

# Staff Report 66 (Informational)

## **SUMMARY:**

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At the June 3, 2025 Commission Meeting, the Commissioners asked staff to provide information on the Commission's jurisdiction over Newport Beach tidelands in response to concerns expressed in public comments. Commission staff have been reviewing topics related to the City's mooring permit program since 2024 and have been working on a report regarding the City's management of mooring permits and residential piers in Newport Bay.

### **COMMISSION JURISDICTION IN NEWPORT BAY**

The Legislature granted the state's sovereign lands in Newport Bay to the City of Newport Beach (The City) in 1919, and amended the grant several times, with the operative grant being Chapter 74, Statutes of 1978, as amended. The City is responsible for managing its legislatively granted lands and has discretion in managing these granted lands within the guidelines of the grant statutes, the Public Trust Doctrine, and the California Constitution.<sup>1</sup>

When the state grants sovereign lands, those lands remain "subject to the oversight authority of the state by and through the State Lands Commission."<sup>2</sup> The Commission has "[a]ll jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been or may be made."<sup>3</sup>

The City's grant contains specific provisions regarding Commission oversight. It directs the Commission to, "from time to time, recommend to the Legislature such amendments as it may determine to be necessary in the terms and conditions of this act"<sup>4</sup> and also, "from time to time, institute a formal inquiry to determine that

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1 City of Long Beach v. Morse (1947) 31 Cal.2d 254, 262.

2 Cal Pub. Resources Code, § 6009, subd. (d).

3 Cal Pub. Resources Code, § 6301.

4 Chapter 74, Statutes of 1978, § 1(o).

the terms and conditions of this act, and amendments thereto, have been complied with in good faith.”<sup>5</sup> If the Commission determines that any “transaction or condition” is “in probable conflict with this act [the grant statute] or with any other provision of law,” it must report to the Legislature, which may direct the Attorney General to bring litigation to revoke the grant or compel compliance.<sup>6</sup> Additionally, after holding a publicly noticed hearing “at which the city has been given an opportunity to express fully any disagreement with the Commission’s findings or to describe any extenuating circumstances causing the violation,” the Commission may formally request the Attorney General to bring litigation against the City to resolve a grant violation.<sup>7</sup>

Ultimately, the Commission’s residual oversight authority over the City’s granted lands is largely limited to reviewing the City’s actions for consistency with the Public Trust Doctrine, the California Constitution, and the grant statutes. The operative grant provides the Commission with specific remedies to address instances in which the City violates its grant statutes or other provisions of law. However, the Commission is not authorized to impose its own discretionary decisions on the City.

## **STAFF REVIEW OF CITY ACTIONS**

In January 2024, City of Newport Beach staff and members of the City’s Harbor Commission requested that Commission staff review the City’s most recent appraisal of fair market rent for its offshore mooring permits.

In April 2024, Commission staff sent a letter to City of Newport Beach staff which concluded that, while there were some areas of the appraisal that could be clarified or revised, the appraisal was generally reasonable and the City could rely on it for setting mooring rates. Staff encouraged the City to phase in the rate increases and commented that the City needs to review its residential pier rates as well. However, piers and independent mooring buoys are not equivalent uses within the grant. Nor would they be if they were under the Commission’s direct leasing authority.

In July 2024, City staff presented the new rates, based on the City’s appraisal, to the City Council. City staff also presented an alternate proposal. The alternate proposal provided that current mooring permit holders would be able to maintain the

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<sup>5</sup> Chapter 74, Statutes of 1978, § 1(p).

<sup>6</sup> Chapter 74, Statutes of 1978, § 1(q).

<sup>7</sup> Chapter 74, Statutes of 1978, § 1(q).

current rates, but the private transfer of mooring permits would be limited to a single transfer within a limited time, with the permits eventually transitioning to the City's license program following such a transfer. This license program prohibits private transfers of moorings and uses rates based on an earlier City appraisal that Commission staff did not review, but whose methodology and approach was similar to the appraisal staff did review. The City approved City staff's alternate proposal on July 9, 2024.

On July 22, 2024, Commission staff sent a letter asking the City to delay the second reading of the ordinance with the alternate proposal so that Commission staff could conduct a management review of the City's granted lands and present it to the Commissioners.

**DRAFT REPORT ON THE CITY OF NEWPORT BEACH'S PUBLIC TRUST LANDS MANAGEMENT:**

Staff has prepared a draft report titled, "Report on the City of Newport Beach's Public Trust Lands Management," attached as Exhibit A. This report is focused on whether, and how, the City explained its discretionary actions considering their legal obligations to act as the State's trustee. When City actions appear to conflict with their legal obligations to the state, this report identifies the potential legal violations so that the City may review its management and either provide additional justifications or make corrections as needed.

In summary, the report concludes:

- Residential pier rates appear significantly below market rates, and the rental area calculations may not reflect the extent of private tidelands use.
- The City can reasonably rely on its recent mooring rate appraisal to set rates for its mooring permits.
- There are clear differences in rate revisions for moorings and residential piers. The trend for mooring permit rates has been to use regular appraisals to reflect market conditions; the trend for residential pier permits has been to reduce the overall rent amount through reductions of lease area and lowering of rates without conducting new or updated appraisals. These decisions appear to be political in nature and may violate both the granting statute and the California constitution.
- The private sale of mooring permits allowed by the City's transfer policy appears to violate the City's grant statutes, fiduciary obligations to the State, and the Public Trust Doctrine.

- The City should review the action it adopted on July 9, 2024, to ensure this action provides a fair solution that addresses the topics discussed in the report.
- Overall, when reviewing the City's actions over the last several decades, it is evident that the City has not adequately explained how its granted lands management decisions comply with the City's obligations as the State's trustee under the granting statute.

Staff intend that the analysis and recommendations in this report provide guidance for how the City should review and revise its residential pier and mooring programs, and how to analyze additional issues even if they are not directly or comprehensively discussed in the report.

This report is in draft form, and staff welcomes written comments. Members of the public can submit comments by emailing [GrantedLands.Public@slc.ca.gov](mailto:GrantedLands.Public@slc.ca.gov). Staff anticipate presenting a final report at the December 2025 Commission Meeting.

## **EXHIBIT:**

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A. Draft "Report on the City of Newport Beach's Public Trust Lands Management"

# Exhibit A

DRAFT

## Report on the City of Newport Beach's Public Trust Lands Management

## Introduction

This report summarizes and comments on the City of Newport Beach's management of tide and submerged lands in Newport Bay, which the Legislature granted to the City to manage on the state's behalf. Lands granted by the Legislature in this manner are often referred to as "granted lands". The report begins with a background of the State Lands Commission's role in overseeing granted lands, including the legal requirements that are often implicated in granted lands management. It then summarizes and analyzes several main topics: pier lease rates, mooring permit rates, a comparison of pier and mooring rates, mooring permit transfers, and the City's mooring license program.

Staff focused on these topics for the report because they are the core issues staff identified when reviewing the City's granted lands management. There are other topics that have been raised in public comments that are not discussed in this report, or which could be addressed more comprehensively. However, staff believe that the analysis and recommendations in this report will provide guidance for how the City should investigate additional issues related to its granted lands management even if such issues are not directly or comprehensively discussed in this report.

Additionally, this report is focused on a review of the City's actions and staff reports, and does not go into detail regarding the public participation process connected to the City's actions, such as Harbor Commission outreach meetings or public comments. As discussed in more detail below, the Legislature entrusted the lands in Newport Bay to the City's discretion, and this report focuses on whether the City is exercising its discretion within the limits created by the California Constitution, the Public Trust Doctrine, and the City's grant statutes. This report is also focused on whether, and how, the City explained its discretionary actions considering their legal obligations to act as the State's trustee. When City actions appear to conflict with their legal obligations to the state, this report identifies the potential legal violations so that the City may review its management and either provide additional justifications or make corrections as needed.

## Background

In January 2024, City of Newport Beach staff and members of the City's Harbor Commission requested that Commission staff review an appraisal of fair market rent for the City's offshore mooring permits.<sup>1</sup> In April 2024, Commission staff sent a letter that concluded that while there were some areas that could be clarified or revised, the appraisal was generally reasonable and

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<sup>1</sup> Email from Lauren Wooding Whitlinger, Real Property Administrator, City of Newport Beach, to Reid Boggiano, Granted Lands Program Manager, State Lands Commission, January 23, 2024.

the City could rely on it for setting mooring rates.<sup>2</sup> Staff encouraged the City to phase in the rate increases and commented that the City should review its residential pier rates as well.<sup>3</sup>

In July 2024, City staff presented the new rates, based on the City's appraisal, to the City Council.<sup>4</sup> City staff also presented an alternate proposal in which current mooring permit holders would be able to maintain their current rates but could only transfer the permit one more time. Upon transfer, the permit would be converted to the City's license program, which prohibits private transfers and which has rates based on an earlier City appraisal that Commission staff did not review, but that provided rates similar to the appraisal reviewed by staff. The City approved staff's alternate proposal.

