RESOLUTION NO. PC2022-007

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF NEWPORT BEACH, CALIFORNIA, APPROVING COASTAL DEVELOPMENT PERMIT NO. CD2021-001 TO ALLOW FOR LANDSLIDE/ROCK FALL MITIGATION AND TO WAIVE CITY COUNCIL POLICY L-6 TO RETAIN EXISTING IMPROVEMENTS WITHIN THE BACK BAY DRIVE PUBLIC RIGHT-OF-WAY LOCATED AT 5000 PARK NEWPORT DRIVE (PA2021-099)

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

SECTION 1. STATEMENT OF FACTS.

1. An application was filed by Park Newport Land LTD, a California limited partnership (“Owner”), with respect to property located at 5000 Park Newport Drive, Newport Beach, California, and legally described as Parcel 1 of Lot Line Adjustment No 94-01 recorded as Document # 94-0092253 in the office of the County Recorder of Orange County (“Property”), requesting approval of an encroachment permit.

2. A landslide occurred at the subject Property on June 26, 2020, that has resulted in the temporary closure of Back Bay Drive to vehicular traffic.

3. The Property owners retained Hetherington Engineering, Inc. a professionally licensed Engineering and Geology firm (“Hetherington”) to assess the risk of further slope failure and assist with remediating the landslide area. On January 6, 2021, Hetherington issued a geotechnical opinion letter that concluded there is an imminent risk of future rockfalls at the subject site due to a steeply inclined scarp along the upper portion of subject landslide area. The letter further opined that the installation of anchored rockfall mesh at the head of the scarp of the landslide area and installing a K-rail barrier along the toe of the slope should be installed as soon as possible.

4. On January 20, 2021, the Owner submitted an emergency coastal development permit request to install anchored rockfall mesh at the head of the scarp of the landslide area and to install a K-rail barrier along the toe of the slope consistent with the recommendation of Hetherington. Emergency coastal development permit CD2021-001 was subsequently approved by the Community Development Director on January 22, 2021.

5. On October 21, 2021, Hetherington issued a geotechnical opinion letter that concluded there was an imminent risk of future landslides during significant rain events and recommended the immediate installation of temporary tarps along selected portions of the property during the 2021-2022 rainy season.

6. On October 21, 2021, the Owner submitted an emergency coastal development permit request to install temporary tarps along selected portions of the property during the 2021-2022 rainy season consistent with the recommendation of Hetherington. Emergency
coastal development permit CD2021-066 was subsequently approved by the Community Development Director on October 26, 2021.

7. Consistent with the conditions of approval of emergency coastal development permit CD2021-001 and CD2021-066, the Owner submitted a coastal development permit request on April 22, 2021, to authorize the work completed under the two emergency coastal development permits as well as future landslide mitigation consisting of the installation of solider piles to protect two existing principle structures.

8. The Owner requests a waiver to retain existing non-compliant improvements consisting of three (3) sections of temporary k-rail within the Back Bay Drive public right-of-way that encroach up to twelve (12)-feet 8-inches into the 40-foot wide public right-of-way at the Property ("Project"). The Back Bay Drive parkway within the public right-of-way varies in width from approximately eight (8)-feet to fifteen (15)-feet from edge of pavement to the property line. City Council Policy L-6 ("Policy") prohibits the proposed structures are limited to a one 1-foot projection into the right-of-way or less than 36-inches in height.

9. The requested approvals are not specifically provided for within City Council Policy L-6 (Encroachment in Public Rights-of-Way) ("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 and approval of the encroachment permit by the Planning Commission.

10. The property is designated by the General Plan Land Use Element as RM (Multiple Residential) and is located in the Planned Community 7-Park Newport Zoning District.

11. The Property is located in the coastal zone. The Coastal Land Use Plan designation is RM-D (Multiple Unit Residential) - (20.0 -29.9 DU/AC) and it is located within the Planned Community 7-Park Newport Coastal Zone District.

12. A public meeting was held on April 21, 2022, in the 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. ("Ralph M. Brown Act") and City Council Policy L-6. 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 15269 (c) (the activity is necessary to prevent or mitigate an emergency) and Section 15301 under Class 1 (Existing Facilities) of the CEQA Guidelines, California Code of Regulations, Title 14, Division 6, Chapter 3. Section 15269 allows specific actions necessary to prevent or mitigate an emergency. The Project is necessary to mitigate and reduce the immediate risks associated with rock, soil, or other debris from falling on to Back Bay Drive during a potential rain event. The Class 1 exemption includes the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use. There are no known exceptions listed in CEQA Guidelines Section 15300.2 that would invalidate the use of these exemptions.

SECTION 3. REQUIRED FINDINGS.

