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OAKLAND

Approved as to Form and Legality

2013 JUL -2 PM 2:25

Ellena Chen

Councilmember

Office of the City Attorney

OAKLAND CITY COUNCIL

Ordinance No. _____ C.M.S.

AN ORDINANCE VACATING WITHOUT COST TO THE ABUTTING PROPERTY OWNER HORIZON SERVICES A PORTION OF THE PUBLIC RIGHT-OF-WAY OF APGAR STREET FROM ITS INTERSECTION AT TELEGRAPH AVENUE TO ITS TERMINATION AT THE MACARTHUR TRANSIT VILLAGE PROJECT BOUNDARY

WHEREAS, pursuant to California Streets and Highways Code Section 8320 et seq., a public meeting was held in the Chamber of the Council of the City of Oakland, on the Third Floor of City Hall, at One Frank H. Ogawa Plaza, in Oakland, California, on July 16, 2013, beginning at 6:30 p.m. local time to adopt findings for a proposed ordinance vacating a portion of the improved public right-of-way of Apgar Street between its intersection at Telegraph Avenue and its termination at the southeastern property boundary of the MacArthur Transit Village project without cost to one of the two abutting property owners, Horizon Services; and

WHEREAS, said meeting also set a hearing beginning at 6:30 p.m. local time in the Chamber of the Council of the City of Oakland, on the Third Floor of City Hall, at One Frank H. Ogawa Plaza, in Oakland, California, on July 16, 2013, to receive supporting evidence and public testimony on said ordinance vacating said portion of Apgar Street; and

WHEREAS, the owners of the two parcels which abut said portion of Apgar Street acquired title individually for valuable consideration through the following instruments:

PROPERTY ADDRESS	ASSESSOR PARCEL No.	PROPERTY OWNER	GRANT DEED
3845 Telegraph Avenue	012-0967-002-00	Horizon Services	recorded 09-28-1992 series no. 1992-313728
516 Apgar Street	012-0968-055-03	Bay Area Rapid Transit District	Subdivision Map 8047

as recorded by the Alameda County Clerk-Recorder, and shown in **Exhibit A** attached hereto; and

WHEREAS, pursuant to California Civil Code section 831, an owner of land bounded by a road or street is presumed to own to the center of the way; and

WHEREAS, the San Francisco Bay Area Rapid Transit District (BART) established pursuant to California Public Utilities Code section 28500 et seq., who is one of the two owners of real property abutting said portion of Apgar Street proposed for vacation, voluntarily supports the redesign and partial vacation of the future Horizon Services parcel; and

WHEREAS, Horizon Services, a California corporation (C0776783), who is one of the two owners of real property abutting said portion of Apgar Street proposed for vacation, has voluntarily agreed to exercise its presumed right and accept without cost its proportional segment of the portion of Apgar Street proposed for vacation and also accept without cost said proportional segment of the portion of Apgar Street which BART supports; and

WHEREAS, pursuant to the California Streets and Highways Code, California Government Code, and California Public Resources Code, the Council of the City of Oakland has previously made the following statutory determinations by Resolution:

- the Council of the City of Oakland may adopt terms of performance by an abutting property owner that condition the vacation; and
- that the proposed vacation conforms with the City of Oakland's adopted General Plan; and
- that the statutory requirements for properly noticing the public through conspicuous site posting and newspaper publication of the location and extent of the proposed vacation and the public hearing to receive supporting evidence and public comments were completed; and
- that said property owners of the parcel abutting Apgar Street own the underlying fee simple interest in the portion of the public right-of-way proposed to be vacated; and
- the City Council approved a resolution (83516) on July 26, 2011, for the division of real property, dedications and vacations of public right-of-way and easements, and construction of publicly and privately maintained infrastructure comprising the Final Map for Tract No. 8047; and
- the proposed vacation does not require reservation of public service easement for emergency vehicle access; and
- the proposed vacation will reserve a public service easement for public utilities; and

- the proposed vacation does not limit public use or impede public access for non-motorized transportation; and
- the proposed vacation will not increase traffic and pedestrian inconvenience nor decrease traffic and pedestrian safety; and
- the proposed vacation will benefit the public and the citizens of Oakland fiscally by decreasing the cost of police services for nuisance and criminal activities and increasing the revenue derived from the general levy of property taxes; and

WHEREAS, the extent of the portion of Apgar Street proposed for vacation is shown in a schematic attached hereto as **Exhibit B** and is delineated in the metes and bounds attached hereto as shown in **Exhibit C**; and

WHEREAS, pursuant to California Streets and Highways Code Section 8324, the Council of the City of Oakland may apply conditions for the vacation of public right-of-way and may instruct the City Clerk not to record a vacation until the conditions have been satisfied; and

