

**CALIFORNIA COASTAL COMMISSION**

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# F9a

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## STAFF REPORT: REGULAR CALENDAR

**Application No.:** 5-21-0087

**Applicant:** Brian Smith

**Agent:** Swift Slip Dock & Pier Builders, Inc., Attention Randy Ocampo

**Location:** 309 North Star Lane, Newport Beach, Orange County (APN: 117-711-08)

**Project Description:** Removal of an existing 592 square foot dock float system supported by two 14-inch square concrete guide piles and replacement with a 482 square foot dock float system supported by two 14-inch square concrete guide piles; removal of a 14-inch concrete T pile and replacement with a 14-inch square concrete T pile; and re-decking of the existing gangway.

**Staff Recommendation:** Approval with conditions.

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## SUMMARY OF STAFF RECOMMENDATION

The proposed project is the removal of an existing private dock float system and replacement with a new private dock float system on and over the water associated with a single-family residence on a bayfront lot in Newport Beach. The proposed project is located within the Commission's original permit jurisdiction because it is on and over the waters of Newport Bay. The standard of review for this development is Chapter 3 of the Coastal Act, and the City's certified Local Coastal Plan (LCP) may provide guidance.

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

The proposed project originally included the removal of three 14-inch piles and replacement with four 14-inch piles. However, the applicant revised the project to remove one of the 14-inch square concrete piles from the design, which will result in no increase in fill of coastal waters. While the applicant has revised the proposed project and provided updated plans, a revised Approval-In-Concept from the City of Newport Beach Harbor Resources Department has not been submitted. Thus, staff recommends the Commission impose **Special Condition No. 1**, which requires the applicant to submit Final Project Plans approved by the City of Newport Beach Harbor Resources Department.

The subject landside lot is developed with an unpermitted deck cantilevered from the bulkhead which extends bayward of the bulkhead over privately owned submerged lands. No work is proposed to this deck as part of the proposed project. To ensure that the unpermitted development is not approved as part of the proposed project, staff recommends the Commission impose **Special Condition No. 1**, which requires the applicant to submit Final Project Plan identifying and stating that the unpermitted deck cantilevered from the bulkhead is not approved as part of the proposed project.

The dock float system has been designed in a manner that avoids adverse impacts to marine resources while still maintaining a usable dock float system and enabling recreational boating. However, 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. 2**, which requires the applicant to prepare a new eelgrass survey prior to beginning construction. This condition will also require the applicant to apply for a permit amendment to relocate or redesign the dock float system to avoid direct impacts to existing eelgrass beds if the updated survey indicates eelgrass would be impacted by the proposed dock float footprint. Staff recommends the Commission also impose **Special Condition No. 3**, which requires the applicant to survey the project area for the presence of *Caulerpa* (an invasive, non-native aquatic species) prior to commencement of construction activities.

While conditions have been imposed to minimize impacts to eelgrass and *Caulerpa Taxifolia* from the instant project, impacts to biological resources may still occur if future development occurs without first being reviewed by the Commission. Thus, staff recommends the Commission impose **Special Condition No. 4**, which requires the applicant to obtain a permit amendment or a new permit for any future improvements to the proposed dock float system.

During construction and post-construction, the proposed project has potential for adverse impacts to water quality and marine resources. Therefore, staff recommends the Commission impose **Special Condition No. 5**, which outlines construction responsibilities and debris removal requirements for the applicant and **Special Condition No. 6**, which requires the applicant to implement post-construction operational Best Management Practices (BMPs) to protect water quality.

To ensure that the applicant complies with all requirements, requests and mitigation measures from 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 the marine environment, staff recommends the Commission impose **Special Condition No. 7**, which requires that the applicant comply with all the requirements, requests, and mitigation measures of these agencies.

