

February 11, 2020, 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 January 25, 2020 Planning Session and January 28, 2020 City Council Meeting

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

Page 282, end of Item II: “...*, and suggested Council **give voters a chance to** change elections to be strictly district-based, ~~**not voted on or strictly**~~ at-large ~~**with no districts**~~, and ~~**possibly**~~ **have add** a run-off system.”*

[note: I did *not* ask the Council do any of these things, because they require amending the City Charter. I *did* ask them to consider placing the questions on the November ballot as Charter amendments – something it *can* do -- so the voters could decide. On reflection, **I believe I misspoke regarding the need for a Charter amendment to correct our single-election, winner-take-all voting system** in which Council members can, in a three- or more-way race, win seats with less than a majority of the votes cast.

It now seems clear to me that while our “from district” system is required by Charter [Section 400](#), and can only be changed by a Charter amendment, [Section 1002](#) allows the Council to institute run-offs, no run-offs, or an alternative voting system, by ordinance. The Charter’s only requirement is that tie votes “*be settled by the casting of lots.*”

I would assume we have chosen not to hold a separate runoff election when no one wins a majority because holding an additional election is expensive. But who made that choice and when is unclear. Possibly it’s buried somewhere in the Election Code as the default election method for city councils in non-charter cities? However that may be, I believe the new voting technology being inaugurated in Orange County this March allows a variety of new “instant run-off” and other innovative voting options in which a runoff can, in effect, be held without a separate election and without delay or extra cost.

The advantages to democracy of encouraging a larger field of candidates without risk of vote-splitting are large and should be seriously considered by this Council. While I continue to think the City would be wise to amend the Charter to either eliminate districts or institute “by district” (as opposed to only “from district”) elections, I strongly urge the Council to appoint a task force to explore the new vote-counting options available in Orange County and recommend an alternative for future elections (such as ranked choice voting) that the Council could, consistent with our Charter, adopt by ordinance.]

Page 282, Item III, paragraph 2: “*In response to Council questions, Finance Director Matusiewicz confirmed that the revenue estimates may be adjusted, will be used as the starting point for the budget, ~~**assists assist**~~ with calculating the operating budget, ~~**the estimates and**~~ do not include grants or donations, ~~**and**~~ **He** reported that paying down unfunded pension liability avoids \$115 million of interest for the City. Regarding property tax revenues, he*

*indicated that staff is starting to see the rate **of** growth begin to **slope slow**.* [note: I was unable to confirm the suggested correction of “slope” to “slow” since I could not find this statement in the [video](#). It seems to be reported out of sequence.]

Page 282, footer at bottom of page: “Volume **63 64** - Page 282”

Page 283, paragraph 1, sentence 2: “*She reported that, in some situations, it makes sense to bring on a full-time employee rather than **a** contract employee.*”

Page 283, paragraph 2: “*Council Member Muldoon discussed the Contracts Clause **of the United States and California Constitutions** which states that **a** legislature cannot change a contractual relationship between two parties. He requested that any proposal to do so be delayed.*”

Page 283, paragraph 4: “***Harbor Director** Borsting utilized a presentation to highlight the Harbor Department’s accomplishments, ...*” [note: Mr. Borsting is referred to in three places on this page as the “Harbor Director.” While that may be a correct alternative title, he is much more commonly referred to as the “**Harbormaster**” (including five times on page 299 of the present draft minutes.)]

Page 283, paragraph 6: “*In response to Council questions, Harbor Director Borsting discussed increased presence on the harbor, noted the various models of service, indicated they will be working with the Recreation and Senior Services Department to fill the gap that will be left due to UCI’s departure **on-the-harbor from Marina Park**, they will be revisiting dock usage, resource allocation and space allocation, and pointed out that the harbor is the size of **New York’s** Central Park.*”

Page 284, paragraph 4: “*Jim Mosher believed the RHNA numbers came from SCAG’s **20012-2035 2020-2045** Regional Transportation Plan/Sustainable Communities Strategy, ...*” [The draft plan referred to is also known as “[Connect SoCal](#)” and should not to be confused with SCAG’s existing [2012-2035 plan](#).]

