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OAKLAND
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2011 OCT 13 PM 2:27
Councilmember

Approved For Form And Legality

K Jain
City Attorney

OAKLAND CITY COUNCIL

RESOLUTION No. 83619 - C.M.S.

**RESOLUTION GRANTING OAKLAND HOUSING INVESTORS LP A
REVOCABLE AND CONDITIONAL PERMIT TO ALLOW ELECTRICAL
TRANSFORMERS AND CONCRETE VAULTS TO ENCROACH UNDER
THE PUBLIC SIDEWALK ALONG 5th STREET AND KIRKHAM STREET
FOR A NEW BUILDING LOCATED AT 1396 5th STREET**

WHEREAS, Oakland Housing Investors LP, a limited partnership company (California Secretary of State entity no. 200807700004) who is the owner of the property described in a grant deed, recorded November 19, 2008, series no. 2008334359, by the Alameda County Clerk-Recorder, and identified by the Alameda County Assessor as parcel number 004-0069-004-00, and identified by the City of Oakland as 1396 5th Street and more particularly described in *Exhibit A* attached hereto, has made an application to the City Engineer of the City of Oakland for a permit (ENMJ 11056) to allow two (2) electrical transformers and concrete vaults to encroach approximately ten (10) feet under the fourteen (14) feet wide public sidewalks along 5th Street and Kirkham Street ; and

WHEREAS, the limits of the encroachment are delineated in *Exhibit B* attached hereto; and

WHEREAS, the Planning Commission of the City of Oakland approved a Conditional Use permit (CMDV 05166) for said project in 2005; and

WHEREAS, the Building Official of the City of Oakland has issued a permit (B1004649) to construct a five (5) story apartment building with ground floor parking and retail space on said parcel for one-hundred nineteen (119) senior housing apartment units; and

WHEREAS, the owner has field an application with the City Engineer of the City of Oakland for a permit (PX 1100052) to construct public infrastructure improvements adjoining said new building; and

WHEREAS, said transformers are necessary to provide electrical power for the new building and will be maintained by the Pacific Gas And Electric Company (PG&E); and

WHEREAS, the location of the encroachments have been approved by PG&E; and

WHEREAS, said transformers will be accessed through hinged steel cover plates set flush with the pedestrian walking surface; and

WHEREAS, section 12.08.030 of the Oakland Municipal Code requires that applications for permanent encroachments in the public right-of-way receive approval from the City Council as a condition of permit issuance; and

WHEREAS, said encroachment under the public right-of-way and its location beyond the limits of said parcel's boundaries will not interfere with the use by the public of the sidewalk; and

WHEREAS, the Council of the City of Oakland has previously approved similar encroachments of new electrical transformers under the public right-of-way throughout Oakland; and

WHEREAS, the requirements of the California Environmental Quality Act (CEQA), the Guidelines as prescribed by the Secretary of Resources, and the provisions of the Statement of Objectives, Criteria and Procedures for Implementation of the California Environmental Quality Act: City of Oakland, have been satisfied, and that in accordance with CEQA Guideline Section 15332 (Class 32: Infill Projects) and Section 15303(d) (new construction or conversion of small structures which includes extensions of serving utilities) and Section 15301(b) (existing facilities serving electrical utilities) this project is categorically exempt from the provisions of the California Environmental Quality Act; now, therefore, be it

RESOLVED: That the encroachment complies with the requirements of the California Environmental Quality Act; and be it

FURTHER RESOLVED: That the encroachment, as conditioned herein and delineated in *Exhibit B*, is hereby granted for a revocable permit to allow the installation of two (2) new concrete vaults and electrical transformers under the public sidewalk along 5th Street and Kirkham Street for a new building located at 1396 5th Street; and be it

FURTHER RESOLVED: That the encroachment is hereby conditioned by the following special requirements:

1. the Permittee (Oakland Housing Investors LP) is responsible for the relocation of all existing public utilities including but not limited to fire alarm cable, master signal cable, street lighting and intersection signal cable, as required; and
2. after notice to the Permittee, this permit shall be revocable at the sole discretion of the Council of the City of Oakland, expressed by resolution of said Council; and
3. the Permittee, by the acceptance of this conditional and revocable permit, hereby disclaims any right, title, or interest in or to any portion of the public right-of-way area, underlying the encroachments or the air space above and agrees that said temporary use of the area does not constitute an abandonment on the part of the City of Oakland of any of its rights for street purposes and otherwise; and
4. the Permittee shall maintain in force and effect at all times that the encroachments occupy the public right-of-way, valid and sufficient Commercial General Liability insurance in an amount not less than \$2,000,000.00 for each occurrence with a property damage sub-limit in the amount not less than \$1,000,000.00 for each occurrence, including contractual liability and naming as

additional insured the City of Oakland, its directors, officers, agents, representatives, employees, and volunteers against any and all claims arising out of the existence of said encroachments in said right-of-way area, and that a certificate of such insurance and subsequent notices of the renewal thereof, shall be filed with the City Engineer of the City of Oakland and that such certificate shall state that said insurance coverage shall not be canceled, materially changed, or be permitted to lapse without thirty (30) days' written notice to the City Engineer; and the Permittee also agrees that the City of Oakland may review the type and amount of insurance required at any time and may require the Permittee to increase the amount of and/or change the type of insurance coverage required; and in addition, the insurance amounts stated above shall be automatically adjusted upwards cumulatively consistent with the Consumer Price Index (CPI) in the Bay Area every five (5) years; and

- 5a.** the Permittee, by the acceptance of this conditional permit agrees and promises agrees and promises to defend (with counsel acceptable to the City), hold harmless, and indemnify the City, the Oakland City Council, and its respective officials, officers, employees, agents, representatives, and volunteers from any and all liability, claims, demands, lawsuits, actions, causes of action proceeding and judgments for injury and/or damages of any kind and nature whatsoever (including legal costs, attorneys' fees, expert witness or consultant fees, City Attorney or staff time, expenses or costs) (collectively called "Action") arising out of, related to or caused by performance of this Agreement, including without limitation the design, construction and/or maintenance (for a period of one year following unconditional issuance of the Certificate of Completion) of the on-site and off-site required public infrastructure improvements and regardless of responsibility for negligence; and the City may elect, in its sole and absolute discretion, to participate in the defense of said Action, and the Permittee shall reimburse the City for its reasonable legal costs and attorneys' fees; and this indemnification shall survive the termination of this Agreement; and
- 5b.** within ten (10) calendar days of the filing of any Action as specified in subsection 5a above, the Permittee shall execute a Joint Defense Letter Agreement with the City, acceptable to the City Attorney, which memorializes the above obligations; and these obligations and the Joint Defense Letter of Agreement shall survive termination, extinguishment or invalidation of this Agreement. Failure to timely execute the Letter Agreement does not relieve the Permittee of any of the obligations contained in this condition or other requirements or conditions of approval that may be imposed by the City; and
- 6.** the Permittee shall make no changes to the encroachments hereby allowed either structurally, with regard to dimension, or with respect to use, without the prior written consent of the City Engineer and understands that the City of Oakland may impose reasonable fees and considerations for processing permits required for such proposed changes; and the Permittee also understands that the City of Oakland is not obligated to grant any changes requested by the Permittee; and
- 7.** the Permittee, by the acceptance of this conditional permit shall be solely and fully responsible for the repair or replacement of any portion or all of the improvements in the event that the improvements shall have failed or have been damaged to the extent of creating a menace or of becoming a hazard to the safety of the general public; and that the Permittee shall be solely liable for the expenses connected therewith; and

