

RESOLUTION NO. PC2021-022

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF NEWPORT BEACH, CALIFORNIA, WAIVING CITY COUNCIL POLICY L-6 (ENCROACHMENTS IN THE PUBLIC RIGHTS-OF-WAY) AND APPROVING ENCROACHMENT PERMIT NO. N2021-0322 TO RETAIN IMPROVEMENTS WITHIN THE PUBLIC RIGHT-OF-WAY FOR THE PROPERTY LOCATED AT 101 CARNATION AVENUE (PA2021-166)

THE PLANNING COMMISSION OF THE CITY OF NEWPORT BEACH HEREBY FINDS AS FOLLOWS:

SECTION 1. STATEMENT OF FACTS.

1. An application was filed by Brion Jeannette Architecture, ("Applicant"), with respect to property located at 101 Carnation Avenue, commonly known as Aerie, Newport Beach, California and legally described as Lot 1 in Block D, as shown on a map recorded in Book 928, Page 49-50 inclusively of Miscellaneous Maps in the office of the County Recorder of Orange County ("Property"), requesting approval of an encroachment permit.
2. The Applicant requests approval to retain non-compliant private improvements including a 42-inch high wrought iron guardrail on top of a 40-inch maximum height retaining wall below the sidewalk elevation that encroaches up to 4 feet 2 inches into the 50-foot wide Carnation Avenue public right-of-way ("Project").
3. The requested approvals are not specifically provided for within City Council Policy L-6. Thus, the Project is prohibited under Section A (Private encroachments that are prohibited without a waiver and approval) of said policy. Due to this prohibition, the requested encroachment may only be approved upon the waiver of City Council Policy L-6 with approval of the encroachment permit by Planning Commission.
4. The Property is located within the coastal zone.
5. A public meeting was held on August 19, 2021, in the City Council Chambers located at 100 Civic Center Drive, Newport Beach, California. A notice of time, place and purpose of the public hearing was given in accordance with Government Code Section 54950 et seq. (the "Ralph M. Brown Act") and City Council Policy L-6 (Encroachments in Public Rights-of-Way). Evidence, both written and oral, was presented to, and considered by, the Planning Commission at this public hearing.

SECTION 2. CALIFORNIA ENVIRONMENTAL QUALITY ACT DETERMINATION.

1. This Project is categorically exempt from the California Environmental Quality Act ("CEQA") pursuant to Section 15305 under Class 5 (Minor Alterations in Land Use Limitations) 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 Class 5 (Minor Alterations in Land Use Limitations) exemption includes minor alterations in land use limitations in areas with an average slope of less than 20 percent, which do not result in any changes in land use or density including the issuance of minor encroachment permits. The encroachments consist of a 42-inch high guardrail on a 40-inch maximum retaining wall below the sidewalk elevation within the public right-of-way. The developed area of the project site above the bluff area has an average slope of less than 20 percent and the structures do not involve any changes in land use or density. The encroachments therefore qualify under the Class 5 exemption.
3. The exceptions to this categorical exemption under Section 15300.2 are not applicable. The Project location does not impact an environmental resource of hazardous or critical concern, does not result in cumulative impacts, does not have a significant effect on the environment due to unusual circumstances, does not damage scenic resources within a state scenic highway, is not a hazardous waste site, and is not identified as a historical resource.

SECTION 3. REQUIRED FINDINGS.

In accordance with City Council Policy L-6 (Encroachments in the Public Rights-of-Way), the following findings and facts in support of such findings are set forth:

Finding:

- A. *The proposed private improvements will not be a detriment to the health, safety, and welfare of the public.*

Facts in Support of Finding:

1. The Carnation Avenue public right-of-way includes approximately 10 feet from the face of the curb to the property line. The overall Carnation Avenue public right-of-way is 50-foot wide. There are no City utilities located within the encroachment area.
2. The Project does not diminish the rights of the public along the Carnation Avenue right-of-way. There is an existing 4-foot wide sidewalk within the Carnation Avenue right-of-way, which will remain at its current width.
3. Carnation Avenue slopes gently downward and the Property slopes down toward the 60-foot high bluff edge and the Pacific Ocean. The project site has a slope of approximately 13 percent to the bluff.
4. The rights of the public, present and future, are not diminished by the installation of private improvements within the public rights-of-way. The wrought iron guardrail does not obstruct ocean views. Additionally, as required by the Aerie development Conditions of Approval, a public bench with an unobstructed ocean view was installed along the property frontage within the public right-of-way.
5. Approval would require the Owner to enter into an Encroachment Agreement to allow the proposed improvements as requested, and any liability associated with the proposed

private improvements would be transferred to the Owner. Additionally, if the need for public improvements should arise in the future, the Owner shall agree to remove all encroachments at no cost to the City.

