

CALIFORNIA COASTAL COMMISSION

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W13c

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STAFF REPORT: REGULAR CALENDAR

Application No.: 5-21-0881

Applicant: Michael Harrah

Agent: CPS Consulting; Attention: Jacquelyn Chung

Location: 44 Linda Isle, Newport Beach, Orange County.

Project Description: Removal of an existing 1,071 square foot floating dock and a 3 foot x 22 foot gangway and installation of a new 1,046 square foot floating dock and 4 foot x 30 foot gangway associated with a single-family residence. Removal of four existing 14-inch square concrete guide piles and installation of five new 18-inch square concrete guide piles.

Staff Recommendation: Approval with conditions.

SUMMARY OF STAFF RECOMMENDATION

The proposed project is the removal of an existing floating dock and gangway and installation of a new floating dock and gangway associated with a single-family residence on a bayfronting lot located in the locked gate community of Linda Isle in Newport Beach.

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

Staff is recommending **APPROVAL** of the coastal development permit with **nine (9) special conditions**. The major issues raised by this proposed project are consistency with the marine resources and water quality and public access and recreation policies of the Coastal Act.

The proposed project results in a floating dock with 25 square feet less water coverage than the existing floating dock. However, the proposed dock does result in 563 square feet of overwater shading impacts to eelgrass at a location in Newport Bay/Harbor where eelgrass has proliferated. To mitigate the shading impacts to eelgrass as a result of the project, the applicant is proposing to mitigate the eelgrass impacts initially at a ratio of 1.38:1 with a final mitigation ratio of 1.2:1 onsite. The proposed project is consistent with Section 30231 of the Coastal Act as marine resources shall be maintained, enhanced and where feasible restored as water coverage has been reduced, which otherwise would have impacted biological productivity, and any impacts to eelgrass, from shading and fill, are being mitigated.

Staff recommends the Commission impose **Special Condition No. 2**, which requires a new eelgrass survey as the existing eelgrass survey is no longer valid. Because the anticipated eelgrass impacts are based on an eelgrass survey which has expired, the total eelgrass impacts which must be mitigated is uncertain.

Due to the uncertain amount of eelgrass area impacted by shading and to clarify that the overall eelgrass mitigation ratio will not be less than 1.38:1 consistent with the California Eelgrass Mitigation Plan (CEMP), staff recommends the Commission impose **Special Condition No. 3**, which requires the applicant to submit a Final Revised Eelgrass Mitigation Plan based on eelgrass conditions identified at the time of construction, consistent with the California Eelgrass Mitigation Policy (CEMP).

The proposed project includes removal of four existing 14-inch square concrete guide piles and installation of five new 18-inch piles in the coastal waters of Newport Harbor, which will result in fill of open coastal waters. The piles will support the proposed dock float and are the minimum amount necessary to meet current harbor design codes and CDBW requirements to safely anchor the dock and is similar or less in number and size for similar docks in the surrounding area. Therefore, this associated fill would be consistent with Section 30233(a)(3) of the Coastal Act, as it is for a boating-related use. However, the proposed project will result in 5.85 square feet of additional fill.

To mitigate the fill, the applicant has indicated that they have contacted Orange County Coastkeeper (Coastkeeper) to contribute a minimum donation of \$2,500.00 for their ongoing restoration and monitoring of eelgrass and Olympia Oysters in Upper Newport Bay. However, the Commission typically desires similar onsite mitigation and this proposal would not result in that. Therefore, the applicant needs to provide a mitigation plan to deal with the proposed fill. In conclusion, staff recommends the Commission impose **Special Condition No. 3**, which requires the applicant to submit a Final Revised Eelgrass Mitigation Plan that takes into the account the fill as a result of the new proposed piles.

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

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

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EXHIBITS

Exhibit No. 1 – Location Map

Exhibit No. 2 – Existing Site Plan

Exhibit No. 3 – Proposed Site Plan

Exhibit No. 4 – Overlay Site Plan

Exhibit No. 5 – Proposed Project Plans with Eelgrass and Mitigation Location

MOTION AND RESOLUTION

Motion:

I move that the Commission approve Coastal Development Permit 5-21-0881 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.

