

RESOLUTION NO. 2018-9

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEWPORT BEACH, CALIFORNIA, ADJUSTING THE RENT CHARGED FOR COMMERCIAL FUEL DOCKS LOCATED UPON TIDELANDS

WHEREAS, pursuant to the 1978 Beacon Bay Bill, as amended, ("Beacon Bay Bill") the City of Newport Beach ("City") acts on behalf of the State of California as the trustee of tidelands located within the City's limits, including Newport Harbor ("Tidelands");

WHEREAS, Section 1(b) of the Beacon Bay Bill authorizes the City to allow third-parties to use the Tidelands for commercial purposes for a term not to exceed fifty (50) years;

WHEREAS, the City allows commercial Tidelands uses to operate upon the Tidelands under either a permit or a lease;

WHEREAS, the Beacon Bay Bill, California Constitution Article 16, Section 6, Newport Beach Municipal Code ("NBMC") Section 17.60.060(D), NBMC Section 17.60.020(E), and City Council Policy F-7(D) require that the rent received by the City from third parties using the Tidelands be based in part upon an appraisal, and reflective of the fair market value related to such uses;

WHEREAS, NBMC Section 17.60.060(D) vests the City Council with the exclusive discretion to determine fair market value rent based in part upon the findings of a City-selected appraiser;

WHEREAS, State law and City Council Policy F-7(E) requires that, whenever less than the fair market value is received for use of the Tidelands, the City make specific findings setting forth the reasons thereof including, but not limited to, findings that the uses serve to promote the goals of the City or that the uses provide an essential or unique service to the community that might not otherwise be provided were full market value required;

WHEREAS, on November 13, 2012, the City Council adopted Resolution No. 2012-98 setting fair market value rent for commercial uses located upon Tidelands;

WHEREAS, on November 26, 2013, the City Council adopted Resolution No. 2013-88, which, among other things, amended Resolution No. 2012-98 to reclassify certain homeowners' associations slips from commercial to residential;

WHEREAS, on July 25, 2017, the City Council adopted Resolution No. 2017-49, which adjusted the fair market value rent charged for various commercial uses of Tidelands;

WHEREAS, the City Council excluded commercial fuel docks from Resolution No. 2017-49, and directed staff to further study this rental category;

WHEREAS, following the adoption of Resolution No. 2017-49, City staff reached out to the commercial fuel docks owners in Newport Harbor;

WHEREAS, at the City's request, George Hamilton Jones, Inc. conducted an appraisal to determine fair market value rent for commercial fuel docks and, thereafter, prepared an appraisal report dated October 30, 2017 ("Appraisal Report"); and

WHEREAS, the City Council reviewed the Appraisal Report and it is part of the record in this matter.

NOW, THEREFORE, the City Council of the City of Newport Beach resolves as follows:

Section 1: The City Council hereby sets rent, rental phase-in, and associated adjustments for commercial fuel docks Tidelands users as provided in the attached *Commercial Tidelands Rent Calculations For Commercial Fuel Docks Located Upon Tidelands*, which is incorporated herein by reference. This finding is made by the City Council in its exclusive discretion but is based on the information contained in the Appraisal Report and on the other documents and testimony contained in the record for this matter.

Section 2: The City Council does hereby repeal any portion of a resolution that conflicts with the rental amounts, rental calculation methods, associated rental adjustments, and rental phase-in provided in the attached *Commercial Tidelands Rent Calculations For Commercial Fuel Docks Located Upon Tidelands*.

Section 3: The City Council sets the rental rates, phase-in, and adjustments contained in the attached *Commercial Tidelands Rent Calculations For Commercial Fuel Docks Located Upon Tidelands* at less than fair market value. Pursuant to City Council Policy F-7(E)(6), the City Council finds charging less than fair market value rent for these specific uses promotes the goals of the City to further marine-related services and activities. More specifically, the City Council finds charging less than fair market value rent for fuel docks promotes public recreation facilities and marine services to the general public, furthers the policies and objectives of the Beacon Bay Bill, and allows for continued operation and improved accessibility to the public. Thus, the charging of less than fair market value rent for this use of the Tidelands is a matter of state-wide concern that benefits the citizens of the State of California.

Section 4: The Recitals provided above are true and correct and incorporated into the operative part of this resolution.

Section 5: Except as expressly modified by this resolution, all provisions, terms, and covenants set forth in other Tidelands resolutions shall be unchanged and shall remain in full force and effect.

