

Introduced by

\_\_\_\_\_  
Councilmember

FILED  
OFFICE OF THE CITY CLERK  
OAKLAND

2009 SEP 24 PM 3:02

Approved for Form and Legality

\_\_\_\_\_  
City Attorney

## OAKLAND CITY COUNCIL

Ordinance No. \_\_\_\_\_ C.M.S.

### RESOLUTION GRANTING THOMAS DOLAN A CONDITIONAL AND REVOCABLE PERMIT TO ALLOW AN EXTERIOR WALL FOR AN EXISTING BUILDING LOCATED AT 2800 MADERA AVENUE TO ENCROACH INTO THE PUBLIC RIGHT-OF-WAY ALONG FLEMING AVENUE

**WHEREAS**, Thomas Dolan (Permittee), owner of the property described in a grant deed, recorded October 8, 2007, series no. 2007735551, by the Alameda County Clerk-Recorder, and identified by the Alameda County Assessor as APN 036-2487-022-00, and identified by the City of Oakland as 2800 Madera Avenue and more particularly described in *Exhibit A* attached hereto, has made an application to the City Engineer of the City of Oakland for a conditional and revocable permit (ENMJ 09061 ) to allow an existing exterior wall to encroach approximately nine (9) inches into the public right-of-way along Fleming Avenue; and

**WHEREAS**, the two (2) story building was originally constructed circa 1928 on a corner lot bounded by Madera Avenue and Fleming Avenue; and

**WHEREAS**, said parcel is a portion of Block A, as originally subdivided by the Map of a Portion of the Alta Vista Track, Brooklyn Township, filed with the Alameda County Recorder on May 20, 1907, in book 23 of maps, on page 5; and

**WHEREAS**, the owner has filed an application with the City of Oakland for a Tentative Map (TPM 9703) to convert the existing eight (8) apartments to four (4) residential condominiums; and

**WHEREAS**, pursuant to Oakland Municipal Code Section 16.24.070, said application requires that the owner submit a boundary survey performed a land surveyor licensed by the State of California for the subsequent Parcel or Final Map; and

**WHEREAS**, said survey has identified said existing encroachment; and

**WHEREAS**, the limit of the encroachment is delineated in *Exhibit B* attached hereto; and

**WHEREAS**, the adjoining sidewalk is more than ten (10) feet wide and the encroachment and its location in the public right-of-way has not interfered with pedestrian access or the maintenance of buried utilities for more than eighty (80) years; 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 (new construction or conversion of small structure) and Section 15301 (existing facilities) this project is categorically exempt from the provisions of the California Environmental Quality Act; now, therefore, be it

**RESOLVED:** That the encroachment permit, as conditioned herein, does comply with 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 existing encroachment of an exterior wall into the Fleming Avenue right-of-way; and be it

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

1. the Permittee (Thomas Dolan) 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.

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. 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

5. the Permittee, by the acceptance of this conditional permit agrees and promises to defend, hold harmless, and indemnify the City of Oakland and its officials, officers, employees, agents, representatives, and volunteers from any and all claim, demand, lawsuit and judgment for damages of any kind and nature whatsoever arising out of or caused by the existence, installation or maintenance of the encroachments into the public right-of-way and regardless of responsibility for negligence. This indemnification shall survive termination of this Permit; 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. 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 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, is responsible for the proper coordination of its activities with all 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

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 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 of the City of Oakland is hereby directed to file a certified copy of this resolution for recordation by the Alameda County Clerk-Recorder.

**IN COUNCIL, OAKLAND, CALIFORNIA, \_\_\_\_\_, 2009**

PASSED BY THE FOLLOWING VOTE:

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

NOES -

ABSENT -

ABSTENTION -

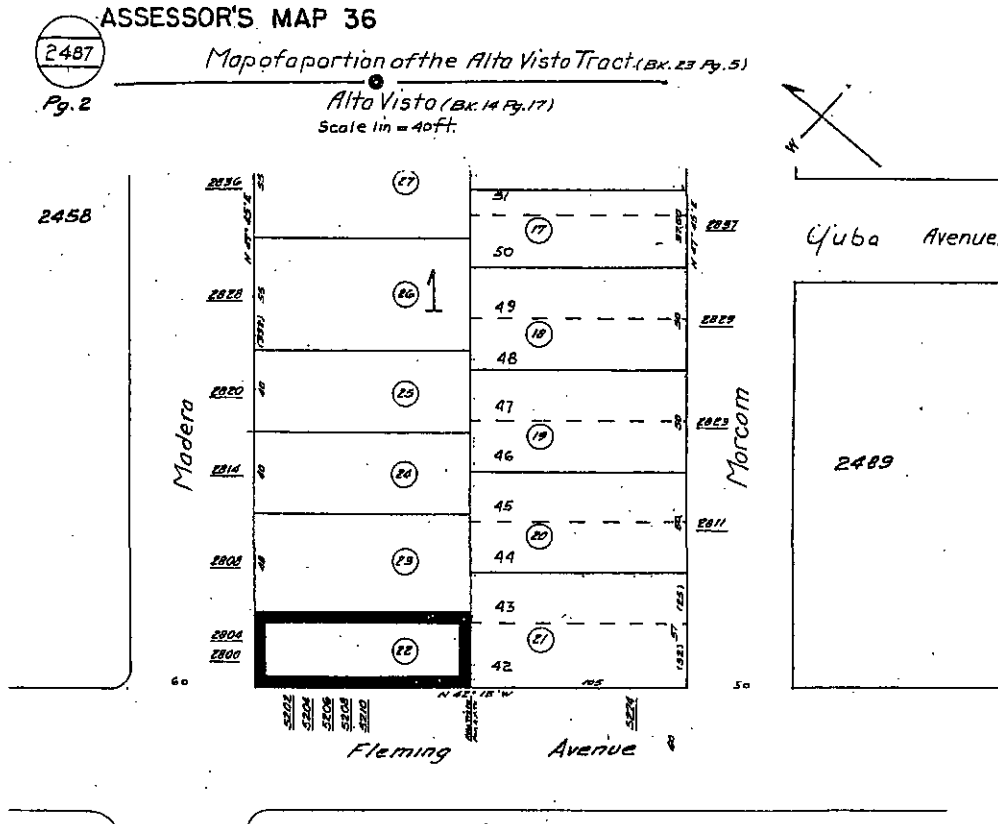
ATTEST: \_\_\_\_\_  
LATONDA SIMMONS  
City Clerk and Clerk of the Council  
of the City of Oakland, California

