CITY OF NEWPORT BEACH
COMMUNITY DEVELOPMENT DEPARTMENT
PLANNING DIVISION ACTION REPORT

TO: CITY COUNCIL, CITY MANAGER AND PLANNING COMMISSION

FROM: Kimberly Brandt, Community Development Director
Brenda Wisneski, Deputy Community Development Director

SUBJECT: Report of actions taken by the Zoning Administrator, Hearing Officer, and/or Planning Division staff for the week ending November 4, 2016.

HEARING OFFICER ACTIONS
OCTOBER 17, 2016

Item 1: Abatement Period Extension (PA2016-133)
Site Address: 123 Marine Avenue

Action**:** Approved by Resolution No. HO2016-003 Council District 5

APPEAL PERIOD: An appeal may be filed with the Director of Community Development or City Clerk, as applicable, within fourteen (14) days following the date the action or decision was rendered unless a different period of time is specified by the Municipal Code (e.g., Title 19 allows ten (10) day appeal period for tentative parcel and tract maps, lot line adjustments, or lot mergers). For additional information on filing an appeal, contact the Planning Division at 949 644-3200.

RESOLUTION NO. HO2016-003

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH APPROVING WITH A CONDITION THE ABATEMENT EXTENSION PERIOD FOR THE PROPERTY LOCATED AT 123 MARINE AVENUE (PA2016-133)

WHEREAS, Chapter 20.38.100 of the Newport Beach Municipal Code (NBMC) requires nonconforming[1] nonresidential uses in residential zoning districts to be abated and terminated upon the expiration of time periods identified by the NBMC. Following the issuance of an Abatement Order, Chapter 20.38.100 provides that a property owner may request an extension of the abatement period in order to amortize the owner's investment in the property and avoid interference with use of the property; and

WHEREAS, an Abatement Order was issued on or about August 30, 2016 by Community Development Director Kimberly Brandt, AICP, which was confirmed without change after the Hearing of the matter on October 17, 2016.

WHEREAS, an application for an extension of the abatement period was filed by Dan Miller, operator of the Village Inn, on behalf of the property owner of 123 Marine Avenue, and legally described as Balboa Island Sec 4 Lot 15 Blk & Lot 16 Blk 1 Ex E 10 Ft Lots 15, requesting an extension of the abatement period specified by the NBMC Section 20.38.100. Applicant seeks an extension that will allow the continued operation of existing restaurant located at 123 and 127 Marine Avenue for ten years from the date of the Hearing Officer's decision. The residential property upon which the restaurant encroaches at 123 Marine Avenue is located in the Two-Unit Residential, Balboa Island (R-BI) Zoning District, where such nonresidential uses are not permitted; and

WHEREAS, a public hearing was held on October 17, 2016, in the Corona del Mar Conference Room (Bay E-1st Floor) at 100 Civic Center Drive, Newport Beach. A notice of time, place and purpose of the meeting was given in accordance with the NBMC and other applicable laws. Evidence, both written and oral, was presented and considered at this meeting. At the close of the Hearing a period of 10 days was extended for the submittal of additional materials, at which time the Record was final and closed; and

WHEREAS, the hearing was presided over by William B. Conners, a California licensed attorney experienced in municipal law and Hearing Officer for the City of Newport Beach; and

WHEREAS, the Hearing Officer finds and determines as follows:

1. PRELIMINARY LEGAL DETERMINATIONS.

[1] As used throughout, the term "nonconforming" refers to the status of *legal* nonconforming.

At the hearing on the application, a coalition of neighbors in the vicinity of the premises were represented by counsel, Robert L. Glushon, esq., who submitted several legal arguments in opposition to the application during the Hearing, and again on October 31, 2016, as permitted by the Hearing Officer at the close of the initial Hearing. Because most, if not all, of the arguments and contentions deal with threshold issues, these will be discussed at this point:

A. Legal nonconforming status must be supported by validly issued building permits.

The opposition challenges the authority of the City to declare that the encroachment area between 123 and 127 Marina Avenue is in fact a legal nonconforming structure, citing *City and County of San Francisco v. Board of Permit Appeals* (1989) 207 CA3d 1099, as authority.

That case dealt with an appeal by the City and County of San Francisco of its own Board of Permit Appeals, which in turn overturned a determination by the City/County Zoning Administrator. The City/County challenged the act of the Board as being in excess of its authority.

Unlike the situation at hand, the Court found the Board did not possess the legal authority to decide if the excess unit was nonconforming and thus legal to continue in existence. Under the City's ordinances, the Board would in effect be legalizing a unit that it did not have jurisdiction to create.

In our matter under consideration, NBMC §20.38.030A. states: "Director's Determination. The Director shall determine the nonconforming conditions of land uses and structures." Thus, unlike the situation in the *Board of Permit Appeals* case where it was determined that agency seeking to legitimatize the use clearly did not have authority to do so, herein the Community Development Director had express and sole jurisdiction to make that discretionary call.

Whether the Director's determination was supported by substantial evidence will be discussed below, but as an initial issue, it is clear the Director was empowered to exercise discretion in deciding the use was indeed nonconforming.

Holding: With respect to the issue of determining whether the use was nonconforming or not, it was the exclusive authority of the Director alone to decide this issue.

B. Was the building permit issued in 2001 "valid"?

Opponent claims that unless the permit issued by the City in 2001 was valid, the request for Abatement is moot under the NBMC's provisions. This issue was raised again in challenging whether the nonconforming use was ever lawful in the later submittal.

Absent extraordinary circumstances that might trigger compliance with the California Environmental Quality Act (CEQA), issuance of building permits are ministerial acts by the City. See *Friends of Westwood v. Los Angeles* (1987) 191 CA3d 259. A ministerial act refers to an action of a person, in this case building official, in a prescribed manner in obedience to a mandate of legal authority without regard to or the exercise of his or her own judgment upon the propriety of the act being done (Black's Legal Dictionary, Revised Fourth Edition, 1968). If the person seeking a building permit submitted an approved plan, demonstrated compliance with then current building codes, and paid a requisite fee, then the permit would have to be issued.

In the case at hand there is evidence that the closing of the breezeway between the restaurant and the adjacent residence may have been accomplished before issuance of a permit occurred. In municipal situations, it is not a rare occurrence to have a party commence construction without securing required permits, especially building permits, as it appears was the case here. Once discovered to be constructing the encroachment without required permits, it is clear a building permit was sought and secured by the owner at the time. It is irrelevant whether there was an attempt to avoid securing of a valid permit in the first instance since it was indeed requested and issued thereafter.

Even if the permit were incorrectly issued by the City in 2001, the time limit for challenging that act would have long ago expired. The general statute of limitations for lodging a dispute in that regard would have been 90 days after the incorrect action pursuant to CCP §1094.6.

There is independent evidence that the building permit was and remains valid: (1) it was signed off by building staff, an indication of compliance with zoning and building regulations, (2) it references a "date of validation" of July 2001, with that term referencing the time when the permit was deemed valid, and (3) the permit itself was issued and filed as an issued building permit. Whether or not the act of closing-in the breezeway complied with then current regulations regarding the crossing of property lines with a structure is not the issue now. The permit was focused on whether or not the construction was safe and met the uniform code requirements which are not now questioned. As long as they permit was officially issued and approved, it was valid.

Holding: The 2001 building permit issued by the City was and is lawful and valid.

C. Compliance with NBMC §20.16.020.B. is mandatory and should act as a bar herein.

Opposition counsel correctly references NBMC §20.16.020.B. as literally stating that securing of permits must occur before a proposed use is commenced, a project is constructed, or any activities associated with the use are commenced, established, or put into operation. Counsel suggests that the term "shall" renders the action of the City to be mandatory, and any project that proceeds without all necessary permits is invalid. Unfortunately, as a matter of law, even the use of "shall" does not, necessarily, render this provision to be mandatory.

Even where the term "shall" is present and even where a reference in the code explains that term as meaning "mandatory", unless there is a penalty associated with a failure to comply the law deems such reference directory in nature, not mandatory. See for instance *Cox v. California Highway Patrol* (1997) 51 CA4th 1580 where the court discusses the need to look to the consequences for an agency disregarding apparent mandatory statutory language. Essentially if there is no negative impact from disregarding the statutory language, it is directory in nature unless it is otherwise clear that it was intended to be required. Herein it remains unclear whether the City Council intended that any failure to secure a building permit in advance of commencing a use or action would bar any future attempt at obtaining such a permit. My belief is the clear intent of this local ordinance is to the contrary. It certainly is directory in that it attempts to establish that necessary permits be obtained in a timely manner as much as possible, but in those instances where compliance is required after the fact, such as with respect to building permits, it is simply not the case. If you commence construction without a building permit and are discovered, you have to pay a penalty fee and can then obtain the permit without any further impediment. The ordinance does not seem to intend that a late obtaining of such a building permit would forever prohibit actual use of that permit in constructing the improvement. That would be contrary to common sense.

