JEAN E. JORDAN
ASSISTANT CITY ATTORNEY

CASSANDRA E. MOUGIN
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CITY OF SAN DIEGO

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MEMORANDUM OF LAW

DATE: May 30, 2023

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Supplemental Memorandum Regarding City-Funded Utility Undergrounding at Alvarado Estates

INTRODUCTION

On September 24, 2019, the City Attorney's Office issued a memorandum of law in response to a question from then-Council President Georgette Gómez regarding whether public funds could be used to underground utilities on the private streets of the Alvarado Estates Community (Community).[1] Based on facts known at that time, this Office opined that undergrounding at public expense would constitute a prohibited gift of public funds. *See* City Att'y MOL No. 2019-1 (Sept. 24, 2019).[2] On November 16, 2022, legal counsel for the Alvarado Estates Community Association (Association) presented additional information and asked the City to reconsider whether the Community is eligible for public financing of undergrounding utilities.[3] *See* letter from G. Scott Williams to City Attorney Mara W. Elliott dated November 16, 2022. Having done so, this Office issues this supplemental memorandum to clarify that our prior advice does not preclude City staff or the City Council (Council) from considering inclusion of the Community's private streets in an Undergrounding District.

ANALYSIS

In order to use public funds to underground utilities within the Community, the Council must determine that the use of such funds serves a public purpose. The process for Council to make such a determination begins with City staff making the required findings under Council Policy 600-08 to include the Community in a proposed Underground District. Undergrounding projects are also subject to the Capital Improvement Project prioritization outlined in Council Policy 800-14, the City's Utility Undergrounding Master Plan, the City's Undergrounding Memorandum of Understanding with San Diego Gas & Electric and the City's Underground

[1] City staff initially proposed including the Community in Undergrounding Utility Project Block 70.
[2] A copy of City Att'y MOL No. 2019-1 (Sept. 24, 2019) is attached as Attachment A.
[3] A copy of the letter from G. Scott Williams to City Attorney Mara W. Elliott dated November 16, 2022, is attached as Attachment B.

Utilities Procedural Ordinance. If staff makes the required findings, and the project is otherwise eligible, then City staff would bring an item to the Council at a public hearing to establish the Underground District. To include the Community in an Underground District, the Council must find, based on the evidence presented at the public meeting, that using public funds to underground utilities in the Community serves a public purpose. The legal defensibility of such a determination, if it is made in the future, will be dependent upon the evidence relied upon by the Council.

CONCLUSION

The Association has renewed its request that the City fund underground utilities on Community streets. Council may hear the matter if City staff makes the findings necessary under City policies and ordinances applicable to the creation of an undergrounding district. If that occurs, Council must determine, based on the evidence presented at the meeting, that using public funds to underground utilities in the Community serves a public purpose before it approves the inclusion of the Community in an undergrounding district.

MARA W. ELLIOTT, CITY ATTORNEY

By */s/ Cassandra E. Mougin*
Cassandra E. Mougin
Deputy City Attorney

CEM:cc:cm
ML-2023-2
Doc. No. 3318643
Attachments:
A. City Att'y MOL No. 2019-1 (Sept. 24, 2019)
B. Letter from G. Scott Williams to City Attorney Mara W. Elliott, dated November 16, 2022

cc: G. Scott Williams, Seltzer Caplan McMahon Vitek
Bethany Bezak, Transportation Department Director

ATTACHMENT A

SANNA R. SINGER
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MEMORANDUM OF LAW

DATE: September 24, 2019

TO: Honorable Council President Georgette Gómez

FROM: City Attorney

SUBJECT: Utility Undergrounding Project Block 70 and Alvarado Estates

INTRODUCTION

The City of San Diego (City) is relocating overhead utility wires to underground conduit throughout the City, and removing the associated utility poles[1] through its Underground Utility Program (Program). The Program is funded through a surcharge paid by San Diego Gas & Electric Company (SDG&E) customers to SDG&E, which SDG&E then pays to the City. The City then pays SDG&E to design and construct Underground Utility Districts .[2]

A proposed Underground Utility District in the College West area named Project Block 70 includes a private gated community known as Alvarado Estates. You have asked this Office whether public funds may be used to underground utilities at Alvarado Estates.

QUESTION PRESENTED

Can the City use public funds to underground utilities at Alvarado Estates?

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[1] "Undergrounding" refers to the removal of overhead utility lines and the installation of underground facilities to serve existing customers. CPUC Tariff Rule 20 B, C, and D provide alternate methods for undergrounding utilities where Rule 20A's criteria is not met. *See* https://www.sdge.com/sites/default/files/elec_elec-rules_erule20.pdf

[2] SDMC § 61.0506 provides that the City may call for a public hearing to ascertain whether the public health, safety or general welfare requires the removal and undergrounding of utilities in a certain area. If City Council determines that undergrounding is required, that area is declared a utility undergrounding district. The Mayor, or his designee, is then authorized to establish schedules for the undergrounding work. Alvarado Estates was part of the proposed Underground Utility District Project Block 70, but the public hearing process has not occurred because of the issues addressed in this memorandum.

SHORT ANSWER

No. The funds the City receives for the Program from SDG&E are public funds. Using public funds to underground utilities along private streets within a gated community would be a prohibited gift of public funds. The presence of general utility easements along private streets does not establish a public purpose that would justify the use of public funds for undergrounding.

BACKGROUND

1. SDG&E Franchise Agreements and the City's Underground Utility Program

In 1920, the City granted itself the right to sell a franchise[3] to erect and maintain poles or wires on public streets or highways for transmitting electricity for heat and power in the City. San Diego Ordinance O-7973 (Apr. 5, 1920). Later that year, the City granted to SDG&E "the franchise and authority to . . . erect and maintain poles, wires, conduit and pipes for wires for transmitting electricity for heat and power purposes along and upon all the public streets, alleys, highways and public places of The City of San Diego" for a period of time ending September 27, 1970. San Diego Ordinance O-8183 (Nov. 23, 1920). In exchange for the electric franchise rights, SDG&E was required to "pay, as rental for that portion or those portions of the streets, highways, roads or alleys exclusively occupied by [SDG&E] to . . . The City of San Diego, the aggregate sum of two per cent (2%) of the gross annual receipts." *Id.*

In 1967, the California Public Utilities Commission (PUC) adopted as tariff Rule 20A (Rule 20A) the requirement that California's investor-owned electric utilities convert part of their overhead lines to underground lines each year using around 2% of their gross receipts. Rule 20A funds can only be spent on projects that meet the PUC's "general public interest" criteria, which are generally overhead wires along major thoroughfares, or areas of particular scenic or recreational interest. *See* Rule 20A, § (1)(a). Because many areas within California do not fall within the criteria set forth by Rule 20A, the PUC may authorize electric utilities to charge their customers a surcharge to cover non-Rule 20A undergrounding.