# Exhibit A

Lands of Thomas Dolan, as described in a Grant Deed, recorded October 8, 2007, series no. 2007353551, by the Alameda County Clerk-Recorder

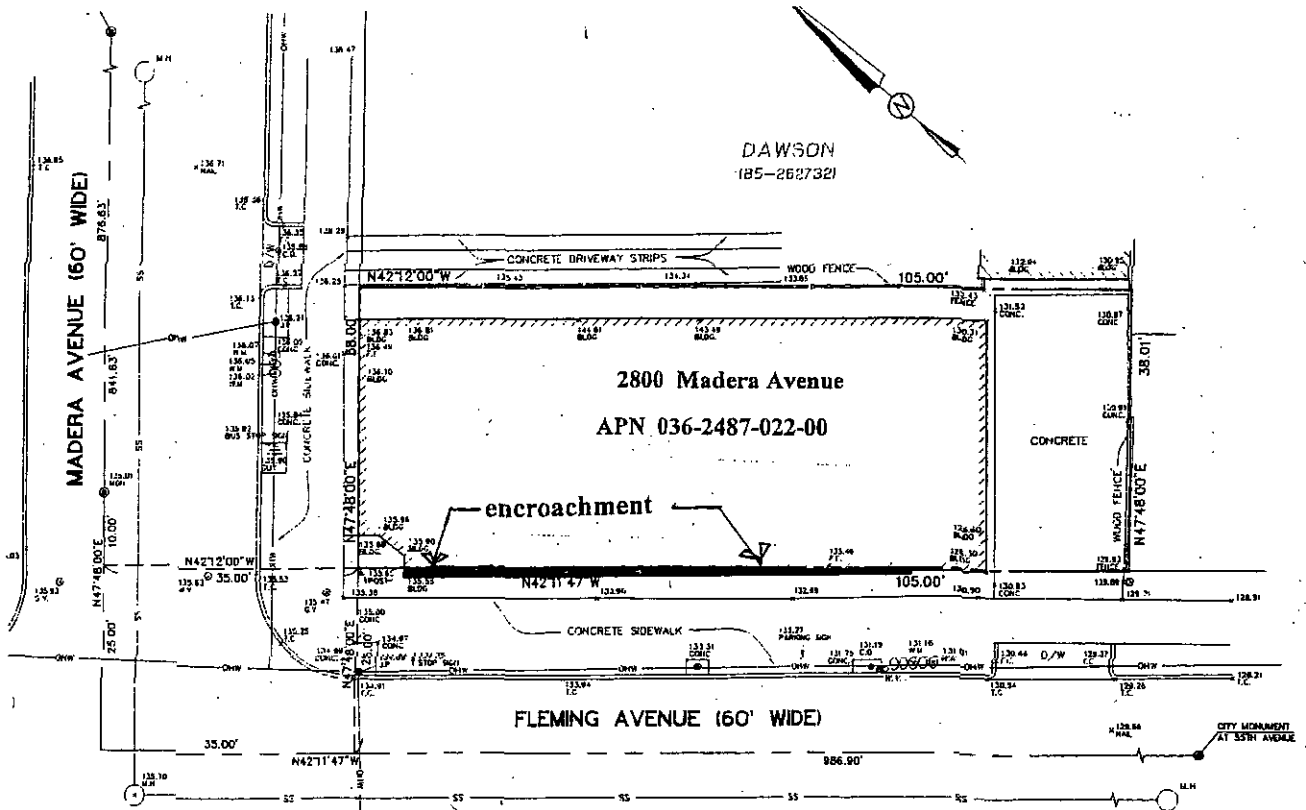
Beginning at the intersection of the southeastern line of Madera Avenue formerly Pleasant Avenue, with the Northeastern line of Fleming Avenue, formerly Stuart Avenue, running thence Northeasterly along said line of Madera Avenue 38 feet, thence at right angles Southeasterly 105 feet; thence at right angles Southwesterly 38 feet to said line of Fleming Avenue; thence Northwesterly along said line of Fleming Avenue 105 feet to the point of beginning.

Being a portion of Block "A" as said is shown on the "Map of a Portion of the Alta Vista Tract, Brooklyn Township, Alameda County, California", filed May 20, 1907, in Book 23 of Maps, at Page 5, in the office of the County of Alameda County.



# Exhibit B

## Limits of Encroachment into the Public Right-of-Way



BASIS OF BEARINGS:  
THE BEARING OF N47°48'00"E BETWEEN FOUND MONUMENTS IN MADERA AVENUE PER MAP OF ALTA VISTA (14 M 17) WAS TAKEN AS THE BASIS OF BEARINGS OF THIS MAP.

