

MEMORANDUM OF LAW

DATE: March 18, 1993

TO: George I. Loveland, Park & Recreation Director

FROM: City Attorney

SUBJECT: Sale or Lease of Ocean Front Walk Right-of-Way

You recently sent a memo to this office requesting a written opinion on the legality of selling or leasing three (3) to four (4) feet of the undeveloped portion of the Ocean Front Walk right-of-way (also known as Mission Beach boardwalk) to adjacent property owners and using the proceeds to widen the boardwalk eight (8) to nine (9) feet. You need this information prior to a 2:00 p.m. Park and Recreation Board meeting on Thursday, March 18, 1993.

As we have opined in the past, the undeveloped right-of-way cannot be sold to adjacent property owners because they own the underlying property in fee and the City holds only an easement for right-of-way purposes. As you may know, the original map of the subdivision of Mission Beach, numbered 1651, was filed on December 14, 1914 and later was revised, numbered 1809, and filed on November 13, 1924. Both the original and revised maps show Ocean Front Walk as a twelve-foot strip of property separate from and adjacent to the most westerly of the lots in the subdivision. All the streets and alleys shown upon the map, including Ocean Front Walk, were dedicated to public use.

Over the years, the owners of lots adjacent to the undeveloped portion of Ocean Front Walk have, apparently without the benefit of building permits, encroached onto this undeveloped portion with private improvements generally consisting of patio walls and fences and open patio type improvements. It is our understanding that some of the owners have obtained encroachment removal agreements per San Diego Municipal Code section 62.0301 et seq. According to those relevant portions of the Code, the owners must remove or relocate an encroachment within thirty (30) days after notice from the City. Encroaching property owners have no right to permanently remain in the public right-of-way with or without encroachment removal agreements. Further, the rights of the City with respect to the rights-of-way are in no way affected by the City's grant of permission to construct and

maintain any encroachments.

California Civil Code section 831 states that "an owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown." California Civil Code section 1112 further states that "a transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." California court cases spanning several years from at least 1875 to 1987 have repeatedly held that the owner of land bounded by a dedicated street or right-of-way is presumed to be the owner of the fee to the street's center. See, *Baker v. Ramirez*, 190 Cal. App. 3d 1123, 1133 (1987); *Abar v. Rogers*, 23 Cal. App. 3d 506, 512 (1972); *Neff v. Ernst*, 48 Cal. 2d 628, 635 (1957); *Moody v. Palmer*, 50 Cal. 31, 36 (1875). In the case where there is no owner on the opposite side of the street or right-of-way, the property owner is presumed to be owner in fee of the entire property. However, it must be understood that such an owner holds title subject to the public right-of-way easement and has no right to the possession or occupancy of any portion of the street or right-of-way.

As you can see, the City cannot charge property owners for land which they presently own. The City has the legal right to require removal or relocation of encroachments with a thirty (30) day notice or the City may cause such work to be done with the costs of such work to be a lien upon the owner's property, per San Diego Municipal Code section 62.0301(c).

Attached are four (4) of our prior opinions from 1982 to 1989 on this general subject. If you require further information, we will be glad to assist you.

JOHN W. WITT, City Attorney

By

Mary Kay Jackson

Deputy City Attorney

MKJ:mb:263.2(x043.2)

Attachments

cc Terri Williams, Deputy Park &
Recreation Director, Coastal Division
Harold O. Valderhaug,
Chief Deputy City Attorney

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