

RESOLUTION 2017-109

RESOLUTION AUTHORIZING ISSUANCE OF AN APPEALABLE COASTAL DEVELOPMENT PERMIT TO THE BRIGANTINE, INC. FOR CONSTRUCTION OF THE PORTSIDE PIER PROJECT

WHEREAS, the San Diego Unified Port District (District) is a public corporation created by the Legislature in 1962 pursuant to Harbors and Navigation Code Appendix I (Port Act); and

WHEREAS, Anthony's Fish Grotto of La Mesa (Anthony's) operated four eating establishments/restaurants (three restaurants and a coffee kiosk) at 1360 North Harbor Drive, San Diego, CA 92101; and

WHEREAS, Anthony's premises has been vacated, leaving an unused, 24,855 square-foot building, 23,285 square-foot platform, a total of 69 piles: 63 piles beneath the platform (47 16-inch diameter octagonal vertical piles and 16 24-inch diameter round battered piles) and 6 16-inch diameter octagonal piles beneath the dock, the remnants of the existing 565 square-foot dock, and associated accessory improvements, such as fencing and signage (Existing Structure); and

WHEREAS, on May 20, 2015, the District issued a Request for Proposal (RFP) for the redevelopment of the Existing Structure on the Project Site and The Brigantine, Inc. (The Brigantine) was ultimately selected as the successful proposer and development partner; and

WHEREAS, originally, The Brigantine proposal consisted of demolition of the Existing Structure and construction of a new two-story, approximately 34,069-square-foot restaurant structure containing three restaurants and a gelato and coffee shop, as well as a second-floor, approximately 3,711-square-foot dedicated public viewing deck, and an approximately 3,370-square-foot expanded dock and dine facility capable of docking up to 12 vessels (Portside Pier Project); and

WHEREAS, at the December 13, 2016 Board of Port Commissioners (BPC) meeting, after taking the appropriate California Environmental Quality Act (CEQA) actions, the BPC adopted Resolution No. 2016-205, which authorized issuance of the Non-Appealable Coastal Development Permit (CDP) to The Brigantine for the Portside Pier Restaurant Redevelopment Project; and

WHEREAS, to date, the December 13, 2016 CDP has not been issued to or executed by The Brigantine, and lease negotiations are on-going; and

WHEREAS, after the BPC's December 2016 actions, California Coastal Commission (CCC) staff expressed concerns about the Portside Pier Project and requested changes to the CDP; and

WHEREAS, as it would with any stakeholder, District staff has been working collaboratively with CCC staff to clarify the Portside Pier Project, revise certain conditions and add new conditions to the CDP with The Brigantine as a partner in the collaborative discussions; and

WHEREAS, The Brigantine is also no longer proposing demolition of the Existing Structure and as supported by the entire record, in the long-term, the Existing Structure poses public health and safety issues, requiring its demolition; and

WHEREAS, accordingly, on July 11, 2017, the BPC approved Resolution No. 2017-110, which authorizes the issuance of a Non-Appealable CDP to the District for Demolition of the Existing Structure; and,

WHEREAS, The Brigantine's proposed project now excludes the demolition of the Existing Site (Reduced Project), but the remaining components are basically the same as the Portside Pier Project, with alterations to the public walkway, signage and parking, and accordingly, District staff is recommending issuance of a new CDP for the Reduced Project (Proposed CDP); and

WHEREAS, as of June 30, 2017, District staff, CCC staff and The Brigantine have agreed to certain clarifications and new or revised conditions which include the following: (1) relocation of the public perimeter walkway to the second floor and a new special conditions specifying the public walkway shall be no less than 48 inches wide and will extend around the entire perimeter of the second floor and clarifying that the public viewing deck shall be 3,711 square-foot; (2) revised language to clarify the access to the second floor public perimeter walkway and viewing deck, the unobstructed nature of the public viewing area and public perimeter walkway; (4) addition of a special condition clarifying that the public viewing deck and public perimeter walkway will not be used for private functions or restaurant events and will be open to the public at all times during operating hours of the restaurant; (5) addition of the special condition stating that dock and dine is available for patrons and non-patrons of the adjacent restaurants and for water taxis at all times during operating hours of the restaurant; (6) the on-site signage program has been revised; (7) additional wayfinding and public signage requirements have been added; (8) addition of a special condition that states existing regulatory requirements for an eelgrass survey be conducted 90 days before construction; (9) clarifications on the number of required parking spaces, and valet parking operations have been added; and (10) a new special condition regarding increased fill from the proposed piles; and

WHEREAS, with respect to parking, an error occurred during finalization of Mitigation Measure TRA-2, which identifies the need for The Brigantine to obtain 979 offsite parking spaces, which was identified in the Traffic Analysis as the near-term parking deficiency in the entire North Embarcadero (890 parking spaces) plus the spaces needed for the Reduced Project under the shared parking scenario; and

