



CITY OF OAKLAND

AGENDA REPORT

TO: Jestin D. Johnson
City Administrator

FROM: Josh Rowan
Director, OakDOT

SUBJECT: Major Encroachment Permit at
2121 East 12th Street

DATE: August 12, 2024

City Administrator Approval


Jestin Johnson (Aug 30, 2024 09:34 PDT)

Date: Aug 30, 2024

RECOMMENDATION

Staff Recommends That The City Council Adopt A Resolution Granting A Conditional And Revocable Major Encroachment Permit And A Waiver of Oakland Municipal Code Section 12.08.100 Standards To Kimmy Chung To Allow Portions Of An Existing Two-Story Commercial Building To Encroach Into The Public Right-Of-Way Fronting The Property At 2121 East 12th Street, Major Encroachment Permit ENMJ24054; And Adopting Appropriate California Environmental Quality Act Findings.

EXECUTIVE SUMMARY

Adoption of this proposed resolution will authorize the City Administrator to issue a conditional and revocable Major Encroachment Permit to the property owner, Kimmy Chung (Permittee), to document and regulate existing encroachments in the public right-of-way at the property located at 2121 East 12th Street. Adoption of this proposed resolution also requires waiving the requirements of Oakland Municipal Code (OMC) Chapter 12.08.100, which states that no major encroachment into the public right-of-way may be granted unless a minimum clear space of five and one-half (5.5) feet remains open for public use in the sidewalk area. The permit will allow existing building elements consisting of a portion of the existing two-story commercial building structure to encroach into the public right-of-way, preserving a five (5) feet wide existing sidewalk. The encroachments are described in more detail in **Exhibit A** to the Resolution.

Consistent with OMC Chapter 12.08, a Major Encroachment Permit is required for all encroachments in the public right-of-way beyond the limits specified in the Oakland Building Code. Major Encroachment Permits are reviewed by the Department of Transportation and approved and issued by the City Council. An Indenture Agreement between the City of Oakland (City) and Permittee, which sets out the conditions and obligations of the revocable Major Encroachment Permit, is provided as **Exhibit B** to the resolution.

BACKGROUND / LEGISLATIVE HISTORY

[OMC Chapter 12.08](#) requires a Major Encroachment Permit for structural encroachments into the public right-of-way beyond the limits specified in the Oakland Building Code. In addition, OMC Chapter 12.08.100 states that no major encroachment into the public right-of-way may be granted unless a minimum clear space of five and one-half (5.5) feet remains open for public use in the sidewalk area.

PWTC
September 10, 2024

The Permittee applied for a Building Department permit with the Planning and Building Department (B2302687) to allow for the legalization of unpermitted tenant improvement work that are intended to convert the existing two-story commercial facility into a cultivation facility. Upon submission for these building permits, the Permittee was informed that they must first obtain an approved Major Encroachment Permit (ENMJ24054) prior to building permit approval and issuance.

The proposed improvement plans pertain to an existing two-story warehouse building in which portions of the existing structure encroach into the public right-of-way. Consistent with OMC Chapter 12.08, the Permittee applied for a Permit for this encroachment.

ANALYSIS AND POLICY ALTERNATIVES

The Major Encroachment Permit requires an Indenture Agreement to be executed between the City and Permittee, which sets out the conditions and obligations of the Permit (see **Exhibit B** to the attached proposed Resolution). This Permit and the Indenture Agreement will hold the property owners liable and responsible for private improvements constructed in the right-of-way and allow for the construction and maintenance of encroachments. It also allows the City to revoke the Permit if it is in the City's best interest and requires the property owners to remove the encroachments and restore the public right-of-way. In addition, Council may direct the Department of Transportation staff to include other conditions, as the location and nature of the proposed encroachments may require for the public health, safety, and appearance.

