

**ENCROACHMENT AND LANDSCAPE MAINTENANCE AGREEMENT  
BETWEEN THE CITY OF NEWPORT BEACH  
AND  
BALBOA ISLAND IMPROVEMENT ASSOCIATION  
(EPN2010-0097)**

THIS ENCROACHMENT AND LANDSCAPE MAINTENANCE AGREEMENT, ("Agreement") is entered into this 22 day of December 2010, ("Effective Date") by and between the City of Newport Beach a California municipal corporation and charter city, ("City"), and the Balboa Island Improvement Association, a California non-profit IRS 501 (c)(4) corporation ("Association"), formed to "provide a non-partisan, non-profit instrument through which the property owners of Balboa Island can work creatively together to promote the common good, to study and give public consideration to the problems and the interests of Balboa Island" located in Newport Beach, California.

**RECITALS**

- A. **WHEREAS**, City is a municipal corporation duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the statutes of the State of California and the Charter of the City.
- B. **WHEREAS**, City is the owner of certain real property on Balboa Island at 124 Marine Avenue, at the intersection of Park Avenue and Marine Avenue, more commonly known as Balboa Island Fire Station No. 4.
- C. **WHEREAS**, City holds easements over certain real property on Balboa Island for the purpose of providing and maintaining public rights of way for vehicular and pedestrian transportation.
- D. **WHEREAS**, Association desires to enhance the aesthetic appearance of Balboa Island by constructing, installing and maintaining certain private improvements on City property and within the public rights-of-way on Balboa Island, including Park Avenue, Marine Avenue, Bayside Drive, South Bay Front, North Bay Front, the Balboa Island/Marine Avenue Bridge, five (5) Little Balboa Island street ends and twenty-six (26) Balboa Island street ends, as more fully described herein; and Association desires to incorporate existing private improvements into this Agreement and has agreed to continue to maintain the private improvements as further defined herein (collectively "Permitted Improvements").
- E. **WHEREAS**, said Permitted Improvements may interfere in the future with City's ability to construct, operate, maintain and replace City and other public facilities and improvements within City property and public rights-of-way.

- F. **WHEREAS**, all improvements on City property or public rights-of-way require the City's approval in the form of an Encroachment Agreement prior to the installation of improvements on the City property or public rights-of-way.
- G. **WHEREAS**, the parties hereto desire to enter this Agreement providing for fulfillment of the conditions required by City to permit Association to construct and maintain said Permitted Improvements.

**NOW, THEREFORE**, in consideration of the mutual promises contained herein, Association and City hereby agree as follows:

### **AGREEMENT**

1. **Incorporation of Recitals.** The above Recitals are incorporated into this Agreement in full by this reference.
2. **Permitted Improvements.** It is mutually agreed upon that the permitted private improvements as depicted on the detailed improvement plans attached to Encroachment Permit N2010-0097 as approved by the City on June 2, 2010 shall be located at the locations identified below and as further depicted in Exhibits "A" through "C", attached hereto and incorporated herein by reference ("Improvement Locations"). The Permitted Improvements are further defined as:
  - (a) Landscaping, artificial grass, and irrigation modification improvements in the public rights-of-way on the southwest corner of Marine Avenue at Bayside Drive as depicted on Exhibit "A." Landscaping includes, but is not limited to, shrubs, hedges, bushes, flowers, annuals, and groundcover. Association shall maintain irrigation, landscaping and artificial grass at its own expense. City shall provide water for irrigation of landscaped area without charge to Association.
  - (b) Landscaping, artificial grass, and irrigation modification improvements on the Marine Avenue public right-of-way immediately north of the Balboa Island/Marine Avenue Bridge on the east and west sides of the street as depicted on Exhibit "A." Landscaping includes, but is not limited to, shrubs, hedges, bushes, flowers, annuals, and groundcover. Association shall maintain landscaping and artificial grass at its own expense. City shall provide water for irrigation of landscaped area on the west side of Marine Avenue without charge to Association.
  - (c) Landscaping, artificial grass, and irrigation modification improvements at 124 Marine Avenue along the Park Avenue frontage as depicted on Exhibit "A." Landscaping includes, but is not limited to, shrubs, hedges, bushes, flowers, annuals, and groundcover. Association shall maintain irrigation, landscaping and artificial grass at its own expense. The City will provide water for irrigation of landscaped area without charge to

Association.

- (d) An existing Flag Pole displaying the American Flag, State of California, Flag and the Balboa Island Flag in accordance with the rules set forth in the Flag Code (4 U.S.C. § 7), and existing permanent spot light for purposes of illuminating the flags. The spot light is located on the Balboa Island/Marine Avenue Bridge entry landscaped wall on the east of the Marine Avenue public right-of-way, as depicted on Exhibit "B." The Association will maintain the pole, halyards, and flags. The City will maintain and provide power to the spot light without charge to Association.
- (e) A lighted information board ("Information Board") displaying messages related to Balboa Island's events and community information, located on the Balboa Island/Marine Avenue Bridge entry landscaped wall on the west of the Marine Avenue public right-of-way. The Association will maintain the Information Board and appurtenances. The Information Board is a City-owned fixture, located on public property. The City intends with this Agreement to create a limited public forum on the Information Board, and to define the categories of speech allowed and speakers that may display messages on the Information Board. The category of speaker allowed by the City to post speech on the information board shall be the Association, the Little Island Improvement Association, and the Marine Avenue Business Improvement District. The categories of speech permitted by the City on the Information Board shall be limited to noncommercial seasonal holiday messages, noncommercial messages related to community events on Balboa Island organized or sponsored by the permitted speakers, and noncommercial messages recognizing unique aspects of life on Balboa Island. Under no circumstances may any speaker post commercial speech, or noncommercial political or religious speech on the Information Board. The City retains the right to display government speech on the Information Board. The City will provide power to the Information Board without charge to Association.
- (f) Decorative flags on the Balboa Island/Marine Avenue Bridge installed, displayed and maintained in accordance with City Council Policy L-24, including any Council Policy limitations on messages permitted and prohibited on such flags.
- (g) Eight (8) existing hanging planter pots attached to the existing dual head decorative street light poles located along the Balboa Island/Marine Avenue Bridge. The Association will supply, install and maintain the flowers, hanging planter pots, brackets and appurtenances.
- (h) Holiday/seasonal lighting decorations attached to three (3) existing City palm trees on the Marine Avenue street end at South Bay Front, displayed and changed by the Association throughout the year. The Association