Page 285, Solid Refuse, paragraph 1: “*Public Works Director Webb utilized a presentation to highlight adjustments, changes, and upcoming program modifications to accommodate State law changes and to control costs, and the possibility of changing from a two receptacle **residential** waste collection system to a three receptacle system.*”

Page 285, Solid Refuse, paragraph 2: “*Mayor O’Neill questioned whether a code amendment could be made to require commercial green waste haulers to divert green waste so it counts toward the City’s credit, and asked if a hybrid system can be used since space is **too** limited in some parts of the City to accommodate three receptacles and to minimize the number of trucks on the road.*”

Page 286, paragraph 6: “*In response to the public’s questions, Mayor O’Neill stated that there is competition relative to **MRP facilities MRFs**, but not with digesters; ...*” [see explanation of abbreviation on page 285]

Page 287, Item VI, paragraph 1: “***Council-Member Mayor** O’Neill noted that the draft Capital Improvement Program (CIP) budget is not available yet, but those discussions will begin at the March **4110**, 2020 study session.*” [note: the Mayor said only “March,” without specifying the

date. March 11 is a Wednesday and clearly incorrect. The Finance Committee Work Plan suggests the presentation will come at the first of the Council's two meetings in March – that is, on March 10.]

Page 287, last paragraph: “*Charles Klobe asked that Council direct staff to look into the increased number of purple pipes throughout the City.*” [This accurately reflects the brief statement captured on the video, but rather than investigating some increase that had already happened, I suspect the request was intended to be for staff to look into increasing the amount of purple pipe – that is, expanding the City’s recycled water infrastructure, purple pipe being the piping used to distribute recycled water.]

Page 288, paragraph 3: “*Hoiyin Ip noted that the City is proposing to use synthetic turf at some of its parks, but expressed concern since ~~they are~~ it is made of plastic.*”

Page 289, Item SS4, paragraph 2: “*Public Works Director Webb and Principal Civil Engineer Sommers utilized a presentation to review previous Council discussions; discuss contrasting community desires; highlight completed improvements in Newport Heights; display an area map, the interior street layout, existing bicycle facilities, a map of existing sidewalks and significant link streets, and a map of Cliff Drive; explain shared lane markings (sharrows), on-street bike lanes, and protected bike lanes; indicate triggers for a significant link street, sidewalk benefits and impacts, and ~~its~~ their existing layout and conditions; and describe considerations for further discussion.*”

Page 289, Item SS4, paragraph 3: “*In response to questions from the Council, Public Works Director Webb and Principal Civil Engineer Sommers advised that there is no law requiring a sidewalk be separate from a protected bike lane, sidewalk width is driven by the Americans with Disabilities Act (ADA), but the City can dictate sidewalk width through standard plans, the sidewalk in the presentation is eight feet wide, the resolution regarding significant link streets was adopted in 1988 and explained significant link streets, and that reducing the width of traffic lanes on Cliff Drive so it does not intrude on residents' landscape and hardscape is a consideration, ...”*

Page 291, paragraph 1: “*Steve Moore expressed concern that the proposed changes would change the unique culture and feel of Newport Heights, believed designating significant link streets may create additional traffic over time and may be considered a tax on the citizens living on the ~~links~~ significant link streets.*”

Page 291, paragraph 2 from end: “*Charles Klobe, Newport Heights Improvement Association President, provided his background, discussed the Newport Heights area, believed the neighborhood is not asking for any changes, took issue with designating significant ~~links~~ link streets, noted that no study has determined that sidewalks are needed, and requested ~~that~~ audience members who agree with his comments to stand.*”

Page 297: Two items are mislabeled:

“~~XVI~~ XIII. ITEMS REMOVED FROM THE CONSENT CALENDAR – None”

“~~XIII~~ XIV. PUBLIC COMMENTS ON NON-AGENDA ITEMS”

Page 298: The description on this page of the Council's action on Item 16 (Cottage Preservation) is incomplete, making it impossible to tell from the minutes what the Council approved.

- At 3:35:10 in the [video](#), Council member Herdman moved the staff recommendation (specifically including its limitation of additions to 500 square feet) with the technical corrections listed by City Attorney Harp. Mayor Pro Tem Avery seconded the motion.
- At 3:35:40, Council member Muldoon offered a substitute motion to increase the cap on additions to 750 square feet.
- Instead of looking for a second, Mayor O'Neill asked Council member Herdman and Mayor Pro Tem Avery if they would accept this as a friendly amendment, which they said they would.
- **The modified motion unanimously approved by the Council thus amended *both* the ordinance *and* the resolution to include *both* the technical corrections *and* 750 square foot additions.**

One would not guess any of this from the draft minutes as presented since they do not say the *resolution* was amended at all, nor do they say what amendments were made to the *ordinance* presented by City staff.