In accordance with Section 21.52.015 (Coastal Development Permits, Findings and Decision) of the Newport Beach Municipal Code ("NBMC"), the following findings and facts in support of such findings are set forth:

Finding:

A. Conforms to all applicable sections of the certified Local Coastal Program.

Facts in Support of Finding:

1. The proposed development complies with applicable residential development standards including, but not limited to, floor area limitation, setbacks, height, and parking.

   a. Local Coastal Program Implementation Plan Section 21.52.025 (Emergency Coastal Development Permits) of the NBMC, allows for the issuance of emergency coastal development permits where, “[I]n the event of a verified emergency, temporary permits to proceed with remedial measures may be authorized by the Director until such time as a full coastal development permit shall be filed.”

   b. Based upon the January 6, 2021, and October 21, 2021, geotechnical opinion letters issued by Hetherington which both concluded there is an imminent risk of future landslides without immediate mitigation, the Community Development Director verified that an emergency existed and authorized immediate action via emergency coastal development permit CD2021-001 and CD2021-066 to prevent/mitigate loss or damage to life, health, property and essential public services.

   c. Local Coastal Program Implementation Plan Section 21.30.030(C)(3)(ii) – (Protective Structures) allows construction of protective structures when designed to mitigate adverse impacts on local shoreline sand supply and existing structures that are: “Threatened by natural hazards, provided that the protective structures...”
d. The Park Newport Apartments on the Property were constructed in 1969 which predates the Coastal Act of 1976 and are considered existing structures located on private land.

e. Based upon a history of six(6) recorded landslides on the Project site dating back to 1978 and existing slope conditions which are described by, Hetherington as “grossly and surficially unstable from an engineering geologic and geotechnical engineering perspective” two (2)existing residential structures (Building 4 & Unit 4830) are threatened by natural hazards (landslide) and require further mitigation in the form of solider pile installation and the use of temporary tarping of select locations along the slope during rainy season.

2. The Property is located in an area known for the potential of seismic activity and liquefaction. All projects are required to comply with the California Building Code (“CBC”) and Building Division standards and policies. Geotechnical investigations specifically addressing liquefaction are required to be reviewed and approved prior to the issuance of building permits. Permit issuance is also contingent on the inclusion of design mitigation identified in the investigations. Construction plans are reviewed for compliance with approved investigations and CBC prior to building permit issuance.

3. The Project site is located adjacent to and immediately east of Back Bay Drive, which is a designated public view road in the Coastal Land Use Plan and offers public views of Upper Newport Bay. Site evaluation revealed that the proposed landslide/rockfall mitigation improvements will not affect the existing views afforded from Back Bay Drive as the Project improvements are located landward of Upper Newport Bay. In addition, tarping of the slope has been limited through conditions of approval to only allow minimum times of the year when heavy rains are likely to occur and pose the greatest risk of landslide/slope failure. Therefore, the Project does not have the potential to degrade the visual quality of the coastal zone or result in significant adverse impacts to public views.

Finding:

B. Conforms with the public access and public recreation policies of Chapter 3 of the Coastal Act if the project is located between the nearest public road and the sea or shoreline of any body of water located within the coastal zone.

Fact in Support of Finding:

1. The Project site is not located between the nearest public road and the sea or shoreline. Implementation Plan Section 21.30.040 requires that the provision of public access bear a reasonable relationship between the requirement and the Project’s impact and be proportional to the impact. In this case, the Project mitigates future landslide risk and protects Back Bay Drive which serves as a popular public recreation amenity through its
use as a cycling, walking and jogging route. Therefore, the Project does not involve a change in land use, density or intensity that will result in increased demand on public access and recreation opportunities. Furthermore, the Project is designed and sited (appropriate height, setbacks, etc.) so as not to block or impede existing public access opportunities.

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:

C. The existing private improvements will not be a detriment to the health, safety and welfare of the public.

Facts in Support of Finding:

4. The Project does not hinder the present or future use of the public right-of-way, including sidewalks, and there are no existing City utilities located within the encroachment area.

5. The Back Bay Drive parkway within the public right-of-way varies in width from approximately eight (8) feet to 15 feet wide of the overall 40 foot right-of-way width. The requested encroachments project up to twelve (12)-feet 8-inches into the parkway.

6. The Project does not diminish the rights of the public along the Back Bay Drive right-of-way. There are no sidewalks along Back Bay Drive adjacent to the Project and the City does not currently have plans to install sidewalks.

7. The Back Bay Drive parkway generally slopes upward toward private property. The top of slope is approximately 86 feet above the road surface of Back Bay Drive.

8. Approval would require the Owner to enter into an Encroachment Agreement to allow the existing improvements as requested, and any liability associated with the existing private improvements would be transferred to the Owner. Additionally, if the need for public improvements should arise in the future, Owner shall agree to remove all encroachments at no cost to the City.