On July 22, 2024, Commission staff sent a letter asking the City to delay the second reading of the ordinance with the alternate proposal so that Commission staff could conduct a management review of the City's granted lands and present it to the Commissioners.<sup>5</sup> In the letter, staff expressed its concern that the City was not comprehensively reviewing rates, resulting in inequitable treatment between mooring permittees and residential pier lessees.<sup>6</sup> Staff noted that it agreed with the City's effort to end the private transfer market for mooring permits.<sup>7</sup> The City agreed to delay the second reading of the ordinance.

On August 12, 2024, staff sent a letter to the City providing an overview of its review of the pier and mooring rental rates and requesting information from the City.<sup>8</sup> The letter explained that Commission staff will "evaluate whether the City's administration of these programs adheres to the City's obligations under its statutory trust grant, California Constitution, and the Public Trust Doctrine. The goal is to ensure that all user groups are treated equitably and that all rates reflect fair rental value." The letter stated that Commission staff would review:

- A history of the City's management of residential pier leases and mooring permits from 2006 to the present
- The City's mooring permit transfer policies

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<sup>2</sup> Letter from Reid Boggiano, Granted Lands Program Manager, State Lands Commission, to Lauren Wooding Whitlinger, Real Property Administrator, City of Newport Beach, April 9, 2024.

<sup>3</sup> Letter from Reid Boggiano, Granted Lands Program Manager, State Lands Commission, to Lauren Wooding Whitlinger, Real Property Administrator, City of Newport Beach, April 9, 2024.

<sup>4</sup> [Agenda Item No. 13](#), July 9, 2024.

<sup>5</sup> Letter from Jennifer Lucchesi, Executive Office, State Lands Commission, to Grace K. Leung, City Manager, City of Newport Beach, July 22, 2024.

<sup>6</sup> The City refers to the residential pier leases as "permits." This report uses "leases" for clarity.

<sup>7</sup> Letter from Reid Boggiano, Granted Lands Program Manager, State Lands Commission, to Lauren Wooding Whitlinger, Real Property Administrator, City of Newport Beach, April 9, 2024.

<sup>8</sup> Letter from Reid Boggiano, Granted Lands Program Manager, State Lands Commission, to Lauren Wooding Whitlinger, Real Property Administrator, City of Newport Beach, August 12, 2024.

- The rates charged for the residential pier leases and mooring permits
- The frequency of rate reassessment
- The basis for rate revisions
- The current terms and conditions imposed on residential pier leases and mooring permits
- A history of the City's modifications to these terms and conditions, including those in response to the 2006-2007 Grand Jury Report
- A comparison between how the City manages its residential pier leases and its mooring permits

## The City manages Newport Bay on behalf of the State, and for the benefit of all Californians.

The State of California acquired tide and submerged lands and beds of navigable waterways when it was admitted to the Union in 1850.<sup>9</sup> These lands are often referred to as “sovereign lands.” Under the Public Trust Doctrine, the State holds these lands as the trustee for the people to ensure the lands are devoted to uses to which they are uniquely suited.<sup>10</sup> These lands must be used for statewide, as opposed to purely local purposes, and must be used for Public Trust purposes, which include commerce, navigation, fishing, water-oriented recreation, environmental protection, and open space, among other uses.<sup>11</sup> The State Lands Commission is responsible for managing these lands.<sup>12</sup>

The Legislature can grant sovereign lands to local governments through legislation, referred to as “grant statutes.”<sup>13</sup> In those cases, the ownership of the sovereign land transfers to the local government, which must use the lands under the conditions described in the grant statutes and subject to the Public Trust Doctrine.<sup>14</sup> These lands are often referred to as “granted lands.” When the state grants sovereign lands, those lands remain “subject to the oversight authority of the state by and through the State Lands Commission.”<sup>15</sup> The State Lands Commission has “[a]ll jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been or may be made.”<sup>16</sup>

The Legislature transferred ownership of the tidelands and submerged lands in Newport Bay to the City, subject to the terms and conditions contained in the granting statute. The Legislature

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<sup>9</sup> *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521.

<sup>10</sup> *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434.

<sup>11</sup> *Marks v. Whitney* (1971) 6 Cal.3d 251, 259.

<sup>12</sup> Cal Pub. Resources Code, § 6301.

<sup>13</sup> *City of Long Beach v. Marshall* (1938) 11 Cal.2d 609, 615.

<sup>14</sup> Pub. Resources Code, § 6009, subd. (c), *City of Long Beach v. Marshall* (1938) 11 Cal.2d 609, 616.

<sup>15</sup> Cal Pub. Resources Code, § 6009, subd. (d).

<sup>16</sup> Cal Pub. Resources Code, § 6301.



first granted these lands to the City of Newport Beach in 1919 and modified that original grant with additional legislation a number of times. In 1978, the Legislature repealed the previous grants and replaced them with the operative grant, and has since amended this grant several times.<sup>17</sup>

The City is responsible for managing its legislatively granted lands and has discretion to determine how it manages the granted lands, as long as it stays within its grant statutes, the Public Trust Doctrine, and the California Constitution.<sup>18</sup> The City's grant contains specific provisions authorizing State Lands Commission oversight. It directs the Commission to, "from time to time, recommend to the Legislature such amendments as it may determine to be necessary in the terms and conditions of this act"<sup>19</sup> and also, "from time to time, institute a formal inquiry to determine that the terms and conditions of this act, and amendments thereto, have been complied with in good faith."<sup>20</sup> If the Commission determines that any "transaction or condition" is "in probable conflict with this act [the grant statute] or with any other provision of law," it must report to the Legislature, which may direct the Attorney General to bring litigation to revoke the grant or compel compliance.<sup>21</sup> Additionally, after holding a publicly noticed hearing "at which the city has been given an opportunity to express fully any disagreement with the commission's findings or to describe any extenuating circumstances causing the violation," the Commission may formally request the Attorney General to bring litigation against the City to resolve a grant violation.<sup>22</sup>

## The State Lands Commission Reviews the City's Management of the Granted Lands for Abuse of Discretion.

The State Lands Commission retains residual oversight authority to review a grantee's actions for consistency with the Public Trust Doctrine, the California Constitution, its grant statutes, and its fiduciary duties to the State. The Commission does not have authority to impose its own discretionary decisions on grantees.

## California Constitution

Article XVI, Section 6 of the California Constitution prohibits the State and local governments from making "any gift or authorize the making of any gift, of any public money or thing of value."<sup>23</sup> If a local agency uses granted tidelands, or money derived from the granted tidelands,

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<sup>17</sup> Chapter 74, Statutes of 1978, as amended [City Grant]. A list of the grant statutes is available at the [Commission's website](#).

<sup>18</sup> *City of Long Beach v. Morse* (1947) 31 Cal.2d 254, 262.

<sup>19</sup> City Grant, § 1(o).

<sup>20</sup> City Grant, § 1(p).

<sup>21</sup> City Grant, § 1(q).

<sup>22</sup> City Grant, § 1(q).

<sup>23</sup> Cal. Const., art. XVI, § 6.

in a manner that does not further the purposes of the grant, it is a gift of public property in violation of California Constitution.<sup>24</sup> If a local agency gifts the use of public property without appropriate payment or a compensating public purpose, that is also an unconstitutional gift. For example, a public agency leasing a building at a nominal rate and allowing the lessee to sublease for a profit would be unconstitutional.<sup>25</sup>

## Public Trust Doctrine

The Public Trust Doctrine applies to the State's submerged lands, tidelands, and lands underneath navigable rivers and lakes.<sup>26</sup> The Public Trust Doctrine, in brief, prohibits the sale or permanent alienation of these lands and requires they be used for the purposes to which they are uniquely suited: navigation, fishing, waterborne commerce, scientific study, and open space, with the caveat that these uses may change to reflect changing public needs and values.<sup>27</sup> It has been described as "an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."<sup>28</sup> When the Legislature granted tidelands and submerged lands to the City, the City took those lands subject to the Public Trust Doctrine.<sup>29</sup>

## Grant Statute

The City's grant statute contains, among other things, a requirement that granted lands be used "for purposes in which there is a general statewide interest," including a "public harbor" and "recreational facilities open to the general public."<sup>30</sup> The grant also requires that, "In the management, conduct, operation, and control of the lands or any improvements, betterments, or structures thereon, the city or its successors shall make no discrimination in rates, tolls, or charges for any use or service in connection therewith."<sup>31</sup>

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<sup>24</sup> *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 210.

<sup>25</sup> See *People v. City of Long Beach* (1959) 51 Cal.2d 875, 883 [holding that nominal rent for a YMCA was not a gift because the YMCA fulfilled a public purpose and gained no monetary benefit from the lease].

<sup>26</sup> *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434.

<sup>27</sup> *People ex inf. Webb v. California Fish Co.* (1913) 166 Cal. 576, 597, *Marks v. Whitney* (1971) 6 Cal.3d 251, 259–260.

<sup>28</sup> *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441

<sup>29</sup> Cal Pub. Resources Code, § 6009, subd. (d), see, e.g., *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1178.

<sup>30</sup> Ch. 74, Statutes of 1978, as amended, Section 1, subd. (a)(1), (2).

<sup>31</sup> Ch. 74, Statutes of 1978, as amended, Section 1(d).

