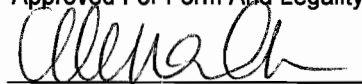


FILED
OFFICE OF THE CITY CLERK
OAKLAND

Introduced By

2013 FEB 27 PM 4:44

Approved For Form And Legality



City Attorney

Councilmember

OAKLAND CITY COUNCIL

RESOLUTION No. 84252 C.M.S.

**RESOLUTION GRANTING DUDLEY FRANKLIN INVESTORS LLC A
CONDITIONAL AND REVOCABLE PERMIT TO ALLOW AN EXISTING
UNDER-SIDEWALK BASEMENT FOR THE GOLDWATER BUILDING
LOCATED AT 2148 BROADWAY TO ENCROACH INTO THE PUBLIC
RIGHT- OF-WAY ALONG THE BUILDING'S FRONTAGE ON BROADWAY**

WHEREAS, Dudley Franklin Investors LLC (Permittee), a California Limited Liability Company (no. 201010610148) and owner of the property described in a grant deed, recorded May 7, 2010, series no. 2010-125003, by the Alameda County Clerk-Recorder, and identified by the Alameda County Assessor as APN 008-0650-001-00, and identified by the City of Oakland as 2148 Broadway, and more particularly described in *Exhibits A.1* and *A.2* attached hereto, has made an application to the City Engineer of the City of Oakland for a conditional and revocable permit (no. ENMJ 11057) to allow the encroachment of the existing under-sidewalk basement into the public right-of-way along the building's frontage on Broadway; and

WHEREAS, the Permittee has also filed an application with the Building Official of the City of Oakland for approval of a building permit (no. B1200148) to renovate the three (3) story building located at 2148 Broadway; and

WHEREAS, the existing basement encroaches into the public right-of-way and under the public sidewalk; and

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

WHEREAS, said encroachments have continuously occupied the delineated areas of the public right-of-way since the building was constructed circa 1923; and

WHEREAS, said encroachments and their locations have not interfered with the use by the public of the roadway or sidewalk or buried utilities for approximately ninety (90) 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 Guidelines Section 15301 (existing facilities) this project is categorically exempted; now, therefore, be it

RESOLVED: That the action by the Council of the City of Oakland approving said encroachments, as conditioned herein, complies with the California Environmental Quality Act; and be it

FURTHER RESOLVED: That a revocable permit, as conditioned herein, is hereby granted to Dudley Franklin Investors LLC to allow the existing under-sidewalk basement, as delineated in *Exhibit B*, located at 2148 Broadway to encroach into the public right-of-way at the intersection of Broadway, 22nd Street, and Franklin Street; and be it

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

1. This agreement may be voided and the associated permit for encroachments may be revoked at any time and for any reason, at the sole discretion of the Oakland City Council, expressed by resolution, or the associated permit may be suspended at any time, at the sole discretion of the City Engineer, upon failure of the Permittee (Dudley Franklin Investors LLC) to comply fully and continuously with each and all of the general and special conditions set forth herein and in the associated permit.
2. The Permittee hereby disclaims any right, title, or interest in or to any portion of the public right-of-way, including the sidewalk and street, and agrees that the encroachment is granted for indeterminate period of time and that the use and occupancy by the Permittee of the public right-of-way is temporary and does not constitute an abandonment, whether expressed or implied, by the City of Oakland of any of its rights associated with the statutory and customary purpose and use of and operations in the public right-of-way.
3. The Permittee shall maintain fully in force and effect at all times that the encroachment occupies the public right-of-way good and sufficient public liability insurance in a face amount not less than \$2,000,000.00 for each occurrence, and property damage insurance in a face amount not less than \$1,000,000.00 for each occurrence, both including contractual liability, insuring the City of Oakland, its officers, agents, employees, and volunteers against any and all claims arising out of the existence of the encroachment in the public right-of-way, as respects liabilities assume under this permit, 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 the insurance coverage shall not be canceled or be permitted to lapse without thirty (30) calendar 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 of the Permittee annually and may require the Permittee to increase the amount of and/or change the type of insurance coverage required.
4. The Permittee shall be solely and fully liable and responsible for the repair, replacement, removal, reconstruction, and maintenance of any portion or all of the private improvements constructed or installed in the public right-of-way, whether by the cause, neglect, or negligence of the Permittee or others and for the associated costs and expenses necessary to restore or remove the encroachment to the satisfaction of the City Engineer and shall not allow the encroachment to become a blight or a menace or a hazard to the health and safety of the general public.

