

File No. 091388

Committee Item No. _____
Board Item No. 25

COMMITTEE/BOARD OF SUPERVISORS
AGENDA PACKET CONTENTS LIST

Committee _____

Date _____

Board of Supervisors Meeting

Date 01/12/10

Cmte Board

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| <input type="checkbox"/> | <input type="checkbox"/> | Motion |
| <input type="checkbox"/> | <input type="checkbox"/> | Resolution |
| <input type="checkbox"/> | <input type="checkbox"/> | Ordinance |
| <input type="checkbox"/> | <input type="checkbox"/> | Legislative Digest |
| <input type="checkbox"/> | <input type="checkbox"/> | Budget Analyst Report |
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| <input type="checkbox"/> | <input type="checkbox"/> | Introduction Form (for hearings) |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | Department/Agency Cover Letter and/or Report |
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| <input type="checkbox"/> | <input type="checkbox"/> | Grant Information Form |
| <input type="checkbox"/> | <input type="checkbox"/> | Grant Budget |
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| <input type="checkbox"/> | <input type="checkbox"/> | Contract/Agreement |
| <input type="checkbox"/> | <input type="checkbox"/> | Award Letter |
| <input type="checkbox"/> | <input type="checkbox"/> | Application |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | Public Correspondence |

OTHER

(Use back side if additional space is needed)

Minor Sidewalk Encroachment Appeals for 77 O'Farrell and
48 Stockton Streets

(Other materials were distributed to each member of the Board upon receipt by the
Clerk's Office, and available in File No. 091388)

Completed by: Joy Lamug

Date 1/07/10

Completed by: _____

Date _____

An asterisked item represents the cover sheet to a document that exceeds 20 pages. The complete document is in the file.

BOS-11
AC
RC
JK

NOV 30 2009

JMBM | Jeffer Mangels
Butler & Marmaro LLP

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San Francisco, California 94111-3813
(415) 398-8080 (415) 398-5584 Fax
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Ref: 70319-0002

November 30, 2009

VIA HAND-DELIVERY

File 091388

Mr. David Chiu, President
City and County of San Francisco
Board of Supervisors
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

BY *RC*

2009 NOV 30 PM 2:3

RECEIVED
CARTER & MCMILLAN
ATTORNEYS AT LAW

Re: Notice of Appeal and Appeal of Department of Public Works, November 16, 2009 Revocation of Minor Sidewalk Encroachment Permit 06 MSE-0181 Issued January 19, 2007 (Attached hereto as Exhibit "A")

Property Block No. 328, Lot 003
77 O'Farrell Street ("Subject Property")
San Francisco, CA 94108

Dear Supervisor Chiu:

By letter dated November 16, 2009, the City and County of San Francisco ("CCSF") Department of Public Works ("DPW") sent Stockton Street Properties, Inc., a Notice of Revocation of the Minor Sidewalk Encroachment Permit ("Minor Encroachment Permit") 06 MSE-0181 issued January 19, 2007. A true and correct copy of DPW's Notice of Revocation is attached hereto as Exhibit "A" and incorporated herein by reference, as if set forth in full detail.

The Minor Encroachment Permit purports to grant the right to "occupy, construct and maintain" certain "subsidewalk basement; door swings; elevator door," although a portion of the improvements located below the Stockton Street sidewalk previously existed for nearly a century. Pursuant to Public Works Code Section 723.2, real party in interest, Barney's, Inc. ("Barney's"), hereby appeals the DPW's November 16, 2009 Minor Encroachment Permit Notice of Revocation to the Board of Supervisors for the City and County of San Francisco.

The Notice of Revocation purports to require the removal of pre-existing utility vaults and other underground improvements and to restore the property to a condition satisfactory to DPW, without expense to the CCSF, by February 1, 2010, despite the fact that a portion of the underground improvements are unrelated to and existed for nearly a century before the Minor Encroachment Permit was issued.

The grounds for appeal are:

1. DPW abused its discretion in revoking the Minor Encroachment Permit;
2. DPW acted arbitrarily and capriciously in revoking the Minor Encroachment Permit;
3. The Minor Encroachment Permit is limited in scope to only a portion of the subsidewalk facilities and does not pertain to facilities which pre-existed the Minor Encroachment Permit improvements, DPW is thereby attempting to arbitrarily expand the scope of the Minor Encroachment Permit to areas and improvements over which it has no jurisdiction or has failed to properly exercise its jurisdiction. Therefore, the DPW's action in revoking the Minor Encroachment Permit and requiring the removal of the subsidewalk structures fails to comply with the notice and substantive abatement provisions of Public Works Code Section 723.2, as amended by Ordinance 210.09, and is discriminatory and arbitrary;
4. DPW's Notice of Revocation of the Minor Encroachment Permit constitutes an unconstitutional taking of Barney's real property interests without due process or paying just compensation in violation of the Takings Clause of the United States and California constitutions;
5. DPW's Notice of Revocation of the Minor Encroachment Permit was done without consideration of and in violation of the California Environmental Quality Act of 1970 ("CEQA") as the Environmental Impact Report ("EIR") and the Environmental Impact Statement ("EIS"), as supplemented, for the Central Subway Project failed to consider the environmental effects of the proposed demolition of portions of the Subject Property and similarly situated historically significant buildings located along Stockton Street;
6. New information has developed which shows significant environmental impacts were not adequately analyzed by the CCSF or the Federal Transit Administration in the Joint Supplemental EIR or EIS;
7. DPW is estopped by its conduct from revoking the Minor Encroachment Permit due to its failure to disclose material facts to Barney's which would impact the permit. Barney's detrimentally relied upon DPW's representations and was damaged by DPW's non-disclosure of critical facts known to DPW, which led Barney's to expend millions of dollars to improve its store and will result in the irreparable loss of substantial real property rights;
8. DPW is estopped from revoking the Minor Encroachment Permit because Barney's and its landlord acquired vested real property rights that have existed at the Subject Property for nearly a century;