WHEREAS, pursuant to Resolution No. 2017-108, on July 11, 2017, the BPC revised Mitigation Measure TRA-2 and the Mitigation Monitoring and Reporting Program (MMRP) for the Portside Pier Restaurant Redevelopment Project Final Mitigated Negative Declaration (MND) (Clerk's Document No. 66702), to identify the correct number of parking spaces for the Reduced Project as 358 parking spaces without a dedicated water transportation service and 327 with a dedicated water transportation service and the Proposed CDP has been clarified accordingly; and

WHEREAS, consistent with BPC Policy 735, District Staff recommends, based on the public benefits of the project, including, without limitation, the extraordinary public access components and the dock and dine, and The Brigantine's maintenance obligations of the public components, that the BPC grant District fill credits to The Brigantine in exchange for a fee equal to the fair market value of those credits; and

WHEREAS, The Brigantine has spent upward of \$2 million on the Reduced Project thus far, and would be required to completely redesign the project if no net increase of water coverage or fill from the piles is agreed to; and

WHEREAS, District staff and CCC staff continue to disagree on the category of development with CCC staff and the CCC alleging it is "appealable" development under Section 30715 of the California Coastal Act (Coastal Act) and the BPC and District staff's position is that it is "non-appealable" development under Section 30715 of the Coastal Act and based on a previous ruling by the California Superior Court; and

WHEREAS, based on a previous decision of the Superior Court in litigation where the CCC and District were parties (*San Diegans for Open Government v. California Coastal Commission; San Diego Unified Port District*, Superior Court Case No. 37-2013-00057492-CU-TT-CTL (2013)), the record, the Port Master Plan and the characteristic of the Reduced Project, the plain language of Section 30715, it is the District's position that the proposed Reduced Project is considered "non-appealable"; and

WHEREAS, during a March 8, 2017 "dispute resolution" hearing, the CCC found that dock and dine facilities and proposed restaurants are appealable under Section 30715 of the Coastal Act, and for the reasons set forth in the corresponding Agenda Sheet and the entire record, it is the District's belief that

the CCC lacked authority to hold the “dispute resolution” hearing, the CCC’s decision at that hearing is not binding on the District, and the dock and dine facilities and restaurants are non-appealable development; and

WHEREAS, while the District’s position continues to be that the Reduced Project is “non-appealable” development, in order to move the proposed Reduced Project forward, the District is proposing to issue an “appealable” CDP under protest; and

WHEREAS, the District reserves its right to challenge any action or decision that concludes a stand-alone restaurant, including the Reduced Project, is an “appealable development” as defined by Section 30715 of the Coastal Act, and the District previously processed a CDP for the Portside Pier project that designated the development as non-appealable under the provisions of Sections 30715 and 30718 of the Coastal Act, affording the CCC an opportunity to comment on the project’s MND; and

WHEREAS, in an effort to diffuse the conflict between the District and CCC regarding the correct procedure for processing the new CDPs for restaurants on Tidelands, the District has agreed to follow the procedures under Section 30717 for the Reduced Project only; and

WHEREAS, accordingly, the District will provide the additional notice and respecting the 10-business-day effective date of the proposed Reduced Project CDP; however, the District does so with the express intent of asserting that compliance with Section 30717 is not required under the Coastal Act for standalone restaurants and potentially all restaurants, including the Reduced Project; and

WHEREAS, authorizing issuance of an “appealable” CDP for the Reduced Project does not constitute an admission, a waiver of any District claims or defenses and the District fully and expressly reserves all its rights; and

WHEREAS, it is the intent of the District that it is not bound by the determination regarding the appealability of the project made by the CCC at its March 8, 2017, meeting pursuant to a “dispute resolution” proceeding and for the reasons set forth in the District’s objections to the procedure filed with the CCC contemporaneously with the hearing (Attachments G and H to the corresponding Agenda Sheet) and as stated at the hearing, the procedure was unauthorized and the CCC’s determination in that manner is not binding on the District; and

WHEREAS, the Reduced Project is located in Planning District 3, Centre City Embarcadero, which is delineated on Precise Plan Map Figure 11 of the certified Port Master Plan (PMP) and the PMP land and water use designations within the limits of the Project are Commercial Recreation (restaurant establishment) and Ship Anchorage (dock and dine); and

WHEREAS, the Reduced Project is consistent with the PMP as: (1) Commercial Recreational use allows for restaurants; (2) dock and dine facilities are compatible with the Ship Anchorage use category, as both are circulation and navigation uses that allows for short-term temporary berthing or anchorage of vessels; and (3) a dock and dine facility is similar to a landside parking lot, but for vessels and parking is allowed in all uses of the PMP; and

WHEREAS, the Reduced Project constitute “development” under Section 30106 of the Coastal Act as it proposes construction of structures (piles, platform, building and dock and dine) and accordingly, a Coastal Act authorization from the District is required.

