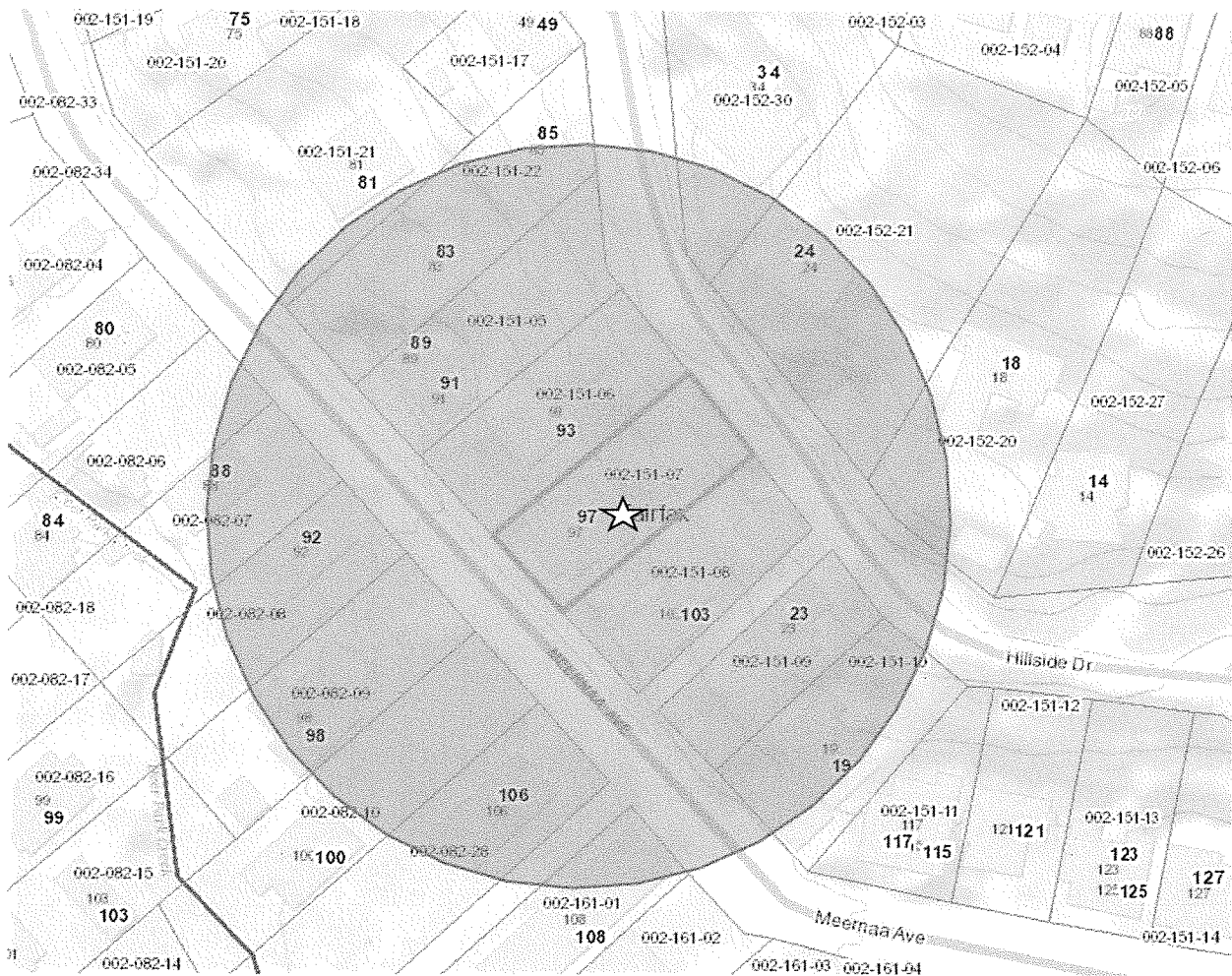


**TOWN OF FAIRFAX  
STAFF REPORT  
Department of Planning and Building Services**

**TO:** Fairfax Planning Commission  
**DATE:** June 29, 2017  
**FROM:** Michelle Levenson, Zoning Technician  
**LOCATION:** 97 Meernaa Avenue; Assessor's Parcel No. 002-151-07  
**ZONING:** Residential RS 6 Zone  
**PROJECT:** Install a Portion of Fence in the Public Right-of-Way  
**ACTION:** Encroachment Permit; Application # 17-26  
**APPLICANT:** Helena and Laurent Martin  
**OWNER:** Helena and Laurent Martin  
**CEQA STATUS:** Categorically exempt, § 15305(a).



**97 Meernaa Avenue**

## **BACKGROUND**

The project site is 6,094 square feet in area and steeply sloped at 37-percent. The site is located within the Residential RS 6 Zone and is developed with a 1,972-square-foot single-family residence constructed in 1927 that contains 3 bedrooms and 2 bathrooms.

## **REQUIRED DISCRETIONARY APPROVALS**

The proposed project would involve installing a six-foot-high, 65-foot-long redwood fence along the rear and side property lines. The entire fence would be located within the public right of way along Hillside Drive.