shall provide, install, and maintain the lighting, decorations and appurtenances. The City shall provide and maintain power to an electrical outlet in the planter area without charge to Association.

- (i) Decorative flower containers at thirty-one (31) street ends as depicted on Exhibit "C", and as further defined below:
  - i. Decorative flower containers on five (5) Little Balboa Island street ends: easterly street end of Balboa Ave., easterly street end of Park Ave., southerly street ends of Abalone Ave., Crystal Ave., and Jade Ave.
  - ii. Decorative flower containers on twenty-six (26) Balboa Island street ends: northwesterly street end of Emerald Ave., both street ends of Garnet Ave., Pearl Ave., Collins Ave., Ruby Ave., Diamond Ave., Sapphire Ave., Coral Ave., Apolena Ave., Amethyst Ave., and Onyx Ave.; northerly street end of Agate Ave.; southwesterly street ends of Opal Ave., Topaz Ave., and Turquoise Ave.; and the southerly street end of Marine Ave.

The flower container encroachment areas shall be installed and maintained in a manner that keeps the North Bay Front, South Bay Front, East Bay Front, and street end sidewalks clear of obstruction. The Association will maintain the flowers and containers consistent with the following conditions: (a) no landscaping shall exceed four (4) feet in height, measured from the sidewalk; and (b) the watering of containers shall not result in overflow of water, soil or plant material onto the adjacent public sidewalk. The City shall maintain any bench(es) and trash can(s) at the street ends. The quantity of benches and trash cans shall be at the sole discretion of the Director of the Municipal Operations Department.

The Association shall obtain written permission from the Little Balboa Island Property Owners Association for any Permitted Improvements installed at the five (5) Little Island street ends.

- (j) Holiday decorations, including holiday wreaths and garlands, wrapped on City street light poles on the Balboa Island/Marine Avenue Bridge and Park Avenue, North Bay Front, South Bay Front, and East Bay Front public rights-of-way. The holiday decorations are installed once a year after Thanksgiving and removed the week after New Year's Day. The holiday decoration shall not obstruct any photo cell or sign located on any street light pole. The Association will provide, install, and maintain the holiday decoration and appurtenances. The City will provide and maintain power to an electrical outlet, if one is present on the street light pole, without charge to Association.

3. **Term.** This Agreement shall be deemed effective on the date first set forth above (the "Effective Date") and shall continue for five (5) years from the Effective Date (the "Initial Term"), unless terminated earlier as provided in Section 13 (Termination) of this Agreement.

Upon expiration of the Initial Term, this Agreement shall be automatically renewed for subsequent additional terms equal to the Initial Term ("Additional Terms"), unless either Party provides the other with written notice of intent to cancel the Agreement at least thirty (30) days before the expiration of the Initial Term or any Additional Term of Agreement. If such notice is not given, the Agreement shall continue to be automatically renewed until a date twenty-five (25) years from the Effective Date is reached. To comply with requirements set forth in the Charter of the City of Newport Beach, the combination of the Initial Term of Agreement and any Additional Terms entered under this Agreement shall not exceed a total of twenty-five (25) years from the Effective Date.

4. **Association Maintenance.** Subject to the terms and provisions contained herein, City hereby assigns to Association the obligation to maintain the Permitted Improvements within the Improvement Locations on City Property and public rights-of-way.
5. **City Maintenance.** The City shall maintain the City street trees, in accordance with the City's annual tree trimming schedule. The City shall to supply electrical and water connections to the Permitted Improvements, as specified in this Agreement.
6. **Encroachment Permit.** Prior to commencement of any additional work on City Property at any time, Association shall apply for and obtain an Encroachment Permit with the City's Public Works Department, authorizing it to perform the installation of the Permitted Improvements within the City right-of-way.
7. **Installation of Improvements.** Association shall install the Permitted Improvements in substantial conformance with the approved exhibits, attached to Encroachment Permit EPN2010-0097 ("Permit") and on file with the City's Public Works Department.
8. **Covenants.** Association hereby agrees to install, operate, inspect, monitor, maintain, relocate, and/or remove the Permitted Improvements in accordance with this Agreement, the Permit, and all applicable provisions of the City of Newport Beach Municipal Code, as amended from time to time.
9. **Standard of Maintenance.** Association shall, at its sole cost and expense, maintain the Permitted Improvements installed within Improvement Locations on City property and public rights-of-way in good condition and repair and as required by City. With the exception of the existing City trees, Association shall maintain the City property and public rights-of-way in accordance with generally

prevailing standards of maintenance, and pay all costs incurred in doing so. In the event that Association does not maintain the Permitted Improvements at the Improvement Locations as required herein, the City may terminate the Agreement as more particularly provided in Section 13 herein.

