



CITY COUNCIL AGENDA REPORT

MEETING DATE: APRIL 15, 2014

ITEM NUMBER:

SUBJECT: PUBLIC HEARING FOR THE VACATION OF A PORTION OF FULLERTON AVENUE AT 1854 FULLERTON AVENUE

DATE: APRIL 3, 2014

FROM: PUBLIC SERVICES DEPARTMENT/ENGINEERING DIVISION

PRESENTATION BY: ERNESTO MUNOZ, PUBLIC SERVICES DIRECTOR

**FOR FURTHER INFORMATION CONTACT: FARIBA FAZELI, CITY ENGINEER,
(714) 754-5335**

RECOMMENDATION:

1. Adopt Resolution ordering the vacation of a portion of Fullerton Avenue Right-Of-Way at 1854 Fullerton Avenue (Attachment 1).
2. Authorize execution of the Quitclaim Deed by the Mayor and the City Clerk (Attachment 2).

BACKGROUND:

The Engineering Division is processing a request from Mr. Nicholas F. Schaumburg (Homeowner), for the vacation of a portion of Fullerton Avenue. This portion of Fullerton Avenue is adjacent to Mr. Schaumburg's property at 1854 Fullerton Avenue (Attachment 3). The proposed vacation of right-of-way is in conjunction with Mr. Schaumburg's improvements to the property.

Per the current City's Master Plan of Highways, Fullerton Avenue is designated as a two-lane collector street. Presently, Fullerton Avenue has been constructed to fulfill the Master Plan of Highway's capacity requirements, therefore, leaving a sliver of 8.7 feet of excess right-of-way along the property located at 1854 Fullerton Avenue. The proposed vacation complies with the current standard for local streets and is consistent with the existing improvements.

On February 24, 2014, a report was presented to the Planning Commission outlining the proposed vacation as required by Government Code Section 65402. Subsequently, the Planning Commission adopted Resolution No. PC-14-07 (Attachment 4) finding that the proposed vacation of a portion of Fullerton Avenue excess right-of-way is consistent with the City's General Plan.

ANALYSIS:

The proposed segment of Fullerton Avenue to be vacated was originally dedicated in 1927 and is in excess of the final alignment. In addition, this segment of street does not serve any ingress and egress purposes to other private properties. Currently, there are no utilities located within this portion of right-of-way and therefore, a reservation for a utility easement is not required. The vacation of this portion of excess right-of-way is in conformance with the objectives of the Circulation Element General Plan and conforms to the California Streets and Highways Code, Chapter 4, Section 8334(a) which allows a local agency to summarily vacate an excess right-of-way of a street or highway not required for street or highway purposes.

The Notice of Intention to vacate right-of-way was presented to the City Council at its regular meeting of March 18, 2014. Resolution 14-16 was subsequently adopted setting this public hearing (Attachment 5). The property has been posted and notices of this public hearing were published as required by the Resolution. Staff has prepared the attached Resolution ordering the vacation of excess right-of-way (Attachment 1). Staff also recommends that a Quitclaim Deed be executed relinquishing the City of any interest in said excess right-of-way (Attachment 2).

ALTERNATIVES:

The City could retain the excess right-of-way and continue to be responsible for its maintenance. The alternative to retain excess right-of-way will result in the City's continued involvement of unusable right-of-way. There are no future plans to widen Fullerton in this area.

FISCAL REVIEW:

Once the area is vacated it becomes taxable square footage, resulting in additional property taxes to the adjacent property owner to which the land will revert. This will result in additional revenue to the City.

LEGAL REVIEW:

The City Attorney's Office has approved the attached resolution as to form.

CONCLUSION:

Staff recommends that the City Council adopt the Resolution ordering the vacation of Fullerton Avenue excess right-of-way at 1854 Fullerton Avenue. In addition, staff recommends that the City Council authorize execution of the Quitclaim Deed by the Mayor and the City Clerk.

