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October 13, 2017

REPORT TO HONORABLE MAYOR AND COUNCILMEMBERS

PROPOSED ORDINANCE TO AMEND THE SAN DIEGO MUNICIPAL CODE FOR PLACEMAKING

INTRODUCTION

On October 17, 2017, the San Diego City Council (City Council) will consider an Ordinance to amend several San Diego Municipal Code (Municipal Code) sections to include a framework for permitting placemaking projects. This Report to Council addresses legal issues associated with the proposed ordinance including the ramifications of making this a ministerial process.

BACKGROUND

Placemaking projects are a temporary use of public or private property. According to proponents, the goal of placemaking is to improve pedestrian experiences, beautify underutilized spaces in neighborhoods and commercial corridors, and capitalize on local community assets with the intention of creating areas that promote health, happiness, and well-being. Based on input from the Placemaking Stakeholder Group, Code Monitoring Team, Technical Advisory Committee, and Community Planners Committee, City staff developed a ministerial permit program to permit and manage placemaking projects on both public right-of-way and private property.

On June 14, 2017, the Smart Growth & Land Use Committee voted 4-0 to recommend introduction of the ordinance and approval by City Council. On August 24, 2017, the proposed placemaking regulations were presented to the Planning Commission, which voted unanimously to forward the item to City Council and recommend approval. The final version of the ordinance will be introduced before the City Council on October 17, 2017. If the City Council adopts the ordinance, this Office will work with staff to implement the placemaking regulations.

DISCUSSION

I. PLACEMAKING PROJECTS MUST COMPLY WITH REQUIREMENTS FOR LAWFUL USES OF THE PUBLIC RIGHT-OF-WAY

A. THE "BELLO" TEST

A public right-of-way is a form of easement that grants use rights in a particular parcel of land to nonowners of the land, and these use rights are vested equally in every member of the

public. *See Bello v. ABA Energy Corp*., 121 Cal. App. 4th 301, 308 (2004). A city may only allow uses of its public right-of-way that are lawful. As this Office explained in a prior memorandum, the Bello test is currently the clearest standard in California for analyzing the lawfulness of a proposed use of the public right-of-way. *See* City Att'y MOL No. 2014-15 (Nov. 18, 2014). Under *Bello*, any proposed use must meet all three requirements: (1) the use must serve as a means, or be incident to a means, for the transport or transmission of people, commodities, waste products or information, or serve public safety; (2) the use must serve either the public interest or a private interest of the underlying landowner that does not interfere with the public's use rights; and (3) the use may not unduly endanger or interfere with use of the abutting property. *Id.* A copy of this memorandum is attached to this Report.

B. PLACEMAKING IN THE PUBLIC RIGHT-OF-WAY

Staff anticipates that applicants may propose various placemaking projects in the public right-of-way, including on streets, sidewalks, and parkways (the area between the sidewalk and the curb). Such proposals could include plazas, shade structures, benches, landscaping, decorative lighting, bicycle racks, refuse containers, and other projects. Placemaking projects must comply with the *Bello* requirements for lawful uses of the public right-of-way, and with all other laws applicable to the public right-of-way, including stormwater requirements and the Americans with Disabilities Act. This requirement is captured in the proposed ordinance, as well as an information bulletin that staff will create to explain placemaking regulations to permit applicants.

Because the concept and definition of placemaking is very broad, it is not possible to create a bright line rule to determine which proposals meet *Bello* and other legal requirements. The determination may depend on the particular project's features and the City's property interest in the affected right-of-way. Our Office will be available to assist City staff in reviewing applications under the *Bello* test and for compliance with other laws, when necessary. Also, if we become aware that adoption of this ordinance results in unintended consequences, we will work with City staff to draft appropriate amendments to the Municipal Code and information bulletin.