10. **Association Alteration of Improvements.** Association shall not materially alter the Improvements from their original condition as installed according to the approved plans attached to the Permit without the prior written approval of City. City's approval of the proposed alterations to the Improvements shall not be unreasonably withheld.
11. **Failure to Perform.** If Association fails to fulfill its maintenance or other responsibilities under this Agreement, City may provide Association written notice of such failure describing the deficiencies in reasonable detail ("Deficiency Notice"), provided that an emergency situation does not exist. If such deficiency is not corrected within ten (10) business days of Association's receipt of Deficiency Notice, City shall have the right, but not the obligation, to cure the deficiency; provided, however, that if the deficiency is of a type that cannot reasonably be cured within ten (10) business days, it will be deemed cured if Association commences to cure the deficiency within such period and proceeds diligently thereafter to complete the cure of such deficiency. If City elects to cure the deficiency, it shall be performed at City's standard rates and prices, and Association shall reimburse City for its costs incurred in curing the deficiency within fifteen (15) days of Association's receipt of City's invoice for such costs. Such invoice shall be accompanied by copies of receipts evidencing the actual cost of cure incurred by City.
12. **Liens.** Association shall not suffer or permit to be enforced against City property and public rights-of-way any mechanics, laborers, materialmen, contractors, subcontractors, or any other liens, claims or demands arising from any maintenance or other work performed by Association within City Property, but Association shall pay or cause to be paid all of said liens, claims and demands before any action is brought to enforce the same against City property and public rights-of-way.
13. **Termination.** This Agreement shall remain in effect as provided in Section 3 (Term) from the Effective Date until either Party terminates the agreement as provided in Section 3, above, or until twenty-five (25) years from the Effective Date, whichever is sooner, provided that: (a) City may terminate this Agreement for cause upon thirty (30) calendar days prior written notice to Association in the event that Association breaches any term of this Agreement or fails to perform or cure any failure to perform as provided in Section 11 above; or (b) City may terminate this Agreement if it determines, in its sole discretion, that the property is needed for a public purpose upon one hundred twenty (120) days prior written notice from City to Association. If this Agreement is terminated, City shall have the right to remove all or any portion of the Permitted Improvements. City shall

incur no liability whatsoever in the event of the termination of this Agreement, or subsequent removal of the Permitted Improvements by City.

14. **Right of Modification.** Association agrees that City reserves the right to make any modifications to Permitted Improvements City deems necessary and/or appropriate.
  
15. **Right of Removal.** Association agrees that should City be required to enter onto Improvement Locations on City property or public rights-of-way to exercise its primary ownership rights, including, but not limited to, the maintenance, removal, repair, renewal, replacement or enlargement of existing or future public facilities or improvements, City may remove portions of the Permitted Improvements, as required, and in such event:
  - (a) City shall notify Association of its intention to accomplish such work, if an emergency situation does not exist.
  - (b) Association shall be responsible for arranging for any renewal, replacement, or restoration of the Permitted Improvements affected by such work by City.
  - (c) City agrees to bear only the cost of any removal of the Permitted Improvements affected by such work by City.
  - (d) Association agrees to pay all costs for renewal, replacement, or restoration of the Permitted Improvements.
  
15. **Damage to City Facilities.** If City or other public facilities or improvements are damaged by the installation or presence of the Permitted Improvements, Association shall be responsible for the cost of repairs.
  
16. **Insurance.** Without limiting Association's indemnification of City, and prior to entry onto City property, Association shall obtain, provide and maintain at its own expense during the term of this License a policy or policies of insurance of the type and amounts described below and in a form satisfactory to City.
  - A. **Coverage and Limit Requirements.**
    - (1) **Workers' Compensation.** Association shall maintain Workers' Compensation Insurance providing statutory benefits and employer's liability insurance with limits of at least one million dollars (\$1,000,000) each type for Association's employees in accordance with the laws of the State of California, Section 3700 of the Labor Code. In addition, Association shall require each vendor to similarly maintain Workers' Compensation Insurance and Employer's Liability Insurance in accordance with the laws of the

State of California, Section 3700 for all of the vendor's employees and in the event the vendor does not employ anyone, then they are required to execute the City's Workers Compensation Exemption form. The insurer issuing the Workers' Compensation insurance shall amend its policy by endorsement to waive all rights of subrogation against City, its elected or appointed officers, agents, officials, employees and volunteers. Association shall submit to City, along with the required certificate of insurance, a copy of such waiver of subrogation endorsement.

- (2) General Liability. Association shall maintain commercial general liability insurance in an amount not less than one million dollars (\$1,000,000) per occurrence, two million dollars (\$2,000,000) General Aggregate for bodily injury, personal injury, and property damage, including without limitation, blanket contractual liability. Coverage shall be at least as broad as that provided by Insurance Services Office form CG 00 01. None of the policies required herein shall be in compliance with these requirements if they include any limiting endorsement that has not been first submitted to City and approved in writing.
- (3) Automobile Liability. Association shall maintain automobile insurance covering bodily injury and property damage for all activities of the Association arising out of or in connection with work to be performed under this License, including coverage for any owned, hired, non-owned or rented vehicles, in an amount not less than one million dollars (\$1,000,000) combined single limit for each accident.

B. Other Insurance Provisions.

- (1) Evidence of Insurance. Association shall provide certificates of insurance to City as evidence of the insurance coverage required herein, along with a waiver of subrogation endorsement for workers' compensation and an additional insured endorsement for general liability. Insurance certificates and endorsements must be approved by City's Risk Manager prior to commencement of performance or issuance of any permit. Current evidence of insurance shall be kept on file with City at all times during the term of this License. All of the executed documents referenced in this License must be returned prior to entry onto City property so that the City may review and approve all documentation. City reserves the right to require complete, certified copies of all required insurance policies, at any time.