ERNESTO MUNOZ
Public Services Director

FARIBA FAZELI
City Engineer

ATTACHMENTS: [1 – Resolution Ordering the Vacation of Excess Right-Of-Way](#)
 [2 – Quit Claim Deed](#)
 [3 – Site Plan](#)
 [4 – Resolution PC-14-07](#)
 [5 – Resolution 14-16](#)

Distribution: Chief Executive Officer
 Assistant CEO
 City Attorney
 City Clerk Division

Re: mistakes associated with Fullerton Avenue ROW vacation
public hearing 1 on the April 15 City Council Meeting agenda

April 14, 2014

Dear Costa Mesa City Council Members,

In the pages that follow I provide, in roughly chronological order, examples of numerous mistakes associated with the proposed vacation of a portion of Fullerton Avenue. City documents related to the vacation contain so many errors that neither the public nor the City Council can rely on the documents to make rational, informed decisions about the vacation.

Two mistakes offend me most:

Firstly, the Notices of Abandonment are posted so as to be unreadable by someone using a wheelchair. Americans with Disabilities Act regulations state: § 35.160 General. (a) (1) **A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.**

Secondly, City staff mischaracterize the area of the proposed vacation as "excess", "unusable" and "not usable." In fact, the area of the proposed vacation is the safest portion of the right of way for pedestrians, wheelchair users, etc., because it is farthest from the roadway and clear of obstructions such as driveway aprons, utility boxes, power poles, fire hydrants, water meters and mailboxes, all of which are naturally near the roadway and currently impede pedestrian, bicycle and wheelchair travel along Fullerton Avenue.

The area of the proposed vacation is a portion of a larger public highway dedication extending along the southeasterly side of Fullerton Avenue from Magnolia to 19th Street. This area is ideally suited for a nonmotorized transportation facility. Streets and Highways Code section 892 (a) states "**Rights-of-way established for other purposes by cities, counties, or local agencies shall not be abandoned unless the governing body determines that the rights-of-way or parts thereof are not useful as a nonmotorized transportation facility.**" [see definition below]

On Fullerton Avenue I have repeatedly seen pedestrians forced by obstructions and inadequate pedestrian facilities to proceed in the roadway, often around park cars. The proposed vacation would only make it more difficult to address these safety issues.

If the hearing is not cancelled, please vote against the resolution of vacation. The public derives no benefit from the vacation--no savings in maintenance cost, no elimination of unsafe or hazardous conditions, nothing.

Sincerely,

Steve Pier
Newport Beach, California

Planning Commission Documents

The Planning Commission Agenda Report states, "This request is exempt from the provisions of the California Environmental Quality Act, under Class 12, Surplus Government Property Sales."

A right of way vacation is not a sale; therefore the request is not exempt under Class 12. Per case law, exemptions are to be narrowly construed. See Example Related Case Law, below.

The statement may give the Council and the public the mistaken impression that:

1. the vacation is exempt from CEQA under Class 12
2. it is legal to sell a portion of a public right of way
3. the right of way is the City's property to sell

None of these is true.

The inter-office memo requesting a determination of consistency with the general plan does not state any public purpose for the vacation. The memo states, "In conjunction with the vacation of right-of-way, Mr. Schaumburg is preparing to build an approved single family detached residence."

This is not a public purpose. Government Code Section 65402 states: "no street shall be vacated or abandoned...until the location, **purpose** and extent of ... such street vacation or abandonment have been submitted to and reported upon by the planning agency as to conformity with said adopted general plan or part thereof." [emphasis added]

Agenda Reports

Under ALTERNATIVES CONSIDERED, the Agenda Report dated March 6 states, "The City could retain the excess right-of-way and continue to be responsible for the maintenance and safety of the street."

Nothing in the area of the proposed vacation is maintained by the City.

The City should not avoid its responsibility for public safety. The area of the proposed vacation is the safest portion of the right of way for pedestrians, wheelchair users, etc., because it is farthest from the roadway and clear of obstructions such as driveway aprons, utility boxes, power poles, fire hydrants, water meters and mailboxes, all of which are naturally near the roadway and currently impede pedestrian, bicycle and wheelchair travel along Fullerton Avenue.