In 1968, the City adopted Council Policy No. 600-08 (Policy 600-08) and the Underground Utilities Procedural Ordinance (UUP Ordinance) to establish the City's policy and program for undergrounding. Policy 600-08 and the UUP Ordinance recognize the City's right to require undergrounding. Notably, Policy 600-08 states that undergrounding is appropriate when it is "in the interest of public health, safety and welfare of the general public."

On December 17, 1970, the City again granted SDG&E a 50-year franchise effective January 17, 1971 (Electric Franchise), and in July 1972, the PUC approved SDG&E's franchise fee surcharge application and authorized SDG&E to collect a franchise fee surcharge as a line item on rate payer bills.

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[3] A utility franchise is a contract between a city and a utility company that outlines certain requirements for the utility to use the city's public rights-of-way.

In late 2001, SDG&E and the City amended the Electric Franchise Agreement and entered into a Memorandum of Understanding (MOU) restructuring the SDG&E undergrounding obligation and increasing the surcharge to fund the Program. The PUC approved the surcharge increase in December 2002.

SDG&E collects the surcharge from City customers on a monthly basis whether or not they have overhead lines in their neighborhoods.[4] Quarterly, SDG&E pays an amount equivalent to the franchise fee and the undergrounding surcharge to the City. The City deposits the franchise fee surcharge monies in the City General Fund, and the undergrounding surcharge monies in the Undergrounding Fund. The City expends funds from the Undergrounding Fund solely to pay for the undergrounding of utilities. As SDG&E completes Underground Utility Districts, it invoices the City and the City uses the Undergrounding Fund to pay those invoices.

When the City amended the Electric Franchise Agreement and entered into the MOU, it substantially revised the UUP and Policy 600-08 to use the Undergrounding Fund to pay for Underground Utility Districts in residential areas along public streets that are not eligible for Rule 20A funds and to eliminate the obligation of property owners along public streets to contract and pay for lateral conversions. The City also uses the Undergrounding Fund to pay for right-of-way restoration following Rule 20A Projects.

2. Alvarado Estates

In 1997, the San Diego City Council (Council) approved vacating the public streets within Alvarado Estates at the request of its residents and Alvarado Estates became a private gated community. San Diego Resolution R-288715 (May 27, 1997) (attached). The streets were vacated "to allow for the installation of gates at the intersection of Yerba Santa Drive and Mesquite Road in order to secure the area and prevent non-local traffic from entering the Alvarado Estates Community." City of San Diego, Minutes for Regular Council Meeting, May 27, 1997. The resolution expressly reserves general utility easements from the vacation, and access for City and emergency vehicles. According to the resolution, Alvarado Estates is responsible for maintaining the streets, sidewalks, streetlights, storm drains, and providing for trash collection.

ANALYSIS

I. THE CITY IS PROHIBITED FROM MAKING ANY GIFT OF PUBLIC FUNDS.

The City has been asked whether public funds may be used to underground utilities at Alvarado Estates. Proponents of using public funds for this purpose assert that the City still maintains general utility easements along these private streets. The San Diego City Charter (Charter) prohibits the gift of public funds. Charter section 93 states, in relevant part, that "[t]he credit of the City shall not be given or loaned to or in aid of any individual, association or corporation; except that suitable provision may be made for the aid and support of the poor." This Office has previously opined that this provision is similar to article XVI, section 6 of the

[4] The PUC specifically found that the surcharge should be billed and collected from all customer classes. Public Utilities Commission of the State of California Resolution E-3788 (December 19, 2002).

Constitution, and the cases interpreting that constitutional provision are relevant in interpreting the Charter provision. *See* 1979 Op. City Att'y 8 (79-2; Mar. 2, 1979); 1979 City Att'y MOL 168 (Sept. 4, 1979); 1952 Op. City Att'y 23 (Feb. 27,1952).

An expenditure of public funds that benefits a private party constitutes an impermissible gift if the public agency does not receive adequate consideration in exchange or if the expenditure does not serve a public purpose. 2011 City Att'y Report 17 (11-17; Apr. 7, 2011), referencing *People v. City of Long Beach*, 51 Cal. 2d 875, 881-83 (1959); *Emps. Assn. v. Sunnyvale Elementary Sch. Dist.,* 36 Cal. App. 3d 46, 59 (1973); *Allen v. Hussey*, 101 Cal. App. 2d 457, 473-74 (1950):

> [T]he true test is that which requires that the work should be essentially public and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need, or contribute to the convenience, of the people of the city at large.

Bank v. Bell, 62 Cal. App. 310, 330 (1923); *see also Perez v. City of San Jose*, 107 Cal. App. 2d 562, 566 (1951). [5]

II. THE MONEY THE CITY RECEIVES FOR UNDERGROUNDING IS PUBLIC FUNDS.

A city may derive revenue by granting utility franchises. 15 McQuillin Mun. Corp. § 39:3 (3d ed.). A utility franchise is a privilege to use public streets or rights-of-way in connection with the utility's provision of services to residents within the government entity's jurisdiction. *Jacks v. City of Santa Barbara*, 3 Cal. 5th 248, 254 (2017). Charter section 105 requires that the City be paid compensation in return for granting a franchise.

A franchise fee is the purchase price of the franchise paid by the franchisee to the municipality. *City & Co. of S.F. v. Market St. Ry. Co.,* 9 Cal. 2d 743, 749 (1937). Surcharge funds are part of the compensation paid for the right to use a city's rights-of-way. *Jacks v. City of Santa Barbara*, 3 Cal. 5th at 267. The PUC has found that that once the City receives a franchise fee, that money is no longer ratepayer money and the City is free to use it as it sees fit except where the City's actions may overlap the PUC's jurisdiction over SDG&E's corporate actions. Public Utilities Commission of the State of California Resolution E-3788 (December 19, 2002). The funds deposited in the Undergrounding Fund are part of the consideration that SDG&E provides to the City under the franchise agreement, which makes them public funds.

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[5] City Council Policy 600-08 is consistent: "[i]t shall be the policy of the Council to: [e]xercise the City's police powers to order, and enforce as necessary, utility companies to convert overhead utilities to underground when it is in the interest of the *public* health, safety and welfare of the *general public*" and projects "[s]hall consist of project 'blocks' composed of *public* residential streets and *public* alley ways to be undergrounded." Council Policy 600-08 (emphasis added). The UUP Ordinance defines overhead lines as those "located above ground upon, along, across, or over the streets, alleys and ways of the City." San Diego Municipal Code § 61.0504(e).

Here, the consideration paid by SDG&E to the City for use of the City's franchise are public funds. Using public funds to enrich Alvarado Estates, a private gated community, would be a violation of Charter section 93.

III. UNDERGROUNDING AT ALVARADO ESTATES WOULD BE A PROHIBITED GIFT OF PUBLIC FUNDS BECAUSE IT DOES NOT BENEFIT THE GENERAL PUBLIC.

