



STAFF REPORT

SAUSALITO CITY COUNCIL

AGENDA TITLE

Encroachment Agreement for a 6-foot concrete retaining wall and an off-set 2-foot catchment fence in the public right-of-way at 19 Edwards Avenue (ADR/EA 08-029).

RECOMMENDED MOTION

The Community Development Director recommends City Council approval of the attached resolution which approves an encroachment agreement for 6-foot concrete retaining wall and an off-set 2-foot catchment fence in the public right-of-way at 19 Edwards Avenue.

DISCUSSION: Applicant Simmonds and Associates, on behalf of the owner John Decker, requests City Council approval of an Encroachment Agreement to allow 6-foot concrete retaining wall and an off-set 2-foot catchment fence in the public right-of-way at 19 Edwards Avenue to encroach into the public right-of-way as shown in the attached site plan (see Exhibit B of the Attachment).

Since the 6-foot concrete retaining wall in the public right-of-way at 19 Edwards Avenue does not exceed 6 feet in height, the Community Development Director is authorized to review and make a recommendation to the City Council regarding issuance of an encroachment agreement under the Administrative Design Review Permit procedures (per Section 10.56.030.C). The Community Development Director reviewed the proposed encroachment and recommended approval of the subject encroachment agreement based on the findings provided in **Exhibit A** of the Attachment.

FISCAL IMPACT: No fiscal impact.

RECOMMENDATION: The Community Development Director recommends that the City Council adopt the attached resolution (see Attachment), approving an encroachment agreement to allow 6-foot concrete retaining wall and a 2-foot catchment fence in the public right-of-way at 19 Edwards Avenue to be located the Edwards Avenue public right-of-way fronting the subject property.

ATTACHMENT: Draft Resolution Approving an Encroachment Agreement for 19 Edwards Avenue.

PREPARED BY:

Lilly Schinsing
Lilly Schinsing
Associate Planner

REVIEWED BY:

Jeremy Graves
Jeremy Graves
Community Development Director

REVIEWED BY:

Mary A. Wagner
Mary Wagner
City Attorney

SUBMITTED BY:

Adam W. Politzer
Adam W. Politzer
City Manager

RESOLUTION NO. XX

**A RESOLUTION OF THE SAUSALITO CITY COUNCIL
APPROVING AN ENCROACHMENT AGREEMENT TO ALLOW A RETAINING WALL AND
CATCHMENT FENCE TO ENCROACH INTO THE PUBLIC RIGHT-OF-WAY FRONTING 19
EDWARDS AVENUE
(ADR/EA 08-029)**

WHEREAS, applicant, Simmonds and Associates, on behalf of the owner John Decker, requested Community Development Director approval of a Design Review Permit and recommendation an off-set City Council approval for an Encroachment Agreement to allow 6-foot concrete retaining wall and a 2-foot catchment fence to encroach into the public right-of-way fronting 19 Edwards Avenue (APN: 165-302-66); and

WHEREAS, the Community Development Director found that, as conditioned, the proposed project complies with requirements of the Zoning Ordinance and the General Plan; and

WHEREAS, on January 23, 2009, the Community Development Director approved Resolution No. 2009-01 which approved an Administrative Design Review Permit and recommended City Council approval of the requested encroachment agreement for improvements in the public right-of-way; and

WHEREAS, on January 3, 2008, the City Council reviewed and considered the project plans for the proposed encroachment agreement titled "Landslide Stabilization Wall; The Decker Residence", date stamped October 7, 2008; and

WHEREAS, the City Council considered all written testimony on the subject application; and

WHEREAS, the City Council finds that proposed project is categorically exempt from the requirements of CEQA pursuant to Section 15301(e) of the State CEQA Guidelines.

NOW, THEREFORE, THE CITY COUNCIL HEREBY RESOLVES AS FOLLOWS:

Section 1. Approval of Encroachment Agreement

Based upon the findings provided in **Exhibit A**, the Encroachment Agreement provided in **Exhibit B** is approved to allow improvements in the public right-of-way along the Edwards Avenue property frontage at 19 Edwards Avenue.

Section 2. Judicial Review

The time within which judicial review of this decision may be sought is governed by the provisions of section 65009 of the Government Code, section 1094.6 of the Code of Civil Procedure and all other applicable law.

