MINUTE ITEM

This Calendar Item No. C29 was approved as Minute Item No. 29 by the California State Lands Commission by a vote of 3 to — at its 2-17-05 meeting.

CALENDAR ITEM
C29

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02/17/05
G09-02.6
C. Fossum
C. Connor
J. Lucchesi

REVIEW OF THE CITY OF NEWPORT BEACH PROPOSED COMMON AREA LEASE INVOLVING LEGISLATIVELY GRANTED FILLED TIDE AND SUBMERGED LANDS LOCATED IN BEACON BAY, CITY OF NEWPORT BEACH, ORANGE COUNTY

GRANTEE

City of Newport Beach
3300 Newport Boulevard
Newport Beach, CA 92658-8915

BACKGROUND

The area known as Beacon Bay is owned in part by the City of Newport Beach in its capacity as a municipality and in part as trustee of the State over filled tide and submerged lands granted to the City pursuant to Chapter 74, Statutes of 1978, as amended. Chapter 74 is a successor statute to the original 1919 grant of the area from the Legislature. Beacon Bay was filled in or about 1927 and leased by the City in 1938 and divided into individual residential lots. The residential lots involve filled tide and submerged lands, which constitute approximately 2.8 acres. The area also contains streets, walkways, beaches, common landscaped areas and tennis courts (known as the Common Area). In 1950, the City of Newport Beach entered into a master lease of Beacon Bay, including the Common Area, to an individual who subsequently subleased individual lots to individual homeowners. When it was determined in the 1970s that portions of Beacon Bay had been constructed on the filled tide and submerged lands the Legislature enacted Chapter 74 to resolve the contravention of the trust use restrictions on the property. Chapter 74 provided for acquisition of alternative property by the City to provide a public benefit.

In 1981, prior to the expiration of the original lease in 1987, the City negotiated to lease the individual lots to individual homeowners and to lease the Common Area to the Beacon Bay Community Association, comprised of the individual homeowners within Beacon Bay. Pursuant to Chapter 74, Statutes of 1978, the State Lands Commission (CSLC or the Commission), by its adoption of Minute

Item #27 at its meeting of May 28, 1981, approved the consideration and form of the leases to allow the City of Newport Beach to lease the filled tide and submerged lands in Beacon Bay. Specifically, the Commission approved the City of Newport Beach's proposed lease agreements with the individual homeowners for the residential parcels (Residential leases), and with the Beacon Bay Community Association for the Common Area (Common Area lease), as shown on Exhibit A.

Following a vote of the citizens of the City of Newport Beach in 1991, the City entered into negotiations with the homeowners to terminate the 25-year leases and enter into new 50-year leases for the residential lots and the Commission, by its adoption of Minute Item #42 at its meeting of May 26, 1994, approved the form of lease and range of consideration for the Residential leases. The Common Area lease was not terminated and remains in effect, but is set to expire next year.

CURRENT STATUS

As the existing Common Area lease is to expire on July 1, 2006, the City has renegotiated and approved a new Common Area lease. The new Common Area lease term will coincide with the 1994 Residential leases, which are to expire on July 1, 2044. CSLC staff has reviewed the form and range of consideration of this new Common Area lease for compliance with Chapter 74, Statutes of 1978, as amended, the Public Trust Doctrine, and other relevant statutes, rules and regulations. After discussions with Commission staff regarding the proposed new lease, provisions for enhanced public parking, public beach recreation and beach access signage within the Common Area were incorporated into the lease. The lease also requires that the Beacon Bay Community Association provide maintenance of the Common Area, including the public parking, public access, signage and public recreation areas.

It is the opinion of staff, that with the incorporation of the suggested changes, as described above, the actions taken by the City, as trustee for the statewide public, are based upon reasonable administrative and business judgments and the Common Area lease is comprehensive, equitable and adequately protect the public interest. Staff, therefore, recommends approval of the Common Area lease between the City of Newport Beach and the Beacon Bay Community Association.

OTHER PERTINENT INFORMATION

1. On February 8, 2005, the city of Newport Beach considered the subject lease amendment. The city's staff report substantiating this consideration is on file in the Sacramento office of the California State Lands Commission. Commission staff therefore recommends concurrence with the city of Newport Beach's determination that the proposed activities are exempt from the requirements of the CEQA under the general rule that the CEQA applies only to projects that have the potential for causing significant effect on the environment. The staff believes, based on the information available to it, that there is no possibility that this project may have a significant effect on the environment.

   Authority: Title 14, California Code of Regulations, section 15061 (b)(3).

EXHIBITS

A. Location/Site Map
B. City of Newport Beach Staff Report

RECOMMENDED ACTION

IT IS RECOMMENDED THAT THE COMMISSION:

CEQA FINDING:

CONCUR WITH THE CITY OF NEWPORT BEACH'S DETERMINATION THAT THE PROPOSED ACTIVITIES ARE EXEMPT FROM THE REQUIREMENTS OF THE CEQA PURSUANT TO TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15061, BECAUSE THERE IS NO POSSIBILITY THAT THE ACTIVITY MAY HAVE A SIGNIFICANT EFFECTON THE ENVIRONMENT; TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15061 (b)(3).

AUTHORIZATION:

1. FIND THAT IN ACCORDANCE WITH CHAPTER 74, STATUTES OF 1978, THE CITY OF NEWPORT BEACH MAY ENTER INTO LEASES OF CERTAIN DESCRIBED FILLED AND RECLAIMED TIDE AND SUBMERGED LANDS FOR A PERIOD NOT TO EXCEED 50 YEARS.

2. APPROVE THE FORM OF LEASE AND THE RANGE OF CONSIDERATION FOR THE COMMON AREA LEASE BETWEEN THE CITY OF NEWPORT BEACH AND THE BEACON BAY COMMUNITY ASSOCIATION.