Supervisor David Chiu, President
City and County of San Francisco Board of Supervisors
November 30, 2009
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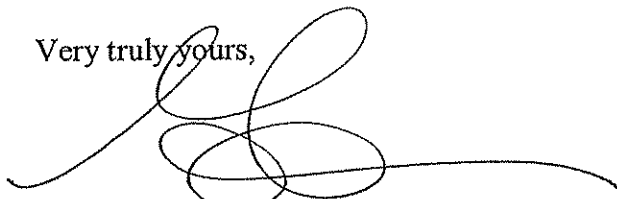
9. DPW is estopped from revoking Barney's real property rights on 60 days' notice and without compensation for all damages Barney's will suffer;

10. Barney's is informed and believes that the public record does not establish that CCSF, in fact, owns the land which is subject to DPW's purported Minor Encroachment Permit; and

11. Any and all grounds for appeal asserted by Stockton Street Properties, Inc., which are incorporated herein by reference, to the extent they are not inconsistent with the above grounds for appeal.

Barney's will submit appropriate legal briefs and evidence prior to the hearing before the Board of Supervisors.

Very truly yours,



MARTIN H. ORLICK of
Jeffer, Mangels, Butler & Marmaro LLP
Attorneys for Barney's, Inc.

MHO:sb

Attachment: November 16, 2009 Minor Encroachment Permit Revocation Notice

cc: Ms. Angela Calvillo, Clerk of the Board of Supervisors
Marc H. Perlowitz, Esq.
Kerry Shapiro, Esq.
Michael J. Yaki, Esq.
Allan Low, Esq.
Keith D. Yendell, Esq.



Gavin Newsom, Mayor
Edward D. Reiskin., Director

Department of Public Works
Office of the Director
City Hall, Room 348
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4645

November 16, 2009

Stockton Street Properties
Attn: Kathleen Bergi-Sanell
909 Montgomery Street, Suite 200
San Francisco, CA 94133

Subject : Minor Sidewalk Encroachment Permit 06MSE-0181
Property Block No. 328 lot 003
77 O'Farrell Street
San Francisco, CA 94108

Dear Ms. Bergi-Sanell:

The San Francisco Municipal Transportation Agency (SFMTA) is currently developing plans for the Central Subway Project. The project will include construction of a subway station on Stockton Street and Ellis Street. In order to construct this station, SFMTA will require permanent use of the area occupied by the subsidewalk encroachments below the public right-of-way along the alignment of the Central Subway Project.

The SFMTA has advised that the encroachment covered by your Minor Sidewalk Encroachment Permit Number 06MSE-0181, issued on January 23, 2007, impedes or otherwise impacts the Central Subway Project. The purpose of this letter is to advise you that the Minor Sidewalk Encroachment Permit issued for your property located at 77 O'Farrell Street (Block No. 328 lot 003) is hereby revoked. Pursuant to Public Works Code Section 723.2, you have the right to appeal this revocation decision. Such appeal must be filed within 15 days from the date of this letter. You may appeal this decision by filing a notice to:

City and County of San Francisco Board of Supervisors
Attn: Ms. Angela Calvillo, Clerk of the Board
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689.

Exhibit A of your Minor Sidewalk Encroachment Permit sets forth the conditions applicable to your permit. Pursuant to paragraph 8 of Exhibit A, upon notification of the revocation of your Minor Sidewalk Encroachment Permit, you must remove, or cause to be removed, the encroachment and all the materials in connection with its construction and restore the encroachment area to a condition satisfactory to the Department of Public Works. The purpose


of this letter is to advise that the encroachment must be restored to a condition satisfactory to the Department of Public Works, without expense to the City and County of San Francisco, by February 1, 2010.

If you are unable to restore the encroachment by February 1, 2010, you may petition the Department of Public Works for an extension. Please submit a written extension request along with abandonment plans and a detailed completion schedule to the Department of Public Works for approval no later than December 7, 2009. In the event that you have already applied for a building permit for the above referenced work, submission of an abandonment plan will not be required. Instead, please submit such application, plans and detailed completion schedule to the Department of Public Works by December 7, 2009.

If the encroachments associated with the permit are not removed and the site is not restored by February 1, 2010, or such other date approved in writing by the Department of Public Works, any improvements present in the encroachments may be considered a public nuisance and may be abated pursuant to Section 723.3 of the San Francisco Public Works Code as recently amended by Board of Supervisors Ordinance No. 210-09. A Copy of the Ordinance is attached.

Should you have any questions concerning this matter, please contact David Greenaway of the SFMTA. Mr. Greenaway can be reached at (415) 701-4237.

Sincerely,


Edward D. Reiskin
Director of Public Works

Attachments