles were removed as well. Thus, the project, as conditioned, results in four new 14-inch diameter square piles that results in 5.44 square feet of fill. Because the project is a recreational pier, it is an allowed use and meets the first test of Section 30233.

The applicant has indicated, and the Commission has reviewed and agreed, that the piles are the minimum sized pilings and the minimum number of pilings necessary for structural stability of the project. Therefore, the project as conditioned is the least environmentally damaging feasible alternative, and it meets the second test of Section 30233.

Finally, fill from the project, as conditioned, is not anticipated to result in adverse impacts due to the nature of the soft-bottom of the harbor (polluted and silty), which does not support subtidal habitat. The City has an ongoing dredging program and is under orders from the Regional Water Quality Control Board to remove contaminants and improve the soft bottom of Newport Harbor; however this project will neither improve nor diminish the already poor condition of the soft bottom of the harbor. Thus, although there will be an increase in fill, adverse environmental impacts will not occur, which is consistent with the third test of Section 30233. Therefore, the proposed fill would be consistent with Section 30233(a)(3) of the Coastal Act and with corresponding portion of the City's certified LCP used as guidance, as it is for a public recreational pier. If additional fill is necessary to support a larger pier platform/vertical segment to be consistent with the City's certified LCP or Harbor Design Guidelines pursuant to **Special Condition No. 1**, which requires reconstruction of the pier platform/vertical segment, the fill will have to be consistent with the requirements of Coastal Act Section 30233 and with the corresponding portion of the City's certified LCP, that is used as guidance.

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.

D. Coastal Act Violations

Violations of the Coastal Act that are associated with the proposed development have occurred on the subject site, including installation of an unpermitted gate across the entrance to the pier platform/vertical segment that precluded public access to the pier (a fence also exists nearby blocking access to the lateral public walkway on a neighboring site, such that there is no opportunity for the public to access this portion of the lateral walkway, nor the pier platform). On June 26, 2019, Commission staff sent the property owner of 2806 Lafayette Ave. a Notice of Violation ("NOV") letter that identified the unpermitted development described above and requested the immediate removal of the barrier gate. However, the property owner of 2806 Lafayette Ave. declined to do so, indicating that the City closed the public pier for public safety reasons. In the NOV letter, Commission staff requested that the applicant provide evidence (red tag, letters, resolution, etc.) that the City found the pier to be unsafe and that the City closed the pier to public access because of unsafe conditions. Indeed the pier was proven to be unsafe, as determined by the City's structural engineer and as required by the above described Emergency CDP the City must submit a complete CDP application to repair or replace the public pier and restore the public walkway for public use. Therefore, the Commission imposes Special Condition No. 1, which requires the applicant to submit Revised Project Plans, which include the like-for-like reconstruction of the pier platform/vertical segment of the lateral public walkway located at 2806 Lafayette Avenue.

Additionally, on July 12, 2019 Commission enforcement staff sent Notice of Violation letters to the property owners of 2800 and 2804 Lafayette, respectively, for erection of the above described fence across the public walkway on the seaward side of 2800 and 2804 Lafayette Ave., which blocks public access to the walkway and placement of "Private Property – No Trespassing" signs along and adjacent to the public walkway. The chain-link fence blocking access to the walkway located in between 2800 and 2804 Avenue will be removed once the subject site is repaired and reopened to public access. Furthermore, pursuant to Special Condition 3.C no "Public Access Disruption" is allowed and "private use" signs are prohibited. Therefore, all unpermitted signage should be removed by the City before the new public access signage is installed. Lastly, this CDP application does not address the liability of the adjacent property owners for installation of the unpermitted "Private Property – No Trespassing" signs and Commission enforcement staff will consider our options to address those violations as a separate matter.

Although unpermitted development has taken place prior to submission of this permit application, consideration of this application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act and the LCP. Approval of this permit does not constitute a waiver of any legal action with regard to any alleged violations nor does it constitute an admission as to the legality of any development undertaken on the subject site without a coastal permit.

E. Local Coastal Program (LCP)

On January 13, 2017, the City of Newport Beach LCP was effectively certified. The proposed development is on and in submerged lands 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 is consistent with Chapter 3 of the Coastal Act and with the City's certified LCP used as guidance

F. 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 July 13, 2020, 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 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 public access and recreation, marine resources and water quality 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 Bi-Annual Eelgrass Surveys 2004-2020.

City of Newport Beach Harbor Resources Division Approval-In-Concept dated July 28, 2020.

Letter from Commission staff to the agent dated September 4, 2020.

Letter from the agent to Commission staff received October 7, 2020.

Emergency Permit G-5-19-0043