NO SCALE

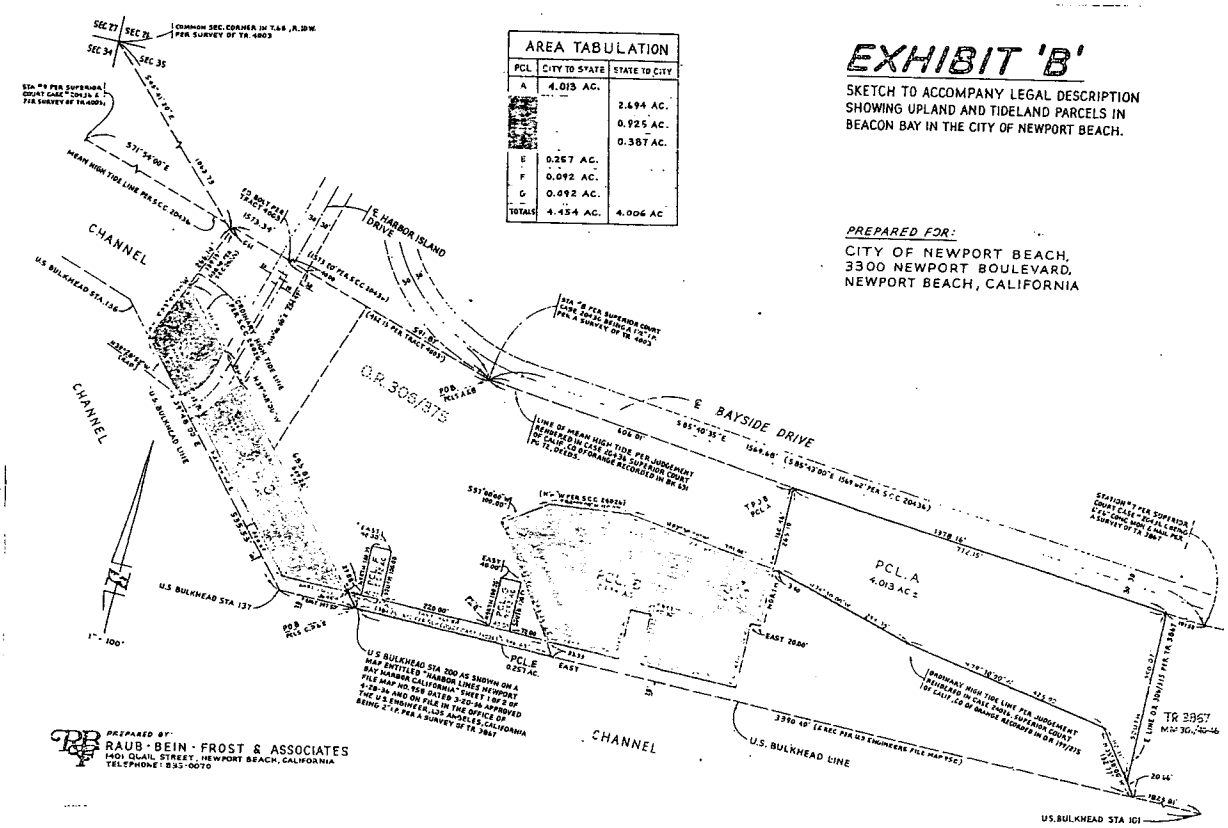

Exhibit A
Location and Site Map

LOCATION AND SITE MAP
G09-02.6
Review of Common Area Lease
Beacon Bay
County of Orange

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This Exhibit is solely for purpose of generally defining the project area, is based on unverified information provided by lessee or other parties, and is not intended to be, nor shall it be construed as, a waiver or limitation of any state interest the subject or any other property.

J.L. 02/17/05

CALENDAR PAGE MINUTE PAGE

CITY OF NEWPORT BEACH
CITY COUNCIL SUPPLEMENTAL STAFF REPORT

Agenda Item No.3
(February 8, 2005)

TO: HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

FROM: Robert Burnham, Contract Attorney
rburnham@city.newport-beach.ca.us

SUBJECT: Lease Agreement for Management of Beacon Bay Common Areas with Beacon Bay Community Association

ISSUE:

Should the City Council approve a new Lease Agreement with the Beacon Bay Community Association to allow the Community Association to continue management and maintenance of the common areas within the Beacon Bay Community?

RECOMMENDATION:

Approve the revised Lease Agreement.

DISCUSSION:

Subsequent to preparation of the staff report for this item, the City received suggested changes to the proposed lease from State Lands Commission staff. This office has, after discussing the suggested changes with State Lands Commission staff and legal counsel for the Beacon Bay Community Association, prepared a revised lease (Exhibit A). The revised lease reflects, in underlined text, proposed changes to the lease that was transmitted to the City Council on February 2, 2005. We have been advised that the proposed changes in the revised lease are acceptable to the Beacon Bay Community Association and State Lands Commission staff. This office recommends approval of the revised lease that accompanies this memo.

Environmental Review: None

Prepared and Submitted by:

Robert Burnham, Contract Attorney

Attachments: Exhibit A - Lease Agreement

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LEASE AGREEMENT

Beacon Bay Common Areas
(Beacon Bay Community Association)

THIS LEASE is made and entered into as of the ___ day of February, 2005, by and between the **CITY OF NEWPORT BEACH**, a chartered municipal corporation ("City") or ("Lessor"), and **BEACON BAY COMMUNITY ASSOCIATION**, a California nonprofit corporation ("Lessee").

RECITALS

A. The City of Newport Beach, by virtue of a 1978 legislative grant found in Chapter 74 of the Statutes of 1978 (the "Beacon Bay Bill"), holds the right, title and interest to certain filled and unfilled tide and submerged lands in trust. The City also holds title to certain ~~and~~ uplands obtained in its municipal capacity in 1929. These areas are collectively and commonly known as Beacon Bay and described in ***Exhibit A*** attached hereto and incorporated herein by this reference ("Beacon Bay").

B. The Beacon Bay Bill exempts the "Westerly Portion" of the filled tidelands from the public trust and specifically authorizes the lease of the property for residential purposes subject to certain statutory conditions.

C. Portions of Beacon Bay, including portions of the "Westerly Portion" thereof, has been divided into individual residential lots. Within Beacon Bay are also certain streets, walkways, beaches, common landscaped areas and tennis courts, identified as Lots A through J and Lot 62 described in ***Exhibit B*** attached hereto and incorporated by reference and as shown on the ***Exhibit C***, attached hereto and incorporated herein by this reference (the "Common Area").

D. On January 9, 1950, Lessor first entered into a master lease of Beacon Bay, including the Common Area, to an individual who thereafter subleased individual lots to individual homeowners. This original lease expired on December 31, 1987. On January 1, 1988, City leased the individual lots in Beacon Bay to individual homeowners and leased the Common Area to Lessee, a community association comprised of the foregoing individual homeowners within Beacon Bay (the "Existing Common Area Lease"). The leases of individual lots to individual homeowners were amended, restated and extended on various dates, each to expire on July 1, 2044 (the "Residential Leases"). The Existing Common Area Lease will expire on July 1, 2006.

E. On November 3, 1987, a majority of electors of the City approved a measure that authorized the City Council to enter into new leases of the residential lots in Beacon Bay for not to exceed fifty (50) years.

F. On November 3, 1992, a majority of electors of the City approved Measure M that authorized the City Council to lease tidelands and waterfront property consistent with the provisions of state law.

G. In 1994 Lessor determined that maintaining the residential character of Beacon Bay was in the best interests of the citizens of Newport Beach and State of California, and agreed to a lease for the residential lots until July 1, 2044. As with the 1988 leases, the form of those leases and range of consideration were approved by the California State Lands Commission, pursuant to Chapter 74, Statutes of 1978.

H. Lessor has further determined it is in the best interests and welfare of the citizens of Newport Beach and State of California:

1. that the Common Area portions of Beacon Bay which have been leased for common area purposes appurtenant to the Beacon Bay residential community continue in that character;

2. to lease the Common Area to Lessee under the terms, conditions and for the consideration as hereinafter set forth; and

3. for Lessee to continue to use the same high standards of care and maintenance of the Common Area that Lessee used on the Effective Date of this Lease to serve the Beacon Bay

CALENDAR PAGE
MINUTE PAGE

residents and visitors.

I. The State Lands Commission has reviewed and approved the form of this Lease and range of consideration for compliance with the provisions of relevant statutes, rules and regulations, including, without limitation, the Beacon Bay Bill.

J. Lessor has determined that this Lease is consistent with provisions of the Beacon Bay Bill, the Charter, General Plan and Zoning Ordinance of the City of Newport Beach, and all other applicable state and local laws.

K. The Parties intend, through this Lease, to confirm Lessor's right to use any properties held in trust by the Lessor (including tidelands) for projects that are intended to enhance the water quality or ecosystem of Newport Bay.

NOW THEREFORE, in consideration of the foregoing recitals, which are hereby incorporated into and made part of the terms and conditions of this Lease, and the covenants in this lease, the Lessor and Lessee agree as follows:

1. DESCRIPTION OF LEASED PREMISES.

Lessor hereby leases to Lessee, and Lessee hereby accepts this Lease of, the Common Area, subject to the terms, covenants and conditions in this Lease.

2. TERM.

The term of this Lease is for a period commencing on the date first above written, and shall expire on July 1, 2044, the date on which the Residential Leases expire, unless earlier terminated as provided in this Lease. The Existing Common Area Lease shall terminate at the time and date this Lease has been approved by formal action of the governing bodies of Lessor and Lessee and fully executed by both parties and approved as to form and the range of consideration by the California State Lands Commission.

3. CONSIDERATION.

The consideration for this Lease is the execution and performance of the Residential Leases and the maintenance and upkeep of the Common Area as provided in this Agreement, which would otherwise~~,~~ be an expense borne by Lessor, and the benefit to the public by access to and use of certain portions of the Common Area.

A. Lessee shall maintain the Common Area at substantially the same high standard of care and maintenance that Lessee used as of the Execution Date of this Lease.