II. THE PLACEMAKING ORDINANCE WILL SUBJECT PLACEMAKING PROJECTS TO A MINISTERIAL, RATHER THAN DISCRETIONARY, PERMITTING PROCESS

This placemaking ordinance relinquishes to private parties much of the City's power and control over uses of the public right-of-way because the ordinance creates a ministerial, rather than a discretionary, approval process.

Individuals proposing placemaking projects have described the current discretionary approval process as difficult because it is unclear and cumbersome. They allege that requiring discretionary permits for these types of projects creates delays and expenses out of proportion with those projects' impacts. With that input in mind, City staff created these regulations to allow ministerial approval of such permits, meaning that there would be no requirement for a public hearing or discretion vested in a decision-maker to determine whether a particular project should or should not receive approval.

Under a ministerial permit process, an applicant who meets all of the permit requirements listed in the Municipal Code is entitled to receive a permit. City staff would not have the authority to deny a permit for any reason other than non-compliance with the Municipal Code provisions. City staff would not be able to reject an application for a project based on staff's opinion that the community might prefer a different project or that the City might prefer the project be sited in a different location, for example.

The City must decide, as a matter of policy, whether the benefits of providing a ministerial permitting process for such projects outweighs its interest in evaluating the worth of individual projects, analyzing their impacts, and imposing conditions on those projects. If the Council is willing to give up discretion, it will approve the ordinance before it today. If, however, the Council wishes to exercise discretion over its communities, it should include a discretionary standard in the Municipal Code. As concerns have been expressed about the burdensome requirements of the discretionary approval processes, Council may wish to direct staff to create streamlined approval processes that give Council discretion and control, yet address stakeholder concerns. Council also has the power to provide ministerial processes for projects of limited duration, and to require discretionary processes for all other projects.

CONCLUSION

We have legal concerns about placemaking activities, including the lawfulness of proposed uses of the public right-of-way. Given the broad definition of placemaking, staff who review placemaking projects should consult our Office, as appropriate, to ensure that the projects constitute a lawful use of the public right-of-way as defined by the *Bello* test and other applicable laws. Further, although the decision to make placemaking subject to a ministerial permit process rather than a discretionary one is a matter of policy for City Council to consider, Council should consider the extent to which it is willing to relinquish control over the projects placed in San Diego communities.

MARA W. ELLIOTT, CITY ATTORNEY

By *__/s/ Ryan Gerrity__*
Ryan Gerrity
Deputy City Attorney

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RC-2017-5
Doc. No. 1602988
Attachment: ML-2014-15 dated 11/18/2014

ATTACHMENT

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MEMORANDUM OF LAW

DATE: November 18, 2014

TO: Honorable Mayor and City Council members

FROM: City Attorney

SUBJECT: Lawful Uses of the Public Right-of-Way

INTRODUCTION

The City of San Diego maintains over 2,800 miles of streets and alleys. Communities across the City have expressed interest in sustainable urban development and pedestrian and bike-friendly transit. As this interest is channeled into planning innovative uses of public space, including streets, alleys and sidewalks, it is important to consider the limits of legal uses of the public right-of-way. A public right-of-way is a form of easement that grants use rights in a particular parcel of land to nonowners of the land, and these use rights are vested equally in every member of the public. *See Bello v. ABA Energy Corp.*, 121 Cal. App. 4th 301, 308 (2004). This memorandum will address the current state of the law in California regarding uses of the public right-of-way.

QUESTION PRESENTED

What is the standard for determining whether a proposed use of the public right-of-way is lawful?

SHORT ANSWER

Although there is no clear statutory scheme that governs lawful uses of the public right-of-way, courts have moved over time towards a flexible approach to allow for developments in technology and transportation. While there is some conflict in the law, the three-part *Bello* test described in this memorandum is a conservative standard that the City should consider when

conducting case-by-case analysis of proposed uses of the public right-of-way, in order to minimize liability to the City for future projects.

