

Introduced By

Councilmember

2011 APR 27 PM 12:56

Approved For Form And Legality

Mark P. Walsh
City Attorney

OAKLAND CITY COUNCIL

RESOLUTION No. 83356 C.M.S.

RESOLUTION GRANTING MACARTHUR BOULEVARD ASSOCIATES A REVOCABLE AND CONDITIONAL PERMIT TO ALLOW A SOIL SHORING SYSTEM TO ENCROACH UNDER THE PUBLIC RIGHT-OF-WAY ALONG FOOTHILL BOULEVARD FOR REDEVELOPMENT OF THE FOOTHILL SQUARE SHOPPING CENTER FEATURING A NEW GROCERY STORE LOCATED AT 10790 MACARTHUR BOULEVARD

WHEREAS, MacArthur Boulevard Associates ("Permittee"), a California limited liability company (no. 199820800004) and the owner of two (2) properties described in a grant deed, recorded July 31, 1998, series no. 1998267256, by the Alameda County Clerk-Recorder, and identified by the Alameda County Assessor with parcel numbers 047-5589-001-04, 047-5589-001-07, and 047-5594-001-00 and identified collectively by the City of Oakland as 10605 and 10700 MacArthur Boulevard and identified by the Permittee as Foothill Square Shopping Center, has filed an application with the City Engineer of the City of Oakland for a permit (ENMJ 10059) to allow a temporary soil shoring system which will support an excavation adjacent to the public right-of-way primarily for a new grocery store (Kroger Company "FoodsCo") to be installed and abandoned in-place under the public sidewalk and roadway along Foothill Boulevard between the intersections of 106th Avenue and 108th Avenue; and

WHEREAS, the Permittee received land use approval (CMDV08187) on May 4, 2011, from the Planning Commission of the City of Oakland to demolish existing improvements on the fourteen (14) acre Foothill Square site and to construct said new grocery store, other buildings, and associated new public and private infrastructure improvements; and

WHEREAS, the Permittee has filed applications with the Building Official of the City of Oakland for permits to grade the site (GR1100059) and to construct public and private infrastructure improvements (PZ1100060, PX100061) for said new grocery store and other buildings; and

WHEREAS, the Permittee has also filed an application (PMW08009) with the Director of Planning of the City of Oakland to adjust the property boundaries between said adjoining parcels to accommodate new construction of said grocery store and other buildings; and

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

WHEREAS, the encroachment under the public right-of-way and its location will not interfere with the use by the public of the roadway or sidewalk or buried utilities; and

WHEREAS, the Planning Commission of the City of Oakland adopted findings pursuant to the California Environmental Quality Act (CEQA) and approved a Mitigated Negative Declaration (MND) for the project on May 4, 2011 (ER080004), finding that all environmental impacts have been reduced to less than significant levels with City standard conditions of approval and traffic-related mitigation measures; now, therefore, be it

RESOLVED: That the Council of the City of Oakland independently reviewed and considered the MND, and in the exercise of its independent judgment, relies upon, and adopts, the Planning Commission's CEQA-related findings and incorporates them by reference as if fully set forth herein, and thus the encroachment, as conditioned herein, complies with CEQA; and be it

FURTHER RESOLVED: That the encroachment, as conditioned herein and delineated in *Exhibit A*, is hereby granted for a revocable permit to allow the installation and abandonment in-place of a soil shoring system under the public sidewalk and roadway adjoining a new grocery store (Kroger Company "FoodsCo") in the Foothill Square Shopping Center located at 10605 and 10700 MacArthur Boulevard to provide temporary support of the public right-of-way during excavation for a new building and construction of a new permanent retaining wall; and be it

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

1. the Permittee (MacArthur Boulevard Associates) 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

- 5a.** the Permittee, by the acceptance of this conditional permit agrees and promises to defend (with counsel acceptable to the City), hold harmless, and indemnify the City of Oakland, the Oakland City Council and its respective officials, officers, employees, agents, representatives, and volunteers (collectively called “City”) 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 the existence, installation or maintenance of the encroachments into the public right-of-way and regardless of responsibility for negligence. 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
- 5b.** within ten (10) calendar days of the filing of any Action as specified in subsection a) above, the Permittee shall execute a Joint Defense Letter Agreement with the City, acceptable to the Office of the City Attorney, which memorializes the above obligations. These obligations and the Joint Defense Letter of Agreement shall survive termination, extinguishment or invalidation of this Permit. 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. 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 A*; 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 in a reasonable manner; and be it

FURTHER RESOLVED: That this resolution shall become immediately void and have no further effect should the Permittee fail to obtain all necessary approvals and be issued all required permits by the City of Oakland for the construction of said new grocery, other buildings, and associated infrastructure improvements within three (3) years from the date of approval by the Council of the City of Oakland as identified below; and be it

FURTHER RESOLVED: That the City Engineer of the City of Oakland is hereby authorized to file a certified copy of this resolution for recordation with the Alameda County Clerk-Recorder as an encumbrance of the title of the parcels identified above.

IN COUNCIL, OAKLAND, CALIFORNIA, MAY 17 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

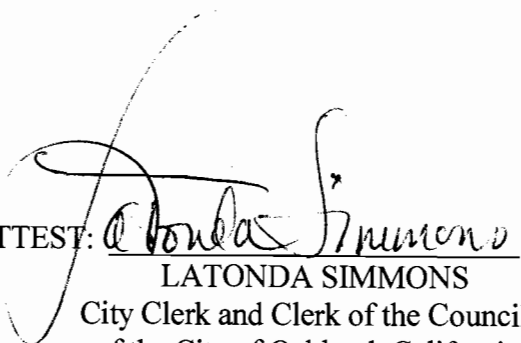
ATTEST: 
LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California

EXHIBIT A

Limits of the Encroachment