Travel by pedestrians, wheelchair users and bicyclists along Fullerton Avenue is currently hazardous. Cars are frequently parked (legally) along both sides of the street. There are no bicycle lanes. At various points persons traveling on sidewalks are forced by obstructions and inadequate pedestrian facilities to proceed in the roadway, often around park cars. The proposed vacation would only make it more difficult to address these safety issues.

Under ALTERNATIVES CONSIDERED, the Agenda Report dated April 3 added to the above, "The alternative to retain excess right-of-way will result in the City's continued involvement of unusable right-of-way. There are no future plans to widen Fullerton in this area."

The area of the vacation is neither "excess" nor "unusable." As described above, the area of the proposed vacation is the safest portion of the right of way for use as a nonmotorized transportation facility, e.g., a sidewalk. There are many examples of 18-foot wide pedestrian facilities in Costa Mesa, **including the sidewalk in front of City Hall.**

Many engineers agree that wide sidewalks and buffers make for safe and pleasant nonmotorized travel: "The furnishings zone buffers pedestrians from the street, and is the proper place for utility poles, signs, litter baskets, etc. (these are called street furniture). The furnishings zone is also the place to plant trees or shrubs, and for this reason it is sometimes called the planter strip. **Other things being equal, the wider the furnishings zone, the better, since a wide buffer makes walking safer and more pleasant.**" [Emphasis added, from Pedestrian and Bicycle Facilities in California (Caltrans technical reference)].

"The setback distance of the sidewalk from the roadway is another important safety and design factor. For example, sidewalks too close to high-speed traffic discourage pedestrian travel due to the high noise level, vehicle spray in wet weather, and the perception of hazard. Consequently, wider setbacks add to the convenience and perceived safety of pedestrian travel and should be used whenever possible." [From Design and Safety of Pedestrian Facilities, published by the Institute of Transportation Engineers (ITE).]

Under FISCAL REVIEW, the Agenda Reports dated March 6 and April 3 state, "Once the area is vacated it becomes taxable square footage, resulting in additional property taxes to the adjacent property owner to which the land will revert. This will result in additional revenue to the City."

This is incorrect and misleads the public into thinking the public will somehow benefit from the vacation. Vacating a right of way to the underlying property owner does not result in a tax reassessment, because the underlying property owner already owns the underlying property. There is no change in ownership and consequently no reassessment. Furthermore, the fiscal review does not address the payroll and other costs the City incurred to process the vacation nor the litigation and other costs the City will incur if someone is injured because the vacation prevented implementation of the safest possible pedestrian and/or bicycle facilities.

See case law references below.

Under CONCLUSION, the Agenda Report dated April 3 states, "Staff recommends that the City Council adopt the Resolution ordering the vacation of Fullerton Avenue excess right-of-way at 1854 Fullerton Avenue."

For a general vacation, The Public Streets, Highways, and Service Easements Vacation Law allows a legislative body to adopt a resolution of vacation only after it has heard the evidence offered by persons interested and has made various findings based on the evidence submitted at the hearing, yet staff made their recommendation unconditionally without regard to evidence to be offered at the hearing. This is likely to discourage public participation in the hearing.

The Agenda Reports dated March 6 and April 3 state, "The vacation of this portion of excess right-of-way...conforms to the California Streets and Highways Code, Chapter 4, Section 8334(a) which allows a local agency to summarily vacate an excess right-of-way of a street or highway not required for street or highway purposes."

This statement is vague and misleading. As far as I can tell, City staff are not proposing a summary vacation. If they were, the following would apply, not just section 8334(a):

SHC section 8310-8314

SHC section 892

SHC Section 8335

case law, see below

Resolution of Intention

The Council's resolution of intention states, "The City Council of the City of Costa Mesa does hereby declare its intention to vacate a portion of its interest in Fullerton Avenue...." This language also appears in posted and published notices.