ATTACHMENT
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THIS RESOLUTION WAS PASSED AND ADOPTED at the regular meeting of the City Council of the City of Sausalito on the ____ day of _____ 2009, by the following vote:

AYES: Councilmember:
NOES: Councilmember:
ABSENT: Councilmember:
ABSTAIN: Councilmember:

Mayor Jonathan Leone

ATTEST: _____
City Clerk

Exhibit A: Encroachment Agreement Findings
Exhibit B: Encroachment Agreement

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EXHIBIT A

ENCROACHMENT AGREEMENT FINDINGS
19 EDWARDS AVENUE (ADR/EA 08-029)

Pursuant to Zoning Ordinance 10.56.060 (Encroachment Review and Agreements), the Community Development Director recommends City Council approval of an Encroachment Agreement at 19 Edwards Avenue based upon the following findings:

- A. The proposed encroachment is compatible with the surrounding area and will either improve or not significantly diminish visual or physical public enjoyment of the streetscape upon which the encroachment is proposed.

The 6-foot concrete retaining wall and off-set 2-foot debris catchment fence improves the visual and physical public enjoyment of the streetscape as they provide slope stabilization. They are appropriately located and are compatible with the surrounding area.

- B. The encroachment will not adversely affect the usability or enjoyment of adjoining parcels nor create or extend an undesirable land use precedent.

The encroachment in front of 19 Edwards Avenue does not impede the use of adjacent parcels.

- C. The encroachment is necessary to the reasonable use and enjoyment of the property and the extent of the encroachment is justifiable.

An Encroachment Agreement would provide for slope stabilization and is a necessary encroachment for reasonable use of the property.

- D. The proposed encroachment will not adversely affect the public circulation nor create or constitute a hazard to public safety.

As the existing wood fence is failing, the 6-foot concrete retaining wall and 2-foot debris catchment fence would improve a potentially hazardous situation by providing for slope stabilization.

- E. The value of the proposed improvements will not prejudice a policy decision to terminate the encroachment nor preclude or make difficult the establishment or improvement of streets or pedestrian ways

The value of the 6-foot concrete retaining wall and 2-foot debris catchment fence would not make difficult the establishment or improvement of streets or pedestrian ways nor would the value of the wall prevent a decision to terminate the encroachment in the future.

EXHIBIT B

**CITY OF SAUSALITO
ENCROACHMENT AGREEMENT**

This **ENCROACHMENT AGREEMENT** ("Agreement") is entered into this ____ day of ____, 2009 (the "Effective Date") by and between **JOHN DECKER** ("Owner") of the property at 19 Edwards Avenue (APN 165-302-66), and the **CITY OF SAUSALITO**, a municipal corporation ("City").

RECITALS

The following Recitals are a substantive part of this Agreement:

A. Improvements in the public right-of-way along the Edwards Avenue property frontage located at 19 Edwards Avenue require City Council approval of an Encroachment Agreement (ADR/EA 08-029). In accordance with Chapter 10.56 of the City's Municipal Code, the Community Development Director has reviewed the proposed encroachment and has recommended that the City Council approve the encroachment.

B. The City has the authority to regulate the use of the public right-of-way and is willing to allow Owner the encroachments as shown in the attached site plan and in accordance with Titles 10 and 17 of the Sausalito Municipal Code under certain terms and conditions as set forth below.

NOW, THEREFORE, Owner and City hereby agree as follows:

1. Description of Encroachments. The encroachments covered by this Agreement are 6-foot concrete retaining wall and a 2-foot off-set catchment fence in the public right-of-way along the Edwards Avenue property frontage at 19 Edwards Avenue, as shown in the attached site plan (see **Exhibit 1**) which is incorporated herein (the "Encroachments").

2. Term. The term of this Agreement is one (1) year after which it shall be automatically renewed on an annual basis unless City issues a notice of non-renewal.

3. Condition of Encroachments and Right-of-Way. Owner shall maintain all Encroachments and the City-owned property affected thereby in good and safe condition and free from any nuisance to the satisfaction of the City Engineer.

4. Removal or Relocation. Owner acknowledges and agrees that it shall remove or relocate the Encroachment(s) at its sole cost and expense if the Encroachment(s) interferes with any lawful governmental or proprietary purpose of the City of Sausalito; is detrimental to governmental activities; and/or the right of way or street is being vacated. If the Owner fails to remove the Encroachment(s) within the time specified by the City Engineer, City may cause the work to be done at the Owners' expense.