- (2) General liability insurance provisions. Primary and excess or umbrella liability policies are to contain, or be endorsed to contain, the following provisions:
- i. City, its elected or appointed officers, agents, officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of activities performed by or on behalf of Association, including the insured's general supervision of Association; products and completed operations of Association; premises owned, occupied or used by Association. The coverage shall contain no special limitations on the scope of protection afforded to City, its elected or appointed officers, officials, employees, agents or volunteers. Association shall submit to City a copy of the additional insured endorsement along with the required certificates of insurance.
  - ii. Association's insurance coverage shall be primary insurance and/or primary source of recovery as respects City, its elected or appointed officers, agents, officials, employees and volunteers as respects to all claims, losses, or liability arising directly or indirectly from the Association's operations or services provided to the City. Any insurance or self-insurance maintained by City, its officers, officials, employees and volunteers shall be excess of the Association's insurance and shall not contribute with it.
  - iii. Association's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- (3) Acceptable Insurers. All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance in the State of California, with an assigned policyholders' Rating of A- (or higher) and Financial Size Category Class VII (or larger) in accordance with the latest edition of Best's Key Rating Guide, unless otherwise approved by the City's Risk Manager.
- (4) Notice of Cancellation. Association agrees to oblige its insurance broker and insurers to provide to City with thirty (30) days notice of cancellation (except for nonpayment for which ten (10) days notice is required) or nonrenewal of coverage for each required.
- (5) Self-Insured Retentions. Association agrees not to self-insure or to use any self-insured retentions on any portion of the insurance

required herein and further agrees that it will not allow any indemnifying party to self-insure its obligations to City. If Association's existing coverage includes a self-insured retention, the self-insured retention must be declared to City. City may review options with the Association, which may include reduction or elimination of the self-insured retention, substitution of other coverage, or other solutions. Association agrees to be responsible for payment of any deductibles on their policies.

- (6) Timely Notice of Claims. Association shall give City prompt and timely notice of any claim made or suit instituted arising out of or resulting from Association's performance under this License.
- (7) Waiver. All insurance coverage maintained or procured pursuant to this License shall be endorsed to waive subrogation against City, its elected or appointed officers, agents, officials, employees and volunteers, or shall specifically allow Association or others providing insurance evidence in compliance with these requirements to waive their right of recovery prior to a loss. Association hereby waives its own right of recovery against City, and shall require similar written express waivers and insurance clauses from each of its vendors.
- (8) Enforcement of License Provisions. Association acknowledges and agrees that any actual or alleged failure on the part of the City to inform Association of non-compliance with any requirement imposes no additional obligations on the City nor does it waive any rights hereunder.
- (9) Requirements not Limiting. Requirements of specific coverage features or limits contained in this Section are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any insurance. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue and is not intended by any party or insured to be all inclusive, or to the exclusion of other coverage, or a waiver of any type.
- (10) Coverage not Limited. All insurance coverage and limits provided by Association and available or applicable to this License are intended to apply to the full extent of the policies. Nothing contained in this License or any other agreement relating to the City or its operations limits the application of such insurance coverage.

- C. Coverage Renewal. Association will renew the coverage required here annually as long as Association continues to provide any services or

participate in any activities under this or any other contract or agreement with the City. Association shall provide proof that policies of insurance required herein expiring during the term of this License have been renewed or replaced with other policies providing at least the same coverage. Proof that such coverage has been ordered shall be submitted prior to expiration. A coverage binder or letter from Association's insurance agent to this effect is acceptable. A certificate of insurance and/or additional insured endorsement as required in these specifications applicable to the renewing or new coverage must be provided to City within five (5) days of the expiration of the coverages.

17. **Indemnification by Association.** To the fullest extent permitted by law, Association shall indemnify, defend and hold harmless City, its City Council, boards and commissions, officers, agents, volunteers, and employees (collectively, the "Indemnified Parties") from and against any and all claims (including, without limitation, claims for bodily injury, death or damage to property), 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 (individually, a Claim; collectively, "Claims"), which may arise from or in any manner relate (directly or indirectly) to any breach of the terms and conditions of this Agreement, any work performed or services provided under this Agreement including, without limitation, defects in workmanship or materials or Association's presence or activities conducted on the Improvement Locations (including the negligent and/or willful acts, errors and/or omissions of Association, its principals, officers, agents, employees, vendors, suppliers, consultants, contractors, anyone employed directly or indirectly by any of them or for whose acts they may be liable for any or all of them).

Notwithstanding the foregoing, nothing herein shall be construed to require Association to indemnify the Indemnified Parties from any Claim arising from the sole negligence or willful misconduct of the Indemnified Parties. Nothing in this indemnity shall be construed as authorizing any award of attorney's fees in any action on or to enforce the terms of this Agreement. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by the Consultant.

18. **Indemnification by City.** To the fullest extent permitted by law, City shall indemnify, defend and hold harmless Association, its board, officers, agents, volunteers, members and employees (collectively, the "Indemnified Parties") from and against any and all claims (including, without limitation, claims for bodily injury, death or damage to property), 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 (individually, a Claim; collectively,

“Claims”), which may arise from or in any manner relate (directly or indirectly) to any breach of the terms and conditions of this Agreement by City, any work performed or services provided under this Agreement by City including, without limitation, defects in workmanship or materials or City’s presence or activities conducted on the Improvement Locations (including the negligent and/or willful acts, errors and/or omissions of City, its City Council, boards and commissions, officers, agents, volunteers, employees, agents, vendors, suppliers, consultants, contractors, anyone employed directly or indirectly by any of them or for whose acts they may be liable for any or all of them).