In raising this issue, it becomes incumbent upon the opposition to establish that this provision is mandatory in all instances, and that once ignored, this provision bars all subsequent attempts at obtaining a valid permit. As noted above, I don't believe that was the intent of the Council, but in any case the issue of mandatory vs. directory was not raised by the opposition and is unpersuasive without further argument or citations.

Finally, there was no showing made that this code provision was in effect in 2001 when the building permit in question was issued. It is not up to the Hearing Officer or the City Staff to research this point, but up to the party seeking to argue that it controls in this instance to do so.

Lacking that showing, I believe it is up to the discretion of the Hearing Officer to determine the intent of this section and apply it to the facts of this matter.

Holding: It is found that compliance with NBMC §20.16.020.B. is not mandatory, but is in fact directory in nature. The literal interpretation suggested by Opposition would be inconsistent with the fact that uniform codes contain provisions for issuance after being discovered in violation of requirements to secure building permits prior commencing construction as long as such permits are subsequently requested and issued.

D. Opposition claims there is no evidence the building permit was in fact issued with respect to the restaurant.

It is curiously stated that "it is uncontested that there is no evidence whatsoever that a building permit was ever applied for or issued for an addition to the restaurant which encroaches onto 123 Marine." It is correct that the 2001 building permit does not literally seek an addition to the restaurant, but it does state the action was attaching the restaurant to the house next door, it references remodeling the rear entryway which was a clear reference to the restaurant, and most importantly the schematic diagram of the building area is labeled as part of the Village Inn. It is readily apparent that in fact the building permit was directly related to the restaurant at 127 Marine Avenue.

Contained in the staff report and entered into the record is Attachment B which sets forth the 2001 Building Permit No. B2001-1972. It may be that at the time the argument was crafted by Opposition they had not seen this document, but at all times that I have been in possession of the staff report this building permit has been plainly and clearly set forth and relates to the restaurant as an encroachment into adjacent property across the property line for some sort of restaurant use.

Holding: A valid building permit was issued by the City in 2001 in conjunction with the Village Inn restaurant encroachment into 123 Marine Avenue property.

E. The burden of proof is on the party asserting a right to nonconforming use

In a sense this is correct, but it is misplaced to assume it is the applicant for the extension of the Abatement Period that has the burden with respect to all issues. There are actually two issues at hand, with two incumbent separate burdens of proof involved.

The first issue is whether or not there is a nonconforming use established under the NBMC. As set forth in A. above, Newport Beach Municipal Code §20.38.030A. states: "Director's Determination. The Director shall determine the nonconforming conditions of land uses and structures." Thus the discretionary determination of whether or not there exists a nonconforming situation falls on the authority of the Community Development Director, not the applicant for the extension of time. As such, the burden of proof rests with the Director, not the applicant. It is found that the Director

has met that burden with substantial evidence, as demonstrated in her memorandum of August 30, 2016 which details the reasons and rationale for that determination. The Director reviewed this determination after the Hearing was closed at my request due to potentially new information that she may not have considered. After reflection, the Director declined to change or revise the earlier memorandum. Perhaps more importantly, the issue is moot.

Once it was found by the Director that there was a nonconforming situation under the NBMC, an opportunity to seek a review by hearing officer to seek an extension of time for required abatement of the nonconforming situation under the factual circumstances set forth in the NBMC arose. That is the purpose of the hearing that was held on October 17, 2016, at which the current arguments were raised. Unlike the issue regarding the propriety of finding nonconforming status, the issues regarding whether or not substantial evidence exists to support an extension in accord with reasons set forth in the Code does indeed rest with the applicant. Staff has the ability to recommend a preferred decision in the same manner as the rest of the public, and it is common for the applicant to concur in this recommendation as sound reasoning when it comports with their own point of view, but in the end it is up to the applicant to make the case. If the staff recommendation is well-reasoned, meeting this burden may be met by simply agreeing with that point of view.

It should be noted that the Director made the decision that the encroachment was nonconforming on or about August 30, 2016. NBMC §§20.64.020 and .030 establish a system for appealing from decisions of the Director, with a statute of limitations of 14 days. It appears that much of opposition's argument is directed at this initial determination, but there is no appeal of the Director's determination allowed at this time because the time to appeal that issue to the Planning Commission has long expired. At this time that issue is moot and the determination of the Director requires deference from the Hearing Officer.

Holding: The decision of the Director affirming nonconforming status to the encroachment onto the 123 Marine Avenue property stands and any appeal has been time barred since September 14, 2016.

Holding: The burden of showing whether or not the Hearing Officer should grant an extension of the Abatement Period falls on the applicant to demonstrate.

F. Findings for the extension are not met.

This section is offered by the Opponent by argument alone as opposed to legal citations and factual findings.