ANALYSIS

I. EVOLUTION OF THE USE OF THE PUBLIC RIGHT-OF-WAY.

The public right-of-way was once considered merely that: "a public right to construct, maintain, and use a road over private land." *Bello*, 121 Cal. App. 4th at 308. As technology has advanced and with the growth of urban centers, this public right transformed from allowing public roads to including "every reasonable means of transportation for persons, and commodities, and of transmission of intelligence," such as railroads, subways, water and gas lines, electrical and telecommunication wires, and sewage pipes. *In re Anderson*, 130 Cal. App. 395, 398 (1933).

Since the late 1800s, there have been two lines of authority in California governing appropriate uses of the public right-of-way. The first, established in *Montgomery v. Railway Co.* 104 Cal. 186 (1894) and confirmed in *Colegrove Water Co. v. City of Hollywood*, 151 Cal. 425 (1907), sought to expand the traditional view of the public right-of-way to encompass modern advances in technology and to address the needs of growing cities. In *Montgomery*, the California Supreme Court ruled that a railway line connecting two cities was a lawful use of the right-of-way. *Montgomery,* 104 Cal. at 191-92. The railway line had been constructed without the consent of the landowner whose property abutted the street. The court, looking to "a broader and more comprehensive view of the rights of the public in and to the streets and highways of city and country," concluded that such streets and highways should be "subject to all the varied wants of the public and essential to its health, enjoyment, and progress." *Id.* at 192.

This expansive view of the right-of-way was reiterated in *Colegrove*. A property owner wanted to install a water pipe underneath a portion of street that had been dedicated to public use. *Colegrove*, 151 Cal. at 426-27. The court determined that, so long as the public's use of the roadway was not interrupted, the landowner retained his rights to the soil. *Id.* at 430. The court's examination of the nature of the public right-of-way was aligned very closely with the comprehensive view taken in *Montgomery*:

> In cities, it is customary to devote not only the surface of the street and the space above the street to public use, but the municipality may, and frequently does, occupy the soil beneath the surface for the accommodation of sewers, gas and water pipes, electric wires, and conduits for railroads. Where the city undertakes to occupy the space above or below the surface of the street for any purpose within the scope of the public uses to which highways may be put, the use by the owner of the fee must yield to the public use.

Id. at 429-30. Thus, even though the court conceded that a property owner retained the use of his property when it did not interfere with the public's use of the right-of-way, the court made clear that any such public use would take priority over the individual property owner's use.

Later, the Supreme Court adopted a viewpoint narrower than the expansive approach of *Montgomery* and *Colegrove*. In *Gurnsey v. Northern California Power Co.*, 160 Cal. 699 (1911), a power company placed electrical lines and poles along a public highway after it was granted a franchise "for the purpose of conducting and transmitting electric current for power, light and other necessary and useful purposes, over and along the county roads, bridges and highways of said Tehama county, and along the streets, alleys and avenues of the various unincorporated towns and villages in said county." *Gurnsey*, 160 Cal. at 702. The owner of the underlying land in an area over which the electrical lines ran sought to have them removed. The court noted that "the original occupation of the highway was not for lighting nor for furnishing power to the pumping plant, which are the only grounds upon which it can justify its occupation of the highway." *Id.* at 708. Evidence showed that, instead of purposes that would have aided the public's use of the right-of-way (such as lighting or watering of the roads), the electrical lines were originally "built purely for commercial purposes" to provide the sale of light and power to a nearby ranch. *Id.* The court did not order the removal of the electrical poles, but it did order the power company to pay compensation to the plaintiff. *Id.* at 709-11.

Unlike *Montgomery* and *Colegrove*, which sought to expand the boundaries of lawful uses of the public right-of-way, the court in *Gurnsey* focused on ensuring that any uses of the public right-of-way were consistent with the intended purpose that right-of-way was meant to serve. As the court said: "a purpose not incidental to the use of such highway, is inconsistent with the dedication of the highway to the use of the public." *Gurnsey*, 160 Cal. at 709. The *Gurnsey* line of reasoning sought to defend the public's right by closely examining the purpose of any proposed use of the right-of-way.

