

# **Newport Mooring Association**

## **Objection to Proposed Offshore Mooring Fee Increase**

**Date: January 31, 2024**

**To: The Newport Beach Harbor Commission**

**Reference: February 1, Study Session on Offshore Mooring Rates**

The Newport Mooring Association strongly objects to the furtherance of DISCRIMINATION against mooring holders in Newport Harbor. In a separate position paper, the Newport Mooring Association will show the history of systematic discrimination against Mooring Holders, as compared to the treatment of all other users of Newport Harbor. An outline of our significant concern over the history of apparent discrimination is outlined in Exhibit 5 below. Mooring Holders already pay far more to the City for use of a small area of the harbor compared to what is paid for by marinas, waterfront homes and virtually all other uses. Now, the Harbor Commission is on the verge of substantially increasing the effect of the Discrimination hammer in what appears to be an ongoing effort to force people of low income and who may be outsiders out of the harbor. Make no mistake, the weaponization of the Appraisal Hammer is just a further attack on mooring holders which appears to be part of an on-going war to rid the harbor of outsiders. The fees being charged mooring holders are already four times more than what is being paid by waterfront homes for use of the tidelands in front of their home for their private docks. This proposal would increase the disparity drastically more, so that the gap would be up to 10 times more than what private dock owners pay, and over 5 times more than what commercial docks and homeowner associations pay.

The Newport Mooring Association (NMA) also objects to the process by which this proposed rate increase was developed, which excluded public input and review. These objections pertain to proposed offshore mooring increases. Two years ago, the NMA provided a report objecting to the then proposed increases in onshore mooring rates, which is a matter of public record. The agenda item in the last Harbor Commission meeting concerned only offshore moorings, the appraisal submitted entitled offshore mooring rates, and the study session announced at the Harbor Commission meeting was for a study session on only this matter. If in the event that there is any discussion of on-shore mooring rates at the study session, the NMA strongly objects to including on-shore moorings for failure of proper notice to the public.

## Overview

The Newport Mooring Association (“NMA”), has studied the proposed fee increase, staff report and Netzer appraisal (“Netzer Report”), and finds that:

- The proposal significantly threatens affordable recreational boating
- The proposal highly discriminates in fees charged by the City of Newport Beach for other tidelands use in direct violation of the Beacon Bay Bill
- The proposal violates the reported and stated goals of the City to provide affordable boating access
- The proposal and methods used in the Netzer Report contradicts the customary method used for determining fees charged for tidelands use, including the State Lands Commission, and contradicts the City’s own 2017 appraisal and valuation of tidelands for almost all other uses, and
- The Netzer Report itself is based on an erroneous methodology and contains numerous false assumptions and errors.

Given the radical nature of the proposal, the clear discrimination in rates prohibited by the Beacon Bay Bill, and the clear contradiction in methods, rates, and conclusions in the City’s own formal appraisal report for values charged for use of the tidelands, the NMA is requesting that any further discussion by the Harbor Commission be delayed no less than 90 days to allow the Commission, Staff, and the Stakeholders to provide input on any proposal to raise rates for the offshore recreational moorings.

## Discussion

Boating and sailing are the heart and soul of Newport Beach. One needs only look at the logo of the City shown everywhere, from signs as you enter the City to the City’s website and letterhead. The social and recreational activities in the area, the commercial, restaurant, and entertainment of the City, and the unique values of properties, are all uniquely connected with the current and historical connection to boating and sailing. Put another way, if the tidelands were just an open marshland, like those seen up and down the coast of California, Newport Beach would be nothing like it is today.

**Preservation of this tradition is not possible without affordable and entry level boating and sailing.** Young boaters and sailors learn their skills on smaller or older boats that are only in the harbor because there is affordable access. The Harbor Commission and the City should commit to supporting affordable boating and sailing. The NMA is concerned that, this Commission will be the first in the history of Newport Beach to take steps to displace, diminish, and destroy the importance of sailing and boating in Newport Beach.

## **I. Discrimination in Rates**

The Beacon Bay Bill, often referenced by the City of Newport Beach as guiding its administration of the harbor, provides that:

**(d) In the management, conduct, operation, and control of the lands or 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 (See Exhibit 1).**

The proposed fee increase will clearly discriminate in rates charged for the use of the same tidelands. For example, in 2017 the City received an extensive appraisal from George Hamilton Jones ("GHJ Appraisal") which assessed the rental charges to be applied to most of the uses in Newport Harbor, most of which were commercial, and some non-commercial uses. Uses not covered were called "Other Uses." In effect, the rates charged for every one of these uses, from large marinas, small marinas, fuel docks, shipyards, yacht club guest slips and "other uses" looked at the square footage of tidelands used by the particular use and applied a similar rate (with some very minor adjustments), including a few discounted rates. The general non-discounted rate was \$.76 (76 cents) a square foot per year for the use of that area of tidelands. That amount was indexed to a CPI adjustment which is still in use, and today's published rate is \$.93 per square foot per year, including the rate for "other uses." This rate has already been published by the City for 2024.

Applying the City's published rates, the annual, non-discriminatory rate for a 40ft. offshore mooring would be \$948.60 per year (1020sq.ft. x \$.93 = \$948.60). This is a rate somewhat less than the current rate even after adding extra square feet for lines to the buoys.