WHEREAS, the City Planning Commission certified the MacArthur Transit Village EIR (ER 06004) on June 4, 2008, and on July 15, 2008, pursuant to Ordinance No. 12883 C.M.S., the City Council independently confirmed and adopted as its own findings and determinations (i) the certification of the FEIR and adoption of the CEQA-related Findings made and adopted by the Planning Commission on June 4, 2008, and (ii) the Conditions of Approval and Mitigation Monitoring and Reporting Program adopted by the Planning Commission on June 4, 2008, as modified in the July 1, 2008 City Council Supplemental Agenda Report; and

WHEREAS, the City Planning Commission adopted an addendum to said EIR determining that no further environmental review was required on March 16, 2011, and on May 17, 2011, pursuant to Resolution No. 83292 C.M.S., the City Council affirmed the Planning Commission's CEQA determination that no further environmental review was required; and

WHEREAS, the City of Oakland has reviewed and considered documentation relevant to the proposed subdivision and the EIR and hereby finds and determines that there are no changes to the project considered in the EIR, or circumstances under which it will be undertaken, or new information of substantial importance that requires preparation of a subsequent or supplemental EIR, as specified in CEQA and the State EIR Guidelines, including without limitation, Public Resources Code Section 2116 and State EIR Guidelines Section 15162 and 15163; and the requirements of CEQA and the CEQA Guidelines have been satisfied; now, therefore,

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

Section 1. The vacation of a portion of the public right-of-way of Apgar Street between its intersection at Telegraph Avenue and its termination at the southeastern property boundary of the MacArthur Transit Village project, as delineated in the attached **Exhibit C**, without cost to the abutting property owner, Horizon Services, complies with CEQA and is hereby ordered.

Section 2. This order of vacation does reserve a public service easement across the vacated right-of-way.

Section 3. Access to the vacated right-of-way by the general public may be controlled or prohibited by said abutting property owner, subject to the final inspection approvals by the City Engineer and Fire Chief of the City of Oakland of infrastructure permits for the reconstruction of the narrowed portion of the Apgar Street right-of-way by the developer of the MacArthur Transit Village project, MacArthur Transit Community Partners LLC (MTCP), a California limited liability company (200419810042).

Section 4. Pursuant to California Streets and Highways Code section 8336, this order of vacation shall not be complete unless and until this Ordinance has been filed for recording with the Alameda County Clerk-Recorder.

Section 5. Construction of Apgar Lane shall be completed by the agent, MTCP, of the abutting property owner, BART, without cost to the City of Oakland with infrastructure permits issued by the City Engineer and within three (3) years of the date of approval of this order of vacation.

Section 6. The conditions herein shall equally bind the abutting property owners, BART and Horizon Services, and the agents of BART, MTCP, and their representatives, heirs, beneficiaries, successors in interest, and assigns and the successive owners of said abutting properties.

Section 7. The developer of the MacArthur Transit Village project, MTCP, as the agent of the abutting property owner, BART, promises to defend, hold harmless, and indemnify the City of Oakland and its officials, officers, employees, agents, representatives, and volunteers from any and all claims, demands, lawsuit and judgment for damages of any kind and nature whatsoever arising out of or caused by the said vacation of a portion of the public right-of-way of Apgar Street and that the hereinabove condition shall be binding upon said agent and its beneficiaries, heirs, assigns, and successors in interest.

Section 8. The abutting property owner, Horizon Services, acknowledges that the City of Oakland makes no representations or warranties as to the conditions beneath the public right-of-way area; and that by accepting this vacation, agrees that it will use the area in the future at its own risk.

Section 9. The abutting property owner, Horizon Services, acknowledges that the City of Oakland is unaware of the existence of any hazardous substances beneath the public right-of-way area and hereby waives and fully releases and forever discharges the City of Oakland and its officials, officers, employees, agents, representatives 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 be connected with the physical condition, or required remediation of the public right-of-way 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 1251 et seq.), the Safe Drinking Water Act (14 U.S.C. Section 1400 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. Section 5101 et seq.), the Toxic Substance Control Act (15 U.S.C. Sections 2601-2692), 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 Carpenter-Presley-Tanner Hazardous Substance Account Act (California Health and Safety Code Section 25300 et seq.), and the Safe Drinking Water and Toxic Enforcement Act of 1986 (California Health and Safety Code Section 25249.5 et seq.).

Section 10. The abutting property owner, Horizon Services, 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.

Section 11. The abutting property owner, Horizon Services, 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 accept this vacation, regardless of whether Horizon Service's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

Section 12. Horizon Services and MTCP shall enter into an Easement and Maintenance Agreement, to which the City of Oakland will be an intended third party beneficiary, that will describe the duties of the parties to construct, install, maintain and repair the Association Maintained Improvements (as such term is defined in the Easement and Maintenance Agreement) in perpetuity, at no cost to the City, the terms of which shall be reasonably satisfactory to the City Attorney's Office.