Notwithstanding the foregoing, nothing herein shall be construed to require City to indemnify the Indemnified Parties from any Claim arising from the sole negligence or willful misconduct of the Indemnified Parties. Nothing in this indemnity shall be construed as authorizing any award of attorney’s fees in any action on or to enforce the terms of this Agreement. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by the Consultant.

19. **Notices.** All notices, demands, requests or approvals to be given under the terms of this Agreement shall be given in writing, and conclusively shall be deemed served when delivered personally, or on the third business day after the deposit thereof in the United States mail, postage prepaid, first-class mail, addressed as hereinafter provided. All notices, demands, requests or approvals from Association to City shall be addressed to City at:

City of Newport Beach  
Public Works Department  
Attention: City Engineer  
3300 Newport Boulevard (P.O. Box 1768)  
Newport Beach, CA 92658-8915

All notices, demands, requests or approvals from City to Association shall be addressed to Contractor at:

Balboa Island Improvement Association  
Attn: Jeff Herdman or current President  
P.O. Box 64  
Newport Beach, CA 92662

20. **Corporate Authority.** The persons executing this Agreement on behalf of each Party warrant that he/she is duly authorized to execute and deliver this Agreement on behalf of the respective Party for whom they sign, and that by so executing this Agreement, the Parties are bound by the provisions of this Agreement.

21. **Controlling Law and Venue.** The laws of the State of California shall govern this Agreement and any action brought relating to this Agreement shall be adjudicated in a court of competent jurisdiction in the County of Orange.
22. **Compliance with Laws.** Association shall at its own cost and expense comply with all statutes, ordinances, regulations and requirements of all governmental entities, including federal, state, county or municipal, whether now in force or hereinafter enacted.
23. **Waiver.** A waiver by either party of any breach, of any term, covenant or condition contained herein shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition contained herein, whether of the same or a different character.
24. **Amendments.** This Agreement may be modified or amended only by a written document executed by both Association and City and approved as to form by the City Attorney.
25. **Severability.** If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.
26. **Successors and Assigns.** Association agrees that this Agreement shall remain in full force and effect from execution thereof and shall be binding upon the heirs, successors, and assigns of Association's interest in the land, whether fee or otherwise.
27. **Interpretation.** The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of the Agreement or any other rule of construction which might otherwise apply.
28. **Integrated Agreement.** This Agreement represents the full and complete understanding of every kind or nature whatsoever between the parties hereto, and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No verbal Agreement or implied covenant shall be held to vary the provisions herein.

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be executed on the dates written below.

**APPROVED AS TO FORM:  
OFFICE OF THE CITY ATTORNEY**

Date: 12/20/10

By: [Signature]  
Mynette Beauchamp,  
Assistant City Attorney

**CITY OF NEWPORT BEACH,  
a California Municipal corporation**

Date: 1/11/11

By: [Signature]  
David A. Kiff,  
City Manager

**ATTEST:**

Date: 1-13-11

By: [Signature]  
Leilani I. Brown, City Clerk

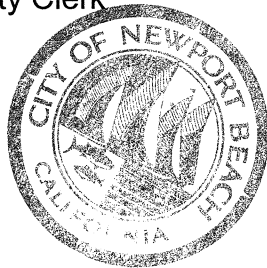
**BALBOA ISLAND IMPROVEMENT  
ASSOCIATION:**

Date: 12/22/10

By: [Signature]  
Jeff Herdman, President

Date: 12/22/10

By: [Signature]  
Marjie Page, Vice President



**ATTACHMENTS:**

- EXHIBIT A- Landscaping Improvements**
- EXHIBIT B- Permitted Improvement Locations**
- EXHIBIT C- Street End Decorative Flower Containers**

[A10-00373] BIIA Enc & Landscape Maint Ag 12.14.10

# CALIFORNIA ALL-PURPOSE ACKNOWLEDGEMENT

STATE OF CALIFORNIA)

COUNTY OF ORANGE )

On DECEMBER 22, 2010 before me, LINDA S. WOOD, Notary Public, personally appeared JEFF HERDMAN & MARJIE PAGE who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Linda S. Wood (SEAL)  
Notary Public in and for said State

## OPTIONAL INFORMATION

Title or Type of Document: ENCROACHMENT & LANDSCAPE MAINTENANCE AGREEMENT - BIFA

Date of Document: DEC. 22. 2010

# CALIFORNIA ALL-PURPOSE ACKNOWLEDGEMENT

STATE OF CALIFORNIA)

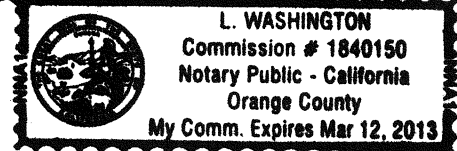
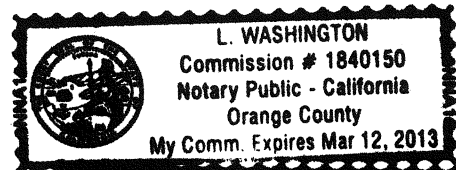
COUNTY OF ORANGE )

On JANUARY 18, 2010<sup>LW</sup> before me, LILLIAN WASHINGTON Notary Public, personally appeared DAVID A. KIFF who proved to me on the basis of satisfactory evidence to be the person~~(s)~~ whose name~~(s)~~ is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she~~/~~they~~ executed the same in his/~~her~~/~~their~~ authorized capacity~~(ies)~~, and that by his/~~her~~/~~their~~ signature~~(s)~~ on the instrument the person~~(s)~~, or the entity upon behalf of which the person~~(s)~~ acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

[Signature] (SEAL)  
Notary Public in and for said State



## OPTIONAL INFORMATION

Title or Type of Document: AGREEMENT (BALPO ISLAND IMPROVEMENT ASSOC.)