Unless the Commission and City were to recommend a substantial increase in rates being charged to all uses of the tidelands (i.e., the various Newport large marinas, small marinas, restaurant docks, shipyards, and guest docks, Homeowner Association slips and moorings, and Waterfront Home Docks), singling out the recreational offshore moorings for a 300% to 500% increase in annual fees for the very same tidelands use would be clearly a discrimination that cannot be justified in any manner. Further such an exorbitant rates, tolls, or charges in uses would be an outrageous violation of the City's obligations under the Beacon Bay Bill, as well as provisions of the California Public Resources regulations.

## **II. Discrimination Against Outsiders and Protected Persons.**

Without having to conduct any studies, it appears that offshore mooring holders are far more likely to live outside the City than homeowners with private docks and persons who rent expensive slip space for their yachts. When one combines the significant overcharges and discriminatory charges now in existence, and the radical proposed increases that further discriminate, in addition to the many other ways mooring holders are treated unequally, this

raises the obvious question of whether the proposed increases are intentionally or unintentionally designed to keep people out of the harbor if they do not live in Newport Beach.

Also, it would appear that the existing discriminatory policies plus the proposed increases do and will have a disparate impact on protected minorities. Therefore, the City should not double down on such discriminatory policies.

### **III. Violation of the City's Reported Commitment to Affordable Boating**

The NMA believes that the Staff report incorrectly implies that the City's hands are tied and that the City must charge maximum fair market permit fees. In reality, the City has in the past taken a more reasonable, fair and affordable approach to setting mooring fees.

- A. The staff report should point out that that the precedent setting City resolution on setting mooring fees (Res #2016-17) gives the City authority in setting fair, reasonable and affordable mooring fees.
- B. In the past, the City, and its staff have incorrectly stated that the state lands grant (aka Beacon Bay Bill) requires the City to charge fair market rents (as if they were landlords in the private sector renting real estate without regard to other factors, including providing accessible and affordable recreational use of the tidelands). The "fair market" language in the Beacon Bay Bill, however, only relates to the private residential lots in Beacon Bay, and not the tidelands in general (See Exhibit 1). Any local ordinance or resolution that relies on or repeats the incorrect reading of the Beacon Bay Bill cannot be used to justify increases in recreation uses in the Harbor. In fact, the City has always recognized special treatment for recreational use considerations. See, for example, the City's justification for lower rates charged for recreational and other uses of the tidelands in relation to boating activities – the City's Resolution 2017-49, Section 3 (Exhibit 2).
- C. The staff report should also include City Council Policy F-7 (E) (Exhibit 3) which gives the city authority to keep fees at an affordable level for recreational purposes.
- D. The State Lands Commission (SLC), the State agency responsible for oversight of these tidelands, has approved, and utilizes better methodologies (i.e., benchmarking) in determining fair and reasonable tideland fees. Resolution 2016-17, NBMC 17.60.060 (D) and the Beacon Bay Bill (Exhibit 1) give the City citywide discretion in determining the best methodology in determining fair and reasonable rents for moorings. Moreover, in the Tomales Bay Mooring Valuation Report (Exhibit 4), just one year ago, SLC has used a totally different methodology, a methodology

consistent with the method used by the City of Newport Beach in its GHJ Appraisal 2016/2017 valuation of rates for different uses of the tidelands in the harbor.

- E. The staff report fails to include, and should include, City Policy 3.3.2-3 (LCP/CLU) (Exhibit 6) whereby the City will continue to provide moorings as an important source of low-cost public access to the water and harbor. The omission of this policy from the staff report is a failure to inform the Harbor Commission, City Council, and the general public that the city has made a promise to keep mooring fees reasonable and affordable which is an important factor in determining any discretionary fee increase.

#### **IV. The Netzer Report Ignores State and City Approved and Established Methods**

The Netzer report ignores the methods used by both the City, the City’s appraiser, and by State Lands when valuing an appropriate fee to be charged for the use of tidelands in general, and in Newport Harbor in particular. Staff and Counsel should review both the 2016/2017 GHJ Appraisal and City resolution regarding the rates and methods applied to valuation of the Newport Harbor tidelands, and also review and include the methods used by SLC in its recent determinations of rates to be charged in SLC’s Tomales Bay Report.

#### **V. The Netzer Report Uses the Wrong Methods and Contains Numerous Errors.**

##### **A. Overview regarding Mr. Netzer’s Approach.**

**1. Ignoring Established Methods.** The report totally ignores the methods of both the City in the recent past appraisal, and the methods used by State Lands, and is a major mistake. The State Lands report clearly says it is using the principle of “Substitution” – namely what the State would receive for the same tidelands if rented to a known use such as a marina owner. In effect, that was the same method used by the 2016/2017 City approved appraisal. The Netzer report states clearly that it is not using the principle of Substitution, ignoring established methods, and instead makes up methods never seen before as the report struggles to establish a type of “comparable” that the Netzer report admits does not exist, or did not want to go to distant harbors to find.