The City has a legal obligation to comply with the terms of the grant, which requires that they act in the statewide best interest, “without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or excises.”<sup>32</sup>

### *Fiduciary Duties*

The City’s grant also creates a trust relationship between the state and the City. “The state acts both as the trustor and the representative of the beneficiaries, who are all of the people of this state, with regard to public trust lands, and a grantee of public trust lands, including tidelands and submerged lands, acts as a trustee, with the granted tidelands and submerged lands as the corpus of the trust.”<sup>33</sup> The City, as the grantee, has fiduciary obligations as the state’s trustee, which are listed in Public Resources Code section 6009.1. The fiduciary duties include, but are not limited to, “the duty to administer the trust solely in the interest of the beneficiaries,”<sup>34</sup> “the duty to act impartially in managing the trust property,”<sup>35</sup> and “the duty to not use or deal with trust property for the trustee’s own profit or for any other purpose unconnected with the trust, and to not take part in a transaction in which the trustee has an interest adverse to the beneficiaries.”<sup>36</sup>

## Residential Pier Rates

### Background

Before 2012, all residential pier leases within the City of Newport Beach’s grant were charged a flat \$100 annual permit fee, which did not consider the size or location of the pier. However, at a November 28, 2012 Special Meeting the City Council considered requiring rent for the residential pier leases. The staff report explained that while the granting statute, referred to as the Beacon Bay Bill, required charging fair market rent, the City had followed the State Lands Commission’s practice of not charging rent for residential piers. But the State Lands Commission’s practice changed, effective January 1, 2012, when Public Resources Code section 6305.5 was amended to require the Commission to charge fair rental value for residential piers. City staff reasoned, “Because the City is a trustee of the State in regard to tidelands property, the City should comport its actions to that of the State and charge fair market value rent for the use of tidelands by residential piers.” The staff report further concluded that “the City can no

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<sup>32</sup> Cal Pub. Resources Code, § 6009, subd. (d).

<sup>33</sup> Pub. Resources Code, § 6009.1, subd. (b).

<sup>34</sup> Pub. Resources Code, § 6009.1, subd. (c)(5).

<sup>35</sup> Pub. Resources Code, § 6009.1, subd. (c)(6).

<sup>36</sup> Pub. Resources Code, § 6009.1, subd. (c)(7).

longer justify an exemption for rental charges based upon the policy of the State and must now charge fair market rent for residential piers located over City tidelands.”<sup>37</sup>

The City commissioned two appraisers, Mr. Netzer and Mr. Rasmussen, to appraise the piers for rental purposes and they arrived at rental rates of \$0.55 and \$0.50 per square foot, respectively. The Committee recommended calculating rent “not over the entirety of the tidelands outside of a residential property but to the tidelands that are both used and useable for docks, gangways, and vessels.” The Committee recommended using an average of the appraised rental values to arrive at a rate of \$0.525 per square foot for rent.<sup>38</sup>

At a December 11, 2012 Special Meeting, the City Council adopted the Committee’s recommended pier rent of \$0.525 per square foot, with 2 percent CPI escalations. The City’s Municipal Code was also amended to allow residential pier owners to rent out their piers, in which case they would pay commercial rates (\$1.26 per square foot). The staff report does not explain why the City decided to allow the private renting of residential piers, only noting that the changes were “a result of the feedback from the Council and the public at the November 28<sup>th</sup> 2012 Special meeting.”<sup>39</sup>

The next year, at a November 12, 2013 Study Session regarding implementation of the new charges, the City Council “looked back” over the various changes to tidelands to see if a decision for one type of use should be modified based on decisions on other uses.<sup>40</sup> At the Study Session, staff recommended that the area considered for rent calculation be “(1) Footprint of the pier, gangway and float over City tidelands; (2) Interior of the U- shaped float; and (3) Buffer area of 10' around the float, except the backside.” Rent would be reduced by 50 percent for the interior of a U-shaped pier and the 10-foot buffer area. There is extensive documentation of the public comments received at previous workshops, but no explanation for why staff made the recommendations it did except that they were based on comments received.<sup>41</sup>

At the November 26, 2013 City Council meeting, the City Council considered modifications to the pier lease program. Staff recommended that the City charge rent based on the footprint of the pier, including the interior of a U-shaped pier, but without a perimeter or buffer area. The staff report includes a chart comparing staff’s proposed approach to the State Lands Commission’s approach, but does not explain why this recommendation was made, except to indicate that staff was directed by the City Council at the previous Study Session after the

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<sup>37</sup> [Agenda Item No. 1](#), November 28, 2012, at pg. 4.; when there are successive sentences paraphrasing a City staff report, for readability, a citation will be provided at the end of the summary or at the end of the paragraph.

<sup>38</sup> [Agenda Item No. 1](#), November 28, 2012,

<sup>39</sup> [Agenda Item No. 1](#), December 11, 2012.

<sup>40</sup> [Agenda Item SS2](#), November 12, 2013.

<sup>41</sup> See [Item No. SS2](#), staff PowerPoint; discussion in [Agenda Item No. 2](#), November 26, 2013.

Council considered public comments and staff recommendations. The City Council approved staff's recommended modifications as part of its consent calendar.<sup>42</sup>

A little over a year later, at a January 27, 2015 Study Session, City staff presented an overview of other jurisdictions' residential pier setting methods, and asked for direction on whether the City Council wanted staff to present changes, including whether to include the gangway or the area in the interior of a "U" shaped dock as part of the rent calculations, and whether to adjust rental rates. The City Council directed staff to return with a revised residential pier permit, including a revised fair market rental fee, an adjusted pier footprint, and to contact State Lands Commission staff regarding the proposed changes.<sup>43</sup>

On February 10, 2015, City staff proposed reducing the rental rate to \$0.50 per square foot, the value concluded in Mr. Rasmuson's appraisal, from the \$0.525 rate that was determined by averaging Mr. Rasmuson's appraisal with Mr. Netzer's appraisal. The staff report does not explain why this lower rate was a better reflection of fair market rent.<sup>44</sup>

The staff report also recommended that the City not charge rent for the interior space of a "U" shaped pier, saying that the approach was consistent with the footprint for piers that did not have a "U" shape. The staff report states that City staff contacted State Lands Commission staff, and that Commission staff were not opposed to the \$0.50 rate but noted that the Commission included the interior of the "U" shape piers in its rental calculations because it still constituted private use of the property. The staff report concludes that "the decision to include or exclude the interior of the U-shape of a slip is left to the discretion of the City Council. As to whether the SLC will deem our actions (especially relating to the water in the U) as contrary to our responsibilities under the Tidelands Trust, that is unknown."<sup>45</sup> At the meeting, an Assistant City Attorney stated that the Commission "desires that the City charge for the u-shaped dock, but the decision to charge for it is ultimately the City Council's decision." Some Council members explained that because the water was public and the pier lease did not allow the lessee to exclude the public from the water, they did not agree with charging rent for the pier owners to use it. The City Council approved reducing the residential rental rate and the pier footprint.<sup>46</sup>

## Analysis

### Comparison to Commission Rates

The Commission leases private recreational facilities such as docks, piers, and mooring buoys on State sovereign tidelands and submerged lands. These facilities offer many of the same

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<sup>42</sup> [Approved Minutes](#), November 26, 2013.

<sup>43</sup> [Agenda Item SS3](#), January 27, 2015, staff PowerPoint presentation ; see discussion in [Agenda Item No. 16](#), February 10, 2015.

<sup>44</sup> [Agenda Item No. 16](#), February 10, 2015,

<sup>45</sup> [Agenda Item No. 16](#), February 10, 2015.

<sup>46</sup> [Approved Minutes](#), February 10, 2015.

amenities as a commercial marina, such as a place for the docking and mooring of boats and the loading and unloading of passengers and equipment. Thus, these privately owned facilities represent a substitute for a commercial marina berth or buoy. Accordingly, the Commission’s method of estimating a fair rental value for improvements used for the docking and mooring of boats is centered on the principle of substitution, which bases the rental rate on what an individual would pay for a similar substitute site in a commercial marina.

To determine a rental rate for docking and mooring facilities on sovereign lands, Commission staff surveys local marinas to determine their rental rates. Generally, marinas rent berths on a per-linear-foot basis, based on the length of the berth or vessel. Commission staff determines average values for both rates and berth sizes based on the data obtained from the surveyed marinas. The average rate is then multiplied by the average berth size to determine gross annual income. The Commission then uses a 5 percent rate of return on this annual income to represent a comparable fair market compensation rate for the use of State sovereign land. The subsequent value is then converted to a per-square-foot value by using data from the Department of Boating and Waterways (DBW) publication *Guidelines for Marina Berthing Facilities*. This per-square-foot rate can then be applied to the area occupied and impacted by improvements and uses on State lands.

