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Written Comments

July 9, 2024, City Council Agenda Comments

The following comments on items on the Newport Beach City Council agenda are submitted by:
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Item SS3. Implementation of the Housing Element and Charter Section 423

I will be waiting with great anticipation for this item, for which there will apparently be no further advance information other than the brief agenda announcement.

I have long been concerned with the possibility a failed Charter Section 423 vote to enable state-required housing could lead to litigation and the section's invalidation. As a result, when running (unsuccessfully) for City Council in 2022, I suggested the Council might consider holding an advisory vote on two possible alternative implementations, with an understanding it would adopt the preferred one, even if it won less than a majority of votes. I have since suggested the Council consider invoking the final sentence of Section 423, which has always said "*This section shall not apply if state or federal law precludes a vote of the voters on the amendment*," and implement the housing with no vote at all.

But I no longer think either of those options is defensible.

For better or worse, Section 423 is the law Council and staff are required to follow (and are sworn to defend). An advisory vote with no final vote is simply incompatible with it. And a claim that state law "precludes" a vote on the staff's proposed 6th Cycle Housing Element Implementation Program is not credible. Most pointedly, the state's Department of Housing and Community Development certified the Housing Element with full disclosure of Charter Section 423 and a promise, on page 4-3, that as an implementing action of Housing Policy 1.1, a vote would be held in March 2024, and, if it failed, a revised element would be prepared followed by a second vote. A vote could hardly be said to be precluded by a state that has certified a plan to hold not one, but two.

Moreover, other cities have held voter-required votes on their RHNA implementation plans. Chino held one, successfully, on its June 7, 2022, ballot. Yorba Linda held one, unsuccessfully, in 2022, with plans for a vote on a new, more citizen-driven plan, consistent with a revised Housing Element, in November. Given the number of California cities with voter-approval requirements, there are undoubtedly many more. Redondo Beach, for example, apparently plans to put a measure on their March 2025 municipal ballot, since they received a letter from HCD warning that would be too late to meet the February 12, 2025, statutory deadline to complete 6th Cycle rezoning in the SCAG region, which "may" lead to revocation of their prior finding that its Housing Element was in substantial compliance with state law (however, it should be noted that in this cycle, and despite numerous warnings, it seems only two cities - Portola Valley and Saint Helena have actually had a prior finding of compliance revoked, and Saint Helena's compliant status was rapidly restored).

It might be argued that the state requires some minimal RHNA compliance, so the Council could adopt the minimally-required plan without need for a Section 423 approval. But the problem is, there is no single minimally-compliant plan since there would still be discretion as to where the minimal housing units went, so a vote on the options would not be precluded.

That comes, then, to how the measure will be presented.

Unfortunately, Newport Beach has relatively little experience with Section 423 votes.

As the late Phil Arst, who I believe was one of the principal authors of Section 423, explained starting at 2:45:40 in the video from the July 25, 2006, Council meeting, Section 423 is focused on individual neighborhoods, defined as statistical areas, and the impacts to each of them is expected to be explained and "*submitted to a public vote as a separate and distinct ballot measure*."

As I noted in a non-agenda written comment to the last Council meeting, staff's proposal for housing assigned to fluid "focus area overlays" that don't coincide with the City's previously-defined statistical areas is quite alien to Section 423.

All of this suggests the City may not be able to mount a successful ballot measure allowing it to complete its 6th Cycle rezoning by February 12, 2025. In that case, I believe developers could proceed as if the rezoning promised in the Housing Element had happened, and, in the unlikely event the City were found out of compliance with state law, the delay might even subject Newport Beach to the "Builder's Remedy." In any of these scenarios, it seems critically important to move forward, before February 12, 2025, with adopting as stringent as possible a set of Objective Design Standards for multi-unit residential development, for according to a 2022 review by Professor Christopher Elmendorf of UCLA (a strong proponent of state housing policy), they could, at least as of 2022, apply to and constrain such developments.

I expect to have more to say after staff has presented their thoughts.

Item 1. Minutes for the June 25, 2024 City Council Meeting

The passages shown in *italics* below are from the draft minutes with suggested corrections shown in ***~~strikeout~~*** ***underline*** format. The page numbers refer to Volume 66.

> **Page 124**, Item X, paragraph 2: "*Luca Shakoori, policy intern from Supervisor Katrina Foley's office, provided an update that highlighted the provisions in the FY 2024-25 approved budget, noise concerns and overall improvements at John Wayne Airport, a community marine* ***~~flair~~*** ***flare*** *disposing event, climate action plan engagement efforts, and the OC Parks summer concerts and sunset cinema film series*."