Holding: These arguments are not legal in nature and will be dealt with separately in the "findings and recommendations" sections below.

G. Categorical exemption pursuant to CEQA is not appropriate.

Opposition argues that staff's determination that the request for Abatement is categorically exempt under §15301 of CEQA Guidelines (existing facilities) is incorrect. It is argued that the exemption is facially wrong because based on prior arguments, the encroachment is illegal, and an illegal structure cannot be considered to be an existing structure.

Facial challenges are directed at the statute in question, and consideration is given only to the text of the measure itself, not its application to particular circumstances. See *Tobe v. City of Santa Ana* (1995) 9 C4th 1069. In general, there can be no set of circumstances that exist under which the statute would be valid.

If this is truly a facial challenge to the CEQA Guideline, it fails immediately. Herein, the categorical exemption applies to existing structures without any reference to whether that structure was created legally or not. To be facially incorrect there would have to be *no* existing structure on the site. Period. That is simply not the case during all relevant times herein.

This argument is presented without any controlling legal authority and seems to defy logic. The encroaching structure either is there or it is not. An illegal structure has the same potential environmental impacts as one that is legal. The broad purpose of CEQA is to provide local agencies sufficient information regarding potentially significant environmental impacts that might result from project approval so that the agency might eliminate or reduce the impacts through conditions of approval. There is nothing of a legal nature that I can find that differentiates between legal and illegal structures that in fact are already in existence. I find this argument to be sophisitic. If a structure exists, the impact on a project will be the same regardless of its status.

The Opposition correctly states that in some instances the categorical exemptions from CEQA themselves are subject to exceptions. In this instance staff has determined that there exists a Class 1 Categorical Exemption (existing structure) which would relieve the project from the application of a CEQA analysis. Opposition argues that an exception from the exemption is appropriate here because "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." citing CEQA Guidelines §15300.2(c).

The legal authority cited does exist, but it is inapposite herein because there are no facts to place the current situation into that exception. The "reasonable possibility" of a significant effect has to be established by plausible evidence. Opposition claims that

the fact the encroachment constitutes a commercial use on a residentially zoned property is enough to trigger the "unusual circumstances" exception, citing to *Berkeley Hillside Preservation v. Berkeley* (2015) 60 C4th 1086.

What is required to be shown pursuant to that case in order to invoke this exception to an exemption is basically two-fold: (1) unusual circumstances must be demonstrated, and (2) a significant environmental impact due to those unusual circumstances (*Berkeley Hillside Preservation v. Berkeley* (supra, 1097). The fair argument test is used to determine if there is a reasonable possibility of this significant impact.

There is no logical connection between the facts that the commercial establishment encroaches on residential property, therefore it automatically results in a significant environmental impact. There is no showing that any impact, such as the noise impact that currently may exist, would not emanate from the commercial restaurant if it were contained on its own property. Likewise, there is no showing herein that noise exists to a level that would constitute a significant environmental impact. There has been no measured level, no expert showing the noise is persistent or repetitive. More is required to meet the test that a fair argument can be made that a significant impact might result from leaving the buildings in the exact same relationship that they are currently arranged. There is no cause and effect relationship demonstrated here.

Holding: Based on the information that is contained in the record, I find no showing that unusual circumstances have given rise to potentially significant environmental impacts such that the Categorical Exemption relied upon was incorrect. (see *Citizens for Envt'l Responsibility v. St. of CA ex rel 14th Dist. Ag. Assn*. (2015) 242 CA4th 555.) The Categorical Exemption relied upon by staff was correctly applied.

Holding: At all times relevant herein, there has been a structure consisting of an enclosed former breezeway between two buildings, one a commercial restaurant and the other a residential premises.

H.[2] No evidence that non-conforming use was ever lawful.

Counsel restates his previous argument that there is no evidence the decision of the Director was lawful.

As noted above, this argument is time-barred and ignores the exclusive act of jurisdiction in this regard exercised by the Director on August 30, 2016. As such, it is

[2] Note that H. and I. are responses to the supplemental briefing provided by Opposition Counsel On October 31, 2016.

beyond the scope of the Hearing Officer to determine. That said, I do find that there is substantial evidence presented by the Director in her August 30, 2016, memorandum, which has not been changed or revised, where she finds that the encroachment area constitutes a nonconforming use, meaning a one that was lawfully established. She cites as evidence the historic long-time use of the commercial property in the encroachment area, the aerial photos and building permits that evidence the nature and use of the storage area that crossed the property line at that time. The notion of "substantial evidence" in land use decisions generally turns on whether there is some significant amount of evidence that supports the determination, and the decision is not entirely lacking in evidentiary support. See *Association for Protection, etc., Values v. City of Ukiah* (1991) 2 CA4th, 720; *Laurel Heights v. Regents of the University of California* (1993) 6 C4th 112. I disagree with counsel's conclusion that there is no evidence that the use was lawful in 2001. I understand that in presenting his opinion he weighs the evidence in a light most favorable to his client, but in this instance I simply disagree with the conclusion that there isn't "any evidence" that supports her decision.