The proposed project is located on and in submerged land (embayment) that is presently under private ownership that is subject to a navigational easement pursuant to Public Resources Code section 7552.5. The proposed development will not interfere with any existing navigational easement that may exist over the navigational waters of the embayment. However, if evidence is presented after approval of this permit that supports a finding that the embayment fronting the applicant's property consists of public tidelands and submerged lands that are subject to the public trust, staff recommends the Commission impose **Special Condition No. 8**, which states that the approval of a coastal development permit for the project does not waive any public rights or interest that exist or may exist on the property.

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

**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](http://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 No. 1 – Location Map

Exhibit No. 2 – Existing Site Plan

Exhibit No. 3 – Proposed Site Plan

## I. MOTION AND RESOLUTION

### Motion:

I move that the Commission approve Coastal Development Permit 5-21-0087 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. Final 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 Final Project Plans approved by the City of Newport Beach Harbor Resources Department. The Final Project Plans shall reflect the following changes:

The plans shall identify and state that the unpermitted deck cantilevered from the bulkhead is not approved as part of the proposed project.

- 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, such as changes needed to be consistent with the City's certified Local Coastal Plan (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. Eelgrass Survey(s).

- A. **Pre-Construction Eelgrass Survey.** A valid pre-construction eelgrass (*Zostera marina*) survey shall be completed during the period of active growth of eelgrass (typically March through October). The pre-construction survey shall be completed prior to the beginning of construction and shall be valid until the next period of active growth. The survey shall be prepared in full compliance with the "California Eelgrass Mitigation Policy" dated October 2014 (except as modified by this special condition) adopted by the National Marine Fisheries Service and shall be prepared in consultation with the California Department of Fish and Wildlife. The applicant shall submit the eelgrass survey for the review and approval of the Executive Director within five (5) business days of completion of each eelgrass survey and in any event no later than fifteen (15) business days prior to commencement of any development. If the eelgrass survey identifies any eelgrass within the project area which would

be impacted by the proposed project, the development shall require an amendment to this permit from the Coastal Commission or a new coastal development permit.

- B. Post-Construction Eelgrass Survey.** If any eelgrass is identified in the project area or the 10 meter buffer area by the pre-construction survey required by Subsection A of this condition, within 30 days of completion of construction, or within the first 30 days of the next active growth period following completion of construction that occurs outside of the active growth period, the applicant shall survey the project site and the 10 meter buffer area to determine if any eelgrass was adversely impacted. The survey shall be prepared in full compliance with the CEMP adopted by the NMFS (except as modified by this special condition), and in consultation with the CDFW. If side-scan sonar methods are to be used, evidence of a valid permit from CSLC must also be provided prior to the commencement of each survey period. The applicant shall submit the post-construction eelgrass survey for the review and approval of the Executive Director within thirty (30) days after completion of the survey. If any eelgrass has been adversely impacted, the applicant shall replace the impacted eelgrass at a minimum final 1.38:1 ratio on-site (mitigation: impact), or at another location, in accordance with the CEMP. Any exceptions to the required 1.38:1 minimum final mitigation ratio found within the CEMP shall not apply. Based on past performance of eelgrass mitigation efforts, in order to achieve this minimum, the appropriate regional initial planting ratio provided in the CEMP should be used. Implementation of mitigation to ensure success in achieving the minimum final mitigation ratio (1.38:1) shall require an amendment to this permit or a new coastal development permit unless the Executive Director provides a written determination that no amendment or new permit is required.

### 3. Pre-construction Caulerpa Sp. Survey

- A.** Not earlier than 90 days nor later than 30 days prior to commencement or re-commencement of any development authorized under this coastal development permit (the "project"), the applicant shall undertake a survey of the project area and a buffer area at least 10 meters beyond the project area to determine the presence of the invasive alga *Caulerpa* sp. The survey shall include a visual examination of the substrate.
- B.** The survey protocol shall be prepared in consultation with the Regional Water Quality Control Board, the California Department of Fish and Wildlife, and the National Marine Fisheries Service.
- C.** Within five (5) business days of completion of the survey, the applicant shall submit the survey:
- (1) for the review and approval of the Executive Director; and

