

DRAFT**RESOLUTION 20xx-xxx****ADOPT RESOLUTION AUTHORIZING ISSUANCE
OF A NON-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 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 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

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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 June 20, 2017, the Board of Port Commissioners (BPC) approved Resolution No. _____, 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 Non-Appealable CDP for the Reduced Project (Proposed CDP); and

WHEREAS, as of June 13, 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 feet; (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

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an eelgrass survey be conducted 90 days before construction; (9) clarifications on the number of required parking spaces, short-term and long-term parking program, and valet parking operations have been added; and

WHEREAS, with respect to parking, a clerical 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, the Proposed CDP has been clarified that under the Reduced Project, a total of 327 parking spaces, rather than 979 spaces, are needed for the project (assuming no restaurant establishments existed previously on the site and water transportation services were servicing the site); and

WHEREAS, District staff and The Brigantine have been unable to resolve the following perceived issues: (1) increase in water coverage; (2) increased in fill from the piles; and (3) the category of development proposed; and

WHEREAS, with respect to water coverage, the Reduced Project will result in a net increase of 4,480 square feet of water coverage – approximately 2,805 square feet of which is attributed to the proposed dock and dine facility, a water dependent use, and 1,675 square feet of which is attributed to the ground floor walkway, which, among other things provides access to the dock and dine; and

WHEREAS, in accordance with BPC Policy 735, the BPC adopted Resolution No. 2016-203, which authorizes The Brigantine to use 4,480 square feet of the District's water coverage credits to mitigate the net increase of shading; and

WHEREAS, CCC staff has asserted that (1) non-water dependent uses may not have a net-increase in water coverage and (2) the Reduced Project is a non-water dependent use; and

WHEREAS, Section 30715.5 of the California Coastal Act (Costal Act or California Coastal Act) specifies that the standard for issuance of the CDP is conformity with the certified Port Master Plan, and is no prohibition against a net increase of shading in the Port Master Plan; and

WHEREAS, there is no prohibition in the California Coastal Act for a project – water-dependent or otherwise – from using shading credits; and

WHEREAS, District Staff recommends no change to the CDP related to water coverage; and

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WHEREAS, upon further review of information received by The Brigantine, it has been determined that the existing platform and dock contain 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, which equates to an existing pile area of 135 square feet; and

WHEREAS, with respect fill from the piles, the Reduced Project proposes a total of 179 square feet of new piles including 20 square feet for the dock and dine facility and 159 square feet for the new restaurants, which discounting the existing 135 square feet of existing piles results in a total net increase of 44 square feet of fill (or 24 square feet without consideration of the dock and dine); and

WHEREAS, CCC staff claims that no net increase in fill is allowed for the Reduced Project; and

WHEREAS, Section 30715.5 of the California Coastal Act specifies that the standard for issuance of the CDP is conformity with the certified Port Master Plan, and is no prohibition against a net increase of fill in the Port Master Plan; and

WHEREAS, Sections 30705 and 30233 of the California Coastal Act collectively allow for fill for public access improvements, shoreline improvements, new or expanded boat facilities, public recreation piers, and recreational opportunities; and

WHEREAS, The Brigantine is proposing several public access components: (1) a second floor viewing deck (approximately 3,711 square feet) and a connecting perimeter public walkway around the second floor (no less than 48 inches wide), both of which are free to the public and shall not include private events; (2) bike racks, wayfinding signage, and an enhanced promenade; and (3) a dock and dine facility (collectively, Public Access Components); and

WHEREAS, the Reduced Project is improving the appearance of the shoreline, which is currently occupied by an aging and deteriorating building; and

WHEREAS, in accordance to previous CCC approvals, with the Public Access Components and the improvement to the shoreline, the Reduced Project's proposed net increase in fill is consistent with the California Coastal Act; and

WHEREAS, as a compromise to CCC's demand, District staff recommends the following condition be added to the Proposed CDP: "The fill area from the platform piles supporting the restaurant establishment shall not exceed the existing 135 square feet of piles unless the Permittee either 1)

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obtains and pays fair market value for fill credits from the District in the same amount of square footage of the exceedance or 2) removes piles in the same square footage of the exceedance”; 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 to 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, during a “dispute resolution” hearing, the CCC found that dock and dine facilities and proposed restaurants are appealable under Section 30715 of the California 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, accordingly, District staff is recommending a Non-Appealable CDP be issued for the Reduced Project; 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 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; and

WHEREAS, the Reduced Project constitute “development” under Section 30106 of the California Coastal Act as it proposes construction of structures (piles, platform, building and dock and dine). Accordingly, a California Coastal Act authorization from the District is required. Pursuant to the District’s CDP Regulations and the reasons set forth in the Agenda Sheet, the Reduced Project has been determined to be a “non-appealable” development and it is also not considered an “excluded,” “emergency,” or “appealable” development; and

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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, the proposed Reduced Development is considered “non-appealable” and a non-appealable CDP is required; and

WHEREAS, the Reduced Project is located between the sea (as defined in the Coastal Act) and the first inland continuous public road paralleling the sea and is fully consistent with Chapter 8 of the Coastal Act, California 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 non-appealable Coastal Development Permit at the June 20, 2017 BPC meeting; and

WHEREAS, in accordance with the California Environmental Quality Act (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

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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 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.

4. The BPC finds that the Reduced Project constitute “development” under Section 30106 of the California Coastal Act as it proposes construction of structures (piles, platform, building and dock and dine). Accordingly, a California Coastal Act authorization from the District is required. The BPC finds, 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, that the Reduced Project is “non-appealable” development and it is also not considered an “excluded,” “emergency,” or “appealable” development.

5. The Reduced Project is located between the sea (as defined in the Coastal Act) and the first inland continuous public road paralleling the sea and the BPC finds that the Reduced Project is fully consistent with Chapter 8 of the Coastal Act, California 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.

6. 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, and for the reasons asserted by the District and The Brigantine during that hearing, as evidenced by Attachments G, H and I of the corresponding agenda sheet, incorporated herein by reference and available with the Office of the District Clerk, restaurants and dock and dine facilities constitute “non-appealable” development under Section 30715.

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7. The Brigantine is granted the use of approximately 44 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.

8. 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 a Non-Appealable Coastal Development Permit for "Construction of the Portside Pier Project." Said Non-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 Non-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

PASSED AND ADOPTED by the Board of Port Commissioners of the San Diego Unified Port District, this 20th day of June 2017, by the following vote: