

Attachment K

Planning Commission Resolution

RESOLUTION NO. PC2019-021

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF NEWPORT BEACH, CALIFORNIA, RECOMMENDING CITY COUNCIL ADOPTION OF ENVIRONMENTAL IMPACT REPORT ADDENDUM NO. ER2016-002 AND APPROVAL OF GENERAL PLAN AMENDMENT NO. GP2018-003, PLANNED COMMUNITY DEVELOPMENT PLAN AMENDMENT NO. PC2018-001, DEVELOPMENT AGREEMENT NO. DA2018-005, MAJOR SITE DEVELOPMENT REVIEW NO. SD2018-003, CONDITIONAL USE PERMIT NO. UP2018-019, AND LOT MERGER NO. LM2018-004 AND REVOCATION OF USE PERMIT NO. UP2005-017 AND MODIFICATION PERMIT NO. MD2004-059 FOR THE VIVANTE SENIOR HOUSING PROJECT, LOCATED AT 850 AND 856 SAN CLEMENTE DRIVE (PA2018-185)

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

SECTION 1. STATEMENT OF FACTS.

1. An application was filed by Nexus Development Corporation representing Vivante Newport Center, LLC ("Applicant"), with respect to property located at 850 and 856 San Clemente Drive, and legally described as Parcel 2 of Newport Beach Lot Line Adjustment No. 95-3 together with Parcel 2 of Resubdivision No. 501 ("Property").
2. The Applicant proposes the demolition of the existing Orange County Museum of Art ("OCMA") (23,632 square feet) and associated administrative office building (13,935 square feet) to accommodate the development of a 183,983-square-foot, six-story combination senior housing (90-unit residential dwelling units) and memory care facility (27 beds). The approximately 2.9 acre site is located on San Clemente Drive opposite the intersection with Santa Maria road.
3. The Applicant, requests the following approvals from the City of Newport Beach ("City"):
 - **General Plan Amendment** – To amend Anomaly No. 49 to change the land use category from PI (Private Institutions) to MU-H3 (Mixed-Use Horizontal). The proposed amendment also includes 90 additional dwelling units and would reduce the nonresidential floor area from 45,208 square feet to 16,000 square feet in Statistical Area L1. Table LU1 is amended to reflect a total of 540 dwelling units authorized within the MU-H3 land use designation.
 - **Planned Community Development Plan Amendment** – To modify the San Joaquin Plaza Planned Community Development Plan (PC-19) to include development and design standards to allow for 90 senior dwelling units and 27 memory care beds. The Applicant also requests an increase in the height limit from 65 feet to 69 feet with 10 feet for appurtenances.

- **Development Agreement** – To provide public benefits should the Project be approved pursuant to Section 15.45.020 (Development Agreement Required) of the Municipal Code because the requested General Plan Amendment includes 50 or more dwelling units and adds dwelling units within Statistical Area L1.
 - **Conditional Use Permit** – To allow the operation of the proposed senior housing and memory care facility, alcohol service for dining hall and lounge areas in the form of a Type 47 (On Sale General) and Type 57 (Special On Sale General) Alcoholic Beverage Control (“ABC”), and ensure land use compatibility.
 - **Major Site Development Review** – To allow the construction of 90 senior dwelling units and a 27-bed memory care facility and to ensure the site is developed in accordance with the applicable planned community and zoning code development standards and regulations pursuant to Newport Beach Municipal Code (“NBMC”) Section 20.52.080 (Site Development Reviews).
 - **Lot Merger** – To merge the two existing parcels into one development site.
 - **Addendum to Environmental Impact Report (SCH#2016021023)** – To address reasonably foreseeable environmental impacts resulting from the legislative and project specific discretionary approvals, the City has determined that an addendum to a previously certified Environmental Impact Report (“EIR”) is warranted pursuant to the California Environmental Quality Act (“CEQA”).
4. The Property is designated PI (Private Institutions) by the General Plan Land Use Element and is located within the PC-19 (San Joaquin Plaza Planned Community) Zoning District.
 5. The Property is not located within the coastal zone; therefore, a coastal development permit is not required.
 6. A study session was held on April 18, 2019, in the Council Chambers located at 100 Civic Center Drive, Newport Beach to introduce the Project to the Planning Commission. No action was taken at the study session.
 7. A public hearing was held on July 18, 2019 in the Council Chambers at 100 Civic Center Drive, Newport Beach. A notice of time, place and purpose of the hearing was given in accordance with the Ralph M. Brown Act and Chapter 15 of the NBMC. Evidence, both written and oral, was presented to, and considered by, the Planning Commission at this hearing.

SECTION 2. CALIFORNIA ENVIRONMENTAL QUALITY ACT DETERMINATION.

1. On November 29, 2016, the City Council adopted Resolution No. 2016-126 certifying Environmental Impact Report No. ER2016-002 for the Museum House Project and approving a Mitigation Monitoring and Reporting Program (“MMRP”) that was prepared in compliance with the California Environmental Quality Act (“CEQA”) set forth in the

California Public Resources Code Section 21000 *et seq.* and its implementing State regulations set forth in the California Code of Regulations Title 14, Division 6, Chapter 3 (“CEQA Guidelines”) and City Council Policy K-3. The Project reviewed under the EIR included a General Plan amendment, Planned Community Development Plan amendment, tentative vesting tract map, major site development review, traffic study, and development agreement to allow demolition of the existing 23,632-square-foot OCMA building to accommodate the development of a 25-story, 100-unit residential condominium building with two levels of subterranean parking on a two-acre site (“Original Project”).

2. The Applicant proposes to include additional land area to the Project site (856 San Clemente Drive), resulting in the demolition of the 23,662-square-foot OCMA and supporting administration offices building totaling approximately 37,567 square feet, and construction of a 183,983-square-foot, six-story senior housing development (90 residential dwelling units) and memory care facility (27 beds). Due to these proposed changes compared with the Original Project considered in the EIR, an Addendum to the EIR was prepared pursuant to Section 15162 (Subsequent EIRs and Negative Declarations) and 15164 (Addendum to an EIR or Negative Declaration) of the State CEQA Guidelines. The City retained PlaceWorks to prepare the Addendum. A revised Mitigation Monitoring and Reporting Program (“MMRP”) was also prepared, and all applicable mitigation measures from the previous MMRP were included.
3. The following environmental topics were identified as potentially affected by the implementation of the proposed Project: Aesthetics, Air Quality, Cultural Resources, Geology/Soils, Greenhouse Gas Emissions, Hazards/Hazardous Materials, Hydrology and Water Quality, Land Use/Planning, Noise, Population and Housing, Public Services recreation, Transportation/Traffic, and Utilities and Sewer Services. These topics were the subject of the Draft EIR analysis, and potential impacts were identified. The document includes mitigation measures to reduce the potentially significant adverse effects to a less than significant level related to Air Quality, Cultural Resources, Geology and Soils and Transportation/Traffic.
4. The noise analysis concluded that even with nine mitigation measures, the construction-related noise impact would be significant and unavoidable. In particular the impact is due to the proximity of the apartments to the north of the site which will be occupied prior to the start of construction. The nine mitigation measures address vehicle and equipment maintenance and the erection of a temporary sound barrier/curtain between the construction site and apartments. All mitigation measures are identified in the Mitigation Monitoring and Reporting Program, which is included as “Exhibit B.” Although the proposed Project requires less excavation and grading and has a shorter construction period, all previously identified noise mitigation will be applied.
5. On the basis of the entire environmental review record, the Project will not result in any new significant impacts that were not analyzed in the EIR for the Original Project, nor will the Project cause a substantial increase in the severity of any previously identified environmental impacts. The potential impacts associated with this Project would either be the same or less than those described in the EIR. In addition, there are no substantial

changes to the circumstances under which the Project would be undertaken that would result in new or more severe environmental impacts than previously addressed in the EIR, nor has any new information regarding the potential for new or more severe significant environmental impacts been identified. Therefore, in accordance with Section 15164 of the CEQA Guidelines, an Addendum to the previously adopted EIR is the appropriate environmental documentation for the Project. In taking action on any of the approvals for the proposed Project, the data presented in the EIR, as augmented by the Addendum, and the MMRP are considered as part of the record.

6. The Addendum to the EIR, including the MMRP, is hereby recommended for adoption by the City Council. The Addendum to the EIR and all materials, which constitute the record upon which this decision was based, are on file with the Planning Division, City Hall, 100 Civic Center Drive, Newport Beach, California.
7. The Planning Commission finds that judicial challenges to the City's CEQA determinations and approvals of land use projects are costly and time consuming. In addition, project opponents often seek an award of attorneys' fees in such challenges. As project applicants are the primary beneficiaries of such approvals, it is appropriate that such applicants should bear the expense of defending against any such judicial challenge, and bear the responsibility for any costs, attorneys' fees, and damages which may be awarded to a successful challenger.

SECTION 3. REQUIRED FINDINGS.

Amendments to the General Plan and Planned Community Development Plan (i.e., "Zoning Code") are legislative acts and neither Chapter 20.66 (Amendments), Amendments of the NBMC nor State Planning Law set forth any required findings for either approval or denial of such amendments. Notwithstanding the foregoing, the General Plan amendment and Planned Community Development Plan amendment are consistent with the General Plan and Zoning Code as provided herein:

I. General Plan Amendment (GPA)

1. The requested GPA from PI to MU-H3 does not eliminate existing or future land uses to the overall detriment of the community given the site's size, location, and surrounding uses. Numerous PI-designated properties are located throughout the City that can accommodate privately owned facilities that serve the public. Additionally, cultural institutions are allowed by right in eleven (11) commercial and mixed-use zoning districts.
2. The requested GPA and resulting land use change are compatible with the surrounding existing uses and planned land uses identified by the General Plan because the Project would introduce a senior housing development (residential use) and memory care facility (nonresidential use) into the Newport Center area, which is currently a regional center of business and commerce that includes major retail, professional office, entertainment, recreation, and residential developments in a master planned mixed-use area. The Project would help to ensure adequate accommodations are available to the City's aging

population and is in furtherance of the policies set forth in the General Plan Land Use Element.

3. The requested GPA and resulting land use change is consistent with other applicable land use policies of the General Plan as provided below.

- a. *Land Use Element Policy LU 2.3 (Range of Residential Choices). Provide opportunities for the development of residential units that respond to community and regional needs in terms of density, size, location, and cost. Implement goals, policies, programs, and objectives identified within the City's Housing Element.*

The Project would replace the OCMA and the possibility to construct 45,208-square-foot private institutional buildings with a facility to serve the aging population defined as people over 60. This demographic comprises almost 22 percent of the City's total population according to latest available Census Bureau data from 2018. At present, there are approximately 752 units (congregate and independent living) and 265 beds (convalescent care) in similar facilities citywide.

- b. *Land Use Element Policy LU3.2 (Growth and Change). Enhance existing neighborhoods, districts, and corridors, allowing for re-use and infill with uses that are complementary in type, form, scale, and character. Changes in use and/or density/intensity should be considered only in those areas that are economically underperforming, are necessary to accommodate City's share of projected regional population growth, improve the relationship and reduce commuting distance between home and jobs, or enhance the values that distinguish Newport Beach as a special place to live for its residents. The scale of growth and new development shall be coordinated with the provision of adequate infrastructure and public services, including standards for acceptable traffic level of service.*

The Project would enhance Newport Center by providing an updated building that complies with all current Building and Fire Codes. The change in use, increase in dwelling units, and reduction of nonresidential floor area are appropriate given that the Project will provide additional, adequate accommodations for the City's aging population, which is continuing to grow and assist in meeting the City's housing goals. Terms may be included in the development agreement to further ensure public welfare and safety. The Project would result in a calculated overall increase of average daily trips ("ADT") by 129, based on trip counts for the existing site and the Institute of Transportation Engineers' ("ITE's") 2017 *Trip Generation Manual*, 10th Edition trip rate for a continuing care retirement community. The existing OCMA and administrative office building generated a calculated 164 average daily trips, while the Project is estimated to generate 367 ADT.

- c. *Land Use Element Policy LU 3.3 (Opportunities for Change). Provide opportunities for improved development and enhanced environments for residents in the following districts and corridors, as specified in Policies 6.3.1 through 6.22.7:*

Fashion Island/Newport Center: expanded retail uses and hotel rooms and development of residential in proximity to jobs and services, while limiting increases in office development

The Project will provide additional, adequate accommodations for the City's aging population, which is continuing to grow and assist the City in meeting housing goals. The Project will be developed in close proximity to retail and service uses, restaurants, entertainment, and recreation amenities present in Fashion Island and would not result in increases in office development in the area.

- d. *Land Use Element Policy LU3.8 (Project Entitlement Review with Airport Land Use Commission). Refer the adoption or amendment of the General Plan, Zoning Code, specific plans, and Planned Community development plans for land within the John Wayne Airport planning area, as established in the JWA Airport Environs Land Use Plan (AELUP), to the Airport Land Use Commission (ALUC) for Orange County for review, as required by Section 21676 of the California Public Utilities Code. In addition, refer all development projects that include buildings with a height greater than two hundred (200) feet above ground level to the ALUC for review.*

The ALUC will review this Project prior to City Council consideration, consistent with this Policy. Staff will report the ALUC's action to the City Council.

- e. *Land Use Element Policy LU 5.3.2 (Mixed-Use Building Location and Size of Nonresidential Uses). Require that 100 percent of the ground floor street frontage of mixed-use buildings be occupied by retail and other compatible nonresidential uses, unless specified otherwise by policies LU 6.1.1 through LU 6.20.6 for a district or corridor.*

The proposed nonresidential portion of the Project consists of a 27-bed memory care facility, which will be located on the second floor level of the building. While LU 5.3.2 requires nonresidential uses to be located on the ground floor level of mixed-use buildings, the memory care facility use has a unique need to limit access of its residents who could become a flight risk. For security purposes, this portion of the development is located on the second floor level, while more common area amenities and services that serve all residents of the Project will be located on the ground floor and basement level portions of the building. This design, with common amenities at the first floor level, is consistent with the intent of this policy to create a synergy for residents and visitors to enter and utilize the building. All residents of the Project (memory care residents must be accompanied by a staff member) will have the opportunity to utilize these common area amenities that are located on the first floor level.

- f. *Land Use Element Policy LU 5.3.3 (Parcels Integrating Residential and Nonresidential Uses). Require that properties developed with a mix of residential and nonresidential uses be designed to achieve high levels of architectural quality in accordance with policies LU 5.1.9 and LU 5.2.1 and planned to ensure compatibility among the uses and provide adequate circulation and parking. Residential uses*

should be seamlessly integrated with nonresidential uses through architecture, pedestrian walkways, and landscape. They should not be completely isolated by walls or other design elements. (Imp 2.1)

The Project integrates residential and nonresidential uses into one cohesive building. The building design will provide a high level of architectural quality, utilizing materials such as smooth-coat plaster walls, natural travertine stone, vinyl windows, metal railings, window trims, and a porte-cochère. The nonresidential memory care facility will be integrated and located within a portion of the second floor level of the building. Residents of the memory care facility (accompanied by staff) will have the ability to mingle and utilize the same common area amenities such as activity rooms, outdoor gardens, seating areas, and dining areas that are provided for the rest of the senior housing. The Project will be served by a 118-space surface level parking lot and the number of parking spaces and circulation is designed to adequately accommodate residents, visitors, staff, shuttles, deliveries, moving vehicles and emergency vehicles.

- g. Land Use Element Policy LU 5.3.6 (Parking Adequacy and Location). Require that adequate parking be provided and is conveniently located to serve tenants and customers. Set open parking lots back from public streets and pedestrian ways and screen with buildings, architectural walls, or dense landscaping.*

The Project will be served by a 118-space surface level parking lot and the number of parking spaces and circulation is designed to adequately accommodate residents, visitors, staff, shuttles, deliveries, moving vehicles and emergency vehicles. The parking area is set back from San Clemente Drive and the adjacent sidewalk with site landscaping along the street frontage.

- h. Land Use Element Goal LU 6.14 (Newport Center/Fashion Island). A successful mixed-use district that integrates economic and commercial centers serving the needs of Newport Beach residents and the subregion, with expanded opportunities for residents to live close to jobs, commerce, entertainment, and recreation, and is supported by a pedestrian-friendly environment.*

Refer to Fact in Support of Finding 3c.

- i. Land Use Element Policy LU 6.14.2 (Newport Center ["MU-H3," "CO-R," "CO-M," and "RM" designations]). Provide the opportunity for limited residential, hotel, and office development in accordance with the limits specified by Tables LU1 and LU2. (Imp 2.1)*

Refer to Fact in Support of Finding 3b and 3c.

- j. Land Use Element Policy LU 6.14.4 (Development Scale). Reinforce the original design concept for Newport Center by concentrating the greatest building mass and height in the northeasterly section along San Joaquin Hills Road, where the natural topography is highest and progressively scaling down building mass and height to*

follow the lower elevations toward the southwesterly edge along East Coast Highway. (Imp 2.1, 3.1, 4.1)

The Project is located at the northwesterly portion of Newport Center. The existing development in Newport Center is consistent with LU 6.14.4 as the majority of the office towers over 200 feet and the Island Hotel are located in northeasterly section in Blocks 500 and 600. The type and design of a structure, not just the use, are important in determining if the bulk and scale of the building are appropriate for this particular location. Additionally, per NBMC Section 20.30.060 (Height Limits and Exceptions), height limits in planned communities are not bound by its limitations provided that appropriate findings are made. The existing PC-19 (San Joaquin Plaza Planned Community) development standards limit building height to 65 feet in height while the proposed Project height is 68 feet 8 inches (with an additional 10 feet allowed for appurtenances). The building design, bulk, and scale, is consistent with the height and grade of other buildings located in the immediate vicinity of Newport Center and will not create a substantial shade or shadow impact on adjacent development such as Villas Fashion Island.

4. City Council Policy A-18 requires that proposed GPAs be reviewed to determine if a vote of the electorate would be required pursuant to Section 423 of the City Charter. If a GPA (separately or cumulatively with other GPAs within the previous ten (10) years) generates more than one hundred (100) peak hour trips (a.m. or p.m.), adds forty thousand (40,000) square feet of nonresidential floor area, or adds more than one hundred (100) dwelling units in a statistical area, a vote of the electorate would be required if the City Council approves the GPA.
 - a. The Property is within Statistical Area L1. One prior GPA in Statistical Area L1 has been approved since 2009. The amendment results in a reduction of nonresidential floor area (45,208 square feet to 16,000 square feet) and an increase of 90 dwelling units. The conversion of the 16,000 square feet of nonresidential floor area from private institutional use to a blended commercial rate and the addition of 90 dwelling units for the proposed facility results in a net increase of twenty-six (26) a.m. peak hour trips and a net increase of fifty-two (52) p.m. peak hour trips. These increases are based on the trip generation rates for the blended private institutions to blended commercial rate (for the convalescent care/memory care component) and residential apartment units (for senior housing/congregate care component), which are considered the best available comparable land uses in Council Policy A-18.
 - b. As none of the thresholds specified by Charter Section 423 are exceeded, no vote of the electorate is required if the City Council chooses to approve GPA No. GP2018-003.
5. Pursuant to California Government Code Section 65352.3 (SB18), a local government is required to contact the appropriate tribes identified by the Native American Heritage Commission ("NAHC") each time it considers a proposal to adopt or amend the General Plan. If requested by any tribe, the local government must consult for the purpose of

preserving or mitigating impacts to cultural resources. The City received comments from the NAHC indicating that four tribal contacts should be provided notice regarding the proposed amendment. The tribal contacts were provided notice on April 4, 2019. California Government Code Section 65352.3 requires notification 90 days prior to Council action to allow tribal contacts to respond to the request to consult. The City was not contacted by any tribal contacts during this 90 day period.

II. Planned Community Development Plan Amendment

1. The proposed amendment to the PC-19 Zoning District meets the intent and purpose for a PC as specified in NBMC Section 20.56.010 (Planned Community District Procedures, Purpose). The Property is located in the northwest portion of Newport Center, which is a regional center of business and commerce that includes major retail, professional office, entertainment, recreation, and residential development in a master planned mixed-use area. The amended PC-19 Development Plan is complementary to the surrounding development, including the development standards and allowed uses of the adjoining PC-56 (North Newport Center Planned Community) Zoning District.
2. The proposed amendment to the PC-19 Development Plan would apply appropriate site and Project-specific setbacks, intensity, and height limits to the Project given the site's urban location and all required parking is provided on site. The Property is currently fully developed and does not support any natural resources. All potential environmental impacts associated with the Project are appropriately addressed through standard building permit procedures and the mitigation measures identified in the EIR addendum.
3. The future development of the Property affected by the proposed amendments will be consistent with the goals and policies of the Land Use Element of the General Plan; and will be consistent with the purpose and intent of the PC-19 Development Plan.

III. Height Increase

NBMC Section 20.30.060(C)(3) (Height Limits and Exceptions, Required Findings) requires findings A through D to be made to adopt a Planned Community District with an increase in the height of the structure above the base height limit:

Finding:

- A. *The Project Applicant is providing additional project amenities beyond those that are otherwise required. Examples of project amenities include, but are not limited to:*
- i. *Additional landscaped open space;*
 - ii. *Increased setback and open areas; and*
 - iii. *Enhancement and protection of public views; and*

Facts in Support of Finding:

1. The building design provides a high level of design with open space, landscape, residential amenities, and building setbacks that are similar or greater than those

required on adjoining properties. The Project provides 15,487 square feet of landscaped area on-site and extensive common open space amenities including outdoor seating areas, raised gardens and vegetable planters, bocce ball court, outdoor kitchen, dog park, and putting green.

2. The Project provides setbacks ranging from 36 feet along the northern property nearest to residential uses up to 94 feet at the San Clemente Drive street frontage.
3. The Project does not inhibit designated public view points or coastal view corridors as identified in Figure NR3 of the General Plan. The nearest coastal view road occurs to the southwest along Jamboree Road and views are oriented toward the ocean. The Project will not be visible from this location. Further, the proposed building will fit into the height and architectural context of other office buildings and development in the Newport Center area.

Finding:

- B. The architectural design of the project provides visual interest through the use of light and shadow, recessed planes, vertical elements, and varied roof planes;*

Facts in Support of Finding:

1. The Project provides high quality architectural materials on the building façade including smooth-coat plaster walls, natural travertine stone, vinyl windows, metal railings, and window trims.
2. The building is designed in an L-shape with a porte-cochère located at the primary building entrance along San Clemente Drive. This feature enhances the building entry and provides visual interest at the most visible building façade.
3. Juliet balconies for each unit will provide visual interest and building articulation throughout the building.
4. The building style is complementary to surrounding office buildings in Newport Center and the façade is architecturally modeled after the office building located at 888 San Clemente Drive.
5. The building's roofline provides a roof screen and mechanical wells to adequately screen unsightly equipment and provide architectural variation at the exterior elevations.

Finding:

- C. The increased height will not result in undesirable or abrupt scale changes or relationships being created between the proposed structure(s) and existing adjacent developments or public spaces. Where appropriate, the proposed structure(s) provides a gradual transition to taller or shorter structures on abutting properties; and*

Facts in Support of Finding:

1. The proposed building height of 68 feet 8 inches is comparable to surrounding building heights of 61 feet 9 inches at 888 San Clemente Drive, 65 feet at the Villas Fashion Island, 80 feet at Pacific Life (700 Newport Center Drive), and 125 feet at 800 Newport Center Drive. Further, these buildings allow an additional 10 feet for architectural appurtenances, consistent with the proposed building height for the Project.
2. The Project height is cohesive with surrounding building heights particularly given the site's grade elevations along San Clemente Drive, which range from 165 feet up to 189 feet. The proposed Project would be measured from the building entrance elevation at 181 feet.

Finding:

- D. The structure will have no more floor area than could have been achieved without the approval of the height increase."*

Facts in Support of Finding:

1. The existing PC-19 (San Joaquin Plaza Planned Community) text does not establish a floor area limit for the subject properties since it is currently designated for private institutional land uses. The amended PC-19 text will establish a floor area consistent with the proposed building area (approximately 184,000 square feet).
2. The proposed floor area could be achieved within the current 65-foot height limit if the building footprint was enlarged. The proposed design with additional height affords additional site area to provide code-required parking, circulation, and open space amenities to serve the Project.

IV. Major Site Development Review

A site development review is required for the construction of five or more residential units processed in conjunction with a mixed-use development. The site development review analyzes the Project as a whole for compatibility with the site and surrounding land uses. In accordance with NBMC Subsection 20.52.080(F) (Site Development Reviews, Findings and Decision), the following findings and facts in support of such findings (E through G) are set forth:

Finding:

- E. The proposed development is allowed within the subject zoning district.*

Fact in Support of Finding:

1. The proposed Major Site Development Review for the approximately one hundred eighty four thousand (184,000) square-foot Project is consistent with the proposed amendment

to the PC-19 Development Plan, which would allow a residential care facility for the elderly, subject to the approval of a conditional use permit. The Residential Care Facility for the Elderly (RCFE) would be a combined memory care senior housing/assisted living facility.

Finding:

- F. The proposed development is in compliance with all of the following applicable criteria:*
- i. Compliance with this section, the General Plan, this Zoning Code, any applicable specific plan, and other applicable criteria and policies related to the use or structure;*
 - ii. The efficient arrangement of structures on the site and the harmonious relationship of the structures to one another and to other adjacent developments; and whether the relationship is based on standards of good design;*
 - iii. The compatibility in terms of bulk, scale, and aesthetic treatment of structures on the site and adjacent developments and public areas;*
 - iv. The adequacy, efficiency, and safety of pedestrian and vehicular access, including drive aisles, driveways, and parking and loading spaces;*
 - v. The adequacy and efficiency of landscaping and open space areas and the use of water efficient plant and irrigation materials; and*
 - vi. The protection of significant views from public right(s)-of-way and compliance with NBMC Section 20.30.100 (Public View Protection).*

Facts in Support of Finding:

1. Refer to previously mentioned facts under *Amendments (I and II)*, which discuss the Project's consistency with the proposed MU-H3 General Plan land use designation and the proposed amendment to PC-19 Development Plan.
2. The building will be set back a minimum of fifteen (15) feet from the San Clemente Drive property line and five (5) feet from all other property lines. The Project is designed such that the building is set back a minimum of approximately thirty-six (36) feet from the adjacent residential property at the Villas Fashion Island to the north. The setback area will be improved with parking areas and landscaping to help buffer the site from adjacent uses and the public right-of-way.
3. The proposed structure will maintain a similar size and scale to that of the existing adjacent buildings to the west and east along San Clemente Drive. The total gross floor area will be no more than one hundred eighty-nine thousand (189,900) square feet, which will be compliant with the maximum floor area allowed pursuant to the amended San Joaquin Plaza PC.
4. The proposed structure complies with the post PC-amendment maximum height of sixty-eight feet eight inches (68 feet 8 inches) as measured from finished grade to the top of the uppermost ceiling. An additional ten (10) feet is allowed for roofing and mechanical screening up to seventy-seven feet ten inches (77 feet 10 inches). All mechanical

equipment on the rooftop will be screened in compliance with NBMC Subsection 20.30.020 (Buffering and Screening).

5. The proposed structure is required to comply with all Building and Fire Codes. The facility is required to obtain a license from the Department of Social Services (DSS) of the State of California for its operation.
6. The Project will be Italianate in appearance with building materials and finishes that include smooth-coat plaster walls, natural travertine stone, vinyl windows, metal railings, window trims, and a porte-cochère. The building style is complementary to surrounding office buildings in Newport Center and the façade is modeled after 888 San Clemente Drive.
7. Site access, including the new curb cut, drive aisles, driveways, parking, loading spaces, and sight distance have all been reviewed by the Public Works Department for adequacy, efficiency, and safety. The Project does not change any street parking configurations as no parking is allowed on San Clemente Drive
8. The Project design complies with the required parking ratio of 1.2 parking spaces per dwelling unit of congregate care/senior housing (i.e., 90 units multiplied by 1.2 = a minimum of one hundred eight (108) parking spaces) and one parking space for every three beds of memory care (i.e., twenty-seven (27) beds divided by three (3) = a minimum of nine (9) parking spaces). A total of 118 parking spaces are provided on-site.
9. All facility operations including delivery hours to the facility are limited by the conditions of approval to help mitigate potential impacts to the adjacent residential neighbors.
10. The Project includes approximately 15,487 square feet of landscape area, which has been designed to meet NBMC Chapter 14.17 (Water-Efficient Landscape) requirements with respect to water efficiency.
11. Lighting of the building is conditioned to meet the requirements of the NBMC to mitigate impacts to neighboring properties.
12. The visual simulations indicate that the Project does not have the potential to obstruct public views from public view points and corridors, as identified on General Plan Figure NR 3 (Coastal Views), to the Pacific Ocean, Newport Bay and Harbor, offshore islands, the Old Channel of the Santa River (the Oxbow Loop), Newport Pier, Balboa Pier, designated landmark and historic structures, parks, coastal and inland bluffs, canyons, mountains, wetlands, and permanent passive open space. The Project is not located near any public view points and there are no designated public views through or across the site.

Finding:

- G. *The proposed development is not detrimental to the harmonious and orderly growth of the City, nor will it endanger, jeopardize, or otherwise constitute a hazard to the public convenience, health, interest, safety, or general welfare of person residing or working in the neighborhood of the proposed development.*

Facts in Support of Finding:

1. The Project has been designed to ensure that potential conflicts with surrounding land uses are minimized to the extent possible to maintain a healthy environment for both businesses and residents by providing an architecturally pleasing building with articulation and building modulation to enhance the urban environment consistent with development in Newport Center.
2. The proposed building has been designed to accommodate and provide safe access for emergency vehicles, delivery trucks, and refuse collections vehicles, as determined by the City Traffic Engineer. Emergency, refuse, and delivery trucks will utilize the entry drive off of San Clemente Drive at the southerly side of the Property. Secondary egress and emergency access will be available through the access drive to the northeast. The final size, design, location, and screening of the refuse enclosures will comply with the requirements of NBMC Section 20.30.120 (Solid Waste & Recyclable Materials Storage), ensuring compatibility with the on-site and adjacent uses.
3. Conditions of Approval are included to help ensure any potential impacts are limited, including, but not limited to:
 - a. Condition of Approval No. 12 limits delivery and commercial trash pick-up hours to the facility to mitigate potential impacts to the adjacent neighbors.
 - b. Conditions of Approval Nos. 29 and 30 require all outdoor lighting to meet the requirements of the Zoning Code, prohibiting light and glare spillage from the facility to the adjacent properties. This will be reviewed in more detail as part of the building permit plan check process.
 - c. The noise from a convalescent and/or congregate care facility is typically low. Conditions of Approval Nos. 32 and 33 helps to ensure that the use will comply with NBMC Chapter 10.26 (Community Noise Control).
4. The Project would introduce approximately one hundred fifty-three (153) new residents, which is a nominal increase in the City's overall total population. However, these types of facilities typically require more calls for emergency medical services than a residential community of the same size. Terms may be included in the development agreement to further ensure public welfare and safety.
5. The Project is located in close proximity to Fire Station 3, which will be available to respond to medical emergency calls for the facility.

6. The City has sufficient water supply to serve the Project. Site landscaping will adhere to the requirements of NBMC Chapter 14.17 (Water-Efficient Landscaping).
7. The John Wayne Airport is located approximately 2.94 miles southeast of the Property and is the nearest public airport. The Project is within the notification area of the Airport Environs Land Use Plan ("AELUP") for John Wayne Airport. According to the notice criteria tool, the Project is in proximity to a navigation facility and may impact the assurance of navigation signal reception. However, many adjacent high rise buildings exceed the height of the proposed Project. A "No Hazard" determination was provided by the Federal Aviation Administration ("FAA"). The Project site also falls outside the 60 dBA Community Noise Equivalent Level contour line established by the AELUP and would, therefore, not conflict with any land use compatibility issues related to noise. Finally, the Project site does not fall within any of the AELUP Safety Zones, in which certain land uses have been identified as incompatible and restricted. The General Plan and PC amendments will first be forwarded to the ALUC for their review prior to the City Council consideration.
8. The Project does not involve the use or manufacture of any hazardous substances that could impact nearby development. Moreover, Project construction would comply with all applicable laws and regulations governing application and disposal of any hazardous materials discovered during construction.
9. Rooftop mechanical equipment is located within a mechanical equipment well and within an equipment screen and is not visible from the public right-of-way.
10. The new construction complies with all Building, Public Works, Fire Codes, City ordinances, and all conditions of approval.
11. A structure has existed at this location since 1976. The Project will improve the site with construction that complies with all current requirements. The Project will nominally increase the overall average daily trips ("ADT") by approximately one hundred twenty-nine (129) per the existing site trip counts and the 2017 Institute of Transportation Engineers ("ITE") Trip Generation Manual. The Public Works Department has reviewed the proposed operational characteristics and determined that a traffic study is not required to comply with the Traffic Phasing Ordinance.
12. The Project would replace the existing office buildings with a needed service for the aging population, where persons over the age of 65 comprise almost twenty-two (22) percent of the City's total population according to latest available US Census Bureau data from July 1, 2018.

V. Conditional Use Permit

The Applicant requests Type 47 (On Sale General) and Type 57 (Special On Sale General) ABC licenses for alcohol service within designated dining hall and lounge areas of the senior housing and memory care facility. In accordance with NBMC Section 20.48.030 (Alcohol Sales) and Section 20.52.020(F) (Conditional Use Permits and Minor Use Permits, Findings and Decision), the following findings and facts in support of such findings (H through M) are set forth:

Finding:

- H. *The use is consistent with the purpose and intent of Section 20.48.030(C)(3) (Alcohol Sales).*

Facts in Support of Finding:

1. The following criteria has been considered:

- a. *The crime rate in the reporting district and adjacent reporting districts as compared to other areas in the City.*

The Part One Crimes Rate in Reporting District 39 (RD 39) is higher than the Part One Crimes Rate for the City and adjacent districts due to the high concentration of commercial land uses. However, with the introduction of the new residential units, the crime rate is expected to decrease. The Police Department does not object to this Project as conditioned.

- b. *The numbers of alcohol-related calls for service, crimes, or arrests in the reporting district and in adjacent reporting districts.*

Due to the high concentration of commercial land uses, the calls for service and number of arrests are greater than adjacent Reporting Districts. The Police Department does not consider the rate high because of the concentration of restaurants and commercial uses within Fashion Island and the surrounding North Newport Center. The Newport Beach Police Department has not previously reported any calls for service to the subject property since the proposed use is part of a new development.

- c. *The proximity of the establishment to residential zoning districts, day care centers, hospitals, park and recreation facilities, places of worship, schools, other similar uses, and any uses that attract minors.*

The Project site is located in a senior housing facility and is intended to serve residents and their guests. The complex is surrounded by commercial and residential zoning districts and uses. The dining area for residents is located inside of the building on the first and second floor levels. There are no day care centers, hospitals, park and recreation facilities, places of worship, or similar uses in the immediate vicinity.

- d. *The proximity to other establishments selling alcoholic beverages for either off-site or on-site consumption.*

The per capita ratio of one license for every 12 residents is higher than all adjacent reporting districts and the average citywide ratio. This is due to the commercial nature of RD 39, which contains all of North Newport Center, including Fashion Island.

- e. *Whether or not the proposed amendment will resolve any current objectionable conditions.*

The Project has been reviewed and conditioned to ensure that the purpose and intent of NBMC Section 20.48.030 (Alcohol Sales) is maintained and that a healthy environment for residents and businesses is preserved. The service of alcohol is intended for the convenience of residents of the apartment complex and their guests. Operational conditions of approval relative to the sale of alcoholic beverages will help ensure compatibility with the surrounding uses and minimize alcohol related impacts.

Finding:

- I. *The use is consistent with the General Plan and any applicable specific plan;*

Fact in Support of Finding:

1. The Project is consistent with the General Plan, as proposed to be amended. See all Facts in Support of Findings 1 through 3 for the General Plan Amendment (I).

Finding:

- J. *The use is allowed within the applicable zoning district and complies with all other applicable provisions of this Zoning Code and the Municipal Code;*

Fact in Support of Finding:

1. The Project complies with all NBMC and PC-19 development standards, as proposed to be amended, including, but not limited to, height, floor area, parking, and landscaping. See all Facts in Support of Findings 1 through 3 for the Planned Community Development Plan Amendment (II).

Finding:

- K. *The design, location, size, and operating characteristics of the use are compatible with the allowed uses in the vicinity;*

Facts in Support of Finding:

1. The Project will replace an existing museum and associated administrative office building with senior housing and a memory care facility. At present, a forty-five thousand two hundred eight (45,208)-square-foot building could be constructed on the Property. The Project improvements will modernize and comprehensively upgrade the general appearance of the site.
2. The Property is located along San Clemente Drive in Newport Center. A new curb cut will be created for site access and will be located directly across from Santa Maria Drive and used as the primary entry and exit. Secondary egress and emergency access will occur across an existing access drive at the northeast corner of the property.
3. The Property is immediately adjacent to professional office buildings to the west and southeast, which are taller or comparable in height. Several residential buildings are located in the immediate vicinity, with The Colony Apartments to the southwest and the Villas Fashion Island to the northeast. These are permitted to have structures with a maximum height of fifty (50) feet on a fifteen (15)-foot high podium and sixty-five (65) feet, respectively with an additional 10 feet for appurtenances. The Project is a quasi-residential use and complies with the maximum height limitations as identified in the amended PC-19 Development Plan. It has been designed such that it will be compatible with the adjoining land uses. All proposed building construction will be set back a minimum of approximately thirty-six (36) feet from the property lines abutting the Villas Fashion Island apartments. The main drive aisle, landscaping, and a perimeter site will serve to further buffer those residential uses from the Project.
4. Condition of Approval No. 2 is included to limit the Project to 90 senior housing dwelling units and 27 memory care beds, which will ensure the operation does not intensify.
5. See all Facts in Support of Finding G above.

Finding:

- L. *The site is physically suitable in terms of design, location, shape, size, operating characteristics, and the provision of public and emergency vehicle (e.g., fire and medical) access and public services and utilities; and*

Facts in Support of Finding:

1. The Property is currently developed with an access drive over the adjacent property at 888 San Clemente Drive. The Project will add its own driveway approach on San Clemente Drive for Project access and a secondary access easement will be recorded for egress and emergency vehicle access.
2. The Project provides adequate parking and circulation including turn-around areas for deliveries. Conditions of approval are included to ensure compliance with all the

circulation standards and the final plans are required to be reviewed and approved by the Public Works Department.

3. Adequate emergency vehicle access has been incorporated into the Project design and have been reviewed by the Fire Department. Conditions of approval are included to help ensure compliance with all emergency vehicle access requirements and the final plans are required to be approved by the Fire Department during plan check.
4. The City currently services the site with water and sewer via mains that run through San Clemente Drive and Santa Barbara Drive out to Jamboree Road. The City has indicated that the Project could be adequately served by its infrastructure. The Gas Company and Southern California Edison will continue to service the site for gas and electrical through existing connections.

Finding:

- M. *Operation of the use at the location proposed would not be detrimental to the harmonious and orderly growth of the City, or endanger, jeopardize, or otherwise constitute a hazard to the public convenience, health, interest, safety, or general welfare of persons residing or working in the neighborhood of the proposed use.*

Fact in Support of Finding:

1. See all Facts in Support of Finding G above.

VI. Lot Merger

In accordance with Section 19.68.030(H) (Lot Mergers, Required Findings), the following findings and facts in support of such findings (N through R) are set forth:

Finding:

- N. *Approval of the merger will not, under the circumstances of this particular case, be detrimental to the health, safety, peace, comfort and general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to property and improvements in the neighborhood or the general welfare of the City, and further that the proposed lot merger is consistent with the legislative intent of Title 19.*

Facts in Support of Finding:

1. The Project consists of a single building site constructed across 850 and 856 San Clemente Drive.
2. The Property is located within the PC-19 (San Joaquin Plaza Planned Community) Zoning District, which is amended to accommodate the Project.

3. The Project is consistent with the purpose and intent of Title 19 (Subdivisions) of the NBMC, inasmuch as it will help to protect landowners and surrounding residents, and will preserve the public health, safety, and general welfare of the City. It will also be consistent with the policies and provisions of the General Plan, as discussed under Subsection I, Facts 1-3 and Finding P.
4. All building improvements are required to comply with applicable NBMC regulations and City policies.

Finding:

- O. The lots to be merged are under common fee ownership at the time of the merger.*

Fact in Support of Finding:

1. The Properties, described in Section 1 of this Resolution, are under common fee ownership by Vivante Newport Center, LLC, as evidenced by the Title Report submitted with the application.

Finding:

- P. The lots, as merged, will be consistent or will be more closely compatible with the applicable zoning regulations and will be consistent with other regulations relating to the subject property including, but not limited to, the General Plan and any applicable Coastal Plan or Specific Plan.*

Facts in Support of Finding:

1. The General Plan Land Use Element designation will be amended for this parcel from PI (Private Institutions) to MU-H3 (Mixed-Use Horizontal), which is consistent with the surrounding block in Newport Center. This area is intended to provide for horizontal intermixing of regional commercial, office, hotel, multi-family residential, and ancillary commercial uses. The Project, which consists of senior housing (an attached multi-family residential use) and memory care facility (a nonresidential use), is consistent with the MU-H3 land use designation.
2. The Project is consistent with the following General Plan Land Use Element Policies:
 - a. *LU 4.2 - Prohibition of New Residential Subdivisions. Prohibit new residential subdivisions that would result in additional dwelling units unless authorized by an amendment of the General Plan (GPA). Lots that have been legally merged through the Subdivision Map Act and City Subdivision Code approvals are exempt from the GPA requirements and may be re-subdivided to the original underlying legal lots. This policy is applicable to all Single Unit, Two Unit, and Multiple Unit Residential land use categories.*

The Project includes a General Plan amendment to allow for a mixed-use land use designation that would accommodate 90 new residential units and 27 memory care beds as part of the Project on a single building site in Newport Center.

3. Merging of the two existing parcels will comply with Zoning Code requirements relating to minimum lot area and minimum lot width. The proposed parcel will be 126,600 square feet in area (2.9 acres) for which there is no required minimum lot size. The width of the parcel will be 429 feet, for which there is no current minimum lot width. The PC-19 (San Joaquin Plaza Planned Community) text will establish minimum lot area and lot widths based on the proposed lot merger.

Finding:

- Q. Neither the lots, as merged, nor the adjoining parcels, will be deprived of legal access as a result of the merger.*

Fact in Support of Finding:

1. Neither of the merged parcels, nor the adjoining parcels, will be deprived of legal access as a result of the merger. Access to both properties is provided from San Clemente Drive and a new driveway and curb cut will be provided to serve the Project. Secondary access will be recorded for egress and emergency vehicle access to the northeast of the property across the Villas Fashion Island property (APN No. 442-261-23).

Finding:

- R. The lots, as merged, will be consistent with the pattern of development nearby and will not result in a lot width, depth or orientation, or development site that is incompatible with nearby lots. In making this finding, the review authority may consider the following:*
- a. Whether development of the merged lots could significantly deviate from the pattern of development of adjacent and/or adjoining lots in a manner that would result in an unreasonable detriment to the use and enjoyment of other properties.*
 - b. Whether the merged lots would be consistent with the character or general orientation of adjacent and/or adjoining lots.*
 - c. Whether the merged lots would be conforming or in greater conformity with the minimum lot width and area standards for the zoning district.*

Facts in Support of Finding:

1. The orientation and primary access to the merged parcel will remain from San Clemente Drive, a public road.
2. Properties along San Clemente Drive consist of varying shapes and sizes. Although the proposed lot merger will create a larger parcel, it will not create an excessively large parcel in comparison to existing lots and parcels in Newport Center. The width of the San Clemente Drive frontage will appear unchanged and consistent with the widths of other properties on San Clemente Drive.

VII. Waiver of Parcel Map

In accordance with NBMC Section 19.08.030(A)(3) (Waiver of Parcel Map Requirement), the Zoning Administrator may approve a waiver of the parcel map requirement in cases where no more than three (3) parcels are eliminated. The following finding and facts in support of such finding are set forth:

Finding:

- S. *That the proposed division of land complies with requirements as to area, improvement and design, flood water drainage control, appropriate improved public roads and property access, sanitary disposal facilities, water supply availability, environmental protection, and other applicable requirements of Title 19, the Zoning Code, the General Plan, and any applicable Coastal Plan or Specific Plan.*

Facts in Support of Finding:

1. Improvements on the Property will be required to comply with the development standards of the NBMC and General Plan.
2. The Project combines the Properties into a single parcel of land and does not result in the elimination of more than three (3) parcels.
3. Approval of the Project would remove the existing interior lot line and allow the Properties to be used as a single site. The Lot Merger in and of itself would not change the land use or intensity at the site. The Project complies with all design standards and improvements required for new subdivisions by Title 19 (Subdivisions), Title 20 (Planning and Zoning), and the General Plan.

VIII. Development Agreement

Development Agreement No. DA2018-005 satisfies the requirement of Chapter 15.45 (Development Agreements):

1. A development agreement is requested by the Applicant, as the Project would add more than 50 dwelling units within Statistical Area L1 (Newport Center Area). The development agreement includes all the mandatory elements for consideration and public benefits that are appropriate to support conveying the vested development rights consistent with the General Plan, NBMC, and Government Code Sections 65864 *et seq.*
2. The Planning Commission recommends the adoption of a development agreement that includes all the mandatory elements for consideration to ensure public safety and public benefits that are appropriate to support conveying the vested development rights consistent with the General Plan and Government Code Section 65867.5 (terms under negotiation).

IX. Revocation

Revocation of Use Permit No. UP2005-017 is requested by the Applicant. Use Permit No. UP2005-017 allowed beer and wine sales at the museum. Revocation of Modification Permit No. MD2004-059 which allowed additional flagpoles/signage beyond that allowed by the NBMC is also requested by the Applicant. In accordance with NBMC Section 20.68.050(B)(4)(a) (Review Authority's Action), the following finding and fact in support of the revocation are set forth:

Finding:

- T. The permit or approval was issued in error or circumstances under which the permit or approval was granted have been modified to an extent that one or more of the findings that justified the original approval can no longer be made and the public health, safety, and welfare require the revocation or modifications.*

Fact in Support of Finding:

1. The Property is subject to changed circumstances under which the site will no longer be improved with the infrastructure and occupied by a use contemplated by Use Permit No. UP2005-017 and Modification Permit No. MD2004-059.

SECTION 4. DECISION.

NOW, THEREFORE, BE IT RESOLVED:

1. The Planning Commission of the City hereby recommends the City Council of the City adopt the Environmental Impact Report Addendum No. ER2016-002 (SCH No. 2016021023), as depicted in Exhibit "A," which consists of the EIR Addendum, Appendices, and Certified EIR.
2. The Planning Commission of the City hereby recommends the City Council of the City approve the Mitigation Monitoring Report Program as depicted in Exhibit "B" of this resolution.
3. The Planning Commission of the City hereby recommends the City Council of the City approve General Plan Amendment No. GP2018-003 as depicted in Exhibit "C," to change the land use category from PI (Private Institutions) to MU-H3 (Mixed-Use Horizontal), amend Table LU1 to allow for 540 dwelling units within the MU-H3 land use designation, and amend Anomaly No. 49 (Table LU2 and associated figures), adding 90 additional dwelling units and reducing the nonresidential floor area from 45,208 square feet to 16,000 square feet in Statistical Area L1.
4. The Planning Commission of the City hereby recommends the City Council of the City approve Planned Community Development Plan Amendment No. PC2018-001 (Zoning) as depicted in Exhibit "D" to change the PC-19 (San Joaquin Plaza Planned Community)

land use designation and revise the development standards to accommodate the Project.

5. The Planning Commission of the City hereby recommends the City Council of the City approve Development Agreement No. DA2018-005, as set forth in Exhibit "E" (terms under negotiation).
6. The Planning Commission of the City hereby recommends the City Council of the City approve Major Site Development Review No. SD2018-003 and Conditional Use Permit No. UP2018-019, subject to the Conditions of Approval set forth in Exhibit "F."
7. The Planning Commission of the City hereby recommends the City Council of the City rescind Modification Permit No. MD2004-059 (PA2004-184) and Use Permit No. UP2005-017 (PA2005-086), which upon vesting of the rights authorized by this resolution, shall become null and void.
8. The Planning Commission of the City hereby recommends the City Council of the City approve Lot Merger No. LM2018-004, subject to the Conditions of Approval set forth in Exhibit "F."

PASSED, APPROVED, AND ADOPTED THIS 18TH DAY OF JULY, 2019.