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.

SPECIAL CONDITIONS

1. **Linda Isle Community Association Approval.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for the review and written approval of the Executive Director, a copy of a letter of permission or approval from the Linda Isle Community Association for the proposed project, or evidence that no permit or permission is required. The applicant shall inform the Executive Director of any changes to the project required by the County. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this coastal development permit, 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" (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 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 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. Final Revised Eelgrass Mitigation Plan.** Prior to issuance of the coastal development permit, the applicant shall submit, for the review and written approval of the Executive Director, a Final Revised Eelgrass Mitigation Plan for transplanting and replacement of eelgrass adversely impacted by the project that shall be in substantial conformance with the Eelgrass Survey Prepared by Solutions Provided INC. dated October 3, 2021, except as required to be modified as described below. The plan shall be prepared in consultation with the (California Department of Fish and Wildlife (CDFW) and National Marine Fisheries Service (NMFS). The plan shall be prepared consistent with the requirements identified below and the requirements of the California Eelgrass Mitigation Policy (CEMP), including but not limited to the requirements outlined relative to mapping, and mitigation site, size, techniques, monitoring and success criteria, but excepting the allowed exclusions and timing requirements that conflict with the requirements identified below.

A. The plan shall provide that:

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

supplementary planting in accordance with subsection (a) above, to the mitigation site(s).

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

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

4. Pre-construction Caulerpa Sp. Survey

- A.** Two pre-construction surveys of the project area for Caulerpa species (Caulerpa) shall be conducted by a certified Caulerpa surveyor in accordance with the Caulerpa Control Protocol (version 5) (<https://media.fisheries.noaa.gov/2021-12/caulerpa-control-protocol-v5.pdf>). The surveys shall include 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.** Within fifteen (15) 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) California Department of Fish & Wildlife Marine Region (Caulerpa@wildlife.ca.gov) and National Marine Fisheries Service (NOAA Fisheries) (nmfs.wcr.caulerpa@noaa.gov).

- C. Prior to initiation of any authorized Bottom Disturbing Activity within an Infected System, two surveys, initiated not less than 60 days apart, shall be conducted within the project area of potential effect (APE). The first survey shall be conducted using High Intensity Level techniques and the second survey shall be conducted using Eradication Area Level techniques. Both surveys shall be conducted within the same High Growth Period. Deviations from this condition may be considered on a case-by case basis by the appropriate regulatory agency in consultation with NOAA Fisheries and CDFW.
 - D. At least one survey shall be conducted within 45 days of initiation of an authorized Bottom Disturbing Activity (a "Pre-Act Survey"). This survey could be the second (Eradication Area Level) survey conducted during the High Growth Period. However, project delays may require that a third survey be conducted prior to initiation of the Bottom Disturbing Activity in order to meet this 45-day requirement. If a third survey is required, this survey shall be conducted at either a High Intensity Level or Eradication Area Level as determined by the NOAA Fisheries/CDFW Contacts based upon site circumstances and proximity to infestations. To determine appropriate survey level, please contact the NOAA Fisheries/CDFW Contacts with project specific information.
 - E. 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.
5. **Future Development.** This permit is only for the development described in CDP No. 5-21-0881. 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. 5-21-0881, including the proposed dock. Accordingly, any future improvements to the development authorized by this permit, including but not limited to repair and maintenance identified as requiring a permit in Public Resources Code Section 30610(d) and Title 14 of the California Code of Regulations Sections 13252(a)-(b), shall require an amendment to CDP No. 5-21-0881 from the Commission or shall require an additional CDP from the Commission or from the applicable certified local government.