Using this methodology and the survey data from Newport Beach marinas collected by Commission staff for the 2022 Southern California Benchmark update, a per-square-foot value for Newport Beach recreational pier facilities could be determined as follows:

<b>Table 1: 2022 CSLC SoCal Benchmark Data</b>					
<b>Marina Name</b>	<b>No. of Slips</b>	<b>Occupancy Rate</b>	<b>Occupied Slips</b>	<b>Avg. Berth Length</b>	<b>Avg. Berth Rate/ft</b>
<b>Balboa Yacht Basin</b>	172	100.00%	172	36	\$35.95
<b>Bayside Village Marina</b>	124	100.00%	124	28	\$34.38
<b>Lido Marina Village</b>	28	100.00%	28	56	\$65.86
<b>Newport Dunes Resort and Marina</b>	405	97.04%	393	30	\$48.52
<b>Averages</b>	<b>182.25</b>	<b>99.26%</b>	<b>N/A</b>	<b>37.5</b>	<b>\$46.18</b>

<b>Table 2: Rent Setting Calculations</b>	
<b>Annual Gross</b>	38(rounded avg. berth length) x \$46.18 x 12 months = \$21,058.08
<b>% of Gross</b>	\$21,058.08 x 5% of gross income = \$1,052.90
<b>Per Sq. Ft. Rate</b>	\$1,052.90 / 1197.1 sq. ft. (from DBW data) = \$0.88

The above rent setting calculations can also be applied to the average monthly slip rent determined by the City's appraisal (\$50.55 per linear foot) to arrive at a per-square-foot value for Newport Beach recreational pier facilities as follows:

<b>Table 3: CLSC Rent Setting Calculations Using Average Slip Rate From City's Appraisal</b>	
<b>Annual Gross</b>	38 (rounded avg. berth length) x \$50.55 x 12 months = \$23,050.80
<b>% of Gross</b>	\$23,050.80 x 5% of gross income = \$1,152.54
<b>Per Sq. Ft. Rate</b>	\$1,152.54 / 1197.1 sq. ft. (from DBW table) = \$0.96

Staff is not suggesting that the City must use the above numbers – which are only rough calculations– or that other approaches to valuation are not reasonable. But using the Commission's benchmark approach, it appears that the \$0.58 per square foot currently charged for residential piers is significantly below market rate, and fair rental value may be as much as double the current rate.<sup>47</sup>

## Lease Area

Commission staff calculates the lease area for which rent is assessed on piers and docks in a different manner than the City. The City only assesses rent for the square footage of tidelands occupied by a pier or dock (the "area of occupation"). In contrast, Commission staff includes an "impact area" in addition to the area of occupation when calculating rent. The impact area is an additional area, beyond the physical footprint of a structure, on which a lessee seeks authorization to conduct activities. In the case of piers or docks, the impact area is generally a nine-foot-wide area where a vessel could be expected to moor, or the area within a "slip" for piers or docks that are "U" shaped and where vessels are moored along the interior of the "U". The impact area is assessed rent as this area is a key component of a pier's utility and because the pier-owner enjoys an exclusive right over the public in these areas. Because lessees anticipate a right to access and moor their vessel at their pier at any time, without obstruction

<sup>47</sup> [City's Schedule of Rents, Fines, and Fees](#). Pier rent is increased by the lesser of CPI or 2% annually per [Resolution 2015-10](#).

from members of the public, they receive a preferential right to the impact area and effectively remove it from public use. Thus, rent is charged for this area.

The City previously included impact areas (also called “buffer areas”). In 2012, it charged rent for up to a 10 foot area if it was usable by a boat.<sup>48</sup> In 2013, the City removed the buffer area but still included the interior of a “U”-shaped dock, though at a lower rate.<sup>49</sup> The 2013 staff report does not explain why removal of the buffer area was recommended. In 2015, the City removed the interior of the “U”-shaped docks and again did not explain why, only noting that “whether the SLC will deem our actions (especially relating to the water in the “U”) as contrary to our responsibilities under the Tidelands Trust, that is unknown.”<sup>50</sup>

### The low rates and lease area calculations may violate the California Constitution

Article XVI, Section 6 of the California Constitution prohibits gifts of public funds.<sup>51</sup> Leasing below fair market rates is an example of an unconstitutional gift.<sup>52</sup> The low rates for residential piers may be an unconstitutional gift of public funds. Additionally, if the City is not using an appropriate lease area to calculate rent in order to reduce overall rental rates, that may also be an unconstitutional gift.

### The low rates and lease area calculations may violate the City’s grant statute and fiduciary duties.

The City has a legal obligation “to manage the state’s tidelands and submerged lands consistent with the terms and obligations of their grants and the public trust, without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or excises.”<sup>53</sup> The City has the duty to administer the trust solely in the interest of the beneficiaries<sup>54</sup>; the duty to act impartially in managing the trust property<sup>55</sup>; and the duty to not use or deal with trust property for the trustee’s own profit or for any other purpose unconnected with the trust, and to not take part in a transaction in which the trustee has an interest adverse to the beneficiaries.<sup>56</sup> During the rental area reduction and rate reduction decisions, the City did not explain how those actions were consistent with their obligations as the State’s trustee. Without that explanation, the City’s approach could be interpreted as

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<sup>48</sup> See [Agenda Item No. 1](#), November 28, 2012.

<sup>49</sup> See [Agenda Item No. 3](#), November 26, 2013.

<sup>50</sup> [Approved Minutes](#), February 10, 2015.

<sup>51</sup> Cal. Const., art. XVI, § 6.

<sup>52</sup> See *People v. City of Long Beach* (1959) 51 Cal.2d 875, 883 [holding that nominal rent for a YMCA was not a gift because the YMCA fulfilled a public purpose and gained no monetary benefit from the lease].

<sup>53</sup> Pub. Resources Code, § 6009, subd. (d).

<sup>54</sup> Pub. Resources Code, § 6009.1, subd. (c)(5).

<sup>55</sup> Pub. Resources Code, § 6009.1, subd. (c)(6).

<sup>56</sup> Pub. Resources Code, § 6009.1, subd. (c)(7).



providing benefits for City residents at the expense of the City's trust funds, which violates its grant statute and its fiduciary duties to the state.

### Recommendation

The City should immediately appraise its residential pier leases and update their rates. The City should also reevaluate its residential pier rent area calculations to determine whether they are adequately compensating the City, as the State's trustee, for private uses of the granted property.

# Mooring Permit Rates

## Background

In 2007, the Orange County Grand Jury published a report highlighting issues with Newport Beach's management of its mooring permits. In particular, the Grand Jury made the following finding and recommendation:

- F-4. The last assessment of the fair market value of mooring permit fees took place almost ten years ago.
- R-6. Establish a regularly scheduled independent appraisal for the fair market value of mooring permit fees, e.g., based on a percentage of the cost of a slip.<sup>57</sup>

In response to the Grand Jury's findings, the City Council approved increased mooring rates at its November 23, 2010 Meeting. The City Council increased mooring rates, which were to be gradually increased until they reached an annual rate of 14 percent of the Newport Harbor Marina Index. The staff report stated, "In the opinion of the City, the Beacon Bay Bill and the California Constitution (Article XVI, Section 6) obligates the City to charge appropriate and non-discriminatory rates for the use of tidelands, without conferring a benefit to private individuals for the use of public property in violation of the California Constitution's prohibition on gifts of public funds." The staff report stated that the mooring permit rates had not changed since 1996, and that the rates were now about 5 percent of the cost that a boater would pay for a slip or berth. City staff recommended that the rates be increased, over a 5-year period, to roughly 14 percent of an average of low- to moderately-priced marina berthing rates in Newport Harbor. This 14 percent rate was based on the Newport Harbor Marina Index, which compiled marina rates in Newport Bay and authorized staff to adjust the marinas selected. The Staff report explained that the 14 percent rate included a downward adjustment to account for the fact that mooring permittees in Newport Bay owned their own tackle. It also explained that Newport had not done an appraisal of the moorings, and asserted an appraisal was not required, contrary to the findings of the Grand Jury.<sup>58</sup>

In January 2015, the City Council directed the Harbor Commission to study the mooring rates and other related mooring issues and return with recommendations.<sup>59</sup> On June 16, 2015, the City Council considered the Harbor Commission's recommendations, which included setting a mooring rental rate of \$25 per foot, per year, with a CPI adjustment, and did not recommend an appraisal. The \$25 per-foot rate was derived by increasing the \$6 per-foot rate charged in

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<sup>57</sup> 2006-2007 Orange County Grand Jury, "[Newport Harbor Moorings: Are They Held in the Public Trust or for Private Profit?](#)" Finding F-4, Recommendation R-6.

<sup>58</sup> [Agenda Item No. 19, November 23, 2010](#); see 2006-2007 Orange County Grand Jury, "[Newport Harbor Moorings: Are They Held in the Public Trust or for Private Profit?](#)", Finding F-4, Recommendation R-6.

<sup>59</sup> [Agenda Item No. 19](#), January 27, 2015.