Section 6: The City Council finds the setting of rent for commercial fuel docks is not subject to the California Environmental Quality Act ("CEQA") pursuant to Sections 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in Section 15378) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential for resulting in physical change to the environment, directly or indirectly. Alternatively, the City Council finds the setting of rent for commercial fuel docks is entitled to a Class 1 Categorical Exemption pursuant to CEQA Regulation Section 15301 because the rent contemplates the continued use of existing facilities, with no expansion of the proposed use. Further, the City Council finds the setting of rent for commercial fuel docks is entitled to a Statutory Exemption pursuant to CEQA Regulation Section 15273(a)(1) because the rent established by the City Council will be used to meet operating expenses within the Tidelands.

Section 7: If any section, subsection, sentence, clause or phrase of this resolution is, for any reason, held to be invalid or unconstitutional, such decision shall not affect the validity or constitutionality of the remaining portions of this resolution. The City Council hereby declares that it would have passed this resolution, and each section, subsection, sentence, clause or phrase hereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid or unconstitutional.

Section 8: This resolution shall take effect immediately upon its adoption by the City Council, and the City Clerk shall certify the vote adopting the resolution.

ADOPTED this 13th day of February, 2018.


Marshall "Duffy" Duffield
Mayor

ATTEST:



Leilani I. Brown
City Clerk



APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE



Aaron C. Harp
City Attorney

Attachment: Commercial Tidelands Rent Calculations For Commercial Fuel Docks Located Upon Tidelands

**Commercial Tidelands Rent Calculations
For Commercial Fuel Docks Located Upon Tidelands**

Beginning on the date a lease or permit is first effective (*i.e.*, the date a lease is executed by all parties or a permit is issued by the City), a Commercial Fuel Dock shall pay to the City, on a monthly basis, Rent (as defined below).

1. Rent.

The "Rental Rate" for each category of commercial Tidelands use is as follows:

<u>Commercial Use Category</u>	<u>Rent Per Square Foot</u>
Fuel Docks - Tenant to select one of three rent calculation methodologies ¹ .	
(1) Base rent	\$0.76
(2) Greater of base rent or percentage rent. Percentage rent calculated at \$0.01 per gallon per year, but not to exceed \$0.76* per square foot per year (as adjusted by CPI)	\$0.38
(3) Percentage rent only, calculated at \$0.01 per gallon per year, but not to exceed \$0.76* per square foot per year (as adjusted by CPI)	N/A

For a term year beginning March 1, 2018, and thereafter, monthly Rent shall equal the then applicable Rental Rate, rounded to the nearest cent, times the Premises square footage as set forth in this resolution (*i.e.*, if the Rental Rate is \$0.76 and the Premises is 10,000 square feet the annual Rent is \$7,600).

To the extent a Premise contains two (2) or more commercial Tidelands uses, the Rent shall be apportioned according to the use and the Premises occupied by the use (*i.e.*, if half (1/2) of a Premises is operated as a Fuel Dock and the other half (1/2) as a Small Commercial Marina the half (1/2) of the Premises used as a Fuel Dock shall pay the applicable Fuel Dock rent and the half (1/2) operated as a Small Commercial Marina shall pay the applicable Small Commercial Marina rent).

2. Rental Phase-In Period.

Rent will be set in accordance with a two (2) period phase-in procedure with the first phase-in billed in February 2018, for Rent due on March 1, 2018. The second phase-in billed in July 2018, for Rent due on August 1, 2018. Rent shall be fully phased-in beginning on August 1, 2018. An example of the two (2) period phase in procedure is provided below:

<u>Commercial Use Category</u>	<u>Ramp-Up Period</u>	
	<u>March 2018</u>	<u>August 2018</u>
Fuel Docks - Base rent option only	\$ 0.49	\$ 0.76

¹ A fuel operator paying percentage rent shall at the City's request provide Books and Records to the City to assist in calculating rent due.

3. Rent Adjustments.

A. Annual Rent Adjustment.

Beginning on March 1, 2019, Rent may be adjusted on the first day of March each permit/lease year to reflect an increase in the cost of living, as indicated by the Consumer Price Index described below. Rent may be adjusted if the Consumer Price Index for the Los Angeles – Orange County - Riverside Area, All Urban Consumers, All Items (“Index”), as published by the United States Department of Labor, Bureau of Labor Statistics (“Bureau”), increases over the Base Period Index. The initial “Base Period Index” shall be the Index for the calendar month which is four (4) months prior to the month of the permit/lease effective date, thus November. The initial Base Period Index shall be compared with the Index for the same calendar month for each subsequent Lease Year (“Comparison Index”). The Comparison Index used for a given year’s adjustment calculation will become the Base Period Index for purposes of the next annual Rent adjustment calculation. If the Comparison Index is higher than the Base Period Index, then Rent for the next Lease Year shall be increased by the amount of such percentage change. Should the Bureau discontinue the publication of the above Index, or publish same less frequently, or alter same in some other manner, then the parties shall adopt a substitute Index or substitute procedure which reasonably reflects and monitors consumer prices.