- (2) to the Surveillance Subcommittee of the Southern California Caulerpa Action Team (SCCAT). The SCCAT Surveillance Subcommittee may be contacted through California Department of Fish & Wildlife (858/467-4218) National Marine Fisheries Service (562/980-4043).
- D.** If Caulerpa species 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, subject to concurrence by the Executive Director, that all Caulerpa sp. 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 species. No revisions to the project shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.
- 4. Future Development.** This permit is only for the development described in CDP No. 5-21-0087. 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. 5-21-0087, including the proposed private dock float system. 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. 5-21-0087 from the Commission or shall require an additional CDP from the Commission or from the applicable certified local government.
- 5. Construction Responsibilities and Debris Removal.** By acceptance of this permit, the applicant agrees to comply with the following construction related requirements:
- A.** No demolition or construction materials, equipment, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain, or tidal erosion and dispersion;
- B.** Any and all debris resulting from demolition or construction activities, and any remaining construction material, shall be removed from the project site within 24 hours of completion of the project;
- C.** Demolition or construction debris and sediment shall be removed from work areas each day that demolition or construction occurs to prevent the accumulation of sediment and other debris that may be discharged into coastal waters;

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

demolition or construction activity, shall be implemented prior to the on-set of such activity; and

- P. All BMPs shall be maintained in a functional condition throughout the duration of construction activity.
- 6. Best Management Practices (BMPs) Program.** By acceptance of this permit the applicant agrees that the long-term water-borne berthing of boat(s) in the approved dock float and/or boat slip will be managed in a manner that protects water quality pursuant to the implementation of the following BMPs.
- A. Boat Cleaning and Maintenance Measures:**
1. In-water top-side and bottom-side boat cleaning shall minimize the discharge of soaps, paints, and debris;
  2. In-the-water hull scraping or any process that occurs under water that results in the removal of paint from boat hulls shall be prohibited. Only detergents and cleaning components that are designated by the manufacturer as phosphate-free and biodegradable shall be used, and the amounts used minimized; and
- B. Solid and Liquid Waste Management Measures:**
1. All trash, recyclables, and hazardous wastes or potential water contaminants, including old gasoline or gasoline with water, absorbent materials, oily rags, lead acid batteries, anti-freeze, waste diesel, kerosene and mineral spirits shall not at any time be disposed of in the water or gutter but, rather be disposed of in a manner consistent with state and/or federal regulations.
- C. Petroleum Control Management Measures:**
1. Boaters will practice preventive engine maintenance and will use oil absorbents in the bilge and under the engine to prevent oil and fuel discharges. Oil absorbent materials shall be examined at least once a year and replaced as necessary. Used oil absorbents are hazardous waste in California. Used oil absorbents must therefore be disposed in accordance with hazardous waste disposal regulations. The boaters shall regularly inspect and maintain engines, seals, gaskets, lines and hoses in order to prevent oil and fuel spills. The use of soaps that can be discharged by bilge pumps is prohibited;
  2. If the bilge needs more extensive cleaning (e.g., due to spills of engine fuels, lubricants or other liquid materials), the boaters will use a bilge pump-out facility or steam cleaning services that recover and properly dispose or recycle all contaminated liquids; and

3. Bilge cleaners which contain detergents or emulsifiers will not be used for bilge cleaning since they may be discharged to surface waters by the bilge pumps.
7. **Resource Agencies.** The permittee shall comply with all requirements, requests and mitigation measures from the California Department of Fish and Wildlife (CDFW), the Regional Water Quality Control Board (RWQCB); the U.S. Army Corps of Engineers (USACE), and the U.S. Fish and Wildlife Service (USFWS) with respect to preservation and protection of water quality and marine environment. Any change in the approved project that may be required by the above-stated agencies shall be submitted to the Executive Director in order to determine if the proposed change shall require a permit amendment pursuant to the requirements of the Coastal Act and the California Code of Regulations.
8. **Public Rights and Public Trust.** The Coastal Commission's approval of this permit shall not constitute a waiver of any public rights that exist or may exist on the property. The permittee shall not use this permit as evidence of a waiver of any public rights that may exist on the property now or in the future.

