


OFFICE  
Introduced By

27084  
Councilmember

Approved For Form And Legality

  
City Attorney

## OAKLAND CITY COUNCIL

RESOLUTION No. 81091 C.M.S.

**RESOLUTION GRANTING DALE WIRTHMAN AND MUAD ALARBES A REVOCABLE AND CONDITIONAL PERMIT TO ALLOW ORIEL WINDOWS FOR AN EXISTING BUILDING AT 2335 MARKET STREET TO ENCROACH OVER THE PUBLIC SIDEWALK**

**WHEREAS**, Dale Wirthman and Muad Alarbes ("Permittee"), owners of a property described in a Grant Deed recorded February 23, 2006, series no. 2006068258, by the Alameda County Clerk-Recorder, and identified by the Alameda County Assessor as parcel no. 005-0431-008-02, and identified by the City of Oakland as 2335 Market Street, and more particularly described in Exhibit A attached hereto, have made an application to the Council of the City of Oakland for a conditional and revocable permit (ENMJ 07277) to allow existing oriel (cantilevered) windows on the second story of three (3) unit residential building to encroach beyond the property lines adjoining the public right-way and over the public sidewalk along Market Street; and

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

**WHEREAS**, the Permittee has also applied for a Tentative Tract Map (TTM 7803) to convert the existing building (Group R, Division 2 occupancy) and a companion existing three (3) unit residential building (Group R, Division 2 occupancy) at the rear of the parcel into condominium ownership; and

**WHEREAS**, Oakland Municipal Code Section 16.24.100 requires that a boundary survey of the property be performed as a condition of approval of the Tentative Map; and

**WHEREAS**, said boundary survey by a California licensed land surveyor did confirm said encroachments of approximately two (2) feet into the public right-of-way; and

**WHEREAS**, said sidewalk is approximately fourteen (14) feet wide, and the encroachments have more than eight (8) feet of clearance above said sidewalk; and

**WHEREAS**, the encroachments and their locations have not interfered with the use by the public of the roadway or sidewalk or buried utilities since their construction in 2001; and

**WHEREAS**, the requirements of the California Environmental Quality Act (CEQA), the CEQA 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 City Council's action approving the encroachment, as conditioned herein, complies with the California Environmental Quality Act; and be it

**FURTHER RESOLVED:** That the encroachments, as conditioned herein and delineated in Exhibit B, are hereby granted for a revocable permit to allow existing oriel (cantilevered) windows to encroach over the public sidewalk along Market Street; and be it

**FURTHER RESOLVED:** That the encroachments are hereby conditioned by the following special requirements:

1. the Permittee 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 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 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 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 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 by the Alameda County Clerk-Recorder.

IN COUNCIL, OAKLAND, CALIFORNIA, MAR 4 2008, 2008

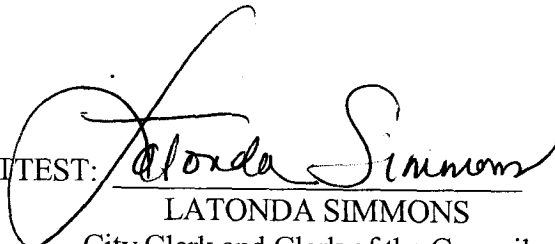
PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, AND  
PRESIDENT DE LA FUENTE - 8