B. That portion of the Common Area lying southerly of the waterfront lots lying between "Beacon Bay" (formerly Rudder Road) and the waters of Newport Bay, including ~~consisting of~~ the wet and dry-sand portions of the beach, ~~(but excluding any upland portion of the Common Area) is public tidelands and~~ shall be held open and maintained by Lessee for use by members of the public.

C. The other portions of the Common Area designated as uplands may be held for the exclusive use and benefit of Lessee and its constituent homeowner members; provided that nothing herein shall be construed to limit public access to or passage over the walkways leading from "Beacon Bay" (formerly Rudder Road) to the beach nor daytime public parking on the streets designated "Beacon Bay" and "Cutter Road" within Beacon Bay.

D. Lessee shall install and maintain public access signage at the entrance to Beacon Bay from Harbor Island Road and at each of the walkways leading from "Beacon Bay" to the beach. The size and exact location of the signs shall be determined by Lessor.

4. SALE, ASSIGNMENT, SUBLEASE.

Lessee shall not assign, transfer, sublease, mortgage, hypothecate or give any grant of control of

this Lease or the Common Area, or any part hereof, either voluntarily or involuntarily, unless first approved by the City Council.

5. ENCUMBRANCES.

Lessee shall have the right to assign this Lease as security for financing of Common Area improvements, such as street repairs, undergrounding of utility lines, construction of homeowners' association improvements, and similar capital expenditures. Lessee may adopt and record Covenants, Conditions and Restrictions (CC&R's) against this Lease as authorized in California Civil Code section 1350 et seq. provided Lessee obtains prior written approval of the CC&R's by Lessor's City Attorney. Preparation, management and enforcement of the CC&R's shall be sole responsibility of Lessee. Otherwise, Lessee shall have no right to encumber this Lease or the Common Area for any purpose whatsoever and any attempt by Lessee to so encumber this Lease or the Common Area shall result in the immediate termination hereof.

6. USE.

A. The Common Area shall be used solely and exclusively for vehicular ingress and egress and parking, boat storage and launching, pedestrian walkway purposes, recreational uses for Beacon Bay residents, except as to the beach areas reserved for public beach recreation, and the property designated as Lot "62" shall be used exclusively for tennis court and park purposes and for construction and maintenance of an office and meeting facilities for Lessee in connection with the maintenance and operation of the homeowners' association in Beacon Bay. The use by Lessee of any portion of the Common Area for any purpose not expressly permitted or required by this Lease is an express violation of this Lease and may be cause for termination, at the sole discretion of Lessor.

B. Lessee shall use and manage the Common Area in a manner that does not violate State or Federal laws, including any law that prohibits discrimination.

C. The property designated as beach property on Exhibit C shall be used exclusively for public beach purposes. Lessee shall maintain the Common Area in a manner that allows for open public access to the beach. Lessee may impose parking limitations on use of streets within the Common Area only for pedestrian, fire safety and/or traffic circulation purposes upon prior written approval of the City Traffic Engineer. Lessee shall not post or position any signs or structures in a manner that will discourage or prohibit public access. Lessor retains the right to use the beach portion of the Common Area for any project designed and intended to enhance the water quality or ecosystem of Newport Bay subject to the ordinances and policies adopted by Lessor in its governmental capacity and as ~~grantee~~ trustee of the State of California.

7. TAXES AND UTILITIES.

Lessee acknowledges that this Lease may give rise to a possessory interest tax obligation. Lessee shall pay, before delinquent, all utility charges and any general and special taxes, assessments or other governmental charges, if any, which may be levied on the Common Area, including any improvements located thereon or associated therewith, or any possessory interests therein arising out of or based upon the leasehold interest throughout the term hereof. Satisfactory evidence of such payment shall be made available to Lessor upon demand. Any lien for unpaid utilities, taxes, assessments or charges shall not attach the leasehold interest but only to the improvements thereon.

8. MAINTENANCE AND REPAIR OF COMMON AREA.

Lessee shall at all times during the term of this Lease and without any cost or expense to Lessor, keep and maintain the Common Area, including, without limitation, all structures, facilities, walks, curbs, parkways, beach areas, public access signage, streets and other improvements, in good order and repair and in a clean, safe, sanitary and orderly condition. Lessee shall repair or reconstruct any improvements on the Common Area following any damage or destruction thereof, unless the improvements are being destroyed in conjunction with remodeling or reconstruction and Lessor has consented, in writing, to the damage or destruction. Lessee shall cause to be constructed, maintained

CALENDAR PAGE MINUTE PAGE

and repaired all utilities, pipes, walls, sewers, drains, and other improvements on the Common Area to the extent required by law or as necessary to maintain the improvement in good order and repair and safe and sanitary condition.

9. STRUCTURAL IMPROVEMENTS.

A. All structural improvements with a cost in excess of five thousand dollars ($5,000) (the "Capital Improvements") that are constructed during the term of this Lease become the property of Lessor upon expiration of the Lease.

B. Lessee shall be required to obtain, prior to commencing the construction of any Capital Improvement, all permits, licenses or approvals that may be required by Lessor in its governmental capacity.

C. Lessee shall, at all times, indemnify, defend and hold Lessor harmless from any and all claims, liens, damages or fees in any way related to any maintenance, construction, repair, alteration or installation of any structure, improvement, equipment or facilities on the Premises. Lessee's obligation extends to the costs of defending such claims, including reasonable attorney's fees. Lessee shall not suffer or permit to be enforced against all or any portion of the Premises, any lien or any claim for damage in any way related to any construction, repair, restoration, replacement, maintenance or improvement on the Premises. In the event any lien or stop notices imposed or recorded on the Premises as a result of the construction, repair or alteration of the facility by or on behalf of Lessee, Lessee shall pay or cause to be paid all such liens, claims or demands before any action is brought to enforce the same against the Premises. Lessee may, in good faith, contest the validity of such lien, claim or demand. In the event of any contest or litigation, Lessee shall, at its sole expense, defend itself and Lessor and shall pay and satisfy any adverse judgment that may be rendered prior to enforcement against Lessor or the Premises. Lessor may require Lessee to furnish a surety bond satisfactory to lessor in an amount equal to any contested lien, claim or demand.

D. Lessee shall give Lessor advance written notice of any construction on or improvement on the premises other than ordinary repairs and maintenance of existing improvements. Lessee shall coordinate the scheduling of any work with Lessor to minimize any inconvenience to the public.

10. MAINTENANCE OF IMPROVEMENTS.

A. Lessee to Maintain All Improvements: Lessee covenants and agrees that during the term of this Lease it will, at its own cost and expense, maintain the Premises in good order and repair and in clean, orderly, safe and sanitary condition. Lessee shall be responsible for the repair of any damage.

B. Lessor May Elect to Repair and Maintain at Expense of Lessee: If, in the judgment of the Lessor, the standards of maintenance and repair required by this Lease are not being maintained, Lessor may elect to correct any deficiency after written notice thereof to the Lessee and Lessee's failure to cure the default. Lessee shall pay to the Lessor on demand any and all sums expended by Lessor in correcting any such deficiency together with interest at the legal rate. If, in the judgment of the Lessor, the disrepair or lack of maintenance constitutes an emergency, the notice shall be a 24-hour notice to remedy; in all other cases is shall be a 5-day notice.

C. Lessor reserves the right by its authorized agents, employees or representatives to enter the Premises upon forty-eight (48) hours advance notice, to inspect the same or any part thereof at any time to attend to or protect the Lessor's interest under this Lease.

11. COMPLIANCE WITH LAWS.

Lessee shall make, or cause to be made, any additions, alterations, maintenance or repairs to any structure or improvement on the Common Area which may be required by this lease or by law, and Lessee shall otherwise observe and comply with, any law, statute, ordinance, plan, resolution or policy applicable to the Common Area. All maintenance, repairs, additions, and alterations to the

CALENDAR PAGE MINUTE PAGE

structure or improvements on the Common Area shall conform to all applicable laws, ordinances, regulations, plans, policies and resolutions and all work shall be performed with reasonable diligence, completed within a reasonable time, and performed at the sole cost and expense of Lessee.