- 6. 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.
7. **Best Management Practices (BMPs) Program.** By acceptance of this permit the applicant agrees that the long-term water-borne berthing of boat(s) in the approved dock and/or boat slip will be managed in a manner that protects water quality pursuant to the implementation of the following BMPs.
- A. Boat Cleaning and Maintenance Measures:
 - 1. In-water top-side and bottom-side boat cleaning shall minimize the discharge of soaps, paints, and debris;
 - 2. In-the-water hull scraping or any process that occurs under water that results in the removal of paint from boat hulls shall be prohibited. Only detergents and cleaning components that are designated by the manufacturer as phosphate-free and biodegradable shall be used, and the amounts used minimized; and
 - B. Solid and Liquid Waste Management Measures:
 - 1. All trash, recyclables, and hazardous wastes or potential water contaminants, including old gasoline or gasoline with water, absorbent materials, oily rags, lead acid batteries, anti-freeze, waste diesel, kerosene and mineral spirits shall not at any time be disposed of in the water or

gutter but, rather be disposed of in a manner consistent with state and/or federal regulations.

C. Petroleum Control Management Measures:

1. Boaters will practice preventive engine maintenance and will use oil absorbents in the bilge and under the engine to prevent oil and fuel discharges. Oil absorbent materials shall be examined at least once a year and replaced as necessary. Used oil absorbents are hazardous waste in California. Used oil absorbents must therefore be disposed in accordance with hazardous waste disposal regulations. The boaters shall regularly inspect and maintain engines, seals, gaskets, lines and hoses in order to prevent oil and fuel spills. The use of soaps that can be discharged by bilge pumps is prohibited;
 2. If the bilge needs more extensive cleaning (e.g., due to spills of engine fuels, lubricants or other liquid materials), the boaters will use a bilge pump-out facility or steam cleaning services that recover and properly dispose or recycle all contaminated liquids; and
 3. Bilge cleaners which contain detergents or emulsifiers will not be used for bilge cleaning since they may be discharged to surface waters by the bilge
- 8. 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.
- 9. 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.

FINDINGS AND DECLARATIONS

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

Project Location

The subject site is located at 44 Linda Isle in the locked gate community of Linda Isle in the City of Newport Beach, Orange County ([Exhibit No. 1](#)). Single-family residences and associated private boat dock systems and cantilevered decks characterize the subject site and the surrounding area. The area of the bay/harbor over which the proposed dock would be located consists of a water parcel owned by the Linda Isle Community Association and the proposed project is similar to numerous adjacent developments located within this water parcel allowed by the Linda Isle Community Association.

Project Description

The proposed project is the removal of an existing 1,071 square foot floating dock and a 3 foot x 22 foot gangway and installation of a new 1,046 square foot floating dock and 4 foot x 30 foot gangway associated with a single-family residence. The project also includes the removal of four existing 14-inch square concrete guide piles and installation of five new 18-inch square concrete guide piles ([Exhibits No. 2-4](#)). The new dock system will be comprised of wood and composite material, foam, and concrete. Water coverage from the floating dock system compared to the proposed floating dock system will be decreased from 1,071 square feet to 1,046 square feet (a decrease of 25 square feet.). Initially, the project resulted in an increase of 177 square feet of overwater coverage, but the applicant revised the project to reduce the overwater coverage after coordinating with Commission staff. The number of piles will increase by one and would result in 5.85 square feet of additional fill. The existing dock extends past the U.S. Pierhead Line, but the proposed dock will not and thus will meet the City of Newport Beach Harbor Permit Policy. The proposed dock system is similar to the docks in the adjacent area and is consistent with past Commission-issued permits. The City of Newport Beach Harbor Resources Division has developed Harbor Design Criteria Guidelines and Standards which, though not certified by the Coastal Commission, provide guidance 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 has indicated that it has a pending permit (Clean Water Act Section 401 Water Quality Standards Certification) under review from the RWQCB. The applicant has a provisional approval from the U.S. Army Corps of Engineers (USACE). 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. 8** requires the applicant to comply with all requirements, requests, and mitigation

measures from the CDFW, the RWQCB, the USACE, and the USFWS with respect to preservation and protection of water quality and marine environment.

