

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: December 3, 2008
TO: Honorable Mayor and City Councilmembers
FROM: Karen A. Heumann, Assistant City Attorney
SUBJECT: December 2, 2008 Council Docket Item-343:

Hillel of San Diego Student Center, Project No. 149437. An application for a Site Development Permit, Easement Acquisition, and Public Right-of-Way Vacation (portion of La Jolla Scenic Drive North between Torrey Pines Road and La Jolla Scenic Way) for a two-phased development.

INTRODUCTION

On December 2, 2008, the City Council was scheduled to hear and consider Item 343, regarding development of a Hillel of San Diego Student Center. The item included four separate requests for action:

1. Certify the Mitigated Negative Declaration No. 14943, Adopt Mitigation Monitoring and Reporting Program
2. Approve Site Development Permit No. 527861
3. Approve Easement Acquisition No. 584509; and
4. Approve Public Right-of-Way Vacation No. 527860

This memorandum addresses noticing deficiencies for the public right-of-way vacation.

After the Council item had already been docketed and the docket was posted for the December 2 meeting, the City Attorney was notified of a potential procedural defect related to the posted notice of the Public Right-of-Way Vacation (No. 4 above).

After an independent review of the property posting requirements and whether those requirements had been met, this Office advised the City Council that the property posting notice requirements would be satisfied by hearing the public right-of-way vacation on December 5. The other sub-items could be properly continued to December 5, when all four components of the project could be heard at a special meeting of the Council. A motion for continuance was

made and discussion was heard. However, during discussion of the continuance, another noticing issue came to light, also affecting the proposed public right-of-way vacation. A representative of the Development Services Department informed the City Council and the City Attorney representatives present that he had published notice of the hearing only once.

The City Council voted to continue the hearing on Item 343 to a special meeting set for December 5, 2008.

QUESTION PRESENTED

1. Was the posted notice sufficient for the right-of-way vacation?
2. Was the notice of the public right of way vacation properly published?

SHORT ANSWER

1. The posted notice, when considered in the light of the totality of the circumstances, was legally adequate.
2. No. The notice was not published twice, as required by state law.

LEGAL ANALYSIS

I. The Posted Notice Was Sufficient for the Right-of-Way Vacation to be Heard on December 5.

San Diego Municipal Code section 125.0940 requires that a public right-of-way considered for vacation have conspicuous notices of vacation posted on the property at least two weeks before the date of the hearing.

This Office researched the issue of the posted notices and confirmed with the Development Services Department that the property initially had been posted for less than two weeks for a December 2, 2008 hearing. This Office also learned that a second posting went up on the property on November 21, 2008, stating that the "Date of Hearing" would be "December 5, 2008." However, an asterisk referred to a paragraph below, which stated:

This Posted Notice is being provided in addition to the Posted Notice, previously posted on November 19, 2008. The Hillel of San Diego Student Center Public Right-of-Way Vacation has been noticed for the City Council hearing of December 2, 2008. It is anticipated that this item will be continued until Friday, December 5, 2008.

Thus, the second posting was made at least two weeks before the date of a December 5, 2008 hearing.

As set forth above, the second notice posted on the property sufficed to meet the requirement of 14 days' notice for the hearing on the right-of-way vacation. Daniel Stricker, Development Project Manager, confirmed that the second notice was posted on November 21, 2008. This Office has inspected a copy of the notice and, on its face, it meets the standard.

However, this Office has some concern regarding the ambiguity set forth in the paragraph below, which indicates that the item was "anticipated" to be continued to December 5 after the heading above clearly stated the hearing was scheduled for December 5.

Even so, the San Diego Municipal Code clearly states that if there is an irregularity in posting, it will not invalidate a Council decision. San Diego Municipal Code section 112.0304(c) states:

(c) Error in posting. The posting required by this section is intended only to supplement other notice requirements of this division. A decision on an application for a permit, map, or other matter shall not be invalidated because of any error or irregularity in the posting of a notice in accordance with this section.

California Streets and Highways Code section 8323 provides:

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

Case law interprets this provision of the California Streets and Highways Code very liberally such that noticing that is in compliance in whole or in consideration of the totality of the circumstances meets the noticing requirements has generally been upheld can not be overturned for inadequate noticing. *See* Streets and Highways Code section 8310; *See generally* *Bowles v. Antonetti* 241 Cal. App. 2d 283 (1966).

Thus, this Office determined that the posted notice deficiencies under the San Diego Municipal Code requirements would probably not preclude a hearing on the public right-of-way for December 5, 2008. However, the conclusion to the second question renders moot the need for further discussion of this issue.

II. The Published Notice Regarding the Public Right-of-Way Vacation was Defective.

In addition to a physical policy requirement, state law and the San Diego Municipal Code require published notice of the public right-of-way vacation. California Streets and Highways Code section 8322 provides:

- (a) Except as provided in subdivisions (b) and (c), **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** conducting the proceeding and which is selected by the legislative body for that purpose or by the clerk or other officer responsible for the publication where the legislative body has not selected any newspaper for that purpose.

....

San Diego Municipal Code section 112.0303 also states in relevant part that when the Land Development Code requires a notice of public hearing to be published, the City shall submit the Notice of Public Hearing for publication in at least one newspaper of general daily circulation within the City.

However, the published notice was insufficient. The California Streets and Highways Code clearly contemplates at least two published notices – “published for at least two successive weeks prior to the hearing in a daily, semiweekly, or weekly newspaper.” The testimony of the representative of the Development Services Department confirms that this did not occur.¹

¹ Development Services Department relied on San Diego Municipal Code section 125.0940 which states:

§125.0940 Decision Process for a Public Right-of-Way Vacation

A decision on an application to vacate a *public right-of-way* shall be made in accordance with Process Five with the following exceptions to Process Five procedures:

- (a) The Notice of Public Hearing required by Section 112.0301(c) shall be distributed 14 calendar days before the date of the public hearing, in accordance with California Streets and Highways Code Section 8322. The Notice of Public Hearing shall be posted in accordance with California Streets and Highways Code Section 8323.

Council President Pro Tem Madaffer referred reconciliation of the Municipal Code noticing requirements and state noticing requirements to Development Services Department and the City Attorney’s Office. This Office concurs with this recommendation and cites the above as one example demonstrating the need for such reconciliation.

While Streets and Highways Code section 8310 states that this part “shall be liberally construed in order to effectuate its purposes,” even the most liberal reading of state law would not allow that it is sufficient to publish only once when “at least twice” is the standard. Further, there are no exceptions set forth in the law to alleviate this requirement. Therefore, the City failed to adequately publish notice of the hearing on the public right-of-way vacation.

CONCLUSION

The City failed to satisfy the state law requirement that published notice of a public right-of-way vacation “shall be published for at least two successive weeks prior to the hearing.” The public right-of-way vacation must be re-noticed and heard at a later date in accordance with all applicable San Diego Municipal Code and state law requirements. Therefore, the practical consequence of the noticing deficiency is to re-notice the entire matter for a future hearing date.

MICHAEL J. AGUIRRE, CITY ATTORNEY

By 

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cc: Andrea Tevlin, Independent Budget Analyst
Elizabeth Maland, City Clerk
Kelly Broughton, Director, Development Service
Daniel Stricker, Development Project Manager