Item 3. Resolution No. 2024-44: Revising Certain Rents Within the Schedule of Rents, Fines and Fees

While it is good to see staff recommending the correction of certain erroneously-adopted tidelands rents, the Council should be aware there is another separately-posted, annually-adjusted schedule of rents for commercial tidelands permits and leases, dictated principally by City Council Resolutions No. 2017-49 and 2018-09. To the best of my knowledge, none of those appear in the adopted Schedule of Rents, Fines and Fees.

It is unclear to me why some tidelands rents should be in the SRFF and other very similar ones not. Is this an additional error that needs to be corrected?

Item 5. Approve a Professional Services Agreement with Chambers Group, Inc. to Monitor and Maintain the Balboa Peninsula Restoration Project, Contract No. 8814-3

Although I don't doubt the report's statement (page 5-2) that staff "found the fee reasonable and consistent with maintenance costs for other restoration projects." Yet some of the rates shown on page 5-50 seem high.

For example, Chambers says it will be charging the City from $53 to $84/hr (plus 3% annual increases) for the services of various classes of "Landscape Maintenance Laborer." That seems considerably more than what the City pays for similar services elsewhere in the City. For example, on page 66 of Item 17 from November 30, 2021, for extra park and facility landscape maintenance, which includes "maintenance of certain natural mitigation sites, such as those located in Big Canyon Park," the City pays Merchants Landscape Services $32/hr for "Landscape Maintenance Leadwork" and $30/hr for a "Detailed Maintenance Worker." Similarly, from the last page of Item 7 from June 27, 2023, for median and roadway landscape maintenance the City pays BrightView Landscape Services $30/hr for a "Lead Enhanced Landscape Maintenance Worker." And on page 50 of Item 9 from October 24, 2023, for on-call maintenance of landscaping in the Civic Center complex and park, the City pays Merchants $30/hr for a "Detailed Maintenance Worker."

Does Chambers actually pay its landscape laborers so much more? Do they have unusual specialized skills? Or does the charge include some kind of overhead not included in the much higher fees charged for the supervising biologists?

Item 6. Approve a Professional Services Agreement with Chambers Group, Inc. to Monitor and Maintain San Diego Creek Trash Interceptor Project Landscaping, Contract No. 7127

Same comments as on Item 5, since the billing rates shown on page 49 appear to be the same.

Item 7. Award Professional Services Agreement for Inspection Services with Willdan Engineering and TKE Engineering Inc. for On-Call Public Works Inspection Services

If the inspection workload exceeds staff's normal capability by an average of "*75 hours of overtime per pay period*" and this situation "*is expected to continue for the foreseeable future*," a better explanation might be in order of why outsourcing is being recommended rather than increasing City staffing.

Is this because the need for inspectors is episodic and not constant?

Item 9. Award of Contracts to Eide Bailly LLP and The Pun Group LLP for Internal Audit Services

It is good to see the disclosure of former City employees who work for the recommended firms and the assurance they will not be working on or benefitting from the proposed contracts.

Item 11. Appointment to the Building and Fire Board of Appeals

Given its members' specialized qualifications and rare meetings, the Building and Fire Board of Appeals is an outlier among the City's boards, commissions and committees.

In the nine years since Saum Noor was appointed to fill out a partial term on July 14, 2015, the scant archived records available suggest the Board of Appeals has met only nine times, the last on October 19, 2022. In other words, in two full four-year terms an appointee to this board prepares for and participates in fewer meetings than most appointees would face in a single year.

Nonetheless, at least as far back as 1977, the Newport Beach City Council has expressed a wish, articulated in former Policy A-4 (and now Policy A-2) to "*To afford the maximum opportunity for citizen service*" on all boards, commissions and committees. To achieve this, it has long been limited appointments to a maximum of two consecutive terms. Indeed, until the July 12, 1999, revision, appointments were made with an understanding that a second consecutive appointment (and no more than that) would be made *only* to "*recognize and extend an unusual contribution by the incumbent*." The Council has also, less strongly, expressed a wish to make appointments only when it has at least two applicants to choose between for each opening.

Against that backdrop, the present seemingly straightforward item seems not only internally inconsistent, but arguably unwise and unnecessary.

