

## RESOLUTION NO. HO2021-001

### A RESOLUTION OF THE HEARING OFFICER OF THE CITY OF NEWPORT BEACH, CALIFORNIA, APPROVING REASONABLE ACCOMMODATION NO. RA2020-002 AND APPROVAL IN CONCEPT NO. AIC2020005 FOR THE PROPERTY LOCATED AT 101 CARNATION AVENUE (PA2020-067)

THE HEARING OFFICER OF THE CITY OF NEWPORT BEACH HEREBY FINDS AS FOLLOWS:

#### SECTION 1. STATEMENT OF FACTS.

1. An application was filed by Brion Jeannette, architect, requesting approval of a reasonable accommodation on behalf of Rick Julian ("Applicant"), with respect to residential property located at 101 Carnation Avenue, Newport Beach, California and legally described as Lot 1 in Tract 16882, Block D in the City of Newport Beach, County of Orange, State of California, Assessor's Parcel No. 052-013-40 ("Property").
2. The Applicant has submitted a **reasonable accommodation application** requesting relief from Section 20.28.040 Bluff (B) Overlay District of the Newport Beach Municipal Code ("NBMC") and from Title 21 of the (Local Coastal Program Implementation Plan) to allow a funicular, a cable railway, below the 50.7-foot contour line. The funicular includes a one-hundred and twenty (120)-foot-long-on-grade track to automatically move one (1) cab for up to four (4) passengers. The funicular is required to accommodate disabled current or future residents to the waterside amenities on the private seven (7)-unit condominium property ("Accommodation").
3. The Property is designated Multiple Residential (RM) by the General Plan Land Use Element and is located within the Multiple Residential (RM) Bluff Development – Carnation Avenue Overlay Zoning District.
4. The Property is located within the coastal zone. The Coastal Land Use Plan category is Multiple Unit Residential (RM-D) 20.0-29.9 du/ac and it is located within the Multiple Residential (RM) Bluff Development Carnation Avenue Overlay Coastal Zoning District.
5. The Property is located within the California Coastal Commission coastal development jurisdiction and requires an Approval in Concept from the City for the Applicant to submit an amendment to the existing Coastal Development Permit No. CDP 5-10-298 to the Coastal Commission for the construction of the funicular.
6. A public hearing was held online on August 25, 2021, a telephonic public hearing was held, on Zoom, observing restrictions due to COVID-19. A notice of time, place and purpose of the public hearing was given in accordance with the California Government Code Section 54950 *et seq.* ("Ralph M. Brown Act") and Chapter 21.62 (Public Hearings) of the NBMC. Evidence, both written and oral, was presented to, and considered by, the Hearing Officer at this public hearing.

7. At the hearing evidence was submitted by staff and the applicant. One member of the public, Mr. Jim Mosher, provided oral and written testimony that while not arguing against development of the funicular, did opine that the vehicle should be open to use by the public. That notion, while perhaps designed to permit greater coastal access, cannot be recommended for a variety of reasons. First, and foremost, is the fact that to access the funicular you would have to pass upon the private property of the applicant. That could lead to issues of liability and even the public taking of private property if ordered by a public entity. When confined to a finite set of residents, the issues of safety and understanding how to operate the machinery would be relatively simple. If opened to an infinite set of persons those abilities would be stretched or rendered impossible to accommodate. The request is to accommodate persons with disabilities that make use of the steep stairs difficult *on private property owned or controlled by the users of the vehicle*. That makes sense and eliminate many issues that might arise if its use was expanded. This is not a fun ride or even a recreational one. It is to accommodate the owners or their guests who for health reasons would have difficulty or find it impossible to access the beach amenities below without the funicular.

