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## MEMORANDUM OF LAW

**DATE:** May 14, 2015

**TO:** Transportation & Stormwater, Streets Division

**FROM:** City Attorney

**SUBJECT:** City Liability for Maintenance and Brush Management on Paper Streets

### INTRODUCTION

The term “paper street” refers to a road or alley that exists only on paper (such as a map or other similar documents). A paper street is typically an area of land that has been offered for dedication for use as a public street but is owned by abutting property owners. A question has been raised whether the City is responsible for maintenance or brush management of these areas.

### QUESTION PRESENTED

Is the City responsible for brush management or other maintenance of paper streets, which have not been improved or formally accepted into the city street system?

### SHORT ANSWER

No. The City does not have any responsibility to clear brush or otherwise maintain paper streets, provided that the underlying land is owned by a private party. The City is responsible for maintenance if the paper street exists on City-owned land. If the paper street area was dedicated to the City by easement or where a prior acceptance of the dedication occurred, a case-by-case analysis is necessary.

## ANALYSIS

### I. STATUTORY FRAMEWORK

The process by which a road is formally accepted into the City street system will typically begin with a dedication. “A dedication is the transfer of an interest in real property to a public entity for the public’s use.” *Biagini v. Beckham*, 163 Cal. App. 4th 1000, 1009 (2008) (quoting *Fogarty v. City of Chico*, 148 Cal. App. 4th 537, 543 (2007)). Like a contract that requires both an offer and an acceptance, a dedication must be accepted to be binding. *Biagini*, 163 Cal. App. 4th at 1009. There are two means by which a dedication can be accepted: (1) by statute, where the offer of dedication is accepted formally by a public agency; or (2) a common law acceptance, where public use over time implies an intention to accept the dedication. *Id.*

With paper streets, the process of dedication typically has not been completed. While such streets may exist on maps, this merely represents the “offer” phase of the dedication. *See McKinney v. Ruderman*, 203 Cal. App. 2d 109, 115 (1962) (“filing of a subdivision map delineating a street thereon is an offer to dedicate the land identified by such delineation to street purposes”). Until the City formally accepts the dedication or the public makes use of the dedication over a period of time, the public’s responsibility for the right-of-way has not been triggered.

California Streets and Highways Code section 1806(a) states that: “[n]o city shall be held liable for failure to maintain any road until it has been accepted into the city street system in accordance with subdivision (b) or (c).” Subdivisions (b) and (c) provide two methods by which a street may be accepted: a resolution of the governing body, or by the act of a designated city officer who has been empowered by an ordinance of the governing body. San Diego Municipal Code section 144.0233 (“Acceptance of Dedication”) states that the “City Engineer, or other designee of the City Manager, may accept on behalf of the City Council streets and roads, or portions thereof, into the City street system and record conveyances to the City of real property interests for street and road uses and purposes.”

Municipal Code section 144.0233 also requires that “[n]o street shall be accepted into the City street system and open to public use until improvements are constructed pursuant to the requirements of this Code.” Therefore, the City Engineer is prohibited from accepting the dedicated land until after improvements (such as pavement and curbs) have been installed. In the case of paper streets, no improvements have been installed; therefore, a paper street cannot be accepted into the city street system. Because such streets cannot be accepted into the City street system, under California Streets and Highway Code section 1806(a), the City cannot be held liable for the failure to maintain paper streets and any required maintenance or brush clearing must be performed by the underlying property owner.

## II. COMMON LAW ACCEPTANCE

Even where the City fails to complete a statutory dedication with a formal acceptance, it remains possible for a dedication to be completed via a common law acceptance. A common law acceptance occurs where an incomplete or defective statutory dedication is accepted by the public. *See Hanshaw v. Long Valley Road Ass'n*, 116 Cal. App. 4th 471, 478 (2004) (citations omitted). While there is no clear test for what level of public use is sufficient to constitute a common law acceptance, there are several factors that a court will consider: (1) the intensity of public use, (2) whether the public use has been commensurate with the intended purpose of the street, (3) whether the length of time that the public has used the road evidences an intent to accept the dedication, and (4) whether the duration of public use has lasted long enough that the “public accommodation... will be affected materially by an interruption of the enjoyment.” *See Biagini*, 163 Cal. App. 4th at 1010-14.

