



## Item No. 3 Town of Atherton

### **CITY COUNCIL STAFF REPORT – STUDY SESSION**

**TO: HONORABLE MAYOR AND CITY COUNCIL**

**FROM: GEORGE RODERICKS, CITY MANAGER**

**DATE: FEBRUARY 4, 2015**

**SUBJECT: ENCROACHMENT PERMIT ORDINANCE AND  
DEVELOPMENT LICENSE PROCESS**

#### **RECOMMENDATION**

Review and Discuss.

#### **BACKGROUND**

As Council is aware, staff has been working on revisions to the Town's Encroachment Permit Process to address the placement of improvements within the Town's rights-of-way. The ordinance will formalize a process for development-related licenses for private improvements within the right-of-way and transfer risk and liability associated with those improvements to the adjacent property owner.

Once adopted, the new procedures will apply Town-wide. With implementation, priority will be directed toward properties along designed bicycle and pedestrian routes (Bicycle/Pedestrian Master Plan), properties with active code enforcement, properties issued new building permits for additional square footage (trigger), and Parker Avenue.

#### **ANALYSIS**

Encroachments can be divided into two categories: (1) temporary/non-development encroachments, and (2) permanent/development-related encroachments. While the Town has regulated temporary/non-development encroachments through its current encroachment permit process, it has allowed more permanent, development-related encroachments to be placed without any significant regulation or oversight.

The Town's encroachment permit ordinance is focused on regulating the single-event use of the public right-of-way. For example, if a property owner or utility contractor wishes to make improvements in, under, or through the public right-of-way, a temporary encroachment permit is issued to regulate access and activity. Through the encroachment permit, the Town regulates the time, place, and manner of the activity – e.g. we require traffic control measures, dictate what

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type of material must be used to backfill any trenches, transfer liability of the ongoing work, and regulate the hours of operation for the activity. We also will require a damage deposit if the activity were to damage public property during the course of work. It is designed to regulate access to and installation of specific types of improvements (sewer lines, utility lines, driveways, etc.).

The current encroachment permit ordinance is not designed to regulate permanent (typically above ground but sometimes below ground) private-development improvements that are placed in the right-of-way – e.g. wireless facilities, fencing, walls, landscaping, mailboxes, security panels, pathways, pavement, stepping stones, large drainage facilities, rocks, and/or lumber barriers. The Town has “standards” that apply to some of these types of improvements, but there is no transfer of liability or risk, no regulatory control, and no formalized review process unless the improvements are proposed as part of a larger construction project.

In many areas of the Town, there exists expansive right-of-way. These rights-of-way are often improved by the adjacent property owners with many of the improvements noted above. Because these improvements are within the Town’s rights-of-way and because they are essentially unregulated, the private improvements place the Town at considerable risk with respect to private property damage. The most egregious of these improvements are landscaping areas that block visibility and eliminate a pedestrian refuge along the edge of the roadway; rocks, boulders, and stumps placed along side the roadway to prevent parking and present a risk at night to cyclists, pedestrians, and vehicles; irrigation lines that present trip and fall hazards; and fences and walls that represent permanent impediments to utilities and public works projects.

For these reasons, staff recommends that the encroachment permit ordinance be updated and incorporate a development-related license process to more formally regulate private improvements within the Town’s rights-of-way and transfer risk for approved improvements to the adjacent property owner. Regulation of the public right-of-way is not uncommon and most agencies strictly prohibit any private development within the public right-of-way. In these communities (which are by far the most common), improvements in the rights-of-way are solely those placed there by the public agency – sidewalks, bus stops, utility boxes, signage, irrigation, etc. The adjacent property owner may have minor landscaping and a mailbox, but all other improvements must be behind the formal property line.

However, Atherton is unique in that it has over the years allowed such improvements to occur in an effort to allow property owners to beautify their frontages beyond their front fence property lines. Rather than taking a draconian approach and eliminating all such improvements per current Town law, staff is recommending an approach that allows the improvements within specified standards (height, depth, type, etc.), requires the property owner to obtain review prior to installation of any new improvements, and requires the property owner to obtain a development license that runs with the property and notifies the property owner (and future property owner) of assumption of liability and risk.