This language mischaracterizes the vacation. It is not the City Council's interest that would be vacated. It is the public's interest. Per section 8309 of Streets and Highways Code, "Vacation" means the complete or partial abandonment or termination of the public right to use a street, highway, or public service easement.

The language is also likely to mislead members of the public into believing that the Council is free to ignore any evidence the public may offer at the hearing. This is because by adopting the resolution the Council declared its intention to vacate long before hearing the evidence offered by the public.

SECTION 1 of the resolution of intention states, "The purpose of this vacation is based on a review of the current and future needs of the City and to vacate the excess land to the underlying fee owner. The vacation will benefit the neighborhood with the new improvements."

The stated purpose is not a legal purpose for vacating a right of way. The purpose must be to promote the public welfare. The advantage coming to the public from vacating the right of way must arise from the vacation itself, and not from the future use to which the vacated property is put.

See case law references below.

SECTION 5 of the resolution of intention states, "This Resolution shall be published twice in a newspaper of general circulation...."

SHC section 8322 states, "...notice of the hearing on the proposed vacation shall be published for at least two successive weeks prior to the hearing in a daily, semiweekly, or weekly newspaper...."

City staff requested publication on April 2 and April 9 in the Daily Pilot. Proof of publication was not available when I visited City Hall on April 11. The hearing is scheduled for April 15.

Resolution Ordering the Vacation

The resolution ordering the vacation states, "notices of said proposed vacation were duly and regularly posted as required by law."

This statement is false. SHC Section 8323 states, "At least two weeks before the day set for the hearing, the legislative body shall post conspicuously notices of vacation along the line of the street, highway, or public service easement proposed to be vacated. The notices shall be posted not more than 300 feet apart, but at least three notices shall be posted."

No notices were posted along the line of the proposed vacation area, which is within a fenced front yard. The fence obstructs public access to the area of the proposed vacation. This is likely to confuse members of the public trying to locate the area of the proposed vacation, especially because the posted NOTICE OF ABANDONMENT itself states, "The City Manager [sic] of the City of Costa Mesa is hereby directed to cause notices of the said proposed vacation to be conspicuously posted *along said strip of land....*" [emphasis added]

Several notices were posted in the general neighborhood of the vacation. Notices were posted as far away as the intersection of Broadway and Orange.

The notice nearest the site of the proposed vacation is posted on a utility pole, facing the roadway. A pedestrian would need to stand in the roadway to read the notice.

No notice was posted so as to be safely readable by someone using a wheelchair. Most notices were posted too high to be read by many people including people using wheelchairs or electric scooters, etc. One notice, at the corner of Flower and Fullerton could be read by person in a wheelchair if the wheelchair was positioned in the roadway, where the person would risk being struck, for example, by a motorist turning right. There is no pedestrian facility (e.g., sidewalk) near this notice.

Americans with Disabilities Act regulations state:

§ 35.160 General. (a) (1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

The resolution ordering the vacation states, "The purpose of this vacation is based on a review of the current and future needs of the City and to vacate the excess land to the underlying fee owner."

This statement does not reveal any public benefit arising from the vacation. It does not address the public's current and future needs, only the City's needs and the benefit to a private party.

The resolution ordering the vacation states, "The portion of the street being vacated is not useful as a non-motorized transportation facility, is unnecessary for present or future public use, and the vacation

serves the public interest and is a public benefit."

As discussed elsewhere in this letter, none of this statement is true.

The portion of right of way being vacated is the safest place for a pedestrian and/or bicycle facility. The public derives no benefit from the vacation itself--no savings in maintenance cost, no elimination of unsafe or hazardous conditions, nothing.

Posted Notices

The posted NOTICE[s] OF ABANDONMENT contain text that appears to be a City Council Resolution, approved as to form by Tom Duarte, City Attorney, and certified by the City Clerk as having been passed by a unanimous vote of the Council. In fact, important text from Sections 1 and 3 of the true resolution has been omitted in the NOTICE, and minor alterations were made to the text of Sections 2 and 4. Furthermore, the official record of the resolution shows that it was not approved to form by Tom Duarte, but by Yolanda Summerhill, and it passed with only four Council members present, not the five Council members listed on the notice.