5. The Permittee acknowledges and agrees that the encroachment is out of the ordinary and does not comply with City of Oakland standard installations. The Permittee further acknowledges and agrees that the City of Oakland and public utility agencies will periodically conduct work in the public right-of-way, including excavation, trenching, and relocation of its facilities, all of which may damage the encroachment. Permittee further acknowledges and agrees that the City and public utility agencies take no responsibility for repair or replacement of the encroachment which may be damaged by the City or its contractors or public utility agencies or their contractors. Permittee further acknowledges and agrees that upon notification by and to the satisfaction of the City Engineer, Permittee shall immediately repair, replace, or remove, at the sole expense of the Permittee, all damages to the encroachment that are directly or indirectly attributable to work by the City or its contractors or public utility agencies or their contractors.
6. The Permittee shall remain liable for and shall immediately reimburse the City of Oakland for all costs, fee assessments, penalties, and accruing interest associated with the City's notification and subsequent abatement action for required maintenance, repairs, or removal, whether in whole or in part, of the encroachment or of damaged City infrastructure made necessary by the failure, whether direct or indirect, of the Permittee to monitor the encroachment effectively and accomplish preventative, remedial, or restorative work expeditiously. The City reserves the unqualified right to collect all monies unpaid through any combination of available statutory remedies, including recordation of Prospective Liens and Priority Liens/ Special Assessments with the Alameda County Recorder, inclusion of non-reimbursed amounts by the Alameda County Assessor with the annual assessment of the general levy, and awards of judgments by a court of competent jurisdiction.
7. Upon revocation of the encroachment permit, the Permittee shall immediately, completely, and permanently remove the encroachment from the public right-of-way and restore the public right-of-way to its original conditions existing before the construction or installation of the encroachment, to the satisfaction of the City Engineer and all at the sole expense of the Permittee.
8. This agreement and the associated permit for an encroachment shall become effective upon filing of this agreement with the Alameda County Recorder for recordation as an encumbrance of the property and its title.
9. The Permittee acknowledges that the City makes no representations or warranties as to the conditions beneath said encroachment. By accepting this revocable permit, 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 safety of itself and any of its personnel in connection with its entry under this revocable permit.
10. The Permittee acknowledges that the City is unaware of the existence of any hazardous substances beneath the encroachment area, and Permittee hereby waives and fully releases and forever discharges the City 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 of 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 466 et seq.), the Safe Drinking Water Act (14 U.S.C. Sections 1401, 1450), the 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 Sections 253000 et seq.), and the Safe Drinking Water and Toxic Enforcement Act (California Health and Safety Code Section 25249.5 et seq.).

11. 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."
12. The Permittee recognizes that by waiving the provisions of this section, Permittee will not be able to make any claims for damages that may exist, and to which, if known, would materially affect its decision to agree to these encroachment terms and conditions, regardless of whether Permittee's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.
13. By the acceptance of this revocable permit, the Permittee agrees and promises
 - (a) to indemnify, defend, and hold harmless the City of Oakland, its officers, agents, employees, and volunteers, to the maximum extent permitted by law, 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; collectively referred to as "claims", whether direct or indirect, known or unknown, foreseen or unforeseen, to the extent that such claims were either (1) caused by the Permittee, its agents, employees, contractors or representatives, or, (2) in the case of environmental contamination, the claim is a result of environmental contamination that emanates or emanated from 2148 Broadway, Oakland, California site, or was otherwise caused by the Permittee, its agents, employees, contractors or representatives; and
 - (b) if any contamination is discovered below or in the immediate vicinity of the encroachment, and the contaminants found are of the type used, housed, stored, processed or sold on or from 2148 Broadway, Oakland, California site, such shall amount to a rebuttable presumption that the contamination below, or in the immediate vicinity of, the encroachment was caused by the Permittee, its agents, employees, contractors or representatives; and