### Encroachments

An encroachment includes, but is not limited to, the performance of any of the acts listed below, in, on, under or above the surface of any Town property or right-of-way. These acts include:

- Excavating, filling or disturbing the surface;
- Erecting or maintaining a flag, banner, decoration, post, sign, pole, fence, guardrail, wall, loading platform, mailbox, pipe, conduit, wire or other structure;
- Planting any tree, shrub, grass or other growing thing;
- Placing or leaving any rubbish, brush, earth or other material of any nature;
- Constructing, placing or maintaining any pathway, sidewalk, driveway, curb, gutter, paving or other surface or subsurface draining structure or facility, or any pipe, conduit or cable;
- Traveling by any vehicle or combination of vehicles or objects of dimension, weight or other characteristic prohibited by law without a permit;
- Lighting or building a fire;
- Constructing, placing, planting or maintaining any structure, embankment, excavation or other objects adjacent to a right-of-way or watercourse which causes or will cause an encroachment.

The Town's right-of-way means all or part of the surface, the air space above the surface, and the area below the surface of the public streets, roads, sidewalks, lanes courts, ways, alleys, boulevards, and places, including, without limitation, all public utility easements and public service easements as the same now or may thereafter exist that are under the jurisdiction of the Town.

### Ordinance Revisions

Revisions to the ordinance are relatively straightforward. The changes will ultimately encompass changes to our temporary encroachment permit process that currently exists (Chapter 12.06) – tightening up the standards and protections; and, we suggest adding a process to address development-related encroachment permits. Once the Council is comfortable with the framework to be discussed this evening, we will develop the final ordinance and return it for Council approval that will include public notice and public hearing(s).

***The more complicated and important process to get right is the process that residents must go through to obtain approval for their improvements.***

### Temporary (non-development) Encroachment Permit Process (Currently Exists)

The non-development permit application process will continue to exist, with enhancements. Public Works staff processes temporary encroachment permits for vehicles or equipment staged within the right-of-way; loading and unloading of large vehicles (truck deliveries, moving vans, etc.); street work; and utility work by homeowners, contractors, and/or utility companies.

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Residents or contractors fill out an Encroachment Permit Application with a complete description of work or improvements to be placed in the right-of-way for submission to the Public Works Department. The application includes:

- a statement of the intended use;
- drawings and/or plans detailing the work to be done (dates, times, extent of work);
- name and address of the applicant(s) and the authority of the applicant to make the application;
- certificates of insurance of the types and amounts required by the Town, including appropriate right-of-way liability coverage naming the Town of Atherton as an additional insured, and appropriate Workers' Compensation coverage as appropriate;
- proof of a current Contractor's License and a copy of Town Business License (if applicable);
- payment of any application fee as established by the City Council, including costs of recording the Permit; and
- Posting of any deposits, inspection fees and performance and labor/materials bonds as may be required by the Town.

The Public Works Department receives, reviews and approves encroachment permits. Conditions may be added that address backfill requirements, material requirements, times of access allowed, hours of construction, traffic control, final paving, and inspection requirements.

Again, these types of permits are issued for temporary access in, under, or over the Town's rights-of-way – truck staging, construction in the right-of-way, underground utility connections, construction project deliveries, etc. Any activity within the Town's rights-of-way that is temporary in nature will require an encroachment permit. The permits are temporary in nature and when the project ends, the permit terminates.

The process described above is pretty well refined and the only significant enhancement is in the documentation required for processing the permits. Permits are not required for de minimus maintenance or modification to existing improvements, such as minor patching and sealing of driveways, mailboxes that meet the requirements of the Code, etc. However, if those activities will cause significant impact on traffic or the public roadway over an extended period of time, a temporary permit may be required as the activity is no longer de minimus.

### *Development-related Encroachment Permits*

Development-related encroachment permits are designed to run with the land, grant the property owner a license to use the public right-of-way, and transfer the risk and liability resultant from the improvement to the property owner. For the Town's purposes, these Encroachment Agreements are termed revocable licenses. These types of licenses would be issued for concrete pilasters, entry keypads, drainage systems, trees and landscaping, rocks/logs, bricks and pavers, irrigation, and other similar types of improvements.

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Building, Planning, and Public Works will all have a hand in processing a development-related encroachment permit and revocable license. Because these improvements are usually more substantial and by their nature, intended to be permanent, they require more careful and considered review prior to approval. For example, there may exist a utility line in the area of the planned improvement or there may be a future intended use of the right-of-way both of which would impact the private development of the area.

Ultimately, there will be an agreement that specifies the terms and conditions of the encroachment, including appropriate hold-harmless, defense and indemnity provisions, maintenance, and a provision that the document is recordable as a covenant running with and binding the land of the property owner. A *sample* of a typical revocable license is attached for reference.