12. "AS IS" CONDITION OF COMMON AREA.

Lessee expressly accepts the Common Area "as is" and acknowledges that Lessor has made no representations or warranties as to the suitability for any intended purpose or use of the Common Area or any construction or improvement thereon. Lessee shall conduct all tests necessary to determine the suitability of the Common Area for any proposed construction or improvement thereon, including, without limitation, the amount and extent of any fill, and related factors. Lessee expressly acknowledges that Lessor shall not be liable for any damage or loss resulting from any subsurface or soil condition in, on, or under the Common Area or adjacent property. Lessee expressly acknowledges that, while the legislature of the State of California has purportedly removed the public trust restrictions on use of the "Westerly Portion" of property pursuant to the Beacon Bay Bill, the Common Area may constitute filled tide and submerged lands, and Lessor has made no representation or warranty relative to the validity of the Beacon Bay Bill or the power of the legislature of the State of California to remove public trust restrictions on tidelands through legislation. Notwithstanding the foregoing, in the event of any challenge to the right and power of Lessor to lease the Common Area for the purposes provided in this Lease, Lessor agrees, at its sole cost and expense, to use all reasonable efforts to resist and defend against such challenge and to seek a ruling or judgment affirming and upholding the right and power of Lessor to lease the Common Area for the purposes provided in this Lease.

13. BUSINESS ACTIVITIES.

Lessee shall not grant any concession, license, permit or privilege for the conduct of any business or other operation for profit within the Common Area without the prior written approval of the City Manager.

14. INSURANCE.

In addition to Lessee's obligations pursuant to Section 10, Lessee shall provide and maintain, at its own expense, policies of liability insurance as follows:

A. All required policies shall be signed by a person authorized by that insurer to bind coverage on its behalf and must be filed with Lessor, prior to execution of this Lease. Current certification of coverage shall be provided throughout the term of this Lease. Except for workers compensation, all insurance policies shall include Lessor and its elected officials, officers, agents, representatives and employees as additional insureds.

B. All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance in the State of California, with an assigned policyholders' Rating of A (or higher) and Financial Size Category Class VII (or larger) in accordance with the latest edition of Bests Key Rating Guide: unless otherwise approved by the City's Risk Manager;

C. Lessee shall provide Worker's compensation insurance covering all employees of Lessee, per the laws of the State of California.

D. Lessee shall provide Commercial general liability insurance covering third party liability risks, including without limitation, contractual liability, in a minimum amount of $1 million combined single limit per occurrence for bodily injury, personal injury and property damage. If commercial general liability insurance or other form with a general aggregate is used, either the general aggregate shall apply separately to this Lease, or the general aggregate limit shall be twice the occurrence limit. Lessor reserves the right to reasonably increase the minimum coverage specified in this subsection once every five years should the City Manager of Lessor determine that then current coverages do not fully protect Lessor.

E. Lessee shall provide Fire and extended coverage for not less than ninety percent (90%) of the

CALENDAR PAGE
MINUTE PAGE

cost of replacement of all insurable improvements in the Common Area.

F. Except for worker's compensation, the policy or policies shall be endorsed to state that coverage shall not be canceled by either party, except after thirty (30) days' prior notice has been given in writing to Lessor. Lessee shall give Lessor prompt and timely notice of claim made or suit instituted arising out of Lessee's operation hereunder. Lessee shall also procure and maintain, at its own cost and expense, any additional kinds of insurance, which in its own judgment may be necessary for its proper protection and prosecution of the work.

G. Lessee agrees that, in the event of loss due to any of the perils for which it has agreed to provide comprehensive general liability insurance, Lessee shall look solely to its insurance for recovery. Lessee hereby grants to Lessor, on behalf of any insurer providing comprehensive general and automotive liability insurance to either Lessee or Lessor with respect to the services of Lessee herein, a waiver of any right of subrogation which any such insurer of said Lessee may acquire against Lessor by virtue of the payment of any loss under such insurance.

15. HOLD HARMLESS.

A. Lessee shall indemnify, defend, save and hold harmless Lessor, its City Council, boards and commissions, officers and employees from and against any and all loss, damages, liability, claims, allegations of liability, suits, costs and expenses for damages of any nature whatsoever, including, but not limited to, bodily injury, death, personal injury, property damages, or any other claims arising from any and all negligent acts or omissions of Lessee, its employees, agents or subcontractors in the use and maintenance of the Common Area pursuant to this Lease.

B. Lessor shall indemnify, defend, save and hold harmless Lessee, its officers and employees, from and against any and all loss, damages, liability, claims, allegations of liability, suits, costs and expenses for damages of any nature whatsoever, including, but not limited to, bodily injury, death, personal injury, property damages, or any other claims arising from any and all negligent acts or omissions of Lessor, its employees, agents or subcontractors arising from Lessor's performance under this Lease.

16. RESTORATION.

If during the term hereof any building or improvement erected by Lessee on the Common Area, or any part thereof, shall be damaged or destroyed by fire or other casualty, Lessee shall, at its cost and expense, repair or restore the same according to the original plans thereof, or, at Lessee's option, Lessee may elect to replace such building or improvement, provided that if Lessee so elects, Lessee shall obtain the approval of Lessor of the proposed architectural plans. Any such work of repair, restoration or replacement shall be commenced within one hundred and eighty (180) days after the damage or loss occurs and shall be completed with due diligence, but not longer than one (1) year after such work is commenced unless delay is caused by events beyond the control of Lessee. If Lessee elects not to repair or rebuild the improvements, it may terminate this Lease by giving Lessor written notice of termination and by assigning all insurance proceeds relating to the premises to Lessor. If Lessee elects to terminate the Lease it shall be obligated to completely clear and restore the building site to its original condition.

17. DEFAULT AND TERMINATION OF LEASE.

A. Default: Time and each of the terms, covenants and conditions hereof are expressly made the essence of this Lease. Lessor may ~~subject to the provisions of Subsection11(B),~~ terminate this Lease and seek other appropriate remedies if Lessee fails to remedy any default related to the payment of money within thirty (30) days after service of a written notice from Lessor to do so, or fails to commence the cure of any other default within thirty (30) days and diligently prosecute the same to completion. Lessee may also terminate this Lease if Lessee abandons or vacates the Premises. The following are examples of material defaults that would warrant termination of this Lease in the event of a failure to cure as specified above: ~~Lessee shall fail to comply with any of the terms, covenants, or conditions of this Lease, including;, but not~~

~~limited to the following, Lessor may terminate this~~:

1. Failure of Lessee to keep current on all utility payments for the Premises;
2. Failure of Lessee to keep the Common Area in state of repair and operation dictated by this lease ("Consideration") and to keep it in a neat, clean, orderly, safe and sanitary condition;
3. Failure to provide certificates of insurance evidencing insurance coverage as required in paragraph 12 of this Lease;

B. Surrender of Possession upon Termination: Lessee shall, upon the expiration or termination of this Lease, peaceably surrender the Premises with all buildings and improvements, in the same condition as when received or constructed, excepting reasonable use and wear thereof, and damage by fire, act of God, or by the elements. The provisions of this Subsection shall be effective upon expiration or termination of this Lease regardless of whether Lessee holds over under the provisions of Subsection E.

C. Remedies Cumulative: The rights, powers, elections and remedies of Lessor are cumulative and no one of them shall be considered exclusive of the other or exclusive of any rights or remedies allowed by law. Lessor's exercise of one or more rights, powers, elections or remedies shall not impair or be deemed a waiver of Lessor's right to exercise any other.

D. No Waiver: No failure of Lessor to exercise any right or power arising from any omission, neglect or default of the Lessee shall impair any such right: or power or shall be construed as a waiver.

E. Holding Over: If the Lessee remains in possession after the expiration of this Lease for any cause, Lessee's possession shall be deemed a tenancy from month-to-month upon the same terms, conditions, and provisions of this Lease.