AYES: Ellmore, Klaustermeier, Lowrey, Rosene and Weigand

NOES:

ABSTAIN:

ABSENT: Kleiman and Koetting

BY: 

Erik Weigand, Vice Chair

BY: 

Lee Lowrey, Secretary

Exhibit “A”

**Addendum to Environmental Impact Report
EIR SCH No. 2016021023**

- **Addendum**
- **Appendices**
- **Certified EIR**

(Available separate due to bulk)
www.newportbeachca.gov/ceqa

Exhibit “B”

Mitigation Monitoring Report Program

June 2019 | Mitigation Monitoring and Reporting Program
State Clearinghouse No. 2016021023

VIVANTE SENIOR LIVING PROJECT

City of Newport Beach

Prepared for:

City of Newport Beach

Contact: Makana Nova, Associate Planner
Community Development Department
100 Civic Center Drive
Newport Beach, California 92660
949.644.3249

Prepared by:

PlaceWorks

Contact: JoAnn Hadfield, Principal,
3 MacArthur Place, Suite 1100
Santa Ana, California 92707
714.966.9220
info@placeworks.com
www.placeworks.com



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1. Mitigation Monitoring and Reporting Program

1.1 PURPOSE OF MITIGATION MONITORING AND REPORTING PROGRAM

This Mitigation Monitoring and Reporting Program has been developed to provide a vehicle by which to monitor mitigation measures and conditions of approval outlined in the Vivante Senior Living Project EIR Addendum, State Clearinghouse No. 2016021023. The Mitigation Monitoring and Reporting Program (MMRP) has been prepared in conformance with Section 21081.6 of the Public Resources Code and City of Newport Beach Monitoring Requirements. Section 21081.6 states:

- (a) When making findings required by paragraph (1) of subdivision (a) of Section 21081 or when adopting a mitigated negative declaration pursuant to paragraph (2) of subdivision (c) of Section 21080, the following requirements shall apply:
 - (1) The public agency shall adopt a reporting or monitoring program for the changes made to the project or conditions of project approval, adopted in order to mitigate or avoid significant effects on the environment. The reporting or monitoring program shall be designed to ensure compliance during project implementation. For those changes which have been required or incorporated into the project at the request of a responsible agency or a public agency having jurisdiction by law over natural resources affected by the project, that agency shall, if so requested by the lead or responsible agency, prepare and submit a proposed reporting or monitoring program.
 - (2) The lead agency shall specify the location and custodian of the documents or other material which constitute the record of proceedings upon which its decision is based.

The State CEQA Guidelines Section 15097 provides clarification of mitigation monitoring and reporting requirements and guidance to local lead agencies on implementing strategies. The reporting or monitoring program must be designed to ensure compliance during project implementation. The City of Newport Beach is the lead agency for the Vivante Senior Living Project and is therefore responsible for implementing the MMRP. The MMRP has been drafted to meet the requirements of Public Resources Code Section 21081.6 as a fully enforceable monitoring program.

The MMRP consists of the mitigation program and the measures to implement and monitor the mitigation program. The MMRP defines the following for the mitigation measure outlined in Table 1, *Mitigation Monitoring Requirements*:

Mitigation Monitoring and Reporting Program

- **Definition of Mitigation.** The mitigation measure contains the criteria for mitigation, either in the form of adherence to certain adopted regulations or identification of the steps to be taken in mitigation.
- **Responsible Party or Designated Representative.** Unless otherwise indicated, the project applicant is the responsible party for implementing the mitigation, and the City of Newport Beach or a designated representative is responsible for monitoring the performance and implementation of the mitigation measures. To guarantee that the mitigation measure will not be inadvertently overlooked, a supervising public official acting as the Designated Representative is the official who grants the permit or authorization called for in the performance. Where more than one official is identified, permits or authorization from all officials shall be required.
- **Time Frame.** In each case, a time frame is provided for performance of the mitigation measure or review of evidence that mitigation has taken place. The performance points selected are designed to ensure that impact-related components of project implementation do not proceed without establishing that the mitigation is implemented or ensured. All activities are subject to the approval of all required permits from local, state, and federal agencies with permitting authority over the specific activity.

The numbering system in Table 1 corresponds with the numbering system used in the EIR Addendum. The last column of the MMRP table will be used by the parties responsible for documenting when implementation of the mitigation measure has been completed. The ongoing documentation and monitoring of mitigation compliance will be completed by the City of Newport Beach. The completed MMRP and supplemental documents will be kept on file at the City of Newport Beach Community Development Department Planning Division.

1.2 PROJECT LOCATION

The project site is in the south-central portion of the City of Newport Beach (City), which is in the western part of Orange County in southern California. The City is bordered by Huntington Beach to the northwest, Costa Mesa to the north, Irvine to the northeast, unincorporated areas (Crystal Cove State Park) of Orange County to the southeast, and the Pacific Ocean to the south. Regional access to the project site is provided via Interstate 405 (I-405), State Route 55 (SR-55), SR-73 (San Joaquin Hills Transportation Corridor), and Highway 1 (Pacific Coast Highway).

The project site is in Newport Center, an area of the City that includes a mix of high- and low-rise office, residential, and hospitality buildings surrounding the Fashion Island regional mall. The site is approximately 2.9 acres and is at 850 and 856 San Clemente Drive (Assessor's Parcel Numbers 442-261-05 and 442-261-17, respectively). The project site is generally bounded by Santa Cruz Drive to the east, Santa Barbara Drive to the west, San Joaquin Hills Road to the north, and San Clemente Drive to the south.

Mitigation Monitoring and Reporting Program

1.3 PROJECT SUMMARY

The proposed project consists of redeveloping the project site with the Vivante Senior Living Project, which is a multistory luxury senior living project that would provide assisted living units, a memory care unit, and various resident amenities and services.

The project site sits on two parcels that are approximately 2.9 acres. The proposed project would demolish the 23,632-square-foot, single-story OCMA building and the 14,556-square-foot single-story office building, remove the surface parking lots, grub onsite vegetation, and remove all ornamental trees onsite. The project site would be developed with the proposed luxury senior living project which includes a six-story plus basement, 183,500-square-foot, L-shaped, building which would be centrally located within the project site.

The proposed building would be constructed up to 69 feet in height and would house assisted living units and a memory care unit, and congregate care services, via a state-licensed residential care facility for the elderly, would be provided to residents in both the assisted living and memory care units. The proposed project would include 54 one-bed units (studios) and 36 two-bed units in the assisted living portion, and 27 beds are proposed in the nine memory care units. There would be a total of 153 beds within the 99 units proposed. Unit sizes would range from 530 square feet for one-bed units and up to 2,500 square feet for two-bed units. All units would be provided on the second to sixth floors of the building, with the exception of a couple of units on the ground level.

Mitigation Monitoring and Reporting Program

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Mitigation Monitoring and Reporting Program

Table 1 Mitigation Monitoring Requirements

Mitigation Measure		Responsibility for Implementation	Timing	Responsibility for Monitoring	Monitor (Signature Required) (Date of Compliance)
5.1 AIR QUALITY					
AQ-1	During construction, the construction contractor(s) shall require the use of interior paint with 0 grams per liter (g/L) of volatile organic compounds (VOC) (i.e., zero VOC paint). Paints that emit less than the low-VOC limits of South Coast Air Quality Management District (SCAQMD) Rule 1113 are known as "super-compliant paints." A list of super-compliant VOC coating manufacturers is available at SCAQMD's website (http://www.aqmd.gov/prdas/brochures/paintguide.html). Use of super-compliant interior paints shall be noted on building plans.	Project Applicant; Construction Contractor	During building plan check and construction	City of Newport Beach Community Development Department – Building Division	
AQ-2	The construction contractor(s) shall limit the daily amount of debris haul trips during the project's Orange County Museum of Art (OCMA) building demolition and asphalt demolition phase to a maximum of 32 truckloads per day (64 truck trips per day). Additionally, except for the building demolition activity, no other construction activities (onsite building debris reprocessing, administrative office building demolition, grading, building construction, etc.) shall commence until completion of the OCMA building debris hauling. These requirements shall be noted on all construction management plans and truck trips and mileage shall be documented.	Project Applicant; Construction Contractor	During grading and construction	City of Newport Beach Community Development Department – Building Division	
5.2 CULTURAL RESOURCES					
CUL-1	Prior to the issuance of grading permits, the project applicant shall demonstrate to the Community Development Department that an Orange County–certified professional archaeologist has been retained to monitor any potential impacts to archaeological resources throughout the duration of any ground-disturbing activities at the project site. The qualified archeologist shall be present at the pregrade meeting to discuss the monitoring, collection, and safety procedures of cultural resources, if any are found.	Project Applicant; Certified Archaeologist; Construction Contractor	Prior to issuance of grading permits	City of Newport Beach Community Development Department – Planning Division	

Mitigation Monitoring and Reporting Program

Table 1 Mitigation Monitoring Requirements

Mitigation Measure	Responsibility for Implementation	Timing	Responsibility for Monitoring	Monitor (Signature Required) (Date of Compliance)
<p>If subsurface cultural resources are discovered during ground-disturbing activities, the construction contractor shall ensure that all work stops within 25 feet of the find until the qualified archeologist can assess the significance of the find and, if necessary, develop appropriate treatment or disposition of the resources in consultation with the City of Newport Beach and a representative of the affected Native American tribe (Gabrieleno or Juaneno). The archeological monitor shall have the authority to halt any project-related activities that may adversely impact potentially significant archaeological resources. Suspension of ground disturbances in the vicinity of the discoveries shall not be lifted until an archeological monitor has evaluated the discoveries to assess whether they are classified as significant cultural resources, pursuant to the California Environmental Quality Act and, if determined to be significant, to develop an appropriate treatment or disposition plan. As required by General Plan Policy HR 2.4, any scientifically valuable materials will be donated to a responsible public or private institution with a suitable repository, located within Newport Beach or Orange County, whenever possible.</p>				
<p>CUL-2 Prior to issuance of any grading permit, the Applicant shall provide satisfactory evidence that a Native American monitor (i.e., Gabrieleno Band of Mission Indians-Kizh Nation), has been retained to observe ground disturbance activities during grading and excavation activities. In the event that tribal cultural resources are discovered, the Native American monitor shall be included in the consultation on the recommended next steps.</p>	<p>Project Applicant</p>	<p>During grading and construction</p>	<p>City of Newport Beach Community Development Department – Planning Division</p>	

Mitigation Monitoring and Reporting Program

Table 1 Mitigation Monitoring Requirements

Mitigation Measure		Responsibility for Implementation	Timing	Responsibility for Monitoring	Monitor (Signature Required) (Date of Compliance)
5.3 GEOLOGY AND SOILS					
GEO-1	<p>Based on the provided plans, sufficient space should be available for deep excavations to be accomplished using open cuts. If site access is limited, temporary shoring may be required for supporting the vertical sides of the required excavations. If shoring is required, it will conform to the Geotechnical Report and following requirements:</p> <p>Prior to issuance of grading permits, the City of Newport Beach Building Division shall confirm that the grading plans include the shoring requirements detailed in the project's geotechnical study. Cantilever, tied-back or internally braced shoring systems can be used for the subterranean excavation. Cantilever shoring systems are typically limited to a maximum retained height of 15 feet. Tied-back shoring walls will require a temporary or permanent easement from the adjacent property owners and the City of Newport Beach. The shoring system shall be designed to resist a lateral earth pressure equivalent to a fluid weighing 35 pounds per cubic foot. An allowable passive earth pressure of 275 psf per foot of depth below the bottom of the excavation shall be used for design of the shoring system. An allowable passive earth pressure of 550 psf per foot can be used for isolated soldier piles.</p> <p>If sufficient distance from the property line is available, it may be possible to excavate to the subgrade elevation without the use of shoring. Temporary slope in the marine terrace deposit may be excavated at slopes where the proportion of the height of the rise is less than or equal to the length of the slope (1H:1V). Alternatively, sloped excavations may be used to reduce the height of the shored excavation. In the case, the earth pressures above may be increased and will be handled on a case by case basis when the height of the sloped excavation is known.</p>	Project Applicant	Prior to issuance of grading permits	City of Newport Beach Community Development Department – Building Division	

Mitigation Monitoring and Reporting Program

Table 1 Mitigation Monitoring Requirements

	Mitigation Measure	Responsibility for Implementation	Timing	Responsibility for Monitoring	Monitor (Signature Required) (Date of Compliance)
	All shoring and excavation shall comply with current Occupational Safety and Health Administration regulations and observed by the designated competent person on site.				
GEO-2	The bedding zone is defined as the area containing the material specified that is supporting, surrounding, and extending to one foot above the top of any proposed utility pipes. During grading and construction plan reviews, the City of Newport Beach Building Divisions shall confirm that the project's proposed bedding satisfies the requirements of the Standard Specifications for Public Works Construction (SSPWC) Section 306- 1.2.1. There shall be a 4-inch minimum of bedding below the pipe and 1-inch minimum clearance below a projecting bell. There shall be a minimum side clearance of 6 inches on each side of the pipe. Bedding material shall be sand, gravel, crushed aggregate, or native free-draining material having a sand equivalent of not less than 30, or other material approved by the engineer. Materials used for the bedding zone shall be placed and compacted with light mechanical means to reduce the potential of damaging the pipe; jetting shall not be allowed.	Project Applicant	Prior to issuance of grading permits	City of Newport Beach Community Development Department – Building Division	
GEO-3	Backfill shall be considered as starting 12 inches above the pipe. On-site excavated materials are suitable as backfill. During construction activities, any boulders or cobbles larger than three inches in any dimension shall be removed before backfilling. All backfill shall be placed in loose lifts not exceeding the thickness specified in the Geotechnical Report and be compacted to at least 90 percent relative compaction. The upper 12 inches below pavement shall be compacted at least to 95 percent relative compaction. Mechanical compaction will be required to accomplish compaction above the bedding along the entire pipeline alignments. In backfill areas, where mechanical compaction of soil backfill is impractical due to space constraints, sand-cement slurry may be substituted for compacted backfill. The slurry shall contain one	Project Applicant; Construction Contractor	Prior to issuance of grading permits and during construction	City of Newport Beach Community Development Department – Building Division	

Mitigation Monitoring and Reporting Program

Table 1 Mitigation Monitoring Requirements

	Mitigation Measure	Responsibility for Implementation	Timing	Responsibility for Monitoring	Monitor (Signature Required) (Date of Compliance)
	<p>and one-half sacks of cement per cubic yard and have a maximum slump of 5 inches. When set, such a mix typically has the consistency of hard compacted soil and allows for future excavation.</p> <p>A lean non-shrink concrete plug with a minimum width length of 3 feet shall be placed in the utility trenches at the location where off-site utilities enter the project boundaries to minimize the potential for off-site water flow onsite.</p>				
GEO-4	<p>All foundation excavations shall be observed and/or tested by the project applicant's geotechnical consultant before placement of concrete to verify that the foundations would be supported in competent soils. If soft or loose soils are encountered at the subgrade level, the soils shall be removed or brought to a near-optimum moisture content (± 2 percent), recompact, and tested to a minimum of 95 percent relative compaction prior to placement of fill or footing or floor slab construction. Only granular soils shall be used for compacted fill.</p> <p>Mat foundations, if used in the project, may also derive lateral load resistance from passive resistance along the vertical sides of the foundations. Therefore, an ultimate passive fluid pressure of 275 pounds per cubic foot (pcf) shall be used. It is recommended that an ultimate sliding friction coefficient of 0.35 to be used for design. Passive and sliding resistance may be used in combination without reduction. The required factor of safety is 1.5 for static loads and 1.1 for wind or seismic loads.</p>	Project Applicant; Geotechnical Consultant	During grading and construction	City of Newport Beach Community Development Department – Building Division	
GEO-5	<p>Prior to the issuance of grading permits, the project applicant shall demonstrate to the Community Development Department that an Orange County–certified professional paleontologist has been retained to monitor any potential impacts to paleontological resources throughout the duration of any ground-disturbing activities at the project site. The paleontologist shall develop and implement a Paleontological Mitigation Plan, which shall include</p>	Project Applicant; Certified Paleontologist	Prior to issuance of grading permits	City of Newport Beach Community Development Department – Planning Division	

Mitigation Monitoring and Reporting Program

Table 1 Mitigation Monitoring Requirements

Mitigation Measure	Responsibility for Implementation	Timing	Responsibility for Monitoring	Monitor (Signature Required) (Date of Compliance)
<p>the following minimum elements:</p> <ul style="list-style-type: none"> ▪ All earthmoving activities eight feet or more below the current surface shall be monitored full-time by a qualified paleontological monitor. ▪ If fossils are discovered, the paleontological monitor has the authority to temporarily divert work within 25 feet of the find to allow recovery of the fossils and evaluation of the fossil locality. ▪ Fossil localities shall require documentation, including stratigraphic columns and samples for micropaleontological analyses and for dating. ▪ Fossils shall be prepared to the point of identification and evaluated for significance. ▪ Significant fossils shall be cataloged and identified prior to being donated to an appropriate repository. ▪ The final report shall interpret any paleontological resources discovered in the regional context and provide the catalog and all specialists' reports as appendices. <p>An executed curation agreement shall be part of the plan, and the project proponent shall bear all expenses of the mitigation program, including curation of materials meeting significance criteria.</p>				

Mitigation Monitoring and Reporting Program

Table 1 Mitigation Monitoring Requirements

Mitigation Measure		Responsibility for Implementation	Timing	Responsibility for Monitoring	Monitor (Signature Required) (Date of Compliance)
4 NOISE					
NOI-1	At least 30 days prior to commencement of demolition or any other construction activities, notification shall be given to all residents or businesses within 500 feet of the project site regarding the planned construction activities. The notification shall include a brief description of the project, the activities that would occur, the duration and hours when construction would occur. The notification shall also include the telephone number of the construction contractor's authorized representative to respond in the event of a vibration or noise complaint.	Project Applicant; Construction Contractor	At least 30 days prior to demolition or construction	City of Newport Beach Community Development Department – Building Division	
NOI-2	Prior to the beginning of construction activities, a sign shall be posted at the entrance to the job site, clearly visible to the public, that contains a contact name and telephone number of the construction contractor's authorized representative to respond in the event of a vibration or noise complaint. If the authorized representative receives a complaint, he/she shall investigate, take appropriate corrective action, and report the action to the City of Newport Beach's Community Development Director.	Project Applicant; Construction Contractor	Prior to construction	City of Newport Beach Community Development Department – Building Division	
NOI-3	Route all construction-related trips (including worker commuting, material deliveries, and debris/soil hauling) so as to minimize pass-bys or residential areas around the project site.	Project Applicant; Construction Contractor	During grading and construction	City of Newport Beach Community Development Department – Building Division	
NOI-4	All heavy construction equipment used on the proposed project shall be maintained in good operating condition, with all internal combustion, engine-driven equipment fitted with intake and exhaust muffles, air intake silencers, and engine shrouds no less effective than as originally equipped by the manufacturer.	Project Applicant; Construction Contractor	During grading and construction	City of Newport Beach Community Development Department – Building Division	
NOI-5	Electrically powered equipment instead of pneumatic or internal combustion powered equipment shall be used to the extent possible.	Project Applicant; Construction Contractor	During grading and construction	City of Newport Beach Community Development Department – Building Division	

Mitigation Monitoring and Reporting Program

Table 1 Mitigation Monitoring Requirements

	Mitigation Measure	Responsibility for Implementation	Timing	Responsibility for Monitoring	Monitor (Signature Required) (Date of Compliance)
NOI-6	All stationary noise-generating equipment shall be located as far away as possible from neighboring property lines; with particular attention paid to the residential complex (currently under construction) to the north of the project site.	Project Applicant; Construction Contractor	During grading and construction	City of Newport Beach Community Development Department – Building Division	
NOI-7	Limit all internal combustion engine idling both on the site and at nearby queuing areas to no more than five (5) minutes for any given vehicle or machine. Signs shall be posted at the job site and along queueing lanes to reinforce the prohibition of unnecessary engine idling.	Project Applicant; Construction Contractor	During grading and construction	City of Newport Beach Community Development Department – Building Division	
NOI-8	The use of noise producing signals, including horns, whistles, alarms, and bells will be for safety warning purposes only. Use smart back-up alarms, which automatically adjust the alarm level based on the background noise level, or switch off back-up alarms and replace with human spotters.	Project Applicant; Construction Contractor	During grading and construction	City of Newport Beach Community Development Department – Building Division	
NOI-9	A temporary noise barrier/curtain shall be erected between the construction zone and adjacent residential receptors to the north of the project site boundary. The temporary sound barrier shall have a minimum height of 16 feet and be free of gaps and holes and must achieve a Sound Transmission Class (STC) of 35 or greater. The barrier can be (a) a ¾-inch-thick plywood wall OR (b) a hanging blanket/curtain with a surface density of at least 2 pounds per square foot. For either configuration, the construction side of the barrier shall have an exterior lining of sound absorption material with a Noise Reduction Coefficient (NRC) rating of at least 0.7.	Project Applicant; Construction Contractor	During building plan check and grading and construction	City of Newport Beach Community Development Department – Building Division	

Mitigation Monitoring and Reporting Program

Table 1 Mitigation Monitoring Requirements

Mitigation Measure		Responsibility for Implementation	Timing	Responsibility for Monitoring	Monitor (Signature Required) (Date of Compliance)
5.5 TRIBAL CULTURAL RESOURCES					
CUL-1	<p>Prior to the issuance of grading permits, the project applicant shall demonstrate to the Community Development Department that an Orange County–certified professional archaeologist has been retained to monitor any potential impacts to archaeological resources throughout the duration of any ground-disturbing activities at the project site. The qualified archeologist shall be present at the pregrade meeting to discuss the monitoring, collection, and safety procedures of cultural resources, if any are found.</p> <p>If subsurface cultural resources are discovered during ground-disturbing activities, the construction contractor shall ensure that all work stops within 25 feet of the find until the qualified archeologist can assess the significance of the find and, if necessary, develop appropriate treatment or disposition of the resources in consultation with the City of Newport Beach and a representative of the affected Native American tribe (Gabrieleno or Juaneno). The archeological monitor shall have the authority to halt any project-related activities that may adversely impact potentially significant archaeological resources. Suspension of ground disturbances in the vicinity of the discoveries shall not be lifted until an archeological monitor has evaluated the discoveries to assess whether they are classified as significant cultural resources, pursuant to the California Environmental Quality Act and, if determined to be significant, to develop an appropriate treatment or disposition plan. As required by General Plan Policy HR 2.4, any scientifically valuable materials will be donated to a responsible public or private institution with a suitable repository, located within Newport Beach or Orange County, whenever possible.</p>	Project Applicant; Certified Archaeologist; Construction Contractor	Prior to issuance of grading permits	City of Newport Beach Community Development Department – Planning Division	

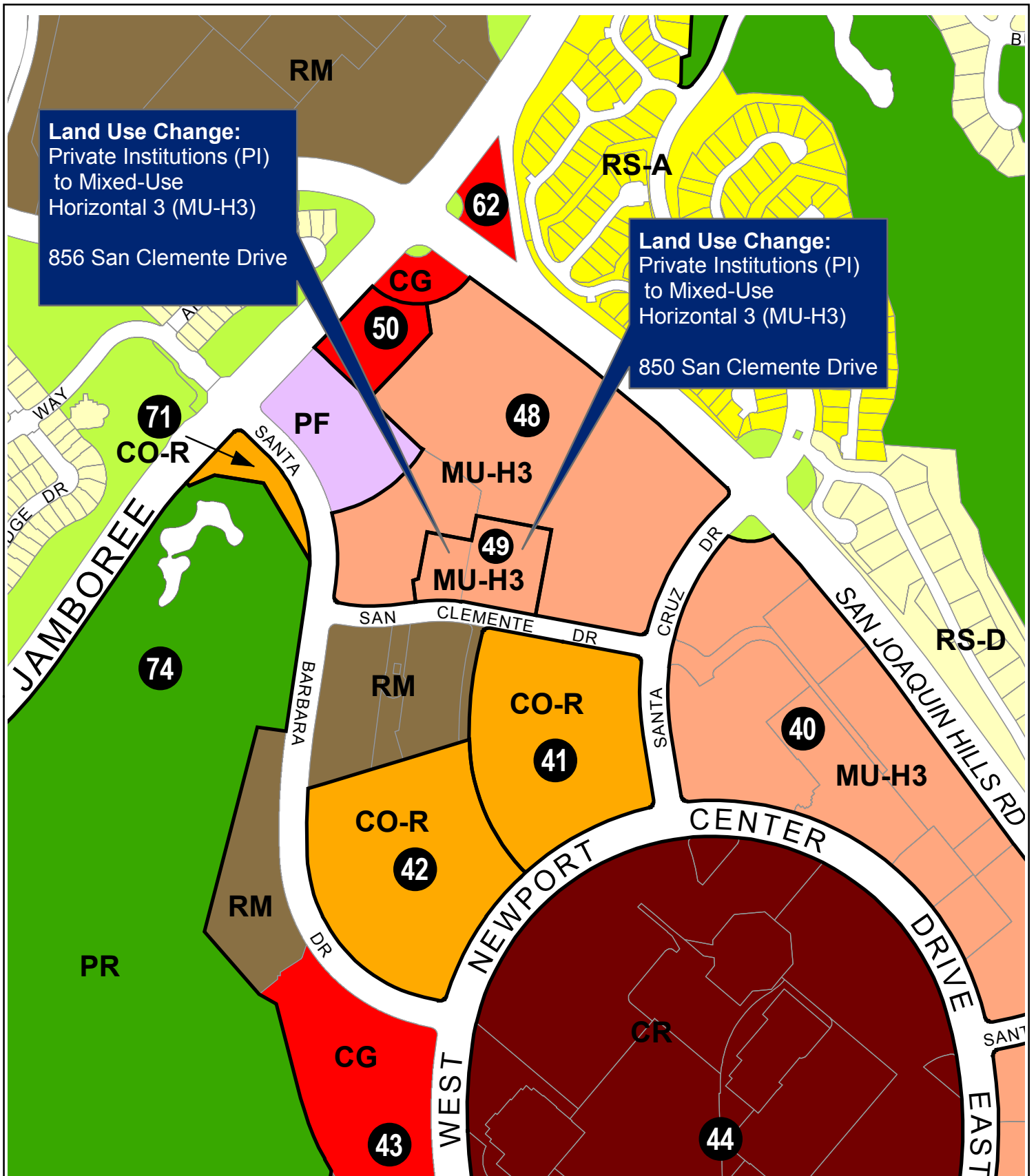
Mitigation Monitoring and Reporting Program

