

June 11, 2019, City Council Consent Calendar Comments

The following comments on items on the Newport Beach City Council [agenda](#) are submitted by:

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Item 1. Minutes for the May 28, 2019 City Council Meeting

The corrections suggested below in ~~strikeout~~ underline format are to the passages from the [draft minutes](#) shown in *italics*. The page numbers refer to Volume 64.

Page 107, Item SS2 (announcement of conflicts on CIP), first bullet: “*Council Member Avery: Balboa Peninsula Crosswalks Improvements Phase II and Balboa Boulevard Pedestrian Crossing Phase II projects due to real property interests*”

[The [video](#) (at 12:25) confirms this is what Council Member Avery read from the City Attorney’s script, but from the PowerPoint slides, I suspect the reference was to Phase “I” and “II” (not “II” and “II”) of the same project, referred to as Projects 18T03 and 19T11, both reported on page 37 of the [proposed CIP budget](#). See [Slide 4](#) (Completed / Near Completion: “Balboa Peninsula Ped Crossings”) and [Slide 7](#) (In Design: “Balboa Blvd Ped Crossings Ph 2”)]

Page 107, last paragraph: “*Public Works Director Webb, Acting City Engineer Sinacori, and Administrative Manager Copeland utilized a PowerPoint presentation ...*”

Page 114, Item XVI, paragraph 5: “Susan ~~Dveraek~~ Dvorak expressed concerns ...”

Page 114, Item XVI, paragraph 6: “Pat ~~Vanness~~ Banas spoke ...”

Page 114, Item XVI, paragraph 7: “~~An unidentified speaker~~ Peggy Palmer discussed the issues she is having with a construction project next to her home, ...” [see [video](#) at 2:42:50; Ms. Palmer, being well known to the Council, forgot to mention her name, but it seems unlikely she intended to speak anonymously.]

Page 115, in “public hearing” section, paragraph 2, line 3: “*size and length of this dock, the ~~precedence~~ precedent it would set if permitted, the possibility of a large boat*”

Item 3. Ordinance No. 2019-9: Adoption of an Ordinance Restricting Construction Related Noise on Saturday and Posting of a Project Information Sign for Construction Projects in High-Density Areas

I commented on this ordinance when it was introduced as Item 3 on May 28. Since nothing was changed at first reading, all those concerns remain valid.

From the May 28 minutes, the Council’s rationale for confining the ordinance to a mapped area of the City was that it was neither needed nor desired in gated areas with strong homeowners associations. Yet, as enacted, the ordinance applies to gated communities with strong HOA’s (Bayshores, Bay Island, Harbor Island, etc.) while providing no relief at all to vast areas without gates on HOA’s (essentially everything west of the Upper Bay, plus Santa Ana Heights. I

continue to be unable to understand the harm that would be done by requiring the posting of contact information on the already-required construction fences in those areas.

Item 4. Resolution No. 2019-48: Approving the Proposed Residential Dock Reconstruction Project at 939 Via Lido Soud

It's possible some of the Council members who voted to approve this might want to reconsider their vote as some misleading statements were made at the hearing.

In particular, the Conzelman's may have created the impression that when they purchased their home a few years ago, they were assured they could, by right, build a dock of the sort being proposed, but that [Council Policy H-1](#) had since been changed without their knowledge. Administrative Manager Miller may have seemed to confirm this by saying that, in some areas, Policy H-1 had formerly allowed docks to extend up to 20 feet beyond the pierhead line, but now all extensions beyond the pierhead line need Harbor Commission review subject to the new criteria. What Mr. Miller was referring to was the ["west" side of Lido Isle](#) (the straight part with sandy beaches facing Marina Park), between U.S. Bulkhead Stations 172 and 174, where the former Policy H-1 (see the [2008](#) and [2004](#) versions) did indeed allow 20-foot extensions out to the project line. But the present property is not in that section, and **Policy H-1 has never allowed construction beyond the pierhead line at this location**, or anywhere else on Lido Isle (other than between Stations 172 and 174). As Mr. Miller tried to explain, the existing dock, extending several feet beyond the pierhead line, had not been constructed in conformity with the approved plans.