- (c) the Permittee shall comply with all applicable federal, state, county and local laws, rules, and regulations governing the installation, maintenance, operation and abatement of the encroachment.
- 14. The encroachment permit and accompanying indenture agreement shall take effect when all the conditions hereinabove set forth shall have been complied with to the satisfaction of the City Engineer, and shall become null and void upon the failure of the Permittee to comply with all conditions.
- 15. The Indenture Agreement alone does not allow work to be done which requires permitting and/or inspection, and the Permittee shall obtain any and all required permits before beginning work.
- 16. 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 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 have been complied with to the satisfaction of the City Engineer 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 Engineer is hereby authorized to file a certified copy of this resolution for recordation by the Alameda County Clerk-Recorder as an encumbrance of the title of the property identified above.

IN COUNCIL, OAKLAND, CALIFORNIA, MAR 19 2013, 2013

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, GALLO, KALB, KAPLAN, McELHANEY, REID, SCHAAF, AND
PRESIDENT KERNIGHAN - 8

NOES - 0

ABSENT - 0

ABSTENTION - 0

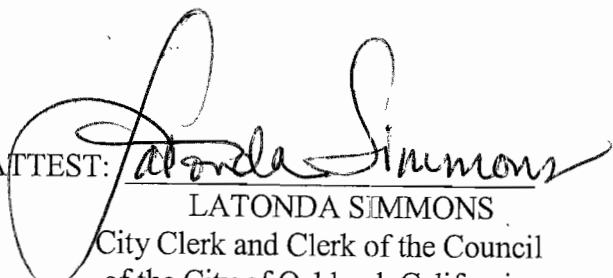
ATTEST: 
LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California

EXHIBIT A.1

Description of the Private Property Abutting the Encroachment

Address 2148 Broadway

Parcel no. 008 -0650-001-00

Deed no. 2010-125003

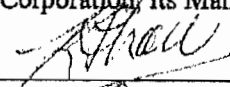
Recorded May7, 2010

APN: 008-0650-001 2134-2148 Broadway and 2127-2135 Franklin Street, Oakland, CA

Effective May 5th, 2010, SHAW PLAZA LLC, a California limited liability company, hereby grants to DUDLEY FRANKLIN INVESTORS, LLC, a Delaware limited liability company, the Alameda County, California, real property described as follows:

Commencing at a point on the Southeasterly line of Broadway, distant thereon Southwesterly 6.64 feet from the Southerly line of 22nd, formerly Walnut or 21st Street, as said 21st Street existed prior to January 17, 1912, said point of commencement being the point of intersection of said line of Broadway with the Southwesterly boundary line of that certain parcel of land fourthly described in the Deed to City Oakland, a municipal corporation, recorded February 27, 1912, in Book 2017 of Deeds, at page 281, Alameda County Records; thence Southwesterly along said line of Broadway 105.36 feet; thence at right angles Southeasterly 113 feet, more or less to the Westerly line of Franklin Street, as the same now exists since the widening thereof; thence Northerly along said line of Franklin Street 69.97 feet, more or less, to said Southwesterly boundary line of said land conveyed to City of Oakland, a municipal corporation; thence Northwesterly along the last named line of the arc of a curve to the left with a radius of 150.274 feet, a distant of 102.01 feet, more or less, to the point of commencement.