The revocable license would include a simple plot plan showing the improvements (see image). These would be recordable documents that would run with land ownership. The Town would keep a copy of these records (digital or hardcopy) within its GIS system or archives associated with the particular address.



### Revocation of a Revocable License

The revocable license makes a distinction between necessary improvements (driveway and utilities) and ancillary improvements (landscaping, irrigation, security boxes, pilasters, drainage, etc.). If the Town needs to revoke the license (e.g. to gain access to the underground area, to allow public utility to install a utility line, etc.), the Town may revoke the permit for ancillary improvements, but for those improvements that are necessary improvements related to home-ownership, the Town may only revoke upon a showing of need. Both situations for revocation have an appeal opportunity.

For revocations based on a showing of need, the property owner has 30-days to file an appeal of the determination to the City Council. For more temporary improvements (landscaping, etc.) where there is not a showing of need requirement, the property owner has an opportunity for hearing to object (10-days notice). In either case, after a final decision is reached, the property owner will have 60 days to restore the property. More typically, what would occur is if the Town for some reason needs access under a driveway, mailbox, fence, landscaping, etc., the Town provides the property owner notice of such need and the property owner is responsible for removal of any improvements in the area and/or be responsible for any costs incurred by the Town to do so. In the event of any emergency access need, the Town is not responsible for damage associated with its access (e.g. pipeline leaks, roadway failures, etc.).

### Permits

Applicants would pursue similar application to the Town for a revocable license and encroachment permit. As mentioned above, Public Works staff reviews the temporary

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encroachment permit. Whereas for development-related revocable license application, Public Works, Building, and Planning staff all review the application and its approval rests with the City Manager.

An application would include similar items to the temporary encroachment permit:

- a statement of the intended use;
- accurate drawings and/or plans detailing the work to be done;
- name and address of the applicant(s) and the authority of the applicant to make the application;
- certificates of insurance of the types and amounts required by the Town, including appropriate right-of-way liability coverage naming the Town of Atherton as an additional insured, and appropriate Workers' Compensation coverage as appropriate;
- proof of a current Contractor's License and a copy of Town Business License (if applicable);
- a statement from a licensed title insurance company indicating the ownership of the affected parcel and the adjoining parcel or parcels where the encroachments are proposed;
- payment of any application fee as established by the City Council, including costs of recording the Permit;
- a completed revocable license permit specifying the terms of the permit, including appropriate hold harmless, defense and indemnity provisions, and a requirement that the property owner agree to maintain any landscaping placed within the public right-of-way; and
- Posting of any deposits, inspection fees and performance and labor/materials bonds as may be required by the Town.

### Standard Conditions for Improvements in the Right-of-Way

For every permit (temporary or development-related) the Town will apply standards to the work to be done. These may include, but not be limited to:

- All work shall be diligently and continuously prosecuted until completion.
- No encroachment can be located or maintained in any manner that impedes drainage or access to any public or private utility, or facility, or to any devices or controls, for inspection, maintenance, or operation.
- No pavement, poured concrete, asphalt or similar material should be used in any right-of-way except for ingress and egress to the property.
- When any existing pavement, poured concrete, asphalt or other impervious material becomes materially damaged and/or unsafe it shall be removed and the area shall be repaired.
- No physical obstructions should be placed within six feet from the edge of the improved public right-of-way.
- New landscaping should meet the following criteria:
  - It should not constitute a hazard to public safety.

- Landscaping within three feet from the edge of the improved public right-of-way is limited to ground level landscaping not to exceed five inches in height, and ground level pervious surface coverings.
- Landscaping located between three feet and six feet from the edge of the improved public right-of-way is limited to groundcover or low-growing shrubs less than thirty-six inches in mature height.
- No shrubbery within a triangular area bounded on two sides by improved right-of-way lines extending a distance of thirty feet from the intersection of the improved right-of-way at the street corner shall be over three feet in height measured from the level of the closes adjoining pavement to the top of the shrubbery. Within such triangular area, all trees, including overhanging trees shall be trimmed so that they shall not obstruct the vision of persons operating vehicles on adjoining streets.
- Only street trees approved by the Town may be planted, and deep root planters or root barriers may be required.
- Property owners are required to properly maintain any improved areas.
- No logs, curbs, rocks or similar obstacles may be placed within six feet of the edge of the improved right-of-way.
- Landscaping shall not be permitted to impede drainage.

### Enforcement and Triggers

As mentioned earlier in this Report, staff will begin implementation with properties along designed bicycle and pedestrian routes (Bicycle/Pedestrian Master Plan), properties with active code enforcement related to rights-of-way, properties issued new building permits for additional square footage (trigger), and Parker Avenue.