Although it may not be completely relevant, since the newly approved dock could go to new owners with different intentions, the Council should be aware they were presented with testimony about the reason for wanting the oversized dock that conflicted with what the Harbor Commission had been told. As the draft minutes indicate, the applicant assured the Council *"they **do not intend to dock a large boat** as it impedes their view."* But when the same matter was before the Harbor Commission on February 13, the same person told the Commission he wanted to reconfigure the dock so it *"could accommodate as many Harbor 20s as possible for regattas, and **could accommodate his wife's dream boat**."* Later the dock builder *"reported **the proposed vessel's overall length is 79 feet**."* (per Harbor Commission [minutes](#), pages [3](#) and [4](#) – which were in the staff report, but possibly overlooked).

Regarding the proposed resolution:

1. On page 4-5, in the fourth "Whereas," the statement *"that the **gangway and** reconfigured U-shape float (currently permitted to extend up to the pierhead line) would extend 16 feet beyond the pierhead line;"* appears to be incorrect with regard to *"the gangway and"* and those words should probably be deleted. The gangway connects to shore, and does not extend to, let alone beyond, the pierhead line.
2. On page 4-6, in the first "Whereas," it is not clear why it says *"on **or about** February 13, 2019,"* for the Harbor Commission hearing date, since the date is quite certain. The words *"or about"* sound needlessly evasive and should probably be deleted (with same

comment regarding the third “Whereas” on that page). In line 5 of the first “Whereas,” the reference to “NBMC” does not explain what code section was used for noticing, and it should probably be inserted since it is not obvious from the context.

3. On page 4-7, in Section 1 (the CEQA determination), the increase from 1,287 square feet to 1,765 square feet of overwater coverage represents a 37% expansion. It is not clear how staff expects the Council to be able to find a 37% increase to be “*negligible or no expansion*” (as is needed for the first cited exemption to apply). Indeed the need (or lack of need) for such an expansion is likely to be an issue for the Coastal Commission.
4. In Section 2, the resolution, oddly, doesn’t quote the required findings but paraphrases and sometimes truncates them.
 - a. In the case of 2.A, the resolution indicates deviations from the Design Standards are allowed in the event of “*practical difficulties*,” but does not explain what the practical difficulties are in this case.
 - b. In addition, as seems increasingly to be the case with variance requests presented to the Planning Commission, the “facts” in support of the findings are marshaled in such a way as to imply the decision maker has no responsibility to use their independent judgment as to whether the proposal might be problematic, but instead has a positive obligation to approve the deviation unless a member of the public is able to supply irrefutable evidence that a required finding cannot be met.
 - c. However that may be, as best I can tell, Section 2 completely, and without explanation, fails to address the required finding of NBMC Section 17.50.040(B)(3). Namely, that the proposal conforms “*to the policies and regulations of the certified Local Coastal Program*.”

Item 6. Resolution No. 2019-50: Adopting a Resolution Pursuant to Labor Code Section 3600.2; Workers’ Compensation

The description of this item on the agenda, which simply repeats the above title’s statement that it involves adopting a resolution related to a Labor Code section having to do with workers’ compensation, is not particularly informative.

The staff report adequately mentions and describes [AB-1749](#) (“Workers’ compensation: off-duty peace officer”), which enacted the new [Labor Code Section 3600.2](#), but does not explain it was prompted by the Orange County Board of Supervisors’ denial (based on legal advice from their counsel that they had no authority to grant them) of claims by off-duty Sheriff’s Deputies for injuries sustained while allegedly aiding victims of the tragic October 1, 2017, mass shooting in Las Vegas.

According to the staff report, the present resolution would *allow* the City to grant a claim under similar circumstances. And despite AB-1749’s author’s belief he was simply re-stating existing law, under the new EIA rules the existence of such a resolution is now apparently *necessary* for

that agency to assist in paying. But it apparently, as with existing law, does not *commit* the City to granting such claims.