## SECTION 2. CALIFORNIA ENVIRONMENTAL QUALITY ACT DETERMINATION.

1. I find this project is exempt from the California Environmental Quality Act ("CEQA") pursuant to Section 15303 under Class 3 (New Construction or Conversion of Small Structures) of the CEQA Guidelines, California Code of Regulations, Title 14, Division 6, Chapter 3, because it has no potential to have a significant effect on the environment.
2. The funicular would provide access to persons with disabilities and does not modify the existing condominium building.

## SECTION 3. REQUIRED FINDINGS.

In accordance with NBMC Section 20.52.070(D)(2) (Decision on Reasonable Accommodation, Findings and Decision), the following findings of facts in support of such decision is set forth following:

### Finding:

- A. *That the requested accommodation is requested by or on behalf of one or more individuals with a disability protected under the Fair Housing Laws.*

### Fact in Support of Finding:

1. A letter from the property owner, Rick Julian, states that the funicular is needed to allow owners or their guests or invitees with disabilities to enjoy the full use of the Property. Documentation from the residents' physicians has been prepared by the following physicians of four (4) existing residents: Dr. Martin I. Bae, Newport Beach Medical Associates on behalf of; Dr. Steve Barnett, Orthopedic Surgeon on behalf of; Dr. Catherine Chang Board Certified Internal Medicine on behalf of; Dr. Eric Olsen Benner,

Internal Medicine on behalf of; and Dr. Mikio Tachibana Internal Medicine on behalf of. The physicians' correspondence indicates disabilities prevent use of stairs, and an accessible accommodation is necessary to provide access throughout the Property including the lower water-side common areas.

Finding:

*B. That the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.*

Facts in Support of Finding:

1. The funicular is needed for the disabled residents or their guests and permittees to enjoy and utilize safe access to the waterside amenities shared by the private seven (7)-unit condominium community.
2. In the letters from the physicians of four (4) of the current residents, stairs do not provide access based upon the residents' disabilities. The doctors explain the mobility impairment disability of each resident making it impossible for each to use stairs. For each resident to have full enjoyment of the Property, the funicular is required.
3. With consideration of the factors provided by NBMC Section 20.52.070(D)(3-4) (Reasonable Accommodations, Decision on Reasonable Accommodation, Factors for Consideration -Necessity, Factors of Consideration -Fundamental Alteration/Reasonableness), the requested reasonable accommodation is necessary to provide the disabled individuals an equal opportunity to use and enjoy a dwelling. If the requested accommodation is granted, the disabled persons will be able to utilize the waterside common amenities of the Property. This area is adjacent to the bay and includes beach area, dock and piers for the boats of the condominium residents. Access to this area for the disabled residents is required for equal use of the Property by all residents and is the area of the common outdoor space that is a part of the Property, thereby enhancing their quality of life. All alternatives have been explored to provide the same access to the waterside of the Property and the funicular is the design that complies the most with the Coastal Land Use Plan Policies and is the least disruptive to the coastal bluff. Approval of the accommodation will not alter the character of the neighborhood, because the funicular is a nominal accessory feature similar to stairways and similar features provided to these properties along the bluff to access the bayside portion of their properties.

Finding:

*C. That the requested accommodation will not impose an undue financial or administrative burden on the City as "undue financial or administrative burden" is defined in Fair Housing Laws and interpretive case law.*

Fact in Support of Finding:

1. Allowing the funicular would not impose an undue financial or administrative burden on the City. The funicular will be constructed and maintained by the condominium association and will not result in any costs to the City. Any permit fees or building permit fees will be paid by the association.

Finding:

- D. That the requested accommodation will not result in a fundamental alteration in the nature of the City's zoning program, as "fundamental alteration" is defined in Fair Housing Laws and interpretive case law.*

Facts in Support of Finding:

1. The Accommodation would not result in any fundamental alterations to the character and use of condominium property or the neighborhood. The funicular would only provide access for the condominium owners to use the waterside amenities on the Property. The funicular will not change or expand the existing use of the condominiums. The funicular with a single cab is nominal in nature and maintains a design, bulk, and scale of development that is consistent with the surrounding neighborhood pattern of development.
2. The coastal bluff will remain unaltered with the exception of the on-grade track to support the funicular. The intent of the bluff overlay is to protect the natural bluff to not contribute to further erosion of the bluff, maintain the visual qualities of the bluff from further development, and protect coastal views from the bluff top. The bluff will remain visually intact with the exception of the on-grade track supporting the funicular. The design is least impactful to the natural bluff and will not impact views. The cab will be parked up at the condominiums in a garage-type structure that is not visible.