Following these priorities, staff will begin a methodical application of the ordinance town-wide. Beyond basic enforcement, staff will be returning to the Council with a companion zoning ordinance that will require property owners that improve a certain square footage of their property to obtain a revocable license for existing and/or new/planned improvements within the right-of-way. For example, if a property owner were to come through the Planning Department with a home remodel project that reached the trigger set within the zoning ordinance (e.g. 1,000 square feet or a project valuation of \$500,000, etc.) that property owner would be required to bring their property frontage into compliance whether through removal or corrective measure or obtaining a revocable license for existing compliant improvements.

Lastly, staff is also working on an in-lieu fee process whereby property owners within designated pedestrian and bicycle routes will be required to pay toward those rights-of-way improvements within their frontage or will be given the opportunity to make those improvements consistent with Town requirements (e.g. to install a decomposed granite pathway along the frontage).

### Next Steps

Following Council review and comment this evening, staff will put the finishing touches on the ordinance and return it to the City Council for introduction and first reading. A town-wide notice

will be provided as well as an educational blog article via the Town's website.

Key feedback staff is seeking from the City Council include:

- Confirmation of concept and approach;
- Identification of priority enforcement areas;
- Confirmation of a trigger ordinance process and priority;
- Any additional public outreach beyond what has been outlined herein.

As always, the Council has the option of not adopting updates to the ordinance and/or a revocable license process. However, there are a growing number of properties in Town with encroachments into the Town's rights-of-way and a growing number of complaints regarding the same. Many of those improvements pose hazards to the general health, safety, and welfare.

The Town can continue its reactive code enforcement process with respect to these types of improvements. However, code enforcement action against one property owner encourages a complaint against neighboring property owners perpetuating neighborhood angst to the process and the Town. As a result, property owners tend to feel singled out and have a general dissatisfaction with the Town and its processes. Staff recommends a broader, Town-wide, consistent approach with an accompanying education and amortization period for compliance.

### **POLICY ISSUES**

This project creates new law. The project would impose stricter standards on development within the Town's rights-of-way. Property owner would be notified and educated about the ordinance in advance and would be given an opportunity to comply with the ordinance through an amortization period which could be anywhere from 30 days to 6-months or more. Following the amortization period, staff will begin a methodical enforcement process to notify property owners and gain compliance. Failure to comply with the ordinance could result in formal code enforcement action up to and including abatement as a public nuisance and assessment of the costs of such abatement as a lien against the property.

### **FISCAL IMPACT**

There is no fiscal impact with the review and discussion of this Report.

Upon adoption of the ordinance, the Town's Code Enforcement Officer will begin enforcement of its provisions. The Town's Code Enforcement Officer is now a full-time position and the cost of enforcement of the ordinance is part of the normal job duties and responsibilities of the position.

The costs of the enhanced encroachment permit process and development license review process and permit will be incorporated into the cost of the permits themselves. It is not anticipated that these will be an impediment to request.

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In the event of failure to comply and the need for public nuisance abatement those costs are born by the respective property owner through the abatement process.

**PUBLIC NOTICE**

Public notification was achieved by posting the agenda, with this agenda item being listed, at least 72 hours prior to the meeting in print and electronically. Information about the project is also disseminated via the Town's electronic News Flash and Atherton Online. There are approximately 1,200 subscribers to the Town's electronic News Flash publications. Subscribers include residents as well as stakeholders – to include, but be not limited to, media outlets, school districts, Menlo Park Fire District, service providers (water, power, and sewer), and regional elected officials.

In addition, the City Manager's Blog included several educational articles on encroachments over the past several months and the Monthly Manager's Report released to the community has noted the upcoming ordinance review.