It is internally inconsistent because it says the Council would need to waive the two-term limit to allow appointment to a third four-year term, but at the end of that, no further waiver would be needed for appointment to a fourth term.[1]

It is unwise because it asks the Council to ignore the established norms of limiting appointments to at the very most two back-to-back terms, and the less rigid goal of making appointments only when the Council has at least two applicants to choose between.

It is unnecessary because although Mr. Noor's "term" has expired, under our City Charter, his tenure on the board continues in the absence of Council action to replace him: as City Charter Section 702 says of the Council-appointed boards and commissions, "***The members thereof shall serve*** *for a term of four years and* ***until their respective successors are appointed and qualified***.

To be sure, it is lamentable that in recent years so few applications have been received as to lead to the recommendations on June 11 and June 25 to waive Council Policy A-2 and consider a single applicant for the two Board of Appeals positions that opened on July 1.

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[1] The Clerk's statement on page 11-2 that "*If the City Council waives the portion of City Council Policy A-2 and reappoints Mr. Nour to a third term, he would also be eligible to serve an additional four-year term after the 2024-2028 term expires*" seems to be based on a mistaken belief that Mr. Nour has been "off the Board" since July 1, so a new term starting July 9 or later would not be consecutive with his last term ending June 30 and hence make him eligible for two consecutive new terms. However, even if Mr. Nour were to create a true vacancy by resigning and later seeking reappointment to the seat he had vacated, despite the late appointment the vacant four-year term he would be seeking to fill would be a term running from July 1, 2024, to June 30, 2028, and be consecutive to his previous two.

However, despite Mr. Nour being an extremely well-qualified candidate who has been an excellent board member and asked probing questions, the present recommendation seems to compound the problem by asking the Council to waive not only the more-than-one nominee rule, but also the two-term limit.

In summary, **since Mr. Nour continues to be a Board of Appeals member until the Council appoints a successor, there is no need to "reappoint" him. Doing so simply, and unnecessarily, closes the opportunity for others to be appointed to the position during the next four years**.

Finally, it might be noted that although the application provided as Attachment A (agenda packet page 11-3) is stamped as "Received June 12, 2024," it is a copy of a more than four-year old form, signed on April 7, 2020, leaving the Council uncertain if it would be making an appointment based on current information. That seems another reason to not take unnecessary action at this time.

Item XVI. PUBLIC COMMENTS ON NON-AGENDA ITEMS

Council members and the public may have noticed they have had less time than normal to review the current 1009-page agenda packet. This is because the custom, for a number of years, has been for the packet to be released at 4:00 p.m. on the Thursday before the meeting, but that Thursday this year fell on the 4th of July holiday, and agenda was not released until near noon on Friday. The agenda could have been posted as late as 4:00 p.m. on Saturday, July 6, and still complied with the Brown Act's 72-hour noticing requirement (and the supporting packet materials released even closer to the meeting).

What the Council and public may not realize is that for many years, Council Policy A-6 set a deadline for release of the packet. However, when Policy A-6 was folded into Policy A-1 in 2017, the deadline was omitted. It is unclear if the omission was intentional or inadvertent.

The Council may wish to consider reinstating a deadline to make the timing of the postings more predictable.

For reference, when the Council met on Mondays, as it did for many years, Policy A-6 required the agenda be made available to the Council on the preceding Wednesday, with supporting materials available to the public by no later than 8:30 a.m. on the preceding Thursday. Those deadlines were retained when the Council meetings moved to Tuesday, starting with the 2000 version. However, after discussion as Item SS 2 on February 8, 2011, and Item 13 on February 22, 2011, the 2011 version relaxed them to making the agenda available to the Council on Thursday and, with supporting materials, to the public no later than 3:30 p.m. on Friday (over the objections of the Central Newport Association). Those were the deadlines omitted in 2017. While Policy A-6 never explicitly detailed how holidays should be handled, a "no later than requirement" implies postings could be made earlier due to a holiday, but not later.

At the moment, the expectation that full Council agenda packets will be available by 4:00 p.m. on Thursday appears to be no more than an informal rule adopted by the City Clerk.

For comparison, Irvine Municipal Code Sec. 1-15-107 requires all their city-related agendas to be posted at least seven days before the meeting, with staff expected, but not required, to make supporting materials available by the seven day deadline.

Item 12. Resolution No. 2024-45: Intent to Override Orange County Airport Land Use Commission's Determination of Inconsistency for the Residences at 1600 Dove Street (PA2022-0297)

Regarding the issue before the Council (whether it should override the ALUC), I have less strong feelings. As I have previously commented, a finding that new housing in high noise areas is compatible with state goals undermines the City's credibility when it seeks relief for existing residents facing the same or lesser airport noise impacts.

