



STAFF REPORT

SAUSALITO CITY COUNCIL

AGENDA TITLE:

Encroachment Agreement for terraced retaining walls, planters, and the construction of stairs on grade within the Toyon Court public right-of-way at 8 Toyon Court (ADR-EA 09-161).

RECOMMENDED MOTION:

Approve the attached resolution for an Encroachment Agreement to allow the construction of three terraced retaining walls, three planters, and stairs on grade within the Toyon Court public right-of-way which fronts of 8 Toyon Court.

BACKGROUND AND DISCUSSION

On October 22, 2009, the Community Development Director approved an Administrative Design Review Permit application for the following project located within the Toyon Court public right-of-way fronting 8 Toyon Court (APN 064-221-031):

1. Three, three-foot tall stone retaining walls ranging in length from 45 feet to 60 feet long as referenced on the plans titled, "John Shaw Residence", date-stamped received September 10, 2009.
2. Three, four-foot tall stone planters to be located around three existing oak trees
3. Construction of stone stairs on grade

Pursuant to Section 10.56.030.E of the Zoning Ordinance, the "City Council shall have the final decision-making authority to approve Encroachment Agreements, thereby authorizing the use of City-owned rights-of-way, easement or property." To satisfy this requirement, the property owner is seeking City Council approval of an Encroachment Agreement in order to proceed with the construction of the aforementioned structures to be located within the Toyon Court public right-of-way.

FISCAL IMPACT

No fiscal impact.


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RECOMMENDATION

The Community Development Director recommends the City Council adopt the attached resolution approving an encroachment agreement for the construction of the improvements listed above within the Toyon Court public right-of-way which fronts 8 Toyon Court.

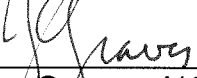
ATTACHMENT: Draft Resolution Approving an Encroachment Agreement for 8 Toyon Court.

PREPARED BY:



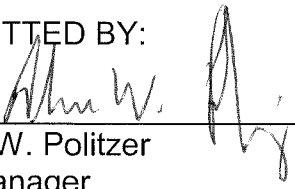
Heidi Burns, AICP
Associate Planner

REVIEWED BY:



Jeremy Graves, AICP
Community Development Director

SUBMITTED BY:



Adam W. Politzer
City Manager

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RESOLUTION NO. XX

**A RESOLUTION OF THE SAUSALITO CITY COUNCIL
APPROVING AN ENCROACHMENT AGREEMENT FOR THE CONSTRUCTION OF
RETAINING WALLS, PLANTERS, AND STAIRS ON GRADE IN THE TOYON COURT
PUBLIC RIGHT-OF-WAY FRONTING 8 TOYON COURT
(ADR-EA 09-161)**

WHEREAS, an application has been filed by John Shaw, requesting City Council approval of an Encroachment Agreement for the construction of three retaining walls, three rock planters, and the construction of stairs on grade within Toyon Court public right-of-way fronting 8 Toyon Court (APN 064-); and

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

WHEREAS, on October 22, 2009, the Community Development Director approved an Administrative Design Review Permit to allow three, three-foot tall stone retaining walls ranging in length from 45 feet to 60 feet long, three, four-foot tall planters to be located around existing oak trees, and the construction of stone stairs on grade within the Toyon Court public right-of-way fronting 8 Toyon Court; and

WHEREAS, on December 8, 2009, the City Council reviewed and considered the project plans for the proposed encroachment agreement titled "John Shaw Residence" date-stamped received on September 10, 2009; 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 CEQA Guidelines Section 15303(e) (New Construction of Accessory Structures).

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 the improvements in the public right-of-way along the Toyon Court public right-of-way fronting 8 Toyon Court.

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.

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 8 Toyon Court (ADR-EA 09-161)

Pursuant to Zoning Ordinance 10.56.060 (Encroachment Review and Agreements), the City Council approves of an Encroachment Agreement at 8 Toyon Court 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 proposed encroachment will allow the applicant to help stabilize the downward sloping hillside along Toyon Court fronting 8 Toyon Court. The hillside is currently sloughing and is in need of stabilization. The proposed retaining walls, rock planters, and stairs of grade will be constructed out of durable materials and is of a design that is commonly used in the general vicinity of the project site. Furthermore, the proposed improvements within the Toyon Court public right-of-way will not impede access and enjoyment of the streetscape upon which the encroachment is proposed because of the existing topography of the site.