**2. Use of Wrong Comparison.** Using the price of expensive land and comparing land to water (tidelands) makes no sense and is not any type of established method. Put simply, you can build a house on land, but not on water, and the values simply can’t be compared.

**3. Not Understanding a Mooring.** To “compare” two properties or two items one needs to understand how the two are alike and not alike. The Netzer report clearly shows a lack of understanding of how moorings are used, and compares a mooring to a slip without proper evaluation and proper offset for:

- lack of access,
- cost of having to rent a slip or dock space for a dinghy or tender for access.
- lack of electricity,
- cost of batteries needed to start an engine,
- lack of water,
- lack of restrooms,
- lack of dedicated parking,
- lack of trash removal,
- lack of lighting and security
- dealing with and cost of installing and maintaining the buoy system,
- cost of installing and maintaining the lines to the buoys,
- the monthly cost of cleaning the lines that get full of marine life,

Each of the above would need to be understood with an appropriate off-set when attempting to compare a mooring to dock space.

**4. Failure to Account of Capital Investment.** In comparing a mooring to a slip, there is no consideration to the fact that, unlike a person renting slip space, the person using a mooring is likely to have a substantial capital investment of \$40,000 to \$60,000 in addition to biannual mooring maintenance fees. A person renting a slip does not have any capital investment or maintenance cost for the slip and is required to only pay rent for the slip.

## **B. Specific Flaws in the Netzer Report**

### **1. The Report Fails to Reduce Value for the Cost of Dinghy Dock Access.**

- All other harbors have dinghy docks for access; Newport does not.
- To equalize comparisons, the cost of a slip for a dinghy or tender should be subtracted from, Netzer’s proposed fees.
- \$500 to \$700 per month is the Current Slip Rate at Marinas in Newport for Dinghies and Tenders 9 ft to 14 feet.

**2. The Report Fails to Use Established Methods Used by State Lands Commission and Used by Newport Beach for All Other Uses.** The SLC uses a benchmark of 5% to 6% of the rents received by a marina. Then, the SLC divides the amount by the square feet of tidelands

exclusively used by the marina to establish a yearly fee per square foot of tidelands used. This “value per square foot” is then used for other uses. The City of Newport Beach followed this standard method for virtually all uses in the Harbor in the 2016 George Hamilton Jones Reports with yearly increases which is currently shown on the City’s website. Netzer breaks away from the Standard Method used by both the State and the City of Newport for all other uses in favor of what appears to be a convoluted contrived method aimed at clearly discriminating against mooring holders, many of whom do not live in Newport Beach and many of whom are of a protected class of persons.

**3. The “Ratio” of Slip Rates to Mooring Rates is Unreliable, per Mr. Netzer in a Prior Appraisal and Compares Apples and Oranges.** *“The Ratio Analysis ... is not judged to be a reliable measure of Fair Market Rent”*. These are Mr. Netzer’s words in his 2016 appraisal of offshore moorings (page 20). We concur, it’s like comparing apples to oranges, and as shown below does not consider the lack of access in Newport Harbor.

**4. The Ratio Approach Compares “Slip Rates to Mooring + Dinghy Dock” Rates in Other Harbors, Instead of Slip Rates to Newport Moorings Without the Same Access.**

- All other harbors that have large mooring fields provide two things not one. Their mooring rates are for both an area of the tidelands for a boat, plus use of dinghy docks for a dinghy or tender for access to the moorings. Newport rates are for only one of these two things. The use of a small amount of tidelands but does not provide dinghy docks for access to the moorings. The real ratio referred to in the Netzer report is for a mooring plus a 24/7 dock space for dinghies as this combination is compared to slips. That ratio cannot be used for a ratio in Newport Beach which does not provide half of what is offered in other harbors when someone rents a mooring.

- The ratio between slips, and moorings without access, can be calculated by comparing the 2016 George Hamilton Jones report and the 2016 Netzer Report. When comparing 2016 rates for slips to the 2016 approved rates for offshore moorings, the ratio was approximately 1 to 14, or about 6% per lineal foot. As far as ratios are concerned, there is no reason why the ratio between Newport slips and Newport offshore moorings without access would have changed in the last few years.

**5. The Report Greatly Exaggerates Tidelands Used by Larger Moorings.** The area of tidelands used by larger sized moorings will only increase marginally on a square foot basis. Comparing the square foot used by a 65-foot boat to the area used by a 40-foot boat, will result in no significant difference in rates charged per lineal foot. Here’s a simple example:

40 foot mooring (allowing for extra distance to each buoy and the buoy itself =  $(40+28) \times 15$  (beam) = 1020 sq ft.

65-foot mooring adding the extra distance to each buoy and the buoy itself =  $65+34 \times 16 = 1,584$  sq feet.

The 65-foot mooring rate is 1.55 the rate of the 40-foot mooring, but on a lineal foot the rate is the same. For example, using the current rate of \$38 per foot, 40-foot mooring is \$1,520, and using the same rate per lineal foot, a 65-foot mooring would be \$2,356 compared to the current rate for a 65-foot mooring at \$38 per lineal foot = \$2,470. The idea of charging the larger mooring substantially more per square foot cannot be justified.