## IV. FINDINGS AND DECLARATIONS

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

#### Project Description, Location and Local Approval

The proposed project is the removal of an existing 592 square foot dock float system supported by two 14-inch square concrete guide piles and replacement with a 482 square foot dock float system supported by two 14-inch square concrete guide piles, removal of a 14-inch concrete T pile and replacement with a 14-inch square concrete T pile, and re-decking of the existing gangway ([Exhibits No. 2-3](#)). The existing dock float system was developed prior to the effective date of the Coastal Act. The new dock float system will be comprised of wood and composite material, foam, and concrete. Water coverage from the proposed dock float system will be decreased from 592 square feet to 482 square feet, a difference of 110 square feet. In addition, the number of piles and amount of fill of coastal waters due to the piles will be maintained and not increased. The existing dock float system does not extend past the U.S. Pierhead system. While the proposed dock float system will extend further bayward by two feet, it will not extend past the U.S. Pierhead Line, consistent with the City of Newport Beach Harbor Permit Policy. This situation is similar to the docks in the adjacent area and is consistent with past Commission actions in Newport Harbor.

Originally, the proposed project included the removal of three 14-inch piles and replacement with four 14-inch piles. However, the applicant revised the project to remove one of the 14-inch square concrete piles from the design. While the applicant has revised the proposed project and provided updated plans, a revised Approval-In-

Concept from the City of Newport Beach Harbor Resources Department has not been submitted. Thus, the Commission imposes **Special Condition No. 1**, which requires the applicant to submit Final Project Plans approved by the City of Newport Beach Harbor Resources Department.

The subject site is located in the waters of Newport Bay adjacent to 309 North Star Lane in the City of Newport Beach, Orange County ([Exhibit No. 1](#)). The privately-owned dock float system is located in the Dover Shores Community and the proposed replacement is intended to berth a recreational vessel.

The subject dock system is located on submerged land that is owned and managed by the Dover Shores Community Association, subject to a navigational easement pursuant to Public Resources Code section 7552.5. The subject site is also within the Coastal Commission's retained permit jurisdiction. The City is the local permit issuing authority for development (i.e., a dock float system) located in the waters of Newport Beach and as such, issues Approval-In-Concepts for developments located in these waters. The applicant received an Approval-in-Concept from the City of Newport Beach Public Works on December 18, 2020. There are also other areas in the City where the submerged area where the dock float systems are located are public tidelands managed by the City of Newport Beach. For those areas, the City also issues permits entitled "City of Newport Beach Harbor Permits." The Harbor Permit does not constitute a lease; however, it authorizes the development over public tidelands managed by the City of Newport Beach. The City assesses a fee for temporary private use of the public tidelands either bi-monthly or annually through the water bill associated with the adjacent private property and the funds from those fees are deposited in a Tidelands Fund reserved for improvements in Newport Harbor. However, since the proposed project is not located over public tidelands managed by the City, the City does not issue a Harbor Permit for the site nor does it assess a fee from the property.

The subject landside lot is developed with a single-family residence and an unpermitted deck cantilevered from the bulkhead which extends bayward of the bulkhead over private submerged lands. The applicant has not provided documentation that the deck obtained approval from the Commission or was constructed prior to the effective date of the Coastal Act, which is January 1, 1977. No work is proposed to this deck as part of the proposed project. To ensure that the unpermitted development is not approved as part of the proposed project, the Commission imposes **Special Condition No. 1**, which requires the applicant to submit Final Project Plan identifying and stating that the unpermitted deck cantilevered from the bulkhead is not approved as part of the proposed project.