1976 based on CPI to the present day. The City Council considered the Harbor Commission's recommendations but directed staff to conduct an appraisal to set mooring permit rates.<sup>60</sup>

On January 26, 2016, the City Council considered new mooring rates based on an appraisal. In the staff report, City staff described that they had spoken with State Lands Commission staff who "expressed two recommendations regarding the City's mooring proposal: (1) the SLC recommended the City provide, in no uncertain terms, that the mooring permits do not convey a real property interest in the underlying tidelands; and (2) the SLC recommended the City obtain a current appraisal to assist with the establishment of fair market value mooring rental rates." City staff retained Netzer and Associates to conduct an appraisal, and the appraisal concluded that fair market rent was a range of annual rent of \$32.00 to \$38.00 per linear foot for offshore moorings, and \$16.00 to \$19.00 for onshore moorings. Staff recommended an annual rate of \$35.00 per linear foot for offshore moorings and \$17.50 per linear foot for onshore moorings, meaning a monthly rate of \$2.91 and \$1.46 respectively, with CPI adjustments.<sup>61</sup>

At the meeting, State Lands Commission staff submitted a letter stating that the appraisal "lacks important supporting discussion and analysis in a number of areas, which may affect the determination of fair market rent," included a list of initial questions on the appraisal, and requested that the City delay a vote so staff could perform a more detailed analysis.<sup>62</sup> The City included responses to the questions from Mr. Netzer, who concluded, "Overall, the questions appear to be concerned with the amount of explanation included in the report, rather than the analysis and the conclusions presented. . . . On the basis of the comments and the above, I believe my analysis and conclusions are well supported and reliable and I see no reason to re-think the analysis or amend my report."<sup>63</sup> The City did not delay the vote and adopted its staff's recommendation.<sup>64</sup> The City's resolution also authorized the City to conduct an appraisal to set new rates after March 1, 2018, and every 5 years thereafter.<sup>65</sup>

In 2023, the City of Newport Beach hired Netzer & Associates to conduct an appraisal to determine updated fair market values for mooring rates. The appraisal used several approaches: a "Tidelands Market Rent" that was based on upland land values; a "Comparable Rentals Approach" that surveyed other marinas that rent mooring buoys and then adjusted the rates based on location and utilities; a "Ratio Analysis" that surveyed marina slip rates and

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<sup>60</sup> [Agenda Item No. 1](#), June 16, 2015.

<sup>61</sup> [Agenda Item No. 20](#), January 26, 2016.

<sup>62</sup> See Letter from Sheri Pemberton, Chief, External Affairs Division, State Lands Commission, to Mayor Dixen and Councilmembers, City of Newport Beach, January 25, 2016, available at [Agenda Item No. 20 Correspondence](#), at p. 25.

<sup>63</sup> Letter from James B. Netzer, MAI, to Chris Miller, Harbor Manager, City of Newport Beach, January 26, 2016, available at [Agenda Item No. 20 Correspondence](#), at p. 31.

<sup>64</sup> [Approved Minutes](#), January 26, 2016.

<sup>65</sup> [Resolution 2017-16](#), adopted January 26, 2016.

compared them to mooring buoy rates to arrive at a ratio, then applied that ratio to Newport Bay marina slip rates to calculate mooring buoy rates; and a “CPI Adjustment Approach” that applied a Consumer Price Index adjustment to current mooring buoy rates. The appraisal then reconciled the four approaches by reviewing their factual and conceptual basis, ultimately placing primary emphasis on the Comparable Rentals Approach and Ratio Analysis after concluding that the Tidelands Market Rent approach was artificially high because of increased upland values and the CPI Adjustment Approach did not capture long term market trends. The appraisal concluded that a “benchmark” fair market rate for the mooring permits is \$16.00 per linear foot per month for a 40-foot mooring (the most common length mooring in the Harbor), increasing rent for a 40-foot mooring from \$134 per month to \$640 per month.<sup>66</sup>

At City staff’s request, State Lands Commission staff “reviewed the appraisal at a high level to determine whether [staff] believed the City could reasonably rely on its concluded fair market mooring rates.”<sup>67</sup> In a letter, staff concluded that “the City can reasonably rely on the appraisal’s fair market rates. The City could also adopt different rates if additional information shows that the recommendations should be modified.”<sup>68</sup>

At the Harbor Commission’s April 10, 2024 meeting, it recommended that the City adopt rental rates equal to 24 percent of the Newport Harbor Marina Index, reduced from the 30 percent ratio used in the appraisal’s Ratio Analysis to account for the costs of maintaining mooring tackle, and that these rates be phased-in over five and a half years.<sup>69</sup> This would result in an increase from the current rate of \$3.35 per linear foot per month, to about \$12.56 per linear foot per month, increasing rent for a 40-foot mooring from \$134 per month to \$502 per month.<sup>70</sup>

## Analysis

### Comparison to Commission rates

Commission staff’s methodology for determining mooring buoy rent on State sovereign lands is a useful point of comparison when analyzing the City’s rent setting methods. When determining a benchmark for mooring buoy rent, Commission staff uses the principle of substitution in a similar manner as when setting a rental rate for piers or docks. As such, staff’s method of determining a fair rental value for mooring buoys is based on what an individual

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<sup>66</sup> Netzer and Associates, “Appraisal Report: Fair Market Rent, Offshore Moorings, Newport Beach, California,” December 26, 2023.

<sup>67</sup> Letter from Reid Boggiano, Granted Lands Program Manager, State Lands Commission, to Lauren Wooding Whitlinger, Real Property Administrator, City of Newport Beach April 9, 2024.

<sup>68</sup> Letter from Reid Boggiano, Granted Lands Program Manager, State Lands Commission, to Lauren Wooding Whitlinger, Real Property Administrator, City of Newport Beach, April 9, 2024.

<sup>69</sup> [Approved Minutes](#), Harbor Commission, April 10, 2024.

<sup>70</sup> See [Agenda Item No. 13](#), July 9, 2024.

would pay for a similar mooring in a commercial marina. To derive a rental benchmark using this methodology, staff surveys local area marinas to determine mooring buoy rental rates and the number of buoys rented. These buoys are generally rented on a monthly or annual basis with rents based on the general size of a moored vessel (e.g. one rate for vessels 40 feet or less, and a different rate for vessels over 40 feet). Staff then utilizes the collected data to calculate the average annual gross income these marinas derive from buoy rentals. Once the average annual gross income is calculated, staff applies a 5 percent rate of return to represent a comparable fair market compensation rate for the use of State sovereign land. The resulting value is then used as the annual rent for buoys on sovereign land in the subject location.

In comparison, the City's appraisal used a variety of valuation methods but ultimately placed primary emphasis on the Comparable Rentals Approach and Ratio Analysis. The Comparable Rentals Approach is similar to the Commission's approach, but differs in that it surveyed marinas from locations all along the California coast instead of only local marinas. The rates collected from the surveyed marinas were then broken down into a per-linear-foot rate and adjusted based on the relative difference in the average monthly slip rent between Newport Harbor and the surveyed marinas. This provided an adjusted, per-linear-foot mooring rate that accounts for the relative difference in mooring costs between locations (similar to a cost-of-living adjustment). Of note, the City's appraisal does not apply a 5 percent rate of return. Instead, the appraisal uses the adjusted, per-linear-foot rate to arrive at a "benchmark" for the City's mooring buoys of \$16 to \$18 per month.

The Ratio Analysis utilized a different methodology from the Commission's approach and is based on the premise that both mooring buoys and slips are options available to mariners for mooring a vessel and that their relative costs can be calculated as a ratio of one to the other. For the Ratio Analysis, marinas from various locations along the California coast were surveyed to determine the monthly per-linear-foot rates for both mooring buoys and slips at each marina. This data was then used to calculate a "ratio," or percentage, for mooring rates as compared to slip rates. For example, if a marina charges a monthly rate of \$50 per linear foot for a 40-foot slip and \$10 per linear foot for a 40-foot mooring, then the ratio for the mooring rate would be calculated as:  $\$10/\$50 = 0.20$  (i.e. the mooring rate is 20 percent of the slip rate).

The Ratio Analysis provided a ratio of mooring rates to slip rates equal to 30 percent and concluded that a "benchmark" fair market rent could be derived by applying this 30 percent ratio to the "average slip rate" in Newport Harbor. The appraisal then provided two options for "average slip rates," one based on published slip fees for the Balboa Yacht Basin which is administered by the City through a third-party management company, and the other based on slip rates at comparable private marinas. By applying the 30 percent ratio to these "average slip rates," the Ratio Analysis provided a "benchmark" mooring rate of \$14.60 to \$15.17 per-linear-foot per month.

As the Comparable Rentals Approach and Ratio Analysis were given primary emphasis in the appraisal, these methodologies were ultimately used to arrive at a reconciled "benchmark"

monthly mooring rate of \$16 per linear foot. This benchmark was used as the rate for the most common mooring size of 40 feet, leading to an annual rate of \$7,680 for a 40-foot mooring. The \$16 benchmark rate was then tiered based on the vessel size that each mooring can accommodate. The resulting rates range from \$10.50 per linear foot per month for a 25-foot mooring, to \$23.25 per linear foot per month for a 95-foot mooring.

### Staff concluded that the City could rely on the appraisal without violating the law.

As discussed in the introduction section above, Staff reviewed the City's December 2023 appraisal and concluded that the City could reasonably rely on it to set mooring rates. Staff's opinion has not changed. The Legislature granted Newport Bay to the City to manage in its discretion, and the Commission's role is to review whether the City is exercising that discretion within the bounds set by the Constitution, Public Trust Doctrine, and granting statute. The Commission does not have authority to dictate how the City exercises its discretion within those bounds. In this case, the appraisal provides a reasonable basis for concluding that the recommended rates are reflective of fair rental value and therefore consistent with the Constitution, Public Trust Doctrine, and grant statutes.