Page 299, paragraph 1: "*Mayor O'Neill thanked Harbor Commissioner Kenney for **his the subcommittee's** efforts in amending Title 17 and **attending the time spent in** public meetings.*" [see [video](#) at 3:37:45 – the thanks were to the subcommittee, not to Commissioner Kenney alone]

Page 299, paragraph 5, sentence 2: "*In response to his questions, City Harbormaster Borsting and Commissioners Kenney, Blank and Yahn discussed how Title 17 has been interpreted over the years, discussed live-aboards, explained why 7% is being proposed **for live-aboards in commercial marinas.***"

Page 299, next to last paragraph: "*Following a discussion relative to live-aboards, the number of live-aboards currently in the harbor, and how not limiting the number may impact City services, City Attorney Harp recommended the motion exclude **the second sentence of Section 17.401.10 17.40.110** and all references to live-aboard permits in commercial marinas.*" [The transcriber misheard the section number, and the recommendation was to omit only part of it. This is, incidentally, reported out of sequence. The statement was actually made after public comments at 4:18:20 in the video.]

Page 300, paragraph 4: "*Motion by **Council Dixon, seconded by Member Council Member Mayor Pro Tem** Avery, to a) determine this action is exempt from the California Environmental Quality Act (CEQA) pursuant to Sections 15060(c)(2) and 15060(c)(3) of the CEQA Guidelines because this action will not result in a physical change to the environment, directly or indirectly; and b) waive reading, read by title only, exclude **the second sentence of Section 17.401.10 17.40.110** and all references to live-aboard permits in commercial marinas, and introduce amended Ordinance No. 2020-5, ...*"

Page 301, first two lines: “~~families receive their plaques if they want them, stated he wants input from the Balboa Island Improvement Association (BIIA), and believed maintaining the current benches is unfeasible.~~” [These two lines appear at end of page 300. In the draft minutes PDF, they are inadvertently reprinted at the top of page 301]

Page 301, next to last paragraph: “~~XVII XVIII.~~ ADJOURNMENT – Adjourned at 9:15 p.m. in memory of Stan Troutman and the ~~passengers victims~~ of the January 26, 2020 helicopter accident.” [the latter is the phrasing used in the index to the [video](#)]

Item 3. Ordinance No. 2020-6: Amendment to Section 9.04.430 of the Newport Beach Municipal Code to Adopt the Local Amendments to the 2019 Edition of the California Fire Code

This item likely needs to be removed from consideration at this meeting because the Municipal Code section cited in the agenda notice (see above) is not the section being proposed for amendment. In any event, as explained below, the text of the ordinance (and probably the staff report explaining it) could use substantial other work before being introduced.

To start with, the statement at the top of page 3-2 of the staff report, that “*On November 5, 2019, the City Council adopted the 2019 California Fire Code with local amendments. However, Chapter 49 was pulled from the amendment package to conduct public outreach for the proposed changes in vegetation management.*” is misleading. On November 5, as Item 10, the Council adopted [Resolution No. 2019-97](#) describing special conditions in Newport Beach, and introduced [Ordinance No. 2019-18](#), adopted on November 19. Despite an assurance on [Slide 16](#) of the staff presentation that “Changes to the Wildland Codes will be presented to the Council as a separate item in early 2020,” Ordinance No. 2019-18 included, among other things, a replacement for Chapter 49 of the California Fire Code, very similar to what is being here proposed, currently codified as [Section 9.04.380](#) of our Municipal Code.

At least equally mysterious, nothing that I can find in the ordinance implements any of the elements of the “Option 3” illustrated on page 3-3 of the staff report. Those requirements are evidently found in the “Guidelines and Standards” referenced in the code. But the Council is not being asked to change the “Guidelines and Standards” nor do the present references to them appear significantly different from those in the ordinance adopted on November 19.

Have the Guidelines and Standards been quietly modified by City staff in response to the public meetings? Does staff plan to do so? Or is this a continuation of the same regulations we have always had?

As to the substance of the item as presented, the following concerns are raised and changes suggested:

Page 3-5¹: The next to last Whereas declares the ordinance correlates with the findings in an as-yet-unnumbered resolution to be adopted at the Council's February 25 meeting.

Without seeing this mysterious resolution (not mentioned in the staff report), it is impossible to judge the accuracy of the assertion in Section 2 of the proposed ordinance (staff report page 3-12) that "*The recitals provided in this ordinance are true and correct.*" While that judgment can be made on February 25 (and the ordinance rejected if it doesn't correlate with the resolution), it would have seemed helpful to provide a draft of the resolution, or at least some explanation of what it will say. Will it make different declarations than Resolution No. 2019-97 adopted on November 5?

It would also have been helpful to indicate if the proposed code is more or less restrictive than the code it will replace. That could have been conveyed, for example, in a table comparing the current code (and the state code) to the proposed code in the areas where they differ.

Page 3-6, Section 1 and following title references the wrong section of the existing Title 9:

"Section 1: Section ~~9.04.430~~ 9.04.380 (Replacement to Chapter 49 ..."

~~"9.04.430~~ 9.04.380 Replacement to Chapter 49 ..."