Table 1 Mitigation Monitoring Requirements

Mitigation Measure		Responsibility for Implementation	Timing	Responsibility for Monitoring	Monitor (Signature Required) (Date of Compliance)
CUL-2	Prior to issuance of any grading permit, the Applicant shall provide satisfactory evidence that a Native American monitor (i.e., Gabrieleno Band of Mission Indians-Kizh Nation), has been retained to observe ground disturbance activities during grading and excavation. In the event that tribal cultural resources are discovered, the Native American monitor shall be included in the consultation on the recommended next steps.	Project Applicant	During grading and construction	City of Newport Beach Community Development Department – Planning Division	

Exhibit “C”

General Plan Land Use Amendments



GP2018-003 (PA2018-185)
General Plan Amendment
850 / 856 San Clemente Drive

0 400 800 Feet



Table LU1 Land Use Plan Categories

<i>Land Use Category</i>	<i>Uses</i>	<i>Density/ Intensity</i>
MIXED-USE HORIZONTAL— MU-H	The MU-H designation is intended to provide for the development of areas for a horizontally distributed mix of uses, which may include general or neighborhood commercial, commercial offices, multi-family residential, visitor-serving and marine-related uses, and/or buildings that vertically integrate residential with commercial uses.	
Mixed-Use Horizontal 1— MU-H1	<p>The MU-H1 designation provides for a horizontal intermixing of uses.</p> <p>For properties located on the inland side of Coast Highway in the Mariners' Mile Corridor, (a) the Coast Highway frontages shall be developed for marine-related and highway-oriented general commercial uses in accordance with CM and CG designations; and (b) portions of properties to the rear of the commercial frontage may be developed for free-standing neighborhood-serving retail, multi-family residential units, or mixed-use buildings that integrate residential with retail uses on the ground floor in accordance with the CN, RM , CV, or MU-V designations respectively.</p> <p>Properties located in the Dover Drive/Westcliff Drive area may also be developed for professional offices or mixed-use buildings that integrate residential with retail or office uses on the ground floor in accordance with the CO and MU-V designations respectively.</p>	<p>Commercial or Office only: floor area to land ratio of 0.5.</p> <p>Multi-Family Residential only: 20.1–26.7 units per acre.</p> <p>Mixed-Use Buildings: floor area to land ratio of 1.5; where a minimum floor area to land ratio of 0.25 and maximum of 0.5 shall be used for nonresidential purposes and a maximum of 1.0 for residential.</p>
Mixed-Use Horizontal 2— MU-H2	The MU-H2 designation applies to properties located in the Airport Area . It provides for a horizontal intermixing of uses that may include regional commercial office, multi-family residential, vertical mixed-use buildings, industrial, hotel rooms, and ancillary neighborhood commercial uses.	<p>Residential: maximum of 2,200 units as replacement of existing office, retail, and/or industrial uses at a maximum density of 50 units per adjusted gross acre, of which a maximum of 550 units may be developed as infill.</p> <p>Nonresidential Uses: as defined by Table LU2</p>
Mixed-Use Horizontal 3— MU-H3	The MU-H3 designation applies to properties located in Newport Center . It provides for the horizontal intermixing of regional commercial office, hotel, multi-family residential and ancillary commercial uses. Within the Tennis Club, residential uses may be developed as single-family units.	<p>Residential: maximum of 450 540 units</p> <p>Hotel: 65 rooms in addition to those specified in Table LU2</p> <p>Other: Nonresidential: As specified by Table LU2</p>

Table LU2 Anomaly Locations

Anomaly Number	Statistical Area	Land Use Designation	Development Limit (sf)	Development Limit (Other)	Additional Information
37	L1	CO-R	131,201	2,050 Theater Seats (not included in total square footage)	
38	L1	CO-M	443,627		
39	L1	MU-H3	408,084		
40	L1	MU-H3	1,426,634	425 Hotel Rooms (included in total Square Footage)	
41	L1	CO-R	327,671		
42	L1	CO-R	286,166		
43	L1	CV		611 Hotel Rooms	
44	L1	CR	1,619,525	1,700 Theater Seats (not included in total square footage)	
45	L1	CO-G	162,364		
46	L1	MU-H3/PR	3,725	24 Tennis Courts	Residential permitted in accordance with MU-H3.
47	L1	CG	105,000		
48	L1	MU-H3	337,261		
49	L1	MU-H3 PI	16,000 45,208	90 Dwelling Units	
50	L1	CG	25,000		
51	K1	PR	20,000		
52	K1	CV		479 Hotel Rooms	
53	K1	PR	567,500		See Settlement Agreement
54	J1	CM	2,000		
55	H3	PI	119,440		
56	A3	PI	1,343,238	990,349 sf Upper Campus 577,889 sf Lower Campus	In no event shall the total combined gross floor area of both campuses exceed the development limit of 1,343,238 sq. ft.
57	Intentionally Blank				
58	J5	PR	20,000		
59	H4	MU-W1	247,402	144 Dwelling Units (included in total square footage)	
60	N	CV	*3,035,000	2,150 Hotel Rooms (2,960,000 square feet for hotel rooms and related commercial uses identified in Newport Coast LCP) 75,000 square feet for Day Use Commercial	Newport Coast LCP Planning Area 13 *Correction per Planning Commission Resolution 2030 adopted October 6, 2016
61	N	CV	125,000		Newport Coast LCP Planning Areas 3B and 14
62	L2	CG	2,300		
63	G1	CN	66,000		
64	M3	CN	74,000		
65	M5	CN	80,000		
66	J2	CN	138,500		
67	D2	PI	20,000		
68	L3	PI	71,150		
69	K2	CN	75,000		
70	D2	RM-D			Parking Structure for Bay Island (No Residential Units)
71	L1	CO-G	11,630		

Exhibit “D”

**Amended PC-19
(San Joaquin Plaza Planned Community
Development Plan)**

San Joaquin Plaza
Planned Community Development Plan
(PC 19 Amendment No. 8)

Land Uses, Development Standards &
Procedures

Amended [insert date here]

**San Joaquin Plaza Planned Community Development Plan
(PC 19 Amendment No. 8)**

Land Uses, Development Standards & Procedures

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San Joaquin Plaza PC Development Plan
Amendment No. 8

I. Introduction

A. Introduction, Purpose, and Intent of this Development Plan

The San Joaquin Plaza Planned Community District (PC-19) (the “San Joaquin Plaza PC District”) for the City of Newport Beach is part of the Newport Center Development in conformance with the Newport Beach General Plan (the “General Plan”). The General Plan identifies the goal of creating a successful mixed-use district that integrates economic and commercial centers serving the needs of Newport Beach residents and the sub-region, with expanded opportunities for a variety of housing development within Newport Center.

As shown on Figure 1, the San Joaquin Plaza PC District is located in the north end of Newport Center where the concentration of building height and mass is greatest. It is generally bounded by Santa Cruz Drive on the east, San Clemente Drive to the south, and Santa Barbara Drive to the west. Surrounding uses include a parking structure to the east, office buildings and a parking structure to the west, residential apartments to the north, and office and residential apartments to the south across San Clemente Drive. The Fashion Island regional mall is approximately ¼ mile to the south. The purpose of the San Joaquin Plaza PC District is to ensure consistency with General Plan policies related to development scale in Newport Center and expectations for high quality development.

This San Joaquin Plaza PC Development Plan (as hereby amended, this “Development Plan”) provides land use and development standards for the subject properties located at 850 San Clemente Drive and 856 San Clemente Drive. This Development Plan supersedes the existing San Joaquin Plaza PC Development Plan in its entirety, including the land use and development standards therein. The specifications of this Development Plan are intended to provide flexibility in both the land use and development standards for the planned buildings.

B. Relationship to the Municipal Code

Whenever the development regulations of this Development Plan conflict with the regulations of the City of Newport Beach Municipal Code (the “Municipal Code”), the regulations contained in this Development Plan shall prevail. The development regulations of the Municipal Code shall apply with respect to those regulations not addressed by this Development Plan. All words and phrases used in this Development Plan shall have the same meaning and definition as used in the Municipal Code unless defined differently in Section IV (Definitions) of this Development Plan.

C. San Joaquin Plaza Statistical Analysis

The San Joaquin Plaza PC District area consists of the following two (2) existing buildings located on the following two (2) adjoining parcels (however, this Development Plan allows for such adjoining parcels to be combined into a single parcel for development purposes):

Building 1 (850 San Clemente Drive) on Parcel 1

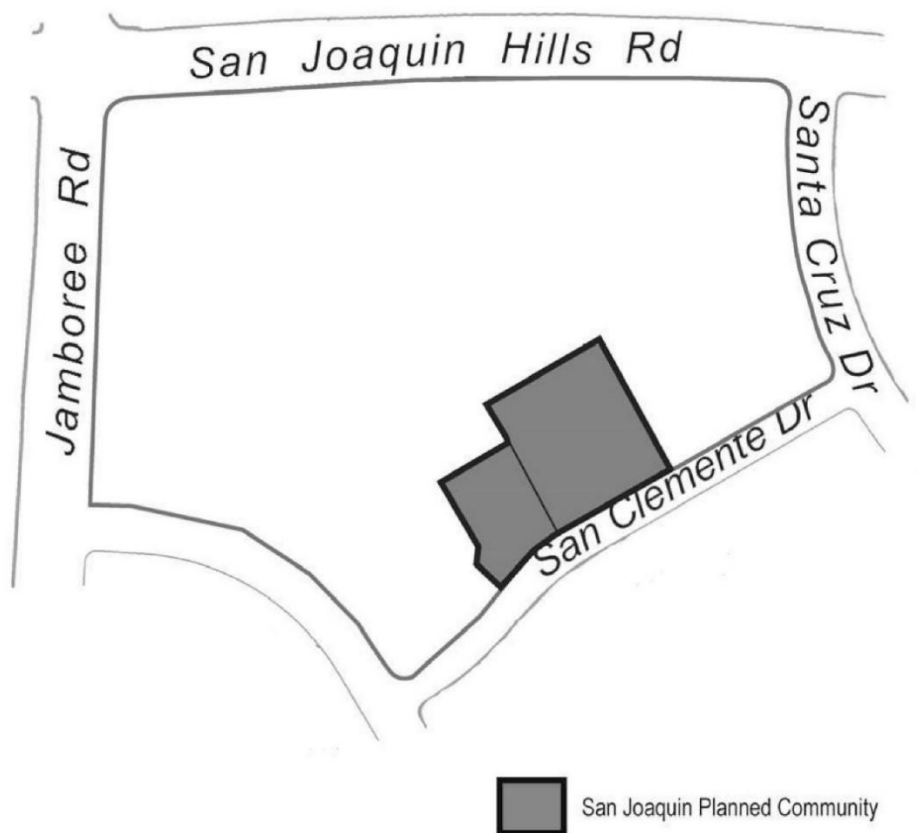
- Existing Use: Orange County Museum of Art Exhibition Space (23,632 Square Feet)
- Parcel Size: 1.996 acres

Building 2 (856 San Clemente Drive) on Parcel 2

- Existing Use: Orange County Museum of Art Galleries Administrative Offices and Storage (13,935 Square Feet)
- Parcel Size: 0.910 acres

Total combined Land Parcels consisting of 2.91 acres

D. Figure 1 - San Joaquin Plaza Planned Community Area Location Map



II. Land Uses and Development Regulations

A. Permitted Uses

1. General

The specific uses listed in Section II.A.2 below are permitted under this Development Plan. In addition, uses determined to be either accessory or ancillary to such permitted uses, or Support Uses to such permitted uses, are also permitted under this Development Plan. In addition, the Community Development Director may determine other uses not specifically listed herein, provided they are consistent with the Mixed- Use Horizontal (MU-H3) Land Use designation.

2. San Joaquin Plaza

- a. Senior Housing (with or without congregate care), which may include a development which is licensed by the State of California as a residential care facility for the elderly ("RCFE"). Such Senior Housing may include independent, assisted-living, and/or memory care units for persons 60 years of age or older.
- b. Convalescent Facility (with or without congregate care), which may include a development which is licensed by the State of California as a RCFE. Such Convalescent Facility may include assisted-living care and/or memory care units.
- c. Uses that are accessory or ancillary to the foregoing permitted uses, including Support Uses for Senior Housing, are also permitted. These include, but are not limited to, the following:
 - i. Lobby
 - ii. Club Rooms
 - iii. Bowling alley
 - iv. Fitness Center
 - v. Business Services
 - vi. Rooftop Lounge
 - vii. Salon/Spa
 - viii. Commercial Kitchen & Dining Hall with ancillary on-site sale alcohol service (Type 47/57 or similar license)
 - ix. Laundry
 - x. Conference Rooms & Admin Offices
 - xi. Pool
 - xii. Putting Green
 - xiii. Bocce Ball Court
 - xiv. Dog Park
 - xv. Raised Herb Gardens
 - xvi. Similar resident serving uses

d. Telecommunications facilities are permitted in accordance with Chapter 20.49 (Wireless Telecommunications Facilities) of the NBMC.

e. Land uses that are not listed above are not allowed, except as provided by Chapter 20.12 (Interpretation of Zoning Code Provisions) of the NBMC or as required by State Law.

f. Temporary uses may be allowed only upon approval of a limited term permit pursuant to Section 20.52.040 (Limited Term Permits) of the NBMC.

B. Development Limits

1. General

The following development limits in this Development Plan are consistent with those established by the General Plan:

2. San Joaquin Plaza

Up to 90 Senior Housing units are permitted within the San Joaquin Plaza PC District. Senior Housing units, associated common areas, and ancillary uses are measured on a per unit basis and not by gross floor area. Senior Housing units are comprised of separate or independent living areas for one or more persons, with area or equipment for sleeping, sanitation, and food preparation.

Up to 16,000 square feet of Convalescent Facilities or other non-residential uses (excluding Senior Housing units and associated common areas and ancillary uses) are permitted within the San Joaquin Plaza PC District. Convalescent Facilities and other non-residential uses (excluding Senior Housing units and associated common areas and ancillary uses) are measured by gross floor area.

C. Transfer of Development Rights

Development limits may be modified through the approval of a Transfer of Development Rights. The transfer of development rights among the San Joaquin Plaza PC District and to/from other areas in the Newport Center/Fashion Island District identified in the General Plan is allowed in accordance with Policy LU 6.14.3 of the General Plan and this Development Plan. The transfer of development rights shall be approved, as specified in the General Plan.

III. Site Development Standards

A. Site Setbacks

- | | |
|----------------------------------------------------|-------|
| a. San Clemente Drive | 15'0" |
| b. East Property Line (Adjacent to Parking Garage) | 5'0" |

- | | |
|-------------------------------------------------------------|------|
| c. North Property Line (Adjacent to San Joaquin Apartments) | 5'0" |
| d. West Property Line | 5'0" |

Note: Carports, site walls, trash or generator enclosures, and parking spaces shall not be subject to any setback requirements.

B. Senior Housing Open Space Requirements

The following open space standards shall apply to Senior Housing:

1. Common Outdoor Open Space

The project shall provide a minimum of 5 percent common outdoor open space based on the lot area (6,330 square feet minimum). The project shall provide common outdoor open space either at grade, podium level, common level within the building or roof level. Qualifying common outdoor open space areas shall have a minimum horizontal dimension of 30 feet and may contain active and/or passive areas and a combination of hardscape and landscape features, but a minimum of 10 percent of the common outdoor open space must be landscaped. All common outdoor space must be accessible to all residents.

2. Common Indoor Open Space

The project shall provide at least one community room of at least 500 square feet for use by residents of the project. The area should be located adjacent to, and accessible from, common access point. This area may contain active or passive recreational facilities or meeting space and must be accessible through a common corridor.

3. Private Open Space

At least 40 percent of all units shall provide private open space, on a balcony, patio, or roof terrace. Private open space shall be a minimum of 30 square feet and an average horizontal dimension of 6 feet. Balconies should be proportionately distributed throughout the project in relationship to floor levels and sizes of units.

C. Parking

Off-street parking for Senior Housing units shall be provided at a ratio of not less than 1.2 parking spaces per unit. Ancillary uses, such as lobbies, club rooms, fitness center, business services, amenities and building services shall not require additional parking as they support the primary operations of the Senior Housing community and its residents.

Off-street parking for Convalescent Facilities (Memory Care) shall be provided at a ratio of not less than one (1) parking space per three beds.

D. Floor Area Ratio

a. Allowable Floor Area Ratio (FAR)	1.5:1 FAR
b. Lot Area	126,600 Square Feet
c. Allowable Floor Area	189,900 Square Feet

E. Lot Coverage

Lot Coverage is the percentage of the site area.

a. Minimum Lot Area	39,639 Square Feet
b. Allowable Lot Coverage is 25%	
c. Minimum Lot Width	150 Feet

F. Permitted Height of Structures

The maximum Building Height of all buildings shall be 69 feet as measured from Finished Grade to the top of primary structure (top of ceiling above highest occupiable living space). Finish Grade is defined as the elevation point of the main building entry point at ground floor in relation to mean sea level.

G. Rooftop Appurtenances

Rooftop Appurtenances are permitted above the primary structure and may exceed the maximum Building Height by up to 10 feet (79 feet maximum). Rooftop Appurtenances must be screened from public view; the height of Rooftop Appurtenances shall not exceed the height of the screening. Supports for window washing equipment are permitted, and are not required to be screened from view. Additional setbacks on the roof are not required.

H. Architectural Features

Architectural Features are permitted above the primary structure and may exceed the maximum Building Height by up to 10 feet (79 feet maximum). Such features must be an extension of the architectural style of the building in terms of materials, design and color.

I. Site Walls, Retaining Walls, Garage Walls and Mechanical Screens

- a. Site Walls
 - i. Site walls shall not exceed 8'0" from Finish Grade.
- b. Retaining Walls
 - i. Interior: The height of a retaining wall that faces interior to the project must not exceed 12'0" from Finish Grade to top of wall. A 42-inch guardrail is allowed above the wall where it is necessary for building and safety.
 - ii. Exterior: Retaining walls that face exterior to adjacent properties and San Clemente Drive at property lines are limited in height to 12'0" from Finish

Grade not including handrail conditions that may be required above these walls. These handrail requirements may be formed by the retaining wall.

- c. Garage walls that are exposed will be treated as architectural building façade.
- d. Mechanical screens will be allowed to be of sufficient height to provide coverage of equipment from public view. Required grills, louvers, vents and other functional requirements of building equipment will, to the extent practical, be incorporated into the building architecture. Ground-mounted mechanical screens shall not exceed 12 feet in height. Mechanical equipment shall comply with the noise standards of the City of Newport Beach Municipal Code.

J. Refuse Collection

The Senior Housing and Convalescent Facility shall provide a minimum of 384 square feet of trash area. The trash area shall provide a dedicated area with three walls, a gate, and a solid roof cover with a drain to the sewer system in accordance with the requirements of [Section 20.30.120 \(Solid Waste and Recyclable Materials Storage\)](#) of the City of Newport Beach Municipal Code. All storage of cartons, containers, and trash shall be shielded from view within a building or within an area enclosed by a wall not less than 6 feet in height.

K. Landscaping

Refer to the landscape standards within the City of Newport Beach Municipal Code.

L. Lighting

Refer to the lighting standards within the City of Newport Beach Municipal Code.

M. Signs

1. General Sign Standards

A comprehensive sign program may be prepared if the applicant wishes to deviate from the sign standards identified herein. Comprehensive sign programs shall be submitted for review and consideration in accordance with the provisions of the City of Newport Beach Municipal Code.

2. Prohibited Sign Types

Signs visible from public rights-of-way are prohibited as follows:

- a. Rotating, flashing, blinking or signing with animation on a permanent basis are prohibited.
- b. Signs that imitate or resemble official traffic signs or signals are prohibited.
- c. Wind signs or audible signs are prohibited.

- d. Any other sign types identified in the City of Newport Beach Municipal Code as prohibited are also prohibited hereunder.

Animated signs visible from public streets are not allowed unless otherwise permitted by the Municipal Code.

3. Sign Standards San Joaquin Plaza

Primary building address numbers shall be visible from the street (and/or pedestrian walkways in the case of necessity) and be located on the building so that they are visible from adjacent frontage roads and designated parking areas. Secondary address signs may be located where appropriate for on-site orientation and safety. All address signs shall have a consistent color, design, and material for any given building. A single letter style sign is recommended.

Table 2 – Sign Standards for San Joaquin Plaza

Sign Type	Description	Location	Maximum Number/Area	Maximum Letter/ Logo Height
A	Entry columns or ground mounted signs in front of landscaping.	Project entry at San Clemente (minimum 5-foot setback from front property line)	4/100 square feet each	36 inches (6-foot maximum overall height clear of sight-distance areas)
B	Building sign	On building elevation or awning	1 Primary/150 square feet and 4 Secondary/100 square feet each	Primary 48 inches Secondary 36 inches
C	Building address	On building elevation	4 (additional address signs may be located where appropriate for in-site orientation)/50 square feet each or as otherwise	4 inches minimum as required by Fire Department and 24 inches maximum

			required by Fire Department	
D	Advisory signs	Entry to service	As appropriate for safety and orientation/25 square feet	As required by Fire Department or Building Code for Safety purposes

4. Temporary Signs

Temporary signs are permitted in accordance with the Newport Beach Municipal Code.

N. LEED Certification

The project shall be designed to meet the criteria of LEED Certification as based on LEED's prototype points and scorecard rating system.

O. Construction and Utility Requirements

1. Archaeological/Paleontological

Grading of the site is subject to the provisions of the City Council Policies K-4 & K-5 regarding archaeological and paleontological resources and Mitigation Measures as adopted in the EIR addendum Mitigation Monitoring and Reporting Program (MMRP).

2. Building Codes

Construction shall comply with applicable provisions of the California Building Code and the various other mechanical, electrical and plumbing codes related thereto as adopted by the Municipal Code.

3. Grading

Grading and excavation of the project shall be conducted and undertaken in a manner both consistent with grading manual standards and ordinances of the City of Newport Beach, in accordance with a grading and excavation plan approved by the City of Newport Beach Building Division, and in accordance with Mitigation Measures as adopted in the EIR addendum Mitigation Monitoring and Reporting Program (MMRP).

4. Telephone, Gas and Electrical Service

All “on-site” gas lines, electrical lines and telephone lines shall be placed underground. Unless prohibited by the utility company, transformer or terminal equipment shall be visually screened from view from streets and adjacent properties.

5. Sewage Service

Any new and upgraded on and off-site sewer lines shall be designed in accordance with the Utilities Department Director’s approval.

6. Storm Water Management

This project shall adhere to the Water Quality Management Plan (WQMP) approved in conjunction with the issuance of building permits. Drainage and water quality assurance measures will be implemented as per the City Public Works and Municipal Separate Storm Sewer System (MS4) requirements. Development of the property will be undertaken in accordance with the flood protection policies of the City.

7. Water Service

Water service to the site will be provided by the City of Newport Beach and is subject to applicable regulations, permits and fees as prescribed by the City. The project shall provide the infrastructure for Fire Protection Water Service and Domestic water.

IV. Definitions

All words and phrases used in this Development Plan shall have the same meaning and definition as used in the Municipal Code unless defined differently in this section.

Advisory Sign: Any sign that contains directional, directory, or safety information, and does not contain advertisements.