Finding:

B. The individual circumstances applicable to this application and the proposed encroachment are consistent with the public interest.

Facts in Support of Finding:

1. Improvements are complementary to the area; adjacent neighbors have similar private encroachments within the right-of-way. Some of the adjacent encroachments are permitted through an encroachment permit and agreement, whereas others have been constructed without approval.
2. The 42-inch high wrought iron guardrail is installed along the edge of the sidewalk. The sidewalk is up to 40 inches above the adjacent parkway elevation and protects the Public from falling into the recessed transformer pit.
3. The 42-inch high guardrail protects from the public accessing a transformer located approximately 4 feet 2 inches away on private property.
4. There are no existing City utilities within the encroachment area.
5. The Property is located in the coastal zone and the proposed improvements do not require a coastal development permit in accordance with Newport Beach Municipal Code (NBMC) Section 21.52.035(C)(2) (Projects Exempt from Coastal Development Permit Requirements). This section exempts minor improvements on property located in proximity to the sea unless the improvements constitute; 1) an increase of ten (10) percent or more of the internal floor area of an existing structure or a lesser improvement that has previously been undertaken pursuant to California Public Resources Code Section 30610(a), 2) the construction of an additional story or loft or increase in existing structure's height by more than ten (10) percent, 3) the construction, placement or establishment of any significant nonattached structure such as a garage, fence, shoreline protective works or docks. The existing wrought iron guardrail and retaining wall at the edge of the existing public sidewalk are minor detached structures. The location of these improvements does not pose a conflict to coastal resources, coastal access, or other adverse environmental effects. The encroachments do not alter the existing bluff oceanward of the existing multi-family development. Therefore, the encroachments are exempt from the requirement for a coastal development permit.

SECTION 4. DECISION.

NOW, THEREFORE, BE IT RESOLVED:

1. The Planning Commission of the City of Newport Beach finds this Project is categorically exempt from the California Environmental Quality Act ("CEQA") pursuant to Section

15305 under Class 5 (Minor Alterations in Land Use Limitations) 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 Planning Commission of the City of Newport Beach hereby waives City Council Policy L-6 and approves Encroachment Permit No. N2021-0322, subject to the conditions set forth in Exhibit "A," which is attached hereto and incorporated by reference.
3. This action shall become final and effective fourteen (14) days following the date this Resolution is adopted unless within such time an appeal or call for review is filed with the City Clerk in accordance with the provisions of Title 20 (Planning and Zoning), of the Newport Beach Municipal Code.

PASSED, APPROVED, AND ADOPTED THIS 19TH DAY OF AUGUST, 2021

AYES: Klaustermeier, Kleiman, Koetting, Lowrey, Rosene and Weigand

NOES:

RECUSED: Ellmore

ABSENT:

BY: 

Lee Lowrey, Chairman

BY: 

Curtis Ellmore, Secretary

EXHIBIT “A”**CONDITIONS OF APPROVAL****PUBLIC WORKS DEPARTMENT**

1. The Project shall be in substantial conformance with the approved site plan stamped and dated with the date of this approval.
2. The Project is subject to all applicable City ordinances, policies, and standards, unless specifically waived or modified by the conditions of approval.
3. The Owner 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 Encroachment Permit and any associated Encroachment Agreements.
4. The Owner shall enter into an Encroachment Agreement within one (1) calendar year upon receipt of approval, otherwise this approval shall automatically expire.
5. The Applicant shall process a revision to the Building Plans to reflect the “as-built” conditions.
6. Owner shall remove all encroachments at no cost to the City if the need for public improvements should arise in the future.
7. To the fullest extent permitted by law, Owner 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 Community Association Encroachment (PA2021-166) including, but not limited to, Encroachment Permit No. N2021-0322. 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 Owner, City, and/or the parties initiating or bringing such proceeding. The Owner 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 Owner shall pay to the City upon demand any amount owed to the City pursuant to the indemnification requirements prescribed in this condition.