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2009 MAY -7 PM 12:4

Councilmember

Approved For Form And Legality

  
City Attorney

## OAKLAND CITY COUNCIL

RESOLUTION No. 81955 C.M.S.

**RESOLUTION GRANTING KAISER FOUNDATION HOSPITALS A REVOCABLE AND CONDITIONAL PERMIT TO ALLOW A BASEMENT EXCAVATION SHORING SYSTEM FOR THE PHASE II HOSPITAL AND MEDICAL SUPPORT BUILDINGS AT 235 WEST MACARTHUR BOULEVARD TO ENCROACH UNDER THE SIDEWALK AND ROADWAY ALONG BROADWAY, WEST MACARTHUR BOULEVARD, AND PIEDMONT AVENUE**

**WHEREAS**, Kaiser Foundation Hospitals (Permittee), a California corporation (no. C0224971) and owner of the properties described in a grant deeds, recorded

- October 23, 1961, series no. AS131012
- September 10, 1997, series no. 97233768
- October 28, 2004, series no. 2004483317
- September 1, 1988, series no. 88223179
- October 29, 2004, series no. 2004486235
- September 10, 1997, series no. 97233768
- December 12, 2005, series no. 2005527230

by the Alameda County Clerk-Recorder, and identified by the Alameda County Assessor as parcel numbers

- 009-0732-001-02
- 009-0732-011-03
- 012-0940-001-03
- 012-0940-009-00
- 012-0940-004-00
- 012-0940-009-00
- 012-0940-011-01
- 012-0940-002-00

and identified collectively by the City of Oakland as 235 West MacArthur Boulevard and more particularly described in Exhibit A attached hereto, has made an application to the City Engineer of the City of Oakland for a permit (ENMJ 09054) to allow a basement excavation shoring system for a replacement hospital and two (2) new adjoining support buildings to be installed and abandoned in-place under the public sidewalk and roadway along Broadway, West MacArthur Boulevard, and Piedmont Avenue; and

**WHEREAS**, the City of Oakland conditionally approved a tentative parcel map (TPM 9831) on December 12, 2008, for merging said parcels; and

**WHEREAS**, the Building Official of the City of Oakland has reviewed plans and specifications prepared by the Permittee, for a grading permit (GR0900055) and a building permit (B090901053) to install said shoring system at said site for the construction of the building basements; and

**WHEREAS**, the limits of the encroachment is delineated in Exhibit B 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 City of Oakland, as the lead agency for purposes of environmental review under the California Environmental Quality Act of 1970 ("CEQA"), prepared the Final Environmental Impact Report ("EIR"), and certified the document (ER050004) on March 24, 2005, in accordance with the California Environmental Quality Act, Public Resources Code § 21000, et seq. (Oakland Redevelopment Agency Resolution No. 2007-0012 C.M.S.); and

**WHEREAS**, the City of Oakland has reviewed and considered documentation relevant to the proposed encroachment 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 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 have been satisfied, in that this project is exempt from the California Environmental Quality Act in accordance with, but not limited to, each of following California Code of Regulations: Section 15332 (Class 32: Infill Projects), Section 15301 (minor alteration to existing structures), and Section 15304 (minor alterations to land); now, therefore, be it

**RESOLVED:** That the Council of the City of Oakland hereby finds and determines: (1) that it has been presented with, and has independently reviewed and considered the information contained in the previously certified EIR and relevant to the encroachments, and the encroachment complies with CEQA and none of the circumstances necessitating preparation of additional CEQA review as specified in CEQA and the CEQA Guidelines, including without limitation Public Resources Code Section 21166 and CEQA Guidelines Section 15162, are present in that (1) there are no substantial changes proposed in the Project or the circumstances under which the Project is undertaken that would require major revisions of the EIR due to the involvement of new environmental effects or a substantial increase in the severity of previously identified significant effects; and (2) there is no "new information of substantial importance" as described in CEQA Guidelines Section 15162(a)(3); 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 installation and abandonment in-place of a shoring system under the public sidewalks and roadway adjoining a replacement hospital and new medical office buildings at 235 West MacArthur Boulevard to provide temporary support for a basement excavation; and be it

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

1. the Permittee (Kaiser Foundation Hospitals) 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; and that 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, 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 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,           MAY 5 2009          , 2009

PASSED BY THE FOLLOWING VOTE:

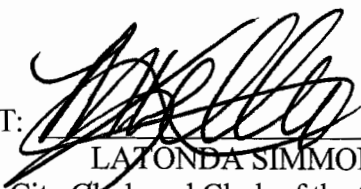
AYES - BROOKS, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, QUAN, ~~REID~~,  
AND PRESIDENT BRUNNER - 7

NOES - 0

ABSENT - 0

ABSTENTION - 0

Excused - Reid - 1

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