[note: [Section 9.04.430](#) of the Municipal Code deals with sale and retail display of explosives, including fireworks]

Page 3-6, Subsection 4901.1: "... or identified Wildland-Urban Interface ~~Areas~~ Area ..."

Page 3-6, Subsection 4901.2: "... to provide minimum ~~vegetative~~ vegetation maintenance standards to reduce the severity of exterior ~~wildlife~~ wildfire exposure to buildings, ..." [I assume this is trying to say the City is concerned about a wildfire in the outside area spreading to the building. Unless this ordinance addresses a concern about squirrels, raccoons, coyotes and other animals damaging buildings (independent of fires?), "wildlife" definitely seems the wrong word.]

Page 3-6, Subsection 4901.3: "*These regulations apply to all Hazard Reduction Zones, and Local Agency Very High Fire Hazard Severity Zones located within the City of Newport Beach.*" The extraneous comma should be deleted. But beyond that, why are "identified Wildland-Urban Interface Areas" mentioned in Subsection 4901.1 but not in 4901.3? In addition, the subsequent sections imply the ordinance also applies to "Fuel Modification Zones" yet they are mentioned in neither Subsection 4901.1 or 4901.3. Why? Also, are the regulations intended to (or can they even?) apply to areas that are not "within the City of Newport Beach" but are within its sphere of influence, in particular Banning Ranch?

¹ For unknown reasons, pages 3-5 and 3-6 (and possibly others?) of the present agenda packet were posted without machine-searchable text underlying the PDF. That means this declaration cannot be located by searching the document for references to "resolution." Those pages would not qualify as "open data" under California standards.

Page 3-6, Subsection 4902.1: “*The following terms are defined in Chapter 2.*” Is this a reference to [Chapter 2](#) of the 2019 California Fire Code? I am unable to find definitions in that chapter of any of the terms listed. Some, but not all, of the terms listed are defined in Section 4902 of [Chapter 49](#) of the 2019 CFC.

Page 3-7, Section 4903: The list of zones in the section title does not match the list of applicable zones listed in Subsection 4903.1 (Compliance). Which is correct? In addition, while the title implies the section will provide guidance for maintenance of Local Agency Very High Fire Hazard Severity Zones, it does not seem to do so (although Subsection 4903.3 *does* set standards for identified Wildland-Urban Interface Areas even though they are not mentioned in the section title.

At least equally importantly, the proposed code in this section endorses “the City’s Guidelines and Standards” (citing specific ones), without explaining where those Guidelines and Standards are found, how they are adopted or modified, and whether the endorsement by this ordinance is confined to the current version, or includes possible future revisions to them. The City’s website, under Fire Prevention, includes a page of [Guidelines & Standards](#) that seem to have been adopted by the Life Safety Services Division of the Community Development Department in 2016. Although the City’s organizational structure is always a bit of a mystery, I do not believe that division still exists, and the source of its authority to create these regulations is not stated in them. I am unable to find any clarification of this in Title 9 of our NBMC. Perhaps it’s in the CFC?

Page 3-8, Subsections 4904.3 and 4904.3.1: These are redundant with Subsection 4904.1. I am unable to see anything they add to the statements made there.

“Fire Code Official,” formerly capitalized, changes to all lower case on this page (as it is in the remainder of Title 9). I’m not sure why.

The provision of Subsection 4904.3.4 regarding the Fire Code Official needing to approve a fuel modification plan prior to the issuance of a building permit appears to be redundant with the same statement made earlier in Subsection 4904.3.2. Grading permits could have been included there, eliminating the need for Subsection 4904.3.4.

Subsection 4904.3.5 contains standards that contradict each other as to the required width of private streets. They also include a logically meaningless “minimum.” Suggested revision: “~~The minimum~~ **Except as otherwise provided, the** width of private and public streets shall not be less than 28 feet (8.53 m). Private streets and driveways serving no more than three dwellings and not exceeding 150 feet (45.72 m) in length shall not be less than 24 feet (7.32 m) in width.” [“must” would also be more grammatically correct than “shall”]

In Subsection 4905.1, it is quite unclear what the intended meaning is of the command that “Areas shall be maintained free of obstructions at all times.” What “areas” are being referred to? The required three feet between structures and property lines? Or the entire area between the structure and the property line, however large that happens to be? And if the actual area is larger than three feet wide, where within that area does the obstruction-free path have to be (adjacent to the property? Or the property line? Or anywhere? And how wide does it need to be? A possible revision (but not necessarily what is intended): “~~Areas shall~~ **A minimum three**

foot wide path somewhere between the structure and the property line must be maintained free of obstructions at all times.”

“Exception: Refuse cans for residential use.” should probably specify that the “cans” (“containers”?) be movable.