Holding: For the reasons set forth above, I find this argument is moot due to a failure to appeal the Director's decision within 14 days of the August 30, 2016, determination.

Holding: Despite the fact that the Hearing Officer has no jurisdiction to act with respect to the Director's now final decision, I do find that there exists substantial evidence to support that decision as outlined in the August 30, 2016, decision and the evidence submitted in the Hearing regarding the 2001 Building Permit submittal and approval.

I. In what amounts to a restatement of a prior position, Opposition Counsel refers to their prior letter brief and once again argues that all of the findings to support the requested extension cannot be made due to a lack of supporting evidence.

It is argued that the *only* justification for the 10 year extension offered by the applicant is to "weigh options." That is simply not the case. In the written statement submitted by the applicant in support of their request they note that: (1) they were required to purchase the adjacent residential property with the restaurant "because of the restaurant encroachment", (2) evaluate different options to address the nonconformity, (3) to avoid economic hardship, (4) removal of the encroachment would be cost-prohibitive, (5) removal would be infeasible due to its use for food preparation and storage, (6) deprivation of this use would result in a taking of the property, and (7) loss of this use would significantly impact the viability of the restaurant use.

As further support for these positions is the fact that Planning Staff offered a staff recommendation to permit the 10 year extension. Despite any conclusions to the contrary, the job of Staff is to look at the pertinent facts for and against the application

and make a professional informed decision as to what is best for the community. The applicant concurred in the Staff Recommendation and basically linked to that analysis. Between the Staff's reasoning and that of the applicant, I believe there is ample justification for the extension, primarily from an economic point of view.

While not changing my opinion as stated above, after the Hearing was closed the Applicant, through their representative Carol McDermott, submitted additional information regarding the potential impacts if the extension did not issue. She stated that: (1) removal of the encroachment area would "significantly impact" the viability of the restaurant, (2) the food preparation and storage area in the encroachment is "necessary" for the on-going restaurant operation in order to achieve food sales goals, (3) the lack of prior complaints over the many years the restaurant has been in existence demonstrates a lack of adverse impacts, and (4) a 1 year extension would be insufficient to support any future renovations or redesign. This information essentially supports the prior applicant and staff findings.

I would note that my analysis did take into account the fact that numerous neighbors believe that the encroachment area creates too much noise. If this were allowed to continue, it could result in a hardship to neighbors, but a condition of approval has been added to require reduction of noise emanating from this site. If applicant concurs and reduces the noise, the other factors argue in favor of the 10 year extension.

2. FINDINGS AND RECOMMENDATIONS OF HEARING OFFICER

NBMC §20.38.100.4. sets forth the process for requesting an extension of the abatement period contained in the abatement order of the Community Development Director—herein one year. In general, it requires that an application for the extension be filed within 90 days prior to expiration of the abatement period—in this matter prior to May 31, 2017. It was obviously timely filed. The application must set forth the length of extension requested, and provide evidence in support of the findings that must be made to support an extension as set forth in NBMC §20.28.100.C.4.c. A hearing officer shall be utilized to make this determination.

The Hearing Officer herein is empowered to approve, conditionally approve, or deny the request for the extension pursuant to NBMC §20.28.100.4.b.iii. The Resolution of decision shall include: (1) findings of fact; (2) evidence presented of economic hardship arising from the abatement proceedings; (3) the nonconformity's impact on the community; (4) and such other factors that may affect the length of the abatement period required to avoid an unconstitutional taking.

Note that the Hearing Officer's authority extends only to determining the validity of the extension, not the underlying decision by the Community Development Director to issue an Order of Abatement.

In making this decision, the Hearing Officer shall consider: (1) the length of the abatement period in relation to the owner's investment in the use; (2) the length of time the use was operating prior to the date of nonconformity; (3) suitability of the structure for an alternate use; (4) harm to the public if the use remains beyond the abatement period; and (5) the cost and feasibility of relocating the use to another site.

Each of these issues is discussed separately below after the Findings of Fact applicable herein are set forth.