The proposed dock is located on a water parcel owned by the Linda Isle Community Association. The applicant has stated that they have begun the process of obtaining approval from the association, but an approval has not yet been obtained. Thus, the Commission imposes **Special Condition No. 1**, which requires the applicant to submit a copy of a letter of permission or approval from the Linda Isle Community Association, or evidence that no permit or permission is required prior to the issuance of the coastal development permit.

The applicant states that there will be 563 square feet of anticipated eelgrass impacts as a result from direct overwater shading to eelgrass located in the area where the new proposed dock will be located. In addition, the fill from three of the new 18 inch square piles will result in direct impacts to eelgrass. To offset the proposed shading impacts to eelgrass, the applicant proposes onsite mitigation at a ratio of 1.38:1 = 777 square feet (Eelgrass Mitigation and Monitoring Plan prepared by Solutions Provided INC. dated October 3, 2021) ([Exhibit No. 5](#)). Mitigation for the proposed fill still needs to be provided. The mitigation associated with the project will be discussed later in the staff report. The applicant has stated that the number of piles is the minimum necessary to support the proposed dock to meet current harbor design codes and the California Department of Boating and Waterways (CDBW) requirements, and to safely anchor the dock floats.

Standard of Review

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

Prior Permit

On March 1, 2000, the Commission approved De-Minimis Waiver No. 5-00-053-W for the removal and in-kind replacement of an existing floating dock. More specifically, the project involved the removal and replacement of two 6-foot x 64-foot fingers and a 6-foot x 32-foot backwalk and the removal of three 12-inch diameter guide piles and replacement with four 14-inch diameter guide piles. No work to the existing 3-foot x 22-foot gangway was proposed. No new pier or platform were proposed.

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 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 4.1.4-4 states,

Provide for the protection of eelgrass meadows and mitigation of impacts to eelgrass meadows in a comprehensive harbor area management plan for Newport Bay.

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

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

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

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

...

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

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

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

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

Avoid impacts to eelgrass (*Zostera marina*) to the greatest extent possible. Mitigate losses of eelgrass at a 1.2 to 1 mitigation ratio and in accordance with the Southern

California Eelgrass Mitigation Policy. Encourage the restoration of eelgrass throughout Newport Harbor where feasible.

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

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

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

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

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

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

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

Incorporate BMPs into the project design in the following progression:

Site Design BMPs.

Source Control BMPs.

Treatment Control BMPs.

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

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

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

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

D. Eelgrass and Marine Habitat.

Pier, pier platform, gangway and dock design shall be designed and sited and make use of materials that will minimize and, where feasible, avoid impacts to

eelgrass and marine habitat. Where possible, design structures to avoid any net increase in overall water coverage, and wherever possible reduce the overall water coverage.

F. Pollution Control.

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

Marine Resources/Biological Productivity

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

Shading Impacts and Eelgrass (*Zostera Marina*)

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

The applicant provided an Eelgrass survey prepared by Solutions Provided INC. dated October 3, 2021. The survey determined that eelgrass was located at the project site;

however, eelgrass surveys completed during the active growth phase of eelgrass (March through October) are valid for only 60 days. Surveys completed between August and October are only valid until the resumption of active growth (i.e., March 1). The existing eelgrass survey is no longer valid and thus a new survey is required for project approval, pursuant to **Special Condition No. 2**. Because the anticipated eelgrass impacts are based on an eelgrass survey which has expired, the total eelgrass impacts which must be mitigated is uncertain.

In order to mitigate the adverse impacts to eelgrass, the applicant has submitted an Eelgrass Mitigation Plan: Eelgrass Mitigation and Monitoring Plan prepared by CPS Consulting dated October 3, 2021, which is based upon an Eelgrass Survey Prepared by Solutions Provided INC. dated October 3, 2021. The mitigation plan details mitigation for 563 square feet of eelgrass shading. The plan proposes an initial mitigation replacement ratio of 1.38:1 resulting in 777 square feet of eelgrass with a final mitigation replacement ratio of 1.2:1 resulting in 676 square feet of eelgrass ([Exhibit No. 5](#)). Mitigation is proposed to take place onsite where the existing dock is being removed.