8. upon the termination of the permission herein granted, the Permittee shall immediately remove the encroachments from within the public right-of-way, restore the premises to its original condition, and shall repair any resulting damage to the satisfaction of the City Engineer; and
9. the Permittee shall file with the City of Oakland for recordation, a disclaimer and agreement that Permittee accepts and shall comply with and shall be bound by each and all of the terms, conditions and provisions of this resolution; and that the disclaimer and agreement shall be subject to the approval of the City Attorney and the City Engineer; and
10. the plans and exact location of the encroachments hereby granted are subject to the review and approval of the City Engineer and that the Permittee shall obtain all necessary permits prior to commencing said work; and that the encroachment shall be located as set forth in *Exhibit B*; and
11. the Permittee acknowledges that the City of Oakland makes no representations or warranties as to the conditions beneath the encroachments; and that by accepting this conditional revocable permit, the Permittee agrees that it will use the encroachment area at its own risk, that it is responsible for the proper coordination of its activities with all other permittees, underground utilities, contractors, or workmen operating within the encroachment area, and that it is responsible for its own safety and the safety any of its personnel in connection with its entry under this conditional revocable permit; and
12. the Permittee acknowledges that the City of Oakland is unaware of the existence of any hazardous substances beneath the encroachment areas, and hereby waives and fully releases and forever discharges the City of Oakland and its officers, directors, employees, agents, and volunteers from any and all claims, demands, liabilities, damages, actions, causes of action, penalties, fines, liens, judgments, costs, or expenses whatsoever (including, without limitation, attorneys' fees and costs), whether direct or indirect, known or unknown, foreseen or unforeseen, that may arise out of or in any way connected with the physical condition, or required remediation of the excavation area or any law or regulation applicable thereto, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Sections 9601 et seq.), the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901 et seq.), the Clean Water Act (33 U.S.C. Section 466 et seq.), the Safe Drinking Water Act (14 U.S.C. Sections 1401-1450), the Hazardous Materials Transportation Act (49 U.S.C. Section 1801 et seq.), the Toxic Substance Control Act (15 U.S.C. Sections 2601-2629), the California Hazardous Waste Control Law (California Health and Safety Code Sections 25100 et seq.), the Porter-Cologne Water Quality Control Act (California Health and Safety Code Section 13000 et seq.), the Hazardous Substance Account Act (California Health and Safety Code Section 25300 et seq.), and the Safe Drinking Water and Toxic Enforcement Act (California Health and Safety Code Section 25249.5 et seq.); and
13. the Permittee further acknowledges that it understands and agrees that it hereby expressly waives all rights and benefits which it now has or in the future may have, under and by virtue of the terms of California Civil Code Section 1542, which reads as follows: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE

RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR"; and

- 14. the Permittee recognizes that by waiving the provisions of Civil Code Section 1542, it will not be able to make any claims for damages that may exist, and to which, if known, would materially affect its decision to execute this encroachment agreement, regardless of whether Permittee's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause; and
- 15. the hereinabove conditions shall be binding upon the Permittee and the successive owners and assigns thereof; and be it

FURTHER RESOLVED: That the Council of the City of Oakland, at its sole discretion and at a future date not yet determined, may impose additional and continuing fees as prescribed in the Master Fee Schedule, for use and occupancy of the public right-of-way; and be it

FURTHER RESOLVED: That this resolution shall take effect when all the conditions hereinabove set forth shall have been complied with to the satisfaction of the City Engineer of the City of Oakland and shall become null and void upon the failure of the Permittee to comply with the conditions hereinabove set forth after notice and failure to cure such conditions; and be it

FURTHER RESOLVED: That the City Engineer is hereby authorized to file a certified copy of this resolution for recordation by the Alameda County Clerk-Recorder.

IN COUNCIL, OAKLAND, CALIFORNIA, NOV 15 2011, 2011

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, BRUNNER, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, SCHAAF, AND PRESIDENT REID - 8

NOES - 0

ABSENT - 0

ABSTENTION - 0

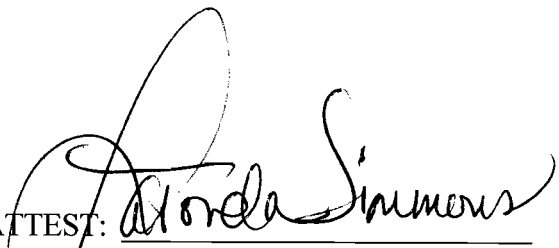
ATTEST: 
LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California

EXHIBIT A

Metes and bounds of parcel no. 004-0069-004-00, as shown in a grant deed, recorded November 19, 2008, series no. 2008334359, by the Alameda County Clerk-Recorder

PARCEL ONE:

LOTS 12 TO 19, INCLUSIVE, AS SAID LOTS ARE SHOWN ON THE "MAP OF THE WESTERLY PART OF BLOCK 492 IN THE CITY OF OAKLAND, ALAMEDA CO., CAL., DECEMBER 24, 1880", FILED DECEMBER 27, 1880, IN BOOK 1 OF MAPS, PAGE 190, ALAMEDA COUNTY RECORDS.

EXCEPTING THEREFROM: THE PORTIONS OF LOTS 12, 13, 18 AND 19, DESCRIBED AS PARCELS ONE AND THREE IN THAT CERTAIN GRANT DEED FROM UNIVERSAL FOODS CORPORATION TO SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, RECORDED JULY 5, 1966, REEL 1799, IMAGE 262, ALAMEDA COUNTY RECORDS.