There are aesthetic benefits to property owners when overhead lines are removed and placed underground. A city has the authority to regulate aesthetics in its right-of-way. *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates, 583 F.3d 716 (2009).* The California Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7). "Often referred to as the 'police power,' this constitutional authority of counties or cities to adopt local ordinances is "the power of sovereignty or power to govern—the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare. [Citation.] The local police power generally includes the power to adopt ordinances for aesthetic reasons." *T-Mobile West LLC v. City and County of San Francisco, 3 Cal. App. 5th 334, 346–47 (2016), as modified on denial of reh'g (Oct. 13, 2016), aff'd 6 Cal. 5th 1107 (April 4, 2019).*

Undergrounding utilities likely increases property values and makes the lines less susceptible to environmental stressors. Although a city has the authority to regulate aesthetics in the public right-of-way, to make improvements to a private property requires a public purpose to support an expenditure of public funds.

Undergrounding the utilities along the Alvarado Estates' private rights-of-way would improve the aesthetics and the integrity of the private streets and rights-of-way, and probably increase the property values. But these are benefits that inure only to the property owners in this private community. Because Alvarado Estates is a private community that is necessarily made up of private sidewalks and streets, the improved aesthetics and integrity of the utilities are not enjoyed by the public at-large because the public at-large is prohibited from using these private rights-of-way. Using the public undergrounding funds to underground utilities at Alvarado Estates would serve that private community of homes, but would not provide for the general good of all the inhabitants of the City. We recognize that SDG&E customers in Alvarado Estates are indirectly contributing to the City's Program through their electric bills, but there is no exception in state or local law that would allow the City to spend public funds under these circumstances. For these reasons, we conclude that using surcharge funds to underground the utilities at Alvarado Estates would be an improper gift of public funds. [6]

[6] The residents of Alvarado Estates may make use of Section G of Council Policy 600-08 which provides for the "underground conversion in situations other than those meeting one of the criteria for conversion of company expense" through the use of assessment district proceedings.

IV. THE PRESENCE OF A GENERAL UTILITY EASEMENT DOES NOT ESTABLISH A PUBLIC PURPOSE.

Generally, every citizen has the right to use the public right-of-way. The vacation of a street, highway, or public service easement extinguishes all public easements therein, except that public utility easements may be expressly reserved. Cal. Sts. & High. Code §§ 8350, 8340. California Streets and Highways Code section 8340(c) specifically requires that public utility easements be reserved from a street vacation where there are public utility facilities in use. The May 27, 1997 vacation extinguished all public easements in Alvarado Estates, except that it reserved a general public utility easement.

Alvarado Estates was made private with the exception that public utilities may enter to construct, maintain or operate their facilities, etc. and the City may enter "for City construction or maintenance vehicles and emergency vehicles of all kinds." San Diego Resolution R-288715 (May 27, 1997).

The intent of the vacation was to prevent the public from entering the community. This intent is further supported by the fact that the Alvarado Community Association agreed to maintain all the vacated rights-of-way, including pavement, curbs, gutters, sidewalks, street lights, etc. San Diego Resolution R-288715 (May 27, 1997).

An easement creates a nonpossessory right to enter and use land in another's possession and obligates the possessor not to interfere with the uses authorized by the easement. 12 Witkin, Summary of California Law, Real Property § 396 (11th ed. 2018). Where an easement is for public access over private property, then public funds may be used to improve the easement, and the improvements are not a gift of public funds. *See* 80 Op. Cal. Att'y Gen. 56, (1997). The California Attorney General opined that public funds may be used to repair and maintain an unpaved road located on private property if the general public has a "prescriptive use easement" to travel on the road. *Id.* In that matter, the public had traveled on the road for 100 years, thus constituting a prescriptive easement to travel on the road.

Here, the streets and sidewalks of Alvarado Estates are private. The community is gated to prevent entry by the public. The May 27, 1997 vacation did not reserve a right for public access. These facts do not support a finding that the public has a prescriptive easement or any other right to travel along the streets and sidewalks of Alvarado Estates.[7]

The utility easement allows public utilities and the City to enter Alvarado Estates only for the reasons stated. The easement obligates Alvarado Estates property owners to not interfere with those specific uses. However, the easement does not obligate the City or any public utility to underground utilities. The easement does not serve as a vehicle to include Alvarado Estates in Undergrounding Project 70.

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[7] The letter authored by attorney Marshall A. Lewis dated February 8, 2019 implies that the Alvarado Estates Community may have trails or paths other than the private streets and sidewalks discussed herein. If there are public access easements within the community, the City may be able to improve those easements, however the City cannot improve private streets that are not open to the public.

CONCLUSION

Alvarado Estates is a private, gated community. Using City funds to underground utilities in Alvarado Estates would be an improper gift of public funds, as this would not be for the general good of all the inhabitants of the City because the streets and sidewalks of this community are closed to the general public. A general utility easement reserved when the public streets were vacated does not justify the use of public funds for undergrounding.

MARA W. ELLIOTT, CITY ATTORNEY

By _____
Cassandra E. Mougin
Deputy City Attorney

CEM:cem:cw
ML-2019-1
Doc. No. 2177999
Attachment: San Diego Resolution R-288715 (May 27, 1997)

Attachment

(R-97-1028)(REV. 1)

RESOLUTION NUMBER R- 288715

ADOPTED ON MAY 27 1997

VACATION OF YERBA SANTA DRIVE (NORTH OF MESQUITE ROAD), MESQUITE ROAD (WEST OF YERBA SANTA DRIVE), NORRIS ROAD, ARMIN WAY, TOYON DRIVE, TOYOFF WAY, EE BARRON ROAD, AVION WAY, FREMONTIA LANE, PALO VERDE TERRACE, AND AN UNIMPROVED STREET RESERVATION.

WHEREAS, a petition to vacate Yerba Santa Drive (north of Mesquite Road) in Maps 2789 and 2823, Mesquite Road (west of Yerba Santa Drive) in Map 2789, Norris Road in Maps 5185 and 3509, Armin Way in Map 3509, Toyon Drive and Toyoff Way in Map 2823, Le Barron Road and Avion Way in Map 5185, Fremontia Lane and Palo Verde Terrace in Map 2823, and an unimproved street reservation in Map 2879 has been submitted pursuant to California Streets and Highways Code Section 8321; and

WHEREAS, there is no present or prospective use for the streets, either for the public street system for which the rights-of-way were originally acquired or for any other public use of a like nature that can be anticipated in that the right-of-way is not needed for public street, bikeway, or open space purposes; and

WHEREAS, the public will benefit from the vacation through reduced maintenance and liability; and

WHEREAS, the vacation is not inconsistent with the General Plan or an approved Community Plan; and

WHEREAS, the public street system for which the right-of-way was originally acquired will not be detrimentally affected by this vacation; and

WHEREAS, in connection with said vacation, the City desires to reserve certain public service and emergency access easements; and

WHEREAS, the owners of the properties which abut the streets have, in addition to the rights of the public, certain private rights which belong to them as owners of the abutting property, including rights-of-way for ingress and egress to the general system of public streets; and

WHEREAS, pursuant to the California Streets Highways and Code Sections 8352 and 8353 the vacation will not affect nor extinguish the abutting property owners' private easements of ingress or egress; and

WHEREAS, the recording of a certified copy of this resolution shall serve as the verified notice referred to in the California Streets Highways and Code Sections 8352 and 8353 for private easements, other than private easement of ingress and egress, claimed by reason of the purchase of a lot; and

WHEREAS, the abutting property owners intend to grant to the Alvarado Estates Homeowner's Association (the "Association") the right to maintain their private easements of ingress and egress, the right to maintain all existing drainage facilities within and adjacent to the private easements of ingress and egress, the obligation of trash collection and the obligation of holding the City harmless for such maintenance and obligations; NOW, THEREFORE,

BE IT RESOLVED, by the Council of The City of San Diego, as follows:

1. That Yerba Santa Drive (north of Mesquite Road) in Maps 2789 and 2823, Mesquite Road (west of Yerba Santa Drive) in Map 2789, Norris Road in Maps 5185 and 3509, Armin Way in Map 3509, Toyon Drive and Toyoff Way in Map 2823, Le Barron Road and Avion Way

in Map 5185, Fremontia Lane and Palo Verde Terrace in Map 2823, and an unimproved street reservation in Map 2879, as more particularly shown on the attached drawing marked Exhibit "A", on file in the office of the City Clerk as Document No. RR- 288715-1, which drawing is made a part hereof, be, and the same is hereby ordered, vacated.

2. That The City of San Diego hereby reserves and excepts from this vacation:

a. An easement for constructing, maintaining, and operating public utilities and all necessary appurtenances thereto, together with the right to protect from all hazards the use of any right hereby reserved including the right to maintain said easement free and clear of any excavation or fills, the erection of any building or other structures, the planting of trees thereon, or the drilling or digging of any wells thereon.

b. An access easement with the right of ingress and egress for City construction or maintenance vehicles and emergency vehicles of all kinds.

c. General utility easements, for any public utility, pursuant to any existing franchise or renewals thereof, at any time, or from time to time, to construct, maintain, operate, replace, remove, renew, and enlarge overhead or underground lines of pipe, conduits, cables, wires, poles, and other structures, equipment, for the transmission of communication signals, and the distribution of electrical energy and natural gas, and incidental purposes, including access to the easement area for installation, inspection, or maintenance of facilities together with the right to maintain the easement area free from all hazards conflicting with the safe enjoyment of the easement rights.

3. That the easements reserved herein are in, under, over, upon, along and across those portions of Yerba Santa Drive (north of Mesquite Road), Mesquite Road (west of Yerba Santa

Drive), Norris Road, Armin Way, Toyon Drive, Toyoff Way, Le Barron Road, Avion Way, Fremontia Lane, Palo Verde Terrace, as more particularly shown and delineated on the attached drawing marked Exhibit "A", on file in the Office of the City Clerk as Document No. RR-288715-1

4. That pursuant to the provisions of the Municipal Code, the City Engineer may issue an Encroachment Permit for the construction of designated and necessary private improvements within the reserved easement which do not conflict with the City's or other easement holder's enjoyment of their rights.

5. That the commmity known as Alvarado Estates and further identified and shown on said Exhibit "A" is approved by this Council as a limited access, gated community subject to the specific provisions of this document, the Municipal Code, and existing Council Policy.

6. That the resolution shall not become effective unless and until the following conditions have been met:

a. The applicant has assured by permit and bond, the design and installation of the entry gate configurationwith supporting improvements to include curbs, gutters, pedestrian ramps, sidewalks, paving, dedication of public right-of-way as necessary and street signs for the private streets satisfactory to the City Engineer and the Fire Chief (except as approved by the City Council in paragraph 7 below) .

b. The Association shall provide keyed access through the gate to the interior streets satisfactory to the City Engineer and components acceptable to the Fire Department and Police Departments for emergency access and to franchise utilities for the maintenance of their facilities.

c. The existing street names shall be retained. Any change shall require City Council approval under Council Policy 600-12. In addition, a specific sign(s) shall be installed at the main gate entry identifying the streets within the gated area as private and providing that the liability and responsibility for the streets are that of the Association. The sign(s) shall be permanently posted and clearly visible to the public at large in a location satisfactory to the City Engineer.

d. The Association has entered into an agreement with the City to maintain all of the vacated improved rights-of-way, and associated infrastructure including pavement, curb, gutter and sidewalk, maintain all existing drainage facilities within and adjacent to the areas proposed for vacation, maintain street lights, and to pay costs for electrical power for the street lights, to provide for private trash collection, and shall hold the City harmless from any litigation directly or indirectly related to the street vacations. The agreement shall be in a form approved by the City Attorney.

7. The City Council hereby finds that there is adequate stacking and turnaround areas provided on Alvarado Estates Street Vacation and Controlled Access Gates Design dated April 24, 1977 (a copy of which is attached as Exhibit "A" hereto) provided that:

a. The Association shall agree to provide an attendant located at the controlled access gate's kiosk during normal business hours or shall have telephone numbers listed at the kiosk for a driver to call if access through the gate is needed (such as a large vehicle turnaround).

b. The Association shall provide in its controller access gate regulations that "any Alvarado Estates resident intending to hold an event attended by more than fifty (50) people is required to have an attendant maintain the controlled access gate opened from thirty (30) minutes

R. 288715

before the start of the event until one (1) hour after the start of the event."

8. That if the above conditions are not completed within three years following the adoption of this resolution, then this resolution shall become void and be of no further force or effect.

9. That the City Engineer shall advise the City Clerk of the completion of the aforementioned conditions, and that the City Clerk shall then cause a certified copy of this resolution, attested by him under seal, with drawing, to be recorded in the Office of the County Recorder. The certified copy shall serve and constitute as verified notice referred to in the California Streets and Highway Code Section 8353.

APPROVED: CASEY GWINN, City Attorney

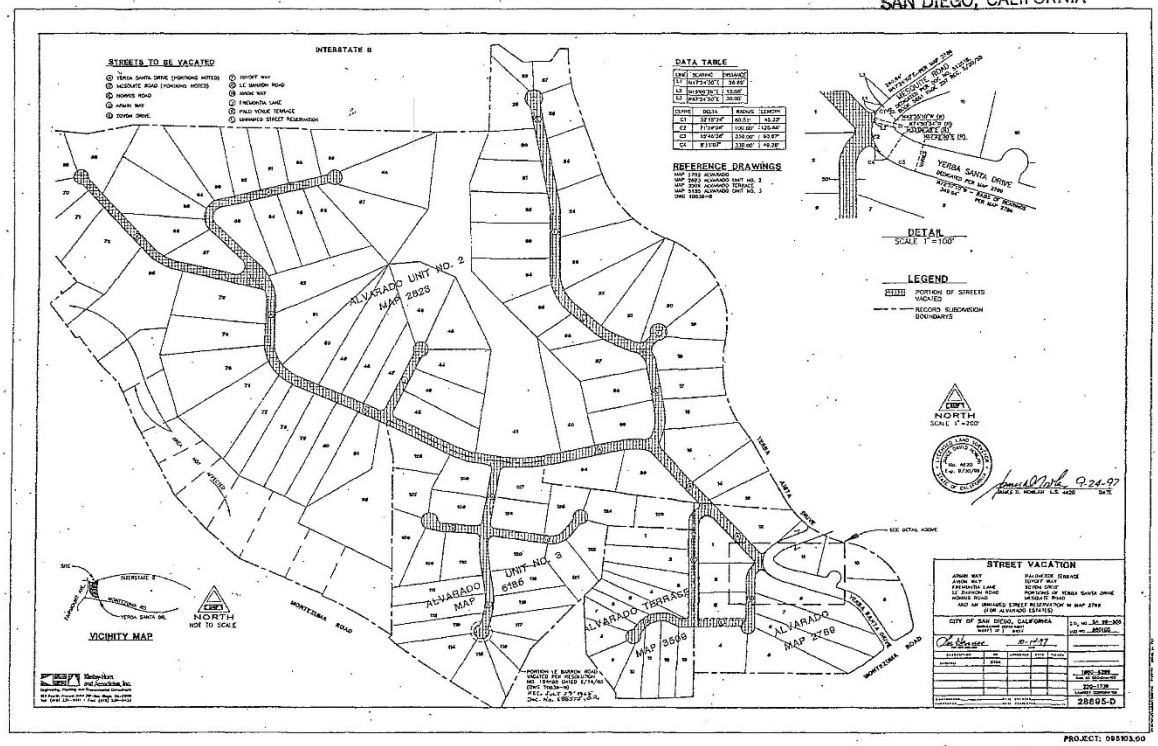
By Prescilla Dugard
Prescilla Dugard
Deputy City Attorney

PD:cdk
Or.Dept:Dev.Svcs
05/22/97
06/13/97 REV. 1
W.O. 960105
R-97-1028
Form=stve.res

R-288715

EXHIBIT "A"

DOCUMENT NO. RR-288715-1
FILED MAY 27 1997
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA



PROJECT: 095103.00

ATTACHMENT B

SELTZER
CAPLAN
MCMAHON
VITEK

G. Scott Williams
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P (619) 685-3151
F (619) 702-6842

November 16, 2022

Mara W. Elliott, City Attorney
Office of the City Attorney
1200 Third Avenue, Suite 1100
San Diego, CA 92101

Via email and first-class mail

Re: Alvarado Estates
Our File No. 22017.81727

Dear Ms. Elliott:

I am contacting you in the hope of heading off a conflict that I believe is caused by a major misunderstanding. I believe some City staff and attorneys in your office have dug their heels in mistakenly and I am hoping that you can bring fresh eyes to the dispute and reverse the City's direction.

I have been engaged by Alvarado Community Association to file a lawsuit against the City based on a position your office has taken against undergrounding utilities in their neighborhood, commonly known as Alvarado Estates, which is located north of Montezuma Road just west of San Diego State University. I think I have a winning case, but I think it would be in everyone's best interest if the dispute could be resolved cooperatively.

By way of background, when SDSU approved the construction of its sports arena in the mid- to late-1990's, the communities around SDSU were extremely concerned about the impact the arena would have on traffic and parking. For example, SDSU had hosted "Lollapalooza" in 1994 and that large music festival had turned the entire area into a parking lot, with traffic at a standstill. When the Environmental Impact Report for the new sports arena did not adequately address traffic and parking in neighboring communities, Alvarado Estates took the lead to stop the arena project until it included an effective traffic solution. This leadership resulted in a settlement that formed a plan for traffic control, created a fund to enhance the surrounding communities in general and put a gate at the entrance to Alvarado Estates to limit motor vehicle access to its streets. It was an expensive settlement for Alvarado Estates, since the gate required that Alvarado Estates fund gate attendants and permanently assume the cost of street maintenance. The City insisted that the gate only stop vehicles, and not pedestrians or bicycles, so the streets remained open to the public, which also continues to have access to the 13-acre park that Alvarado Estates owns and maintains. The City formally approved the vacation of the public streets in Alvarado Estates and the installation of the gate to the community in 1997.

Meanwhile, and as I am sure you know given recent litigation over the City's undergrounding program, the City and the CPUC have long authorized SDG&E to impose a surcharge on customers to pay for undergrounding utilities. The surcharge includes both so-called Rule 20A projects on major streets, scenic or recreational areas, and/or higher-voltage lines, and non-Rule 20A projects on residential streets that do not qualify for Rule 20A funding. The City Council selects the neighborhoods or streets that will be undergrounded each year.

In 2018, the City identified non-Rule 20A areas for the next round of undergrounding. Alvarado Estates was included on this list, which was prepared by City staff and ready for Council approval. At the 11th hour, the City Attorney's office objected to the proposed undergrounding activity in Alvarado Estates on the purported basis that its streets are not public. As a result, Alvarado Estates was removed from the City's list of the next communities scheduled for undergrounding. After much objection from community residents, the City Attorney issued a Memorandum of Law to Council President Gomez on September 24, 2019. A copy is attached as Exhibit 1. In that memorandum, your office asserted that it would be illegal to use public funds to underground electrical lines in a private community because that would amount to a gift of public funds in violation of Section 93 of the City Charter. The memorandum reasoned that undergrounding in Alvarado Estates would benefit only the members of the private community rather than the general public.

While I believe there are multiple errors in the memorandum, the most glaring is the conclusion that undergrounding in Alvarado Estates under the non-Rule 20A program would violate Charter section 93 because it would only benefit members of that community. This conclusion arises from legal and factual errors.

The memorandum mischaracterizes the legal test for whether specific expenditures of public funds are a prohibited gift. Specifically, if a gift of public funds is for a "public purpose" it is legal even if the funds may benefit private entities. (See *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 583 [funds may be disbursed to private entities "if a direct and substantial public purpose is served and nonstate entities are benefited only as an incident to the public purpose"]; *County of Alameda v. Janssen* (1940) 16 Cal.2d 276, 281 ["in determining whether an appropriation of public funds or property is to be considered a gift, the primary question is whether the funds are to be used for a 'public' or a 'private' purpose . . . . The benefit to the state from an expenditure for a 'public purpose' is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom"]. "The concept of public purpose has been liberally construed by the courts . . . . The fact that individuals may be incidentally benefited is irrelevant." (*Mannheim v. Superior Court* (1970) 3 Cal.3d 678, 691.)

Courts have determined that increasing housing stock, urban redevelopment, promoting county

fairs, promoting scientific research, environmental mitigation, voter registration, and the preservation of public parkland can all be legitimate public purposes. The memorandum from your office looked only at the private benefit from undergrounding to residents of Alvaradoo Estates. It did not assess whether there was also an important public purpose to the undergrounding. But plainly a significant public purpose would be served by undergrounding utilities in Alvarado Estates.

There are several ways in which undergrounding utilities in Alvarado Estates would serve a public purpose. First, the streets of Alvarado Estates are open to the public for pedestrian and bicycle travel and, in fact, are frequently used for those purposes. So it is not accurate to say the streets of Alvarado Estates are private, at least as that term is typically understood. Undergrounding utilities would provide aesthetic benefits beyond the residents of Alvarado Estates.

Second, when the City vacated the streets of Alvarado Estates, it retained an easement over the streets for "constructing, maintaining, and operating public utilities," including the right to "construct, maintain, operate, replace, remove, renew, and enlarge overhead or underground lines." As a result, the City owns a property interest in the streets of Alvarado Estates. The City can protect its property interest by undergrounding utilities in its easement area and those actions benefit the City, not just the residents of Alvarado Estates.

Third, **and most importantly**, the benefits of undergrounding go way beyond aesthetics and those additional benefits plainly promote a public purpose. Undergrounding is an important tool to promote stability in electrical transmission, fire safety and reduced maintenance costs. For example, SDG&E states on its website that undergrounding "increases grid resiliency, as undergrounded power lines can remain energized during Public Safety Power Shutoffs, which are enacted as a measure of last resort to prevent wildfires during extreme fire weather conditions." Additionally, SDG&E states that "[b]urying power lines removes the risk of these lines sparking fires during adverse weather events." Furthermore, the City also acknowledges public benefits beyond aesthetics: "Residents of the City and SDG&E benefit from the [Undergrounding Utility Program]. For example, Undergounding of overhead utility lines improves safety for SDG&E crews and customers. Similarly, Undergrounding improves reliability of service and quality of life." (Declaration of Hasan Youseff, ¶ 15 (June 17, 2018) (*Mahon* litigation)). And the City is clear that those benefits extend outside the immediate area being undergrounded: "I still see benefits [from undergrounding] to other customers beyond the immediate undergrounding area." (Deposition of Kathryn L. Valdivia, June 28, 2016 [131:16-18] (*Mahon* litigation)).

The electrical lines running through Alvarado Estates include a high-voltage transmission line to downstream customers outside of the community. Undergrounding utility lines in Alvarado

Estates would help ensure a reliable supply to the public by reducing the chances of service interruption beyond Alvarado Estates because of a falling tree, a car accident involving a utility pole, or a fire in Alvarado Estates. Moreover, a malfunction in an overhead electrical line in Alvarado Estates could trigger a fire that would threaten the canyons and densely populated communities surrounding Alvarado Estates. Given the multiple wildfires in California in recent years caused by failures in power lines, this concern is not hypothetical. And undergrounding in Alvarado Estates would reduce maintenance costs in the community, which reduces costs for the benefit of all rate payers.

Finally, the memorandum appeared to assume that the primary benefit of undergrounding utilities is to the homeowners who no longer have poles and wires in front of their homes. That assumption is wrong, as explained above, but even if it were true that benefit is the same whether undergrounding is conducted on "public" or "private" streets. Why single out a community like Alvarado Estates for discriminatory treatment when there is no basis for such a distinction?

In short, undergrounding in Alvarado Estates would plainly serve an important public purpose, and that public purpose would extend beyond the community. But the memorandum from your office did not acknowledge these benefits or the legal standard for "private gifts" that requires an assessment of such benefits.

I am familiar with some of your public statements in support of undergrounding utilities, where you recognize the benefits of undergrounding beyond aesthetics. For example, in early 2021, you drafted an op-ed piece that was published in the Mission Times Courier (February 12, 2021) and the College Times Courier (March 11, 2021), where you acknowledged that "[o]verhead power lines also create a significant public safety hazard, especially in wildfire-prone areas of the city, where a power line detached by high winds can quickly lead to an out-of-control fire, resulting in terrible losses of lives and property." Again, Alvarado Estates is adjacent to canyons vulnerable to wildfires and is precisely the sort of community which you have described is important to have its utilities undergrounded to prevent fires from spreading, in the case of Alvarado Estates to Mission Valley, the College area, and elsewhere. You have recognized the very real public benefits from undergrounding, which are so much more than simply aesthetic concerns that benefit the individual homeowners where the undergrounding takes place. Unfortunately, the memorandum issued by your office failed to account for the myriad reasons, discussed above, that comprise the public purpose to undergrounding. I hope you can revisit this issue with an open mind to withdrawing the position in that memorandum and clearing the way for undergrounding in Alvarado Estates.

My clients are pushing for a lawsuit to be filed now. The draft complaint will be ready shortly, but I am hopeful more thoughtful reasoning can prevail. The question of undergrounding Alvarado Estates is a unique situation and a decision by the City to undertake undergrounding

would not create a precedent that would upset the program. On the contrary, if we proceed with litigation, one of the causes of action that I will include would challenge the application of the surcharge to Alvarado Estates if the community will not benefit from the very undergrounding that the surcharge is intended to fund, thereby becoming a tax not authorized by the voters. A ruling in our favor on that issue would trigger a refund of all surcharge payments previously made by the community and potentially all other "private" communities and preclude the collection of the surcharge from all such communities in the future. These fiscal and programmatic consequences far outweigh any potential burden caused by a decision to underground utilities in Alvarado Estates.

I would be pleased to discuss this matter at your convenience, but such a discussion must occur soon if it is to avoid a lawsuit, a burden your office does not need. Thanks for your attention to this matter.

Sincerely,

G. Scott Williams
Seltzer Caplan McMahon Vitek
A Law Corporation

cc: Mayor Todd Gloria (via first class mail)
Council President Sean Elo-Rivera (via first class mail)
Jose Reynoso, President, Alvarado Community Association (via email)
Marshall Lewis (via email)

EXHIBIT 1

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MEMORANDUM OF LAW

DATE: September 24, 2019

TO: Honorable Council President Georgette Gómez

FROM: City Attorney

SUBJECT: Utility Undergrounding Project Block 70 and Alvarado Estates

INTRODUCTIO N

The City of San Diego (City) is relocating overhead utility wires to underground conduit throughout the City, and removing the associated utility poles [1] through its Underground Utility Program (Program). The Program is funded through a surcharge paid by San Diego Gas & Electric Company (SDG&E) customers to SDG&E, which SDG&E then pays to the City. The City then pays SDG&E to design and construct Underground Utility Districts .2

A proposed Underground Utility District in the College West area named Project Block 70 includes a private gated community known as Alvarado Estates. You have asked this Office whether public funds may be used to underground utilities at Alvarado Estates.

QUESTION PRESENTED

Can the City use public funds to underground utilities at Alvarado Estates?

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[1] "Undergrounding" refers to the removal of overhead utility lines and the installation of underground facilities to serve existing customers. CPUC Tariff Rule 20 B, C, and D provide altemate methods for undergrounding utilities where Rule 20A's criteria is not met. See https://www.sdge.com/sites/default/files/elec elec-rules_erule20.pdf

2 SDMC 61.0506 provides that the City may call for a public hearing to ascertain whether the public health, safety or general welfare requires the removal and undergrounding of utilities in a certain area. If City Council determines that undergrounding is required, that area is declared a utility undergrounding district. The Mayor, or his designee, is then authorized to establish schedules for the undergrounding work. Alvarado Estates was part of the proposed

Underground Utility District Project Block 70, but the public hearing process has not occurred because of the issues addressed in this memorandum.

