

MEMORANDUM OF LAW

DATE: February 9, 1994

TO: Allegra Pajot, Graffiti Control Program Manager

FROM: City Attorney

SUBJECT: Consent Forms/Graffiti Abatement

On December 2, 1993, our office received a memorandum from your office asking several questions regarding the due process (notice and opportunity to be heard) necessary for graffiti abatement. Subsequent to that memorandum, Janis Sammartino, then Senior Chief Deputy City Attorney, and I met with Councilman George Stevens and Charles Lewis, staff assistant, regarding some of the issues raised in your memorandum. This memorandum of law will address four areas: (1) graffiti abatement of public property, (2) graffiti abatement of sidewalks and curbs, (3) graffiti abatement of retaining walls and fences built by the City located in the public right-of-way, and (4) graffiti abatement of private property.

Background

California Government Code sections 38771 and 38773 provide the City with the power to declare a nuisance and to summarily abate a public nuisance. Under this authority, the City has found that "graffiti is obnoxious and constitutes a public nuisance, and must be abated to avoid the detrimental impact of such graffiti on the City and its residents and prevent the further spread of graffiti." (See San Diego Municipal Code ("SDMC") section 54.0401.)

The Graffiti Abatement Ordinance (SDMC sections 54.0401-54.0412) provides for an administrative abatement procedure that includes notice and the opportunity to appeal the nuisance determination. This office stated in Memorandum of Law ML-92-107 (attached hereto) that due process is required prior to entering private property to abate a nuisance. Currently, the Waste Management Department attempts to have a consent form signed before abating a nuisance on private property. A signed consent form meets the requirements of due process; however, obtaining a signed consent form is time consuming and difficult. Consequently, the department is looking for clarification regarding those circumstances when due process is necessary prior

to abating graffiti versus those times it is not.

Graffiti Abatement on Public Property

The City may abate graffiti on City property without providing itself due process. However, SDMC section 54.0409 addresses graffiti abatement on public property other than City property. This section requires the City to obtain consent from the public entity owning the property before abating the graffiti. Therefore, the City may abate graffiti on its property without a signed consent form but may not abate graffiti on public property owned by another public entity without providing due process or have obtained a signed consent form from the affected public entity.

Graffiti Abatement on Sidewalks and Curbs

The City does not need to obtain a signed consent form from abutting property owners before abating graffiti on a sidewalk, curb, or street. Case law has established that the definition of "street" includes sidewalk. (See *Short Line Associates v. City and County of San Francisco*, 78 Cal. App. 3d 50, 56 (1978); citing with approval *Health v. Manson*, 147 Cal. 694, 699 (1905); *Marini v. Graham*, 67 Cal. 130, 132 (1885); *Conjorsky v. Murray*, 135 Cal. App.2d 478 (1955).

Property owners have certain rights as it relates to sidewalks abutting their property. "An owner of property abutting upon a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property. That easement is one of ingress and egress to and from his property or, generally the right of access over the street to and from his property." *Goycoolea v. City of Los Angeles*, 207 Cal. App. 2d 729, 733 (1962). Thus, the property owner has easement rights of ingress and egress to and from his property.

The City, however, has plenary (absolute) control over the primary and secondary uses of its streets. (See Charter section 105.) The sidewalk and curb are a part of the street for which the City has plenary control. The City may abate a nuisance on its streets without providing due process to abutting property owners. The City, although, may be liable for damages if it substantially and unreasonably interferes with the property owners easement rights of ingress and egress to its property as the nuisance is being abated. *Id.* at 735-736.

Graffiti Abatement of Retaining Walls and Fences

Graffiti on retaining walls and fences constructed by the City and located in its public right-of-way may be abated without providing due process to abutting property owners. Again, there is no need for the City to provide itself due process prior to abating graffiti on its property.

Graffiti Abatement on Private Property

Ordinances which provide for the abatement of nuisances on private property must contain provisions which afford the owner due process. *Thain v. City of Palo Alto*, 207 Cal. App. 2d 173, 189-190 (1962) (abatement of weeds); *Leppo v. Petaluma*, 20 Cal. App. 3d 711, 717-718, (1971). The property owner should be allowed the opportunity to abate the nuisance on their own. If they fail to abate the nuisance and the "Responsible Person" has not appealed the "Abatement Notice" within the ten days provided by statute (see SDMC section 12.0604), then the City may abate the nuisance at the conclusion of the ten day statutory period.

The City may summarily abate (not required to provide notice to "Responsible Person") a nuisance when it determines that an "... imminent life safety hazard exists that requires immediate correction or elimination" (See SDMC section 12.0702.) Thus, if it's determined that "imminent life safety hazard" is present on private property, then it may be summarily abated. As it relates to graffiti, this may be an extremely difficult burden to meet.

Conclusion

Due process is not required when graffiti is being abated from public property owned by the City. In addition, due process is not required to abate graffiti from streets, sidewalks, and curbs. However, graffiti abatement on private property necessitates due process as required by case law and must be consistent with the procedures outlined in SDMC sections 54.0401-54.0412.

Don't hesitate to call if I can be of further assistance regarding this issue.

JOHN W. WITT, City Attorney

By

Elmer L. Heap, Jr.

Deputy City Attorney

ELH:mm:519(x043.2)

Attachment

cc Richard Hays, Waste Management Director

Robert Epler, Assistant Waste Management Director

Yvonne Williams, Litter Control Division

ML-94-13

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