SHAW PLAZA LLC,
a California limited liability company
By: SRG Corporation, its Manager

By: 
Kenneth Shaw, President

MAIL TAX STATEMENTS TO:

Dudley Franklin Investors, LLC, 543 Howard Street, Ste 500, San Francisco, CA 94105

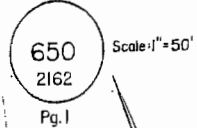
EXHIBIT A.2

Description of the Private Property Abutting the Encroachment

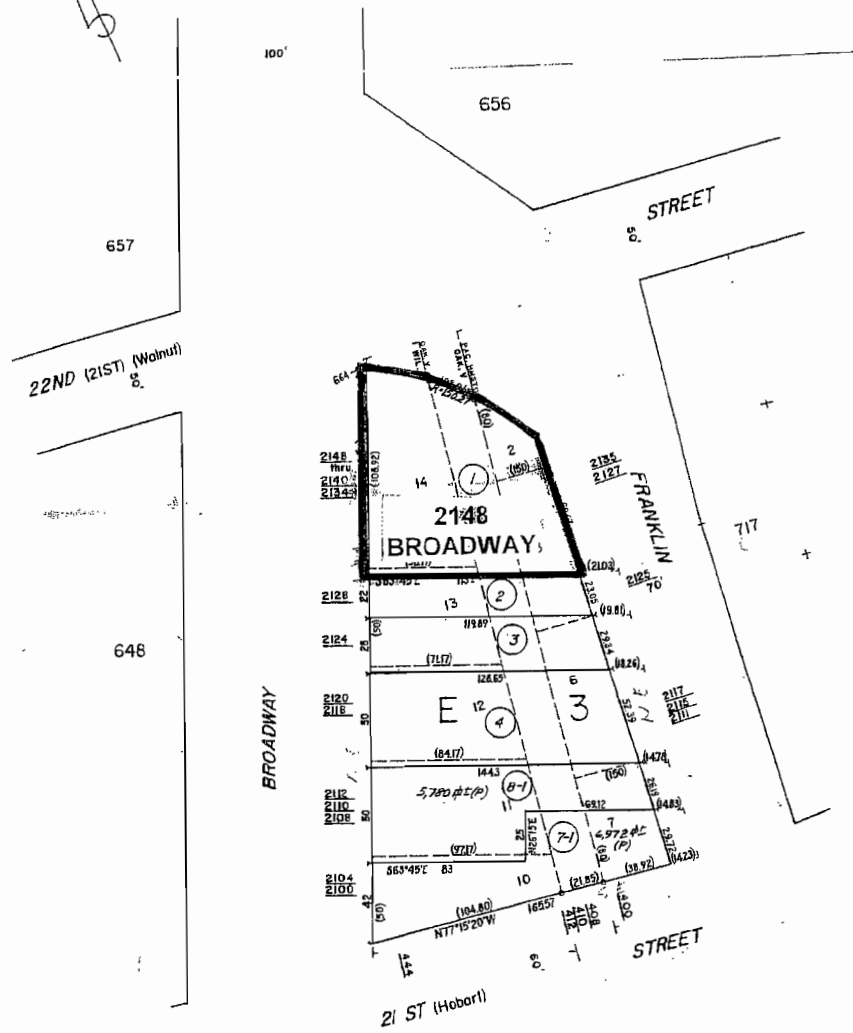
Address 2148 Broadway

Parcel no. 008-0650-001-00

ASSESSOR'S MAP 8



MAP OF OAKLAND AND VICINITY (Bk. 17 Pg. 14)
MAP OF THE PACIFIC HOMESTEAD (Bk. W Deeds Pg. 2)
WILCOX PLACE (Bk. 36 Deeds Pg. 173)



A more legible copy is available at the
Office of the City Engineer
250 Frank Ogawa Plaza - 2nd floor
Oakland, CA 94612