18. EMINENT DOMAIN.

In the event the whole or part of the Premises is condemned by a public entity in the lawful exercise of the power or eminent domain, this Lease shall cease as to the part condemned upon the date possession of that part is taken by the public entity. If only a part is condemned and the taking of does not substantially impair the capacity of the remainder to be used for the purposes required in this Lease, Lessee shall continue to be bound by the terms, covenants and conditions of this Lease. If only a part is condemned and the taking of that part substantially impairs the capacity of the remainder to be used for the purposes required in this Lease, Lessee shall have the election of: (a) terminating this Lease and being absolved of obligations that have not accrued at the date possession is taken by the public entity; or (b) continuing to occupy the remainder of the Premises and to be bound by this Lease. Lessee shall give notice in writing of his election hereunder, within thirty (30) days of the date possession of the part is taken by the public entity. Lessor shall be entitled to receive and shall receive all compensation for the condemnation of all or any portion of the remainder interest in the property by exercise of eminent domain. Lessee shall be entitled to receive and shall receive all compensation for the condemnation of ~~all or any portion of the improvements constructed by~~its leasehold interest ~~Lessee on~~in the Premises by the exercise of eminent domain.

19. SURRENDER OF POSSESSION UPON EXPIRATION OR TERMINATION.

Upon expiration or termination of this Lease, Lessee agrees to peaceably deliver possession of the Common Area to Lessor and unconditionally agrees to vacate the Common Area without contest, legal or otherwise. Improvements shall become the property of the Lessor upon expiration of this lease.

20. ATTORNEYS' FEES.

Should either Lessee or Lessor be required to employ counsel to enforce the terms, conditions and covenants of this Lease, the prevailing party shall recover all reasonable attorneys' fees incurred therein, whether or not court proceedings were commenced, and court costs, if any.

21. NOTICES.

It is mutually agreed that any notice or notices provided for in this Lease or by law, to be given or served by Lessee, may be given or served by mail, registered or certified, with postage prepaid, on the City of Newport Beach addressed to the City Manager or City Clerk, 3300 Newport Boulevard, Newport Beach, California 92663. Should Lessor be required to serve notice on Lessee, it may be served upon the President of the Association. Lessee shall be obligated during the term hereof to provide Lessor with current information as to the name, residence and business addresses, and residence and business phone numbers of the president of Lessee from time to time. Service of any notice, demand or communication by either party on the other shall be deemed complete at the expiration of 72 hours from and after the deposit in the United States mail, postage pre-paid, addressed as set forth above.

22. PARTIAL INVALIDITY.

If any part of this Lease is declared invalid for any reason, this ruling shall not affect the validity of the rest of this Lease. The other parts of the Lease shall remain in effect as if this Lease had been executed without the invalid part, provided, however, the parties shall immediately thereafter make all reasonable efforts to modify or amend this Lease, consistent with the aforesaid declaration, so as to fully implement and carry out the intent and purposes of the parties in entering into this Lease.

IN WITNESS WHEREOF, the parties have caused this Lease to be executed on the day and year first above written.

CITY OF NEWPORT BEACH

By _____
Mayor

ATTEST:

_____
LaVonne Harkless, City Clerk

APPROVED AS TO FORM:

_____
Robin Clauson,
City Attorney

BEACON BAY COMMUNITY ASSOCIATION

By _____
President

By _____
Vice President

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EXHIBIT "A"

LEGAL DESCRIPTION

A parcel of land situated in the projected Northwest quarter of Section 35, Township 6 South, Range 10 West, S.B.B. & M., Orange County, California, more particularly described as follows, to-wit:

Beginning at the U.S. Bulkhead Station No. 200, as shown upon a map entitled "Harbor Lines, Newport Bay Harbor, California", approved May 2nd, 1936, by the Secretary of War and on file in the office of the United States District Engineer at Los Angles, California; running thence West along the U.S. Bulkhead line 147.50 feet to U.S. Station No. 137; thence North 39° 48' West along said Bulkhead line -535.53 feet; thence North 23° 57' 30" East 126.34 feet to an angle point in the ordinary high tide of the Pacific Ocean in Newport Bay, as described in Court Case No. 24026 of the Superior Court of the State of California, in and for the County of Orange; thence South 39° 48' East along said ordinary high tide line 334.47 feet to the most Westerly corner of that certain parcel of land conveyed to the City of Newport Beach by the Irvine Company, as described in deed recorded September 25th, 1929, in Book 306, page 375 of Official Records of Orange County, California; thence North 23° 57' 30" East along the Northwesterly line of said parcel of land 317.57 feet; thence South 71° 54' East along the Northerly line of said parcel of land 290.24; then South 85° 43' East along the Northerly line of said parcel of land, said Northerly line being the Southerly line of Bayside Drive, 606.01 feet; thence South 424.71 feet to a point in the U.S. Govt. Bulkhead line between U.S. Stations Nos. 101 and 200; thence West along said Bulkhead line 784.25 feet to the point of beginning containing approximately twelve (12) acres.

EXHIBIT "B"

COMMON AREA
LEGAL DESCRIPTION

Lots 62 and A through J as shown on that certain record of Survey filed in the Official Records of the County of Orange, State of California, as Instrument Number 5383 on February 28, 1939 covering a portion of the projected Northwest one-quarter (1/4) of section 35, Township 6 South, Range 10 West, S.B.B.M.

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EXHIBIT "C"

DEPICTION OF COMMON AREA LEASE

CITY OF NEWPORT BEACH
CITY COUNCIL STAFF REPORT

Agenda Item No. 3
(February 8, 2005)

TO: HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

FROM: Robin Clauson, City Attorney
rclauson@city.newport-beach.ca.us

SUBJECT: Lease Agreement for Management of Beacon Bay Common Areas with Beacon Bay Community Association

ISSUE:

Should the City Council approve a new Lease Agreement with the Beacon Bay Community Association to allow the Community Association to continue management and maintenance of the common areas within the Beacon Bay Community?

RECOMMENDATION:

Approve the attached Lease Agreement.

DISCUSSION:

Beacon Bay is a residential community authorized to be located on City tidelands pursuant to Legislation enacted in 1978, known as the Beacon Bay Bill. In 1994 the City Council approved a 50 year lease for the residential lots that will expire on July 1, 2044. The Beacon Bay Community Association has maintained the common areas under leases with the City since 1950. The current common area lease dated January 1, 1988 will expire on July 1, 2006.

The Beacon Bay Community Association has requested a new lease to manage the common areas that will run concurrently with the residential leases. The attached Lease Agreement will expire on July 1, 2044, and will provide for the Community Association to continue the care and maintenance of the common areas with the same high degree of care used in the past. The beaches and street access to the beaches will be required to be maintained accessible to the public at all times.

If the Community Association did not maintain the common areas, the responsibility would fall to the City to maintain the streets, beaches, beach access and landscaping in the common areas. These costs of maintenance and the rents paid on the residential leases have been determined to provide sufficient consideration for the lease.

Environmental Review: None

Prepared and Submitted by:

_____
Robin Clauson, City Attorney
Attachments: Lease Agreement

LEASE AGREEMENT

Beacon Bay Common Areas
(Beacon Bay Community Association)

THIS LEASE made and entered into as of the ___ day of February, 2005, by and between the **CITY OF NEWPORT BEACH**, a chartered municipal corporation ("City") or ("Lessor"), and **BEACON BAY**

CALENDAR PAGE MINUTE PAGE

COMMUNITY ASSOCIATION, a California nonprofit corporation ("Lessee").

RECITALS

A. The City of Newport Beach, by virtue of a 1978 legislative grant found in Chapter 74 of the Statutes of 1978 (the "Beacon Bay Bill"), holds the right, title and interest to certain tidelands and uplands commonly known as Beacon Bay and described in ***Exhibit A*** attached hereto and incorporated herein by this reference ("Beacon Bay").

B. The Beacon Bay Bill exempts the "Westerly Portion" of the filled tidelands from the public trust and specifically authorizes the lease of the property for residential purposes subject to certain statutory conditions.