Architectural Features: Architectural features include, but are not limited to, any extension of the architectural style of the building in terms of materials, design and color that may exceed the building height. Examples include: Roof overhangs, brackets, cornices, eaves, belt courses, ornamental moldings, pilasters, and similar features.

Audible Signs: Any sign that uses equipment to communicate a message with sound or music.

Building Elevation: The exterior wall surface formed by one (1) side of the building.

Building Height: The height of a building as measured from the exterior finished grade to the roof of the highest occupied space. If the building is on a sloping surface, the height measurement is taken from the main building entrance.

Convalescent Facility: An age-restricted area or facility (with or without medical professional staffing) designed and intended for persons ages 60 years and older with memory care needs. A Convalescent Facility may be licensed by the State of California as a Residential Care Facility for the Elderly, may include the provision of congregate care, and may offer services and assistance with activities of daily living, such as bathing, dressing, eating, toileting, ambulating, assistance with medications, housekeeping, scheduling of medical and dental appointments, accessing community resources and transferring to outside facilities.

Finish Grade: The elevation point of the main building entry point at ground floor in relation to mean sea level.

Floor Area, Gross: The gross floor area is the total enclosed area of all floors of a building measured to the outside face of the structural members in exterior walls, including halls, stairways, elevator shafts at each floor level, service and mechanical equipment rooms and basement or attic areas having a height of more than seven feet. Excluded from gross floor area are covered porches, space below building entry or basement, parking, walkways, loading docks, service tunnels, mechanical shafts, and mechanical spaces which are inaccessible to tenants.

Monument Sign: Any sign that is supported by its own structure and is not part of or attached to any building.

Parking Structure: Structures containing more than one story principally dedicated to parking. Parking structures may contain accessory, ancillary, and resident Support Uses.

Podium Level: A superposed terrace conforming to a building's plan, a continuous pedestal; a line of vertical segregation linking separate areas.

Rooftop Appurtenance: A rooftop structure, equipment or element servicing or appurtenant to a building, including, but not limited to, mechanical equipment, mechanical equipment screens,

stairwell and elevator shaft housing, antennae, window washing equipment, and wireless communication facilities.

Senior Housing: An age-restricted residential development designed and intended for persons ages 60 years and older. Such development may include the provision of congregate care services for independent, assisted-living, or memory care residents. Senior housing units are comprised of separate or independent living facilities for one or more persons, with area or equipment for sleeping, sanitation, and food preparation. Additionally, a Senior Housing development may be licensed by the State of California as a Residential Care Facility for the Elderly.

Sign: Any media, including their structure and component parts which are used or intended to be used out-of-doors to communicate the information to the public.

Support Uses: Uses within Senior Housing developments and parking structures designed, oriented, and intended to primarily serve building occupants. This includes uses such as dry cleaners, coffee vendors, and sundry shops.

Temporary Sign: Any sign, banner, pennant, valance, or advertising display constructed of cloth, canvas, plywood, light fabric, cardboard, wallboard or other light materials, with or without frames, intended to be displayed for a limited period of time.

Wind Sign: A series or similar banners or objects of plastic or other light material more than two inches in diameter which are fastened together at intervals by wire, rope, cord, spring or any other means, designed to move and attract attention upon being subjected to pressure by wind or breeze.

V. Site Development Review

The purpose of the Site Development Review (SD) process is to ensure that any new development proposal within the Development Plan, Amendment No. 8) is consistent with the goals and policies of the General Plan and the provisions of the PC-Text. Prior to the issuance of building permits for development, a SD application shall be required in accordance with [Section 20.52.080 \(Site Development Reviews\)](#) of the Newport Beach Municipal Code. The submitted site plans and elevations shall be part of this application.

Exhibit “E”

Draft Development Agreement

(terms under negotiation)

RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:

City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660
Attn: City Clerk

(Space Above This Line Is for Recorder's Use Only)

This Agreement is recorded at the request and for the benefit of the City of Newport Beach and is exempt from the payment of a recording fee pursuant to Government Code §§ 6103 and 27383.

DEVELOPMENT AGREEMENT

between

CITY OF NEWPORT BEACH

and

VIVANTE NEWPORT CENTER, LLC

concerning

**VIVANTE SENIOR LIVING
850 AND 856 SAN CLEMENTE DRIVE**

DEVELOPMENT AGREEMENT

(Pursuant to Newport Beach Municipal Code Chapter 15.45 and California Government Code Sections 65864-65869.5)

This DEVELOPMENT AGREEMENT (“Agreement” or “Development Agreement”) is dated for reference purposes as of the __ day of _____, 2019 (“Agreement Date”), and is being entered into by and between the CITY OF NEWPORT BEACH (“City”) a California municipal corporation and charter city, organized and existing under and by virtue of its Charter and the Constitution, and the laws of the State of California, and VIVANTE NEWPORT CENTER, LLC, a Delaware limited liability company (“Developer”). City and Developer are sometimes collectively referred to in this Agreement as the “Parties” and individually as a “Party.”

RECITALS

A. Developer is fee simple owner of that certain real property located in the City of Newport Beach, County of Orange, State of California commonly referred to as 850 and 856 San Clemente Drive, Newport Beach, California (APN #442-261-05 and #442-261-17) (“Property”) and therefore is authorized to enter into this Agreement pursuant to Government Code Section 65865 and Newport Beach Municipal Code Chapter 15.45. The Property is more particularly described in the legal description attached hereto as Exhibit A and is depicted on the site map attached hereto as Exhibit B.

B. To encourage investment in, and commitment to, comprehensive planning and public facilities financing, strengthen the public planning process and encourage private implementation of the local general plan, provide certainty in the approval of projects to avoid waste of time and resources, and reduce the economic costs of development by providing assurance to property owners that they may proceed with projects consistent with existing land use policies, rules, and regulations, the California Legislature adopted California Government Code Sections 65864-65869.5 (“Development Agreement Statute”) authorizing cities and counties to enter into development agreements with persons or entities having a legal or equitable interest in real property located within their jurisdiction.

C. On March 13, 2007, the City Council adopted Ordinance No. 2007-6, entitled “Ordinance Amending Chapter 15.45 of City of Newport Beach Municipal Code Regarding Development Agreements” (“Development Agreement Ordinance”). This Agreement is consistent with the Development Agreement Ordinance.

D. As detailed in Section 4 of this Agreement and the Development Plans (as defined herein), and in consideration of the significant benefits outlined in this Agreement, Developer has agreed to pay a total Public Benefit Fee (as defined herein) in the sum of _____ Dollars and 00/100 (\$_____.00). Developer shall pay the Public Benefit Fee to the City at the time of the City’s issuance of the first building permit for the Project (as defined herein).

E. This Agreement is consistent with the City of Newport Beach General Plan, including, without limitation, the Property’s proposed “Private Institutions” General Plan designation that is being adopted and approved by the City Council concurrently with its

approval of this Agreement to establish appropriate standards to regulate land use and development of the Property consistent with the General Plan.

G. In recognition of the significant public benefits that this Agreement provides, the City Council has found that this Agreement: (i) is consistent with the City of Newport Beach General Plan as of the date of this Agreement; (ii) is in the best interests of the health, safety, and general welfare of City, its residents, and the public; (iii) is entered into pursuant to, and constitutes a present exercise of, the City's police power; (iv) is consistent and has been approved consistent with the Project's Addendum to the Environmental Impact Report and final Environmental Impact Report (SCH# 2016021023) ("EIR") that has been certified by the City Council on November 29, 2016, for the prior project, all of which analyze the environmental effects of the proposed development of the Project on the Property, and all of the findings, conditions of approval and mitigation measures related thereto; and (v) is consistent and has been approved consistent with provisions of California Government Code Section 65867 and City of Newport Beach Municipal Code Chapter 15.45.

H. On July 18, 2019, City's Planning Commission held a public hearing on this Agreement, made findings and determinations with respect to this Agreement, and recommended to the City Council that the City Council approve this Agreement.

I. On **enter hearing date**, the City Council also held a public hearing on this Agreement and considered the Planning Commission's recommendations and the testimony and information submitted by City staff, Developer, and members of the public. On **enter date**, consistent with applicable provisions of the Development Agreement Statute and Development Agreement Ordinance, the City Council adopted its Ordinance No. **insert ordinance number** ("Adopting Ordinance"), finding this Agreement consistent with the City of Newport Beach General Plan and approving this Agreement.

AGREEMENT

NOW, THEREFORE, City and Developer agree as follows:

1. Definitions.

In addition to any terms defined elsewhere in this Agreement, the following terms when used in this Agreement shall have the meanings set forth below:

"Action" shall have the meaning ascribed in Section 8.10 of this Agreement.

"Adopting Ordinance" shall mean City Council Ordinance No. **insert ordinance number** approving and adopting this Agreement.

"Agreement" shall mean this Development Agreement, as the same may be amended from time to time.

"Agreement Date" shall mean the date first written above, which date is the date the City Council adopted the Adopting Ordinance.

“CEQA” shall mean the California Environmental Quality Act (California Public Resources Code sections 21000-21177) and the implementing regulations promulgated thereunder by the Secretary for Resources (California Code of Regulations, Title 14, Division 6, Chapter 3, Section 15000 *et seq.*), as the same may be amended from time to time.

“City” shall mean the City of Newport Beach, a California municipal corporation and charter city, and any successor or assignee of the rights and obligations of the City of Newport Beach hereunder.

“City Council” shall mean the governing body of City.

“City’s Affiliated Parties” shall have the meaning ascribed in Section 10.1 of this Agreement.

“Claim” shall have the meaning ascribed in Section 10.1 of this Agreement.

“CPI Index” shall mean the Consumer Price Index published from time to time by the United States Department of Labor for all urban consumers (all items) for the smallest geographic area that includes the City or, if such index is discontinued, such other similar index as may be publicly available that is selected by City in its reasonable discretion.

“Cure Period” shall have the meaning ascribed in Section 8.1 of this Agreement.

“Default” shall have the meaning ascribed to that term in Section 8.1 of this Agreement.

“Develop” or “Development” shall mean to improve or the improvement of the Property for the purpose of completing the structures, improvements, and facilities comprising the Project, including but not limited to: grading; the construction of infrastructure and public facilities related to the Project, whether located within or outside the Property; the construction of all of the private improvements and facilities comprising the Project; the preservation or restoration, as required of natural and man-made or altered open space areas; and the installation of landscaping. The terms “Develop” and “Development,” as used herein, do not include the maintenance, repair, reconstruction, replacement, or redevelopment of any structure, improvement, or facility after the initial construction and completion thereof.

“Developer” shall mean Vivante Newport Center, LLC, a Delaware limited liability company, and any successor or assignee to all or any portion of its right, title, and/or interest in and to ownership of all or a portion of the Property and/or the Project.

“Development Agreement Ordinance” shall mean Chapter 15.45 of the City of Newport Beach Municipal Code.

“Development Agreement Statute” shall mean California Government Code Sections 65864-65869.5, inclusive.

“Development Exactions” shall mean any requirement of City in connection with or pursuant to any ordinance, resolution, rule, or official policy for the dedication of land, the construction or installation of any public improvement or facility, or the payment of any fee or

charge in order to lessen, offset, mitigate, or compensate for the impacts of Development of the Project on the environment or other public interests.

“Development Plan” shall mean all of the land use entitlements, approvals and permits approved by the City for the Project on or before the Agreement Date, as the same may be amended from time to time consistent with this Agreement. Such land use entitlements, approvals and permits include, without limitation, the following: (1) the Development rights as provided under this Agreement; (2) General Plan Amendment No. GP2018-003 to amend Anomaly No. 49 to change the land use category from PI (Private Institutions) to MU-H3 (Mixed-Use Horizontal); (3) Planned Community Development Plan Amendment No. PC2018-001 to modify the San Joaquin Plaza Planned Community Development Plan (PC-19) to include development and design standards to allow for 90 senior dwelling units and 27 memory care beds and an increase in the height limit from 65 feet to 69 feet with 10 feet for rooftop and mechanical appurtenances; (4) Development Agreement No. DA 2018-005– To provide public benefits should the Project be approved; (5) Conditional Use Permit No. UP2018-19 to allow the operation of the proposed senior housing and memory care facility, alcohol service for dining hall and lounge areas in the form of a Type 47 (On Sale General) and Type 57 (Special On Sale General), and ensure land use compatibility; (6) Major Site Development Review No. SD2018-003 to allow the construction of 90 senior dwelling units and a 27 bed memory care facility; (7) Lot Merger No. LM2018-004 to merge the two existing parcels into one development site; (8) Addendum to Environmental Impact Report No. ER2016-002 (SCH#2016021023); (9) the EIR (State Clearinghouse No. 2016071062); and (10) all conditions of approval and all mitigation measure approved for the Project on or before the Agreement Date.

“Development Regulations” shall mean the following regulations as they are in effect as of the Effective Date and to the extent they govern or regulate the development of the Property, but excluding any amendment or modification to the Development Regulations adopted, approved, or imposed after the Effective Date that affects the Development of the Property, unless such amendment or modification is expressly authorized by this Agreement or is agreed to by Developer in writing: the General Plan; the Development Plan; and, to the extent not expressly superseded by the Development Plan or this Agreement (see Section 4.3 in particular), all other land use and subdivision regulations governing the permitted uses, density and intensity of use, design, and improvement, procedures for obtaining required City permits and approvals for development, and similar matters that may apply to the Development of the Project on the Property during the Term of this Agreement that are set forth in Title 15 of the Municipal Code (buildings and construction), Title 19 of the Municipal Code (subdivisions and inclusionary housing), and Title 20 of the Municipal Code (planning, zoning and density bonus), but specifically excluding all other sections of the Municipal Code, including without limitation Title 5 of the Municipal Code (business licenses and regulations). Notwithstanding the foregoing, the term “Development Regulations,” as used herein, does not include any City ordinance, resolution, code, rule, regulation or official policy governing any of the following: (i) the conduct of businesses, professions, and occupations; (ii) taxes and assessments; (iii) the control and abatement of nuisances; (iv) the granting of encroachment permits and the conveyance of rights and interests which provide for the use of or the entry upon public property; or (v) the exercise of the power of eminent domain.

“Effective Date” shall mean the latest of all of the following occurring: (i) the date that is thirty (30) calendar days after the Agreement Date; (ii) if a referendum concerning the Adopting

Ordinance, the Development Plan, or any of the Development Regulations approved on or before the Agreement Date is timely qualified for the ballot and a referendum election is held concerning the Adopting Ordinance or any of such Development Regulations, the date on which the referendum is certified resulting in upholding and approving the Adopting Ordinance and the Development Regulations; (iii) if a lawsuit is timely filed challenging the validity or legality of the Adopting Ordinance, this Agreement, the Development Plan, and/or any of the Development Regulations approved on or before the Agreement Date, the date on which said challenge is finally resolved in favor of the validity or legality of the Adopting Ordinance, this Agreement, the Development Plan, and/or the applicable Development Regulations, whether such finality is achieved by a final non-appealable judgment, voluntary or involuntary dismissal (and the passage of any time required to appeal an involuntary dismissal), or binding written settlement agreement; or (iv) the date on which title to the Property has been transferred to, and vested in, Developer as evidenced by an instrument duly recorded with the Office of the County Recorder of the County of Orange. Promptly after the Effective Date occurs, the Parties agree to cooperate in causing an appropriate instrument to be executed and recorded against the Property memorializing the Effective Date.

“Environmental Laws” means all federal, state, regional, county, municipal, and local laws, statutes, ordinances, rules, and regulations which are in effect as of the Agreement Date, and all federal, state, regional, county, municipal, and local laws, statutes, rules, ordinances, rules, and regulations which may hereafter be enacted and which apply to the Property or any part thereof, pertaining to the use, generation, storage, disposal, release, treatment, or removal of any Hazardous Substances, including without limitation the following: the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. Sections 9601, et seq., as amended (“CERCLA”); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. Sections 6901, et seq., as amended (“RCRA”); the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. Sections 11001 et seq., as amended; the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., as amended; the Clean Air Act, 42 U.S.C. Sections 7401 et seq., as amended; the Clean Water Act, 33 U.S.C. Section 1251, et seq., as amended; the Toxic Substances Control Act, 15 U.S.C. Sections 2601 et seq., as amended; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Sections 136 et seq., as amended; the Federal Safe Drinking Water Act, 42 U.S.C. Sections 300f et seq., as amended; the Federal Radon and Indoor Air Quality Research Act, 42 U.S.C. Sections 7401 et seq., as amended; the Occupational Safety and Health Act, 29 U.S.C. Sections 651 et seq., as amended; and California Health and Safety Code Section 25100, et seq.

“General Plan” shall mean City’s 2006 General Plan adopted by the City Council on July 25, 2006, by Resolution No. 2006-76, and any amendments to the 2006 General Plan that became effective before the Effective Date. The term “General Plan” shall exclude any amendments that became effective after the Effective Date unless such amendment is expressly authorized by this Agreement, or is specifically agreed to by Developer. The Land Use Plan of the Land Use Element of the General Plan was approved by City voters in a general election on November 7, 2006.

“Hazardous Substances” means any toxic substance or waste, pollutant, hazardous substance or waste, contaminant, special waste, industrial substance or waste, petroleum or petroleum-derived substance or waste, or any toxic or hazardous constituent or additive to or

breakdown component from any such substance or waste, including without limitation any substance, waste, or material regulated under or defined as “hazardous” or “toxic” under any Environmental Law.

“Mortgage” shall mean a mortgage, deed of trust, sale and leaseback arrangement, or any other form of conveyance in which the Property, or a part or interest in the Property, is pledged as security and contracted for in good faith and for fair value.

“Mortgagee” shall mean the holder of a beneficial interest under a Mortgage or any successor or assignee of the Mortgagee.

“Notice of Default” shall have the meaning ascribed in Section 8.1 of this Agreement.

“Party” or “Parties” shall mean either City or Developer or both, as determined by the context.

“Project” shall mean all on-site and off-site improvements, as provided in this Agreement and the Development Regulations, as the same may be modified or amended from time to time consistent with this Agreement and applicable law.

“Property” is located at 850 and 856 San Clemente Drive in the City, as described in Exhibit A and depicted on Exhibit B.

“Public Benefit Fee” shall have the meaning ascribed in Section 3.1 of this Agreement.

“Subsequent Development Approvals” shall mean all discretionary development and building approvals that Developer is required to obtain to Develop the Project on and with respect to the Property after the Agreement Date consistent with the Development Regulations and this Agreement.

“Term” shall have the meaning ascribed in Section 2.4 of this Agreement.

“Termination Date” shall have the meaning ascribed in Section 2.4 of this Agreement.

“Transfer” shall have the meaning ascribed in Section 11 of this Agreement.

2. General Provisions.

2.1 Plan Consistency, Zoning Implementation.

This Agreement is consistent with the General Plan and the SN Joaquin Plaza Planned Community District (“PC-19”) as amended by the approvals in the Development Plan adopted concurrently herewith.

2.2 Binding Effect of Agreement.

The Property is hereby made subject to this Agreement. Development of the Property is hereby authorized and shall be carried out in accordance with the terms of this Agreement.

2.3 Developer Representations and Warranties Regarding Ownership of the Property and Related Matters Pertaining to this Agreement.

Developer and each person executing this Agreement on behalf of Developer hereby represents and warrants to City as follows: (i) that Developer is the fee simple owner to the Property; (ii) if Developer or any co-owner comprising Developer is a legal entity that such entity is duly formed and existing and is authorized to do business in the State of California; (iii) if Developer or any co-owner comprising Developer is a natural person that such natural person has the legal right and capacity to execute this Agreement; (iv) that all actions required to be taken by all persons and entities comprising Developer to enter into this Agreement have been taken and that Developer has the legal authority to enter into this Agreement; (v) that Developer's entering into and performing its obligations set forth in this Agreement will not result in a violation of any obligation, contractual or otherwise, that Developer or any person or entity comprising Developer has to any third party; and (vi) that neither Developer nor any co-owner comprising Developer is currently the subject of any voluntary or involuntary bankruptcy or insolvency petition; and (vii) that Developer has no actual knowledge of any pending or threatened claims of any person or entity affecting the validity of any of the representations and warranties set forth in clauses (i)-(vi), inclusive.

2.4 Term.

The term of this Agreement ("Term") shall commence on the Effective Date and shall terminate on the "Termination Date."

Notwithstanding any other provision set forth in this Agreement to the contrary, if any Party reasonably determines that the Effective Date of this Agreement will not occur because, for example, (i) the Adopting Ordinance or any of the Development Regulations approved on or before the Agreement Date for the Project has/have been disapproved by City's voters at a referendum election or (ii) a final non-appealable judgment is entered in a judicial action challenging the validity or legality of the Adopting Ordinance, this Agreement, and/or any of the Development Regulations for the Project approved on or before the Agreement Date such that this Agreement and/or any of such Development Regulations is/are invalid and unenforceable in whole or in such a substantial part that the judgment substantially impairs such Party's rights or substantially increases its obligations or risks hereunder or thereunder, then such Party, in its sole and absolute discretion, shall have the right to terminate this Agreement upon delivery of a written notice of termination to the other Party, in which event neither Party shall have any further rights or obligations hereunder except that Developer's indemnity obligations set forth in Article 10 shall remain in full force and effect and shall be enforceable, and the Development Regulations applicable to the Project and the Property only (but not those general Development Regulations applicable to other properties in the City) shall be repealed by the City after delivery of said notice of termination except for the Development Regulations that have been disapproved by City's voters at a referendum election and, therefore, never took effect.

The Termination Date shall be the earliest of the following dates: (i) the tenth (10th) anniversary of the Effective Date; (ii) such earlier date that this Agreement may be terminated in accordance with Articles 5, 7, and/or Section 8.3 of this Agreement and/or Sections 65865.1 and/or 65868 of the Development Agreement Statute; or (iii) completion of the Project in accordance with the terms of this Agreement, including Developer's complete satisfaction,

performance, and payment, as applicable, of all Development Exactions, the issuance of all required final occupancy permits, and acceptance by City or applicable public agency(ies) or private entity(ies) of all required offers of dedication.

Notwithstanding any other provision set forth in this Agreement to the contrary, the provisions set forth in Article 10 and Section 14.11 (as well as any other Developer obligations set forth in this Agreement that are expressly written to survive the Termination Date) shall survive the Termination Date of this Agreement.

3. Public Benefits.

3.1 Public Benefit Fee.

As consideration for City's approval and performance of its obligations set forth in this Agreement, Developer shall pay to City a fee in the amount of _____ Dollars and 00/100 (\$_____.00), which shall be in addition to any other fee or charge to which the Property and the Project would otherwise be subject.

The Developer shall pay the Public Benefit Fee to the City at the time of City's issuance of the Project's first building permit. Should the Developer fail to pay the Public Benefit Fee at the time of the City's issuance of the Project's first building permit, the Developer shall be in default of the Agreement, as further described in Section 8 of this Agreement.

The City has not designated a specific project or purpose for the Public Benefit Fee. Developer acknowledges by its approval and execution of this Agreement that it is voluntarily agreeing to pay the Public Benefit Fee, that its obligation to pay the Public Benefit Fee is an essential term of this Agreement and is not severable from City's obligations and Developer's vested rights to be acquired hereunder, and that Developer expressly waives any constitutional, statutory, or common law right it might have in the absence of this Agreement to protest or challenge the payment of the Public Benefit Fee on any ground whatsoever, including without limitation pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, California Constitution Article I Section 19, the Mitigation Fee Act (California Government Code Section 66000 *et seq.*), or otherwise. In addition to any other remedy set forth in this Agreement for Developer's default, if Developer shall fail to timely pay any portion of the Public Benefit Fee when due, City shall have the right to withhold issuance of any further building permits, occupancy permits, or other development or building permits for the Project.

3.1.1 Public Benefit Fee Allocation

The City Council retains sole and absolute discretion to determine how the Public Benefit Fee shall be allocated and no final decisions have been made as of the Agreement Date.

3.2 Reserved

3.3 Reserved

4. Development of Project.

4.1 Applicable Regulations; Developer's Vested Rights and City's Reservation of Discretion With Respect to Subsequent Development Approvals.