SHORT ANSWER

No, The funds the City receives for the Program from SDG&E are public funds. Using public funds to underground utilities along private streets within a gated community would be a prohibited gift of public funds. The presence of general utility easements along private streets does not establish a public purpose that would justify the use of public funds for undergrounding.

BACKGROUND

1. SDG&E Franchise Agreements and the City's Underground Utility Program

In 1920, the City granted itself the right to sell a franchise[1] to erect and maintain poles or wires on public streets or highways for transmitting electricity for heat and power in the City. San Diego Ordinance 0-7973 (Apr. 5, 1920). Later that year, the City granted to SDG&E "the franchise and authority to . . . erect and maintain poles, wires, conduit and pipes for wires for transmitting electricity for heat and power purposes along and upon all the public streets, alleys, highways and public places of The City of San Diego" for a period of time ending September 27, 1970. San Diego Ordinance 0-8183 (Nov. 23, 1920). In exchange for the electric franchise rights, SDG&E was required to "pay, as rental for that portion or those portions of the streets, highways, roads or alleys exclusively occupied by [SDG&E] to . . . The City of San Diego, the aggregate sum of two per cent (2%) of the gross annual receipts." Id.

In 1967, the California Public Utilities Commission (PUC) adopted as tariff Rule 20A (Rule 20A) the requirement that California's investor-owned electric utilities convert part of their overhead lines to underground lines each year using around 2% of their gross receipts. Rule 20A funds can only be spent on projects that meet the PUC's "general public interest" criteria, which are generally overhead wires along major thoroughfares, or areas of particular scenic or recreational interest. See Rule 20A, (l)(a). Because many areas within California do not fall within the criteria set forth by Rule 20A, the PUC may authorize electric utilities to charge their customers a surcharge to cover non-Rule 20A undergrounding.

In 1968, the City adopted Council Policy No. 600-08 (Policy 600-08) and the Underground Utilities Procedural Ordinance (UUP Ordinance) to establish the City's policy and program for undergrounding. Policy 600-08 and the UUP Ordinance recognize the City's right to require undergrounding. Notably, Policy 600-08 states that undergrounding is appropriate when it is "in the interest of public health, safety and welfare of the general public."

On December 17, 1970, the City again granted SDG&E a 50-year franchise effective January 17, 1971 (Electric Franchise), and in July 1972, the PUC approved SDG&E's franchise

[1] A utility franchise is a contract between a city and a utility company that outlines certain requirements for the utility to use the city's public rights-of-way.

fee surcharge application and authorized SDG&E to collect a franchise fee surcharge as a line item on rate payer bills.

In late 2001, SDG&E and the City amended the Electric Franchise Agreement and entered into a Memorandum of Understanding (MOU) restructuring the SDG&E undergrounding obligation and increasing the surcharge to fund the Program. The PUC approved the surcharge increase in December 2002.

SDG&E collects the surcharge from City customers on a monthly basis whether or not they have overhead lines in their neighborhoods.[2] Quarterly, SDG&E pays an amount equivalent to the franchise fee and the undergrounding surcharge to the City. The City deposits the franchise fee surcharge monies in the City General Fund, and the undergrounding surcharge monies in the Undergrounding Fund. The City expends frnds from the Undergrounding Fund solely to pay for the undergrounding of utilities. As SDG&E completes Underground Utility Districts, it invoices the City and the City uses the Undergrounding Fund to pay those invoices.

When the City amended the Electric Franchise Agreement and entered into the MOU, it substantially revised the UUP and Policy 600-08 to use the Undergrounding Fund to pay for Underground Utility Districts in residential areas along public streets that are not eligible for Rule 20A funds and to eliminate the obligation of property owners along public streets to contract and pay for lateral conversions. The City also uses the Undergrounding Fund to pay for right-of-way restoration following Rule 20A Projects.

2. Alvarado Estates

In 1997, the San Diego City Council (Council) approved vacating the public streets within Alvarado Estates at the request of its residents and Alvarado Estates became a private gated community. San Diego Resolution R-288715 (May 27, 1997) (attached). The streets were vacated "to allow for the installation of gates at the intersection of Yerba Santa Drive and Mesquite Road in order to secure the area and prevent non-local traffic from entering the Alvarado Estates Community." City of San Diego, Minutes for Regular Council Meeting, May 27, 1997. The resolution expressly reserves general utility easements from the vacation, and access for City and emergency vehicles. According to the resolution, Alvarado Estates is responsible for maintaining the streets, sidewalks, streetlights, storm drains, and providing for trash collection.

ANALYSIS

1. THE CITY IS PROHIBITED FROM MAKING ANY GIFT OF PUBLIC FUNDS.

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[2] The PUC specifically found that the surcharge should be billed and collected from all customer classes. Public Utilities Commission of the State of California Resolution E-3788 (December 19, 2002).

The City has been asked whether public funds may be used to underground utilities at Alvarado Estates. Proponents of using public funds for this purpose assert that the City still maintains general utility easements along these private streets. The San Diego City Charter (Charter) prohibits the gift of public funds. Charter section 93 states, in relevant part, that "[t]he credit of the City shall not be given or loaned to or in aid of any individual, association or corporation; except that suitable provision may be made for the aid and support of the poor." This Office has previously opined that this provision is similar to article XVI, section 6 of the

Constitution, and the cases interpreting that constitutional provision are relevant in interpreting the Charter provision. see 1979 op. City Att'y 8 (79-2; Mar. 2, 1979); 1979 City Att'y MOL 168 (Sept. 4, 1979); 1952 op. City Att'y 23 (Feb. 27,1952).

An expenditure of public funds that benefits a private party constitutes an impermissible gift if the public agency does not receive adequate consideration in exchange or if the expenditure does not serve a public purpose. 2011 City Att'y Report 17 (11-17; Apr. 7, 2011), referencing People v. City ofLong Beach, 51 Cal. 2d 875, 881-83 (1959); Emps. Assn. v. Sunnyvale Elementary Sch. Dist., 36 Cal. App. 3d 46, 59 (1973); Allen v. Hussey, 101 Cal App. 2d 457, 473-74 (1950):

> [T]he true test is that which requires that the work should be essentially public and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need, or contribute to the convenience, of the people of the city at large.

Bank v. Bell, 62 Cal. App. 310, 330 (1923); see also Perez v. City ofSan Jose, 107 Cal. App. 2d 562, 566 (1951). [3]

11. THE MONEY THE CITY RECEIVES FOR UNDERGROUNDING IS PUBLIC FUNDS.

A city may derive revenue by granting utility franchises. 15 McQuillin Mun. Corp. 39:3 (3d ed.). A utility franchise is a privilege to use public streets or rights-of-way in connection with the utility's provision of services to residents within the government entity' s jurisdiction. Jacks

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[3] City Council Policy 600-08 is consistent: "[i]t shall be the policy of the Council to: [e]xercise the City's police powers to order, and enforce as necessary, utility companies to convert overhead utilities to underground when it is in the interest of the public health, safety and welfare ofthe general public" and projects "[s]hall consist of project 'blocks' composed ofpublic residential streets and public alley ways to be undergrounded." Council Policy 600-08 (emphasis added). The UUP Ordinance defines overhead lines as those "located above ground upon, along, across, or over the streets, alleys and ways of the City." San Diego Municipal Code 61.0504(e).

v. City ofSanta Barbara, 3 Cal. 5th 248, 254 (2017). Charter section 105 requires that the City be paid compensation in return for granting a franchise.