Approval of the Permit will allow the Permittee to legalize tenant improvement work without radically disrupting the historical façade and structural integrity of the existing building. The existing structure currently encroaches approximately 4.71 feet into the public right-of-way. The available clear space provided for public use within the sidewalk area immediately adjacent to the encroachment is approximately 5 feet wide to the face of curb. This clear space is less than the minimum 5.5 feet required by OMC Chapter 12.08.100. However, Staff recommend waiving this provision under the condition the Permittee bring the existing sidewalk into compliance with the Americans with Disabilities Act (ADA). Typically, Major Encroachment Permit approval is not contingent on ADA compliance of the adjacent sidewalk.

Approval of the Permit conditions the Permittee within two (2) years of its adoption to bring the existing sidewalk into compliance with the ADA by completing public infrastructure improvements, which include, but are not limited to, sidewalk, curb, and gutter replacement, and removal of an unused driveway. The proposed encroachments and public infrastructure construction are not expected to interfere with the current or potential future public use of the right-of-way and will not endanger but instead improve public welfare, convenience, and access. The Permittee has submitted to the City a surety bond as assurance for completing said public infrastructure construction.

Denial of the Permit and/or denial of the OMC Chapter 12.08.100 waiver would cause financial hardship to the Permittee, who would need to remove the existing two-story building encroachment before receiving final approval of their tenant improvements. Removal of the existing encroachments would entail the demolition and reconstruction of a portion of the existing structure's 8" concrete masonry unit perimeter walls, which significantly increases the original financial cost and scope of the Permittee's building permit. Staff do not recommend

relocating the existing curb to widen the sidewalk area at the location of the encroachment as this may impact future implementation of the 2019 Oakland Bike Plan, which recommends Class IV separated bikeways on East 12th Street. Should the property owner consider redeveloping the parcel, the Permit will be revoked and the full sidewalk width restored.

Final approval of the building permit for these tenant improvements to the existing building are on hold until the Major Encroachment Permit is issued.

Approval of the proposed Resolution granting the Major Encroachment Permit would support the Citywide priorities of 1) **holistic community safety** 2) **housing, economic, and cultural security** and 3) **responsive, trustworthy government** because it would facilitate upgrades to both existing public right-of-way and existing commercial buildings within the City and allow an existing small business to operate in Oakland without excessive building reconstruction, which would not be financially possible for the Permittee.

FISCAL IMPACT

There is no fiscal impact to the City associated with this permit. Staff costs for processing the proposed Major Encroachment Permit are covered by fees set by the Master Fee Schedule and paid by the Permittee.

PUBLIC OUTREACH / INTEREST

This item did not require special public outreach other than the required posting on the City's website.

COORDINATION

The agenda report and proposed resolution were coordinated with the Planning and Building Department, Budget Bureau, and Office of the City Attorney.

SUSTAINABLE OPPORTUNITIES

Economic: This Major Encroachment Permit facilitates upgrades to existing commercial buildings, thereby improving the quality of Oakland's building stock.

Environmental: Approval of the Major Encroachment Permit enhances the structural integrity and Americans with Disability Act (ADA) compliance of pedestrian facilities in Oakland with attendant potential greenhouse gas emissions benefits as walking becomes a more viable transportation option for some Oaklanders.

Race & Equity: There are no direct race and equity impacts of this resolution.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The California Environmental Quality Act (CEQA) and the CEQA Guidelines exempt specific types of projects from environmental review. The following CEQA exemptions apply to this project, each of which provides a separate and independent basis for CEQA clearance: CEQA Guidelines section 15303 (New Construction or Conversion of Small Structures), CEQA Guidelines section 15332 (In-Fill Development Projects), and CEQA Guidelines section 15183 (Projects Consistent with a Community Plan or Zoning).