A. FINDINGS OF FACT: Following are the factual determinations deemed pertinent to this matter:

a. The current owners of the properties purchased them as two separate lots of record in early 2012.

b. The property located at 123 Marine Avenue is residentially zoned and used, with the exception of the encroachment which serves the restaurant, while the adjacent property at 127 Marine Avenue is zoned and used as a commercial restaurant.

c. At all times since at least 2001, and definitely at all times owned by the current property owners, the setback area between the two properties and formerly used as a covered breezeway has been enclosed and essentially joins a portion of the restaurant and part of a parking garage under a residential unit and an area in front of the garage structure. This area is being used for restaurant supporting activity, including cold storage, dry storage, and food preparation. This area is referred to herein as the encroachment.

d. The enclosure of the encroachment was constructed in accordance with a City Building Permit, No. B2001-1972, issued on or about July 30, 2001.

e. At all times during the period of ownership of the property by applicants, the nonconforming status of the encroachment has lawfully existed.

f. On or about August 30, 2016, the Community Development Director issued notice to the property owner that the encroachment was nonconforming due to an amendment of NBMC §19.04.035 in 2008 which prohibits the construction of structures across a property line. The Director found that the original enclosure of the encroachment was lawfully established, thus legally nonconforming at that time and subject to the abatement procedures detailed in Zoning Code §20.38.100 which

required discontinuance of the encroachment within one year unless an extension was granted. This decision was not appealed.

g. An application for an extension of the abatement period was filed in a timely manner[3] by Dan Miller, Operator of the restaurant, on behalf of the property owners, seeking a 10 year extension of time to abate the nonconforming situation.

h. The Hearing of the request for the extension of the abatement period was held on October 17, 2016, at City Hall. It was open to the public and afforded an opportunity for public testimony. The preliminary statements introducing this Resolution above (the WHEREAS statements) are found to be factually correct and incorporated herein by reference.

i. The record of this proceeding was opened at the Hearing, and includes any and all information contained in the staff report, any writings provided to the City before, during, or after the hearing until such time as the record is closed by the Hearing Officer, along with all oral testimony made during the hearing, along with a sign-in sheet for attendees. At the close of the Hearing, the Record remained open for receipt of additional materials requested by the Hearing Officer, along with any additional responses from the applicant, the opponents, or staff. Minutes of the meeting created by staff are also included in the Record. The Record officially closed on November 2, 2016. Additional information and photos were received from: (1) Robert Glushon, esq., (2) Jim Mosher, (3) Mike Sullivan, (4) planning staff (News Splash), and (5) Applicant and representative. All of this information has been considered and is added to the record.

j. During the Hearing testimony was received from several residents living near the encroachment, as well as written and oral testimony from an attorney representing a coalition of residents in the neighborhood, who all stated, among other things, that there was an emanation of annoying noise from the food preparation area within the encroachment. It was described as a hammering or banging noise which was loud enough to interfere with the quiet enjoyment of nearby properties.

k. Representatives of the restaurant present at the hearing did not deny the presence of this noise or explain why it was necessary at this location, although they did agree with the staff recommendation and responded to other issues raised by speakers.

l. The factual findings of the Hearing Officer in responding to preliminary legal issues raised are incorporated herein as if set forth separately. In the interest of avoiding redundancy they are not set forth herein again.

[3] Although the application is not dated, it is clear that it was submitted within 1 ½ months of the Director's determination prior to the hearing date of October 17, 2016 and is therefore timely.

B. MANDATORY ITEMS OF REVIEW AND FINDINGS.

Pursuant to NBMC §20.38.100.C.4.(c) the Hearing Officer is directed to consider the following: (a.) the length of the abatement period in relation to the owner's investment in the use; (b.) the length of time the use was operating prior to the date of nonconformity; (c.) suitability of the structure for an alternate use; (d.) harm to the public if the use remains beyond the abatement period; and (e.) the cost and feasibility of relocating the use to another site. These guidelines and resulting findings are set forth following:

a. The length of the appropriate abatement period considering the owner's investment in the use.

Finding: The extension of the abatement period for 10 years is allowed, but with one condition. The extension is financially supported, but if it continues in its present configuration it will continue to be a source of annoyance and nuisance to nearby residences due to excess noise emitted from the activity in the encroachment area. Therefore, the extension is conditioned on owner implementing approved procedures to reduce noise emanating from the encroachment area. Such procedures could include eliminating doors and windows from this area that are not required by building code provisions, addition of sound attenuation insulation in the south walls of the structure, and likewise insulating the ceiling might assist in accomplishing this goal, too. Installing heavier insulated doors where required with automatic closing devices may help as well. The condition expressly requires creation of an approved sound reduction plan that is submitted to Community Development Staff and demonstrates a positive reduction in noise from the food preparation area. The owner is required to work with the Community Development Staff as well as the Building Department to create a plan to abate the noise that exists according to others in the neighborhood, and implement that plan within 90 days of this decision. If not substantially implemented within that time period, the extension shall be reopened and the Hearing Officer authorized to review the recommendation for extension of the abatement period at that time.