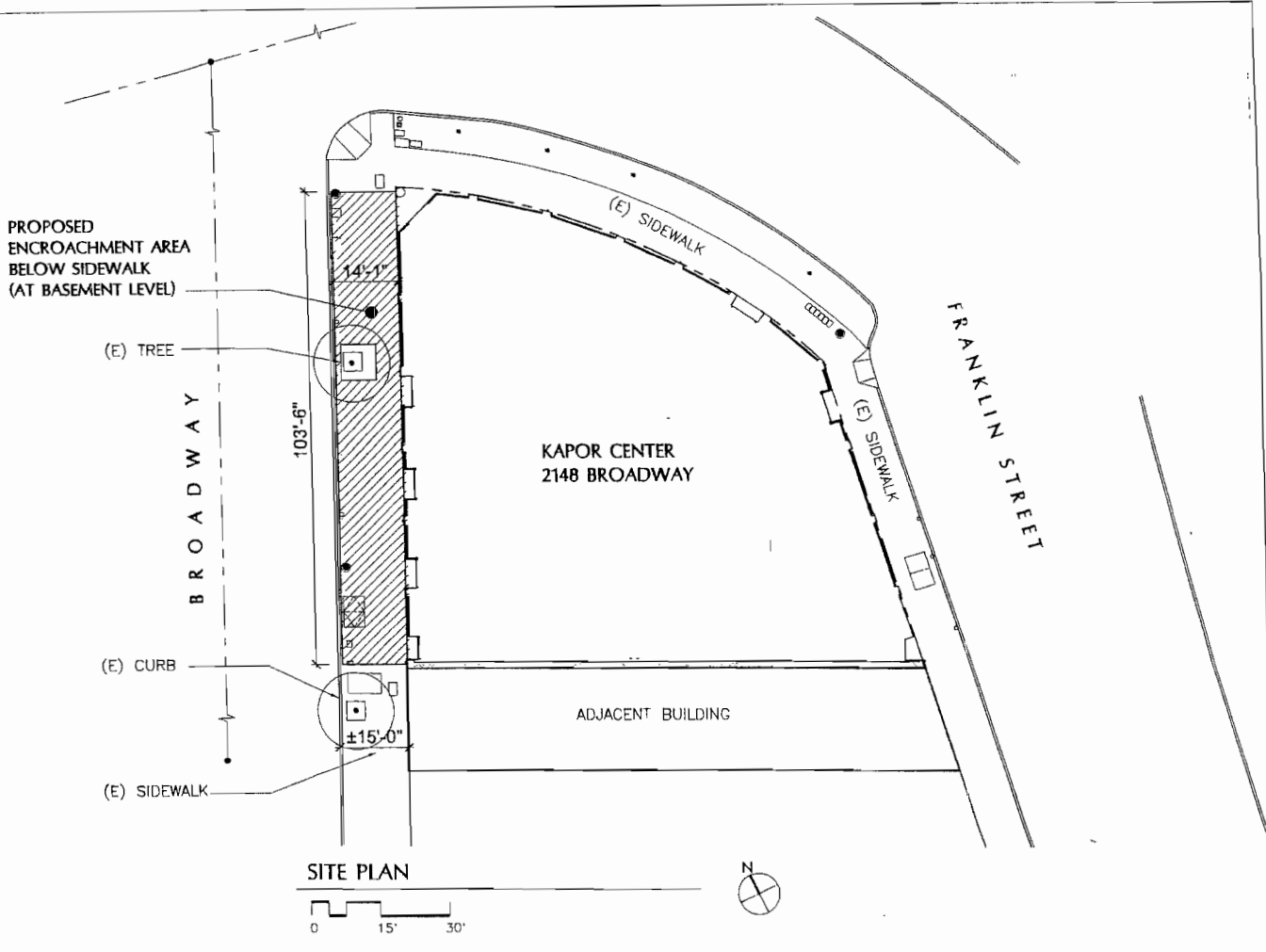
Not to scale

EXHIBIT B

Limits of the Encroachment in the Public Right-Of-Way

Address 2148 Broadway

Parcel no. 008 -0650-001-00



Architect:
MARCY WONG
DONN LOGAN
ARCHITECTS
 800 boicraft way #200
 berkeley ca 94710
 tel 510. 843.0914
 office@wonglogan.com

PROPOSED ENCROACHMENT PERMIT FOR

2148 BROADWAY
 OAKLAND, CA 94612

Date: Oct. 6, 2011
 Job: 1008
 Drawn: KS
 Scale: 1" = 30'-0"

EC-1

A more legible copy is available at the
Office of the City Engineer
 250 Frank Ogawa Plaza - 2nd floor
 Oakland, CA 94612

Not to scale