Section 13. This vacation shall expire by limitation and become void should reconstruction of Apgar Lane not be issued a Certificate of Completion by the City Engineer within three (3) years following adoption of this Ordinance by the Council of the City of Oakland.

Section 14. Should any article, section, subsection, sentence, clause, or phrase of this Ordinance or the attached Exhibits be held to be invalid or unconstitutional, the offending portion shall be severed and shall not affect the validity of remaining portions which shall remain in full force and effect.

Section 15. This Ordinance is enacted by the Council of the City of Oakland pursuant to the police powers accorded to the City by and through section 106 of the Charter of the City of Oakland and Article XI of the Constitution of the State of California.

Section 16. Upon final adoption or approval of a reconsideration by sufficient votes of the Council of the City of Oakland, this Ordinance shall be effective on and after the day established in section 216 of the Charter of the City of Oakland.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2013

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, GALLO, GIBSON McELHANEY, KALB, KAPLAN, REID, SCHAAF,
AND PRESIDENT KERNIGHAN

NOES -

ABSENT -

ABSTENTION -

ATTEST:

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

EXHIBIT A

Grant Deed for 3845 Telegraph Avenue, recorded 09-28-1992, series no. 1992-313728

RECORDING REQUESTED BY FIRST AMERICAN TITLE GUARANTY COMPANY

Order No. 164807
Escrow No. 164007
Loan No.

92313728

WHEN RECORDED MAIL TO:
Horizon Services
2595 Depot Road
Hayward, CA 94545



RECORDED IN OFFICIAL RECORDS
ALAMEDA COUNTY, CALIF
PATRICK O CORNELL CO. RECORDED

SEP 28 1992
AM 7:18 (9:10) 11:21 12:19 4:51 6:10 PM

SPACE ABOVE THIS LINE FOR RECORDERS USE

MAIL TAX STATEMENTS TO:

SAME AS ABOVE

CITY TRANSFER TAX \$ 5,000.00
DOCUMENTARY TRANSFER TAX \$ 650.00
SURVEY MONUMENT FEE \$ 10.00



2. Computed on the consideration or value of property conveyed; OR Computed on the consideration or value less taxes or encumbrances remaining at time of sale.

As registered by the undersigned Grantor
Signature of Deed Grantor or Agent Submitting Tax - Print Name

A.P.N. # 12-967-1 & 12-967-2

GRANT DEED

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged.

Phillip M. Spielman, a married man as his sole and separate property

hereby GRANTS to

Horizon Services, a California nonprofit corporation

the real property in the City of
County of

Oakland
Alameda

State of California, described as

FOR LEGAL DESCRIPTION, SEE EXHIBIT 'A' ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

Dated September 17, 1992

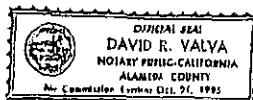
STATE OF CALIFORNIA)
COUNTY OF Alameda)

Phillip M. Spielman
Phillip M. Spielman

On September 22, 1992
before me: David R. Valva (Notary)
appeared: Phillip M. Spielman

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) have subscribed to the within instrument and acknowledged to me that he/she/they executed the same instrument (or that authorized capacity), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal
Signature: *DRV*



(This area for official notary seal)