The applicant's eelgrass mitigation plan states that initially the mitigation ratio would be 1.38:1 but the final mitigation ratio would be 1.2:1; however, this does not appear to be consistent with the California Eelgrass Mitigation Plan (CEMP). Due to the uncertain amount of eelgrass area impacted by shading and to clarify that the overall eelgrass mitigation ratio will not be less than 1.38:1, the Commission imposes **Special Condition No. 3**, which requires the applicant to submit a Final Revised Eelgrass Mitigation Plan based on eelgrass conditions identified at the time of construction, consistent with the California Eelgrass Mitigation Policy (CEMP). The plan shall be prepared in consultation with the CDFW (California Department of Wildlife) and NMFS (National Marine Fisheries Service), which may require a ratio in excess of 1.38:1 to account for the uncertainty of the successful implementation of the plan.

While the project does result in 563 square feet of overwater shading impacts to eelgrass, the project was determined to be the least environmentally damaging alternative as it results in 25 square feet less of overall overwater coverage. The proliferation of eelgrass onsite has resulted in anticipated potential impacts to eelgrass due to its significant growth onsite. The proposed project, as conditioned, is consistent with Section 30231 of the Coastal Act as marine resources shall be maintained, enhanced and where feasible restored as water coverage has been reduced, which otherwise would have impacted biological productivity, and any impacts to eelgrass, from shading and fill, are being mitigated.

Caulerpa Sp.

In 1999, a non-native and invasive aquatic plant species, *Caulerpa*, was discovered in parts of Huntington Harbor. *Caulerpa* 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* 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 indicated that a pre-construction *Caulerpa* survey was completed in conjunction with the Eelgrass Survey Prepared by Solutions Provided INC. dated October 3, 2021, as required by the City of Newport Beach Harbor Resources Division. None was found in the proposed project area. However, *Caulerpa* surveys are only valid for 90 days and therefore the submitted *Caulerpa* survey is outdated. Thus, pursuant to **Special Condition No. 4**, an additional *Caulerpa* survey must be conducted prior to commencement of the project. If *Caulerpa* 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*, unless the Executive Director determines that no amendment or new permit is legally required.

Special Condition No. 5 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 on coastal waters. The storage or placement of construction material, debris, or waste in a location where it could be discharged into coastal waters would result in adverse impacts on the marine environment. The applicant is proposing Best Management Practices (BMPs) for reducing or eliminating construction-related impacts to water quality during construction, such as netting, sandbags, tarps, or other forms of barriers to be placed around staging areas to prevent debris from entering the water, and floating booms to be maintained around the project site to capture floating debris. The Commission imposes **Special Condition No. 6**, 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. 7** requires the continued use and maintenance of post-construction BMPs.

Fill of Coastal Waters

Coastal Act Section 30233 limits the allowable fill of open coastal waters, wetlands, and estuaries to certain uses only, including “new or expanded boating facilities.” However, fill for boating facilities is only allowed “...where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to

minimize adverse environmental effects.” The proposed project includes removal of four existing 14-inch square concrete guide piles and installation of five new 18-inch piles in coastal waters of Newport Harbor, which will result in the fill of open coastal waters. The piles will support the proposed dock float, and, therefore, this associated fill would be consistent with Section 30233(a)(3) of the Coastal Act, as it is for a boating-related use. However, the proposed project will result in 5.85 square feet of additional fill.

While the proposed project design increases the number and size of piles compared to the current dock, the applicant has demonstrated that this is the minimum amount necessary to meet current harbor design codes and CDBW requirements to safely anchor the dock and is similar or less in number and size for similar docks in the surrounding area. To mitigate the fill, the applicant has indicated that they have contacted Orange County Coastkeeper (Coastkeeper) to contribute a minimum donation of \$2,500.00 to their restoration department fund for their ongoing restoration and monitoring of eelgrass and Olympia Oysters in Upper Newport Bay. However, the Commission typically desires similar onsite mitigation and this proposal would not result in that. Thus, the applicant needs to provide a mitigation plan to deal with the proposed fill. Therefore, the Commission imposes **Special Condition No. 3**, which requires the applicant to submit a Final Revised Eelgrass Mitigation Plan that takes into the account the fill as a result of the new proposed piles.

