

CITY OF OAKLAND

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OFFICE OF THE CITY CLERK  
OAKLAND

2017 NOV 21 PM 3:48 **AGENDA REPORT**

**TO:** Sabrina B. Landreth  
City Administrator

**FROM:** Ryan Russo  
Director, DOT

**SUBJECT:** Major Encroachment Permit at  
1937-1943 5<sup>th</sup> Avenue

**DATE:** October 23, 2017

City Administrator Approval

Date:

11/21/17

**RECOMMENDATION**

**Staff Recommends That The City Council Adopt A Resolution Granting A Conditional And Revocable Major Encroachment Permit To Cleavon Smith, Tamara R. Dukes, Daniel Levy, And Sarah H. Gailey To Allow Portions Of The Existing Building, Concrete Steps, And Retaining Wall At 1937-1943 5th Avenue To Encroach Into The Public Right-Of-Way Along E 20th Street, Major Encroachment Permit ENMJ17059.**

**EXECUTIVE SUMMARY**

Approval of this resolution will authorize the Director of the Department of Transportation (DOT) to issue a Major Encroachment Permit to document and regulate existing encroachments in the public right-of-way at 1937-1943 5th Avenue.

The encroachment permit requires the property owner to comply with the conditions of approval issued by the Planning and Building Department. The encroachments do not impact the use of the sidewalk fronting the property nor do they obstruct the path of travel for pedestrians or persons with disabilities. They consist of building façade, concrete stair, and retaining wall that project approximately 3 inches into the public right-of-way. The encroachments are described in more detail in an **Exhibit** to the Resolution.

**BACKGROUND / LEGISLATIVE HISTORY**

The Oakland Municipal Code (OMC) Chapter 12.08 requires a major encroachment permit for building elements encroaching into the public right-of-way as stated in the OMC Chapter 15.04.679 for revisions to the California Building Code (CBC) Section 3201.5. The Planning and Building Department has approved the development plan (permit number PLN17058) to add a fifth unit to an existing four unit condominium building subject to the City's approval of property owner's request for a revocable Major Encroachment Permit for existing encroachments. Encroachments comply with the OMC and follow the conditions of approval by the Planning and Building Department.

Item: \_\_\_\_\_  
Public Works Committee  
December 5, 2017

**ANALYSIS AND POLICY ALTERNATIVES**

The existing encroachments do not interfere with public use of the right-of-way or buried utilities and do not endanger the public welfare and convenience. There is no feasible alternative.

The encroachment permit (permit number: ENMJ17059) to be issued to Cleavon Smith, Tamara R. Dukes, Daniel Levy, and Sarah H. Gailey allows for the existing condominium building, concrete stairs, and concrete retaining wall along East 20th Street to encroach into the public right-of-way by approximately 3 inches. Details of existing encroachments are shown in the Exhibit attached to the Resolution.

Approval of this Major Encroachment permit will allow the City to execute an indenture agreement with the property owners. The indenture agreement holds the property owner liable and responsible for existing private improvements in the public right-of-way. The indenture agreement will also allow the City to revoke the Permit if necessary and require the property owner to remove the encroachments and restore the public right-of-way if necessary.

**FISCAL IMPACT**

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

**PUBLIC OUTREACH / INTEREST**

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

**COORDINATION**

The permit application was coordinated with Planning and Building Department, Budget Bureau, and Office of the City Attorney.

**SUSTAINABLE OPPORTUNITIES**

***Economic*** – This Major Encroachment Permit will allow the property owner to meet the Planning Department's approval for the associated development, which will provide 1 new residential unit.

***Environmental*** – No significant impact on the environment is identified.

***Social Equity*** – No significant impact on social equity is identified.

**CEQA**

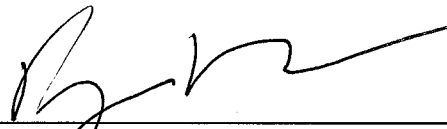
The California Environmental Quality Act ("CEQA") and the CEQA Guidelines exempt specific types of projects from environmental review. The following CEQA exemptions apply to this encroachment under CEQA Guidelines sections 15301 (existing facilities), 15183 (projects consistent with a Community Plan, General Plan, or Zoning), and 15061(b)(3) (no significant effect on the environment).

**ACTION REQUESTED OF THE CITY COUNCIL**

Resolution Granting A Conditional And Revocable Major Encroachment Permit To Cleavon Smith, Tamara R. Dukes, Daniel Levy, and Sarah H. Gailey To Allow Portions Of The Existing Building, Concrete Steps, and Retaining Wall At 1937-1943 5th Avenue To Encroach Into The Public Right-Of-Way Along E 20th Street, Major Encroachment Permit ENMJ17059.

For questions regarding this report, please contact Kevin Kashi, Engineering Design and Right-Of-Way Supervisor (510) 238-7116.

Respectfully submitted,



RYAN RUSSO  
Director, Department of Transportation

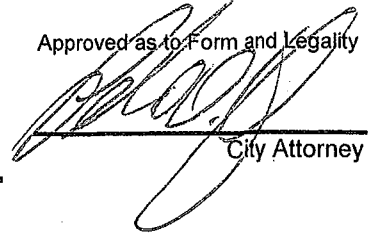
Reviewed by:  
Wladimir Wlassowsky, P.E., Interim Assistant  
Director, Department of Transportation

Prepared by:  
Kevin Kashi, P.E., Supervising Civil Engineer  
Engineering Design and R.O.W. Management  
Division, Department of Transportation

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# OAKLAND CITY COUNCIL

Approved as to Form and Legality



City Attorney

RESOLUTION No. \_\_\_\_\_ C.M.S.