<http://www.ci.atherton.ca.us/Blog.aspx?CID=1>

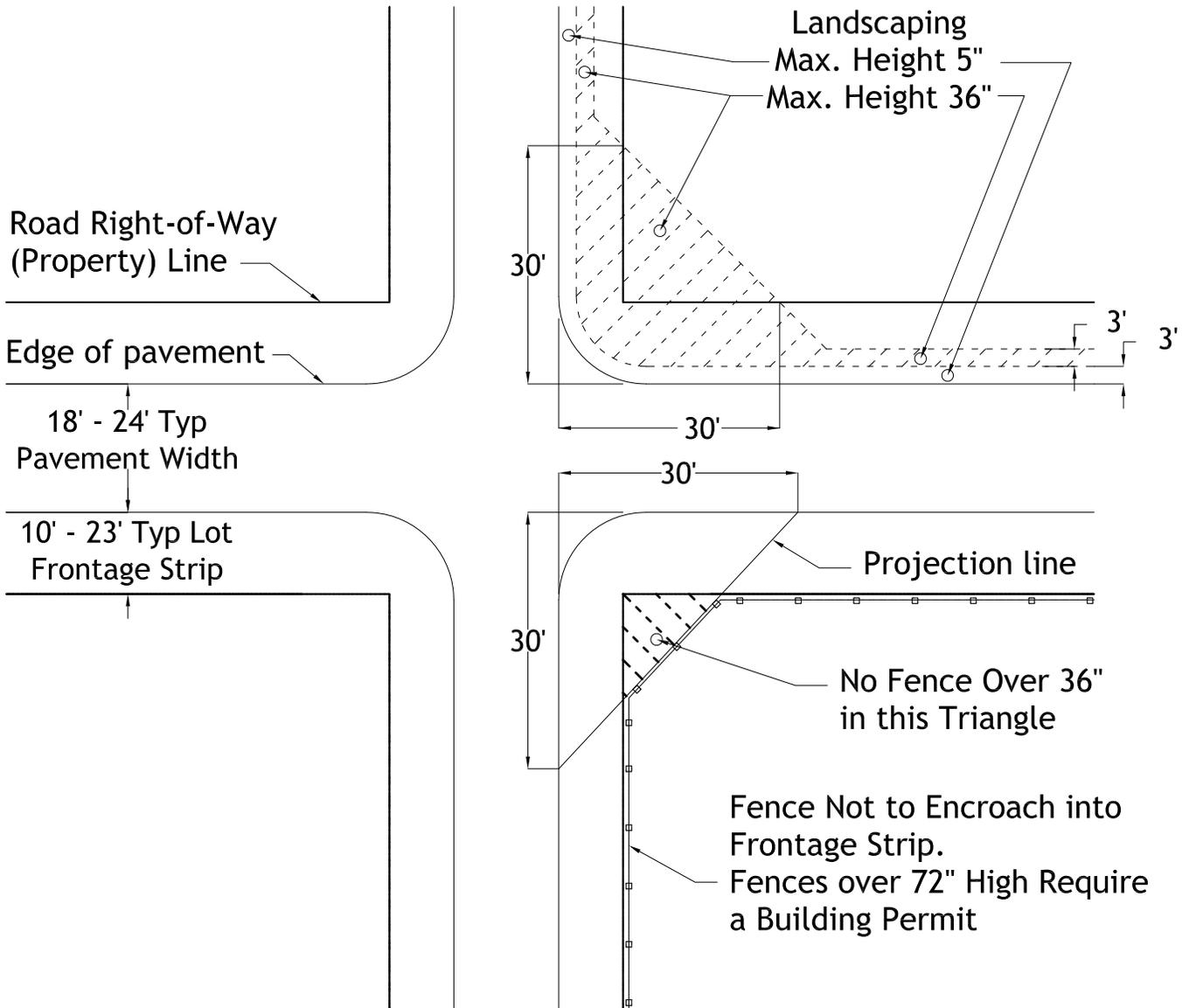
If/when the Council chooses to move forward with an ordinance, staff will provide town-wide noticing for each of the public meetings.

**ATTACHMENTS**

Existing Street Frontage Requirements

Sample Revocable License

# TOWN OF ATHERTON STREETFRONTING LANDSCAPING AND FENCE LOCATION AND SIGHT DISTANCE STANDARDS



No logs, curbs, rocks or similar obstructions are allowed within 6' of pavement edge.

Existing trees and shrubs may remain, so long as not a public hazard.

Keypads and intercoms must be a minimum of 6' from pavement edge.

Mailboxes are permitted closer to pavement edge than 6' if required to meet postal regulations.

No objects or improvements may impede drainage.