WHEREAS, the Reduced Project is fully consistent with Chapter 8 of the Coastal Act, Coastal Act Sections 30604(c), 30210-30224, and the Coastal Act public access and recreation policies referenced therein as it provides extensive public access and recreational opportunities through the public viewing deck, public access way, wayfinding signage, bike racks, improved promenade and dock and dine facility; and

WHEREAS, the BPC finds that said application and attachments contain correct and accurate statements of fact; and

WHEREAS, the BPC has concluded that the Project conforms to the certified Port Master Plan; and

WHEREAS, the BPC considered the appealable Coastal Development Permit at the July 11, 2017 BPC meeting; and

WHEREAS, in accordance with the CEQA statutes and guidelines, the Project was analyzed in the MND entitled “Portside Pier Restaurant Redevelopment Project” (UPD #MND-2016-91 and SCH #2016081007) and pursuant to Resolution No. 2016-202, on December 13, 2016, the BPC adopted the MND and a Mitigation, Monitoring Reporting Program and made certain findings as particularly stated in said Resolution.

NOW, THEREFORE, BE IT RESOLVED by the Board of Port Commissioners (BPC) of the San Diego Unified Port District, as follows:

1. The BPC finds the facts recited above are true and further finds that this BPC has jurisdiction to consider, approve and adopt the subject of this Resolution.

2. In general, the Reduced Project consists of, without limitation (1) construction of a new two-story, approximately 34,069-square-foot restaurant structure containing three restaurants and a gelato and coffee shop, as well as a

second-floor, approximately 3,711-square-foot dedicated public viewing deck, a second-story contiguous public walkway and an approximately 3,370-square-foot expanded dock and dine facility capable of docking up to 12 vessels.

3. The Reduced Project is located in Planning District 3, Centre City Embarcadero, which is delineated on Precise Plan Map Figure 11 of the certified Port Master Plan (PMP) and the PMP land and water use designations within the limits of the Project are Commercial Recreation (restaurant establishment) and Ship Anchorage (dock and dine). The BPC finds that the Reduced Project is consistent with the PMP as: (1) Commercial Recreational use allows for restaurants; (2) dock and dines facilities are compatible with the Ship Anchorage use category, as both are circulation and navigation uses that allows for short-term temporary berthing or anchorage of vessels; and (3) a dock and dine facility is similar to a landside parking lot, but for vessels and parking is allowed in all uses of the PMP.

4. The BPC finds that the Reduced Project constitute "development" under Section 30106 of the California Coastal Act (Coastal Act) as it proposes construction of structures (piles, platform, building and dock and dine). Accordingly, a Coastal Act authorization from the District is required.

5. The BPC's position is that Reduced Project constitutes "non-appealable" development based on a previous decision of the Superior Court in litigation where the CCC and District were parties (*San Diegans for Open Government v. California Coastal Commission; San Diego Unified Port District*, Superior Court Case. No. 37-2013-00057492-CU-TT-CTL (2013)), the record, the corresponding agenda sheet, the Port Master Plan and the characteristic of the Reduced Project, and the plain language of Section 30715; however, to move the Reduced Project forward, the BPC is willing to authorize issuance of an "appealable" CDP under protest.


6. The Reduced Project is fully consistent with Chapter 8 of the Coastal Act, Coastal Act Sections 30604(c), 30210-30224, and the Coastal Act public access and recreation policies referenced therein as it provides extensive public access and recreational opportunities through the public viewing deck, public access way, wayfinding signage, bike racks, improved promenade and dock and dine facility.

7. The BPC finds that the CCC did not have jurisdiction to hold the March 8, 2017 "dispute resolution" hearing (No. 6-17-0146-EDD), the findings of that hearing are not binding on the District or The Brigantine.

8. The Brigantine is granted the use of approximately 43 square feet of District "fill" credits pursuant to BPC Policy 735 and as supported by the public benefits described in this Resolution and the corresponding agenda sheet.


9. Based on the entire record available to the BPC and the findings set forth in this Resolution, the Executive Director or her designated representative is hereby authorized and directed to issue an Appealable Coastal Development Permit for "Construction of the Portside Pier Project" after passage of the ten (10) working day appeal period as described in the CDP Regulations of the District. Said Appealable Coastal Development Permit shall require compliance with all conditions set forth therein; provided, however, as a condition of approval, The Brigantine, Inc. shall indemnify and hold the San Diego Unified Port District (District) harmless against all third-party legal challenges, claims, lawsuits, proceedings and the like, including reimbursement of all attorneys' fees, costs and expenses incurred by the District related to the approval of this Appealable Coastal Development Permit. Said condition is independent of any agreement between the District and The Brigantine, Inc.

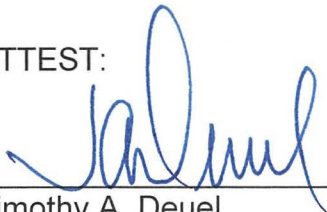
APPROVED AS TO FORM AND LEGALITY:
GENERAL COUNSEL


By: Assistant/Deputy

PASSED AND ADOPTED by the Board of Port Commissioners of the San Diego Unified Port District, this 11th day of July 2017, by the following vote:

- AYES: Bonelli, Castellanos, Malcolm, Merrifield, Moore, Valderrama, and Zucchet
- NAYS: None.
- EXCUSED: None.
- ABSENT: None.
- ABSTAIN: None.


Robert Valderrama, Chair
Board of Port Commissioners

ATTEST:

Timothy A. Deuel
District Clerk