In *Biagini* a court determined that an unaccepted dedication along a deadend road in a rural area with an average of 2,200 annual trips across it had commensurate use for its purpose and that a period of several years was sufficient to demonstrate the public’s intent to accept. *Id.* However, private easements existed that allowed all residents access to their property. Thus, even if the dedication had never occurred, no person would be materially affected, leading the court to conclude that the “fundamental basis for finding such an acceptance does not exist.” *Id.* at 1013. No factor on its own can determine whether the public has accepted a dedication by use; the court will look at the entirety of the situation when making a determination.

Although it is possible for a dedication to be accepted by public use rather than by formal acceptance by a local governing body, this process will grant the public the right to use a street but it will not result in liability to the city or county for the maintenance of such a street. In *Hanshaw*, a road was dedicated to a county in three stages: North, Middle, and Southern. 116 Cal. App. 4th at 475. The county had accepted the dedication of the Middle portion only and had not accepted the other dedications. *Id.* at 480. The public continued to make use of all portions of the road and the court determined that use by the public constituted an informal acceptance of the dedication. *Id.* at 481-84. The court concluded, however, that the county would not be liable for maintaining the road, stating:

Although a road is a “public street” and subject to “public control,” it need not necessarily be maintained by the local governing entity. All roads over which the public has right to travel, whether express or prescriptive, are “public” roads. “Public” roads, however, are not “county” roads until accepted as such by appropriate resolution of the board of supervisors. [Citations.] The general rule is that a county may not use county road funds for maintaining “public” roads other than “county” roads. [Citations.] Accordingly, a county has no statutory duty to maintain public roads that have not been accepted into the county highway system by resolution of the board of supervisors.

*Id.* at 479-80 (quoting *County Responsibility for Public Roads*, 61 Ops. Cal. Atty. Gen. 466, 468 (1978)) (citations omitted).<sup>1</sup> Thus, even if a paper street exists where a court could determine that public use has caused a common law acceptance, the City would have no responsibility to maintain such a street.

### **III. EXCEPTIONS**

The above analysis applies in situations where paper streets exist on privately owned land where the City has not accepted a dedication for public use. There are three other categories into which a paper street may fall.

#### **A. City-owned land**

Generally, the City is responsible for maintenance and brush management for a paper street that exists on City-owned land. As the underlying property owner, the City would retain the responsibility for maintenance of such areas, even if they have not been accepted into the City street system, just like any other property owner.

#### **B. Easement**

It is also possible that the City may have received a property interest in land via easement instead of dedication. If the City owns an easement with terms that require the City to maintain the subject property, the City is obligated to perform such maintenance depending on the terms of the easement, even if the area has not been accepted into the City street system.

#### **C. Prior Acceptance**

Many of San Diego's neighborhoods were developed decades (and in some cases, a century) ago. As a result, there exist some unimproved streets and alleys that were dedicated for public use and accepted by the City long before the current statutory framework was crafted. Such situations will require a case-by-case analysis to determine the City's obligations. City staff can work with the Development Services Department to locate and examine property records to determine if an acceptance occurred.

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<sup>1</sup> Although this case deals with a county instead of a city, the situations are analogous because neither entity would have liability for failing to maintain roads that had not been accepted into their street system. California Streets and Highways Code section 941(b), which describes the acceptance of roads into a county street system, has almost exactly the same language as contained in section 1806(a), which describes the acceptances of roads into a city street system.

### CONCLUSION

In situations where private land has been dedicated to the City for use as a street, the City is not responsible for maintenance or brush clearing until the street has been improved and formally accepted into the City street system. Therefore, any required maintenance and brush clearing responsibilities will fall on the underlying property owner. The City may, however, have an obligation to perform maintenance or brush clearing in certain cases, including City-owned land, as required by an easement, or in the case of an acceptance of a dedication for public use in the past. This Office is prepared to offer analysis and advice on any specific situations on a case-by-case basis.

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By \_\_\_\_\_ /s/ \_\_\_\_\_

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