**6. Mr. Netzer Appears to have Misstated the Facts in his Public Comments.** Upon inquiry by one or more commissioners at the January Harbor Commission meeting, many of us recall that Mr. Netzer stated that he had been in discussion with a person or persons in San Diego who advised him that (a) the Port Authority had approved a substantial increase in rates for San Diego moorings (which have dinghy docks) and that this had also been approved by the California State Lands Commission.

Members of the NMA contacted the owner of the San Diego Mooring Company, the Port Authority, and State Lands Commission and found that (a) there have been no approvals, (b) the request has not been made public yet and public input has not yet been requested, and (c) the State Lands Commission has received no request and had not even heard of the matter.

What is more, the San Diego Port Authority is not being asked to “approve” new rates, rather, they are being asked to amend a current restriction in the lease with the mooring company which would allow them to test the market and experiment with rate increases up to a new requested higher cap in rates. What may or may not be a rate increase and how the market responds over time, is not a matter that any appraiser would ever consider at this time in rendering an opinion of values and rates.

**7. Valuation of Home Docks is an Unacceptable Never-Before-Used Method, a False Comparison, and Will Raise Home Dock Taxes and Fees.**

- The method does not account for location – homes with docks in more desirable locations will show a higher square foot value for the home, which does not equate to more value for use of the dock.
- The method fails to explain why a private dock next to an expensive home rents for the same as a private dock next to a substantially less valuable home.
- The method is derivative on derivative and is almost never used.
- The method if used would require home dock fees to be increased 20-Fold.
- The *Stop the Dock Tax* cry will likely be heard again by homeowners with docks, if subjected to such an increase.



## **VI. The Harbor Commission Needs Time To Consider the Forthcoming Independent Appraisal**

The NMA has requested an independent appraisal of market rates for offshore mooring rates. As announced a few days after the publication of the Netzer report at the Harbor Commission Meeting in January, that report was scheduled to be completed three to five weeks later. Following that announcement, the Harbor Commission chose to set its study session approximately a week before the independent report is due. It is unclear why they would want to have the study session without having the benefit of reviewing the independent report. Be that as it may, the NMA urges the Harbor Commission to take no action until they have the benefit of the independent report and set another study session with the full Harbor Commission to allow further study and public input after the independent report is available to the public.

### **CONCLUSION AND REQUEST TO CONTINUE**

For the reasons stated above, and given the major public interest in the issue, and the important of current and future boating and sailing in Newport Harbor, and given the extraordinary proposed increase in fees, and given what appears to be a proposal that clearly discriminates in use rates, and a clear violation of the Beacon Bay Bill, and given the clear contradictions in methods, rates, and conclusions in the City's own formal appraisal report for values charged for use of the tidelands, as stated above, the NMA is requesting that any further discussion by the Harbor Commission be delayed no less than 90 days to allow the Commission, staff, and the stakeholders to provide input on any proposal to raise rates for the offshore recreational moorings.

**Newport Mooring Association,**

**Approved by the Board of Directors**

## **EXHIBITS**

## **Exhibit 1 – Relevant Sections of the Beacon Bay Bill**

[ Ch. 317 ] STATUTES OF 1997 CHAPTER 317

An act to amend Sections 1 and 2 of Chapter 74 of, and to add Section 2.5 to, the Statutes of 1978, relating to tide and submerged lands in the City of Newport Beach.

[Approved by Governor August 18, 1997. Filed with  
Secretary of State August 18, 1997.]

The people of the State of California do enact as follows:

SECTION 1. Section 1 of Chapter 74 of the Statutes of 1978 is amended to read:

Section 1. There is hereby granted to the City of Newport Beach and its successors all of the right, title, and interest of the State of California held by the state by virtue of its sovereignty in and to all that portion of the tidelands and submerged lands, whether filled or unfilled, bordering upon and under the Pacific Ocean or Newport Bay in the County of Orange, which were within the corporate limits of the City of Newport Beach, a municipal corporation, on July 25, 1919; the same to be forever held by the city and its successors in trust for the uses and purposes and upon the following express conditions:

(a) The lands shall be used by the city and its successors for purposes in which there is a general statewide interest, as follows:

(1) For the establishment, improvement, and conduct of a public harbor; and for the construction, maintenance, and operation thereon of wharves, docks, piers, slips, quays, ways, and streets, and other utilities, structures, and appliances necessary or convenient for the promotion or accommodation of commerce and navigation.

(2) For the establishment, improvement, and conduct of public bathing beaches, public marinas, public aquatic playgrounds, and similar recreational facilities open to the general public; and for the construction, reconstruction, repair, maintenance, and operation of all works, buildings, facilities, utilities, structures, and appliances incidental, necessary, or convenient for the promotion and accommodation of any such uses.

(3) For the preservation, maintenance, and enhancement of the lands in their natural state and the reestablishment of the natural state of the lands so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

(b) Except as otherwise provided in this section, the city or its successors shall not, at any time, grant, convey, give, or alienate the lands, or any part thereof, to any individual, firm, public or private entity, or corporation for any purposes whatever; except that the city or its successors may grant franchises thereon for a period not exceeding 50 years for wharves and other public uses and purposes and may lease the lands, or any part thereof, for terms not exceeding 50 years for purposes consistent with the trust upon which the lands are held by the state and with the uses specified in this section.