### Recommendation

As stated in Commission staff's April 9, 2024 letter to the City, the City may reasonably rely on the 2023 appraisal to set mooring permit rates. Staff understands that increasing the rates paid by current mooring permit holders to fair market values may create hardships, and is comfortable with the City phasing in the rate increase over time. Additionally, if the City wishes to explore adopting a program to provide a certain amount of reduced rate permits as part of a comprehensive program to provide equitable access to Newport Bay, staff will be happy to work with the City to determine how to implement that program in a way that is consistent with California Constitution and other legal requirements.

# Residential Pier and Mooring Permit Comparison

## Analysis

In broad strokes, the calculation of residential pier rates and mooring rates are both based on appraisals that rely on comparisons to marina rates. There are differences, however, in how the City conceptualizes the rental area calculations.

Residential pier leases use only the footprint of the pier to calculate rent; there are no impact areas to account for the area used by boats moored to the pier, and no inclusion of water areas made inaccessible by the pier, such as the interior portion of a “U”-shaped pier.<sup>71</sup>

Mooring permit rates are based on linear feet of the maximum vessel size the mooring can accommodate, with different rates charged based on the maximum vessel size. So, for example, the proposed rate for a 40-foot mooring is \$16 per linear foot and the proposed rate for a 60-foot mooring is \$21 per linear foot. Thus, a mooring that can accommodate up to a 40-foot vessel will be charged a monthly rate of \$16 multiplied by 40 and a mooring that can accommodate a 60-foot vessel will be charged a monthly rate of \$21 multiplied by 60, regardless of the actual length of the vessel associated with the mooring.

The mooring permit rate is based on the maximum length of the vessel and so is conceptually tied to the amount of space a moored vessel could occupy. The residential pier leases, on the other hand, are calculated only based on the physical footprint of the pier and do not include areas that could be occupied by vessels or areas that are rendered inaccessible to the public because of the pier, such as the interior of a “U”-shaped pier. The issues related to the residential pier rental rates and lease area calculations are analyzed above in more detail, but even if the methodology is supportable, there is a discrepancy when comparing pier rent calculations to mooring permit rent calculations. One group is being charged based on the vessel’s occupation, and the other group is not.

When comparing the frequency of rate adjustments there also appears to be a difference in how the City has addressed mooring permit rates and pier rates. For the piers, the City first adopted rates based on an average of two different appraisals in 2012<sup>72</sup>; the City then adjusted buffer areas and rates in 2013<sup>73</sup>; and in 2015 the City removed the buffer areas and reduced the rate to the lower of the two 2012 appraisals.<sup>74</sup> For moorings, the City raised rates in 2010 based on a percentage of a marina rate survey (the Marina Index)<sup>75</sup>; in 2016 increased rates

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<sup>71</sup> [Agenda Item No. 16](#), Feb 10 2015, attachment B.

<sup>72</sup> [Agenda Item No. 1](#), November 28, 2012.

<sup>73</sup> [Agenda Item No. 3](#), November 26, 2013.

<sup>74</sup> [Agenda Item No. 16](#), February 10, 2015.

<sup>75</sup> [Agenda Item No. 19](#), November 23, 2010.

based on an appraisal<sup>76</sup>; and proposed raising rates in 2024 based on another new appraisal,<sup>77</sup> although that action has been paused.

For both the pier rates and the mooring rates, the City's resolutions contemplated new appraisals every 5 years.<sup>78</sup> But, while the City has generally kept to that schedule for its mooring rates, it has been over 12 years since the City appraised its residential piers, and, as discussed above, the current residential pier rates appear to be significantly below fair market rates.

Viewing all this together, there appears to be a difference in how the City has managed its pier lease rates and its mooring permit rates. The trend for mooring rates has been to have regular appraisals to reflect market conditions; the trend for residential pier permits has been to reduce the overall rent amount through reductions of lease area and lowering of rates without conducting a new appraisal.

### **The City's discrepancy between residential pier and mooring permit rates may violate the grant statute and the City's fiduciary duties.**

The City's Grant states, "In the management, conduct, operation, and control of the lands or any improvements, betterments, or structures thereon, the city or its successors shall make no discrimination in rates, tolls, or charges for any use or service in connection therewith."<sup>79</sup>

Commission staff interprets this provision to prohibit charging different rates for the same use – for example, a different mooring permit rate for residents and non-residents. Charging different rates for different types of uses is appropriate when the City can rationally explain the reason for the differences. In this case, it is arguable whether residential pier leases and mooring permits are similar enough to require the same rental rate calculations by the Granting Statute's anti-discrimination clause. On the one hand, they both have the purpose of providing boat storage; on the other, they might reasonably use different approaches to calculating the amount of tidelands used or the value of that use.

Nevertheless, even if the anti-discrimination clause is not violated, the City has a fiduciary duty to act with care and impartiality, to act only in the interest of the beneficiaries – the statewide public, and not to act for any purposes unconnected to its trustee duties.<sup>80</sup> The City appears to have treated its residential pier lessees, who are necessarily City residents, more favorably than its mooring permit holders. This could be interpreted as the City providing favorable treatment for its residents, especially when the City has not explained how its actions are consistent with

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<sup>76</sup> [Agenda Item No. 20](#), January 26, 2016.

<sup>77</sup> [Agenda Item No. 13](#), July 9, 2024.

<sup>78</sup> [Resolution 2016-17](#), adopted January 26, 2016; [Resolution 2012-120](#), adopted December 11, 2012.

<sup>79</sup> City Grant section 1(d).

<sup>80</sup> California Public Resources Code section 6009.1, subds. (c)(2), (6).



its obligations as the State's grantee. Even if this does not fit into the technical definition of discrimination in the City's Grant, this disparate treatment risks violating its fiduciary duties to the State.

## Recommendation

The City should comprehensively review its mooring permit conditions and residential pier lease conditions, including rental rates, method and frequency of rent revisions, potential for subleasing, and other terms, to ensure that both user groups are being treated equitably. When the City updates its residential pier lease rates, it should also establish a schedule to reappraise the residential pier rates and mooring rates at the same time, or at least on a regular schedule with the same intervals between reappraisals.

# Mooring Permit Transfers

## Background

In the City's current mooring permit system, the mooring permit authorizes the permittee to occupy a mooring space located within the City's granted lands, and the permittee owns and is responsible for maintaining the mooring tackle (the tackle includes the buoys, chains, and anchors). Under this system, mooring permit holders are allowed to privately transfer their mooring permits. The ability to privately transfer mooring permits has led to a private market for these permits. According to the City, the prices for mooring permits within this market have ranged from \$10,000 to \$60,000.<sup>81</sup>

The Orange County Grand Jury Report criticized the City of Newport Beach for allowing this secondary market for mooring permits, making the following Finding and Recommendation:

- Finding F-1. Private profits are being made from the current procedures used in transferring the mooring permits located on the public tidelands in Newport Harbor. Because the mooring equipment and the vessel currently assigned to that mooring must be sold to the same person, when a vessel on a mooring is sold, the new owner transfers that mooring permit into his or her name, rather than vacating the mooring and allowing the waiting list to proceed in order.
- Recommendation R-1. Tighten the regulations and procedures involved with Newport Harbor mooring permits and their transfers to ensure that all monies received which rightly belong to the public, stay within the public arena.<sup>82</sup>

In response to the Grand Jury Report, on November 23, 2010, the City limited mooring permit transfers to two transfers per permit before 2021. After two transfers, mooring permits would revert to City control and be redistributed through a public waiting list, except for transfers within families. The staff report explained, "The City took the Grand Jury's report seriously, and embarked with the City's Harbor Commission and NMA [Newport Mooring Association] on a plan to address transfers (but not rates)."<sup>83</sup>

But on March 28, 2017, the City reversed its phase-out of the private mooring transfers and allowed permits to be transferred indefinitely. The City also created an internet listing of sold moorings detailing the location, size, and sale price at the time of transfer, which staff explained "promotes transparency, and provides a central location for the public to review pricing trends which there assists with determining the fair market value for moorings." The City's staff report did not discuss the Grand Jury report or the City's obligations under its grant

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<sup>81</sup> [Agenda Item No. 19](#), November 23, 2010.

<sup>82</sup> 2006-2007 Orange County Grand Jury, "[Newport Harbor Moorings: Are They Held in the Public Trust or for Private Profit?](#)" Finding F-1, Recommendation R-1.

<sup>83</sup> [Agenda Item No. 19](#), November 23, 2010.

statute. The only discussion and basis for the change was that “[f]eedback from the mooring community suggests allowing transfers among private parties and rescinding the transfer-cap date.”<sup>84</sup>

The City also abolished the wait list. The staff report explained, “Because moorings have been privately sold to third parties and were rarely returned to the City, the wait list virtually never moved over the decades. . . . Under the current policy and after 2020, the wait list, in theory, would begin to move as permittees would no longer be allowed to sell moorings to third parties and would instead be required to return them to the City. However, given the recommendation in No. 1, above, to allow unlimited transfers, the wait list will once again be ineffective and be a burden to maintain as well as providing false expectations to the public.”<sup>85</sup>

Finally, the City increased the mooring transfer fee to 75 percent of annual mooring rent, up from 50 percent so the transfer fee for a 40-foot mooring increased from \$708.60 to \$1,062.90.<sup>86</sup>

## Analysis

The mooring permit transfer system has been in place for decades – from a time when moorings were not as in-demand as they are today, and a transfer system existed side by side with a public waitlist. Now, however, the transfer system has replaced the waitlist and is the only way to obtain a mooring permit.<sup>87</sup> The transfer program created a private market for permit sales, and the City reported sales ranging from \$10,000 to \$60,000.<sup>88</sup> Because a transfer is the only way to obtain a mooring, there is effectively a required up-front payment dictated by private parties and benefiting those private parties.