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

The proposed encroachment runs parallel with Toyon Court and 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.

The encroachment along Toyon Court is necessary to stabilize the hillside fronting 8 Toyon Court.

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

The proposed encroachment will not affect access and circulation on Toyon Court.

- 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 proposed encroachment is designed to address the current needs of the hillside. However, the improvements do not preclude the City Council from terminating the encroachment if the City Council finds improvements to the street are necessary. Any such street improvement would need to address the geology and integrity of the hillside and will be mitigated accordingly.

EXHIBIT B

**CITY OF SAUSALITO
ENCROACHMENT AGREEMENT**

This **ENCROACHMENT AGREEMENT** ("Agreement") is entered into this ___ day of ___, 20___ (the "Effective Date") by and between **John Shaw** ("Owner") of the property at 8 Toyon Court (APN 064-221-31), and the **CITY OF SAUSALITO**, a municipal corporation ("City").

RECITALS

The following Recitals are a substantive part of this Agreement:

A. New construction of three, three-foot tall stone retaining walls ranging in length from 45 feet to 60 feet long, three, four-foot tall planters to be located around existing oak trees, and the construction of stone stairs on grade to be located in the public right-of-way along the Toyon Court property fronting 8 Toyon Court require City Council approval of an Encroachment Agreement (ADR/EA 09-161). In accordance with Chapter 10.56 of the City's Municipal Code, the Community Development Director reviewed the proposed encroachment and 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 allows the new construction of three retaining walls, three planters, and stairs on grade within the public right-of-way fronting 8 Toyon Court, 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,

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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(s):

John Shaw
8 Toyon Court
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 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.

OWNERS:

CITY:

John Shaw, Owner

Jonathan Leone, Mayor

RECOMMENDED FOR APPROVAL:

APPROVED AS TO FORM:

Todd Teachout, City Engineer

Mary Wagner, City Attorney

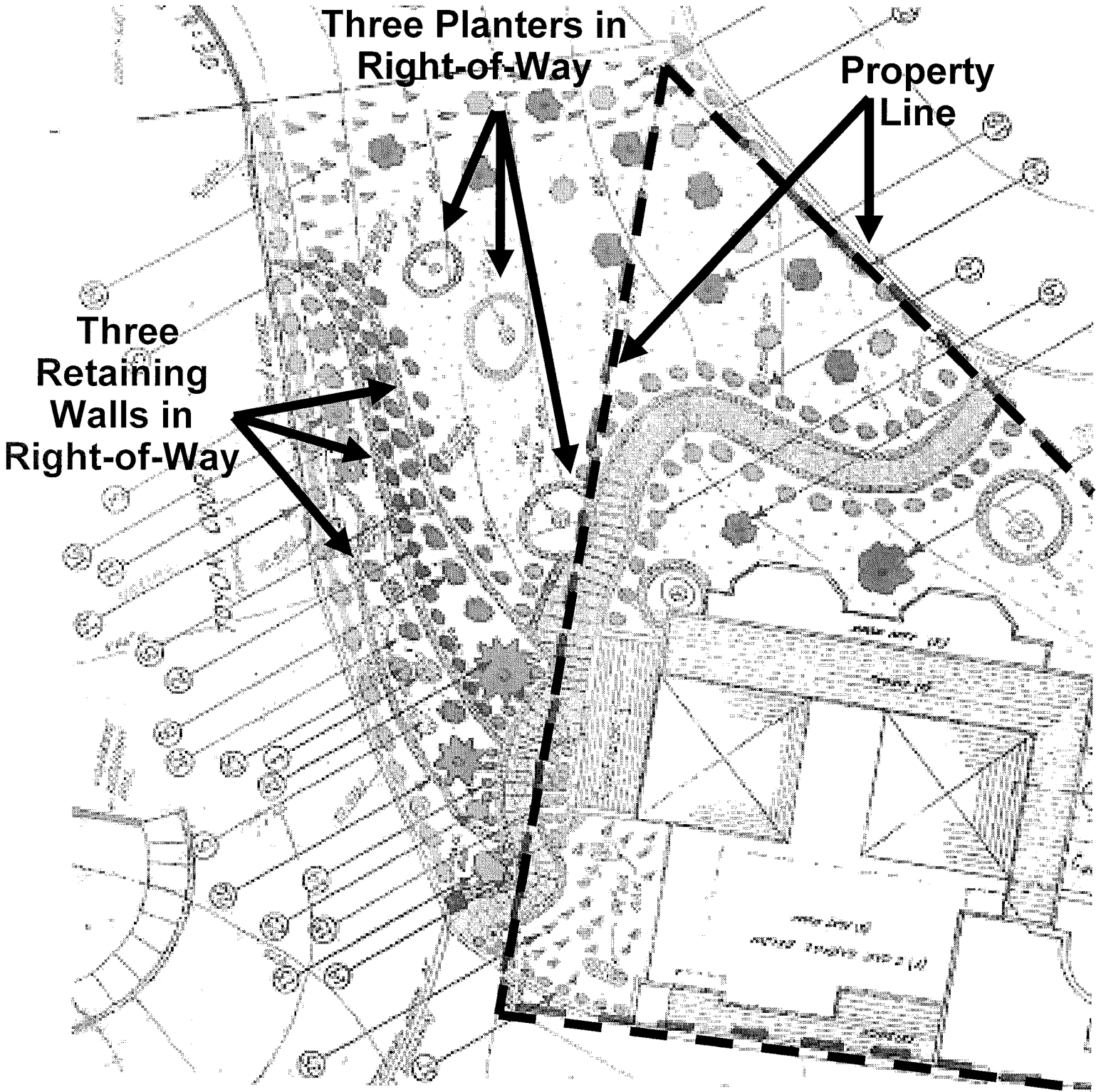
EXHIBITS:

1. "John Shaw Residence" date-stamped received on September 10, 2009
2. Encroachment Agreement Conditions of Approval

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EXHIBIT 1

Community Development Director Approved Administrative Design Review Plans, dated October 22, 2009
"John Shaw Residence"
Date-stamped September 10, 2009



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EXHIBIT 2

ENCROACHMENT AGREEMENT CONDITIONS OF APPROVAL

These conditions apply only to the project plans "John Shaw Residence" date-stamped received on September 10, 2009.

1. The encroachment agreement is predicated on a slope stabilization project for three retaining wall, three planters, and stairs on grade as shown on the project plans titled, "John Shaw Residence" date-stamped received on September 10, 2009.
2. As a condition of this approval, no alternative or unrelated construction, site improvements, tree removal and/or alterations, not specified in the project plans, or alterations approved by the Community Development Director, shall be performed on the project site. In such cases, this approval shall be rendered null and void unless approved by the Community Development Department as a modification to this approval.
3. 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.
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.
5. Prior to installation of the retaining wall, the applicant shall obtain the necessary building permits and encroachment permit for the construction within the Toyon Court public right-of-way from the Building Division and Engineering Division.
6. Construction materials, equipment, vehicles, and debris boxes shall be placed 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.

Advisory Notes

Advisory notes are provided to inform the applicant of Sausalito Municipal Code requirements, and requirements imposed by other agencies. These requirements include, but are not limited to, the items listed below.

1. All applicable City fees as established by City Council resolutions and ordinances shall be paid.
2. Construction Impact Fees shall be paid in accordance with the Construction Impact Fee Ordinance. The fee is due prior to issuance of Building Permit.

3. Encroachment permit, grading permit, third party review fees (cost plus 10%) fees shall be paid.
4. An encroachment permit shall be obtained from the Public Works Department prior to using the public right of way for non-public purposes (e.g., material storage, sidewalk construction or demolition) including any and all construction and demolition activities.
5. Grading/drainage permit(s) shall be obtained from the Public Works Department for any earthwork in excess of 50 cubic yards.
6. Grading on hillside land with of geologic formation known to slide will be limited to between April 15 and October 15 without written approval of the City Engineer.
7. Pursuant to Municipal Code Chapter 11.17, 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. 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 Section 11.17.060.B.
8. Pursuant to Municipal Code Section 18.08.020, overhead electrical and communication service laterals shall be placed underground when the main electrical service equipment is relocated or replaced.
9. Pursuant to Municipal Code Section 12.16.140, the operation of construction, demolition, excavation, alteration, or repair devices and equipment within all residential zones and areas within a 500 foot radius of residential zones shall only take place during the following hours:
Weekdays – Between 8:00 a.m. and 6:00 p.m.
Saturdays – Between 9:00 a.m. and 5:00 p.m.
Sundays – Prohibited
Holidays recognized by the City – Between 9:00 a.m. and 7:00 p.m.
10. Permits required by other agencies having jurisdiction within construction area shall be obtained in accordance with their respective agency's regulations.