Page 3-9:

The Section 4906 title contains an extraneous comma.

Subsection 4907.1 “General. Defensible space will be maintained around all buildings and structures in **a** State Responsibility Area (SRA) as required in Public Resources Code 4290 and “SRA Fire Safe Regulations” California Code of Regulations, Title 14, Division 1.5, Chapter 7, Subchapter 2, Section 1270 et seq.” This appears to proclaim different maintenance standards in State Responsibility Areas, but does not explain if there are any such areas in Newport Beach.

“Buildings and structures within the Very-high Fire Hazard Severity Zones of a Local Responsibility **Areas Area** (LRA) shall maintain defensible space as outlined in Government Code Sections 51175-51189 and any local ordinance of the authority having jurisdiction.” The odd wording at the end of this regulation makes one wonder if the Council expects there to be local agencies other than the City having authority over portions of the City.

The last line of Subsection 4907.2 self-references itself. The intent of the self-reference is completely unobvious to me.

Page 3-10: The Section 4909 title contains an extraneous comma.

Page 3-11: The Section 4910 title contains an extraneous comma.

Exception to Subsection 4910.1: “Fires located within the property boundary of inhabited **premise premises** or designated campsites where such fires are built in a permanent barbeque, ...”

Subsections 4910.1 and 4911.1: “hazard reduction zones” is not capitalized as it is in the remainder of the ordinance.

Item 5. Ordinance No. 2020-3: Lobbyist Registration, Reporting and Disclosure Requirements

As the draft minutes of the January 28 City Council meeting (Item 1) indicate, one speaker suggested the requirement for attorney lobbyists to register and report were likely illegal, or at least unenforceable, due to their inconsistency with certain oaths taken by attorneys. That speaker was evidently unfamiliar with California [Business and Professions Code Section 6009](#), which quite clearly empowers cities to collect the same basic lobbying information from attorney lobbyists as from non-attorney lobbyists “*notwithstanding any other provision of law.*”

As indicated in my previous comments², I continue to feel the ordinance as written is riddled with ambiguities, including as to who must report what and when. For the City to have a realistic expectation of compliance, I believe it will need to provide (as many other cities do) a brochure giving a layman's explanation of how the City interprets its code.³

And I remain curious when the Council is going to be asked to fulfill its obligation under Subsection 1.28.040.A.1 (page 5-7) to adopt a resolution setting the registration fee. Without that, lobbyist registration cannot begin.

Item 7. Ordinance No. 2020-5: Changes to the Newport Beach Municipal Code, Title 17 - Harbor Code

The Council (and public) may wish to be aware of these general points regarding this revision of the Harbor Code:

1. Although the ad hoc committee of the Harbor Commission spent many hours (including public meetings) poring over the existing code and debating revisions to it, the review of their recommendations by the full Commission appeared rather cursory and selective. This is reflected in the Harbor Commission minutes from [August 14, 2019](#), and especially [November 13, 2019](#)⁴, which were not included in the Council agenda packet.
2. Subsequent to the Harbor Commission's final review and approval of the ad hoc committee's work on November 13, City staff (including the City Attorney's Office) conducted a further review and made an unknown number of changes prior to their submission of the text to the Council for first reading on January 28. Some of those changes were made in response to the extensive comments I made⁵ on the Harbor Commission approved text *after* they voted on it. While I appreciate my after-the-fact comments, and possibly others, being taken seriously, and while the intent of all the later changes was presumably to clarify what the revisers thought the Harbor Commission wanted the code say, those changes have never been publicly reviewed. In addition, in what is presently being provided, the non-Harbor Commission reviewed changes cannot be distinguished from the Harbor Commission recommended text.
3. The redline provided as Attachment B (starting on page 7-119) of the agenda packet is not an entirely reliable guide to the changes being made to the existing code. For example, in some places The redline may show words being struck out that are not part

² January 28, 2020, City Council agenda, [Item 4, Attachment C](#).

³ Explaining, for example, that the requirement in Subsection 1.28.040.A.2.d (page 5-8) to disclose "*The date and amount of all campaign contributions to **any** candidate or candidate's controlled committee*" requires only the disclosure of contributions to **Newport Beach city** candidates (if that is, indeed, the intent). And to clarify, for example, how the \$500 threshold of Subsection 1.28.020.D (page 5-5) is applied when a lobbyist has multiple clients; and when a lobbying firm with multiple lobbyist employees has to register as a firm in addition to or in lieu of the individual registrations.

⁴ Currently available only in draft form.