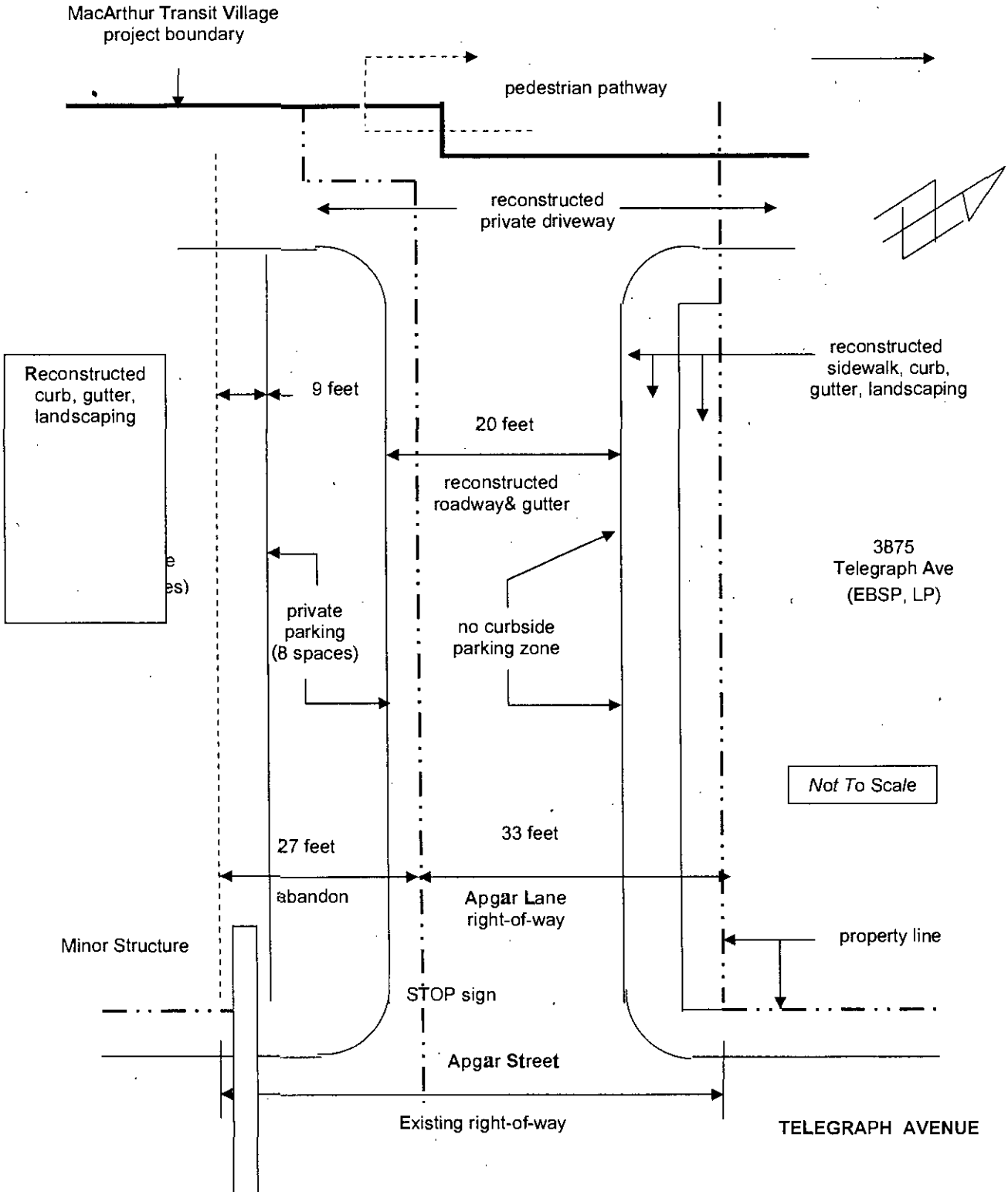
1002-BM (6/82)

MAIL TAX STATEMENTS AS DIRECTED ABOVE

D

EXHIBIT B

Schematic of the Apgar Street Vacation



Metes and Bounds of Apgar Street Vacation

ALL THAT CERTAIN REAL PROPERTY IN THE CITY OF OAKLAND, COUNTY OF ALAMEDA AND STATE OF CALIFORNIA, BEING A PORTION OF APGAR STREET, AS SHOWN AND CREATED ON THE "MAP OF THE LUNING TRACT", AS FILED AS FILED OCTOBER 10, 1905 IN BOOK 20 OF MAPS, AT PAGE 78, ALAMEDA COUNTY RECORDS, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEASTERLY CORNER OF LOT 3, AS SHOWN ON SAID MAP, AT THE INTERSECTION OF THE SOUTHERLY LINE OF APGAR STREET AND THE WESTERLY LINE OF TELEGRAPH AVENUE;

THENCE NORTH 77°07'14" WEST ALONG THE NORTHERLY LINE OF SAID LOT 3 AND THE SOUTHERLY LINE OF APGAR STREET, A DISTANCE OF 109.99 FEET TO THE NORTHWESTERLY CORNER OF SAID LOT 3, AT AN INTERSECTION WITH THE EASTERLY LINE OF PARCEL "D", AS SHOWN ON "TRACT NO. 8047" AS FILED MARCH 23, 2012 IN BOOK 321 OF MAPS; AT PAGES 41-46, ALAMEDA COUNTY RECORDS;

THENCE NORTH 12°52'46" EAST ALONG THE EASTERLY LINE OF SAID PARCEL "D", A DISTANCE OF 15.00 FEET;

THENCE SOUTH 77°07'14" EAST A DISTANCE OF 10.07 FEET;

THENCE NORTH 12°52'46" EAST A DISTANCE OF 12.00 FEET;

THENCE SOUTH 77°07'14" EAST A DISTANCE OF 100.04 FEET TO AN INTERSECTION WITH THE WESTERLY LINE OF TELEGRAPH AVENUE;

THENCE SOUTH 13°08'17" WEST ALONG THE WESTERLY LINE OF TELEGRAPH AVENUE, A DISTANCE OF 27.00 FEET TO THE POINT OF BEGINNING.

CONTAINING 2,851 SQUARE FEET, MORE OR LESS.