Date of Document: DECEMBER 22, 2010

BAYSIDE DR

CURB LINE

R/W

MARINE AVE



TO BALBOA  
ISLAND

NOTE:

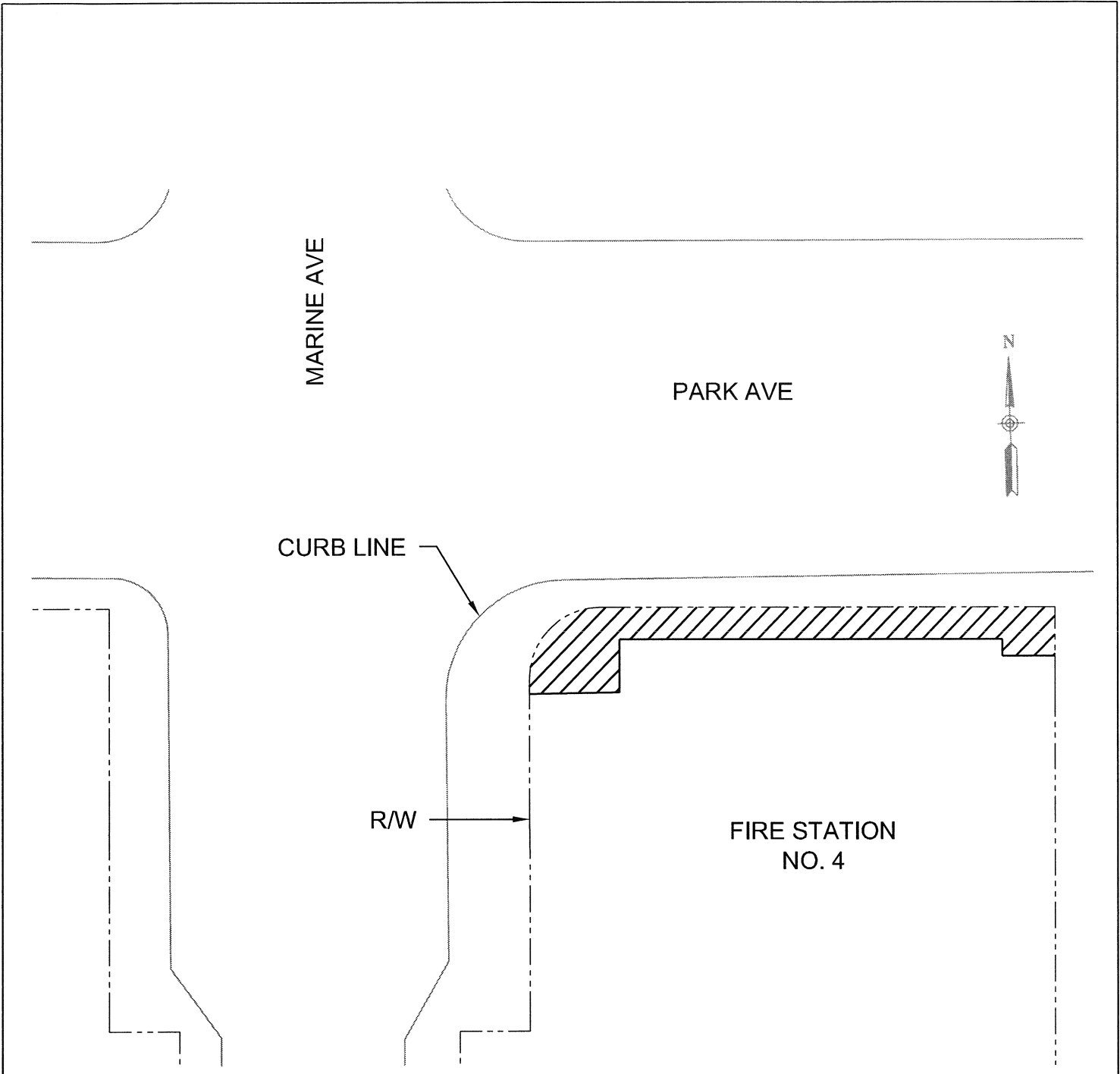


- ENCROACHMENT AREA  
MAINTAINED BY BIIA

LANDSCAPING  
IMPROVEMENTS

EXHIBIT A (1 OF 2)