⁵ See January 28, 2020, City Council agenda, [Item 17 correspondence](#) (starting on page 2).

of the present Harbor Code, but, instead, may have been considered, but rejected, during the revision process.⁶

4. As I tried to explain to the Harbor Commission at its meetings, and to the Council when the present text was introduced on January 28, the Harbor Code as proposed continues to suffer from problems both in its details and in a bigger-picture structural sense. Some of structural problems arise from the last comprehensive revision in 2008 which, although intended to simplify, shredded a number of previously coherent policies about specific topics (for example, moorings) and sprinkled the pieces among newly created sections, unintentionally making them even harder to understand than they were. Additional detailed problems have originated in subsequent amendments to that already difficult-to-comprehend code, each adding new wrinkles, warts and inconsistencies.
5. Some of the previous revisions were in response to a 2007 [Orange County Grand Jury report](#) critical of the City's administration of moorings. The Council should be aware that some of the changes intended to address the Grand Jury's criticisms have been erased by subsequent amendments, and others (such as the propriety of the City ceding control over certain areas of the harbor to private yacht clubs) have never been adequately answered.

The bottom line is the Harbor Code is, and probably always will be, a work in progress.

At the introduction of this ordinance on January 28, much was made about our regulations regarding live-aboards on boats other than on off-shore moorings, in particular in commercial marinas, with the intent apparently being to maintain the status quo until the Harbor Commission could come back with a re-thought recommendation.

As may or may not have been clear, the status quo allowed by the [current Title 17](#), at least since its last major revision in 2008, is that live-aboards are illegal anywhere other than on off-shore moorings. Existing [Section 17.40.020.A](#) explicitly prohibits live-aboards "*at piers that are bayward of residentially zoned areas*" as well as on an onshore mooring. Some might assume the absence of any statement about live-aboards in commercial marinas means there is no limit to them. But this is not correct for existing [Section 17.05.030](#) holds that "*Any activity or action or use of the harbor is prohibited unless specifically permitted by the provisions of this Code, or the tidelands trust.*" Since live-aboards in commercial marinas are not "*specifically permitted,*" they are, at present, prohibited.

If the Council adopts the revised Title 17 as proposed for second reading, the legality of live-aboards in commercial marinas will be less clear, since the meaning of silence in the code has been revised.

⁶ For example, at the bottom of page 7-185, some of the words shown as struck out are also underlined in blue. Those underlined words are not part of the present code. And near the top of the same page, numerous aspects of the redlined changes shown to Section 17.40.030 do not conform to the clean version being proposed for adoption on page 7-71.

Section 17.05.030 will now⁷ say “*Any activity or action or use of Newport Harbor regulated herein is prohibited unless specifically permitted by the provisions of this Code, or the tidelands trust.*” One could say live-aboards in commercial marinas are not regulated, and therefore they are allowed (and with no limits on their numbers or what they can do?). Alternatively, one could say live-aboards *are* regulated, and a key regulation is that they can exist only on off-shore moorings. Neither reading sounds like it yields a clearly intended result.

The fact that even after the present revisions the Harbor Code will remain in a state short of complete clarity (and the accumulation of errors from successive revisions) is evident, for example, from a closer examination of live-aboards chapter about to be adopted (starting on page 7-70):

1. It will be noted that proposed Section 17.40.010 (Purpose) mentions only “offshore moorings” even though the ordinance was revised to allow live-aboards in places other than on offshore moorings (specifically in commercial marinas before the last minute changes requested by the Council on January 28).
2. Subsections 17.40.020.B and C⁸ continue the [current code](#)’s referral of readers to “Section 17.60.040(G)” for rules regarding the permissibility of live-aboards on “long-term mooring sub-permits” versus “short-term sub-permits,” but no such rules can be found in Section 17.60.040(G).
 - a. This language was added by [Ordinance No. 2010-26](#), which also added definitions of “long-term mooring sub-permits” and “short-term sub-permits” to [Section 17.01.30\(O\)](#), was always incorrect. It was supposed to reference [Section 17.60.040\(H\)\(7\)](#), not “G”. And, compounding the problem, the language at that location was altered by subsequent ordinances so even it no longer mentions live-aboards on long-term mooring sub-permits. And it appears to now specify “short-term” as 15 days or less, in contradiction to the still-existing definition of less than 30 days.
 - b. Adding to that, is the continuing mystery what the intent of allowing live-aboard permits for less than 30 (or 15) days was, since [Section 17.40.030](#) (Permits Required) prohibits the issuance of a live-aboard permit without a commitment to live aboard the vessel for at least eight months (243 days as proposed in the current revision) a year.
 - c. And the currently proposed revisions delete the definitions of “long-term mooring sub-permit” and “short-term sub-permit” which Ordinance No. 2010-26 put in place (see current agenda packet, page 7-137).