Other than as expressly set forth in this Agreement, during the Term of this Agreement, (i) Developer shall have the vested right to Develop the Project on and with respect to the Property in accordance with the terms of the Development Regulations and this Agreement and (ii) City shall not prohibit or prevent development of the Property on grounds inconsistent with the Development Regulations or this Agreement. Notwithstanding the foregoing, nothing herein is intended to limit or restrict the City's discretion with respect to (i) those review and approval requirements contained in the Development Regulations, (ii) the exercise of any discretionary authority City retains under the Development Regulations, (iii) the approval, conditional approval, or denial of any Subsequent Development Approvals that are required for Development of the Project as of the Effective Date, or (iv) any environmental approvals that may be required under CEQA or any other federal or state law or regulation in conjunction with any Subsequent Development Approvals that may be required for the Project, and in this regard, as to future actions in connection with the Subsequent Development Approvals, the City reserves its full discretion to the same extent that it would have such discretion in the absence of this Agreement. In addition, it is understood and agreed that nothing in this Agreement is intended to vest Developer's rights with respect to any laws, regulations, rules, or official policies of any other (*i.e.*, non-City) governmental agency or public utility company with jurisdiction over the Property or the Project; or any applicable federal or state laws, regulations, rules, or official policies that may be inconsistent with this Agreement and that override or supersede the provisions set forth in this Agreement, and regardless of whether such overriding or superseding laws, regulations, rules, or official policies are adopted or applied to the Property or the Project prior or subsequent to the Agreement Date.

Developer has expended and will continue to expend substantial amounts of time and money planning and preparing for Development of the Project. Developer represents, and City acknowledges, that Developer would not make these expenditures without this Agreement, and that Developer is and will be making these expenditures in reasonable reliance upon its vested rights to Develop the Project as set forth in this Agreement.

Developer may apply to City for permits or approvals necessary to modify or amend the Development specified in the Development Regulations, without amending this Agreement, provided that the request does not propose an increase in the maximum density, intensity, height, or size of proposed structures, or a change in use that generates more peak hour traffic or more daily traffic and, in addition, Developer may apply to City for approval of minor amendments to the existing tentative tract map, if any, or associated conditions of approval, consistent with City of Newport Beach Municipal Code Section 19.12.090. This Agreement does not constitute a promise or commitment by City to approve any such permit or approval, or to approve the same with or without any particular requirements or conditions, and City's discretion with respect to such matters shall be the same as it would be in the absence of this Agreement.

4.2 No Conflicting Enactments.

Except to the extent City reserves its discretion as expressly set forth in this Agreement, during the Term of this Agreement City shall not apply to the Project or the Property any ordinance, policy, rule, regulation, or other measure relating to Development of the Project that is enacted or becomes effective after the Effective Date to the extent it conflicts with this Agreement or Developer consents in writing. This Section 4.2 shall not restrict City's ability to enact an ordinance, policy, rule, regulation, or other measure applicable to the Project pursuant to California Government Code Section 65866 consistent with the procedures specified in Section 4.3 of this Agreement. In *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, the California Supreme Court held that a construction company was not exempt from a city's growth control ordinance even though the city and construction company had entered into a consent judgment (tantamount to a contract under California law) establishing the company's vested rights to develop its property consistent with the zoning. The California Supreme Court reached this result because the consent judgment failed to address the timing of development. The Parties intend to avoid the result of the *Pardee* case by acknowledging and providing in this Agreement that Developer shall have the vested right to Develop the Project on and with respect to the Property at the rate, timing, and sequencing that Developer deems appropriate within the exercise of Developer's sole subjective business judgment, provided that such Development occurs in accordance with this Agreement and the Development Regulations, notwithstanding adoption by City's electorate of an initiative to the contrary after the Effective Date. No City moratorium or other similar limitation relating to the rate, timing, or sequencing of the Development of all or any part of the Project and whether enacted by initiative or another method, affecting subdivision maps, building permits, occupancy certificates, or other entitlement to use, shall apply to the Project to the extent such moratorium or other similar limitation restricts Developer's vested rights in this Agreement or otherwise conflicts with the express provisions of this Agreement.

4.3 Reservations of Authority.

Notwithstanding any other provision set forth in this Agreement to the contrary, the laws, rules, regulations, and official policies set forth in this Section 4.3 shall apply to and govern the Development of the Project on and with respect to the Property.

4.3.1 Procedural Regulations. Unless otherwise specified in this Agreement, procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, and any other matter of procedure shall apply to the Property, provided that such procedural regulations are adopted and applied City-wide or to all other properties similarly situated in City.

4.3.2 Processing and Permit Fees. City shall have the right to charge, and Developer shall be required to pay, all applicable processing and permit fees to cover the reasonable cost to City of processing and reviewing applications and plans for any required Subsequent Development Approvals, building permits, excavation and grading permits, encroachment permits, and the like, for performing necessary studies and reports in connection therewith, inspecting the work constructed or installed by or on behalf of Developer, and monitoring compliance with any requirements applicable to Development of the Project, all at the rates in effect at the time fees are due.

4.3.2.1 Vested Development Impact Fees. All City development impact fees shall be fixed at the rates in place on the Agreement Date as shown on attached Exhibit C. Fees and charges levied by any other (*i.e.*, non-City) governmental agency or public utility company with jurisdiction over the Property or the Project shall not be fixed in place by the Development Agreement.

4.3.3 Consistent Future City Regulations. City ordinances, resolutions, regulations, and official policies governing Development which do not conflict with the Development Regulations, or with respect to such regulations that do conflict, where Developer has consented in writing to the regulations, shall apply to the Property.

4.3.4 Development Exactions Applicable to Property. During the Term of this Agreement, Developer shall be required to satisfy and pay all Development Exactions at the time performance or payment is due to the same extent and in the same amount(s) that would apply to Developer and the Project in the absence of this Agreement; provided except where the extent the timing, value, scope and/or extent of a particular Development Exaction for the Project has been established and fixed by City in this Agreement, the Project's conditions of approval, or the Development Regulations. City shall not alter, increase, or modify said Development Exaction in a manner that is inconsistent with this Agreement, the Project's conditions of approval, or the Development Regulations without Developer's prior written consent or as may be otherwise required pursuant to overriding federal or state laws or regulations (Section 4.3.5 below). In addition, nothing in this Agreement is intended or shall be deemed to vest Developer against the obligation to pay any of the following (which are not included within the definition of "Development Exactions") in the full amount that would apply in the absence of this Agreement: (i) City's normal fees for processing, environmental assessment and review, tentative tract and parcel map review, plan checking, site review and approval, administrative review, building permit, grading permit, inspection, and similar fees imposed to recover City's costs associated with processing, reviewing, and inspecting project applications, plans, and specifications, including CEQA review; (ii) fees and charges levied by any other public agency, utility, district, or joint powers authority, regardless of whether City collects those fees and charges; or (iii) community facility district special taxes or special district assessments or similar assessments, business license fees, bonds or other security required for public improvements, transient occupancy taxes, sales taxes, property taxes, sewer lateral connection fees, water service connection fees, new water meter fees, and the Property Development Tax payable under Section 3.12 of City's Municipal Code.

4.3.5 Overriding Federal and State Laws and Regulations. Federal and state laws and regulations that override Developer's vested rights set forth in this Agreement shall apply to the Property, together with any City ordinances, resolutions, regulations, and official policies that are necessary to enable City to comply with the provisions of any such overriding federal or state laws and regulations, provided that (i) Developer does not waive its right to challenge or contest the validity of any such purportedly overriding federal, state, or City law or regulation; and (ii) upon the discovery of any such overriding federal, state, or City law or regulation that prevents or precludes compliance with any provision of this Agreement, City or Developer shall provide to the other Party a written notice identifying the federal, state, or City law or regulation, together with a copy of the law or regulation and a brief written statement of the conflict(s) between that law or regulation and the provisions of this Agreement. Promptly thereafter, City and Developer shall meet and confer in good faith in a reasonable attempt to

determine whether a modification or suspension of this Agreement, in whole or in part, is necessary to comply with such overriding federal, state, or City law or regulation. In such negotiations, City and Developer agree to preserve the terms of this Agreement and the rights of Developer as derived from this Agreement to the maximum feasible extent while resolving the conflict. City agrees to cooperate with Developer at no cost to City or Developer in resolving the conflict in a manner which minimizes any financial impact of the conflict upon Developer. City also agrees to process in a prompt manner Developer's proposed changes to the Project and any of the Development Regulations as may be necessary to comply with such overriding federal, state, or City law or regulation; provided, however, that the approval of such changes by City shall be subject to the discretion of City, consistent with this Agreement.

4.3.6 Public Health and Safety. Any City ordinance, resolution, rule, regulation, program, or official policy that is necessary to protect persons on the Property or in the immediate vicinity from conditions dangerous to their health or safety, as reasonably determined by City, shall apply to the Property, even though the application of the ordinance, resolution, rule regulation, program, or official policy would result in the impairment of Developer's vested rights under this Agreement.

4.3.7 Uniform Building Standards. Existing and future building and building-related standards set forth in the uniform codes adopted and amended by City from time-to-time, including building, plumbing, mechanical, electrical, housing, swimming pool, and fire codes, and any modifications and amendments thereof shall all apply to the Project and the Property to the same extent that the same would apply in the absence of this Agreement.

4.3.8 Public Works Improvements. To the extent Developer constructs or installs any public improvements, works, or facilities, the City standards in effect for such public improvements, works, or facilities at the time of City's issuance of a permit, license, or other authorization for construction or installation of same shall apply.

4.3.9 No Guarantee or Reservation of Utility Capacity. Notwithstanding any other provision set forth in this Agreement to the contrary, nothing in this Agreement is intended or shall be interpreted to require City to guarantee or reserve to or for the benefit of Developer or the Property any utility capacity, service, or facilities that may be needed to serve the Project, whether domestic or reclaimed water service, sanitary sewer transmission or wastewater treatment capacity, downstream drainage capacity, or otherwise, and City shall have the right to limit or restrict Development of the Project if and to the extent that City reasonably determines that inadequate utility capacity exists to adequately serve the Project at the time Development is scheduled to commence. Notwithstanding the foregoing, City covenants to provide utility services to the Project on a non-discriminatory basis (*i.e.*, on the same terms and conditions that City undertakes to provide such services to other similarly situated new developments in the City of Newport Beach as and when service connections are provided and service commences).

5. Amendment or Cancellation of Agreement

This Agreement may be amended or canceled in whole or in part only by mutual written and executed consent of the Parties in compliance with California Government Code Section 65868 and Newport Beach Municipal Code Section 15.45.070 or by unilateral termination by City in the event of an uncured default of Developer.

6. Enforcement.

Unless amended or canceled pursuant to California Government Code Section 65868, Newport Beach Municipal Code Section 15.45.070, or modified or suspended pursuant to Newport Beach Municipal Code Chapter 15.45 or California Government Code Section 65869.5, and except as otherwise provided in subdivision (b) of Section 65865.3, this Agreement shall be enforceable by any Party despite any change in any applicable general or specific plan, zoning, subdivision, or building regulation or other applicable ordinance or regulation adopted by City (including by City's electorate) that purports to apply to any or all of the Property.

7. Annual Review of Developer's Compliance With Agreement.

7.1 General.

City shall review this Agreement once during every twelve (12) month period following the Effective Date for compliance with the terms of this Agreement as provided in Government Code section 65865.1. Developer (including any successor to the owner executing this Agreement on or before the date of the Adopting Ordinance) shall pay City a reasonable fee in an amount City may reasonably establish from time-to-time to cover the actual and necessary costs for the annual review. City's failure to timely provide or conduct an annual review shall not constitute a Default hereunder by City.

7.2 Developer Obligation to Demonstrate Good Faith Compliance.

During each annual review by City, Developer is required to demonstrate good faith compliance with the terms of the Agreement. Developer agrees to furnish such evidence of good faith compliance as City, in the reasonable exercise of its discretion, may require, thirty (30) calendar days prior to each anniversary of the Effective Date during the Term.

7.3 Procedure.

The Zoning Administrator shall conduct a duly noticed hearing and shall determine, on the basis of substantial evidence, whether or not Developer has, for the period under review, complied with the terms of this Agreement. If the Zoning Administrator finds that Developer has so complied, the annual review shall be concluded. If the Zoning Administrator finds, on the basis of substantial evidence, that Developer has not so complied, written notice shall be sent to Developer by first class mail of the Zoning Administrator's finding of non-compliance, and Developer shall be given at least ten (10) calendar days to cure any noncompliance that relates to the payment of money and thirty (30) calendar days to cure any other type of noncompliance. If a cure not relating to the payment of money cannot be completed within thirty (30) calendar days for reasons which are beyond the control of Developer, Developer must commence the cure within such thirty (30) calendar days and diligently pursue such cure to completion. If Developer fails to cure such noncompliance within the time(s) set forth above, such failure shall be considered to be a Default and City shall be entitled to exercise the remedies set forth in Article 8 below.

7.4 Annual Review a Non-Exclusive Means for Determining and Requiring Cure of Developer's Default.

The annual review procedures set forth in this Article 7 shall not be the exclusive means for City to identify a Default by Developer or limit City's rights or remedies for any such Default.

8. Events of Default.

8.1 General Provisions.

In the event of any material default, breach, or violation of the terms of this Agreement ("Default"), the Party alleging a Default shall deliver a written notice (each, a "Notice of Default") to the defaulting Party. The Notice of Default shall specify the nature of the alleged Default and a reasonable manner and sufficient period of time (twenty (20) calendar days if the Default relates to the failure to timely make a monetary payment due hereunder and not less than thirty (30) calendar days in the event of non-monetary Defaults) in which the Default must be cured ("Cure Period"). During the Cure Period, the Party charged shall not be considered in Default for the purposes of termination of this Agreement or institution of legal proceedings. If the alleged Default is cured within the Cure Period, then the Default thereafter shall be deemed not to exist. If a non-monetary Default cannot be cured during the Cure Period with the exercise of commercially reasonable diligence, the defaulting Party must promptly commence to cure as quickly as possible, and in no event later than thirty (30) calendar days after it receives the Notice of Default, and thereafter diligently pursue said cure to completion. Notwithstanding the foregoing, the City is not required to give Developer notice of default and may immediately pursue remedies for a Developer Default that result in an immediate threat to public health, safety or welfare.

8.2 Default by Developer.

If Developer is alleged to have committed Default and it disputes the claimed Default, it may make a written request for an appeal hearing before the City Council within ten (10) calendar days of receiving the Notice of Default, and a public hearing shall be scheduled at the next available City Council meeting to consider Developer's appeal of the Notice of Default. Failure to appeal a Notice of Default to the City Council within the ten (10) calendar day period shall waive any right to a hearing on the claimed Default. If Developer's appeal of the Notice of Default is timely and in good faith but after a public hearing of Developer's appeal the City Council concludes that Developer is in Default as alleged in the Notice of Default, the accrual date for commencement of the thirty (30) calendar day Cure Period provided in Section 8.1 shall be extended until the City Council's denial of Developer's appeal is communicated to Developer in writing.

8.3 City's Option to Terminate Agreement.

In the event of an alleged Developer Default, City may not terminate this Agreement without first delivering a written Notice of Default and providing Developer with the opportunity to cure the Default within the Cure Period, as provided in Section 8.1, and complying with Section 8.2 if Developer timely appeals any Notice of Default. A termination of this Agreement by City shall be valid only if good cause exists and is supported by evidence presented to the

City Council at or in connection with a duly noticed public hearing to establish the existence of a Default. The validity of any termination may be judicially challenged by Developer. Any such judicial challenge must be brought within ninety (90) calendar days of service on Developer, by first class mail, postage prepaid, of written notice of termination by City or a written notice of City's determination of an appeal of the Notice of Default as provided in Section 8.2.

8.4 Default by City.

If Developer alleges a City Default and alleges that the City has not cured the Default within the Cure Period, Developer may pursue any legal or equitable remedy available to it, including, without limitation, an action for a writ of mandamus, injunctive relief, or specific performance of City's obligations set forth in this Agreement. Upon a City Default, any resulting delays in Developer's performance hereunder shall neither be a Developer Default nor constitute grounds for termination or cancellation of this Agreement by City and shall, at Developer's option (and provided Developer delivers written notice to City within thirty (30) calendar days of the commencement of the alleged City Default), extend the Term for a period equal to the length of the delay.

8.5 Waiver.

Failure or delay by any Party in delivering a Notice of Default shall not waive that Party's right to deliver a future Notice of Default of the same or any other Default.

8.6 Specific Performance Remedy.

Due to the size, nature, and scope of the Project, it will not be practical or possible to restore the Property to its pre-existing condition once implementation of this Agreement has begun. After such implementation, both Developer and City may be foreclosed from other choices they may have had to plan for the development of the Property, to utilize the Property or provide for other benefits and alternatives. Developer and City have invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement and will be investing even more significant time and resources in implementing the Project in reliance upon the terms of this Agreement. It is not possible to determine the sum of money which would adequately compensate Developer or City for such efforts. For the above reasons, except as set forth in Section 8.7, City and Developer agree that damages would not be an adequate remedy if either City or Developer fails to carry out its obligations under this Agreement. Therefore, except as set forth in Section 8.7, specific performance of this Agreement is necessary to compensate Developer if City fails to carry out its obligations under this Agreement or to compensate City if Developer fails to carry out its obligations under this Agreement.

8.7 Monetary Damages.

The Parties agree that monetary damages shall not be an available remedy for any Party for a Default hereunder by the other Party; provided, however, that (i) nothing in this Section 8.7 is intended or shall be interpreted to limit or restrict City's right to recover the Public Benefit Fees due from Developer as set forth herein; and (ii) nothing in this Section 8.7 is intended or shall be interpreted to limit or restrict Developer's indemnity obligations set forth in Article 10 or the right of the prevailing Party in any Action to recover its litigation expenses, as set forth in

Section 8.10. In no event shall damages be awarded against the City upon an event of default or upon termination of this Agreement. Developer expressly agrees that the City, any City agencies and their respective elected and appointed councils, boards, commissions, officers, agents, employees, volunteers and representatives (collectively, for purposes of this Section 8.7, “City”) shall not be liable for any monetary damage for a Default by the City or any claims against City arising out of this Agreement. Developer hereby expressly waives any such monetary damages against the City. The sole and exclusive judicial remedy for Developer in the event of a Default by the City shall be an action in mandamus, specific performance, or other injunctive or declaratory relief.

8.8 Additional City Remedy for Developer’s Default.

In the event of any Default by Developer, in addition to any other remedies which may be available to City, whether legal or equitable, City shall be entitled to receive and retain any Development Exactions applicable to the Project or the Property, including any fees, grants, dedications, or improvements to public property which it may have received prior to Developer’s Default without recourse from Developer or its successors or assigns.

8.9 No Personal Liability of City Officials, Employees, or Agents.

No City official, employee, or agent shall have any personal liability hereunder for a Default by City of any of its obligations set forth in this Agreement.

8.10 No Recovery of Legal Expenses by Prevailing Party in Any Action.

In any judicial proceeding, arbitration, or mediation (collectively, an “Action”) between the Parties that seeks to enforce the provisions of this Agreement or arises out of this Agreement, the prevailing Party shall not recover any of its costs and expenses, regardless of whether they would be recoverable under California Code of Civil Procedure section 1033.5 or California Civil Code section 1717 in the absence of this Agreement. These costs and expenses include, but are not limited to, court costs, expert witness fees, attorneys’ fees, City staff costs (including overhead), and costs of investigation and preparation before initiation of the Action.

9. Force Majeure.

No Party shall be deemed to be in Default where failure or delay in performance of any of its obligations under this Agreement is caused, through no fault of the Party whose performance is prevented or delayed, by floods, earthquakes, other acts of God, fires, wars, riots or similar hostilities, strikes or other labor difficulties, state or federal regulations, or court actions. Except as specified above, nonperformance shall not be excused because of the act or omission of a third person. In no event shall the occurrence of an event of force majeure operate to extend the Term of this Agreement. In addition, in no event shall the time for performance of a monetary obligation, including without limitation Developer’s obligation to pay Public Benefit Fees, be extended pursuant to this Section.

10. Indemnity Obligations of Developer.

10.1 Indemnity Arising From Acts or Omissions of Developer.

Except to the extent caused by the intentional misconduct or gross negligent acts, errors or omissions of City or one (1) or more of City's officials, employees, agents, attorneys, and contractors (collectively, the "City's Affiliated Parties"), Developer shall indemnify, defend, and hold harmless City and City's Affiliated Parties from and against all suits, claims, liabilities, losses, damages, penalties, obligations, and expenses (including but not limited to reasonable attorneys' fees and costs) (collectively, a "Claim") that may arise, directly or indirectly, from the acts, omissions, or operations of Developer or Developer's agents, contractors, subcontractors, agents, or employees in the course of Development of the Project or any other activities of Developer relating to the Property or Project, or pursuant to this Agreement. City shall have the right, in its sole discretion, to select and retain counsel to defend any Claim filed against City and/or any of City's Affiliated Parties, and Developer shall pay the reasonable cost for defense of any Claim. The indemnity provisions in this Section 10.1 shall commence on the Agreement Date, regardless of whether the Effective Date occurs, and shall survive the Termination Date.

10.2 Third Party Litigation.

In addition to its indemnity obligations set forth in Section 10.1, Developer shall indemnify, defend, and hold harmless City and City's Affiliated Parties from and against any Claim against City or City's Affiliated Parties seeking to attack, set aside, void, or annul the approval of this Agreement, the Adopting Ordinance, any of the Development Plan approvals for the Project (including without limitation any actions taken pursuant to CEQA with respect thereto), any Subsequent Development Approval, or the approval of any permit granted pursuant to this Agreement. Said indemnity obligation shall include payment of reasonable attorney's fees, expert witness fees, City staff costs (including overhead), and court costs. City shall promptly notify Developer of any such Claim and City shall cooperate with Developer in the defense of such Claim. Developer shall not be responsible to indemnify, defend, and hold City harmless from such Claim until Developer is so notified and if City fails to cooperate in the defense of a Claim Developer shall not be responsible to defend, indemnify, and hold harmless City during the period that City so fails to cooperate or for any losses attributable thereto. City shall be entitled to retain separate counsel to represent City against the Claim and the City's reasonable defense costs for its separate counsel shall be included in Developer's indemnity obligation, provided that such counsel shall reasonably cooperate with Developer in an effort to minimize the total litigation expenses incurred by Developer. In the event either City or Developer recovers any attorney's fees, expert witness fees, costs, interest, or other amounts from the party or parties asserting the Claim, Developer shall be entitled to retain the same (provided it has fully performed its indemnity obligations hereunder). No settlement of any Claim against City or City's Affiliated Parties shall be executed without the written consent of both the City and Developer. The indemnity provisions in this Section 10.2 shall commence on the Agreement Date, regardless of whether the Effective Date occurs, and shall survive the Termination Date.

10.3 Environmental Indemnity.

In addition to its indemnity obligations set forth in Section 10.1, from and after the Effective Date Developer shall indemnify, defend, and hold harmless City and City's Affiliated Parties from and against any and all Claims for personal injury or death, property damage, economic loss, statutory penalties or fines, and damages of any kind or nature whatsoever, including without limitation reasonable attorney's fees, expert witness fees, and costs, based upon or arising from any of the following: (i) the actual or alleged presence of any Hazardous Substance on or under any of the Property in violation of any applicable Environmental Law; (ii) the actual or alleged migration of any Hazardous Substance from the Property through the soils or groundwater to a location or locations off of the Property; and (iii) the storage, handling, transport, or disposal of any Hazardous Substance on, to, or from the Property and any other area disturbed, graded, or developed by Developer in connection with Developer's Development of the Project. The indemnity provisions in this Section 10.3 shall commence on the Effective Date occurs, and shall survive the Termination Date.

11. Assignment.

Developer shall have the right to sell, transfer, or assign (hereinafter, collectively, a "Transfer") Developer's interest in or fee title to the Property, in whole or in part, to a "Permitted Transferee" (which successor, as of the effective date of the Transfer, shall become the "Developer" under this Agreement) at any time from the Agreement Date until the Termination Date; provided, however, that no such Transfer shall violate the provisions of the Subdivision Map Act (Government Code Section 66410 *et seq.*) or City's local subdivision ordinance and any such transfer shall include the assignment and assumption of Developer's rights, duties, and obligations set forth in or arising under this Agreement as to the Property or the portion thereof so Transferred and shall be made in strict compliance with the following conditions precedent:

(i) no transfer or assignment of any of Developer's rights or interest under this Agreement shall be made unless made together with the Transfer of all or a part of Developer's interest in the Property; and (ii) prior to the effective date of any proposed Transfer, Developer (as transferor) shall obtain the City's written approval to the Transfer and deliver to City a written assignment and assumption, executed in recordable form by the transferring and successor Developer and in a form subject to the reasonable approval of the City Attorney of City (or designee), pursuant to which the transferring Developer assigns to the successor Developer and the successor Developer assumes from the transferring Developer all of the rights and obligations of the transferring Developer with respect to the Property and this Agreement, or interest in the Property, or portion thereof to be so Transferred, including in the case of a partial Transfer the obligation to perform such obligations that must be performed outside of the Property so Transferred that are a condition precedent to the successor Developer's right to develop the portion of the Property so Transferred. Any Permitted Transferee shall have all of the same rights, benefits, duties, obligations, and liabilities of Developer under this Agreement with respect to the portion of, or interest in, the Property sold, transferred, and assigned to such Permitted Transferee; provided, however, that in the event of a Transfer of less than all of the Property, or interest in the Property, no such Permitted Transferee shall have the right to enter into an amendment of this Agreement that jeopardizes or impairs the rights or increases the obligations of the Developer with respect to the balance of the Property, without Developer's written consent.