5. Taxes. Owner shall be responsible for payment of all fees and taxes charged in connection with the right, title and interest in the Encroachments.

6. Indemnification. Owner hereby agrees to indemnify, defend (with counsel reasonably acceptable to City) and hold harmless City and its elected and appointed officials, officers,

employees, consultants, agents, volunteers and successors in interest from any and all claims, demands, causes of action, damages, liabilities and obligations arising from or in any way related to this Agreement and/or Owner's use of the right of way.

7. Termination. This Agreement may be terminated by either party with or without cause upon thirty (30) days written notice. Upon such termination, the Encroachment(s) must be removed as specified by and within the time required by the City Engineer. In addition, the City owned right of way must be restored to the condition required by the City Engineer. In the event that Owner fails to remove the Encroachment(s) and/or restore the right of way as required by the City Engineer within the specified time, City shall have the right to perform the work and charge Owner.

8. No Grant. This Agreement is not a grant by City of any property interest but is made subject and subordinate to the prior and continuing right of City and its assigns to lawfully use any or all of the right of way for public facilities, including but not limited to, public use as a street and for the purpose of laying, installing, maintaining, repairing, protecting, replacing and removing sanitary sewers, water mains, storm drains, gas mains, poles, overhead and underground electric and telephone wires, television and other utility and municipal uses together with appurtenances thereof and with right of ingress and egress along, over, across and in the right of way. No use of any right of way or other interest under this Agreement shall create or vest in Owner any ownership interest in the right of way; nor shall anything in this Agreement be deemed or construed to grant or create any franchise rights.

9. Condemnation. If the right-of-way is taken totally by condemnation, this Agreement shall terminate on the date of the taking with no compensation to Owner therefore. If a portion of the right of way is taken by condemnation, then this Agreement shall remain in effect as to the part not taken.

10. Standard Conditions. Owner shall comply with any and all Standard Conditions for Encroachment Permits required by the City Engineer, including the Conditions of Approval (see **Exhibit 2**) which are incorporated herein.

11. Compliance with Laws. Owner shall comply with all applicable laws, any permit issued by the City pursuant to this Agreement and any general or specific conditions required by the City Engineer.

12. Notices. All notices required or permitted to be given under the terms of this Agreement shall be in writing and shall be deemed to be given as of the time of hand delivery to the addresses set forth below, or three (3) days after deposit in the United States mail, postage prepaid, by register or certified mail, return receipt requested, addressed as follows:

Owner:

John Decker
19 Edwards Avenue
Sausalito, CA 94965

City:

City Engineer
420 Litho Street
Sausalito, CA 94965

13. Assignment. This Agreement is not assignable unless City consents in writing, which

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consent shall be withheld unreasonably. Such consent to assignment shall bind and insure to the benefit of the respective successors and assigns of the parties. This requirement for consent shall not apply to: (a) any disposition of all or a portion of the Property; or (b) any collateral assignment, security interest or pledge of this Agreement by Owner to any lender.

14. Waivers. The failure of any party at any time or times to require performance of any provision hereof shall in no manner affect the right at a later time to enforce the same. No waiver by any party of any condition, or of any breach of any term, covenant, representation, or warranty contained herein, in any one or more instances, shall be deemed to be construed as a further or continuing waiver of any such condition or breach or waiver of any other condition or of any breach of any other term, covenant, representation or warranty.

15. Severability. If one or more of the provisions of this Agreement shall be held by a court of competent jurisdiction in a final judicial action to be void, voidable or unenforceable, such provision shall be deemed severable from the remaining provisions of this Agreement and shall not affect the legality, validity or constitutionality of the remaining portions of the Agreement.

16. Entire Agreement. This Agreement contains the entire agreement of the parties with respect to the matters addressed herein.

17. Modification. This Agreement may not be amended unless made in writing and signed by each party.

18. California Law. The interpretation and enforcement of this Agreement shall be governed by the laws of the State of California. In the event that suit shall be brought by either party to this Agreement, the parties agree that venue shall be exclusively vested in the State courts of the County of Marin or where appropriate, in the United States District Court, Northern District of California.