Finding:

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

Facts in Support of Finding:

1. The temporary K-rail is necessary to minimize slope debris onto the roadway to maintain access along Back Bay Drive. The temporary K-rail along Section 2 was installed in 2021 as part of Coastal Development Permit CD2021-001 for emergency slope repair and future slope stabilization measures. It is unclear when Section 1 and Section 3 were installed.
2. The maximum height of proposed structures in the right-of-way will not exceed 36 inches in height above the adjacent pavement surface. Public views along the Back Bay Drive will remain unobstructed.

3. There are no existing City utilities within the encroachment area.

SECTION 4. DECISION.

NOW, THEREFORE, BE IT RESOLVED:

1. The Planning Commission of the City of Newport Beach hereby determines this Project is categorically exempt from the California Environmental Quality Act (“CEQA”) pursuant to Section 15301 and Section 15303 under Class 1 (Existing Facilities) and 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 Planning Commission of the City of Newport Beach hereby waives City Council Policy L-6 and, subject to the conditions set forth in Exhibit “A,” which is attached hereto and incorporated by reference.

3. The Planning Commission of the City of Newport Beach hereby approves Coastal Development Permit No. CD2021-001, subject to the conditions set forth in Exhibit “A,” which is attached hereto and incorporated by reference.

4. 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 City Council Policy L-6 and Title 21 Local Coastal Program (LCP) Implementation Plan, of the Newport Beach Municipal Code. Final action taken by the City may be appealed to the Coastal Commission in compliance with Section 21.64.035 (Appeal to the Coastal Commission) of the City’s certified LCP and Title 14 California Code of Regulations, Sections 13111 through 13120, and Section 30603 of the Coastal Act.

PASSED, APPROVED, AND ADOPTED THIS 21st DAY OF APRIL, 2022

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

NOES: None

ABSTAIN: None

ABSENT: None
Lee Lowrey, Chairman
Curtis Ellmore, Secretary
EXHIBIT “A”

CONDITIONS OF APPROVAL

PLANNING DEPARTMENT

1. The Project shall be in substantial conformance with the approved site plan stamped and dated with the date of this approval.

2. This approval does not authorize any new or existing improvements (including landscaping) on California Coastal Permit Jurisdiction, State tidelands, public beaches, or the public right-of-way. Any improvements located on tidelands, submerged lands, and/or lands that may be subject to the public trust shall require a coastal development permit (CDP) approved by the California Coastal Commission (Coastal Commission). Prior to the issuance of building permits, the Owner shall provide a copy of said coastal development permit or CDP waiver or documentation from the Coastal Commission that subject improvements are not subject to the permit requirements of the Coastal Act and/or not located within the permit jurisdiction of the Coastal Commission.

3. No demolition or construction materials, equipment debris, or waste, shall be placed or stored in a location that would enter sensitive habitat, receiving waters, or a storm drain or result in impacts to environmentally sensitive habitat areas, streams, the beach, wetlands or their buffers. No demolition or construction materials shall be stored on public property.

4. The Owner is responsible for compliance with the Migratory Bird Treaty Act (MBTA). In compliance with the MBTA, grading, brush removal, building demolition, tree trimming, and similar construction activities shall occur between August 16 and January 31, outside of the peak nesting period. If such activities must occur inside the peak nesting season from February 1 to August 15, compliance with the following is required to prevent the taking of native birds pursuant to MBTA:

   A. The construction area shall be inspected for active nests. If birds are observed flying from a nest or sitting on a nest, it can be assumed that the nest is active. Construction activity within 300 feet of an active nest shall be delayed until the nest is no longer active. Continue to observe the nest until the chicks have left the nest and activity is no longer observed. When the nest is no longer active, construction activity can continue in the nest area.

   B. It is a violation of state and federal law to kill or harm a native bird. To ensure compliance, consider hiring a biologist to assist with the survey for nesting birds, and to determine when it is safe to commence construction activities. If an active nest is found, one or two short follow-up surveys will be necessary to check on the nest and determine when the nest is no longer active.
5. Best Management Practices (BMPs) and Good Housekeeping Practices (GHPs) shall be implemented prior to and throughout the duration of construction activity as designated in the Construction Erosion Control Plan.

6. The discharge of any hazardous materials into storm sewer systems or receiving waters shall be prohibited. Machinery and equipment shall be maintained and washed in confined areas specifically designed to control runoff. A designated fueling and vehicle maintenance area with appropriate berms and protection to prevent spillage shall be provided as far away from storm drain systems or receiving waters as possible.