A franchise fee is the purchase price of the franchise paid by the franchisee to the municipality. City & co. ofS.F. v. Market St. Ry. co., 9 Cal. 2d 743, 749 (1937). Surcharge funds are part of the compensation paid for the right to use a city's rights-of-way. Jacks v. City of Santa Barbara, 3 Cal. 5th at 267. The PUC has found that that once the City receives a franchise fee, that money is no longer ratepayer money and the City is free to use it as it sees fit except where the City's actions may overlap the PUC's jurisdiction over SDG&E's corporate actions. Public Utilities Commission of the State of California Resolution E-3788 (December 19, 2002). The funds deposited in the Undergrounding Fund are part of the consideration that SDG&E provides to the City under the franchise agreement, which makes them public funds.

Here, the consideration paid by SDG&E to the City for use of the City's franchise are public funds. Using public funds to enrich Alvarado Estates, a private gated community, would be a violation of Charter section 93.

111. UNDERGROUNDING AT ALVARADO ESTATES WOULD BE A PROHIBITED GIFT OF PUBLIC FUNDS BECAUSE IT DOES NOT BENEFIT THE GENERAL PUBLIC.

There are aesthetic benefits to property owners when overhead lines are removed and placed underground. A city has the authority to regulate aesthetics in its right-of-way. Sprint PCS Assets, L.L.C. v. City ofPalos Verdes Estates, 583 F.3d 716 (2009). The California Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const. , art. XI, 7). "Often referred to as the 'police power,' this constitutional authority of counties or cities to adopt local ordinances is "the power of sovereignty or power to govern—the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare. [Citation.] The local police power generally includes the power to adopt ordinances for aesthetic reasons." T-Mobile West LLC v. City and County ofSan Francisco, 3 Cal. App. 5th 334, 346—47 (2016), as modified on denial ofreh 'g (Oct. 13, 2016), aff'd 6 Cal. 5th 1107 (April 4, 2019).

Undergrounding utilities likely increases property values and makes the lines less susceptible to environmental stressors. Although a city has the authority to regulate aesthetics in the public right-of-way, to make improvements to a private property requires a public purpose to support an expenditure of public funds.

Undergrounding the utilities along the Alvarado Estates' private rights-of-way would improve the aesthetics and the integrity of the private streets and rights-of-way, and probably increase the property values. But these are benefits that inure only to the property owners in this private community. Because Alvarado Estates is a private community that is necessarily made up of private sidewalks and streets, the improved aesthetics and integrity of the utilities are not enjoyed by the public at-large because the public at-large is prohibited from

using these private rights-of-way. Using the public undergrounding funds to underground utilities at Alvarado Estates would serve that private community of homes, but would not provide for the general good of all the inhabitants of the City. We recognize that SDG&E customers in Alvarado Estates are indirectly contributing to the City's Program through their electric bills, but there is no exception in state or local law that would allow the City to spend public funds under these circumstances. For these reasons, we conclude that using surcharge funds to underground the utilities at Alvarado Estates would be an improper gift of public funds,[4]

IV. THE PRESENCE OF A GENERAL UTILITY EASEMENT DOES NOT ESTABLISH A PUBLIC PURPOSE.

Generally, every citizen has the right to use the public right-of-way. The vacation of a street, highway, or public service easement extinguishes all public easements therein, except that public utility easements may be expressly reserved. Cal. Sts. & High. Code 8350, 8340. California Streets and Highways Code section 8340(c) specifically requires that public utility easements be reserved from a street vacation where there are public utility facilities in use. The May 27, 1997 vacation extinguished all public easements in Alvarado Estates, except that it reserved a general public utility easement.

Alvarado Estates was made private with the exception that public utilities may enter to construct, maintain or operate their facilities, etc. and the City may enter "for City construction or maintenance vehicles and emergency vehicles of all kinds." San Diego Resolution R-288715 (May 27, 1997).

The intent of the vacation was to prevent the public from entering the community. This intent is further supported by the fact that the Alvarado Community Association agreed to maintain all the vacated rights-of-way, including pavement, curbs, gutters, sidewalks, street lights, etc. San Diego Resolution R-288715 (May 27, 1997).

An easement creates a nonpossessory right to enter and use land in another's possession and obligates the possessor not to interfere with the uses authorized by the easement. 12 Witkin, Summary of California Law, Real Property 396 (1 Ith ed. 2018). Where an easement is for public access over private property, then public funds may be used to improve the easement, and the improvements are not a gift of public funds. See 80 Op. Cal. Att'y Gen. 56, (1997). The California Attorney General opined that public funds may be used to repair and maintain an unpaved road located on private property if the general public has a "prescriptive use easement" to travel on the road. Id. In that matter, the public had traveled on the road for 100 years, thus constituting a prescriptive easement to travel on the road.

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[4] The residents of Alvarado Estates may make use of Section G of Council Policy 600-08 which provides for the "underground conversion in situations other than those meeting one of the criteria for conversion of company expense" through the use of assessment district proceedings.

Here, the streets and sidewalks of Alvarado Estates are private. The community is gated to prevent entry by the public. The May 27, 1997 vacation did not reserve a right for public access. These facts do not support a finding that the public has a prescriptive easement or any other right to travel along the streets and sidewalks of Alvarado Estates.[5]

The utility easement allows public utilities and the City to enter Alvarado Estates only for the reasons stated. The easement obligates Alvarado Estates property owners to not interfere with those specific uses. However, the easement does not obligate the City or any public utility to underground utilities. The easement does not serve as a vehicle to include Alvarado Estates in Undergrounding Project 70.

CONCLUSION

Alvarado Estates is a private, gated community. Using City funds to underground utilities in Alvarado Estates would be an improper gift of public funds, as this would not be for the general good of all the inhabitants of the City because the streets and sidewalks of this community are closed to the general public. A general utility easement reserved when the public streets were vacated does not justify the use of public funds for undergrounding.

MARA W. ELLIOTT, CITY ATTORNEY

By Cass dra-E. ougin Cassandra E. Mougin
Deputy City Attorney

CEM:cem:cw
ML-2019-1
Doc. No. 2177999
Attachment: San Diego Resolution R-288715 (May 27, 1997)

[5] The letter authored by attorney Marshall A. Lewis dated February 8, 2019 implies that the Alvarado Estates Community may have trails or paths other than the private streets and sidewalks discussed herein. If there are public access easements within the community, the City may be able to improve those easements, however the City cannot improve private streets that are not open to the public.