⁷ See current agenda packet page 7-28, understanding that much of this is language that has never been publicly reviewed by the Harbor Commission. The inclusion of words limiting the applicability of the Harbor Code to areas “*not subject to Title 21*” is particularly problematic since, to the best of my knowledge, the entire harbor is subject to [Title 21](#) (the Local Coastal Program Implementation Plan).

⁸ Regarding 17.40.020.C, isn’t it odd to have provision *permitting* live-aboards in a section titled “Live-Aboards *Prohibited*”?

- d. In short, Subsections 17.40.020.B and C of the about-to-be-adopted code employ terms whose definitions will be deleted and direct readers to a section cited with a wrong number which, if found, appears to allow live-aboard permits to be issued to persons who do not meet the definition of a live-aboard.

Stepping back for a bigger picture view, it is not immediately obvious from the code as revised how it interacts with other laws (federal⁹, state¹⁰ or county¹¹) applicable to activities on the water and the extent to which City personnel are empowered to enforce them (or, alternatively, enjoined from enforcing local rules).

There also seem to be large categories of activities on which the Harbor Code seems silent and (despite its current statement that anything not permitted is prohibited) the meaning of that silence is not obvious. For example, the use of alcohol, restricted in many public places by NBMC [Sec. 10.04.010](#), but seemingly not restricted in the harbor even though it seems a public place.

Item 9. Resolution No. 2020-16: Resolution in Support of Balanced Energy Solutions and Local Control

Other than its clear promotion by the Southern California Gas Company, this resolution is very thin on explanation. It would have been helpful to explain what role our City government currently plays in selecting energy providers, and precisely what legislation it is objecting to.

Clearly if there is some threat to SoCal Gas, there is an argument on the other side that is not being presented for the Council's (and the public's) consideration.

I would like to hear from both sides.

Although the positions stated in Sections 1 and 2 may seem like apple pie and motherhood, I don't think the City should be taking positions at the behest of private companies simply because they ask.

Item 10. Resolution No. 2020-17: Correcting Recently Approved Fire Protection Service Water Rates and Charges in Resolution No. 2019-103

It is good to see City staff acknowledging the existence of a "scrivener's error" in a document approved by the Council, and even better to see the acknowledgement that such errors need to be corrected through a new formal action rather than quietly "repairing" the previously-adopted version.

⁹ Such as the U.S. Coast Guard [Navigation Rules](#)

¹⁰ The California Division of Boating and Waterways has a page devoted to "[Laws and Regulations](#)"

¹¹ Orange County Code of Ordinances, [Title 2, Division 2](#) (Orange County Parks – Harbor)

Appreciating that the Proposition 218 noticing of the rates to be considered by the Council constrains the correction to what is being proposed, this new attention to that noticing does raise a couple of new questions. The error arose from *listing* ¾-inch meters and *not listing* 2-½ inch meters in the “Fire Protection” table. However, in the “Water Service” and “Recycled Water” tables we *do* list a rate for ¾-inch meters and *do not list* one for 2-½ inch meters.

So the questions are: Are ¾-inch meters possible for fire protection service, and if so, what is the rate charged for them (since none is listed)? Are 2-½ inch meters possible for regular or recycled water service, and if so, what is the rate for them (since none is listed)?

Finally, 2-½ inch meters do not appear to be a common meter size. They are not listed in the otherwise very comprehensive-looking Table B-1 of the AWWA Manual M1. Was it intentional, or an error, that a rate for them, and not for ¾-inch meters was listed in the Proposition 218 noticing?

Item 11. Resolution No. 2020-18: Proposed City Council Policy - Offshore Mooring Extensions

1. The titles to the columns in Attachment A are only marginally legible. I am unable, for example, to tell if the last line of the middle column title says “2/12/2020” or “2/17/20.” It would seem wise to use a clearer typeface.
2. “LENGHTS” (should be “LENGTHS”) is misspelled in the second line of the titles at the tops of pages 11-8 through 11-15.
3. The three paragraphs at the top of page 11-7 of the proposed policy refer to “*the maximum length set forth in Attachment A.*”¹²
 - a. Since Attachment A contains two columns (with different numbers) labeled “maximum length” it is not obvious which the policy refers to. I assume it is the “Maximum Length Based Upon Site Conditions” one, even though quite a few of the rows already contain vessels exceeding that maximum length.
 - b. To correct this ambiguity, either the policy should be revised to match the desired column title or vice versa.
 - c. It might be noted that the Harbor Code about to be adopted by the Council (see page 7-106 of the present agenda packet) says extensions shall not “*Exceed the intended vessel LOA established by Council Policy for the row or mooring area in which the vessel will be moored.*”
 - d. Since it there is still time to change Policy H-3, but it is too late to change Ordinance 2020-05, it would seem wise to use the term “***intended vessel LOA***” (rather than “maximum length”) in Policy H-3 and its attachments.