Introduced by Councilmember \_\_\_\_\_

**RESOLUTION GRANTING A CONDITIONAL AND REVOCABLE MAJOR ENCROACHMENT PERMIT TO CLEAVON SMITH, TAMARA R. DUKES, DANIEL LEVY, AND SARAH H. GAILEY TO ALLOW PORTIONS OF THE EXISTING BUILDING, CONCRETE STEPS, AND RETAINING WALL AT 1937-1943 5TH AVENUE TO ENCROACH INTO THE PUBLIC RIGHT-OF-WAY ALONG E 20TH STREET, MAJOR ENCROACHMENT PERMIT ENMJ17059.**

**WHEREAS**, Cleavon Smith, Tamara R. Dukes, Daniel Levy, and Sarah H. Gailey (Collectively "Permittee"), the owners of the real property known as 1937-1943 5<sup>th</sup> Avenue and described in Grant Deeds Recorded March 8, 2004, September 4, 2009, December 2, 2015, and October 21, 2015, by the Alameda County Clerk-Recorder and identified by the Alameda County Assessor as APNs: 021-0277-029, -031, -030, and -032 respectively, and commonly known as 1937, 1939, 1941, and 1943 5<sup>th</sup> Avenue, respectively, hereto and incorporated herein, have filed an application with Public Works for a conditional and revocable permit (ENMJ17059) to allow portions of the existing building, concrete steps, and retaining wall at 1937-1943 5<sup>th</sup> Avenue to encroach into the public right-of-way;

**WHEREAS**, the limits of the encroachment are delineated in Exhibit hereto and Incorporated herein; and

**WHEREAS**, the City has issued conditional and revocable major encroachment permit for existing encroachments into the right of way when parcels are divided or merged creating new entities which must be made current with the Oakland Municipal Code; and

**WHEREAS**, staff has determined, based on review of the plans and investigation of the site of the encroachment, said encroachments in the public right-of-way and their location will not interfere with public use of the roadway, sidewalk, buried utilities, and will not endanger the public welfare and convenience during said public use; and

**WHEREAS**, each as a separate and independent basis, this action is exempt from the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines sections 15301(existing facilities), 15183 (projects consistent with General Plan and Zoning), and 15061(b)(3) (no significant effect on the environment); now, therefore, be it

**RESOLVED**: That the City Council has reviewed all relevant documents relating to its grant of the encroachment permit that is the subject of this resolution; and be it

**FURTHER RESOLVED**: That the City Council finds and determines that the decision made hereby is made in conformance with the requirements of CEQA; and be it

**FURTHER RESOLVED:** That the City Council hereby grants to the Permittee a conditional revocable major encroachment permit to allow encroachment into the public right-of-way and according to the permit conditions set forth below; and be it

**FURTHER RESOLVED:** That said major 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 City Council, expressed by resolution as being in the City's best interest, or the associated permit may be suspended at any time, at the sole discretion of the City Engineer, upon failure of the Permittee to comply fully and continuously with each and all of the 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 an 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 its own expense, at all times during the period for which the permit is in effect, good and sufficient public liability insurance in a face amount not less than \$300,000.00 for each occurrence, and property damage insurance in a face amount not less than \$50,000.00 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 assumed under this permit. The policy shall contain an endorsement declaring the policy as primary coverage on said liabilities. The Permittee shall submit a written certificate of such insurance or copy of the policy to City Engineer showing that insurance is in effect in compliance with this section, and shall file subsequent notices of the renewal thereof with the City Engineer. Such certificate shall state that the insurance coverage shall not be canceled, amended or be permitted to lapse without thirty (30) days' prior written notice to City Engineer. The Permittee also agrees that the City Engineer, at his or her sole discretion, 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 as circumstances warrant.
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 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. The 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. The 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, repair any damage resulting therefrom, 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 in 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 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 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 OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE; WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR." 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.
  
12. The Permittee shall, and by the acceptance of this revocable permit agrees and promises:
  - a. to indemnify, defend, save and hold harmless the City of Oakland, its officers, agents, employees, and volunteers, to the maximum extent permitted by law, from any and all suits, 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, brought by any person for or on account of any bodily injuries, disease or illness or damage to persons and/or property sustained or arising in the construction of the work performed under the permit or arising out of the Permittee's failure to perform the obligations with respect to the use and occupancy of the public right-of-way by virtue of the permit, 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 1937-1943 5<sup>th</sup> Avenue, 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 the property, 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. 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.
  
13. 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.

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.

14. The hereinabove conditions shall be binding upon the Permittee and the successive owners and assigns thereof; and be it

**FURTHER RESOLVED:** That the City Council, 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 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 Engineer is hereby directed to file a certified copy of this resolution for recordation with the Office of the Alameda County Clerk-Recorder as an encumbrance of the title of the property identified above.

IN COUNCIL, OAKLAND, CALIFORNIA, \_\_\_\_\_,

**PASSED BY THE FOLLOWING VOTE:**

AYES - BROOKS, CAMPBELL WASHINGTON, GALLO, GIBSON, MCELHANEY, GUILLEN, KALB, KAPLAN and PRESIDENT REID,

NOES -

ABSENT -

ABSTENTION -

ATTEST: \_\_\_\_\_

LaTonda Simmons  
City Clerk and Clerk of the Council  
of the City of Oakland, California

Exhibit: 1937-1943 5<sup>th</sup> Avenue Encroachment (1 page)



**EXHIBIT: 1937-1943 5TH AVENUE ENCROACHMENT**