As indicated in the proposed resolution, on page 12-12, the subject site is located in the 60 to 65 dBA CNEL planning contours of both the AELUP and the City's General Plan Noise Element. However, I am unaware of any measurements revealing what the actual noise levels at the site currently are. There are no permanent noise monitors near its location, but the most recent Annual Noise Contours available from JWA's Access and Noise Office predict it is currently outside the 60 dBA CNEL impact area. However, as recognized by the FAA in its recent, and still not completed, Noise Policy Review, CNEL, alone, is not always a good indicator of aviation impacts.

I did not attend the June 20, 2024, ALUC hearing, but it appears from the letter on the last page of the present staff report that the commissioners were concerned about both noise and safety impacts from the many small aircraft and flight school operations turning directly over the project site at relatively low altitude.

The other concern, alluded to in the bullet at the top of page 12-6 is that repeated overrides of ALUC concerns may result in the City being deemed an "inconsistent agency," which could cause problems with regard to the promise the City made to remain consistent in its 2006 Cooperative ("Spheres") Agreement with the County, which protects the City from runway expansion. I believe the ALUC's understanding has been that any local agency that overrides them is, by definition, a "consistent agency" if it does so by following the procedure specified in Public Utilities Code Section 21676. However, the Council would be declaring consistency "*with the purposes of this article stated in Section 21670*,"[2] not with the AELUP. It would, therefore, seem an open question whether actions like the presently contemplated one violate the promise to become and remain "*a "consistent agency" for purposes of the AELUP*" as stated in the Agreement.

As to the project itself, which, as the staff report emphasizes, is not currently before the Council, it raises questions with regard to the Housing Element Implementation and the study session item earlier on this agenda. In particular, as the report indicates, it is "Opportunity Site 80" in the City's certified 6th Cycle Housing Element. However, the developer appears to be seeking

[2] Although the staff report and proposed resolution correctly quote the purposes stated in Subsection 21670(a)(2), they do not address the finding in Subsection 21670(a)(1) that " *It is in the public interest … to prevent the creation of new noise and safety problems*" – which most new development close to the airport does.

entitlements without reliance on that implementation. So should this, along with its bonus units, count as a "pipeline project" reducing the need for 6th Cycle rezones?

In addition, the proposed development seems inconsistent with Table B-12 (Airport Area Sites Inventory), which predicted Site 80 would redevelop during the 6th Cycle with 37 low/very low, 12 moderate and 75 above moderate income units (not counting bonus units). While, according to page 12-116, the proposed number of base units (139) will be slightly higher than that prediction, according to page 12-121, only 28 very low income and no low or moderate income units are being proposed. So, it will fall short by 21 affordable units.

Item 13. Ordinance No. 2024-15, Resolution Nos. 2024-46 and 2024-47: Harbor Commission Recommendations and Alternative Recommendations for Rental Rates for Moorings

When Newport Beach voters added the Harbor Commission to the City Charter by approving Measure Z in 2020, it was with an understanding, according to the new Section 713 it created, that the Commission would "*Advise the City Council on all matters relating to proposed harbor improvements and the use of Newport Harbor*" as well as "*all matters pertaining to the use, control, operation, promotion and regulation of all vessels within Newport Harbor*."

With this item, the Council is being asked to make a decision regarding a staff proposal[3] radically different from anything the Harbor Commission has ever considered or proposed. Although it seems an interesting proposal, and I feel it, or something like it, deserves to be considered as an alternative to the initial Harbor Commission proposal, I also believe Section 713 requires the Council, before acting, to refer it back to the Commission for their review and advice.

Even better, I think the Council should ask the Commission to review and advise on all tideland rents, together, and not advance these one-off proposals. Tellingly, the staff report, on page 13-6, says "*Community Development Department staff reviewed the Harbor Commission's recommendations and the rates established for residential piers under Resolution No. 2015-10 and developed alternative recommendations for the City Council to consider.*" Yet it does not further mention residential piers rates or how its examination of Resolution No. 2015-10 influenced its proposal. Perhaps having noticed a privileged class of tidelands users who pay nothing for the water occupied by their vessels and who are shielded from any annual increase greater than 2% in the token rent they pay for their piers, staff decided it would be appropriate to create a new privileged class of private mooring tackle owners who would be similarly shielded from increases while new tidelands users of identically-situated City-maintained mooring tackle would be asked to pay greatly more?