The following discretionary approval from the Planning Commission is required:

*Encroachment Permit.* Town Code Section 12.032.010 states, "Upon certain portions of public streets and public rights-of-way in the town, not being used for vehicular or pedestrian travel, temporary carport and other structures may be erected and maintained by the owners of adjoining property, upon terms and conditions and for the time prescribed in a permit issued to the property owner by the Planning Commission...." Because the fence would be located entirely within the public right-of-way, approval of an Encroachment Permit from the Planning Commission is required.

## **ENCROACHMENT PERMIT**

Town Code Section 12.32.020 states that in considering an Encroachment Permit for a temporary structure in the public right-of-way, the public area shall not be currently used by the public and the applicant shall demonstrate that there is no suitable place for the structure on the owner's property.

The 65-foot-long fence would be located within an area of Hillside Drive that is not paved and is steeply-sloped, making vehicular and pedestrian access on the area difficult and unsafe. In addition, adjacent properties contain fences that appear to be located within the public right of way; the proposed fence would continue the visual site line of the adjacent fencing. The purpose of the fencing is to safely secure the rear yard for pets. Due to the topography of the site, it is difficult to site the fence while maintaining the safety of the rear yard for pets without locating it within the right-of-way. Attachment A contains the sample "License Agreement to Permit Revocable Encroachment on Town Property" that the owners would be required to complete and record with the County to construct the fence in the right-of way. The License Agreement contains provisions that enable the Town to remove private improvements in the right-of-way if the public area is needed in the future.

## **RECOMMENDATION**

1. Open the public hearing and take testimony.
2. Close the public hearing.

3. Move to approve Application No. 17-26.

**ATTACHMENT**

Attachment A – Sample-License Agreement to Permit Revocable Encroachment on Town Property

RECORDING REQUESTED BY AND  
AFTER RECORDING RETURN TO:

Town of Fairfax  
Department of Public Works  
142 Bolinas Road  
Fairfax, CA 94930

\_\_\_\_\_ /

## LICENSE AGREEMENT TO PERMIT

### REVOCABLE ENCROACHMENT ON TOWN PROPERTY

This License Agreement is entered into on \_\_\_\_\_, between the Town of Fairfax, a municipal corporation, hereinafter referred to as "Licensor" and \_\_\_\_\_, of \_\_\_\_\_, Fairfax, CA, hereinafter referred to as "Licensee", and is made with reference to the following facts:

#### RECITALS

A. Licensee is the owner of the real property located at \_\_\_\_\_, Fairfax, California.

B. Adjacent to the \_\_\_\_\_ property line of said real property owned by Licensee, there exists a right-of-way owned by Licensor, which is owned by Licensor for roadway purposes.

C. Licensee desires to construct a certain development project on the real property and as part of that construction desires to include certain improvements, which will encroach upon, and be located in the above-referenced right-of-way owned by Licensor.

D. Licensor is agreeable to permitting said encroachment upon the terms and conditions expressed herein below.

#### AGREEMENT

In consideration of the foregoing, and subject to the terms and conditions set forth herein below, the parties agree as follows:

1. Grant Licensor hereby grants to Licensee, subject to the terms and conditions contained herein, the right to construct, maintain and install the following described improvements on the following described right-of-way owned by Licensor and shown on the diagram attached hereto as **Exhibit "A"**.

**ATTACHMENT** 

a. The improvements permitted to be constructed, maintained and installed by this License are described as follows: \_\_\_\_\_, as shown in **Exhibit "B"**.

b. The right-of-way and/or property owned by the Licensor permitted to be burdened by said improvements is described as follows: \_\_\_\_\_

\_\_\_\_\_, as shown in **Exhibit "A"**.

2. License Fee In consideration for the license herein granted, Licensee agrees to pay Licensor a one-time lump sum payment of \$ -0-, payable upon execution of this license.

3. Construction and Maintenance Expenses Licensee shall bear the cost and expense of constructing, reconstructing and maintaining the improvements described above. Licensee further agrees that all work upon or in connection with said improvements shall be done at such times and in such manner as is approved by Licensor and shall be done in accordance with plans and specifications approved by Licensor.

a. Licensee shall not modify or in any fashion change the improvements, once constructed, without the written permission of Licensor.

b. Licensee agrees to construct said improvements in a workmanlike fashion and to religiously maintain said improvements in a good and sound condition and in a condition that remains aesthetically and visually pleasing and acceptable to the Licensor. If Licensee fails to maintain said improvements in said condition, Licensee hereby grants to Licensor the right to either remove said improvements or to maintain them. If Licensor is required to remove and/or maintain said improvements, Licensee agrees to reimburse the Town for the cost thereof within 30 days after receipt of an invoice and, if such invoice is not so paid, the remaining balance shall accrue interest at the rate of 10% per year until paid. Furthermore, if said invoice is not paid, Licensee agrees to permit Licensor to impose a lien upon the real property described in **Exhibit "B"** without notice to Licensee.