¹² See Footnote 1, above. Pages 11-3 through 11-25 of the current agenda packet are provided in a PDF format without underlying searchable/copiable text.

- e. In fact, **it might be wise for Policy H-3 to confine itself to setting the “intended vessel LOA” for each row and not repeat the policy statements in the code for how the “intended vessel LOA” is used.** The repetition of the policy statements (especially in different words) at best does nothing, and at worst can create a conflict and confusion.
4. Attachment B seems essential for identifying the rows, but the significance of the numbers displayed on it is not explained. I am guessing those white are existing vessel lengths, while the ones outlined in red appear to be actual measurements of distances between the green lines.
 - a. What the green lines represent, and how they were drawn is not explained.
 - b. They seem likely to depict “*the fairway as delineated by City Policy*” (see top of page 11-6, but it would be good to say so.
5. Although the proposed policy opens by saying (under “Purpose” on page 11-5) “*The City of Newport Beach manages the offshore moorings located on the City’s tidelands,*” there are at least two [mooring fields](#) on the City’s tidelands¹³ that the City does *not* seem to manage and for which *no* parameters are given in the policy.
 - a. The management of one of these seems to have been turned over to the Balboa Yacht Club and the other to the Newport Harbor Yacht Club (see NBMC [Section 17.60.040.B.1.a](#)).
 - b. The vessels in these fields appear to be primarily anchored at one end only and swing around with the winds and currents. Although there would seem to be a maximum acceptable length for vessels moored in that way, it is not obvious how the concept of fairways and rows that figures so prominently in this policy would apply to them. How the vessel lengths allowed on them are set and modified is not obvious from the Harbor Code or this policy.

Item 15. Approve an Agreement with Newport Bay Conservancy to Designate Funds for Restoration Work in Big Canyon Phase 2A (20X12)

Although I support this project, the arrangement must strike some as strange.

The Conservancy seems to have obtained grants for modification of a City park – which work it would presumably be powerless to execute without the City’s blessing. Having obtained the grants, rather than asking to perform the work it received the grants to do, the Conservancy is asking the City to do the work through contractors of the City’s choosing, with the Conservancy reimbursing the City while confining itself to the grant administration work which one would normally expect a city to do. Something seems backwards about this.

¹³ Mooring field G is on Orange County tidelands. Mooring field HP is mapped by the City as being on City tidelands, but for some reason is managed by the Harbor Patrol.

As to the proposed Agreement:

1. In the first line of Recital D on page 15-5, “grant” should be “grants”.
2. On the first line of page 15-6, “of” should be “with”.
3. On line 7, “Phases 1B” should be “Phase 1B”.

Item 18. Newport Beach Wine and Food Festival Request for Waiver of City Council Policy B-13

I have never understood the City’s obligation to provide a venue for a private for-profit operation of this sort.

The reference on page 18-2 (third paragraph) to staff having obtained “consensus” from the from the Balboa Village Advisory Committee regarding holding the event at [Peninsula Park](#) (adjacent to the entrance to the Balboa Pier) is a bit disturbing. BVAC is a Brown Act body appointed by the City Council. As such, its individual members have no power, and a consensus can be reached only at a noticed public meeting. The City’s [Laserfiche archive](#) suggests BVAC has not met since July 17, 2019, and nothing about this seems to have been on the agenda at that time.

I urge the Council to urge staff to not approve this event on any public site.

By the terms of Council Policy B-13 (see opening paragraph, page 18-4), public facilities are supposed to be available only for “*limited commercial use.*” Of the priorities listed on pages 18-8 through 18-9, commercial use is the very lowest (“K. Others”). Yet according to the applicant’s letter (page 18-3), this matter, if approved, will make a public park unavailable for eight solid days (October 6 through October 13). Not only that, but it will be displacing a low-cost, ocean-adjacent use opportunity with one that has no obvious relation to the ocean or the beach.

In addition, as indicated in the applicant’s letter, the event has a long history of causing significant damage to the Civic Green at City Hall. It seems reasonable to expect it to cause as much or more damage to the grass at Peninsula Park, and I would suspect a lawn so close to the ocean will be even harder to restore than the one at City Hall.

It should also be mentioned that according to the City’s [FPPC Form 802 filings](#), in 2019 the applicant gave \$3,000 of free tickets to City staff members to attend the [Saturday](#) and [Sunday](#) events, including ten \$150 tickets to the Recreation and Senior Services Department which is the department recommending approval of the present request. Without further explanation, that, in itself, to many minds, would cast doubt on the objectivity of the analysis.