Given that history, it might have been helpful to disclose if Newport Beach has previously honored any workers' compensation claims in connection with the October 2017 tragedy, or any other out-of-state incidents.

Item 11. Resolution No. 2019-53: Formation of Ad Hoc Committee on Business Improvement Districts

It is good to see this committee/"working group" being formally and publicly created by the Council, rather than appearing out of the blue by staff appointment (as has happened in the past, most recently, with various aviation-related committees).

In that connection, although the staff report refers to this ad hoc committee as consisting of "two Council members **and** City staff," it is presumably understood that the unnamed City staff people are not really members of the committee, but simply resources available to assist the two committee members in their research. If any non-Council-members **were** part of the committee and had any say in its recommendation back to the Council, then the Brown Act would require all the committee's discussions to be noticed and open to the public.

Regarding the substance of the committee's work, I'm not sure who they plan to talk to, but I think it's important to realize most of the City's BID's evolved out of existing private organizations that had experienced difficulty raising enough private funds to sustain themselves. To keep the group going, a small group of enthusiasts then turns to the government to impose involuntary dues on prospective members, with promises the groups will be self-sustaining with no drain on public resources. But then they eventually seek a government "match" to the involuntary contributions, and having established that as a "right," may even evolve back, as has happened with Balboa Island and Balboa Village, into private organizations totally funded by the government "match" with no member contributions at all. That model, it seems to me, is not a particularly good or democratic one.

Item 15. Tentative Agreement with the Part Time Employees Association of Newport Beach (PTEANB)

The staff report provides no explanation for why the negotiations with this group weren't started until after the previous agreement with them had expired. That said, it is good to see it involves no retroactive raises.

The staff report is less clear about what effect approving the MOU with the 55 represented employees will have on the City's relationship with the additional 208 part-time staff who are not represented by the group.

It also does not explain the significance of page 15-16 where the tentative agreement has been signed by eight unidentified people, but not by the one PTEANB member whose signature seems to be needed on page 15-15.

Regarding the substance of the agreement, it is a little disturbing to see the boilerplate statement under “B” on page 15-5 (apparently common to all the City’s MOU’s) that there may be “*decisional or statutory law*” that allows agreements like this to prevail over provisions of the City Charter. Given that [Article XI, Section 5\(b\)](#) of the California Constitution gives charter cities “plenary” (which means “absolute”) authority to set the compensation of their employees, it would be good to know what laws those are that allow a council to set compensation contrary to its charter.

Item 16. Tentative Agreement with the Newport Beach Fire Management Association (NBFMA)

It is very good to see an agreement that has been reached before the old one expired, and that involves no retroactive terms.

Item 17. General Liability Third Party Administrator - Approval of Professional Services Agreement with AdminSure, Inc.

It is good to see staff concluding from the prescribed procurement process that someone other than the present contractor is not only better qualified to do the work, but also cheaper (at least for the new contract period).

The staff report might have acknowledged, however, that AdminSure *is* (and has been since 2014) the City’s current incumbent on another contract ([C-5976](#)), for worker’s compensation claims. It might also have indicated how much the City is currently paying for the same services (\$537,805 plus CPI for the five-year term of [C-3366](#)).

Item 19. Appointments to the Aviation Committee

It is a continuing mystery why one of the deal points in the Newport Coast annexation was that residents there would have a special seat reserved for them on the Aviation Committee. Did residents in Newport Coast want to be sure the City wouldn’t push too hard for re-use of the El Toro Marine Air Station (fearing it might have affected them more than JWA)? Or was there some other reason? In any event, it now has the curious effect that District 7, the district with arguably the least impact from JWA, has the greatest representation on the Aviation Committee.

Regarding the other appointments, as City staff is undoubtedly aware, unlike the [Airport Working Group](#) and [Stop Polluting Our Newport](#), the name “Citizens Against Airport Noise and Pollution” has not been found among legal entity [registrations](#) filed with the California Secretary of State [through](#) June 4.