II. THE BELLO TEST.

In 2004, the appellate court in *Bello* addressed the trend towards accommodating the necessities of modern urban infrastructure and the need to ensure that right of the public to make use of the right-of-way was preserved. *Bello*, 121 Cal. App. 4th at 315-16. The *Bello* court created a "synthesis" between these two purposes and crafted a three-part test to determine whether a proposed use of the public right-of-way was lawful. *Id.* Under this test, a "proposed use of a public right of way should: (1) serve as a means, or be incident to a means, for the transport or transmission of people, commodities, waste products or information, or serve public safety; (2) serve either the public interest or a private interest of the underlying landowner that does not interfere with the public's use rights; and (3) not unduly endanger or interfere with use of the abutting property." *Id.* (citations omitted). In order to meet the test, a proposed use would have to satisfy all three requirements.

In *Bello*, a natural gas production company installed a four-inch metal pipeline for transporting gas along the shoulder of a local road. *Id.* at 306. Though the gas company had applied for a right-of-way encroachment permit that was approved by the county, the company did not seek or receive consent from a nearby landowner who owned the land over which the pipe was laid. *Id.* This landowner filed a complaint, seeking damages for trespass and an injunction to have the pipeline removed. *Id.* The court upheld the county's encroachment permit for the pipeline by applying the three-part test, and concluding that the pipeline was: (1) a safe and efficient method for transporting goods, (2) served the public interest by providing access to and encouraging the domestic production of natural gas, and (3) there was no evidence that the

pipeline, which was buried underground, interfered with or caused any damage to the landowners' property. *Id.* at 316-17.

The first prong of the *Bello* test encompasses both modern and future uses of the public right of way. *Id.* at 313. This follows the line of thought established in *Montgomery* and *Colegrove*, and follows the general trend in cases that have held that legitimate uses of the right-of-way may not always be known or anticipated. *See, e.g., Smith v. County of San Diego*, 252 Cal. App. 2d 438, 444 (1967) ("[a]ny use which was rendered necessary for the public by future development or discovery would also have been contemplated"); *Norris v. State of California ex rel. Dept. of Public Works*, 261 Cal. App. 2d 41, 47 (1968) (determining that use of the public right-of-way "should be presumed to be not merely for such purposes and uses as were known and customary, at that time, but also for all public purposes, present or prospective, whether then known or not, consistent with the character of such highways . . ."). In fact, a flexible view allowing for technological development in uses of the right-of-way has been the "approach that has been adopted invariably by California courts in right-of-way decisions since [1911]." *Bello,* 121 Cal. App. 4th at 313.

This does not mean, however, that any use of the public right-of-way is acceptable. The first prong of the *Bello* test makes clear that such uses must "serve as a means, or be incident to a means, for the transport or transmission of people, commodities, waste products or information, or serve public safety." *Id.* at 315-16. This calls back to the *Gurnsey* line of thought that sought to examine the underlying purpose of any proposed use of the right-of-way, to ensure that such a purpose was legitimate and did not unduly interfere with the intended uses of the right-of-way. Although the *Bello* test does not define what will qualify as a means or something incident to a means of transportation, there are enough examples provided by the court to extrapolate at least a rough range of options. Clearly, vehicular travel (such as cars, trains, trolleys and the like) is an approved use of the public right-of-way. Likewise, use of the public right-of-way for utilities, sewage, telecommunication conduits and similar means of moving goods or commodities may be acceptable, as long as all three elements of the test are met. In many situations, proposed uses of the public right-of-way will require analysis on a case-by-case basis.