[3] Is this really a staff proposal? Or is it the product of one of the shadowy topical Council working groups that appear without public knowledge?

I do not see how this can be justified,[4] which is still more reason to refer the staff proposal to the Commission for their review, adjustments and advice.

I do not think the Harbor Commission proposal is any more ready for action, for as the mooring permittees have loudly made known, it exacerbates the already large and unfair disparity between rents charged of mooring tackle versus pier owners.

Should the Council choose to proceed, it should realize the statement at the bottom of page 13-3 that the 2010 Resolution) (Attachment E) proposed an increase from $1.67 per linear foot per year to $36.45 per linear foot per month is a typo. As shown at the bottom of page 4 of the 2010 staff report, the then-current rate for offshore moorings was $20 per linear foot per year, which was about 5% of the new Newport Harbor Marina Index. The proposal was to go to 14%, which would have raised the annual rent for a 40-foot mooring from $800 to $2,449 – a 3-times increase, not a 22-times increase.

As to the proposed Resolution No. 2024-47 (Attachment D), to enact staff's alternative fee structure, it is curious the "Whereas" clauses (which seem copied from the other proposed resolution, Attachment B) say the Council wishes to consider the Harbor Commission's recommendation, when it is actually considering a staff recommendation (of which no mention is made).

Beyond that, at the bottom of page 13-42, I believe more thought may need to be given to the wording of Section 1.a (which has been posted in a non-machine-readable image format so I have to retype it). It was probably meant to say "*The mooring rent established by Resolution No. 2016-17 shall continue to apply to an existing mooring permittee issued a mooring permit pursuant to Section 17.60.040 (Mooring Permits) of the NBMC* ~~***that has not been transferred as of***~~ ***prior to*** *the effective date of this resolution*" (or better: "... ***before August 22, 2024***"). The following Section 1.b deals with permits issued between August 22, 2024, and August 21, 2028. The revision is necessary both to harmonize the two sections, and essentially all existing permits would have "transferred" (that is, been the subject of a transfer) "as of" (that is, by the time of) the resolution.

Similarly, in Section 1.b there are what seem to be superfluous references to NBMC Sections 17.60.040(B)(3) and 17.60.040(E). Those could be deleted as they have nothing (as far I can tell) to do with the conversion of a permit to a license.

As to the proposed Ordinance 2024-15, looking at the redline (Attachment K), the proposed changes on pages 13-418 and 13-419 to NBMC Sec. 17.60.020 seem unnecessary, for, as best I can tell, there are no licenses issued by Public Works.

Also on page 13-419, near the end of the first sentence of the proposed Section 17.60.040.A, it should say "... *without first having obtained a mooring permit* ***or license*** *from the* …" Otherwise,

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[4] Since users of privately-owned versus city-owned mooring tackle are asking to use an identically-sized patch of state tidelands, the only difference I can see in the rents should be the cost of maintenance, which should be an easily quantifiable amount, not something arbitrary.

this code would make it illegal for anyone to tie to or use a licensed mooring without also obtaining a permit (for which none will be available after four years).

It might also be said the process of mandatory conversion from permit to license does not seem to have been fully thought through. A permittee owns the tackle (the purchase of which is claimed to be the justification for the very large cost – $1,000 per foot and up – to acquire a prior owner's permit), but the City owns the tackle of a licensed mooring. Will the City purchase the tackle? Is the prior permittee forced to forfeit it? I don't see any answers.

The treatment of the yacht clubs and LICA is also unclear. The ordinance suggests they will remain permittees, meaning they will be responsible for owning and maintaining their tackle. The staff report, on page 13-8, says (erroneously?) that they "*are subject to the **onshore** mooring rates established in Resolution No. 2016-17 until August 31, 2032*," but the fee resolution (page 13-43) omits the word "onshore" (which does not make sense for BYB and NHYC, anyway, since Resolution No. 2016-17 provides no "onshore" rate for "offshore" moorings). But even though they will apparently have to maintain their own tackle, the resolution says that after August 31, 2032, "*the mooring permit will convert to a mooring license and **be** subject to the short-term mooring rates established in Resolution No. 2023-62*," which is to say they will pay the license rents. But the license rents include a premium to cover the City's cost of providing and maintaining the tackle. Why would the clubs and LICA be expected to pay that premium if they have to provide their own tackle?