19. Attorneys' Fees. Should any legal proceeding be commenced between the parties to this Agreement seeking to enforce any of its provisions, the prevailing party in such a proceeding shall be entitled, in addition to such other relief as may be granted, to a reasonable sum for attorneys' fees which shall be determined by the court or forum in such a proceeding or in a separate action brought for that purpose. For purposes of this provision, "prevailing party" shall include a party which dismisses an action for recovery hereunder in exchange for payment of the sum allegedly due, performance of covenants allegedly breached, or consideration substantially equal to the relief sought in the action or proceeding.

20. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same agreement.

21. Authority. The parties represent that the individuals signing this Agreement have the authority to do so.

22. No Personal Liability. No member, official or employee of City shall be personally liable to Owners or any successor in interest in the event of any default or breach by City or on any obligation under the terms of this Agreement.

IN WITNESS WHEREOF, the parties have hereto set their signatures as of the date first above named herein.

OWNER:

CITY:

John Decker

Jonathan Leone, Mayor

RECOMMENDED FOR APPROVAL:

APPROVED AS TO FORM:

Todd Teachout, City Engineer

Mary Wagner, City Attorney

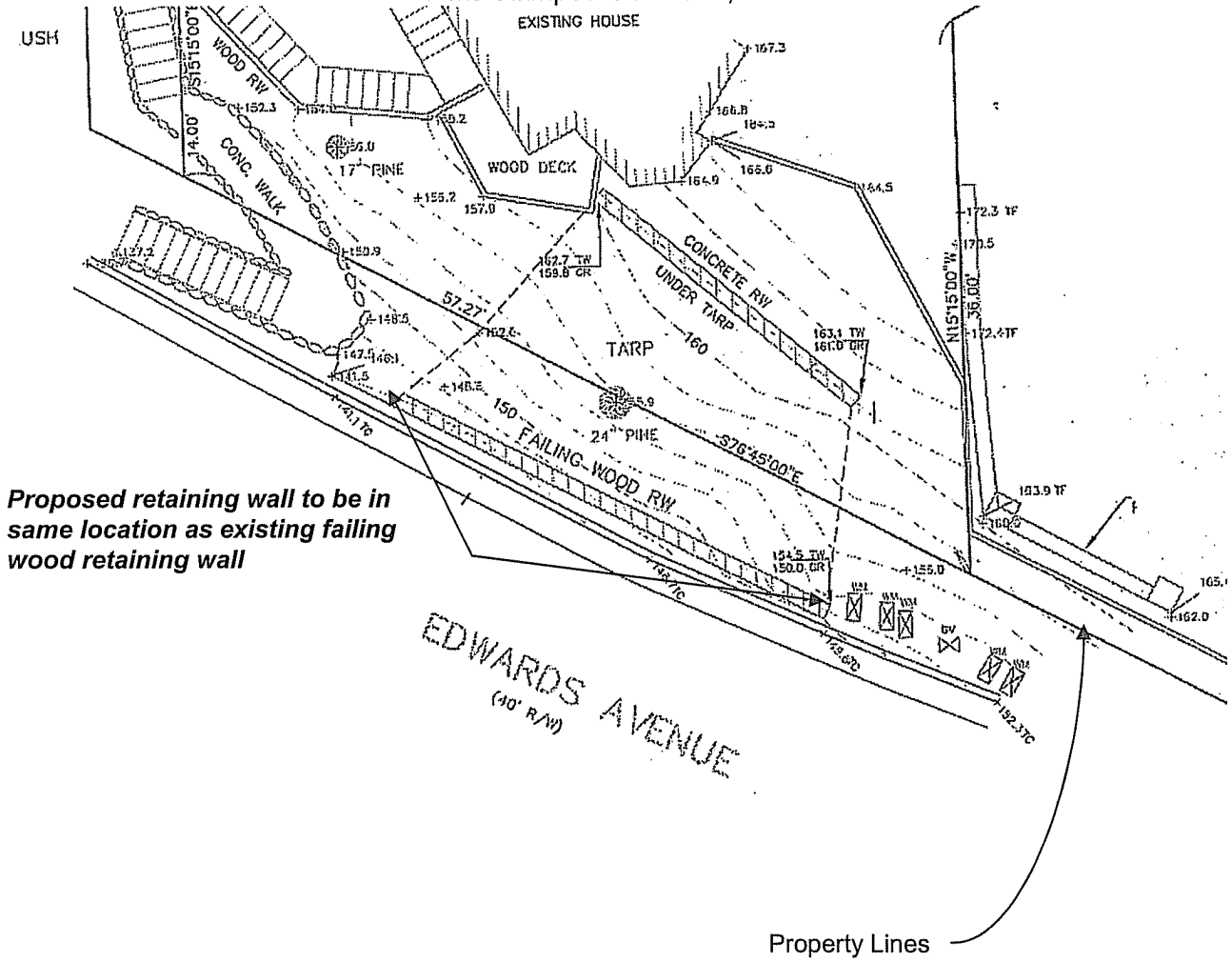
EXHIBITS:

1. Detail from Site Plan Titled "Landslide Stabilization Wall; The Decker Residence", date stamped October 7, 2008
2. Encroachment Agreement Conditions of Approval

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EXHIBIT 1

Detail from Site Plan Titled
"Landslide Stabilization Wall: The Decker Residence,"
Date-stamped October 7, 2008



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EXHIBIT 2

ENCROACHMENT AGREEMENT CONDITIONS OF APPROVAL

These conditions apply to the project plans "Detail from Site Plan Titled 'Landslide Stabilization Wall: The Decker Residence'" date-stamped received October 7, 2008.

1. The encroachment agreement is predicated on construction of the improvements. If the improvements are not constructed, the encroachment agreement is void.
2. In the event that any condition imposing a fee, exaction, dedication or other mitigation measure is challenged by the project sponsors in an action filed in a court of law or threatened to be filed therein which action is brought within the time period provided by law, this approval shall be suspended pending dismissal or final resolution of such action. If any condition is invalidated by a court of law, the entire project shall be reviewed by the City and substitute conditions may be imposed
3. In accordance with Ordinance No. 1160, the applicant shall pay any and all City costs arising out of or concerning the proposed project, including without limitation, permit fees, attorneys' fees, engineering fees, license fees and taxes, whether incurred prior to or subsequent to the date of this approval. Applicant acknowledges and agrees that City's costs shall be reimbursed prior to this approval becoming valid.
4. The applicant shall indemnify the City for any and all costs, including without limitation attorneys' fees, in defending this project or any portion of this project and shall reimburse the City for any costs incurred by the City's defense of the approval of the project.

Prior to Issuance of a Building / Grading Permit:

5. An encroachment permit shall be required for all improvements to be constructed or staging of equipment and materials within the public right-of-way

During Construction / Grading:

6. Construction materials, equipment, vehicles, and debris boxes shall be placed on-site to minimize obstruction of roads and gutters, shall be maintained in a clean and safe condition, and shall not be maintained in a manner that becomes a nuisance to the neighborhood. Construction materials, equipment, vehicles, and debris boxes placed off-site shall be done only after securing an encroachment permit from the Community Development Department.
7. The applicant, subject to the satisfaction of the City Engineer, shall install appropriate temporary construction signage and pavement markings.

Advisory Notes:

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Advisory notes are provided to inform the applicant of (a) Sausalito Municipal Code requirements, or (b) requirements imposed by other agencies. The advisory notes are not a part of the Conditions of Approval.

1. Dumping of residues from washing of painting tools, concrete trucks and pumps, rock, sand, dirt, agricultural waste, or any other materials discharged into the City storm drain system that is not composed entirely of storm water is prohibited pursuant to Sausalito Municipal Code (SMC) Chapter 11.17. Liability for any such discharge shall be the responsibility of person(s) causing or responsible for the discharge. Violations constitute a misdemeanor in accordance with SMC Section 11.17.060.B.
2. Pursuant to Ordinance 1143, the operation of construction, demolition, excavation, alteration, or repair devices within all residential areas or within a 500-foot radius of residential zones shall be limited to the following hours:
Weekdays – Between 8 a.m. and 7 p.m.
Saturdays – Between 9 a.m. and 5 p.m.
Holidays – Between 9 a.m. and 7 p.m.
Such operation is prohibited on Sundays except by a homeowner residing on the property.
Such work shall be limited to 9 a.m. to 7 p.m.
3. The Developer shall pay all applicable City fees as established by City Council resolution and City ordinances.
4. For any damage to existing public improvements due to construction activities, Developer shall repair, at their expense, damage prior to issuance of a Certificate of Occupancy. Contractor must protect all existing and new improvements.