### **Standard of Review**

The City of Newport Beach LCP was effectively certified on January 13, 2017. The proposed project is beyond the bulkhead located bayward of the mean high tide line and is thus within the Commission's original permit jurisdiction. The standard of review for

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

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

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

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

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

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

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

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

Section 30233 of the Coastal Act states in part:

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

...

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

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

...

(6) Restoration purposes.

Section 30250 of the Coastal Act states in part:

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

Coastal Land Use Plan, Eelgrass Meadows, Policy 4.1.4-5 states,

Where applicable require eelgrass and *Caulerpa taxifolia* surveys to be conducted as a condition of City approval for projects in Newport Bay in accordance with operative protocols of the Southern California Eelgrass Mitigation Policy and *Caulerpa taxifolia* Survey protocols.

Coastal Land Use Plan, Dredging, Diking and Filling, Policy 4.2.3-1 states,

Permit the diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes in accordance with other applicable provisions of the LCP, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects and limited to the following:

...

- C. In open coastal waters, other than wetlands, including estuaries and streams, new or expanded boating facilities, including slips, access ramps, piers, marinas, recreational boating, launching ramps, and pleasure ferries, and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.
- D. Maintenance of existing and restoration of previously dredged depths in navigational channels, turning basins, vessel berthing, anchorage, and mooring areas, and boat launching ramps. The most recently updated U.S. Army Corps of Engineers maps shall be used to establish existing Newport Bay depths.

Coastal Land Use Plan, Dredging, Diking and Filling, Policy 4.2.3-2 states,

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

Coastal Land Use Plan, Dredging, Eelgrass Protection and Restoration, Policy 4.2.5-1 states,

Avoid impacts to eelgrass (*Zostera marina*) to the greatest extent possible. Mitigate losses of eelgrass at a 1.2 to 1 mitigation ratio and in accordance with the Southern California Eelgrass Mitigation Policy. Encourage the restoration of eelgrass throughout Newport Harbor where feasible.

Coastal Land Use Plan, TMDLs, Policy 4.3.1-8 states,

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

Coastal Land Use Plan, NPDES, Policy 4.3.2-1 states,

Promote pollution prevention and elimination methods that minimize the introduction of pollutants into coastal waters, as well as the generation and impacts of dry weather and polluted runoff.

Coastal Land Use Plan, NPDES, Policy 4.3.2-6 states,

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

Coastal Land Use Plan, NPDES, Policy 4.3.2-7 states,

Incorporate BMPs into the project design in the following progression:

Site Design BMPs.

Source Control BMPs.

Treatment Control BMPs.

Include site design and source control BMPs in all developments. When the combination of site design and source control BMPs are not sufficient to protect water quality as required by the LCP or Coastal Act, structural treatment BMPs will be implemented along with site design and source control measures.

Coastal Land Use Plan, NPDES, Policy 4.3.2-22 states,

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

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

D. Eelgrass and Marine Habitat.

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

F. Pollution Control.

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

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

The biological productivity of coastal waters is highly dependent on sunlight for photosynthesis by lower order green algae, phytoplankton, and diatoms that form the basis of the marine food chain. In addition to 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 structures decrease foraging habitat for sight foraging marine birds, such as the State and federally listed California brown pelican found throughout Newport Harbor. Although the coverage of bay surface area habitat associated with any one project may not seem significant, the cumulative effect of allowing unnecessarily large dock structures and resulting increases in water coverage throughout Newport Harbor could be significant. It should be noted that there are hundreds of private residential docks in Newport Harbor. If each were permitted to increase the amount of fill and water coverage beyond that which is consistent with the Coastal Act, the cumulative effect would be a significant loss of coastal waters and soft bottom habitat.