RECORDING REQUESTED BY:  
**Town of Atherton**

WHEN RECORDED MAIL TO:  
**City Clerk**  
**Town of Atherton**  
**91 Ashfield Road**  
**Atherton, CA 94027**

SPACE ABOVE THIS LINE FOR RECORDER'S USE

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**REVOCABLE LICENSE AND ENCROACHMENT PERMIT**  
**AGREEMENT NO. \_\_\_\_\_**

WHEREAS, the undersigned applicant proposes to construct certain improvements on a public right-of-way running in favor of the Town of Atherton adjacent to the following described parcel of real property in the Town of Atherton, San Mateo County, California, which property has frontage on:

Street Address: \_\_\_\_\_

Assessor's Parcel Number: \_\_\_\_\_

Legal Description: \_\_\_\_\_

WHEREAS, Applicant desires to use and encroach in, over, upon or under the right-of-way of said street, in constructing, using and maintaining said improvements, to the extent and in the manner hereinafter more specifically described and set forth; and

WHEREAS, the requested encroachment will currently not, in the opinion of the Town of Atherton, obstruct, interfere with, or in any way whatsoever impede or endanger the Town or any member of the public in any lawful use of said street or right-of-way as the same is presently improved for public use and a revocable license and encroachment permit can reasonably and safely be granted to the present and future owners of said property for the encroachment hereinafter described until such time when and if said license and encroachment permit is revoked;

NOW THEREFORE, IN CONSIDERATION OF THE PREMISES and subject to the terms and conditions hereinafter set forth, the Town of Atherton does hereby give and grant to Applicant, for the use and benefit of herein above described parcel of real property, a revocable license and encroachment permit to construct, keep use and maintain within the right-of-way where it bounds said parcel of real property, the following described use, improvement, or encroachment:

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(A map, plat, plot plan, sketch or drawing showing said encroachment is attached hereto, and is referred to herein, and shall be deemed incorporated herein and a part hereto for all purposes.)

**THIS LICENSE AND ENCROACHMENT PERMIT IS EXPRESSLY GRANTED  
SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:**

1. Said license and encroachment permit shall run with the parcel of real property as described above and the terms and conditions thereof and all of the duties and liabilities created hereby shall be a benefit to and a burden upon the owners and occupants of the land, their assigns, and their successors in interest. The Town will record the Permit with the County at Permittee's expense. Permittee shall deliver this Permit to any successor in interest to the above-described land.

2. The process for revocation depends on the type of encroachment:

A. Where the encroachment is related to new development related to a property such as a driveway, connection to public utilities, or similar long-term use, the permit may be revoked by the City Manager only upon substantial evidence of good cause based on clear need and necessity to do so. Any decision by the City Manager to revoke a permit involving a driveway, utilities, or similar semi-permanent encroachment may be appealed to the City Council in writing within thirty (30) days.

B. Where the encroachment is less permanent in nature, such as for landscaping, fencing, or similar use, the permit shall be revocable at any time thereafter by the City

Manager with or without cause; provided, however, that before revoking such permit, the City Manager shall provide the owner with an opportunity to a hearing to object to the revocation upon at least ten (10) days' notice.

In either case, if the City Manager exercises his/her option to revoke this permit and agreement and that decision becomes final after all appeals are exhausted, the Permittee and/or any successors, assigns or holders of interest in the land adjoining the encroachment permit benefit area shall be responsible for the removal of all improvements in the right-of-way as required by the Town of Atherton at no cost to the Town for such removal and restoration of the terrain within sixty (60) days after written notice of the final decision to revoke such license and permit has been served on the owners of said parcel of real property herein above described.

3. Licensee and Permittee does hereby, for him/herself and his/her successors in interest of said real property, release and hold harmless the Town of Atherton from any and all damage and claim for damage related to or arising from the use or improvement within the right-of-way related to this Agreement, and does hereby waive any and all actions, causes of action and claims which he or she or they may have, or claim to have, against the Town by reason of any future revocation of this license and permit;

4. It is mutually agreed that the Town shall not be responsible for any loss, cost, or damage, or claim of loss, cost, or damage to persons or property by any person as a result of the existence of said use or improvement of the right-of-way, and the Licensee and Permittee, for him/herself and his/her successors in interest, does hereby agree to hold the Town, its officers, agents and employees, free, clear and harmless from any such loss, cost or damage;

5. Licensee and Permittee, for him/herself and his/her successors in interest, does hereby agree at all times during the life of this license and permit, to provide insurance coverage upon the property and improvements within the right-of-way under the same policy of insurance provided on the adjacent property owned by Licensee/Permittee, with the Town to be named as an additional insured under that policy of insurance covering the adjacent



On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me, \_\_\_\_\_,  
a Notary Public, personally appeared \_\_\_\_\_,  
who proved to me on the basis of satisfactory evidence to be the person whose name is  
subscribed to the within instrument and acknowledged to me that he executed the same in  
his/her authorized capacity, and that by his/her signature on the instrument the person, or  
the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that  
the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

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Notary's Signature

Sample