Finding:

- E. That the requested accommodation will not, under specific facts of the case, result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.*

Facts in Support of Finding:

1. The funicular will provide a safe means for disabled residents to access the lower water-side of the Property. The funicular is the least impactful to the coastal views as the cab will be parked up towards the existing condominium structure when not in use. Use of these types of funiculars are common and safe to provide access when an elevator or wheelchair lift are not possible.
2. The funicular will not result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others. The funicular includes a 120-

foot-long-on-grade track. The track would be equipped to automatically move one (1) cab for up to four (4) passengers. The track would be designed with the minimum required size of twenty (24) inches wide, thirty-six (36) inches deep and six (6) inches below grade. The footings will be engineered with the Utilities and Fire footings already approved by the Coastal Commission, essentially the same footings just widened to accommodate the additional footing required for the funicular track.

Finding:

*F. For housing located in the coastal zone, a request for reasonable accommodation under Section 21.16.020 (E) may be approved by the City if it is consistent with the findings provided in subsection (D)(2) of this section; with Chapter 3 of the California Coastal Act of 1976; with the Interpretative Guidelines for Coastal Planning and Permits established by the California Coastal Commission dated February 11, 1977, and any subsequent amendments, under the Local Coastal Program. As outlined herein, the request in the application is both reasonable and sound. It meets a defined need in an efficient and safe manner.*

Facts in Support of Finding:

1. In accordance with Section 21.16.020(E), (General Requirements for New Development, Reasonable Accommodations) of Title 21, the review authority may grant reasonable accommodations to the City's coastal zoning and land use regulations, policies, and practices when needed to provide an individual with a disability an equal opportunity to use and enjoy a dwelling in compliance with Federal and State Fair Housing Laws.
2. The Project requires an amendment to Coastal Development Permit No. CDP 5-10-298 approved by the Coastal Commission. Approval of the Reasonable Accommodation authorizes Approval in Concept No. AIC2020005 for the applicant to submit the funicular to the California Coastal Commission.
3. There are no feasible alternatives for providing an accommodation at the condominium project that would provide greater consistency with the LCP. Alternatives considered included: 1) a ski-lift-type gondola that would result in a greater visual disturbance to the bluff and obstruction to public coastal views in the area due to the use of three (3) to four (4), ten (10)-foot tall poles; 2) a wheelchair lift that utilizes the existing stairway handle but deemed unfeasible due to the tight turns of the stairway that restricts the mobility and wheel chair that restricts stairway usage creating an issue for first responders; and 3) a subterranean tunnel that would require an extensive amount of grading and would be detrimental to the coastal bluff stability. The funicular maintains public coastal views as the cab will be parked at the top of the bluff between uses. The track will require minimal grading with little disruption to the natural form. The track will also be painted to match the bluff and preserve the visual integrity of the bluff.

4. The project as designed is reasonable and functional. It allows disabled residents and their permitted users to access beach elements of the property in a safe and efficient manner.

#### SECTION 4. DECISION.

#### **NOW, THEREFORE, BE IT RESOLVED:**

1. This project is exempt from the California Environmental Quality Act ("CEQA") pursuant to Section 15303 under Class 3 (New Construction or Conversion of Small Structures) of the CEQA Guidelines, California Code of Regulations, Title 14, Division 6, Chapter 3, because it has no potential to have a significant effect on the environment.
2. The Hearing Officer of the City of Newport Beach hereby approves Reasonable Accommodation No. RA2020-002 and Approval in Concept No. AIC2020005, subject to the conditions set forth in Exhibit "A," which is attached hereto and incorporated by reference, expressly finding that this use is in fact reasonable to accommodate disabled persons use of the property.
3. This action shall become final and effective fourteen (14) days following the date this Resolution was adopted unless within such time an appeal is filed with the City Clerk in accordance with the provisions of NBMC Title 20 (Planning and Zoning).