Eelgrass (*Zostera marina*) can be adversely affected by increased water coverage. Eelgrass is a marine flowering plant that grows in soft sediments within coastal bays and estuaries. Eelgrass canopies consist of shoots and leaves approximately 1 to 3 feet long that typically attract marine invertebrates and fish species. Under normal circumstances, a diverse community of benthic organisms (e.g., clams, crabs, and worms) live within the soft sediments that cover eelgrass root and rhizome mass systems. Eelgrass beds also function as a nursery for many juvenile fishes – including species of commercial and/or sporting value such as California halibut and corbina. Eelgrass beds are also important foraging areas for piscivorous seabirds that seek baitfish attracted to eelgrass cover. Eelgrass is also an important ecological contributor

to the detrital (decaying organic material) food web of bays and estuaries as the decaying plant material is consumed by many benthic invertebrates and converted to primary nutrients by bacteria.

### **Water Coverage and Eelgrass (*Zostera Marina*)**

The proposed project includes the removal of an existing 592 square foot floating dock system and replacement with a 482 square foot dock float system ([Exhibit No. 2-3](#)). This results in a decrease of 110 square feet of water coverage, which minimizes impacts to biological resources consistent with Sections 30230 and 30231 of the Coastal Act

Regardless, the Commission must analyze new overwater development independently of existing coverage. The proposed dock float system is of a similar size to docks in the surrounding area and is consistent with past Commission actions in the area. More importantly, it has been designed at the minimum size to ensure the structural stability necessary for private recreational boating opportunities with commonly-sized recreational vessels. The City of Newport Beach Harbor Resources Department has developed Harbor Design Criteria Guidelines and Standards which, though not certified by the Coastal Commission, provide criteria for designing dock systems in a way that minimizes water coverage while providing for a usable dock. The proposed project is generally consistent with those guidelines and standards.

The applicant submitted an eelgrass survey for the project site conducted on October 18, 2020, which determined that no eelgrass beds were located throughout the site. Eelgrass surveys completed between August through October are valid until the resumption of active growth (i.e., March 1). This date has passed, and the subject eelgrass survey is no longer valid for project construction. Therefore, the Commission imposes **Special Condition No. 2**, which requires a new eelgrass survey and identifies the procedures necessary to be completed prior to beginning construction. If the pre-construction eelgrass survey required by **Special Condition No. 2** shows new eelgrass beds that would be impacted by the proposed dock construction, the applicant must apply for a CDP amendment or new CDP to re-design and/or relocate the new dock to avoid eelgrass impacts consistent with Sections 30230 and 30231 of the Coastal Act which protect biological resources.

### **Caulerpa and Soft-Bottom Habitat**

In 1999, a non-native and invasive aquatic plant species, *Caulerpa*, was first discovered in portions of Huntington Harbor. *Caulerpa* is a type of marine algae identified as a significant threat to California's coastal marine environment due to its ability to displace native aquatic plant species and habitats, including eelgrass. *Caulerpa* is known to grow on rock, sand, or mud substrates in both shallow and deep-water areas. Information available from NMFS indicates that *Caulerpa* 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.

In April 2021, a specimen of a potentially invasive seaweed (*Caulerpa prolifera*) was collected from within Newport Bay. The genus *Caulerpa* consists of approximately 75 different species of single-celled aquatic organisms that can grow rapidly and have the potential to adversely impact native marine habitat along the West Coast.

The applicant has submitted a *Caulerpa* survey conducted in conjunction with the eelgrass survey on October 18, 2020. The bathymetric surveys did not find evidence of *Caulerpa* onsite—however, *Caulerpa* surveys only remain valid for 90 days. Given the potential for the *Caulerpa* species to take over eelgrass and other marine habitat in the project vicinity, the Commission staff recommends requires an up-to-date *Caulerpa* survey be conducted prior to commencement of the project, as addressed by **Special Condition No. 3**. Also, if any *Caulerpa* is found on the project site, **Special Condition No. 3** identifies the procedures necessary to be completed prior to beginning any construction consistent with Sections 30230 and 30231 of the Coastal Act which protect biological resources. In order to protect the biological resources on-site from potential future impacts consistent with Sections 30231 and 30232 of the Coastal Act, **Special Condition No. 4** also requires that the applicant must obtain a permit amendment or a new permit for any future repair or maintenance of the proposed dock system.