The second and third prongs of the *Bello* test are concerned with protecting the interests of the public and the owner of property abutting on a proposed use of the public right-of-way. The second prong requires that any proposed use of the public right-of-way must be in the public interest or a private interest that does not interfere with the public's ability to make use of the right-of-way. *Id.* at 316. To ensure that such interference does not occur, any private encroachment into the public right-of-way must be authorized by a permit issued by an appropriate public agency. *See People v. Henderson*, 85 Cal.App.2d 653, 656-58 (1948) (explaining that an unpermitted private shed constructed within the public right-of-way was unlawful because it interfered with the public's right to make use of the whole of the right-of-way). Conversely, the third prong protects a private owner from a proposed use of the public right-of-way that may "unduly endanger or interfere with use of the abutting property." *Bello,* 121 Cal. App. 4th at 316. For example, in *Norris v. State ex rel. Dept. of Public Works*, 261 Cal.App.2d 41 (1968), the court determined that constructing a vista point and roadside rest area on land dedicated for use as a public highway was acceptable, but that same area could not be converted into a public campground or beach.

Bello may open the door to some uses of the right-of-way that are not readily apparent. For example, *Bello* relies in part on *In re Anderson*, in which the Court of Appeal ruled that a public market that was set up in the public right-of-way for five hours three mornings each week was a lawful use of the right-of-way. *In re Anderson,* 130 Cal. App. at 396. While a market with vendor stalls placed within the right-of-way would seem to violate the first prong of the *Bello* test by preventing the public from using the street for transportation, the *Anderson* court specifically notes that "no attempt has been made to close this highway to travel, a space considerably less than one-half the width of the roadway being set apart for the public stalls, permitting the movement of vehicles at all times in both directions over the balance of the thoroughfare." *Id.* at 397-98. Furthermore, nearby businesses had not complained that the public market was a "nuisance to [surrounding businesses] or detrimental or offensive to the conduct of [their] business." *Id.* at 397. Therefore, the public market provided for the conveyance of goods without unduly restricting the ability of the public to make use of the right-of-way for vehicular and pedestrian transportation. The *Bello* court cites *In re Anderson* as an example of an expansive interpretation of the right-of-way that simultaneously serves a transportation-related purpose in order to meet the requirements of the *Bello* test.

The *Bello* court, however, rejected some of the rationale used in the *In re Anderson* decision. For example, the court in *In re Anderson* gave great weight to the fact that that public market had been operating for over twenty years and had achieved the status of "a long continued custom." *Id.* at 399. The *Bello* test makes no mention of duration or historical custom as factors in testing the lawfulness of a proposed use of the public right-of-way. Similarly, the *Bello* court distinguished the *Gurnsey* standard, saying that the "rule of law announced by *Gurnsey* is applicable only to rights-of-way that have yet to be subjected to the 'other and further uses' that are incident to modern development." *Bello*, 121 Cal. App. 4th at 308. By choosing which parts of previous decisions to incorporate into the *Bello* test, the court indicated that it was not merely bowing to previous decisions. Instead, the *Bello* court adopted its own interpretation for governing lawful uses of the public right-of-way.

Because *Bello* is an appellate court decision from the First District Court of Appeal, it does not take precedence over century-old California Supreme Court decisions like *Gurnsey, Montgomery,* and *Colegrove.* If presented with the same issue, it is possible that the appellate court in San Diego could reach a different conclusion than in *Bello.* However, the clarity of the *Bello* test and its synthesis of the archaic strains of Californian public right-of-way jurisprudence into a simple three prong test make it likely that a court will give it serious consideration. For that reason, a conservative approach in analyzing uses of the public right-of-way would follow the standards laid out in the *Bello* test. This would minimize liability to the City in the event that such a standard is formally adopted by the Fourth District Court of Appeal in San Diego.

CONCLUSION

The *Bello* test is currently the clearest standard in California for analyzing the lawfulness of a proposed use of the public right-of-way. Any proposed use must meet all three requirements: (1) the use must serve as a means, or be incident to a means, for the transport or transmission of people, commodities, waste products or information, or serve public safety; (2) the use must serve either the public interest or a private interest of the underlying landowner that does not interfere with the public's use rights; and (3) the use may not unduly endanger or interfere with

use of the abutting property. This Office is prepared to offer analysis and advice on any specific projects or proposed uses on a case-by-case basis.

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By /s/

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