City staff should not portray altered versions of Council resolutions as though they are the actual resolution.

City staff should not retain official approvals, certifications, etc., on altered or paraphrased documents. For example, the posted notices contain the phrases "APPROVED AS TO FORM: Tom Duarte, City Attorney" and "IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the City of Costa Mesa". Members of the public rely on such approvals and certifications to know that they are reading an official document. Most would never suspect that they are reading something else.

If the public cannot trust public notices, it faces the unnecessary burden of traveling to City Hall to inspect official records.

As described elsewhere in this letter, the language of the NOTICE OF ABANDONMENT mischaracterizes the vacation.

The posted and published notices do not meet the requirements of SHC section 8320.

As described elsewhere in this letter, notices were not properly posted as required by state law and federal regulation (ADA).

Various Documents

Various documents report that the area to be vacated is "adjacent" to Mr. Schaumburg's property, whereas it actually overlies it.

This is likely to confuse members of the public trying to locate the area of the proposed vacation.

Members of the public might also be lead to conclude that the City is selling or transferring City property, whereas the City is actually terminating the public right to use the area of the proposed vacation.

Example Related Case Law

**from THE PEOPLE v. CITY OF SAN RAFAEL [emphases added]
95 Cal. App. 733; 273 P. 138; 1928 Cal. App. LEXIS 538 December 24, 1928:**

"It is, of course, true that a city cannot 'barter' away its streets. And it has been held that the advantage coming to the public from vacating a street must arise from the vacation itself, and not from the future use to which the vacated property is put. (*Horton v. Williams*, 99 Mich. 423 [58 N.W.369].)"

**from THE PEOPLE, v. CITY OF LOS ANGELES [emphases added]
62 Cal. App. 781; 218 P. 63; 1923 Cal. App. LEXIS 577 July 7, 1923:**

"a street or alley cannot be vacated for a private use, that is, for the purpose of devoting it to the exclusive use and benefit of a private person or corporation, but it may only be vacated to promote the public welfare."

"there is no power, it is generally held, to vacate a street or alley on payment of a cash consideration by an abutter."

"the delegation of legislative power to subordinate political divisions of the state is solely for public purposes and must be exercised with reference to them."

McQueen v. Midpeninsula Regional Open Space District (1988) 202 Cal. App. 3d 1136:

The court stated that the terms 'sale' and 'acquisition' are not interchangeable and reaffirmed that **CEQA exemptions must comply with the "specific terms" of the exemption which are to be narrowly construed.**

Related Statutes

STREETS AND HIGHWAYS CODE

887. As used in this chapter, "nonmotorized transportation facility" means a facility designed primarily for the use of pedestrians, bicyclists, or equestrians. It may be designed primarily for one or more of those uses.

892. (a) **Rights-of-way established for other purposes by cities, counties, or local agencies shall not be abandoned unless the governing body determines that the rights-of-way or parts thereof are not useful as a nonmotorized transportation facility.**

8308. "Street" and "highway" include all or part of, or any right in, a state highway or other public highway, road, street, avenue, alley, lane, driveway, place, court, trail, or other public right-of-way or easement, or purported public street or highway, and rights connected therewith, including, but not limited to, restrictions of access or abutters' rights, sloping easements, or other incidents to a street or highway.

8309. "Vacation" means the complete or partial abandonment or termination of the public right to use a street, highway, or public service easement.