Notwithstanding any Transfer, the transferring Developer shall continue to be jointly and severally liable to City, together with the successor Developer, to perform all of the transferred obligations set forth in or arising under this Agreement unless there is full satisfaction of all of the following conditions, in which event the transferring Developer shall be automatically released from any and all obligations with respect to the portion of the Property so Transferred: (i) the transferring Developer no longer has a legal or equitable interest in the portion of the Property so Transferred other than as a beneficiary under a deed of trust; (ii) the transferring Developer is not then in Default under this Agreement and no condition exists that with the passage of time or the giving of notice, or both, would constitute a Default hereunder; (iii) the transferring Developer has provided City with the notice and the fully executed written and recordable assignment and assumption agreement required as set forth in the first paragraph of this Section 11; and (iv) the successor Developer either (A) provides City with substitute security equivalent to any security previously provided by the transferring Developer to City to secure performance of the successor Developer's obligations hereunder with respect to the Property, or interest in the Property, or the portion of the Property so Transferred, as determined in the City's sole discretion, or (B) if the transferred obligation in question is not a secured obligation, the successor Developer either provides security reasonably satisfactory to City or otherwise demonstrates to City's reasonable satisfaction, as determined in the City's sole discretion, that the successor Developer has the financial resources or commitments available to perform the transferred obligation at the time and in the manner required under this Agreement and the Development Regulations for the Project. Any determination by the City in regards to the second paragraph of Section 11, subpart (iv) (A), (B), shall be documented in writing.

12. Mortgagee Rights.

12.1 Encumbrances on Property.

The Parties agree that this Agreement shall not prevent or limit Developer in any manner from encumbering the Property, any part of the Property, or any improvements on the Property with any Mortgage securing financing with respect to the construction, development, use, or operation of the Project.

12.2 Mortgagee Protection.

This Agreement shall be superior and senior to the lien of any Mortgage. Nevertheless, no breach of this Agreement shall defeat, render invalid, diminish, or impair the lien of any Mortgage made in good faith and for value. Any acquisition or acceptance of title or any right or interest in the Property or part of the Property by a Mortgagee (whether due to foreclosure, trustee's sale, deed in lieu of foreclosure, lease termination, or otherwise) shall be subject to all of the terms and conditions of this Agreement. Any Mortgagee who takes title to the Property or any part of the Property shall be entitled to the benefits arising under this Agreement.

12.3 Mortgagee Not Obligated.

Notwithstanding the provisions of this Section 12.3, a Mortgagee will not have any obligation or duty under the terms of this Agreement to perform the obligations of Developer or other affirmative covenants of Developer, or to guarantee this performance except that: (i) the Mortgagee shall have no right to develop the Project under the Development Regulations without

fully complying with the terms of this Agreement; and (ii) to the extent that any covenant to be performed by Developer is a condition to the performance of a covenant by City, that performance shall continue to be a condition precedent to City's performance.

12.4 Notice of Default to Mortgagee; Right of Mortgagee to Cure.

Each Mortgagee shall, upon written request to City, be entitled to receive written notice from City of: (i) the results of the periodic review of compliance specified in Article 7 of this Agreement, and (ii) any default by Developer of its obligations set forth in this Agreement.

Each Mortgagee shall have a further right, but not an obligation, to cure the Default within thirty (30) calendar days after receiving a Notice of Default with respect to a monetary Default and within sixty (60) calendar days after receiving a Notice of Default with respect to a non-monetary Default. If the Mortgagee can only remedy or cure a non-monetary Default by obtaining possession of the Property, then the Mortgagee shall have the right to seek to obtain possession with diligence and continuity through a receiver or otherwise, and to remedy or cure the non-monetary Default within sixty (60) calendar days after obtaining possession and, except in case of emergency or to protect the public health or safety, City may not exercise any of its judicial remedies set forth in this Agreement to terminate or substantially alter the rights of the Mortgagee until expiration of the sixty (60) calendar day period. In the case of a non-monetary Default that cannot with diligence be remedied or cured within sixty (60) calendar days, the Mortgagee shall have additional time as is reasonably necessary to remedy or cure the Default, provided the Mortgagee promptly commences to cure the non-monetary Default within sixty (60) calendar days and diligently prosecutes the cure to completion.

13. Bankruptcy. The obligations of this Agreement shall not be dischargeable in bankruptcy.

14. Miscellaneous Terms.

14.1 Reserved

14.2 Notices.

Any notice or demand that shall be required or permitted by law or any provision of this Agreement shall be in writing. If the notice or demand will be served upon a Party, it either shall be personally delivered to the Party; deposited in the United States mail, certified, return receipt requested, and postage prepaid; or delivered by a reliable courier service that provides a receipt showing date and time of delivery with courier charges prepaid. The notice or demand shall be addressed as follows:

TO CITY:

City of Newport Beach
100 Civic Center Drive
Newport Beach, California 92660
Attn: City Manager

With a copy to: City Attorney
City of Newport Beach
100 Civic Center Drive
Newport Beach, California 92660

TO DEVELOPER: Robert Eres
Vivante Newport Center, LLC
1 MacArthur Place, Suite 300
Santa Ana, CA 92707

With a copy to: **Insert Developer's Atty Contact Information**

Any Party may change the address stated in this Section 14.2 by delivering notice to the other Parties in the manner provided in this Section 14.2, and thereafter notices to such Party or Parties shall be addressed and submitted to the new address. Notices delivered in accordance with this Agreement shall be deemed to be delivered upon the earlier of: (i) the date received, or (ii) three business days after deposit in the mail as provided above.

14.3 Project as Private Undertaking.

The Development of the Project is a private undertaking. Neither the Developer nor the City is acting as the agent of the other in any respect, and each is an independent contracting entity with respect to the terms, covenants, and conditions set forth in this Agreement. This Agreement forms no partnership, joint venture, or other association of any kind. The only relationship between the Parties is that of a government entity regulating the Development of private property by the owner of the property.

14.4 Cooperation.

Each Party shall cooperate with and provide reasonable assistance to the other Party to the extent consistent with and necessary to implement this Agreement. Upon the request of a Party at any time, the other Party shall promptly execute, with acknowledgement or affidavit if reasonably required, and file or record the required instruments and writings and take any actions as may be reasonably necessary to implement this Agreement or to evidence or consummate the transactions contemplated by this Agreement.

14.5 Estoppel Certificates.

At any time, any Party may deliver written notice to the other Party requesting that that Party certify in writing that, to the best of its knowledge: (i) this Agreement is in full force and effect and is binding on the Party; (ii) this Agreement has not been amended or modified either orally or in writing or, if this Agreement has been amended, the Party providing the certification shall identify the amendments or modifications; and (iii) the requesting Party is not in Default in the performance of its obligations under this Agreement and no event or situation has occurred that with the passage of time or the giving of Notice or both would constitute a Default or, if such is not the case, then the other Party shall describe the nature and amount of the actual or prospective Default.

The Party requested to furnish an estoppel certificate shall execute and return the certificate within thirty (30) calendar days following receipt.

14.6 Rules of Construction.

The singular includes the plural; the masculine and neuter include the feminine; “shall” is mandatory; and “may” is permissive.

14.7 Time Is of the Essence.

Time is of the essence regarding each provision of this Agreement as to which time is an element.

14.8 Waiver.

The failure by a Party to insist upon the strict performance of any of the provisions of this Agreement by the other Party, and failure by a Party to exercise its rights upon a Default by the other Party, shall not constitute a waiver of that Party’s right to demand strict compliance by the other Party in the future.

14.9 Counterparts.

This Agreement may be executed in two (2) or more counterparts, each of which shall be identical and may be introduced in evidence or used for any other purpose without any other counterpart, but all of which shall together constitute one (1) and the same agreement.

14.10 Entire Agreement.

This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter addressed in this Agreement.

14.11 Severability.

The Parties intend that each and every obligation of the Parties is interdependent and interrelated with the other, and if any provision of this Agreement or the application of the provision to any Party or circumstances shall be held invalid or unenforceable to any extent, it is the intention of the Parties that the remainder of this Agreement or the application of the provision to persons or circumstances shall be rendered invalid or unenforceable. The Parties intend that no Party shall receive any of the benefits of the Agreement without the full performance by such Party of all of its obligations provided for under this Agreement. Without limiting the generality of the foregoing, the Parties intend that Developer shall not receive any of the benefits of this Agreement if any of Developer’s obligations are rendered void or unenforceable as the result of any third party litigation, and City shall be free to exercise its legislative discretion to amend or repeal the Development Regulations applicable to the Property and Developer shall cooperate as required, despite this Agreement, should third party litigation result in the nonperformance of Developer’s obligations under this Agreement. The provisions of this Section 14.11 shall apply regardless of whether the Effective Date occurs and after the Termination Date.

14.12 Construction.

This Agreement has been drafted after extensive negotiation and revision. Both City and Developer are sophisticated parties who were represented by independent counsel throughout the negotiations or City and Developer had the opportunity to be so represented and voluntarily chose to not be so represented. City and Developer each agree and acknowledge that the terms of this Agreement are fair and reasonable, taking into account their respective purposes, terms, and conditions. This Agreement shall therefore be construed as a whole consistent with its fair meaning, and no principle or presumption of contract construction or interpretation shall be used to construe the whole or any part of this Agreement in favor of or against any Party.

14.13 Successors and Assigns; Constructive Notice and Acceptance.

The burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, all successors in interest to the Parties to this Agreement. Except for those provisions relating to indemnity in Section 10, all other provisions of this Agreement shall, from and after the Effective Date hereof, be enforceable as equitable servitudes and constitute covenants running with the land. Subject to occurrence of the Effective Date, each covenant to do or refrain from doing some act hereunder with regard to Development of the Property: (i) is for the benefit of and is a burden upon every portion of the Property; (ii) runs with the Property and each portion thereof; and (iii) is binding upon each Party and each successor in interest during its ownership of the Property or any portion thereof. Every person or entity who now or later owns or acquires any right, title, or interest in any part of the Project or the Property is and shall be conclusively deemed to have consented and agreed to every provision of this Agreement. This Section 14.13 applies regardless of whether the instrument by which such person or entity acquires the interest refers to or acknowledges this Agreement and regardless of whether such person or entity has expressly entered into an assignment and assumption agreement as provided for in Section 11.

14.14 No Third Party Beneficiaries.

The only Parties to this Agreement are City and Developer. This Agreement does not involve any third party beneficiaries, and it is not intended and shall not be construed to benefit or be enforceable by any other person or entity.

14.15 Applicable Law and Venue.

This Agreement shall be construed and enforced consistent with the laws of the State of California, without regard to conflicts of law principles. Any action at law or in equity arising under this Agreement or brought by any Party for the purpose of enforcing, construing, or determining the validity of any provision of this Agreement shall be filed and tried in the Superior Court of the County of Orange, State of California, or the United States District Court for the Central District of California. The Parties waive all provisions of law providing for the removal or change of venue to any other court.

14.16 Section Headings.

All section headings and subheadings are inserted for convenience only and shall not affect construction or interpretation of this Agreement.

14.17 Incorporation of Recitals and Exhibits.

All of the Recitals are incorporated into this Agreement by this reference.

14.18 Recordation.

The City Clerk of City shall record this Agreement and any amendment, modification, or cancellation of this Agreement in the Office of the County Recorder of the County of Orange within the period required by California Government Code section 65868.5 and City of Newport Beach Municipal Code section 15.45.090. The date of recordation of this Agreement shall not modify or amend the Effective Date or the Termination Date.

[SIGNATURE PAGE FOLLOWS]

SIGNATURE PAGE TO DEVELOPMENT AGREEMENT

“DEVELOPER”

VIVANTE NEWPORT CENTER, LLC, a
Delaware limited liability company

By: VIVANTE NEWPORT HOLDINGS LLC
It's Managing Member

Name: _____
Title: _____

Name: _____
Title: _____

“CITY”

CITY OF NEWPORT BEACH, a municipal
corporation and charter city

Diane B. Dixon, Mayor

ATTEST:

Leilani I. Brown, City Clerk

APPROVED AS TO FORM:

Aaron C. Harp, City Attorney

_____, Attorney for Developer

ACKNOWLEDGEMENTS

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA

COUNTY OF _____

On _____, _____, before me, _____
(here insert name and title of the officer)

personally appeared _____

_____,
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)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA

COUNTY OF _____

On _____, _____, before me, _____
(here insert name and title of the officer)

personally appeared _____

_____,
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)

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

PARCEL A:

PARCEL 2, IN THE CITY OF NEWPORT BEACH, COUNTY OF ORANGE, STATE OF CALIFORNIA, AS SHOWN ON A MAP FILED IN BOOK 81, PAGES 8 AND 9 OF PARCEL MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF ORANGE COUNTY, CALIFORNIA.

EXCEPTING THEREFROM ALL OIL, OIL RIGHTS, GAS, MINERALS, MINERAL RIGHTS, NATURAL GAS RIGHTS, AND OTHER HYDROCARBON SUBSTANCES IN AND UNDER SAID LAND, AND THE RIGHT TO GRANT AND TRANSFER THE SAME, TOGETHER WITH ALL NECESSARY AND CONVENIENT RIGHTS TO EXPLORE FOR, DEVELOP, PRODUCE AND EXTRACT AND TAKE THE SAME, SUBJECT TO THE EXPRESS LIMITATION THAT ANY AND ALL OPERATIONS FOR THE EXPLORATION, DEVELOPMENT, PRODUCTION, EXTRACTION AND TAKING OF ANY OF SAID SUBSTANCES SHALL BE CARRIED ON AT LEVELS BELOW THE DEPTH OF FIVE HUNDRED (500) FEET FROM THE SURFACE OF SAID LAND BY MEANS OF WELLS, DERRICK AND/OR OTHER EQUIPMENT FROM SURFACE LOCATIONS ON ADJOINING OR NEIGHBORING LAND, AND SUBJECT FURTHER TO THE EXPRESS LIMITATION THAT THE FOREGOING RESERVATION SHALL IN NO WAY BE INTERPRETED TO INCLUDE ANY RIGHT OF ENTRY IN AND UPON THE SURFACE OF SAID LAND, AS RESERVED BY THE IRVINE COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF WEST VIRGINIA IN A DEED RECORDED FEBRUARY 28, 1977 AS INSTRUMENT NO. 35908 IN BOOK 12085, PAGE 1561 OF OFFICIAL RECORDS.

APN: 442-261-05

PARCEL B:

PARCEL 2 AS SHOWN ON EXHIBIT 'B' OF NEWPORT BEACH LOT LINE ADJUSTMENT NO. 95-3

RECORDED OCTOBER 31, 1995 AS INSTRUMENT NO. 19950483821 OF OFFICIAL RECORDS OF ORANGE COUNTY, CALIFORNIA, IN THE CITY OF NEWPORT BEACH, COUNTY OF ORANGE, STATE OF CALIFORNIA.

EXCEPTING THEREFROM ALL OIL, OIL RIGHTS, MINERALS, MINERAL RIGHTS, NATURAL GAS RIGHTS AND OTHER HYDROCARBONS BY WHATSOEVER NAME KNOWN, GEOTHERMAL STEAM, AND ALL PRODUCTS DERIVED FROM ANY OF THE FOREGOING, THAT MAY BE WITHIN OR UNDER THE LAND, TOGETHER WITH THE PERPETUAL RIGHT OF DRILLING, MINING, EXPLORING AND OPERATING THEREFOR, AND STORING IN AND REMOVING THE SAME FROM SAID LAND OR ANY OTHER LAND, INCLUDING THE RIGHT TO WHIPSTOCK OR DIRECTIONALLY DRILL AND MINE FROM LANDS OTHER THAN THE LAND, OIL OR GAS WELLS, TUNNELS AND SHAFTS INTO, THROUGH OR ACROSS THE SUBSURFACE OF THE LAND, AND TO BOTTOM SUCH WHIPSTOCKED OR DIRECTIONALLY DRILLED WELLS, TUNNELS AND SHAFTS UNDER AND BENEATH OR BEYOND THE EXTERIOR LIMITS THEREOF, AND TO REDRILL, RETUNNEL, EQUIP, MAINTAIN, REPAIR, DEEPEN AND OPERATE ANY SUCH WELLS OR MINES, WITHOUT, HOWEVER, THE RIGHT TO DRILL, MINE, STORE, EXPLORE AND OPERATE THROUGH THE SURFACE OR THE UPPER 500 FEET OF THE SUBSURFACE OF THE LAND, AS RESERVED BY THE IRVINE COMPANY, A MICHIGAN CORPORATION IN A DEED RECORDED NOVEMBER 22, 1995 AS INSTRUMENT NO. 19950519960 OF OFFICIAL RECORDS.

ALSO EXCEPTING THEREFROM ANY AND ALL WATER, WATER RIGHTS OR INTERESTS THEREIN APPURTENANT OR RELATING TO THE LAND OR OWNED OR USED BY THE IRVINE COMPANY IN CONNECTION WITH OR WITH RESPECT TO THE LAND (NO MATTER HOW ACQUIRED BY THE IRVINE COMPANY), WHETHER SUCH WATER RIGHTS SHALL BE RIPARIAN, OVERLYING, APPROPRIATIVE, LITTORAL, PERCOLATING, PRESCRIPTIVE, ADJUDICATED, STATUTORY OR CONTRACTUAL, TOGETHER WITH THE RIGHT AND POWER TO EXPLORE, DRILL, REDRILL,

REMOVE AND STORE THE SAME FROM OR IN THE LAND OR TO DIVERT OR OTHERWISE UTILIZE SUCH WATER, RIGHTS OR INTERESTS ON ANY OTHER PROPERTY OWNED OR LEASED BY THE IRVINE COMPANY; BUT WITHOUT, HOWEVER, ANY RIGHT TO ENTER UPON THE SURFACE OF THE LAND IN THE EXERCISE OF SUCH RIGHTS, AS RESERVED BY THE IRVINE COMPANY, A MICHIGAN CORPORATION IN A DEED RECORDED NOVEMBER 22, 1995 AS INSTRUMENT NO. 19950519960 OF OFFICIAL RECORDS.

APN: 442-261-17

PARCEL B1:

AN APPURTENANT NON-EXCLUSIVE JOINT ACCESS EASEMENT FOR ACCESS, INGRESS AND EGRESS OVER THAT PORTION OF PARCEL 1 AS SHOWN ON EXHIBIT "B" OF NEWPORT BEACH LOT LINE ADJUSTMENT NO. 95-3 RECORDED OCTOBER 31, 1995 AS INSTRUMENT NO. 19950483821 OF OFFICIAL RECORDS, AS MORE FULLY DESCRIBED IN THE DECLARATION OF EASEMENTS RECORDED OCTOBER 31, 1995 AS INSTRUMENT NO. 19950484848 OF OFFICIAL RECORDS, DESCRIBED AS FOLLOWS:

BEGINNING AT THE MOST SOUTHERLY SOUTHEASTERLY CORNER OF SAID PARCEL 1; THENCE NORTHERLY ALONG THE EASTERLY PARCEL LINE OF SAID PARCEL 1 NORTH 07° 03' 01" WEST 55.00 FEET; THENCE SOUTH 82° 56' 59" WEST 65.00 FEET; THENCE SOUTH 07° 03' 01" EAST 55.00 FEET TO A POINT ON THE MOST SOUTHERLY LINE OF SAID PARCEL 1, SAID POINT BEING ALSO ON THE MOST NORTHERLY RIGHT OF WAY LINE OF SAN CLEMENTE DRIVE; THENCE EASTERLY ALONG SAID SOUTHERLY LINE AND SAID RIGHT OF WAY LINE NORTH 82° 56' 59" EAST 65.00 FEET TO THE POINT OF BEGINNING.

EXHIBIT B

SITE MAP

EXHIBIT C

VESTED DEVELOPMENT IMPACT FEES

Impact Fee Estimate:

- **Fair Share Fees**

\$895 per dwelling unit (elderly residential) x 90 DU

=\$80,550

Credit applied for existing nonresidential floor area

- **San Joaquin Transportation Corridor Fees-Zone B**

\$2,595/DU x 0.5 x 99DU = \$128,452.50 (in accordance with interpretation 87-1, fees for congregate care are charged at the multi-family rate times one half of the total number of dwelling units)

No credit applied for existing floor area since property is currently tax exempt

Exhibit “F”

Conditions of Approval

(Project-specific conditions are in italics)

PLANNING DIVISION

1. The development shall be in substantial conformance with the Property site plan, floor plans and building elevations stamped and dated with the date of this approval (except as modified by applicable conditions of approval).
2. *This approval authorizes ninety (90) dwelling units of senior housing/congregate care and twenty-seven (27) beds for a memory care facility as a Residential Care Facility for the Elderly, as specified in the adopted Planned Community Development Plan.*
3. *The Project shall adhere to the development standards established in the amended PC-19 Development Plan for the Project site.*
4. *The Applicant shall comply with all Project design features, mitigation measures, and standard conditions contained within the approved mitigation monitoring reporting program (MMRP) of the EIR Addendum (SCH No. 2016021023) for the Project.*
5. The Project is subject to all applicable City ordinances, policies, and standards, unless specifically waived or modified by the conditions of approval.
6. All proposed signs shall be in conformance with the provisions of PC-19 and [Chapter 20.42 \(Sign Standards\)](#) of the NBMC.
7. *Prior to the issuance of building permits, Fair Share Traffic Fees shall be paid for the new elderly residential dwelling units (currently \$895.00 per new additional dwelling unit) in accordance with [Chapter 15.38 \(Fair Share Traffic Contribution Ordinance\)](#) of the NBMC. A credit for the existing commercial square footage shall be applied toward this fee and any remaining balance shall be charged to the Applicant.*
8. *Prior to the issuance of building permits, San Joaquin Transportation Corridor fees shall be paid at the multi-family rate (currently \$2,595 per dwelling unit times one half for each new senior housing unit) and at the nonresidential rate (currently \$5.68 per square foot), if applicable, in accordance with the Zone B fees identified in the City’s fee schedule. Fees may not apply if the property is considered property tax exempt, to be determined at the time of building permit issuance.*
9. *Prior to issuance of final building permits, the Applicant shall prepare a written disclosure statement prior to sale, lease, or rental of a residential unit in the proposed mixed-use development consistent with Section 20.48.130.H (Notification to Owners and Tenants) of the Municipal Code.*

10. *Prior to issuance of final building permits, the Applicant shall record a deed notification with the County Recorder's Office approved as to form by the Office of the City Attorney consistent with Section 20.48.130.I (Deed Notification). The deed notification shall state that the residential units are located in a mixed-use project or in a mixed-use zoning district and that an owner may be subject to impacts, including inconvenience and discomfort, from lawful activities occurring in the project or zoning district (e.g. noise, lighting, odors, high pedestrian activity levels, etc.).*
11. *Any material changes in operational characteristics, including but not limited to the following, may require an amendment to this use permit or issuance of a new use permit as determined by the Community Development Director:*
 - a. *Expiration without renewal, or permanent loss of a Department of Social Services (DSS) license as a Residential Care Facility for the Elderly (RCFE).*
 - b. *Change in on-site staffing that creates a deficiency in parking supply or results in a parking impact to surrounding properties.*
 - c. *Increase in physical capacity of facility and increases in floor area of facility.*
 - d. *Request for amendment to any condition or conditions of approval.*
12. *Deliveries and refuse collection for the facility shall be prohibited between the hours of 10:00 p.m. and 7:00 a.m. on weekdays and Saturdays and between the hours of 10:00 p.m. and 9:00 a.m. on Sundays and Federal holidays, unless otherwise approved by the Director of Community Development, and may require an amendment to this Use Permit.*
13. *All residents, visitors, and employees shall park on-site. Parking on any streets is strictly prohibited.*
14. *Prior to the issuance of the final certificate of occupancy, the Operator shall obtain approval of an RCFE license from the DSS and maintain a DSS license at all times for the memory care facility. The use shall be operated in compliance with applicable State and local laws.*
15. *The Operator shall comply with the Business License provisions of the Municipal Code.*
16. *The Operator shall provide and maintain public notice of the Regional DSS Office and the Long-Term Ombudsman addresses and phone numbers for receiving inquiries and/or complaints in reference to the operation of its facility.*
17. *The Operator shall not allow more than two residents in one bedroom for the senior housing dwelling units.*
18. *Smoking on-site shall be restricted to a designated area that will prevent second-hand smoke from traveling to the adjacent properties. This area shall be identified on the final construction drawings.*

19. *On-site assembly-type amenities within the property are limited solely to use by the residents of the facility and their visiting guests, and facility staff during their shift.*
20. *Any and all medical waste generated through the operation of the facility shall be disposed of in accordance with the NBMC, and all other laws and best industry standards and practices.*
21. All trash shall be stored within the building or within dumpsters stored in the trash enclosure (three walls and a self-latching gate) or otherwise screened from view of neighboring properties, except when placed for pick-up by refuse collection agencies.
22. Prior to the issuance of building permits, the trash enclosure design shall provide a minimum of 384 square feet of trash/recycling area and shall have a decorative solid roof for aesthetic and screening purposes.
23. Trash receptacles for patrons shall be conveniently located both inside and outside of the establishment, however, not located on or within any public property or right-of-way.
24. The exterior of the business shall be maintained free of litter and graffiti at all times. The owner or operator shall provide for daily removal of trash, litter debris and graffiti from the premises and on all abutting sidewalks within twenty (20) feet of the premises.
25. The Applicant shall ensure that the trash dumpsters and/or receptacles are maintained to control odors. This may include the provision of either fully self-contained dumpsters or periodic steam cleaning of the dumpsters, if deemed necessary by the Planning Division. Cleaning and maintenance of trash dumpsters shall be done in compliance with the provisions of Title 14; including all future amendments (including Water Quality related requirements).
26. A copy of the Resolution, including conditions of approval Exhibit "A" shall be incorporated into the Building Division and field sets of plans prior to issuance of the building permits.
27. Prior to the issuance of building permits, the Applicant shall submit a final landscape and irrigation plan prepared by a licensed landscape architect. These plans shall incorporate drought tolerant plantings and water efficient irrigation practices, and the plans shall be approved by the City Urban Forester and the Planning Division. The design shall comply with NBMC [Chapter 14.17 \(Water-Efficient Landscaping\)](#).
28. All landscape materials and irrigation systems shall be maintained in accordance with the approved landscape plan. All landscaped areas shall be maintained in a healthy and growing condition and shall receive regular pruning, fertilizing, mowing and trimming. All landscaped areas shall be kept free of weeds and debris. All irrigation systems shall be kept operable, including adjustments, replacements, repairs, and cleaning as part of regular maintenance.