4. Removal of Improvements Licensee expressly acknowledges that the improvements covered by this agreement are being allowed to be constructed in a public right-of-way and that, from time to time, said right-of-way will require improvement, relocation, destruction and/or removal. In the event of said events occurring, Licensee expressly consents to the Licensor removing and/or replacing said improvements, at the unfettered and complete discretion of Licensor, and Licensee further agrees to effect the removal and replacements at its cost within 60 days of receipt of written notice to do so from Licensor or, in the event that Licensee declines to effect said removal and/or replacement, Licensee grants to Licensor the right to remove and/or replace said improvements and the cost thereof shall be paid in accordance with the immediately preceding subparagraph.

a. Licensee hereby waives any/or all claims against Licensor for any and all damage or injury done to the real property described in **Exhibit "B"** and/or the structures located thereon caused as a result of the removal and/or replacement described in the immediately preceding paragraph and Licensee indemnifies and holds Licensor

harmless for any and all such damages or injuries, irrespective of the passive or active negligence of Licensor.

5. Indemnification and Hold Harmless

a. Licensee shall assume all risks of damage to the improvements and any appurtenances thereto and to any other property of Licensee or any property under the control of Licensee while upon or near Licensor's right-of-way described at paragraph 1(b).

b. Licensee further agrees to indemnify and save harmless Licensor, its officers, employees, agents, successors, and assigns, from any and all claims, liabilities, damages, failure to comply with any current or prospective laws, attorney's fees, for loss or damage to property and for injury to or death of any person arising out of the construction, maintenance, removal, replacement, rehabilitation, repair, or the location of the improvements or out of Licensee's activities on Licensor's right-of-way described hereinabove.

6. Insurance Licensee, at its sole cost, shall maintain property damage insurance in the amount of \$1 million combined single limit for bodily injury and property damage with insurers which are acceptable to Licensor, insuring against all liability of Licensee and its authorized representatives arising out of and in connection with Licensee's use or occupancy of the property.

All general liability insurance and property damage insurance shall insure performance by Licensee of the indemnity provisions of paragraph 6.

Each policy, or a certificate of the policy, shall be deposited with Licensor at the commencement of the term of this agreement, and on renewal of the policy not less than twenty (20) days before expiration of the term of the policy. Licensee shall provide evidence of said insurance, the certificate and endorsements in the forms attached hereto as **Exhibit "C"**.

Licensee shall make arrangements with the insurers that the insurers shall provide Licensor with notice of cancellation or termination of the insurance at least thirty (30) days in advance of cancellation or termination.

7. Term This agreement and the rights granted hereunder may be terminable by Licensor upon giving written notice to Licensee at least six (6) months prior to the termination.

a. Should Licensee, its successors and assigns, at any time abandon the use of the property described in **Exhibit "B"** or any part thereof, or fail at any time to use the same for the purpose for which development of said property was approved for a continuous period of six months, the rights and obligations hereby created shall cease to the extent of the use so abandoned and/or discontinued, and Licensor shall have the right to declare this license terminated to the extent of the use so abandoned or discontinued.

b. Upon termination of the rights and privileges hereby granted, Licensee, at its own cost and expense, agrees to remove said improvements for which this license is granted and to return the right-of-way to the condition it was in prior to the execution of this License. Should Licensee in such event fail, neglect, or refuse to remove said improvement or return the right-of-way to such condition, such removal and restoration may be performed by Licensor at the expense of Licensee, which expense, including any attorney's fees, Licensee agrees to pay upon demand and, if not so paid, said expenses shall be paid in accordance with paragraph 3(b), above.

8. Notices Any and all notices and demands required or permitted to be given hereunder, shall be in writing and shall be served either personally or by certified mail, return receipt requested, to the following addresses:

If to Licensor, to:      Town of Fairfax  
Attention:                Public Works Director  
                                  142 Bolinas Road  
                                  Fairfax, CA 94930

If to Licensee, to:      \_\_\_\_\_  
                                  \_\_\_\_\_  
                                  Fairfax, CA 94930

9. Waiver The waiver by Licensor of any breach or any term, covenant, or condition herein shall not be deemed to be a waiver of such term, covenant, condition or any subsequent breach of the same, or any other term, covenant or condition herein contained.

10. Authority of Parties Each individual executing this agreement in behalf of a corporation or other private entity shall represent and warrant and that he/she is duly authorized to execute this agreement on behalf of the corporation and/or entity, in accordance with the duly adopted resolution of the Board of Directors of such corporation, and/or entity, a copy of said resolution shall be provided to Licensor, along with the executed original of this agreement.

11. Attorney's Fees In the event that either party is required to bring an action to enforce or interpret terms and conditions of this agreement, the prevailing party shall be entitled to payment of its attorney's fees, as well as expert witness fees.

12. Assigns and Successors This agreement shall inure to the benefit and be binding upon each party's assigns and successors, and it is the intent of the parties that this license and its terms and conditions shall run with the land and be binding upon all successors in interest to the real property described in **Exhibit "B"** attached hereto.

IN WITNESS WHEREOF, the undersigned have executed this agreement the day and year first written above.

TOWN OF FAIRFAX

Date: \_\_\_\_\_

By \_\_\_\_\_  
Public Works Director

Date: \_\_\_\_\_

By \_\_\_\_\_

Date: \_\_\_\_\_

By \_\_\_\_\_