NOT TO SCALE | DATE: 12/13/10

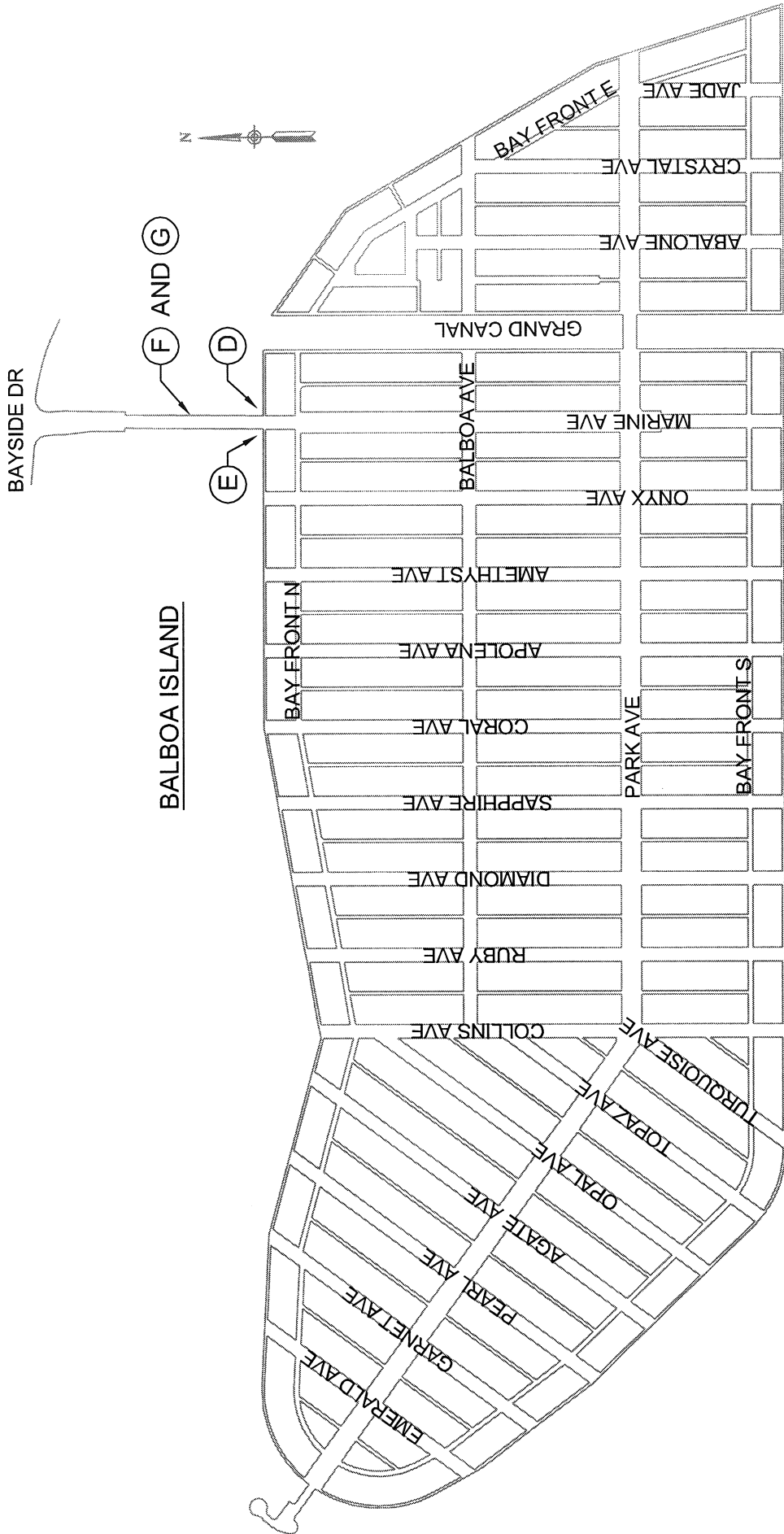


**NOTE:**



- ENCROACHMENT AREA  
MAINTAINED BY BIIA

LANDSCAPING IMPROVEMENTS	
EXHIBIT A (2 OF 2)	
NOT TO SCALE	DATE: 12/13/10



BALBOA ISLAND

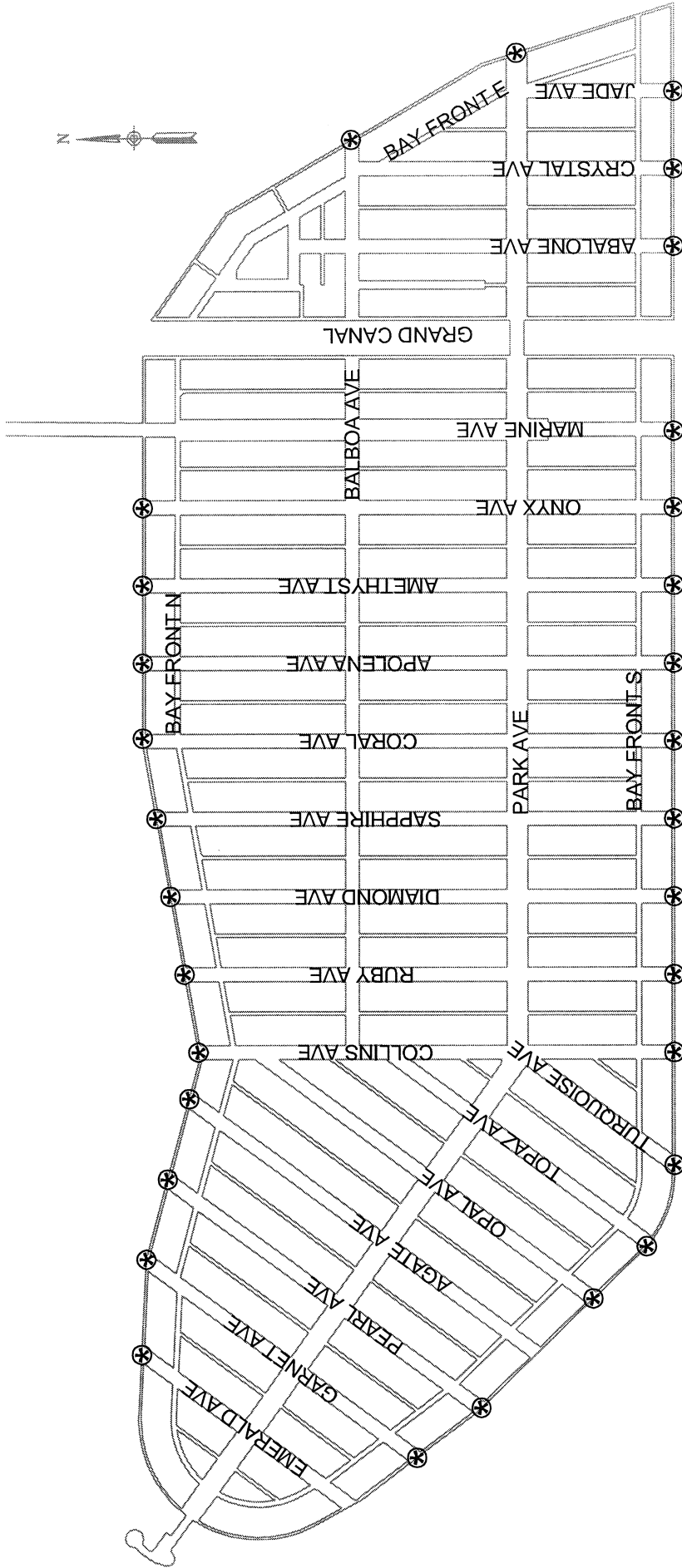
PERMITTED IMPROVEMENT LOCATIONS

- Ⓔ FLAG POLE
- Ⓕ INFORMATION BOARD
- Ⓖ DECORATIVE FLAGS ON STREET LIGHT POLES
- Ⓖ HANGING PLANTER POTS
- Ⓖ HOLIDAY/ SEASONAL LIGHTING DECORATIONS

PERMITTED IMPROVEMENT LOCATIONS

EXHIBIT B

NOT TO SCALE    DATE: 12/13/10