29. The Property shall be in compliance with [Section 20.30.070 \(Outdoor Lighting\) of the NBMC](#). If in the opinion of the Community Development Director, the illumination creates an unacceptable negative impact on surrounding land uses or environmental resources, the Director may order the dimming of light sources or other remediation upon finding that the site is excessively illuminated.
30. Prior to the issuance of building permits, the Applicant shall prepare a photometric study in conjunction with a final lighting plan for approval by the Planning Division. The survey shall show that lighting values are “1” or less at all property lines, unless otherwise approved by the Community Development Director.
31. Prior to the issuance of a building permit, the Applicant shall pay any unpaid administrative costs associated with the processing of this application to the Planning Division.
32. All noise generated by the proposed use shall comply with the provisions of [Chapter 10.26 \(Community Noise Control\)](#) of the NBMC 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:

Location	Between the hours of 7 a.m. and 10 p.m.		Between the hours of 10 p.m. and 7 a.m.	
	Interior	Exterior	Interior	Exterior
Residential Property	45dBA	55dBA	40dBA	50dBA
Residential Property located within 100 feet of a commercial property	45dBA	60dBA	45dBA	50dBA
Mixed Use Property	45dBA	60dBA	45dBA	50dBA
Commercial Property	N/A	65dBA	N/A	60dBA

33. Construction activities shall comply with NBMC [Section 10.28.040 \(Construction Activity - Noise Regulations\)](#), 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. Noise-generating construction activities are not allowed on Sundays or Holidays.
34. No outside paging system shall be utilized in conjunction with this establishment.
35. Storage outside of the building in the front or at the rear of the property shall be prohibited, with the exception of the required trash container enclosure.
36. A Special Events Permit is required for any event or promotional activity outside the normal operational characteristics of the approved use, as conditioned, or that would attract large crowds, involve the sale of alcoholic beverages, include any form of on-site media broadcast, or any other activities as specified in the Newport Beach Municipal Code to require such permits.

37. *A valet plan shall be reviewed and approved by Public Works prior to the first use of valet service. The approved valet plan shall be used for each event/holiday. Any changes to the approved plan requires approval of the Public Works Department.*
38. *Prior to issuance of any building permit, the Applicant shall provide satisfactory evidence that a Native American monitor has been retained to observe the site when construction activities occur in native soils. In the event that tribal cultural resources are discovered, the Native American monitor shall be included in the consultation on the recommended next steps.*
39. *Prior to issuance of any building permit, the Applicant shall submit a construction management and delivery plan to be reviewed and approved by the Public Works and Community Development Departments. The plan shall include discussion of Project phasing; parking arrangements for both sites during construction (including construction parking); anticipated haul routes; and construction mitigation. Upon approval of the plan, the Applicant shall be responsible for implementing and complying with the stipulations set forth in the approved plan.*
40. This approval may be modified or revoked by the Planning Commission should they determine 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.
41. Any change in operational characteristics, expansion in area, or other modification to the approved plans, shall require an amendment to this Use Permit or the processing of a new Use Permit.
42. 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 either the current business owner, property owner or the leasing agent.
43. *The term and expiration of Lot Merger No. LM2018-004, Major Site Development Review No. SD2018-003 and Conditional Use Permit No. UP2018-019 shall be governed by Development Agreement No. DA2018-005.*
44. To the fullest extent permitted by law, 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 Vivante Senior Housing including, but not limited to, General Plan Amendment No. GP2018-003, Planned Community Development Plan Amendment No. PC2018-001, Development Agreement No. DA2018-005, Major Site Development Review No. SD2018-003, Conditional Use Permit No. UP2018-019, Lot Merger No. LM2018-004, and EIR Addendum No. ER2016-002 (PA2018-185). 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.

POLICE DEPARTMENT

45. *Alcohol service be limited to 7:00 a.m. through 11:00 p.m., daily.*
46. *Alcohol service shall be limited to a Type 47 (On Sale General) and Type 57 (Special On Sale General) Alcoholic Beverage Control License.*
47. *Only residents and their guests may be served in the dining halls, café, and lounge areas. The dining halls, café, and lounge areas shall not be open to the general public for food and/or alcohol service.*
48. *Security cameras with at least a two week retention period must be installed in and around the alcohol consumption area in the Lounge, Café, and Dining Hall areas. Those recordings shall be made available to police upon request in a timely manner.*
49. All owners, managers and employees selling alcoholic beverages shall undergo and successfully complete a certified training program in responsible methods and skills for selling alcoholic beverages within sixty (60) days of hire. This training must be updated every three (3) years regardless of certificate expiration date. The certified program must meet the standards of the certifying/licensing body designated by the State of California. The establishment shall comply with the requirements of this section within sixty (60) days of approval. Records of each owner's, manager's, and employee's successful completion of the required certified training program shall be maintained on the premises and shall be presented upon request by a representative of the City of Newport Beach.
50. Approval does not permit the premises to operate as a "bar, tavern, cocktail lounge or nightclub" as defined by the Newport Beach Municipal Code. The Newport Beach Municipal Code defines bars, lounges, and nightclubs as an establishment that sells or serves alcoholic beverages for consumption on the premises and is holding or applying for a public premises license from the California State Department of Alcoholic Beverage Control (ABC) (i.e. ABC License Type 42 (On-Sale Beer and Wine – Public Premises), ABC License Type 48 (On-Sale General – Public Premises), and ABC License Type 61 (On-Sale Beer – Public Premises)). Persons under twenty-one (21) years of age are not allowed to enter and remain on the premises. The establishment shall include any immediately adjacent area that is owned, leased, rented, or controlled by the licensee.
51. No alcoholic beverages shall be consumed on any property adjacent to the licensed premises under the control of the licensee.

52. Petitioner shall not share any profits or pay any percentage or commission to a promoter or any other person based upon monies collected as a door charge, cover charge, or any other form of admission charge, including minimum drink orders or the sale of drinks.
53. Food service from the regular menu shall be available at all times when alcohol is served.
54. Strict adherence to maximum occupancy limit is required.
55. The operator shall be responsible for the control of noise generated by the subject facility. All noise generated by the proposed use shall comply with the provisions of Chapter 10.26 and other applicable noise control requirements of the Newport Beach Municipal Code.
56. The operator shall take reasonable steps to discourage and correct objectionable conditions that constitute a nuisance in all areas surrounding the alcoholic beverage outlet and adjacent properties during business hours.

BUILDING DIVISION

57. *A full building code, accessibility, and structural review will be performed at the time of plan review submittal.*
58. The Applicant is required to obtain all applicable permits from the City's Building Division. The construction plans must comply with the most recent, City-adopted version of the California Building Code (CBC). The construction plans must meet all applicable State Disabilities Access requirements.
59. *All new construction shall comply with the latest code edition at the time of plan check submittal. Current code cycle is 2016 California Code Edition with Newport Beach Municipal Code Amendments.*
60. *Prior to grading permit issuance, a grading bond shall be required in accordance with [Section 15.10.080 \(Bonds\)](#) of the NBMC.*
61. *Prior to grading permit issuance, a geotechnical report shall be submitted to the Building Division for review.*
62. *Prior to issuance of grading permits, the Applicant shall prepare and submit a Water Quality Management Plan (WQMP) for the Project, subject to the approval of the Building Division and Code and Water Quality Enforcement Division. The WQMP shall provide appropriate Best Management Practices (BMPs) to ensure that no violations of water quality standards or waste discharge requirements occur.*
63. *Prior to grading permit issuance, a drainage and hydrology study shall be submitted.*
64. *Prior to issuance of building permits, the Project shall obtain a general construction NPDES storm water permit from the State Water Resources Control Board. Tel. (909) 782-4130.*

65. Prior to the issuance of grading permits, a Storm Water Pollution Prevention Plan (SWPPP) and Notice of Intent (NOI) to comply with the General Permit for Construction Activities shall be prepared, submitted to the State Water Quality Control Board for approval and made part of the construction program. The Applicant will provide the City with a copy of the NOI and their application check as proof of filing with the State Water Quality Control Board. This plan will detail measures and practices that will be in effect during construction to minimize the Project's impact on water quality. *The SWPPP Report shall prepared by a qualified SWPPP Developer (QSD)* (<http://cfpub.epa.gov/npdes/stormwater/swppp.cfm>).

66. The Applicant shall employ the following best available control measures ("BACMs") to reduce construction-related air quality impacts:

Dust Control

- Water all active construction areas at least twice daily.
- Cover all haul trucks or maintain at least two feet of freeboard.
- Pave or apply water four times daily to all unpaved parking or staging areas.
- Sweep or wash any site access points within two hours of any visible dirt deposits on any public roadway.
- Cover or water twice daily any on-site stockpiles of debris, dirt or other dusty material.
- Suspend all operations on any unpaved surface if winds exceed 25 mph.

Emissions

- Require 90-day low-NOx tune-ups for off road equipment.
- Limit allowable idling to 30 minutes for trucks and heavy equipment

Off-Site Impacts

- Encourage carpooling for construction workers.
- Limit lane closures to off-peak travel periods.
- Park construction vehicles off traveled roadways.
- Wet down or cover dirt hauled off-site.
- Sweep access points daily.
- Encourage receipt of materials during non-peak traffic hours.
- Sandbag construction sites for erosion control.

Fill Placement

- The number and type of equipment for dirt pushing will be limited on any day to ensure that SCAQMD significance thresholds are not exceeded.
- Maintain and utilize a continuous water application system during earth placement and compaction to achieve a 10 percent soil moisture content in the top six-inch surface layer, subject to review/discretion of the geotechnical engineer.

67. A list of "good housekeeping" practices will be incorporated into the long-term post-construction operation of the site to minimize the likelihood that pollutants will be used, stored or spilled on the site that could impair water quality. These may include frequent parking area vacuum truck sweeping, removal of wastes or spills, limited use of harmful fertilizers or pesticides, and the diversion of storm water away from potential sources of

pollution (e.g., trash receptacles and parking structures). The Stage 2 WQMP shall list and describe all structural and non-structural BMPs. In addition, the WQMP must also identify the entity responsible for the long-term inspection, maintenance, and funding for all structural (and if applicable Treatment Control) BMPs.

68. Prior to the issuance of building permits, Applicant shall provide full building code analysis on occupancy, type of construction, actual/allowable floor area, actual/allowable height, number of stories, sprinkler system, etc.
69. Prior to the issuance of building permits, Applicant shall provide a full egress analysis plan.
70. Prior to the issuance of building permits, Applicant shall provide building or structure setbacks from top and bottom of slope as shown in CBC, Fig. 1808.7.1. For descending slopes less than 12 feet in height, minimum setback from competent slope face material shall be 4 feet.
71. Prior to the issuance of building permits, Applicant shall provide accessible routes throughout the entire site such as parking lot area, public area, common area, and all pedestrian circulations.
72. Prior to the issuance of building permits, Applicant shall clearly distinguish between the public and common area on the plan. Any public areas within the building shall comply with Title 24 Chapter 11B; and all ground-floor dwelling units and common areas shall comply with Title 24 Chapter 11A.
73. Prior to the issuance of building permits, the plans shall reflect all ground-floor units shall be adaptable and accessible.
74. Prior to the issuance of building permits, accessible parking spaces shall be provided for the public use areas in accordance with Section 11B-208.2.
75. Prior to the issuance of building permits, accessible parking spaces shall be provided for unassigned and visitor parking in accordance with Section 1109A.5, in the event provided parking stalls are insufficient.
76. If any public funding is received for the proposed Project, the entire building will need to comply with CBC 11B as public housing requirements.
77. Prior to the issuance of building permits, building areas used to determine based on the type of construction and occupancy classification shall be the area include within surrounding exterior walls exclusive of vent shafts and courts. See definition of "Area, Building" under CBC.
78. Prior to the issuance of building permits, Applicant shall identify/clarify all the dotted lines shown on the civil drawings.

79. *Prior to the issuance of building permits, the plans shall reflect that the proposed building shall not impose surcharge pressures onto existing neighboring retaining walls.*
80. *Prior to the issuance of building permits, the plans shall reflect that the exit enclosure located at the south wing shall discharge directly out of the building or via passageway.*
81. *Prior to the issuance of building permits, the plans shall reflect a minimum two-hour rated exit enclosure stairway. This will be required when connected to four or more stories.*
82. *Prior to the issuance of building permits, the plans shall reflect where the means of egress from stories above and below converge at an intermediate level, the capacity of the means of egress from the point of convergence shall be not less than the largest minimum width or the sum of the required capacities for the stairways serving the two adjacent stories, whichever is larger (CBC 1005.7)*
83. *Prior to the issuance of building permits, the plans shall provide elevator lobby and hoistway opening protection in accordance with CBC Section 3006.*
84. *Prior to the issuance of building permits, the plans shall identify the pool equipment and list the quantity of all hazardous materials stored on-site.*

FIRE DEPARTMENT

85. The Applicant is required to obtain all applicable permits from the City's Fire Department.
86. *Per California Fire Code (CFC) Section 907.2.9 Group R-2.1, fire alarm systems and smoke alarms shall be installed in Group R-2.1 occupancies as required in Sections 907.2.9.1 and 907.2.9.4.*
87. *A manual fire alarm system that activates the occupant notification system in accordance with Section 907.5 shall be installed in Group A occupancies where the occupant load due to the assembly occupancy is 300 or more (CFC Section 907.2.1).*
88. *Automatic sprinkler systems shall be designed and installed in accordance with Section 903.3.1 through 903.3.9 (CFC Section 903.3).*
89. *Single or multiple station smoke alarms shall be installed and maintained in Group R-2.1 in the following locations:*
 - a. *On the ceiling or wall outside of each, separate sleeping area in the immediate vicinity of bedrooms.*
 - b. *In each room used for sleeping purposes.*
90. *Fire apparatus access roads shall meet the requirements of CFC Section 503.1.1 and Newport Beach Fire Department Guideline C.01 and C.02. The fire apparatus access road shall extend to within 150 feet of all portions of the facility and all portions of the*

exterior walls of the first story of the buildings as measured by an approved route around the exterior of the building or facility.

91. *Dead-end fire apparatus access roads in excess of 150 feet in length shall be provided with an approved cul-de-sac for turning around the fire apparatus without backing up. Turnarounds shall meet the turning radius requirements identified in Newport Beach Fire Department Guideline C.01. The minimum cul-de-sac radius is 40 feet without parking. An alternative hammerhead turnaround is acceptable, designed to the dimensions as indicated in Newport Beach Fire Department Guideline C.01.*
92. *Fire access roadways must be constructed of a material that provides an all-weather driving surface and capable of supporting 72,000 pounds imposed load for fire apparatus and truck outrigger loads. Calculations stamped and signed by a Registered Professional Engineer shall certify that the proposed surface meets the criteria of an all-weather driving surface and is capable of withstanding the weight of 72,000 pounds (Newport Beach Fire Department Guideline C.01).*
93. *An approved water supply capable of supplying the required fire flow for fire protection shall be provided to premises upon which facilities and buildings are hereafter constructed or moved into or within the jurisdiction (CFC Section 507.1).*
94. *Fire flow shall be determined as per City Guideline B.01 (CFC 507.3).*
95. *Fire hydrants shall be provided and located within 400 feet of all portions of the building (CFC Section 507.5.1).*
96. *The Fire Department Connection (FDC) shall be on the address side of the building and located a minimum of 30 feet from beginning of the radius for the driveway approach; arranged so they are located immediately adjacent to the approved fire department access road so that hose lines can be readily and conveniently attached to the inlets without interference from nearby objects including building, fence, posts, or other fire department connections (Newport Beach Fire Department Guideline F.04).*
97. *The FDC shall be located no more than 100 feet from a public hydrant (Newport Beach Fire Department Guideline F.04).*
98. *Public Safety Radio Coverage will be required as per CFC Section 510.1 and City Guideline D.05.*
99. *Standby power shall be provided for emergency responder radio coverage systems as required in Section 510.4.2.3. The standby power supply shall be capable of operating the emergency responder radio coverage system for a duration of not less than 24 hours (CFC Section 604.2.3).*
100. *As per Amendment to CFC Section 604.8, provide and install electrical outlets (120 volt, duplex) connected to the emergency generator circuitry system when a generator is*

required by Section 604.2 of the CFC in every fire control room and in other areas as may be designated by the fire code official in the following locations:

- a. In the main exit corridor of each floor adjacent to each exit enclosure;*
- b. On every level in every stairwell;*
- c. In each elevator lobby;*
- d. In public assembly areas larger than 1,500 square feet;*
- e. In every fire control room; and*
- f. In such other areas as may be designated by the fire code official.*

- 101. *Gurney-sized accessible elevator will be required with elevator recall as per CFC Section 607 and CBC Section 3002.*
- 102. *A Type I hood shall be installed at or above all commercial cooking appliances and domestic cooking appliances used for commercial purposes that produce grease vapors (CFC Section 609.2).*
- 103. *Each required commercial kitchen exhaust hood and duct system required by Section 609 to have a Type I hood shall be protected with an approved automatic fire extinguishing system installed in accordance with this code (CFC Section 904.2.2).*
- 104. *Separation walls and horizontal separations must be provided as per California Building Code (CBC) Sections 420.2 and 420.3*
- 105. *Smoke barriers shall be provided in Group R-2.1 to subdivide every story used by persons receiving care, treatment or sleeping and to provide other stories with an occupant load of 50 or more persons, into no fewer than two smoke compartments. Such stories shall be divided into smoke compartments with an area of not more than 22,500 square feet and the distance of travel from any point in a smoke compartment to a smoke barrier door shall not exceed 200 feet. The smoke barrier shall be in accordance with CFC Section 709.*
- 106. *Refuse areas shall be provided within each smoke compartment as per California Building Code (CBC) Section 420.4.1.*
- 107. *Licensed 24-hour care facilities in a Group R-2.1, R-3.1 or R-4 occupancy shall comply with CBC Section 435 for special provisions for licensed 24-hour care facilities in a Group R-2.1, R3.1 or R-4 occupancy.*
- 108. *Carbon dioxide systems with more than 100 pounds of carbon dioxide used in beverage dispensing applications shall comply with CFC Sections 5307.2 through 5307.5.2 (CFC Section 5307.1 and City Guideline E.04).*
- 109. *Where carbon dioxide storage tanks, cylinders, piping and equipment are located indoors, rooms, or areas containing carbon dioxide storage tanks, cylinders, piping and fittings and other areas where a leak of carbon dioxide can collect shall be provided with either ventilation in accordance with Section 5307.5.1 or an emergency alarm system in accordance with Section 5307.5.2 (CFC Section 5307.5).*

110. *Underground Fire line shall be designed as per Newport Beach Fire Department Guideline F.04.*

PUBLIC WORKS DEPARTMENT

111. *All improvements shall be constructed as required by Ordinance and the Public Works Department.*
112. *Reconstruct the existing broken and/or otherwise damaged concrete sidewalk panels, curb, and gutter along the San Clemente Drive frontage.*
113. *Water and sewer demand studies are required.*
114. *All unused sewer laterals to be abandoned shall be capped at the property line. If the sewer lateral to be abandoned has an existing cleanout, abandonment shall include removal of the cleanout riser, the 4TT box and the wye. Sewer lateral shall then be capped where the wye used to be.*
115. *A new sewer cleanout shall be installed on the proposed sewer lateral per STD-406-L adjacent to the property line in the San Clemente Drive public right-of-way or within the sewer easement.*
116. *Prior to the issuance of building permits and in accordance with Chapter 13 of the City Municipal Code, 48-inch box street trees shall be planted along the San Clemente Drive frontage. Tree species (*Ficus Rubiganosa*) shall be planted per Council Policy G-6. Quantity and location of trees to be determined by Municipal Operations Division at plan check.*
117. *All improvements, including the proposed landscaping at the driveway shall comply with the City's sight distance requirement. See City Standard 110-L and Municipal Code Section 20.30.130.*
118. *In case of damage done to public improvements surrounding the development site by private construction, additional reconstruction within the public right-of-way could be required at the discretion of the Public Works Inspector.*
119. *All on-site drainage shall comply with the latest City Water Quality requirements.*
120. *The driveway approach shall be constructed per City Standards.*
121. *No permanent structures can be built within the limits of the proposed and existing easements.*
122. *All proposed street trees are to be located at least 10 feet away from all utility services and driveway approaches.*

123. *All dead-end drive aisles shall be accompanied by a dedicated turnaround area and 5-foot wide minimum hammerhead/drive aisle dedication.*
124. *No temporary or permanent structural encroachments will be permitted within the public right-of-way or city easement areas, including but not limited to, caissons, tie-backs, shoring, etc. No excavation will be permitted within the public right-of-way as part of the foundation shoring installation.*
125. *Due to proposed modification or removal of existing City water and sewer facilities, existing easements will need to be adjusted prior to recordation of the lot merger. Applicant is responsible for the preparation of all easement documents.*
126. *Applicant is responsible for all utility upgrades that are required to accommodate the Project, including off-site sewer upgrades.*
127. *Applicant is required to obtain approval from the adjacent property owner (888 San Clemente Drive) regarding the proposed street end configuration and is responsible to construct said improvements.*
128. Orange County Sanitation District fees shall be paid prior to the issuance of any building permits.
129. Prior to commencement of demolition and grading of the Project, the Applicant shall submit a construction management and delivery plan to be reviewed and approved by the Public Works Department. The plan shall include discussion of Project phasing; parking arrangements for both sites during construction; anticipated haul routes and construction mitigation. Upon approval of the plan, the Applicant shall be responsible for implementing and complying with the stipulations set forth in the approved plan.
130. Traffic control and truck route plans shall be reviewed and approved by the Public Works Department before their implementation. Large construction vehicles shall not be permitted to travel narrow streets as determined by the Public Works Department. Disruption caused by construction work along roadways and by movement of construction vehicles shall be minimized by proper use of traffic control equipment and flagman.
131. Prior to the issuance of building permits, the Lot Merger shall be recorded. The Lot Merger exhibits shall be submitted to the Public Works Department for final review and approval. All applicable fees shall be paid.
132. Prior to the final of building permits, a secondary access easement shall be recorded for the rear access drive across Villas Fashion Island (APN No. 442-261-22).
133. Prior to the issuance of building permits, easements for unused utilities shall be abandoned and recorded.

UTILITIES DEPARTMENT

134. *A Standard Stormwater Mitigation Plan (SSMP) is required for the private sewer system. The SSMP shall be recorded with the property similar to a WQMP.*