ACTION REQUESTED OF THE CITY COUNCIL

Recommends That The City Council Adopt A Resolution Granting A Conditional And Revocable Major Encroachment Permit And A Waiver of Oakland Municipal Code Section 12.08.100 Standards To Kimmy Chung To Allow Portions Of An Existing Two-Story Commercial Building To Encroach Into The Public Right-Of-Way Fronting The Property At 2121 East 12th Street, Major Encroachment Permit ENMJ24054; And Adopting Appropriate California Environmental Quality Act Findings.

For questions regarding this report, please contact Tadd Tsui, Assistant Engineer II, at ttsui@oaklandca.gov.

Respectfully submitted,


Josh Rowan (Aug 26, 2024 12:11 PDT)

JOSH ROWAN
Director, Department of Transportation

Reviewed by:
Jamie Parks, Assistant Director, Department of
Transportation

Emily Ehlers, Division Manager
Department of Transportation

Ishrat Jahan, PE, Supervising Civil Engineer
Department of Transportation

Prepared by:
Tadd Tsui, Assistant Engineer II
Engineering Services and Right-of-Way
Management

Attachments (2): Exhibit A: Depiction of Encroachment
Exhibit B: Indenture Agreement

No Fee Document Pursuant To Government Code Section 27383

Recording requested by:
CITY OF OAKLAND
When recorded mail to:
City of Oakland
Department of Transportation
Dalziel Admin Building
250 Ogawa Plaza - 4th Floor
Oakland, CA 94612
Attn: Ishrat Jahan

----- space above for Recorder's use only -----

INDENTURE AGREEMENT

Address 2121 East 12th Street

Permit no. ENMJ 24054

Parcel no. 19-47-1-7

Authorities Municipal Code Section 12.08.080

Description Portions of an existing two-story commercial building encroaching into the Public Right of Way addressed to 2121 East 12th Street. The executed agreement produced by this permit application shall automatically expire upon substantial redevelopment of the subject parcel, at which point the encroachment shall be removed and the full sidewalk width restored.

RECITAL

The owner subscribed below of fee simple interest in the property referenced above and described in Exhibit B, attached hereto, is hereby granted, for an indeterminate period of time, the revocable permit referenced above allowing the temporary encroachment described above and delineated in Exhibit C, attached hereto, and limiting the use, exercise, and operation of the encroachment with the requirements and restrictions set forth in Exhibit A, attached hereto, and the associated permit. The owner agrees by and between themselves to be bound by the general and special conditions in Exhibit A and to comply with these conditions faithfully and fully at all times. The conditions of this agreement and associated permit shall equally bind all agents, heirs, successors, and assigns of the owner.

ACKNOWLEDGEMENT OF PROPERTY OWNER

(Notarization of signature required)

Kimmy Chung, an unmarried woman

Signature _____

Date _____

Print Name _____

Title _____

ATTACHMENTS

- Exhibit A - Conditions of encroachment
- Exhibit B - Description of privately owned parcel
- Exhibit C - Limits of encroachment
- Exhibit D - Oakland City Council Resolution XXXX
- Exhibit E - Form of Notice to Prospective Purchasers

CITY OF OAKLAND a municipal corporation JAMIE PARKS Assistant Director Department of Transportation	by	_____ date _____ EMILY EHLERS Transportation Manager Department of Transportation
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EXHIBIT A