C. Beacon Bay, including the "Westerly Portion" thereof, has been divided into individual residential lots. Within Beacon Bay are certain streets, walkways, beaches, common landscaped areas and tennis courts, identified as Lots A through J and Lot 62 described in ***Exhibit B*** attached hereto and incorporated by reference and as shown on the ***Exhibit C***, attached hereto and incorporated herein by this reference (the "Common Area").

D. On January 9, 1950, Lessor first entered into a master lease of Beacon Bay, including the Common Area, to an individual who thereafter subleased individual lots to individual homeowners. This original lease expired on December 31, 1987. On January 1, 1988, City leased the individual lots in Beacon Bay to individual homeowners and leased the Common Area to Lessee, a community association comprised of the foregoing individual homeowners within Beacon Bay (the "Existing Common Area Lease"). The leases of individual lots to individual homeowners were amended, restated and extended on various dates, each to expire on July 1, 2044 (the "Residential Leases"). The Existing Common Area Lease will expire on July 1, 2006.

E. On November 3, 1987, a majority of electors of the City approved a measure that authorized the City Council to enter into new leases of the residential lots in Beacon Bay for not to exceed fifty (50) years.

F. On November 3, 1992, a majority of electors of the City approved Measure M that authorized the City Council to lease tidelands and waterfront property consistent with the provisions of state law.

G. In 1994 Lessor determined that maintaining the residential character of Beacon Bay was in the best interests of the citizens of Newport Beach, and agreed to a lease for the residential lots until July 1, 2044.

H. Lessor has further determined it is in the best interests and welfare of the citizens of Newport Beach:

1. that the Common Area portions of Beacon Bay which have been leased for common area purposes appurtenant to the Beacon Bay residential community continue in that character;
2. to lease the Common Area to Lessee under the terms, conditions and for the consideration as hereinafter set forth; and
3. for Lessee to continue to use the same high standards of care and maintenance of the Common Area that Lessee used on the Effective Date of this Lease to serve the Beacon Bay residents and visitors.

I. The State Lands Commission has reviewed the form of this Lease for compliance with the provisions of relevant statutes, rules and regulations, including, without limitation, the Beacon Bay Bill.

J. Lessor has determined that this Lease is consistent with provisions of the Beacon Bay Bill, the Charter, General Plan and Zoning Ordinance of the City of Newport Beach, and all other applicable state and local laws.

K. The Parties intend, through this Lease, to confirm Lessor's right to use any properties held in trust by the Lessor (including tidelands) for projects that are intended to enhance the water quality or ecosystem of Newport Bay.

NOW THEREFORE, in consideration of the foregoing recitals, which are hereby incorporated into and made part of the terms and conditions of this Lease, and the covenants in this lease, the Lessor and Lessee agree as follows:

1. DESCRIPTION OF LEASED PREMISES.

Lessor hereby leases to Lessee, and Lessee hereby accepts this Lease of, the Common Area, subject to the terms, covenants and conditions in this Lease.

2. TERM.

The term of this Lease is for a period commencing on the date first above written, and shall expire on July 1, 2044, the date on which the Residential Leases expire, unless earlier terminated as provided in this Lease. The Existing Common Area Lease shall terminate at the time and date this Lease has been approved by formal action of the governing bodies of Lessor and Lessee and fully executed by both parties.

3. CONSIDERATION.

The consideration for this Lease is the execution and performance of the Residential Leases and the maintenance and upkeep of the Common Area as provided in this Agreement, which would otherwise, be an expense borne by Lessor.

A. Lessee shall maintain the Common Area at substantially the same high standard of care and maintenance that Lessee used as of the Execution Date of this Lease.

B. That portion of the Common Area consisting of dry-sand portions of the beach (but excluding any upland portion of the Common Area) is public tidelands and shall be held open by Lessee for use by members of the public.

C. The portions of the Common Area designated as uplands may be held for the exclusive use and benefit of Lessee and its constituent homeowner members; provided that nothing herein shall be construed to limit public access to or passage over the streets within Beacon Bay.

4. SALE, ASSIGNMENT, SUBLEASE.

Lessee shall not assign, transfer, sublease, mortgage, hypothecate or give any grant of control of this Lease or the Common Area, or any part hereof, either voluntarily or involuntarily, unless first approved by the City Council.

5. ENCUMBRANCES.

Lessee shall have the right to assign this Lease as security for financing of Common Area improvements, such as street repairs, undergrounding of utility lines, construction of homeowners' association improvements, and similar capital expenditures. Lessee may adopt and record Covenants, Conditions and Restrictions (CC&R's) against this Lease as authorized in California Civil Code section 1350 et seq. provided Lessee obtains prior written approval of the CC&R's by Lessor's City Attorney. Preparation, management and enforcement of the CC&R's shall be sole responsibility of Lessee. Otherwise, Lessee shall have no right to encumber this Lease or the Common Area for any purpose whatsoever and any attempt by Lessee to so encumber this Lease or the Common Area shall result in the immediate termination hereof.

6. USE.

A. The Common Area shall be used solely and exclusively for vehicular ingress and egress and parking, boat storage and launching, pedestrian walkway purposes, recreational uses for Beacon Bay residents, and the property designated as Lot "62" shall be used exclusively for tennis court and park purposes and for construction and maintenance of an office and meeting facilities for Lessee in connection with the maintenance and operation of the homeowners' association in Beacon Bay. The use by Lessee of any portion of the Common Area for any purpose not expressly permitted by this Lease is an express violation of this Lease and may be cause for termination, at the sole discretion of Lessor.

CALENDAR PAGE
MINUTE PAGE

B. Lessee shall use and manage the Common Area in a manner that does not violate State or Federal laws, including any law that prohibits discrimination.

C. The property designated as beach property on Exhibit C shall be used exclusively for beach purposes. Lessee shall maintain the Common Area in a manner that allows for open public access to the beach. Lessee may impose parking limitations on use of streets within the Common Area only for pedestrian, fire safety and/or traffic circulation purposes upon prior written approval of the City Traffic Engineer. Lessee shall not post or position any signs or structures in a manner that will discourage or prohibit public access. Lessor retains the right to use the beach portion of the Common Area for any project designed and intended to enhance the water quality or ecosystem of Newport Bay subject to the ordinances and policies adopted by Lessor in its governmental capacity and as grantee of the State of California.

7. TAXES AND UTILITIES.

Lessee acknowledges that this Lease may give rise to a possessory interest tax obligation. Lessee shall pay, before delinquent, all utility charges and any general and special taxes, assessments or other governmental charges, if any, which may be levied on the Common Area, including any improvements located thereon or associated therewith, or any possessory interests therein arising out of or based upon the leasehold interest throughout the term hereof. Satisfactory evidence of such payment shall be made available to Lessor upon demand. Any lien for unpaid utilities, taxes, assessments or charges shall not attach the leasehold interest but only to the improvements thereon.

8. MAINTENANCE AND REPAIR OF COMMON AREA.

Lessee shall at all times during the term of this Lease and without any cost or expense to Lessor, keep and maintain the Common Area, including, without limitation, all structures, facilities, walks, curbs, parkways, streets and other improvements, in good order and repair and in a clean, safe, sanitary and orderly condition. Lessee shall repair or reconstruct any improvements on the Common Area following any damage or destruction thereof, unless the improvements are being destroyed in conjunction with remodeling or reconstruction and Lessor has consented, in writing, to the damage or destruction. Lessee shall cause to be constructed, maintained and repaired all utilities, pipes, walls, sewers, drains, and other improvements on the Common Area to the extent required by law or as necessary to maintain the improvement in good order and repair and safe and sanitary condition.

9. STRUCTURAL IMPROVEMENTS.

A. All structural improvements with a cost in excess of five thousand dollars ($5,000) (the "Capital Improvements") that are constructed during the term of this Lease become the property of Lessor upon expiration of the Lease.

B. Lessee shall be required to obtain, prior to commencing the construction of any Capital Improvement, all permits, licenses or approvals that may be required by Lessor in its governmental capacity.

