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November 23, 2010

Mayor and City Council
City of Newport Beach
3300 Newport Boulevard
Newport Beach, CA 92661

Re: Proposed Ordinance on Mooring Charges and Mooring Transfers

Honorable Mayor and Council:

I am writing to you in connection with your consideration of a proposed ordinance to modify the manner in which moorings in Newport Harbor are transferred from the manner that has existed for more than 50 years. There is also a resolution to modify the rent schedule for moorings which has not been modified since 1996. I am a resident of Balboa Island and the owner of both onshore and offshore moorings. It is my request that you not adopt the proposed ordinance and resolution and direct your staff to return with an ordinance and resolution implementing the recommendations of the Mooring Master Plan Sub-Committee and the Harbor Commission.

1. Mooring Transferability.

Many others have commented on the proposed rates which the City Manager has recommended. I support those comments. My letter deals with the elimination of the ability of a mooring tackle owner to transfer the right to maintain the mooring to a purchaser of the vessel anchored at the mooring. Section 17.60.040E of the proposed ordinance would terminate the ability to transfer the mooring along with a vessel in 2021. I urge the City not to adopt 17.60.040E.

The City is under no obligation to terminate mooring transfers with transfers of vessels. The California Constitution does not compel the City to terminate mooring transfers. Much has been made of the idea that people have been "profiteering" on mooring transfers, i.e., taking money for public property. I doubt that this has occurred in any significant measure. If so, the procedures worked out by the Mooring Master Plan Sub-Committee and Harbor Commission would have solved those problems. In any event, it is not reason to punish 1,000 others who did not "profit".

If the City Manager is correct in his assessment that increasing the mooring fees to 14% of the "Index Rate" for slips will be fair market value, then the values of moorings for transfer ought to be reduced to zero or the value of the tackle. I do not expect that this would be the case as the ability to acquire a boat and mooring on the open market has other benefits for both the purchaser and seller. The purchaser gets assurance of the location and the ability to obtain a boat and a place for a boat at the time of the purchaser's own choosing. The seller is able to sell a boat which at times of high slip occupancy might not be sold without a place to moor it.

The City is also relieved of an unnecessary administrative burden. Maintaining a waiting list, notifying a person of availability, waiting to see if the person still needs the mooring, notifying the next person, responding to continuous inquiries about availability, all of this requires City resources that are not presently required. The City will also become responsible for mooring maintenance while a mooring is unassigned, an additional cost.

Finally, the City has heard clearly from many of its residents who presently have moorings that lack of transferability will destroy all value with which they parted to acquire the mooring rights. Raising rents will affect that value but not destroy it. If the City is not obligated to destroy all value of its residents, why must the City do it? To the mooring owners it seems inescapable that the intent of the City Council must be that its members want to destroy this value. Why you wish to visit such harm on your own citizens for the supposed benefit of some others who are not even known is puzzling.

2. Application of California Environmental Quality Act.

The staff report contains a conclusory statement that the adoption of the ordinance and resolution do not require review under the California Environmental Quality Act. I disagree. An action of the City will come within the City's obligation to assess whether or not it may have adverse environmental effects if it is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment". Cal.Pub.Res.Code §21065.

It is reasonably foreseeable that as a result of the fee increases, the boats which will be at moorings, particularly shore moorings, will increase in size. My own assessment of shore moorings on Balboa Island notes that most are used for dinghies or other small boats, often less than 10 feet in length. At the present fee of \$100 per year, it is quite reasonable to keep a boat worth \$500 on the mooring. However, at the increased fee of more than \$500 per year, it is likely that the boats which are kept will trend toward the largest size allowed at 18 feet. This will have a clear visual impact. In addition, the shore moorings are tightly packed and the anchoring and flexibility of the shore mooring lines are likely to result in boats which will collide from time

to time. Also, if shore moorings must be given up to some waiting list of users, homeowners on Balboa Island, Lido Island and Balboa Peninsula will likely find the proportion of shore moorings owned by non-residents will increase, increasing the parking and traffic demands in these locations.

As the increases in fees constitutes an activity by the City and it is reasonably foreseeable that this activity will cause changes in use among the 500 shore moorings as well as the more than 700 offshore moorings, the City must at the very least assess whether or not its activity may have an adverse effect on the environment. The City has not done so.

3. Application of Ralph M. Brown Act.

Finally, I have been concerned about the fact that on the November 9 and the November 23 agendas, your closed session has calendared “[p]otential litigation over raising mooring fees within the harbor.” The question of whether or not to raise mooring fees and terminate transferability are policy questions for the City. They are not the subject of any lawsuit.

Although the Ralph M. Brown Act does provide the opportunity for the council to meet in closed session with regard to pending litigation, I do not think that closed sessions for discussion of this mooring issue are lawful. Just because litigation about a policy decision which the City proposes to make is threatened does not mean that the City may exclude the public from its discussions or deliberations. In this day and age litigation about any controversial policy decision will always be a threat.

The exception from the open meeting requirement for litigation is to allow for attorney-client communications. However, if the City Attorney has advice concerning the legality or the process by which this proposed mooring ordinance is being advanced, such advice forms part of the policy judgment by which the City Council may act and must be exposed to the public just as much as Mr. Kiff’s advice or that of Mr. Miller. The purpose of the exception is to permit the City Council “to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach nonlitigation oriented policy decisions.” 71 Ops.Cal.Atty.Gen. 96, 104-105. It is hard to see what “litigation” decisions the City Council could be considering at this time when the ordinance has not even been adopted.

4. Conclusion.

To the extent that I have not focused upon any particular issue, I wish to incorporate in my concerns those comments which the Newport Mooring Association (of which I have been a member for more than 5 years) has submitted to the City as though I has stated it myself.

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It is my sincere hope that the City will not adopt the proposed ordinance and resolution. I urge the City to refer the matter back to its staff to return with an ordinance and resolution along the lines of the "transferability" document which was proposed by the Mooring Master Plan Sub-Committee and Harbor Commission.

Sincerely,

/s/

SHERMAN L. STACEY

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