NOES - 0

ABSENT - 0

ABSTENTION - 0

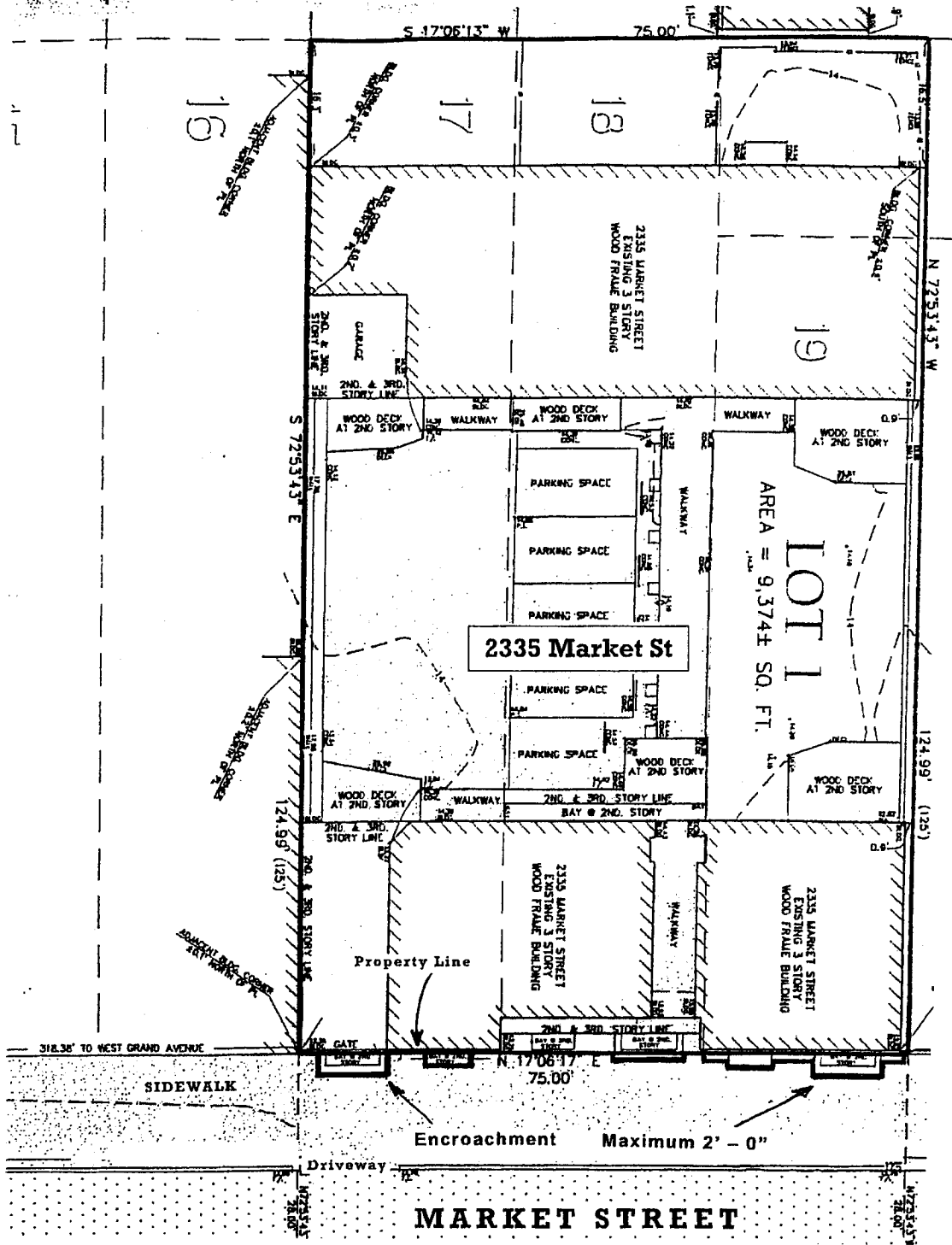
ATTEST:   
LATONDA SIMMONS  
City Clerk and Clerk of the Council  
of the City of Oakland, California

# EXHIBIT B

## Limits Of The Encroachment In The Public Right-Of-Way

address 2335 Market Street

parcel no. 005-0431-008-02



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## **SUSTAINABLE OPPORTUNITIES**

### **Economic**

The buildings were constructed with sound insulation required for condominium conversions.

### **Environmental**

No additional construction will be required for the condominium conversion.

### **Social Equity**

The condominium conversion will provide home ownership opportunities for the Oakland community.

## **DISABILITY AND SENIOR CITIZEN ACCESS**

The buildings were constructed in conformance with current State and City requirements for handicapped accessibility.

## **RECOMMENDATIONS**

Staff recommends that the Committee accept this report and forward it to the City Council to adopt the proposed resolution approving the encroachment over the public sidewalk.

## **ACTION REQUESTED OF THE CITY COUNCIL**

Staff recommends that the City Council accept this report and adopt the proposed resolution granting Dale Wirthman and Muad Alarbes a conditional and revocable encroachment permit to allow existing oriel windows to encroach over the public sidewalk along Market Street.

Respectfully submitted,



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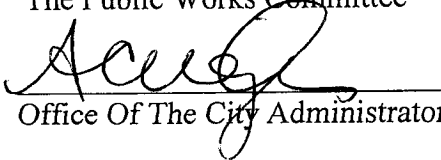
**DAN LINDHEIM**

Interim Development Director  
Community and Economic Development Agency

Prepared by:

Raymond M. Derania  
Interim City Engineer  
Building Services Division

Approved For Forwarding To  
The Public Works Committee



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Office Of The City Administrator

Item No. \_\_\_\_\_  
Public Works Committee  
February 26, 2008