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

The proposed work will occur in and on coastal waters. The storage or placement of construction material, debris, or waste in a location where it could be discharged into coastal waters would result in adverse impacts on the marine environment. The applicant is proposing Best Management Practices (BMPs) for reducing or eliminating construction-related impacts to water quality during construction, such as placing a catch bucket and floating boom at the project site to prevent debris from entering the water and to also capture floating debris. The Commission imposes **Special Condition No. 5**, which requires appropriate storage and handling of construction equipment and materials to minimize the potential for pollutants to enter coastal waters. To reduce the potential for post-construction impacts to water quality, **Special Condition No. 6** requires the continued use and maintenance of post-construction BMPs. As conditioned, the proposed project minimizes impacts to biological resources consistent with Sections 30230, 30231, and 30232 of the Coastal Act.

The applicant has indicated that the project has a pending Clean Water Act Section 401 Water Quality Standards Certification under review from the RWQCB. The applicant has also applied for a permit from the USACE, which is pending until coastal development permit approval. To ensure that the proposed project adheres to the requirements from other resource agencies, and to account for changes to other resource agency permits that may be necessary given the design alternative required by the Commission, **Special Condition No. 7** requires the applicant to comply with all requirements, requests and mitigation measures from the CDFW, the RWQCB, the

USACE, and the USFWS with respect to preservation and protection of water quality and marine environment consistent with Section 30231, 30232 and 30233 of the Coastal Act.

### **Fill of Coastal Waters**

Coastal Act Section 30233 limits the allowable fill of open coastal waters, wetlands, estuaries to certain uses only, including “new or expanded boating facilities.” However, fill for boating facilities is only allowed where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects. Mitigation for impacts is not the only requirement of the Coastal Act; first, impacts must first be avoided or minimized, then the alternative with the least impacts must be mitigated. The City’s certified LCP also mirrors this Coastal Act regulation. Initially, the proposed project included the removal of three 14-inch piles and replacement with four 14-inch piles. However due to concerns of increased fill expressed by Commission staff of the additional pile, the applicant worked with Commission staff and revised the project to eliminate one of the proposed 14-inch pile from the project design. As revised, the existing amount of fill will be maintained and not increased. The fill previously occupied by two of the existing 14-inch piles will no longer exist as those two piles will be removed. The two new piles, which will be the same size, will maintain the existing amount of fill. The third existing 14-inch pile will be removed and replaced in the same location and the existing amount of fill would be maintained there as well. While the applicant has revised the proposed project and provided updated plans, a revised Approval-In-Concept from the City of Newport Beach Public Works Department has not been submitted. Thus, the Commission imposes **Special Condition No. 1**, which requires the applicant to submit Final Project Plans approved by the City of Newport Beach Harbor Resources Department.

This is the minimum number of piles necessary for structural stability of the project based on a statement by the applicant and review of similar docks by Commission staff; therefore, this associated fill would be consistent with Section 30233(a)(3) of the Coastal Act.

### **Conclusion**

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

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

Article X, Section 4 of the California Constitution provides:

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

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

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

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

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

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

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

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

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

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

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

Maximizes public access to and along the shoreline;

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

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

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

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

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

E. Docking Facilities.

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

G. Piers.

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

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

3. Setbacks.

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

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

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

i. Where property lines are not approximately perpendicular to the bulkhead line;

- ii. Where curves or angles exist in the bulkhead line;
  - iii. Where bridges, topography, street ends or publicly owned facilities adjoin the property.
- d. Setbacks apply to joint ownership piers with the exception that the slips, floats and piers may extend over the common property line.

Coastal Act Section 30210 requires that maximum public access and recreational opportunities be provided, and that development not interfere with the public's right to access the coast. Additionally, Sections 30220 and 30221 of the Coastal Act protect coastal areas suited for water-oriented recreational activities and oceanfront land for recreational uses, such as boating. The City's certified LCP also includes a number of similar policies that protect public access. Newport Harbor is a popular spot for recreational boating. Hundreds of private boat docks and public marinas line the shores of the harbor. Sandy shoreline areas along the bay are also used for access/recreation, including swimming and hand launching of small watercraft such as kayaks and stand up paddleboards.