Facts in Support of Finding: The applicant is requesting an abatement extension of ten years. The property was purchased in 2012 at which time it was already in violation of the NBMC and potentially subject to an abatement order. For whatever reason that order did not issue until August 30, 2016. The owner has already enjoyed four years of extended abatement status. There has been little evidence other than comments from the owner and his agents to the effect that it would be economically problematic if the extension were not granted. This ignores the fact that four years of extra advantage have already been received by the owner. It goes without saying that every owner of a business facing an abatement order that impacts square footage being

used would have a good argument that it would result in an economic hardship of some degree.

The staff recommendation indicates that it is their opinion that a one year abatement period would be insufficient to allow the property owner to provide improvements to the property that may be needed. It is staff's opinion that a hardship might result if the extension were not approved.

In 2012, when the property owner purchased the restaurant at 127 Marine Avenue, he was also required to acquire the property at 123 Marine Avenue. He suggests this requirement was due to the encroachment. Since the purchase the owner has implemented several interior improvements to the restaurant to update the older, outdated interior. Implicitly extending the abatement period would allow continued improvements to be made, especially those that might abate other nuisance conditions being imposed for the benefit of surrounding residents.

The one year abatement period specified by the Municipal Code is not of sufficient duration to allow the property owner to explore interior renovations to redesign the kitchen, utilize the upstairs area for restaurant use, or other options. Therefore, an extension of 10 years for the abatement of the encroachment is necessary to allow continued viable use of the applicant's property and to avoid the economic hardship that might result by the abatement of the encroachment which is a functional and important component of the restaurant operation. As long as continued use of this area can reduce the noise emanating from it, the length of abatement is commensurate with the owner's investment in the use and expectation of continued viability.

b. The length of time the use was operating prior to the date of nonconformity justifies the extension of the abatement period beyond the code specified one year.

Finding: It is apparent that since at least 1989 the area between the two structures on the adjacent parcels were joined by a roof structure. It is somewhat in dispute when the complete enclosure of this space occurred, but definitely in 2001 when permits memorialize the current configuration. The NBMC changed in 2010 and made the use of the encroachment area which extend over the property line one of nonconformity, although staff did not issue an abatement order until 2016. In either case the property has been utilized in its current relationship for more than 15 years and probably more than 25 years. At a minimum, the current encroachment has been in its present state for many years, enough that had if it been a significant nuisance it would have been brought to the City's attention long ago. The fact that it has existed for an extensive period of time demonstrates it is a suitable use in the neighborhood, and justifies continued use beyond the one year abatement period automatically granted by the NBMC.

Facts in Support of Finding: Historic aerial photos of the encroachment are inconclusive regarding whether the structure was fully enclosed as early as 1989 due to the fact such photos only show the roof of the structure. That said, it is clear that at all times since 1989 the area has been covered, creating a structure of sorts until it was fully enclosed and in its current configuration in 2001. Building permits were issued in 2001, at which time the City of Newport Beach had notice that the encroachment area was fully encapsulated and extended across the property line. The City of Newport Beach adopted an ordinance in 2010 which requires that nonconforming uses of structures crossing property lines such as this be discontinued within one year unless an extension is granted by the Hearing Officer.

While there was a significant factual dispute as to exactly when the breezeway between the two buildings was enclosed, there is no doubt that by at least the summer of 2001 the enclosure was complete and a building permit supporting the improvement issued. At all times since there is no substantial factual argument that it was used as anything but a storage and preparation area for the restaurant next door.

The current owners purchased the two lots containing the restaurant and adjacent residence, along with the enclosure, in 2012. Thus the owners have had only four years to make improvements, grow the business, and basically attempt to recoup their investment based on the current configuration. In terms of business development, this is not a long time. I find that the additional period of 10 years will give them a greater opportunity to recover their investment, along with any costs of noise attenuation required by this decision.

c. The existing structure is not suitable for conversion to an alternate use.

Finding: It is difficult to envision what alternate use would be appropriate in the existing encroachment area. Elimination could greatly impact the existing restaurant, and the current wall of the garage area makes residential expansion or use impractical. The current use is appropriate under the circumstances.