Conclusion

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30230, 30231, 30233 and 30250 of the Coastal Act and with the marine resources and water quality policies of the City’s certified LCP, as identified above.

C. Public Access and Recreation

Article X, Section 4 of the California Constitution provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

Maximizes public access to and along the shoreline;

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

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

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

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

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

E. Docking Facilities.

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

G. Piers.

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

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

3. Setbacks.

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

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

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

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

ii. Where curves or angles exist in the bulkhead line;

iii. Where bridges, topography, street ends or publicly owned facilities adjoin the property.

d. Setbacks apply to joint ownership piers with the exception that the slips, floats and piers may extend over the common property line.

The area of the harbor over which the proposed dock would be located consists of a water parcel owned by the Linda Isle Community Association and is not part of the mapped State Tidelands held in trust by the City. The applicant has stated that they have begun the process of obtaining approval from the association, but an approval has

not yet been obtained. Thus, the Commission imposes **Special Condition No. 1**, which requires the applicant to submit a copy of a letter of permission or approval from the Linda Isle Community Association, or evidence that no permit or permission is required prior to the issuance of the coastal development permit.

Although the proposed dock does not appear to be located on State tidelands administered by the City of Newport Beach pursuant to a tidelands grant, because the properties seaward of the bulkhead are fully submerged bay waters at all times, the question of the public trust doctrine arises. The public trust provides that tide and submerged lands and the beds of lakes, streams and other navigable waterways are to be held in trust by the State for the benefit of the people of California for uses including the right to swim, boat and engage in other forms of water recreation. Based on the information available to the Commission at this time, it appears that the submerged parcel is not subject to the public trust 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). The court determined that the MHTL in this area is located west of the subject property. Further, the areas are part of a subdivision tract that dredged a channel eastward and northward from the MHTL established in case no. 20436. This dredging changed portions of the property from upland swamp and overflow property to property subject to tidal flow.

Determinations about the Public Trust boundary are ultimately the jurisdiction of the State Lands Commission (SLC). However, assuming the information concerning the history of the submerged lands are correct, pursuant to Public Resources Code section 7552.5, the submerged land is nevertheless subject to a navigational easement that, in general, precludes the owner from preventing the public from using the waters for navigational purposes even if the submerged lands are not public trust lands. The proposed dock will be landward of the designated pierhead line, as opposed to the existing dock, and, therefore, is not expected to interfere with navigation through the channel on the north of Linda Isle because pierhead lines are established to ensure that docks and piers do not interfere with navigation. In addition, construction of the proposed dock may hinder but would not completely obstruct the public's ability to access the water areas fronting the applicant's lot for recreational boating purposes and, as a practical matter, is unlikely to have much additional impact on public access due to the adjacent over-water development. Thus, the proposed dock would not be inconsistent with the navigational easement over the submerged lands.

There is no direct public pedestrian access to the water through this subject private residential lot, but public access to the bay exists in the area across the channel from the Linda Isle community along the public walkways on Lido Island and Balboa Island. From these access points, members of the public may access the bay and, for example, launch a kayak or standup paddle board. The public can access the submerged lands immediately seaward of the bulkhead at the subject site by watercraft or by swimming. However, the existing and proposed dock to some extent limit public use of the waters immediately adjacent to the bulkhead. Additionally, the proposal would reduce water coverage by 25 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. 9**, 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.

Conclusion

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30210, 30220, 30221, and 30224 of the Coastal Act and with the public access and recreation policies of the City's certified LCP, as discussed above.

D. 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 October 26, 2021, that the proposed project is subject to a ministerial decision or to be statutorily or categorically exempt from CEQA.

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, and water quality, and 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

CDP Application File No. 5-21-0881 and associated file documents