C. Lessee shall, at all times, indemnify, defend and hold Lessor harmless from any and all claims, liens, damages or fees in any way related to any construction, repair, alteration or installation of any structure, improvement, equipment or facilities on the Premises. Lessee's obligation extends to the costs of defending such claims, including reasonable attorney's fees. Lessee shall not suffer or permit to be enforced against all or any portion of the Premises, any lien or any claim for damage in any way related to any construction, repair, restoration, replacement or improvement on the Premises. In the event any lien or stop notices imposed or recorded on the Premises as a result of the construction, repair or alteration of the facility by or on behalf of Lessee, Lessee shall pay or cause to be paid all such liens, claims or demands before any action is brought to enforce the same against the Premises. Lessee may, in good faith, contest the validity of such lien, claim or demand. In the event of any contest or litigation, Lessee shall, at its sole expense, defend itself and Lessor and shall pay and satisfy any adverse judgment that may be rendered prior to enforcement against Lessor or the Premises. Lessor may require Lessee to furnish a surety bond satisfactory to lessor in an amount equal

to any contested lien, claim or demand.

D. Lessee shall give Lessor advance written notice of any construction on or improvement on the premises other than ordinary repairs and maintenance of existing improvements. Lessee shall coordinate the scheduling of any work with Lessor to minimize any inconvenience to the public.

10. MAINTENANCE OF IMPROVEMENTS.

A. Lessee to Maintain All Improvements: Lessee covenants and agrees that during the term of this Lease it will, at its own cost and expense, maintain the Premises in good order and repair and in clean, orderly, safe and sanitary condition. Lessee shall be responsible for the repair of any damage.

B. Lessor May Elect to Repair and Maintain at Expense of Lessee: If, in the judgment of the Lessor, the standards of maintenance and repair required by this Lease are not being maintained, Lessor may elect to correct any deficiency after written notice thereof to the Lessee and Lessee's failure to cure the default. Lessee shall pay to the Lessor on demand any and all sums expended by Lessor in correcting any such deficiency together with interest at the legal rate. If, in the judgment of the Lessor, the disrepair or lack of maintenance constitutes an emergency, the notice shall be a 24-hour notice to remedy; in all other cases is shall be a 5-day notice.

C. Lessor reserves the right by its authorized agents, employees or representatives to enter the Premises upon forty-eight (48) hours advance notice, to inspect the same or any part thereof at any time to attend to or protect the Lessor's interest under this Lease.

11. COMPLIANCE WITH LAWS.

Lessee shall make, or cause to be made, any additions, alterations or repairs to any structure or improvement on the Common Area which may be required by, and Lessee shall otherwise observe and comply with, any law, statute, ordinance, plan, resolution or policy applicable to the Common Area. All repairs, additions, and alterations to the structure or improvements on the Common Area shall conform to all applicable laws, ordinances, regulations, plans, policies and resolutions and all work shall be performed with reasonable diligence, completed within a reasonable time, and performed at the sole cost and expense of Lessee.

12. "AS IS" CONDITION OF COMMON AREA.

Lessee expressly accepts the Common Area "as is" and acknowledges that Lessor has made no representations or warranties as to the suitability for any intended purpose or use of the Common Area or any construction or improvement thereon. Lessee shall conduct all tests necessary to determine the suitability of the Common Area for any proposed construction or improvement thereon, including, without limitation, the amount and extent of any fill, and related factors. Lessee expressly acknowledges that Lessor shall not be liable for any damage or loss resulting from any subsurface or soil condition in, on, or under the Common Area or adjacent property. Lessee expressly acknowledges that, while the legislature of the State of California has purportedly removed the public trust restrictions on use of the "Westerly Portion" of property pursuant to the Beacon Bay Bill, the Common Area may constitute filled tidelands, and Lessor has made no representation or warranty relative to the validity of the Beacon Bay Bill or the power of the legislature of the State of California to remove public trust restrictions on tidelands through legislation. Notwithstanding the foregoing, in the event of any challenge to the right and power of Lessor to lease the Common Area for the purposes provided in this Lease, Lessor agrees, at its sole cost and expense, to use all reasonable efforts to resist and defend against such challenge and to seek a ruling or judgment affirming and upholding the right and power of Lessor to lease the Common Area for the purposes provided in this Lease.

13. BUSINESS ACTIVITIES.

Lessee shall not grant any concession, license, permit or privilege for the conduct of any business or other operation for profit within the Common Area without the prior written approval of the City Manager.

14. INSURANCE.

In addition to Lessee's obligations pursuant to Section 10, Lessee shall provide and maintain, at its own expense, policies of liability insurance as follows:

A. All required policies shall be signed by a person authorized by that insurer to bind coverage on its behalf and must be filed with Lessor, prior to execution of this Lease. Current certification of coverage shall be provided throughout the term of this Lease. Except for workers compensation, all insurance policies shall include Lessor and its elected officials, officers, agents, representatives and employees as additional insureds.

B. All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance in the State of California, with an assigned policyholders' Rating of A (or higher) and Financial Size Category Class VII (or larger) in accordance with the latest edition of Bests Key Rating Guide: unless otherwise approved by the City's Risk Manager;

C. Lessee shall provide Worker's compensation insurance covering all employees of Lessee, per the laws of the State of California.

D. Lessee shall provide Commercial general liability insurance covering third party liability risks, including without limitation, contractual liability, in a minimum amount of $1 million combined single limit per occurrence for bodily injury, personal injury and property damage. If commercial general liability insurance or other form with a general aggregate is used, either the general aggregate shall apply separately to this Lease, or the general aggregate limit shall be twice the occurrence limit. Lessor reserves the right to reasonably increase the minimum coverage specified in this subsection once every five years should the City Manager of Lessor determine that then current coverages do not fully protect Lessor.

E. Lessee shall provide Fire and extended coverage for not less than ninety percent (90%) of the cost of replacement of all insurable improvements in the Common Area.

F. Except for worker's compensation, the policy or policies shall be endorsed to state that coverage shall not be canceled by either party, except after thirty (30) days' prior notice has been given in writing to Lessor. Lessee shall give Lessor prompt and timely notice of claim made or suit instituted arising out of Lessee's operation hereunder. Lessee shall also procure and maintain, at its own cost and expense, any additional kinds of insurance, which in its own judgment may be necessary for its proper protection and prosecution of the work.

G. Lessee agrees that, in the event of loss due to any of the perils for which it has agreed to provide comprehensive general liability insurance, Lessee shall look solely to its insurance for recovery. Lessee hereby grants to Lessor, on behalf of any insurer providing comprehensive general and automotive liability insurance to either Lessee or Lessor with respect to the services of Lessee herein, a waiver of any right of subrogation which any such insurer of said Lessee may acquire against Lessor by virtue of the payment of any loss under such insurance.

15. HOLD HARMLESS.

A. Lessee shall indemnify, defend, save and hold harmless Lessor, its City Council, boards and commissions, officers and employees from and against any and all loss, damages, liability, claims, allegations of liability, suits, costs and expenses for damages of any nature whatsoever, including, but not limited to, bodily injury, death, personal injury, property damages, or any other claims arising from any and all negligent acts or omissions of Lessee, its employees, agents or subcontractors in the use and maintenance of the Common Area pursuant to this Lease.

B. Lessor shall indemnify, defend, save and hold harmless Lessee, its officers and employees, from and against any and all loss, damages, liability, claims, allegations of liability, suits, costs and expenses for damages of any nature whatsoever, including, but not limited to, bodily injury, death, personal injury, property damages, or any other claims arising from any and all

CALENDAR PAGE MINUTE PAGE

negligent acts or omissions of Lessor, its employees, agents or subcontractors arising from Lessor's performance under this Lease.