B. Market Adjustment of Rent and Other Fees and Charges.

At the Market Adjustment Date, the Rental Rate may be adjusted, in the City’s sole and absolute discretion, to reflect the then-current fair market value, as such value shall be determined by an appraisal to be conducted in accordance with the provisions of this section. If applicable, the Rental Rate determined by the appraisals shall commence on March 1 of the year following the appraisals (*i.e.*, the Rental Rate determined by the appraisals following March 1, 2026 shall be effective March 1, 2027). If applicable, the City shall retain one (1) independent MAI appraiser to conduct a harbor-wide appraisal of commercial uses. All MAI appraisers selected pursuant to this subsection shall have at least ten (10) years’ experience appraising Tidelands in the Southern California area.

4. Definitions.

Unless otherwise provided, the terms provided in the NBMC shall apply to this resolution. The singular of any term also includes the plural.

- A. Base Rent and Rent, unless otherwise provided, means the annual rent charged on a square footage basis for the use of the Premises.
- B. Books and Records means full, complete, accurate and proper books, records and accounts of all business, use or occupation, or any combination thereof, transacted, arranged or performed, in whole or in part, on, from or for any fuel sold from the Premises, whether by the lessee, permittee or by a sublessee, licensee, concessionaire or other party.
- C. City means the City of Newport Beach.
- D. Fuel Dock or Commercial Fuel Dock means a facility that provides fuel (*e.g.*, gasoline, diesel, oil, etc.) to vessels.
- E. Market Adjustment Date means March 1, 2026 and every tenth (10th) anniversary year thereafter.

- F. Percentage Rent means rent which is determined each calendar year and shall be calculated by multiplying the rental rate, as indicated in the tables above, by the total sales made in, upon, or from the Premises and/or otherwise attributable to the Premises for the calendar year. For each calendar year that Percentage Rent exceeds Base Rent, the Tidelands user shall pay to City the Percentage Rent less the Base Rent paid to the City for that calendar year.
- G. Premises means those Tidelands which are subject to the applicable permit/lease and are more particularly described and depicted in the applicable permit/lease, excluding any Private Waterways and improvements.
- H. Private Waterways means privately owned submerged lands.
- I. Small Commercial Marina(s) means a “marina” as defined in NBMC Section 17.01.030(J)(3) or any successor statute, which occupies less than thirteen thousand square feet (13,000 sf) of Tidelands and Private Waterways.
- J. Tidelands means certain tidelands and submerged land (whether filled or unfilled), located in the City of Newport Beach, County of Orange, State of California granted to the City of Newport Beach, as trustee, by the State of California, pursuant to the Tidelands Grant.
- K. Tidelands Grant means uncodified legislation related to the State of California’s grant of certain rights in the Tidelands to the City of Newport Beach, including, without limitation, the Beacon Bay Bill (Chapter 74 of the Statutes of 1978, as amended [citations omitted]).

STATE OF CALIFORNIA }
COUNTY OF ORANGE }
CITY OF NEWPORT BEACH } ss.

I, Leilani I. Brown, City Clerk of the City of Newport Beach, California, do hereby certify that the whole number of members of the City Council is seven; the foregoing resolution, being Resolution No. 2018-9 was duly introduced before and adopted by the City Council of said City at a regular meeting of said Council held on the 13th day of February, 2018; and the same was so passed and adopted by the following vote, to wit:

AYES: Council Member Jeff Herdman, Council Member Kevin Muldoon, Council Member Diane Dixon, Council Member Scott Peotter, Council Member Brad Avery, Mayor Pro Tem Will O'Neill, Mayor Duffy Duffield
NAYS: None

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the official seal of said City this 14th day of February, 2018.



Leilani I. Brown
City Clerk
Newport Beach, California



STATE OF CALIFORNIA }
COUNTY OF ORANGE }
CITY OF NEWPORT BEACH } ss.

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NAYS: None

RECUSED: Mayor Duffy Duffield

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the official seal of said City this 14th day of February, 2018.



Leilani I. Brown
City Clerk
Newport Beach, California