(c) The lands shall be improved without expense to the state; provided, however, that nothing contained in this act shall preclude expenditures for the development of the lands for the purposes authorized by this act, by the state, or any board, agency, or commission thereof, or expenditures by the city of any funds received for such purpose from the state or any board, agency, or commission thereof.

**(d) 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.**

(e) The state shall have the right to use without charge any transportation, landing, or storage improvements, betterments, or structures constructed upon the lands for any vessel or other watercraft or railroad owned or operated by the state.

(f) There is hereby reserved to the people of the state the right to fish in the waters on the lands with the right of convenient access to the waters over the lands for such purpose, which rights shall be subject, however, to such rules and regulations as are necessary for the accomplishment of the purposes specified in subdivision (a).

(g) **Notwithstanding any provision of this section to the contrary, the city may lease the lots** located within Parcels A, B, and C described in Section 6 of this act for the purposes set forth in this act and for terms not to exceed 50 years. The consideration to be received by the city for **such leases** shall be the **fair market rental value of such lots as finished subdivided lots with streets constructed and all utilities installed.** The form of such leases and the range of consideration to be

received by the city shall be approved by the State Lands Commission prior to the issuance of any such lease. All money received by the city from existing and future leases of those lots shall be deposited in the city tideland trust funds as provided in Section 2.

## Exhibit 2 - Section 3 of Resolution 2017-49

**Section 3:** The City Council sets the rental rates, phase-in, and adjustments contained in the attached *Commercial Tidelands Rent Calculations For Commercial Uses Located Upon Tidelands* for Shipyards, Yacht Club Guest Slips, and Free Public Access Docks (not associated with a restaurant) at less than fair market value. Pursuant to City Council Policy F-7(E)(6), **the City Council finds charging less than fair market value rent for these specific uses promotes the goals of the City to further marine-related services and activities. More specifically, the City Council finds charging less than fair market value rent for these uses promotes public recreation facilities and marine services to the general public, furthers the policies and objectives of the Beacon Bay Bill, and allows for continued operation and improved accessibility to the public.** Thus, the charging of less than fair market value rent for these uses of the Tidelands is a matter of state-wide concern that benefits the citizens of the State of California.

### **Exhibit 3 - City Council Policy F-7 (E)**

NB City Council Policy F7 (paragraph E) allowing city to discount for recreational public use

- E. However, in some circumstances the City may determine that use of a property by the public for recreational, charitable or other nonprofit purpose is preferred and has considerable public support, in which case the City may determine that non-financial benefits justify not maximizing revenue from such property. In such circumstances, the City has a vested interest in ensuring that the lessee of such property operates the activities conducted on or from the property in the manner that has been represented to the City throughout the duration of any lease or contract with the City.

## Exhibit 4 - Tomales Bay Mooring Valuation Report

### (Excerpt re Mooring Fee Methodology)

Meeting Date: 12/17/20 -Work Order Number: W27247 Staff: D. Tutov, K. Foster

Staff Report 28 - LAND TYPE AND LOCATION: Sovereign land in Tomales Bay, Marin County

#### Category 1 Benchmark Methodology

**Leases are issued by the Commission for private recreational facilities such as docks, piers, and buoys/mooring poles.** These facilities offer many of the same 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. In this manner, these privately owned facilities represent a substitute for a commercial marina berth/buoy. **Accordingly, the method of valuation used in estimating a fair return and a fair rental value is based on what an individual would pay for a similar substitute site in a commercial marina.** Since a Commission-leased site for a privately owned pier or dock is a reasonable substitute for a marina berth, a lessee occupying state land should pay a similar rate for the leased site as the state would receive for leasing the land to a commercial marina.

The current methodology for setting rent for berthing vessels at docks and piers occupying state-owned sovereign land is *based on the principle of substitution described above*. The first step in setting the Tomales Bay Berths Benchmark is to survey local marinas to determine their rental rates. Marinas usually rent their berths on a per-linear-foot basis, based on the length of the berth or vessel. For benchmark purposes, the average surveyed rental rate is used. The rate is multiplied by the average or typical berth length as indicated in the survey data. Based on these inputs, the annual gross income is calculated. For Category 1 benchmarks the State's rent is based on a 5 percent rate of return of this annual income, which represents a comparable fair market compensation rate for the use of State-owned sovereign land. The State's rent is then converted to a per-square foot basis using a table calculated by the California State Parks Division of Boating and Waterways 2005 publication titled "Layout and Design Guidelines for Marina Berthing Facilities" (DBW berthing publication). This publication provides formulas and tables for calculating the submerged land area needed to accommodate various sizes and layouts of berths in marinas. Among other variables, the formulas account for the berth length, berth layout (single or double),



and the type of vessel (powerboat or sailboat). The publication can be requested from the Department of Boating and Waterways [here](#).

### **Category 1 Tomales Bay Benchmarks**

The Commission has been using the Tomales Bay benchmarks since 2010. They were last updated in 2015, when the rates were set at \$0.114 per square foot for berths and \$125 per buoy.