Facts in Support of Finding: The subject encroachment is located within the setback area of both the residential and commercial developments. A 3-foot setback is required for the residential parcel. It would not be appropriate for this area of the structure be used for an alternative use. The area serves the restaurant, so removal would simply create a very small buffer between the two buildings at a detriment to the commercial establishment.

d. No harm to the public will result if the nonresidential uses remain beyond the one year abatement period.

Finding: As set forth in the conditional grant of extension by the Hearing Officer above, the extension is appropriate, but to avoid any undue continuation of noise problems, which could be harmful to the public, the noise attenuation condition needs to be implemented.

Facts in Support of Finding: The subject encroachment has existed since at least 2001. It serves as storage, a food preparation area, and access for the restaurant from the alley. The property owner owns both affected properties and can remedy any future concerns to these parcels. There are mixed uses along Marine Avenue to the north of the property and a fire station across the street. It is anticipated that the continued use of the site will remain compatible with the surrounding land uses and will not create a negative impact to the adjacent residential uses or cause harm to the general public, assuming that the negative impacts from noise that exist at the current time are reduced. This condition is key to making this extension viable.

There was substantial repeat testimony at the hearing that the encroachment area is a source of noise. Several persons testified to this fact, and it was raised in the Hearing brief of Opposition counsel. I find there is substantial evidence to support a finding that there is a frequent and unwanted amount of noise escaping from the encroachment area. It would be unfair to surrounding residents to allow the encroachment to continue in its present condition, which according to the 2001 building permits consists of wood framing with drywall covering. There is no showing that any sound insulation was utilized at all, and in fact the consistent comments regarding noise emanating from the area where food was being processed underlies this fact.

The owner is really asking for what amounts to a 14 year extension given the 4 years that have expired since he could have legally been required to abate this use. It is inherently fair that if the owner is to experience a continued ability to utilize this area for his own profit, then the surrounding neighbors should be granted some relief from what is already some level of nuisance.

e. The cost and feasibility of relocating the uses to another site cannot be accommodated within the one-year abatement period.

Finding: If the encroachment area was to be removed or relocated, the only place on the restaurant property where this might occur is the upstairs residential area. The inherent cost of moving to this location, even if feasible at all, would be great. It is clear that the cost of moving to this location would be great, and certainly would not generate any additional income for the restaurant and definitely not something that would be recoverable in a one-year period.

Facts in Support of Finding: The encroachment area is used for food preparation and storage for the restaurant. Relocation of this component of the kitchen operations

would require a complete redesign of the kitchen, reduction in seating area, and change in access. Even if storage could be relocated to the upstairs area, that would require engineering, potential revisions to the area, and a disruption of the existing operation.

3. COMPLIANCE WITH CEQA.

As noted under preliminary legal issues above, this activity has been determined to be categorically exempt under the requirements of the California Environmental Quality Act under Class 1 (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment (Section 15061(b)(3) of the CEQA Guidelines.) It can be seen with high probability that there is little or no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA. Further, it is found that there is no applicable exception to the exemption such that would trigger further analysis and review under CEQA as analyzed in some detail above.

This issue has been analyzed above with respect to the challenge raised by Opposing counsel. Please refer to that analysis for further legal review. It is the opinion of the Hearing Officer that compliance with CEQA has occurred.

NOW THEREFORE, BE IT RESOLVED:

Section 1. Based on the record herein, the Hearing Officer of the City of Newport Beach hereby conditionally approves the requested Abatement Period Extension of ten years (PA2016-133), subject to the findings, condition, and considerations set forth above.

Section 2. The Abatement Period Extension for the property located at 123 Marine Avenue, and legally described as Balboa Island Sec 4 Lot 15 Blk & Lot 16 Blk 1 Ex E 10 Ft Lots 15, is hereby extended for ten years and will expire on November 3, 2026, at which time the encroachment area shall be demolished, unless an additional extension of the abatement period is granted, or an appropriate change in the Zoning District and the General Plan Land Use Designation are approved and adopted, or a change to the Zoning Regulations pertaining to nonconforming uses or their abatement are approved and adopted prior to that date. However, if the condition relating to noise abatement is not substantially implemented within 90 days, the extension shall return to the Hearing Officer for further review. It should be noted that this extension is *only* in full force and effect as long as there is compliance with the required condition.

Section 3. This action shall become final and effective fourteen (14) days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk

in accordance with the provisions of Title 20, Planning and Zoning, of the Newport Beach Municipal Code, or unless there is a failure to comply with the condition attached to this approval.

PASSED, APPROVED, AND ADOPTED THIS 2nd DAY OF NOVEMBER, 2016.

_/s/_____
William B. Conners
Hearing Officer for the City of Newport Beach