PARCEL TWO:

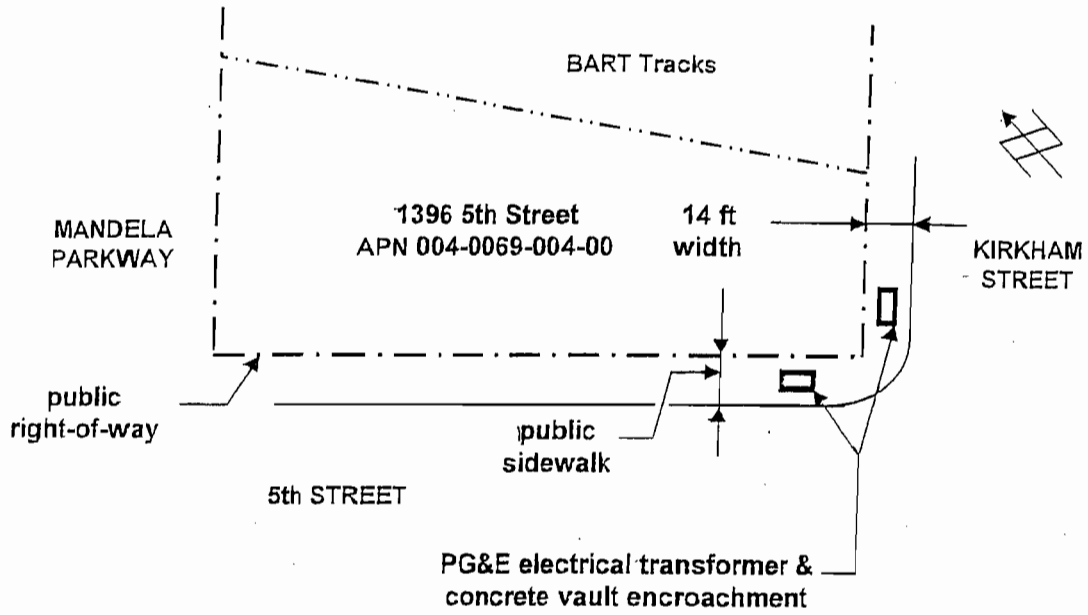
A PORTION OF BLOCK 492, AS SAID BLOCK IS SHOWN ON BOARDMAN'S MAP OF OAKLAND AND VICINITY, FILED APRIL 23, 1883, IN BOOK 17 OF MAPS, PAGE 14, ALAMEDA COUNTY RECORDS, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE WESTERN LINE OF KIRKHAM STREET DISTANT THEREON SOUTH 17° 05' 54" WEST 256.06 FEET FROM THE INTERSECTION THEREOF WITH THE SOUTHERN LINE OF 7THB STREET, FORMERLY RAILROAD AVENUE, AS SAID STREET AND AVENUE ARE SHOWN ON THE AFORESAID MAP; THENCE CONTINUING ALONG SAID LINE OF KIRKHAM STREET, SOUTH 17° 05' 54" WEST 120.83 FEET TO THE NORTHERN LINE 5TH STREET; THENCE ALONG THE LAST MENTIONED LINE NORTH 72° 55' 15" WEST 182.32 FEET TO THE EASTERN LINE OF LOT 19, AS SAID LOT IS SHOWN ON THE "MAP OF THE WESTERLY PART OF BLOCK 492, IN THE CITY OF OAKLAND, ALAMEDA CO., CAL. DECEMBER 24, 1880" FILED DECEMBER 27, 1880, IN BOOK 1 OF MAPS, PAGE 190, ALAMEDA COUNTY RECORDS; RUNNING THENCE ALONG SAID EASTERN LINE OF LOT 19, NORTH 17° 06' 24" EAST 156.06 FEET TO A POINT DISTANT THEREON 19.63 FEET SOUTHERLY FROM THE NORTHERN LINE OF SAID LOT 19; THENCE SOUTH 61° 59' 10" EAST 185.66 FEET TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM: THAT PORTION DESCRIBED AS PARCEL FOUR IN THE GRANT DEED TO SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, RECORDED JULY 5, 1966, REEL 1799, IMAGE 262, ALAMEDA COUNTY RECORDS.

EXHIBIT B

Locations of Encroachments



ASSESSOR'S MAP 4



OAKLAND AND VICINITY (FORWARD)
WESTERLY PART OF BLOCK 69