**For determining the proposed new rental rates, the following summary describes the methodology;** more detailed information is included in Exhibit C. A total of four marinas and/or buoy fields in Tomales Bay were identified. However, due to the lack of comparable rental data information for three of the locations (Marconi Cove Marina, Inverness Yacht Club, and Lawson's Landing), the Tomales Bay Resort (previously Tomales Bay Lodge and Marina, and the Golden Hinde Marina) was the only marina located in Tomales Bay used in the analysis for this benchmark.

Because of the limited number of marinas in Tomales Bay, a survey was done of other nearby marinas outside of Tomales Bay that might be used in absence of the three marinas acknowledged above. Four nearby marinas with slips were also used: Spud Point Marina, Mason's Marina, and Porto Bodega in Bodega Bay, approximately 20 miles northwest; and the Petaluma Marina on the Petaluma River, approximately 24 miles northeast. Thus, a total of five commercial marinas with slips were used in the analysis of the current Tomales Bay benchmark.

These five marinas with berths reported a total of 652 berths available to the public, or an average of 130 berths per marina. The average occupancy was reported at 85 percent.

The survey found that berth sizes in Tomales Bay, Bodega Bay, and the Petaluma River ranged from 12 to 80 linear feet, **with an average of approximately 31 linear feet. Rent for berths is commonly expressed in terms of dollars per linear foot (per month). The survey data yielded an average rent for berths of \$6.20 per linear foot.**

The benchmark rental rate for berths is calculated by multiplying the average berth length by the average monthly rental rate. The product is then multiplied by 12 months to arrive at the gross annual income. **The gross annual income is multiplied by 5 percent to get the income attributable to the submerged land.** The income attributable to the submerged land is then divided by the amount of submerged land needed to accommodate the average berth length within a marina.

Using the DBW berthing publication described above, the submerged land area used in this benchmark analysis is based on a double berth layout (on the premise that it was the most economically efficient for the marina operator) and represents an average of the powerboat and sailboat berths.

From the tables in the publication, **a submerged area of 865 square feet is shown as being necessary to accommodate the 31-foot average slip length indicated by the survey.**

**Taking all the inputs into account, the proposed benchmark rental rate is calculated as follows:**

**31-foot average berth size x \$6.20/linear foot average berth rate = \$192.20/berth/month**

**\$192.20/berth x 12 months =**

**\$2,306/berth/year \$2,306 x 5 percent of**

**gross income = \$115.30 \$115.30 ÷ 865**

**square feet = \$0.133/square foot**

**PROPOSED BERTHS BENCHMARK RENTAL RATE = \$0.133/SQUARE FOOT** [NMA Comment: *This is the annual, not monthly rental rate*]

Other than the leases being issued by the Commission, there is no independent market for buoys in Tomales Bay. Therefore, the current minimum annual rent of \$140 is proposed to be applied per buoy. The minimum rent for a Recreational Use lease is set by California Code of Regulations, title 2, section 2003, subdivision (b), and as revised by Commission action on June 28, 2019 ([Item 92, June 28, 2019](#)).

**PROPOSED BUOYS BENCHMARK RENTAL RATE = \$140/BUOY**

The table below summarizes the comparison between the 2015 and 2020 benchmark rates (**Note by NMA – these are annual not monthly rates**).

*Figure 1. Tomales Bay Benchmarks*

Tomales Bay Benchmark	2015	2020 [NMA note : fee per year]
Category 1 Berths	\$0.114/square foot	\$0.133/square foot
Category 1 Buoys	\$125	\$140

**[NMA Comment: The entire report can be found here]:**

[https://sleprdwordpressstorage.blob.core.windows.net/wordpressdata/2020/12/12-17-20\\_28.pdf](https://sleprdwordpressstorage.blob.core.windows.net/wordpressdata/2020/12/12-17-20_28.pdf)

## **Exhibit 5**

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### **Outline of Concerns over Apparent Historic Discrimination by the City of Newport Beach against Mooring Holders**

Moorings on the State Public Tidelands in Newport Harbor have been in existence for over 100 years and have provided an important source of access for boating both within Newport Harbor, the California Coast, and the Pacific Ocean. The granting statutes enabling and allowing the City of Newport Beach, including but not limited to the Beacon Bay Bill disallow discrimination related to the administration of the tidelands among different uses both in the letter of the laws as well as the spirit of the law. This outline suggests discrimination over the last 20 years by the City Newport Beach as it relates to these 100-year-old moorings.

#### **A Few Examples of Apparent Ongoing Acts of Systematic Discrimination Against Mooring Permit Holders.**

##### **1. Killing Access to Moorings.**

Historically, shore moorings were readily available that provided access to offshore moorings. Over time the shore moorings were transferred to people who did not have offshore moorings which created the need for dinghy docks for dinghies and tenders to access the offshore moorings, similar to virtually every other harbor in California and the United States that has a substantial number of offshore moorings. However, for decades the City has consistently ignored requests to provide real access for in-water dingy docks for access to moorings. The City's consistent reply is there is no place available for such access. Yet at the same time, the City has found such areas and used them for other projects.