7. Debris from demolition shall be removed from work areas each day and removed from the Project site within 24 hours of the completion of the project. Stockpiles and construction materials shall be covered, enclosed on all sites, not stored in contact with the soil, and located as far away as possible from drain inlets and any waterway.

8. Trash and debris shall be disposed in proper trash and recycling receptacles at the end of each construction day. Solid waste, including excess concrete, shall be disposed in adequate disposal facilities at a legal disposal site or recycled at a recycling facility.

9. Revisions to the approved plans may require an amendment to this Coastal Development Permit or the processing of a new coastal development permit.

10. The Project is subject to all applicable City ordinances, policies, and standards, unless specifically waived or modified by the conditions of approval.

11. 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 Coastal Development Permit.

12. This Coastal Development Permit may be modified or revoked by the Planning Commission if determined that the proposed uses or conditions under which it is being operated or maintained is detrimental to the public health, welfare or materially injurious to property or improvements in the vicinity or if the property is operated or maintained so as to constitute a public nuisance.

13. Prior to issuance of a building permit, a copy of the Resolution, including conditions of approval Exhibit “A” shall be incorporated into the Building Division and field sets of plans.

14. Construction activities shall comply with Section 10.28.040 (Construction Activity – Noise Regulations) of the Newport Beach Municipal Code (“NBMC”), which restricts hours of noise-generating construction activities that produce noise to between the hours of 7:00 a.m. and 6:30 p.m., Monday through Friday, and 8:00 a.m. and 6:00 p.m. on Saturday.

15. All noise generated by the proposed use shall comply with the provisions of Chapter 10.26 (Community Noise Control) and other applicable noise control requirements of the
NBMC. The maximum noise shall be limited to no more than depicted below for the specified time periods unless the ambient noise level is higher:

<table>
<thead>
<tr>
<th>Location</th>
<th>Between the hours of 7:00AM and 10:00PM</th>
<th>Between the hours of 10:00PM and 7:00AM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residential Property</td>
<td>Interior 45dBA</td>
<td>Exterior 55dBA</td>
</tr>
<tr>
<td>Residential Property located within 100 feet of a commercial property</td>
<td>Interior 45dBA</td>
<td>Exterior 60dBA</td>
</tr>
<tr>
<td>Mixed Use Property</td>
<td>Interior 45dBA</td>
<td>Exterior 60dBA</td>
</tr>
<tr>
<td>Commercial Property</td>
<td>N/A</td>
<td>65dBA</td>
</tr>
</tbody>
</table>

16. Prior to the issuance of building permit, the owner shall pay any unpaid administrative costs associated with the processing of this application to the Planning Division.

17. Tarps shall be black in color with similar colored material used for the sandbags that secure the tarps. The use of bright contrasting colors such as orange or yellow shall be prohibited.

18. Temporary tarping shall be limited to the months of October to the end of April to coincide with Southern California’s rainy season.

19. Should the Property be sold or otherwise come under different ownership, any future owners or assignees shall be notified of the conditions of this approval by the current property owner or agent.

20. This Coastal Development Permit No. CD2021-001 shall expire unless exercised within 24 months from the date of approval as specified in Section 21.54.060 (Time Limits and Extensions) of the NBMC unless an extension is otherwise granted.

21. Protective devices authorized under Coastal Development Permit No. CD2021-001 shall be removed when the existing structures requiring protection are redeveloped, or no longer present, whichever comes first.

22. The Project is subject to all applicable City ordinances, policies, and standards, unless specifically waived or modified by the conditions of approval.

23. 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.

PUBLIC WORKS DEPARTMENT

24. The owner shall obtain an “After the Fact” Encroachment Permit to allow three (3) sections of k-rail that encroach up to twelve (12) feet 8-inches into the Back Bay Drive.
public right-of-way with a waiver of City Council Policy L-6, Section A “Private Encroachments that are Prohibited Without a Waiver and Approval”.

25. The Owner shall enter into an Encroachment Agreement within one (1) calendar year upon receipt of approval, otherwise this approval shall automatically expire.

26. This Encroachment Permit allows three (3) sections of K-rail that encroach up to twelve (12) feet 8-inches into the Back Bay Drive public right-of-way with a waiver of City Council Policy L-6, Section A of “Private Encroachments that are Prohibited Without a Waiver and Approval”.

27. Crash cushions shall be installed at the beginning of each K-rail section. Design shall be reviewed and approved by Public Works prior to installation.

28. The Owner shall immediately remove any slope debris from the roadway surface.

29. A minimum of monthly removal of debris behind and around the K-rail.

30. If the need for public improvements arises in the future, Owners shall remove all encroachments at no cost to the City.

31. 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, but not limited to, and Coastal Development Permit CD2021-001 and associated Encroachments into the Public Right of Way. 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.