

Jakub, Barbara, Env. Health

Subject: RO390, 12th St, Oakland
Entry Type: Phone call
Company: ERI

Start: Wed 5/28/2008 10:00 AM
End: Wed 5/28/2008 10:30 AM
Duration: 30 minutes

Discuss site with Paula Simes of ERI. Ask for history of effort to obtain encroachment permit for the site. Wells installed in 1988 by HLA. No record of encroachment permit (or well permit) is currently available. City of Oakland required that an encroachment permit be obtained before further access to wells was allowed. The city required that the off-site wells be permitted, since ACPWA did not have these records on file, they wanted ERI to repermit. ACPWA and DWR did not want duplicate permits so initially they did not want to permit the existing wells. They have since given permission to repermit. In the meantime, the city of Oakland would not accept self-insurance from Exxon –Mobile. They originally wanted the new property owner to request the permit, but they have nothing to do with the cleanup efforts. Chris Bacina of Oakland Risk Dept. has agreed that they would accept Exxon’s self-insurance and now they require a Blanket Indenture Agreement to be signed. This is pending through Exxon Mobil lawyers. (Blank Indenture Agreement is attached.)

We also discussed including the field notes in their GWM reports. She will add them in future reports and submit a separate letter for the 1Q report.

Recording requested by:
CITY OF OAKLAND
When recorded mail to:
City of Oakland
CEDA - Building Services
Dalziel Administration Building
250 Ogawa Plaza - 2nd Floor
Oakland, CA 94612
Attn: City Engineer

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

INDENTURE AGREEMENT

Address 45 Your Avenue

Permit no. ENMI 08XXX

Parcel no. 048D-XXXX-021-0X

Authorities Municipal Code Section 12.08.080

Description Encroach into

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)

Signature _____
Name

Date _____

Signature _____
Name

Date _____

ATTACHMENTS

Exhibit A - Conditions of encroachment

Exhibit C - Limits of encroachment

Exhibit B - Description of privately owned parcel

CITY OF OAKLAND

a municipal corporation

by _____ date _____

DEBORAH EDGERLY

City Administrator

RAYMOND M. DERANIA

Interim City Engineer

Community and Economic Development Agency

EXHIBIT A

Conditions for an Encroachment in the Public Right-Of-Way

address 45 Your Avenue

parcel no. 048D-XXXX-021-0X

permittee OWNER'S NAME

permit no. ENMI 08XXX

- **General conditions of the encroachment**

1. This agreement may be voided and the associated permit for an encroachment may be revoked at any time and for any reason, at the sole discretion of the City Administrator or his or her designee, 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 general and special conditions set forth herein and in the associated permit.
2. The property owner and permittee 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 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 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 for on account of 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 of or installation of a private improvement itself or sustained as result of its construction or installation or resulting from the permittees' failure to maintain, repair, remove and/or reconstruct the private improvement.
4. 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 \$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 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 overage required.
5. 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.

6. The permittee acknowledge and agree that the encroachment is out of the ordinary and does not comply with City of Oakland standard installations. The permittee further acknowledge and agree 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 acknowledge and agree 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 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.
7. 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.
8. Upon revocation of the encroachment permit, 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.
9. 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.

- **Special conditions of the encroachment**

10. 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.
11. 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.).

12. 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."
13. 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.
14.
 - (a) That said permittee, by the acceptance of this revocable permit, agrees and promises 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 45 Your Avenue, 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 45 Your Ave, 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.
15. That said Minor Encroachment Permit and 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.

EXHIBIT B

Description of the Private Property Abutting the Encroachment

| Address 45 Your Avenue

Parcel no. 048D-XXXX-021-0X

| Deed no. 2003XXXX71

Recorded April 09, 2003

Property legal description here

EXHIBIT C

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

address 45 Your Avenue

parcel no. 048D-XXXX-021-0X

Site plan goes here