I continue to object to having seats reserved for “*The President ... or his/her designee*” of any of these groups. My reasons are these:

1. Although it may not be technically prohibited by the “Maddy Act” (Cal. [Gov. Code Secs. 54970 et seq.](#)), it is certainly contrary to the concept that local government citizen appointments should be open to enough people to make them worth posting. Posting

notice of the opportunity to serve in a position for which a single person qualifies seems rather pointless (indeed, for that reason, I don't think these citizen-appointee positions were actually ever posted or advertised).

2. Requiring membership in a private organization as a pre-requisite for government service is contrary to my notions of civics.
3. In the event the designated President chooses not to serve, giving a person unconnected with the government the power to choose who will fill a government position is also contrary to my notions of civics.

Item 20. Board and Commission Scheduled Vacancies - Confirmation of Nominees

In commenting on this normally routine item, it is difficult to know where to begin. **The recommended actions ask the Council to commit two violations of the City Charter, with one of those supported by written testimony developed in violation of the Brown Act.**

I would start, however, by wondering how many of those being considered for appointment have ever bothered to attend a meeting of the body they are applying for, let alone having contributed anything to its deliberations, orally or in writing? Of the current crop of applicants, only Renee West, a candidate for the Harbor Commission, cites prior attendance at its meetings as a qualification (although I don't recall her speaking). And I recall Ash Kumra attending, candidate for the Board of Library Trustees, attending one meeting (again, without saying anything, as best I can recall) when he thought he might be appointed a year or two ago.

It is probably vain to note I have had an application in continuously for service on the Board of Library Trustees, and attended and participated in nearly all their meetings, since 2009. And have attended and participated in nearly all the Planning Commission meetings since 2011 (and had an application in continuously since an unscheduled opening developed in later 2011). Yet am evidently not considered a qualified candidate for either.

Board of Library Trustees

First, it might be noted that in nominating and appointing Barbara Glabman, who is currently completing the second year of her [2017 appointment](#) to the City Arts Commission, the Council would be creating yet another vacancy on the latter commission, which the Ad Hoc Appointments Committee was already unable to find qualified applicants for. Also, although there is no Council policy prohibiting citizens from seeking appointment to another position before completing the service they previously committed to, it does not seem like something the Council would want to encourage. To be fair, given the Council's penchant for reappointing incumbents, the current [BCC Roster](#) suggests there won't be an "opening" on the BLT until 2023 (when Ms. Ray will be termed out), and perhaps Ms. Glabman didn't want the two year hiatus that would result if she didn't seek reappointment to the CAC in 2021.

It might also be pointed out that although the current BCC Roster indicates the incumbent, Janet Ray, was appointed on "6/30/2015," she was actually appointed on September 8, 2015 (see [Item 21](#)), which suggests the appointment process can be delayed when there is a lack of

qualified applicants, as seems, in the Ad Hoc Appointments Committee's opinion, to be the case this year. In 2015, the Council had two positions to fill on the BLT, to one of which it apparently intended to re-appoint incumbent Jill Johnson-Tucker, and to the other, newcomer Will O'Neill. However, the Jack Wu matter caused Mr. O'Neill to withdraw his application and pursue a Finance Committee appointment, instead. Rather than backfilling the list of applicants with another name from the existing pool of qualified applicants, the Council instructed the Clerk to re-advertise the vacancies so the desired appointee (Ms. Ray) would have time to add her name to that pool. A re-advertising of opportunities to serve would seem appropriate again this year in those cases where the Appointments Committee feels there are fewer than two qualified applicants per position.

City Arts Commission

The recommended action to appoint Arlene Greer for a one-year term would violate [City Charter Section 702](#) ("Appointments. Terms.").

While the Council is free to follow the staff recommendation to waive the term limits it has established in [Council Policy A-2](#) (which are not part of the Charter), it is **not** free to waive the requirements imposed on it by the people through their Charter. Section 702 clearly states that citizens are to be appointed for four-year terms, and gives the Council no latitude to change that.