The City collects a transfer fee of 75 percent of annual rent. This amount is not connected to the sale price of the mooring permit itself. In the 2017 staff report reauthorizing transfers, the City noted that some people sought a mooring permit through the waitlist solely to profit from a subsequent transfer sale.<sup>89</sup> The transfer program creates the potential for private parties to financially benefit from a private market for use of the City’s granted lands – without the City’s trust funds being fairly compensated.

Private profit from the use of granted lands is not, by itself, a legal violation. For example, commercial businesses lease tidelands to profit from the use; local governments benefit financially from tourism driven by waterfront uses; and residential home values increase if they have adjacent private docks. The problem with the mooring transfer sales in Newport Bay is

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<sup>84</sup> [Agenda Item No. 3](#), March 28, 2017.

<sup>85</sup> [Agenda Item No. 3](#), March 28, 2017.

<sup>86</sup> [Agenda Item No. 3](#), March 28, 2017.

<sup>87</sup> [Agenda Item No. 3](#), March 28, 2017.

<sup>88</sup> [Agenda Item No. 19](#), November 23, 2010.

<sup>89</sup> [Agenda Item No. 3](#), March 28, 2017.

that the mooring permits have been privately commodified by restricting public access, which allows individuals to dictate costs for access that are unrelated to the actual use of the tidelands and unregulated by the City. Undeniably, there is a potential for private profit without the City's tidelands fund being compensated. But even if an individual permit holder did not profit for their sale when compared to their own purchase price, the requirement that there be a private purchase is a barrier to access unrelated to the actual tidelands use and which does not benefit the City's trust fund.

Therefore, the private sale of mooring permits that is allowed by the City's transfer policy could be a violation of the City's grant statutes, fiduciary obligations to the State, and the public trust doctrine.

### The City failed to consider its role as the State's trustee when rescinding the mooring permit transfer phase-out.

The concern with the mooring permit transfer market was brought to the City's attention in the 2006-2007 Grand Jury Report. Finding F-1 of that Report stated:

*"Private profits are being made from the current procedures used in transferring the mooring permits located on the public tidelands in Newport Harbor. Because the mooring equipment and the vessel currently assigned to that mooring must be sold to the same person, when a vessel on a mooring is sold, the new owner transfers that mooring permit into his or her name, rather than vacating the mooring and allowing the waiting list to proceed in order."*

The report's recommendation R-1 was to "Tighten the regulations and procedures involved with Newport Harbor mooring permits and their transfers to ensure that all monies received which rightly belong to the public, stay within the public arena."<sup>90</sup> When the City eliminated the transfers in 2010 (effective 2020), the City's ordinance stated that

*"When there is a great demand for moorings, a value is associated with a mooring permit well in excess of the annual permit fees. This value may be inappropriate in light of the California Constitution's prohibition against the gifting of public funds or assets as set forth in Article XVI, Section 6 of the state Constitution. This amendment to the mooring permit and transferability provisions... begins to bring the City's administration of moorings into compliance with Article XVI, Section 6."*<sup>91</sup>

While prior to the Grand Jury report the City might have been unaware of the legal implications of the transfer program, it was demonstrably aware of them when it began to phase out the

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<sup>90</sup> 2006-2007 Orange County Grand Jury, ["Newport Harbor Moorings: Are They Held in the Public Trust or for Private Profit?"](#) Finding F-1, Recommendation R-1.

<sup>91</sup> [Ordinance No. 2010-26](#), adopted November 23, 2010.

transfers in 2010. The City should have been aware of those issues when it reversed its phase-out of the transfer program in 2017.

But when these transfer restrictions were rescinded in 2017, the City did not make any statements about the Grand Jury Report's conclusions, the identified conflict with Article XVI, Section 6, of the California constitution identified in the City ordinance, or the City's obligations under its Grant. The only reason given for the recommended changes in the staff report was that "[f]eedback from the mooring community suggests allowing transfers among private parties and rescinding the transfer-cap date."<sup>92</sup> The official minutes of the meeting also do not reflect that any Councilmember or staff person raised the issue.<sup>93</sup>

The City appears to have failed to consider its legal and fiduciary obligations as a Legislative grantee when making the decision to revert the transfer restrictions in 2017. The City's staff report does not contain any analysis of how the changes would, or would not, satisfy their obligations under their grant statute, and does not mention the Gift of Public Funds issue that, in 2010, was noted in the transfer restrictions. This failure means that the City could be violating the California Constitution, the Public Trust Doctrine, its Legislative Grant, and the fiduciary duties it owes to the State.

### The City's transfer program may violate the California Constitution.

The City's transfer program appears to violate the Constitutional prohibition against gifts of public property. Article XVI, Section 6 of the California Constitution prohibits the State and local governments from making "any gift or authorize the making of any gift, of any public money or thing of value."<sup>94</sup> When local agencies manage tidelands under a grant from the Legislature and use these granted tidelands, or money derived from the granted tidelands, in a manner that does not further the purposes of the grant, it is a gift of public property in violation of the California Constitution.<sup>95</sup>

In 2010 the City estimated that the value of privately sold moorings ranged from \$10,000 to \$60,000.<sup>96</sup> The City's mooring transfer log shows that in 2024 the average transfer price was \$35,187.50 (when excluding off-market transfers such as family transfers, additions of a second permittee, and transfers associated with house sales).<sup>97</sup> The City charges a transfer fee of 75 percent of the annual mooring rent, which for a 40' mooring would result in a transfer fee of about \$1,206. This transfer fee is unrelated to the mooring permit purchase price and does not adequately compensate the City for the transfer. Therefore, the City's program allows private persons to profit from mooring permit transfers by creating a private market for the sale of

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<sup>92</sup> [Agenda Item No. 3](#), March 28, 2017.

<sup>93</sup> [Approved Minutes](#), March 28, 2017.

<sup>94</sup> Cal. Const., art. XVI, § 6.

<sup>95</sup> *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 210.

<sup>96</sup> [Agenda Item No. 19](#), November 23, 2010.

<sup>97</sup> The City keeps a transfer log on its [website](#).

public assets without compensation to the City. This is like a public agency leasing a building at a nominal rate and allowing the lessee to sublease for a profit, which violates the California Constitution.<sup>98</sup>

### The transfer program may violate the Public Trust Doctrine and the City's grant statute.

The City, as the Legislature's tidelands grantee, is bound by the Public Trust Doctrine when managing Newport Bay.<sup>99</sup> The Public Trust Doctrine's "dominant theme is the state's sovereign power and duty to exercise continued supervision over the trust."<sup>100</sup> Grantees like the City assume that duty of continued supervision of the granted lands. Accordingly, the grant statute imposes a term limit of 50 years for any franchise or lease.<sup>101</sup> While the grant statute does not mention permits, for purposes of the Commission's management, the Public Resources Code defines "lease" as including "a permit, easement, or license."<sup>102</sup>

In this case, not only do the mooring permits not have a time limit, but because they allow private parties to transfer them they effectively never return to the City for distribution, and the public now relies on private parties to obtain a mooring permit.<sup>103</sup> The City can revoke mooring permits for certain reasons,<sup>104</sup> including a provision allowing the permit to be revoked if the "space is to be devoted for a more necessary public use."<sup>105</sup> But this requires the City to justify the revocation, which may be difficult when it relies on subjective determinations like another use being "more necessary" than a mooring permit. The practical effect is that revocation of a permit will only be for cause, similar to terminating a lease for cause. And a lease for longer than 50 years will still violate the grant statute even though it can be terminated if the lessee fails to comply with its terms. Therefore, the City's mooring permit transfer program could be viewed as a relinquishment of the City's control of the permits to private parties, in violation of the Public Trust Doctrine and the City's grant statute

The City does sublease moorings when the permit holder is away for an extended period of time, which to some degree helps address the privatization of the mooring permits. But this

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<sup>98</sup> See *People v. City of Long Beach* (1959) 51 Cal.2d 875, 883 [holding that nominal rent for a YMCA was not a gift because the YMCA fulfilled a public purpose and gained no monetary benefit from the lease].

<sup>99</sup> Pub. Resources Code, § 6009, subd. (c); *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1174.

<sup>100</sup> *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 437.

<sup>101</sup> City Grant, section 1(b).

<sup>102</sup> Pub. Resources Code, § 6501.

<sup>103</sup> [Agenda Item No. 3](#), March 28, 2017.

<sup>104</sup> Newport Beach Municipal Code, section 17.70.020, subds. (A)(1), (4).