The nearest public access to Upper Newport Bay can be found at the end of North Star Lane at Back Bay Beach, approximately 370 feet southeast from the front of the single-family home at 309 North Star Drive. However, the site where the proposed dock float system would be located is not accessible on foot from the end of North Star Lane. There is presently no beach area in front of the bulkhead at this site where the public could walk or sit. There is also no direct public access to the water from the land side in the immediate vicinity of the dock float system (i.e. from North Star Lane). None of the homes in the Dover Shores subdivision, where this project site is located, provide public access to the water. A beach owned by the Dover Shores Community Association is located at the intersection of White Cliffs Drive and Polaris Drive approximately 415 feet northwest of the subject site. Entry to that beach from the landside is presently limited by a gate.

There is substantial evidence that the submerged land (embayments of the Dover Shores community) to be occupied by the proposed project is presently under private ownership subject to a navigational easement. These embayments are private tide and submerged lands because the mean high tide line (MHTL) was adjudicated in this area in case no. 20436 in Orange County Superior Court in 1926 (Orange County v. The Irvine Company). Based on the information provided, the embayments within the Dover Shores community were dredged from private swamp and overflow land landward of the adjudicated MHTL, therefore, the embayment fronting the subject property would not be subject to the public trust. Rather, it is a navigational waterway that is subject to the navigational easement pursuant to Public Resources Code section 7552.5, which, in general, precludes the property owner, in this case the Dover Shores Community Association, or any other person or entity with a legal right to use the tide and submerged lands in the waterway for development, from interfering with the public's right to navigate the embayment. While the proposed dock float system will extend two

feet further bayward than the existing dock, the proposed dock float system will not extend past the U.S. Pierhead Line and will not interfere with the public's right to navigate the embayment fronting the applicant's property. Additionally, the proposal would reduce water coverage by 110 square feet, improving access. Therefore, the proposed development will not interfere with any existing navigational easement that may exist over the navigational waters of the embayment. If, on the other hand, evidence is presented after approval of this permit that supports a finding that the embayment fronting the applicant's property consists of public tide and submerged lands that is subject to the public trust, the Commission imposes **Special Condition No. 8**, which states that the approval of a coastal development permit for the project does not waive any public rights or interest that exist or may exist on the property. As conditioned, navigability within the embayment will not be impeded and public access will be maintained and provided consistent with Sections 30210, 30220 and 30224 of the Coastal Act.

### **Conclusion**

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30210, 30220, and 30224 of the Coastal Act and the City's certified LCP used as guidance regarding the public's right of access to the sea and does not interfere with recreational opportunities on public tidelands.

### **D. Local Coastal Program (LCP)**

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

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

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

In this case, the City of Newport Beach Harbor Resources Division is the lead agency and the Commission is a responsible agency for the purposes of CEQA. The City of Newport Beach determined on December 14, 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 Commission finds that the project, as conditioned, is consistent with Coastal Act requirements and will not cause new adverse impacts to the environment.

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

Therefore, as conditioned, the Commission finds that there are no feasible alternatives or additional feasible mitigation measures available that would substantially lessen any significant adverse effect that the activity may have on the environment. The Commission finds that the proposed project, as conditioned, is the least environmentally damaging feasible alternative and is consistent with the requirements of the Coastal Act and CEQA.

## **APPENDIX A – SUBSTANTIVE FILE DOCUMENTS**

City of Newport Beach Harbor Resources Division Harbor Design Criteria Guidelines and Standards.

Eelgrass Survey Prepared by Swift Slip Dock & Pier Builders, Inc. dated October 18, 2020.

City of Newport Beach Harbor Resources Division Approval-In-Concept dated December 14, 2020.