The letter from five sitting City Arts Commissioners supporting that recommendation, attached following Ms. Greer's application and designating her as their desired Chair-apparent, was submitted in violation of the [Brown Act](#) – and for that reason, if solicited by the applicant, should result in disqualification. The letter does not cite the public meeting at which the Commissioners reached their decision, and I do not recall there ever having been one. If the letter is accurate, it provides strong evidence the sitting Commissioners illegally discussed this matter outside a public meeting, either together or serially – as they likely do other Commission matters. As the current Chair, and the most experienced of the Commissioners, avoiding such situations should have been especially Ms. Greer's responsibility.

Civil Service Board

The recommendation to make an appointment based on a single name provided by the Civil Service Board violates [City Charter Section 710](#).

The asterisked footnote on staff report page 20-3 says "*this year's Civil Service Board appointment would generally come from a list of three nominees provided by a majority of the Civil Service Board members.*" But it is more than "generally." That this seat be filled by appointment come from "**a list of three persons nominated by a majority of the [other] four**" members of the CSB is a requirement of the Charter. The Charter does not give either the Council or the CSB the latitude to waive the number "three."

In short, the vacancy on the CSB needs to be re-advertised until the CSB is able to come up with three names from which the Council may choose.

And following the Charter prescription is more than a technicality, for allowing future CSB's to present a single name would allow them to name their fellow members without any Council discretion, which is clearly not what the Charter intended. The fact that, in this case, only one person applied is irrelevant. The Charter requires the CSB to present three names, even if that necessitates action on their part to scare up additional interested parties.

In their defense, at the [June 3, 2019, meeting](#) where the one application received was reviewed and voted on, the CSB members were given a [staff memo](#) that did not explain the Charter Section 710 requirement for three nominees. I was present at the meeting, but did not bring the problem up to them since I, too, was unaware of it at the time.

Harbor Commission

As with the Planning Commission (see below), it is disturbing to see just three names being offered from which the Council is expected to fill two "open" positions (that is, ones for which no incumbent has applied for re-appointment).

In the case of the Harbor Commission, it is a bit difficult to fathom why the Appointments Committee could produce only three names. In this case, we have both an unexpected "retirement" as well as an incumbent choosing not to apply for re-appointment, resulting, too the extent that was known, in 11 applications being submitted.

Without an explanation of what criteria were applied, it is hard to believe that 8 of the applicants could not be recommended to serve on the Commission. And it would be interesting to know what the criteria were. Since the Commission makes recommendations, including on spending, that affect everyone, and not just harbor users, I personally believe it would be useful to have people on the Harbor Commission who are not intimately familiar with harbor matters.

Planning Commission

As with the Harbor Commission, having only three candidates from which to fill two "open" positions on something as important as the Planning Commission is not, in my opinion, a good thing.

And it seems more than a bit insulting to the remaining 9 applicants (including myself, there being 12 total) to declare they are unqualified to serve.

As explained above having happened with the Board of Library Trustees in 2015, I would suggest the Council use its discretion to re-post the existence of these vacancies.

Having sitting PC Chair Peter Zak (and HC Chair Dave Girling) choose not to apply for re-appointment is highly unusual. And extending the application period would be similar to the (mandatory) provision in the Elections Code that when an incumbent does not file for re-election, the normal deadline for filing nominating papers is extended.

Compounding this problem, I believe that in attempting to follow Council Policy A-2, the City Clerk has discarded applications of persons who may have assumed they were still active candidates. Some of these may have had their names in the running for so many years, and

have become accustomed to the annual inquires about whether they are “still interested,” that they may have incorrectly assumed their names were still in the hat. But as it turns out, each month prior to May the Clerk’s Office discards all applications with date stamps older than two years *without alerting those people that they need to re-apply*. The email they received the previous year to enquire about their continued interest will have likely lulled them into a sense the Clerk is watching over their application and keeping them informed about its status. But she is not. To remedy this, **I think it would be appropriate to send a one-time email notifying appointment seekers whenever an existing application has been discarded and informing them that if they are still interested they need to submit a new one.**