Conditions for the Encroachments in the Public Right-Of-Way

Address 2121 East 12th Street

Parcel no. 19-47-1-7

Permittee Kimmy Chung

Permit no. ENMJ 24054

1. This Indenture Agreement will be automatically voided should (a) the associated Permit be revoked at any time and for any reason, at the sole discretion of the City Council, expressed by resolution, or (b) the associated Permit be suspended at any time, upon failure of the Permittee to comply fully and continuously with each and all of the general and special conditions set forth herein and in the associated Permit, as may be determined by the City Engineer in his or her sole discretion.
 2. Upon revocation of the Permit, the Permittee shall immediately, completely, and permanently remove the Encroachments 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.
 3. The Permittee does hereby disclaim any right, title, or interest in or to any portion of the public right-of-way, including the sidewalk and street, and agree 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.
 4. The Permittee agrees to indemnify and save harmless the City of Oakland, its officers, agents, employees, and volunteers, and each of them, from any suits, claims, or actions brought by any person or persons, corporations, or other entities on account of (a) any bodily injury, disease, or illness, including death, damage to property, real or personal, or damages of any nature, however caused, and regardless of responsibility for negligence, arising in any manner out of the construction or installation of a private improvement itself or resulting from the Permittee's failure to maintain, repair, remove and/or reconstruct the private improvement, or (b) any title, ownership or authority issues arising from the existence of the Encroachments in the public right of way.
1. The Permittee shall maintain fully, in force and effect at all times that the Encroachments occupy the public right-of-way good and sufficient public liability insurance in a face amount not less than \$1,000,000.00 for each occurrence, including contractual liability, naming the City of Oakland, its Councilmembers, 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 calendar (30) days written notice to the City Engineer. The Permittee also agree 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.
 2. 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 Encroachments to become a blight or a menace or a hazard to the health and safety of the general public.

3. The Permittee acknowledges and agrees that the Encroachments are out of the ordinary and do 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 Encroachments, which may be damaged by the City or its contractors or public utility agencies or their contractors. Permittee further acknowledge and agree 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.
4. 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 Permittees 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.
5. The Permittee shall provide written notice, in the form attached hereto as *Exhibit E*, to all prospective purchasers and/or tenants of any enclosed habitable space subject to this Encroachment Permit, that the City may revoke or suspend this Permit and require the removal of such encroachments (the "Notice").
6. The Permittee shall file this Indenture Agreement and the Notice to prospective purchasers and/or tenants with the Alameda County Recorder for recordation as encumbrances of the property and its title.
7. That said 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 Permittee, 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.
8. That said 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.).
9. That said 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."

10. That said 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.
11. That said Permittee, by the acceptance of this revocable Permit, agrees and promises:
 - (a) To indemnify, defend, and hold harmless the City of Oakland, its officers, agents, and employees, 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 the 2121 East 12th Street, Oakland, California site, or was otherwise caused by the Permittee, its agents, employees, contractors or representatives.
 - (b) That, 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 2121 East 12th Street, 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.
 - (c) That said 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.
12. That this Indenture Agreement and associated Permit shall take effect when all the conditions hereinabove set forth shall have been complied with to the satisfaction of the City Engineer.
13. That this Indenture Agreement alone does not allow work to be done which requires permitting and/or inspection. The Permittee must obtain any and all required permits before beginning work.
14. The City, at its sole discretion and at future date not yet determined, may impose additional and continuing fees for use and occupancy of the public right-of-way.
15. Additional or continuing fees will apply in accordance with the City's Municipal Code, City standards, future plans for the right of way, and City practices to regulate the right of way for the public interest.
16. The rights and obligations of this Indenture Agreement shall be binding upon the Permittee, all successive owners and assigns thereof, and shall be automatically assigned to and assumed by any and all successive persons or entities with a fee interest in all or any portion of the Property.

EXHIBIT B (continued)

THE LAND REFERRED TO HEREIN BELOW IS SITUATED OAKLAND IN THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

A portion of Blocks 6 and 7 and 21st Avenue, formerly Alameda Street, as said Blocks and Avenue are shown on the "Map of San Antonio", filed September 12, 1854, in the Office of the County Recorder of Alameda County, and of record in Map Book 1, Page 3, bounded as follows:

Beginning at the intersection of the Southwestern line of East 12th Street, as said line was established by Deed from Standard Realty and Development Co. to City of Oakland, dated February 13, 1948, recorded March 29, 1948, under Recorder's Series AC/25485, Alameda County Records, with the Northwestern line of 22nd Avenue; running thence along said line of 22nd Avenue, Southwesterly 90.56 feet to a line drawn parallel with the center line of the Western Pacific Railroad Company's main line track, and distant at right angles 38 feet Northeasterly therefrom, as said center line existed on April 1, 1948; thence deflecting to the right, through an angle $93^{\circ} 51' 30''$ along said parallel line, Northwesterly 282.58 feet; thence continuing parallel with said center line of main line track, Northwesterly along the arc of a curve to the left with a radius of 8632.42 feet and tangent to the preceding course, through a central angle of $0^{\circ} 55' 05''$, a distance of 138.32 feet to a line drawn parallel with the direct extension Southwesterly of the center line of 21st Avenue, and distant 80 feet Northwesterly therefrom, measured along the Southwestern line of East 12th Street, as last said line was established by the Deed from the Western Pacific Railroad Co. to City of Oakland, dated February 13, 1948, recorded March 29, 1948, under Recorder's Series No. AC/25484, Alameda County Records; thence along last said parallel line, Northeasterly 63.34 feet to said line of East 12th Street; thence along the last mentioned line, as established by the Deeds herein mentioned, Southeasterly 420 feet to the point of beginning.

Excepting therefrom, that portion described in the Judgment in Condemnation entered April 10, 1963 in the Superior Court of the State of California in and for the County of Contra Costa, Case No. 85839, a Certified Copy of which recorded April 19, 1963, Reel 859, Image 907, Series No. AU-66591, Official Records.

Also excepting therefrom, that portion described in the Final Order of Condemnation entered March 14, 1969, in the Superior Court of the State of California in and for the County of Alameda, Case No. 359970, a Certified Copy of which recorded March 14, 1969, Reel 2364, Image 859, Series No. 69-28890, Official Records.

APN: 019-0047-001-07

A more legible copy is available at the Office of the Director, DOT, City of Oakland, 250 Frank H. Ogawa Plaza, 4th floor.

EXHIBIT D

Oakland City Council Resolution XXXX C.M.S. (page 1 reference)

EXHIBIT E:

**FORM OF NOTICE TO PROSPECTIVE PURCHASERS AND/OR TENANTS
OF PORTION OF EXISTING TWO-STORY COMMERCIAL BUILDING
IN RIGHT-OF-WAY AT 2121 E 12th STREET**

Recording requested by:

CITY OF OAKLAND

When recorded mail to:

City of Oakland
Department of Transportation
Dalziel Admin Building
250 Ogawa Plaza - 4th Floor
Oakland, CA 94612
Attn: Ishrat Jahan

----- space above for Recorder's use only -----

Address 2121 East 12th Street

Permit no. ENMJ 24054

Parcel no. 19-47-1-7

Authorities Municipal Code Section 12.08.080

Description Portions of an existing two-story commercial building encroaching into the Public Right of Way addressed to 2121 E 12th Street. The executed agreement produced by this permit application shall automatically expire upon substantial redevelopment of the subject parcel, at which point the encroachment shall be removed and the full sidewalk width restored.

This property is subject to a conditional and revocable Major Encroachment Permit No. ENMJ24054 for portions of the existing two-story commercial building encroaching into the public right-of-way ("Encroachment Property"), authorized by City Council Resolution C.M.S. XXXX on **DATE**, and effective upon recordation of the accompanying Indenture Agreement between the City of Oakland and Kimmy Chung, an unmarried woman ("Permittee") and satisfaction of all conditions therein.

The conditional and revocable Major Encroachment Permit and accompanying Indenture Agreement are binding on the Permittee, successive owners and assigns thereof, and on all successive persons or entities with a fee interest in all or any portion of the Encroachment Property. The conditions and requirements of said Major Encroachment Permit and accompanying Indenture Agreement are recorded with the Alameda County Recorder as encumbrances of the Encroachment Property and its title.

Prospective purchasers and tenants are hereby given notice that the City may revoke this Major Encroachment Permit and require removal of said Encroachments upon the terms and conditions set forth in the Indenture Agreement.