##### **2. Overcharging for the Costs to Administer Moorings.**

The City collects about 1.5 million dollars per year from off-shore moorings, when the cost to administer the moorings, in our view, may be less than \$300,000 per year (unless you allocate inappropriate costs related to the harbor). Note the mooring permit holder is required to maintain its buoy and equipment, so other than collecting fees and inquiring about boat insurance and other contact

information, very little costs are associated with the administration of moorings. Yet, over the last 20 years, the City may have collected over 20 million dollars in excess fees without creating a single in-water dinghy dock to provide reasonable access. A mooring without access is like the sound of one hand clapping. It's just a method of making the acquisition and use of a mooring unattractive to most people. The exception might be local residents who have home docks, local slips, access to friend's docks for access to offshore moorings.

### **3. Failing to Provide Access While Building Dock Facilities for Access to Restaurants and Businesses.**

While the City has claimed for decades “there is no space”, the City has built docks for short terms tie ups to benefit businesses such as restaurants. For example, this is true of Marina Park, (reported to have been built at a cost of 40 million dollars) which created a dock which appears to be 200 long to tie up for use of boaters going to the restaurant at Marina Park and for use of approximately 25 large boat slips (for boats over 40 feet) and 18 or more small boat slips. At the same time, not a single dock space was created for use of a motorized 9 to 10 foot dinghy for access to moorings (one 40 foot boat slip equals 8 in-water dinghy spaces). These slips, many of which are not used most of the year, are directly in front of the two biggest mooring fields. As a very minor concession, the City did allow “racks” for storage of a non-motorized rowboat, inflatable, or kayak, but these have to be lifted up, taken to the water to row out to a mooring, if the mooring holder is able enough to do so. These are nothing like real access by having a motorized electric or outboard dinghy in the water as provided for in virtually every other harbor with moorings).

### **4. Charging Fees that are 4 Times, or More, for Tidelands Used a Mooring Compared to What is Charged for All Other Uses.**

For the same amount of tidelands used by an offshore mooring, the City charges homeowners with docks  $\frac{1}{4}$  what it charges for an individual mooring. In addition, an offshore mooring is currently charged substantially more than the published rates charged by the City for almost all other uses, including commercial uses. At the same time, the City is now considering raising these rates so the discrimination will be up to 20 times more than what homeowners with docks pay, and 5 to 10 times more than what commercial users pay for the same amount of space. Put

another way, the other uses are charged far less for the use of the same amount of tidelands they use. In most cases these other uses are commercial uses, where the permit holder is making a profit. In general, the State is allowed to charge less for uses that are not commercial, not more.

As shown in the City's public posted rates, annual fees paid by restaurants with docks, marinas for releasing its slips, and homeowners with docks that sit on the same tidelands are charged far less than the annual fees set for mooring permit holders. Calculating rates based on the square foot of tidelands used is the standard method used by the State Land Commission when establishing the fair and non-discriminatory rates to be charged for use of tidelands, including offshore mooring in the state. Recent reports and appraisals from the State Lands Commission clearly demonstrate this is the proper methodology. Ironically, many people would argue that tidelands which touch the shore have a higher square foot value because of easy access when compared to offshore tidelands with limited access. As such, it could be fairly argued that the use of tidelands for offshore moorings should be charged even less than what is charged for tidelands that touch the shore, yet for the City of Newport Beach charges 5 to 10 times more for use of the offshore mooring tidelands.

**5. Attempting to Make Access to Moorings Dangerous and Inaccessible by Eliminating Space Needed to Get Onto and Off Moorings, while Proposing to Increase Space for Boats on Homeowner Docks.** Currently before the Coastal Commission is a proposal to crowd together boats in mooring fields (which make it much more difficult to use moorings) in the name of making "open water" views for homeowners, while at the same time not asking the Yacht Clubs who have mooring fields to bring their boats closer together. By way of background, the Yacht Club mooring fields use approximately twice the amount of tidelands space per boat than all the other public mooring fields. That's because these are "single point moorings" where a boat could swing in a 360-degree circle depending on the wind and tidal currents. However, no one, including myself and all other mooring field permittees that I know would ask these mooring fields to change to a different system that uses less of the tidelands.

Having noted the discrepancy and the fact that no one would consider asking the yacht clubs to put boats closer together, keeping the yacht clubs mooring configurations (just like keeping the other mooring field configurations, is important). Yacht clubs single point moorings are easier to get on and off and

allow for other uses such as small boat races within these single point fields. Both systems work well together. San Diego, for example, has both single point and double point moorings and both serve an important public purpose.

**6. Prohibiting the Rental of Moorings While Allowing the Rentals by Homeowner and Others.** If unoccupied the City is allowed to rent out an offshore mooring dock and collect a fee, they do not allow for the rental of similar tidelands used by homeowners, restaurants and others. The two uses are being treated differently, especially without any compensation to the mooring holders who paying their fee to the City for use of the tidelands when the mooring is not being used and rented to others, the City continues to collect the permit holder's fee and collects a fee from the visitor who's boat is tied to the mooring, and tied to the mooring hardware owned by the mooring permit holder (not by the City), including use of the buoy, chains and tackle owned 100% by the mooring permit holder. Not one penny is being reimbursed to the mooring holder who is and has been paying the fee for the use of the tidelands - the same tidelands the City is renting out to others.