8314. Section 892 applies to a street, highway, or public service easement vacated pursuant to this part.

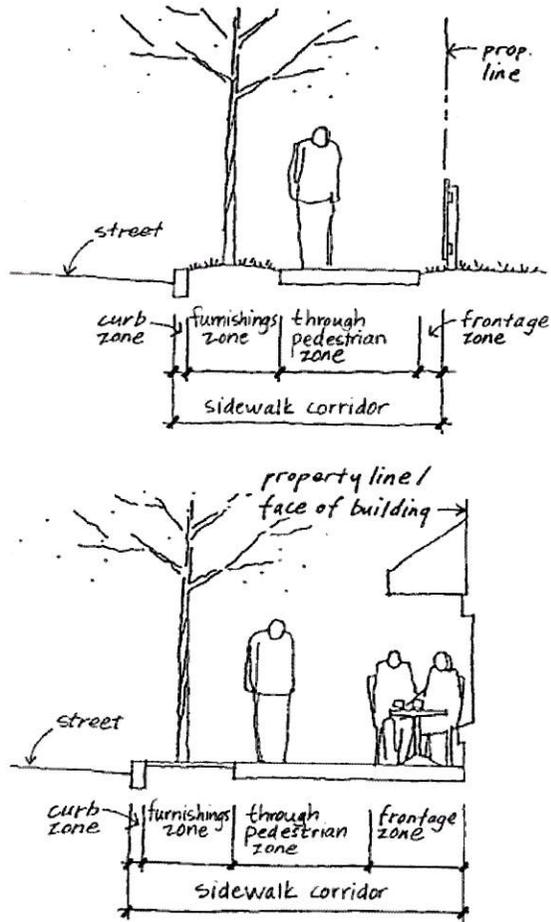
VEHICLE CODE

21949. (a) The Legislature hereby finds and declares that it is the policy of the State of California that safe and convenient pedestrian travel and access, whether by foot, wheelchair, walker, or stroller, be provided to the residents of the state.

(b) **In accordance with the policy declared under subdivision (a), it is the intent of the Legislature that all levels of government in the state, particularly the Department of Transportation, work to provide convenient and safe passage for pedestrians on and across all streets and highways, increase levels of walking and pedestrian travel, and reduce pedestrian fatalities and injuries.**

PEDESTRIANS: SIDEWALKS: ZONE SYSTEM

GRAPHIC



(Source: Portland Pedestrian Plan)

DESCRIPTION

Where paved sidewalks exist, a *sidewalk corridor* lies in a public right-of-way between the street and a property line adjacent to the street. The *curb zone* is designed for drainage, and to isolate pedestrians from the street; it is typically about 15 cm (6 in) wide, and 15 cm (6 in) high. The *furnishings zone* buffers pedestrians from the street, and is the proper place for utility poles, signs, litter baskets, etc. (these are called *street furniture*). The furnishings zone is also the place to plant trees or shrubs, and for this reason it is sometimes called the *planter strip*. Other things being equal, the wider the furnishings zone, the better, since a wide buffer makes walking safer and more pleasant.

The furnishings zone provides width for any slopes that must exist for access through the sidewalk corridor; for example, a *driveway apron*, the part of the driveway that slopes to the street level, or a *curb ramp* for disabled pedestrian access.

The space adjacent to the property line that is not part of the normal walking surface is called the *frontage zone*. Its width will vary, depending on its use. The lower diagram shows a sidewalk café in the frontage zone. If there is a barrier on the property line, such as a fence or the side of a building, the frontage zone should be at least wide enough so that a pedestrian on the edge of the sidewalk will not touch the barrier. This extra room is called *shy distance*.

The *through pedestrian zone* is the clear space to walk commonly referred to as a sidewalk. The *through pedestrian zone* should ideally be at least 1.8 m (6 ft) wide and free of both permanent and temporary obstructions. Walking surfaces in the through pedestrian zone should be firm and stable, resistant to slipping when wet, and allow for use by people using canes, wheelchairs, etc. Except where absolutely required by the topography, there should be no significant *slope* (in line with the direction of travel) or *cross-slope* (at right angles to the direction of travel) in the through pedestrian zone.

SOURCE

Portland Office of Transportation (1998) *Pedestrian Plan*. Portland, OR
Architectural and Transportation Barriers Compliance Board. (1999) Chapter 3: Pedestrian Accessibility. *Accessible Public Rights-of-Way Design Guide*. Retrieved October 6, 2003, from http://www.access-board.gov/publications/PROW%20Guide/PROWGuide.htm#3_2_1