

Introduced by

Councilmember

Approved for Form and Legality  
F. Faiz  
OFFICE OF THE CITY CLERK  
OAKLAND  
City Attorney  
2008 SEP - 1 PM 12:06

## OAKLAND CITY COUNCIL

RESOLUTION No. 79460 C.M.S.

**A RESOLUTION GRANTING FC OAKLAND, INC., A CONDITIONAL AND REVOCABLE ENCROACHMENT PERMIT TO INSTALL AND MAINTAIN CUSTOM ROADWAY PAVEMENT IN WILLIAM STREET FOR THE UPTOWN OAKLAND MIXED USE REDEVELOPMENT PROJECT**

**Whereas**, FC Oakland ("Permittee"), a California corporation (no. C2207573), and the Redevelopment Agency of the City of Oakland are the subdividers of five lots abutting William Street, 19th Street, Thomas L. Berkley Way, San Pablo Avenue, and Telegraph Avenue and further described on the Final Map for Tract 7616 for the UpTown Oakland mixed use redevelopment project; and

**Whereas**, FC Oakland, as the developer of the UpTown Oakland project, has made an application to the Council of the City of Oakland for a conditional and revocable permit to allow the installation of custom embossed and colored asphalt concrete for roadway pavement in William Street; and

**Whereas**, the City Engineer has approved plans and specifications prepared by the developer of the UpTown Oakland project, Forest City, for a permit (PX0400051) to construct required publicly and privately maintained surface and subsurface improvements within the public right-of-way, including reconstruction of William Street, partial reconstruction of 19th Street and Thomas L. Berkley Way, and construction of a new street; and

**Whereas**, the location of the custom pavement encroachment in William Street is described in Exhibit A attached hereto; and

**Whereas**, the Permittee will assume the continuing maintenance of the custom pavement; and

**Whereas**, the custom pavement encroachment will not interfere with the use by the public or public utilities of the public sidewalk and roadway; and

**Whereas**, the requirements of the California Environmental Quality Act (CEQA) has been satisfied as identified in an Environmental Impact Report for the UpTown Oakland project and certified by the Planning Commission on February 18, 2004.

**Now, therefore, the Council of the City of Oakland does resolve as follows:**

**Resolved**, that the encroachment permit, as conditioned herein, does comply with the California Environmental Quality Act; and be it further

**Resolved**, that the encroachment permit, as conditioned herein, is hereby granted for custom embossed and colored asphalt cement pavement to be installed in William Street, as described herein in Exhibit A; and be it further

**Resolved**, that the encroachment permit is hereby conditioned by the following special requirements:

1. the Permittee is solely responsible for the relocation of all existing public utilities including but not limited to potable water, natural gas, sanitary and storm water sewer, street lighting, and intersection signal cable, as required; and that

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 that
3. the Permittee acknowledges that the issuance of this permit does not establish any precedent for other encroachments; and that
4. 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 that
5. the Permittee shall maintain in force and effect at all times that the encroachments occupy the public roadway area, good and sufficient commercial general insurance in the amount of \$2,000,000 for each occurrence, and property damage insurance in the amount of \$1,000,000 for each occurrence both including contractual liability, naming as additional insureds the City of Oakland, its officers, employees, agents, 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 that the Permittee also agrees that the City of Oakland may annually review the type and amount of insurance required and may require the Permittee to increase the amount of and/or change the type of insurance coverage required, if such is reasonably necessary as determined by the City of Oakland; and that the insurance amounts stated above shall be automatically adjusted upwards, consistent with the Consumer Price Index (CPI) in the Bay Area, every five years; and that
6. the Permittee, by the acceptance of this conditional permit agrees and promises to defend and hold harmless and indemnify the City of Oakland, its officers, directors, employees, agents, volunteers, representatives, assigns, and successors 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 and expert witness fees, whether direct or indirect, known or unknown, foreseen or unforeseen, that may arise out of or in any way connected with this encroachment permit; and that this indemnification shall survive termination of this permit; and that
7. the Permittee shall make no changes to public right-of-way in any manner nor 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 that the Permittee also understands that the City of Oakland is not obligated to grant any changes requested by the Permittee; and that
8. the Permittee, by the acceptance of this conditional permit shall be solely and fully responsible for keeping the public right-of-way in good repair and shall promptly repair, replace, or remove all or any portion or all of the encroachment and effected public improvements and utilities in the event that the encroachment shall have failed or have been damaged to the extent of creating a nuisance or of becoming a hazard to the safety of the general public, as determined by the City Engineer; and that the Permittee shall be solely and fully liable for the expenses connected therewith; and that all work in the public right-of-way by the Permittee, including but not limited to repair, shall be subject to inspection and approval by the City Engineer; and that the Permittee shall be responsible for and shall promptly reimburse the City for all associated costs and fees at the rates set forth in the Master Fee Schedule; and that
9. upon the termination of the permission herein granted, the Permittee shall immediately remove the encroachments from within the public right-of-way, and shall repair any damage resulting there from and shall install asphalt cement roadway pavement to the satisfaction of the City Engineer; and that

10. 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 that

11. 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 Exhibits B and C; and that

12. 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, is responsible for the proper coordination of its activities with other permittees, underground utilities, contractors, or workmen operating within the encroachment area and for the its own safety and any of its personnel in connection with its entry under this conditional revocable permit; and that

13. 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, servants, representatives, assigns and successors 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 that notwithstanding the above provisions of this Paragraph 12, Permittee shall not be liable to the City of Oakland for any hazardous substances on, in or beneath the encroachment area that were not caused by the Permittee, his or her agents, employees, tenants or service providers; and that

14. 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 that

15. the Permittee recognizes that by waiving the provisions of Section 1542 mentioned in the preceding paragraph, 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 that

16. the above conditions shall be binding upon the Permittee and the successors, heirs, and assigns thereof; 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 Attorney and 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 in a reasonable manner; and be it further

**Resolved**, that the City Clerk is hereby directed to file a certified copy of this resolution for recordation with the Office of the Alameda County Recorder.

IN COUNCIL, OAKLAND, CALIFORNIA, SEP 20 2005, 2005.

PASSED BY THE FOLLOWING VOTE:

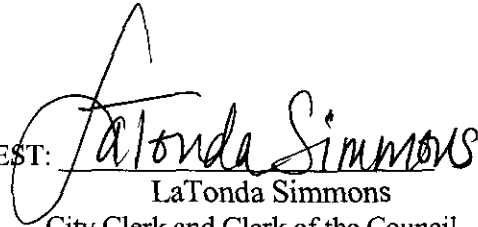
AYES - ~~BRUNNER~~, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, AND PRESIDENT DE LA FUENTE -7

NOES -  $\emptyset$

ABSENT - BROOKS -1

ABSTENTION -  $\emptyset$

ATTEST:



LaTonda Simmons  
City Clerk and Clerk of the Council  
of the City of Oakland, California