<sup>105</sup> Newport Beach Municipal Code, section 17.70.020, subds. (A)(1)(h).

does not resolve the fundamental problem that acquiring a mooring permit is now done at the discretion of private parties and not the City.

### The transfer program may violate the City's fiduciary duties to the State.

As a legislative grantee, the City must manage the granted property “without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or excises,” and is bound to act as the State’s fiduciary.<sup>106</sup>

Public Resource Code section 6009.1 lists fiduciary duties that legislative grantees must fulfill. Among these duties are the following:

- The duty to administer the trust solely in the interest of the beneficiaries.<sup>107</sup>

Under both the Public Trust Doctrine and the City’s grant statute, the City must manage Newport Bay to serve the statewide public interest, and the statewide public are the beneficiaries in the trust relationship created by the City’s Grant.<sup>108</sup> The transfer program allows the group of current mooring permit holders to control the recipients of the mooring permits and potentially extract value from the process. The transfer program is therefore for the benefit of the group of current mooring permit holders and not for the general public that wishes to acquire a permit.

- The duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property,<sup>109</sup> and the duty to not delegate to others the performance of acts that the trustee can reasonably be required to perform and to not transfer the administration of the trust to a co-trustee.<sup>110</sup>

The City’s transfer program allows the private mooring tackle owners to control who the future user of the property is. The current mooring holders could, in theory, select future users based on discriminatory intent, such as only transferring the mooring to another Newport Beach resident, or another member of a certain belief system. While this would be an extreme example, and staff has not seen any indication this has happened, the point is that the City’s system allows for private parties to make those decisions, which is potentially an impermissible transfer of power over the sovereign land. This could be a violation of the City’s duty to keep control of the trust property and not to delegate or transfer administration of the trust.

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<sup>106</sup> Pub. Resources Code, §§ 6009, subd. (d), 6009.1, subd. (c).

<sup>107</sup> Pub. Resources Code, § 6009.1, subd. (c)(5).

<sup>108</sup> See *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 211.

<sup>109</sup> Pub. Resources Code, § 6009.1, subd. (c)(8).

<sup>110</sup> Pub. Resources Code, § 6009.1, subd. (c)(13).

- The duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust.<sup>111</sup>

As discussed above, private persons are selling mooring transfers and the City's transfer fee does not appear to reflect that sale. This could violate the duty to make the property productive – in this case, by failing to secure adequate value for the City's trust fund.

## Recommendation

The City should end its program of allowing private mooring permit sales. Many current mooring permit holders purchased their moorings with the expectation that they would have the option to sell them in the future to recoup the purchase cost. The City could consider ways to phase out transfers which recognizes that the current mooring permit holders were only following the City's established rules when they purchased their moorings. Commission staff is not taking a position on whether compensation should be provided to the current mooring permit holders.

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<sup>111</sup> Pub. Resources Code, § 6009.1, subd. (c)(9).



## The Mooring License Program and the City's July 9, 2024 Action

On November 4, 2023, the City created the mooring license program.<sup>112</sup> The City's mooring licenses are non-transferable licenses that provide mariners with an option to rent moorings on a monthly basis, renewable for additional one-month terms. Fees for these licenses are based on an appraisal prepared by Netzer and Associates in August 2023, before the appraisal that Netzer and Associates prepared in December 2023 for the offshore moorings. Commission staff did not review or comment on the August 2023 Netzer appraisal. The license terms included:

- Mooring Licenses are month-to-month and may be renewed, provided the licensee has paid in full the license fee, any late fees, and is not in violation of any provision of the license program.
- Live-aboards are prohibited.
- The City may temporarily assign a mooring that is vacant or unoccupied to another vessel through the issuance of a mooring sub-permit.
- Mooring licenses are not transferable.
- The assigned vessel must actively occupy the mooring. Vacancy for more than 25 consecutive days is considered abandonment if it occurs without the prior approval of the Harbormaster. However, the mooring can be vacant for up to 6 months with prior approval from the Harbormaster.
- A single tender – a small vessel, like a dinghy or kayak, which serves as access to and from shore to the assigned vessel – may be secured to the assigned vessel or to the offshore mooring in the absence of the assigned vessel.
- A licensee may not allow vessels other than the assigned vessel and tender to use the mooring.<sup>113</sup>

On July 9, 2024, the City considered the Harbor Commission's recommendation to increase mooring permit rates. City staff also provided an alternate recommendation, where mooring permits would be phased out in favor of the License Program. City staff's alternate recommendation included:

- As of August 22, 2024, no new mooring permits would be issued. Instead, all new moorings would be authorized under the License Program.
- Existing mooring permittees would continue to pay the current mooring permit rates, with annual CPI adjustments or a 2 percent increase (whichever is less).

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<sup>112</sup> [Agenda Item No. 4](#), November 14, 2023.

<sup>113</sup> [Resolution 2023-62](#), November 15, 2023.

- Existing mooring permittees would be allowed to privately transfer their permit one time within four years, but no later than August 21, 2028. Following that transfer, no further transfers would be permissible for that mooring permit.
- Mooring permits transferred during the four year “grace period” would be subject to the 2016 rates for four years from the date of the transfer. After this additional four-year period the permit would convert to a License.
- Mooring permittees that also held a live-aboard permit as of September 1, 2028, and whose mooring permit has converted to a mooring license, may continue to live on the vessel.
- Moorings and associated tackle subject to the License Program would be owned and maintained by the City. Moorings and associated tackle subject to the Permit Program would continue to be owned and maintained by the permittee.<sup>114</sup>

The City approved staff’s alternate recommendation.<sup>115</sup> However, the City deferred a second reading of the ordinance at State Lands Commission staff’s request, meaning that it is not yet effective.<sup>116</sup>

## Analysis

The City concluded that the License Program rates were reflective of fair market value, and that conclusion is supported by the August 2023 appraisal. Similar to the December 2023 appraisal, the appraisal used for the License Program employed a “Comparable Rentals Approach” and a “Ratio Analysis” to arrive at a recommended fair market rent. The recommended rates were similar in both appraisals: for a 40-foot offshore mooring the August appraisal recommended \$15.00 per linear foot, and the December appraisal recommended a benchmark rate of \$16.00 per linear foot.

The alternate recommendation would eventually lead to the cessation of private mooring transfers, while allowing existing Mooring Permit holders to continue paying current rates (with CPI adjustments) in exchange for the removal of the ability to transfer the permit.

## Recommendation

As discussed elsewhere in this report, staff supports both ensuring that rates remain at fair market value and the implementation of a fair resolution to the issues created by the City’s transfer program. The City should review the staff alternate proposal in light of the discussion in this report to determine if this proposal provides a fair solution that ensures both fair market rent and addresses the mooring transfer program.

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<sup>114</sup> [Agenda Item No. 13](#), July 9, 2024.

<sup>115</sup> [Approved Minutes](#), July 9, 2024.

<sup>116</sup> [Approved Minutes](#), July 23, 2024.

## Conclusion

When reviewing the City's management of its mooring permits and residential pier leases, a common issue is that the City has not adequately explained – or sometimes, has not explained at all – how its granted lands management decisions comply with the City's obligations as the State's trustee under the granting statute.

For example, when recommending that the City remove the interior of a "U"-shaped pier from the rental calculations in 2017, the staff report does not explain why it is making the recommendation, only stating that "the decision to include or exclude the interior of the U-shape of a slip is left to the discretion of the City Council."<sup>117</sup> It is the same with the recommendation to reduce the pier rate from an average of the two appraisals to the lower value: the staff report just states that "the City Council has the discretion under the Beacon Bay Bill [the grant statute] and Newport Beach Municipal Code to determine the fair market value rent for residential piers based in part on these two appraisals."<sup>118</sup> In the official minutes of that meeting, there is some discussion at the City Council meeting of the City's trustee obligations, and the reason for the reduction in the lease area, but not the rate reduction.<sup>119</sup> From the minutes it is unclear exactly how the City viewed its actions in relation to its trustee obligations.

This is also seen when the City reverted its mooring permit transfer policy in 2017, and staff only explained the basis for the reversion by stating, "Feedback from the mooring community suggests allowing transfers among private parties and rescinding the transfer-cap date."<sup>120</sup> The official minutes of that meeting do not reflect any discussion of the transfer policy's compliance with the City's trustee obligations.<sup>121</sup>

The City has discretion on how to manage its granted lands, but the City must exercise that discretion for the benefit of the statewide public and for the purposes described in its statute and within the bounds imposed by that statute and the Public Trust Doctrine. It might be that in some cases the City performs the analysis of its management decisions during the meeting when such decisions are made, but this is not always the case. And a failure to provide that analysis in the staff report means that the public cannot review the City's reasoning prior to the meeting.

Going forward, when the City takes any action involving its granted lands, it should explain how that action is consistent with its trust obligations – ideally in the staff report, so that the public can review that reasoning ahead of the meeting.

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<sup>117</sup> [Agenda Item No. 16](#), February 10, 2015.

<sup>118</sup> [Agenda Item No. 16](#), February 10, 2015.

<sup>119</sup> [Approved Minutes](#), February 10, 2015.

<sup>120</sup> [Agenda Item No. 3](#), March 28, 2017.

<sup>121</sup> [Approved Minutes](#), March 28, 2017.