This is not only a clear act of discrimination in the management of the tidelands, it is intentionally designed to keep mooring unoccupied. As noted below, at any given time there are 100 or more offshore mooring vacant for periods in excess of 30 days, and often for months and years.

**8. Claiming that the City is Attempting to Increase Access While Killing Access to the 100 Empty Moorings.** According to the Harbor Commissioner, at any given time there are approximately 100 vacant moorings. As noted above the City has the right to rent these out to both visitors coming in for a few days as well as for people seeking affordable places to keep and use boats. For over 20 years, the City could easily have increased use of these 100 empty moorings. However, the City has set the rental rates so high that the vacancies remain. While a few are rented the vast majority sit unused. The reason is obvious, the City intentionally sets the rental rates so high that most boaters are priced out of the market, putting rates as high as the cost of having a boat on a slip at a neighboring harbor.

The City has suggested that one reason for the vacancy is that they cannot offer a 3, 6, or 12 month lease, and that discourages the use of these 100 moorings. They claim that they cannot offer these longer-term leases because the mooring holder

has the right to put a boat on the mooring at any time, so the would-be long-term lessee is not interested if he or she can be asked to move on short notice. This explanation has no merit. First, most vacant moorings have been vacant for years and a simple inquiry can find out if there are any plans for occupancy, so while it might be a theoretical concern, most people will understand this is a remote risk in most cases. Second Commission in public stakeholder meetings, the Newport Mooring Association has proposed that the City ask vacant mooring holders if they would agree not to put a boat on a mooring for a certain period, such as 6 or 12 months in exchange for a relief of having to pay mooring fees during that time. Having presented the obvious solution, the Harbor Commission never even studied the proposal. This suggests that it is more important for the City to keep the water free of boats on moorings, and enhance some homeowner's harbor views, than it is to actually provide additional public use of these empty moorings.

Simply put, by over-charging for these 100 moorings, in addition to the other acts and omissions noted above, the City has shown a systematic attempt to keep moorings vacant and through various means drive the diverse group of mooring holders, including many protected minorities, out of the City.

### **Effect of Discrimination**

The discrimination is wrong and needs to stop. It violates plain decency as well as state and federal laws.

This discrimination in rates and charges violates the Beacon Bay Bill, often referenced by the City of Newport Beach as guiding its administration of the harbor, provides that:

**(d) In the management, conduct, operation, and control of the lands or 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**

What is more, without having to conduct any studies, it appears that offshore mooring holders are far more likely to live outside the City than homeowners with

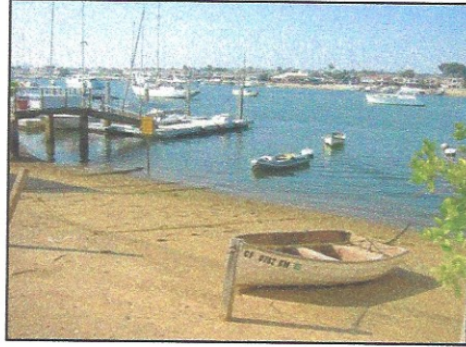
private docks and persons who rent expensive slip space for their yachts. When one combines the significant overcharges and discrimination charges now in existence, and the radical proposed increases further that discrimination, in addition to the many other ways mooring holders are treated equally, this raises the obvious question of whether the proposed increases are intentionally or unintentionally designed to keep people out of the harbor if they do not live in Newport Beach.

Even more concerning, without have to conduct any study, it would appear that the existing discriminatory policies and proposed increases do and will have a Disparate Impact on protected minorities and the City should double down on such policies.



## Exhibit 6 - City Policy 3.3.2-3 (LCP/CLU)

- 3.3.2-3.** Continue to provide shore moorings and offshore moorings as an important source of low-cost public access to the water and harbor.
- 3.3.2-4.** Provide anchorages in designated areas, which minimize interference with navigation and where shore access and support facilities are available.
- 3.3.2-5.** Continue to enforce the ordinances that require moored and docked vessels to be seaworthy and navigable and thereby preserve the positive image of the harbor and promote public use of the water.
- 3.3.2-6.** Protect, and where feasible, enhance and expand guest docks at public facilities, yacht clubs and at privately owned-marinas, restaurants and other appropriate locations.
- 3.3.2-7.** Protect, and where feasible, expand and enhance facilities and services for visiting vessels, including public mooring and docking facilities, dinghy docks, guest docks, club guest docks, pump-out stations and other features, through City, County, and private means.



11<sup>th</sup> Street boat launch and onshore moorings

### 3.3.3 Harbor Support Facilities

Harbor support facilities are uses, equipment, and vessels that provide repair, maintenance, new construction, parts and supplies, fueling, waste removal, cleaning, and related services to vessels berthed in, or visiting the harbor. Harbor support facilities are considered essential to maintaining a working harbor.

Increased environmental regulation and real estate price inflation in coastal communities have impacted a number of harbor support businesses. Those businesses that do not have to be on the water have moved to inland locations. Those that are more water dependent have been involved in land use conflicts with residential and other land uses. Newport Beach has used land use controls as the primary method to provide for the continuation of harbor support uses and minimize land use conflicts. However, additional strategies and incentives may be necessary to protect these facilities.