**PASSED, APPROVED, AND ADOPTED THIS 25<sup>th</sup> DAY OF AUGUST, 2021.**



William B. Conners, Hearing Officer

## EXHIBIT "A"

### CONDITIONS OF APPROVAL

#### **PLANNING**

1. The funicular shall be in substantial conformance with the approved site plan and elevations stamped and dated with the date of this approval (except as modified by applicable conditions of approval).
2. *The approval of the Reasonable Accommodation shall authorize submittal of Approval in Concept No. AIC2020005 for the Coastal Development Permit Amendment to the Coastal Commission for the funicular.*
3. *If authorized by the California Coastal Commission, a building permit will be required for the construction funicular and the track.*
4. The reasonable accommodation shall lapse if the exercise of rights granted by it are discontinued for at least one hundred eighty (180) consecutive days.
5. *The track and cab shall be painted to match the bluff and natural surroundings. The final paint color shall be reviewed and approved by the Planning Division prior to final of the building permit.*
6. *The construction and structural components of the funicular shall not exceed the minimum required to provide the four-(4) passenger carrier and shall not limit disruption to the bluff.*
7. *Because of the substantial cost of this improvement, and because the funicular can effectively be used by future owners and users of the property and is physically integrated into the residential property and cannot be easily removed or altered to make the residence comply with the Zoning Code, the reasonable accommodation shall remain indefinitely unless the Director determines that the modifications authorized by this reasonable accommodation application are no longer appropriate due to disrepair, damage to the funicular that is beyond repair or abandonment by the property owners, and therefore should be removed to protect the public health, welfare, or safety under the NBMC. It is the intent of the Hearing Officer based on the findings in this matter that the funicular remain indefinitely so long as it remains fully functioning and safe for use as intended..*
8. The Project is subject to all applicable City ordinances, policies, and standards, unless specifically waived or modified by the conditions of approval.
9. The Applicant shall comply with all federal, state, and local laws. Material violation of any of those laws in connection with the use may be cause for revocation of this Reasonable Accommodation, including payment of all appropriate fees.

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10. A copy of the Resolution, including conditions of approval set forth in this Exhibit "A", shall be incorporated into the Building Division and field sets of plans prior to issuance of the building permits.
  11. This approval shall expire and become void unless exercised within twenty-four (24) months from the actual date of review authority approval, except where an extension of time is approved in compliance with the provisions of NBMC Title 20 (Planning and Zoning).
  12. To the fullest extent permitted by law, the Applicant shall indemnify, defend and hold harmless City, its City Council, its boards and commissions, officials, officers, employees, and agents from and against any and all claims, demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including without limitation, attorney's fees, disbursements and court costs) of every kind and nature whatsoever which may arise from or in any manner relate (directly or indirectly) to City's approval of Aerie Condominium Funicular including, but not limited to, Reasonable Accommodation No. RA2020-002 and Approval in Concept No. AIC2020005 (PA2020-067). This indemnification shall include, but not be limited to, damages awarded against the City, if any, costs of suit, attorneys' fees, and other expenses incurred in connection with such claim, action, causes of action, suit or proceeding whether incurred by applicant, City, and/or the parties initiating or bringing such proceeding. The applicant shall indemnify the City for all of City's costs, attorneys' fees, and damages which City incurs in enforcing the indemnification provisions set forth in this condition. The applicant shall pay to the City upon demand any amount owed to the City pursuant to the indemnification requirements prescribed in this condition.