**NOTES:**

- ⊗ STREET END DECORATIVE FLOWER CONTAINER(S)  
SEE EXHIBIT D, SHEET 2 FOR DETAIL

STREET END DECORATIVE  
FLOWER CONTAINERS

EXHIBIT C (1 OF 2)

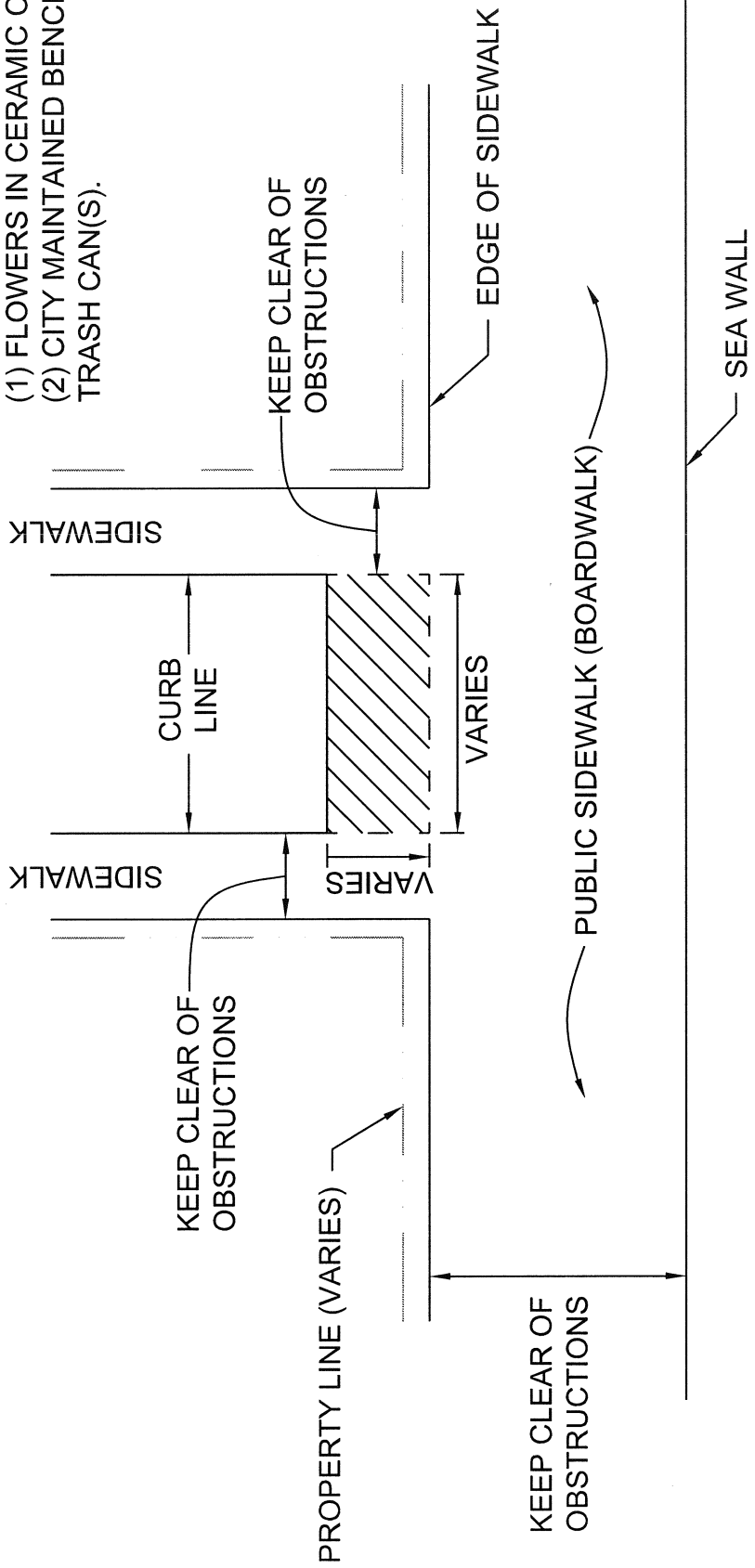
NOT TO SCALE DATE: 12/13/10

NOTE:



- ENCROACHMENT AREA MAINTAINED BY  
BIIA. STREET END DECORATIONS  
INCLUDE:

- (1) FLOWERS IN CERAMIC CONTAINER(S)
- (2) CITY MAINTAINED BENCH(ES) AND  
TRASH CAN(S).



TYPICAL STREET END DETAIL

STREET END DECORATIVE  
FLOWER CONTAINERS

EXHIBIT C (2 OF 2)

NOT TO SCALE DATE: 12/13/10