16. RESTORATION.

If during the term hereof any building or improvement erected by Lessee on the Common Area, or any part thereof, shall be damaged or destroyed by fire or other casualty, Lessee shall, at its cost and expense, repair or restore the same according to the original plans thereof, or, at Lessee's option, Lessee may elect to replace such building or improvement, provided that if Lessee so elects, Lessee shall obtain the approval of Lessor of the proposed architectural plans. Any such work of repair, restoration or replacement shall be commenced within one hundred and eighty (180) days after the damage or loss occurs and shall be completed with due diligence, but not longer than one (1) year after such work is commenced unless delay is caused by events beyond the control of Lessee. If Lessee elects not to repair or rebuild the improvements, it may terminate this Lease by giving Lessor written notice of termination and by assigning all insurance proceeds relating to the premises to Lessor. If Lessee elects to terminate the Lease it shall be obligated to completely clear and restore the building site to its original condition.

17. DEFAULT AND TERMINATION OF LEASE.

A. Default: Time and each of the terms, covenants and conditions hereof are expressly made the essence of this Lease. If the Lessee shall fail to comply with any of the terms, covenants, or conditions of this Lease, including; but not limited to

1. Failure of Lessee to keep current on all utility payments for the Premises;
2. Failure of Lessee to keep the Common Area in state of repair and operation dictated by this lease ("Consideration") and to keep it in a neat, clean, orderly, safe and sanitary condition;
3. Failure to provide certificates of insurance evidencing insurance coverage as required in paragraph 12 of this Lease; Lessor may, subject to the provisions of Subsection11 (B), terminate this Lease if Lessee fails to remedy any default related to the payment of money within thirty (30) days after service of a written notice from Lessor to do so, or fails to commence the cure of any other default within thirty (30) days and diligently prosecute the same to completion. Lessee may also terminate this Lease if Lessee abandons or vacates the Premises.

B. Surrender of Possession upon Termination: Lessee shall, upon the expiration or termination of this Lease, peaceably surrender the Premises with all buildings and improvements, in the same condition as when received or constructed, excepting reasonable use and wear thereof, and damage by fire, act of God, or by the elements. The provisions of this Subsection shall be effective upon expiration or termination of this Lease regardless of whether Lessee holds over under the provisions of Subsection E.

C. Remedies Cumulative: The rights, powers, elections and remedies of Lessor are cumulative and no one of them shall be considered exclusive of the other or exclusive of any rights or remedies allowed by law. Lessor's exercise of one or more rights, powers, elections or remedies shall not impair or be deemed a waiver of Lessor's right to exercise any other.

D. No Waiver: No failure of Lessor to exercise any right or power arising from any omission, neglect or default of the Lessee shall impair any such right: or power or shall be construed as a waiver.

E. Holding Over: If the Lessee remains in possession after the expiration of this Lease for any cause, Lessee's possession shall be deemed a tenancy from month-to-month upon the same terms, conditions, and provisions of this Lease.

18. EMINENT DOMAIN.

000144 CALENDAR PAGE 000168 MINUTE PAGE

In the event the whole or part of the Premises is condemned by a public entity in the lawful exercise of the power or eminent domain, this Lease shall cease as to the part condemned upon the date possession of that part is taken by the public entity. If only a part is condemned and the taking of does not substantially impair the capacity of the remainder to be used for the purposes required in this Lease, Lessee shall continue to be bound by the terms, covenants and conditions of this Lease. If only a part is condemned and the taking of that part substantially impairs the capacity of the remainder to be used for the purposes required in this Lease, Lessee shall have the election of: (a) terminating this Lease and being absolved of obligations that have not accrued at the date possession is taken by the public entity; or (b) continuing to occupy the remainder of the Premises and to be bound by this Lease. Lessee shall give notice in writing of his election hereunder, within thirty (30) days of the date possession of the part is taken by the public entity. Lessor shall be entitled to receive and shall receive all compensation for the condemnation of all or any portion of the property by exercise of eminent domain. Lessee shall be entitled to receive and shall receive all compensation for the condemnation of all or any portion of the improvements constructed by Lessee on the Premises by the exercise of eminent domain.

19. SURRENDER OF POSSESSION UPON EXPIRATION OR TERMINATION.

Upon expiration or termination of this Lease, Lessee agrees to peaceably deliver possession of the Common Area to Lessor and unconditionally agrees to vacate the Common Area without contest, legal or otherwise.

20. ATTORNEYS' FEES.

Should either Lessee or Lessor be required to employ counsel to enforce the terms, conditions and covenants of this Lease, the prevailing party shall recover all reasonable attorneys' fees incurred therein, whether or not court proceedings were commenced, and court costs, if any.

21. NOTICES.

It is mutually agreed that any notice or notices provided for in this Lease or by law, to be given or served by Lessee, may be given or served by mail, registered or certified, with postage prepaid, on the City of Newport Beach addressed to the City Manager or City Clerk, 3300 Newport Boulevard, Newport Beach, California 92663. Should Lessor be required to serve notice on Lessee, it may be served upon the President of the Association. Lessee shall be obligated during the term hereof to provide Lessor with current information as to the name, residence and business addresses, and residence and business phone numbers of the president of Lessee from time to time. Service of any notice, demand or communication by either party on the other shall be deemed complete at the expiration of 72 hours from and after the deposit in the United States mail, postage pre-paid, addressed as set forth above.

22. PARTIAL INVALIDITY.

If any part of this Lease is declared invalid for any reason, this ruling shall not affect the validity of the rest of this Lease. The other parts of the Lease shall remain in effect as if this Lease had been executed without the invalid part, provided, however, the parties shall immediately thereafter make all reasonable efforts to modify or amend this Lease, consistent with the aforesaid declaration, so as to fully implement and carry out the intent and purposes of the parties in entering into this Lease.

IN WITNESS WHEREOF, the parties have caused this Lease to be executed on the day and year first above written.

CITY OF NEWPORT BEACH

By _____

Mayor

000145
CALENDAR PAGE

000169
MINUTE PAGE

ATTEST:

LaVonne Harkless, City Clerk

APPROVED AS TO FORM:

Robin Clauson,
City Attorney

BEACON BAY COMMUNITY ASSOCIATION

By _____
President

By _____
Vice President

000146
CALENDAR PAGE

000170
MINUTE PAGE

EXHIBIT "A"

LEGAL DESCRIPTION

A parcel of land situated in the Northwest quarter of Section 35, Township 6 South, Range 10 West, S.B.B. & M., Orange County, California, more particularly described as follows, to-wit:

Beginning at the U.S. Bulkhead Station No. 200, as shown upon a map entitled "Harbor Lines, Newport Bay Harbor, California", approved May 2nd, 1936, by the Secretary of War and on file in the office of the United States District Engineer at Los Angles, California; running thence West along the U.S. Bulkhead line 147.50 feet to U.S. Station No. 137; thence North 39° 48' West along said Bulkhead line 535.53 feet; thence North 23° 57' 30" East 126.34 feet to an angle point in the ordinary high tide of the Pacific Ocean in Newport Bay, as described in Court Case No. 24026 of the Superior Court of the State of California, in and for the County of Orange; thence South 39° 48' East along said ordinary high tide line 334.47 feet to the most Westerly corner of that certain parcel of land conveyed to the City of Newport Beach by the Irvine Company, as described in deed recorded September 25th, 1929, in Book 306, page 375 of Official Records of Orange County, California; thence North 23° 57' 30" East along the Northwesterly line of said parcel of land 317.57 feet; thence South 71° 54' East along the Northerly line of said parcel of land 290.24; then South 85° 43' East along the Northerly line of said parcel of land, said Northerly line being the Southerly line of Bayside Drive, 606.01 feet; thence South 424.71 feet to a point in the U.S. Govt. Bulkhead line between U.S. Stations Nos. 101 and 200; thence West along said Bulkhead line 784.25 feet to the point of beginning containing approximately twelve (12) acres.

EXHIBIT "B"

LEGAL DESCRIPTION

Lots 62 and A through J as shown on that certain record of Survey filed in the Official Records of the County of Orange, State of California, as Instrument Number 5383 on February 28, 1939 covering a portion of the Northwest one-quarter (1/4) of section 35, Township 6 South, Range 10 West, S.B.B.M.