

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Request by Ryland Mews
Homeowners Association to
Use Eminent Domain to Acquire
Temporary Right of Entry on
Adjacent Property

DATE: August 21, 2009

RECOMMENDATION

Adoption of a resolution by the City Council finding and declaring that each of the conditions required under California Civil Code Section 1002 appear to exist and consenting to the acquisition of a temporary right of entry by eminent domain on adjacent property located at 440 North First Street ("Adjacent Property") by the Ryland Mews Homeowners Association (Ryland HOA).

OUTCOME

Adoption of the resolution will allow the Ryland HOA to use eminent domain to acquire a temporary right of entry over a portion of the Adjacent Property to complete repair work on the exterior of the Ryland Mews condominium project located at the 400 Block of First Street (at Bassett Street) ("Ryland Mews").

BACKGROUND

At the September 3, 2008 Rules and Open Government Committee, Mr. Michael Terrizzi, from the Law Offices of Plastiras & Terrizzi, requested that a proposed resolution to consent to an eminent domain proceeding by the Ryland HOA as a quasi-public entity, as defined under Civil Code Section 1002, be forwarded to the City Council for consideration. The Rules Committee referred this item to staff for further investigation and recommendation.

On September 9, 2008, the City received a letter from the Law Offices of Plastiras & Terrizzi with additional information to support the Ryland HOA's designation as a quasi-public entity pursuant to Civil Code Section 1002, as well as information regarding the Ryland HOA's efforts to negotiate an access agreement with the owner of the Adjacent Property. (Attachment A).

On September 30, 2008, staff from Planning, Building and Code Enforcement (PBCE) met with representatives from the Ryland HOA at Ryland Mews to inspect the site and to confirm the facts presented in the September 9, 2008 letter.

Based on that inspection, City staff determined that a small landscaping strip between the Adjacent Property and Ryland Mews was insufficient to allow the Ryland MOA to perform certain repair work to the exterior wall of Ryland Mews. After the inspection, our Office requested additional information from the Ryland HOA attorneys to support some of the facts presented in the September 9, 2008 letter. On October 10, 2008, the attorney for the Ryland HOA forwarded a report dated January 9, 2001 from Allana & Lippert, architects and engineers, a copy of the initial report is attached as Attachment B (Initial Report). The Initial Report described various leaks at Ryland Mews, but did not include a recommendation that the masonry walls be coated with an elastomeric paint.

Based on our review of the Initial Report, our Office requested additional information from the Ryland HOA to substantiate the need to coat the exterior masonry walls with the elastomeric paint. On March 7, 2009, the attorney for the Ryland HOA forwarded a letter dated January 14, 2009 from Karim Allana, CEO and President of Allana Buick & Bers, architects and engineers, a copy of which is attached (Attachment C). This letter described various leaks in the masonry wall at Ryland Mews and recommended that the masonry walls be coated (painted) with an elastomeric paint and the slab be sealed with a silicone sealant.

On May 18, 2009, City staff met with representatives from the Ryland HOA for another site inspection. Based on the information provide by the Ryland HOA and City staff site inspections, it appears that there is sufficient support for the Council to determine that the conditions required under Civil Code Section 1002 exist.

ANALYSIS

Pursuant to California Civil Code Section 1002, the power of eminent domain may be exercised by a private property owner to acquire a temporary right of entry upon adjacent property to repair or reconstruct land or improvements if certain conditions exist. Those conditions are as follows:

- (1) There is a necessity to do the repair or reconstruction work and there is a great necessity to enter upon the adjacent or nearby property to do the repair or reconstruction work because (A) the repair or reconstruction work cannot be done safely without entry, or the cost of performing the repair or reconstruction work without entry would be substantially higher; and (B) the property without repair or reconstruction adversely affects the surrounding community.
- (2) The right to enter upon the adjacent or nearby land will be exercised in a manner which provides the least damage to the property and the least inconvenience or

annoyance to the occupants or owners thereof consistent with satisfactory completion of the repair or reconstruction work.

- (3) The hardship to the person seeking to exercise the power of eminent domain, if that power is not exercised, clearly outweighs any hardship to the owner or occupant of the adjacent or nearby property.

In order for the Ryland HOA to utilize the provisions of Section 1002, the City Council must adopt a resolution containing the findings set forth in Code of Civil Procedure Section 1245.340. In lieu of the general findings required in a resolution to commence an eminent domain action, Section 1245.326 requires that the City Council find that each of the conditions required by Civil Code Section 1002 appears to exist. In addition, the resolution shall contain (i) a general statement of the public use for which the property is to be taken and a reference to the statute that authorizes the quasi-public entity to acquire property by eminent domain, and (ii) a description of the general location and extent of the property to be taken.

Based on the information provided by the Ryland HOA and pursuant to the applicable provisions of the California Civil Code and Code of Civil Procedure, our Office concluded as follows:

(a) Subject to satisfaction of certain conditions, Civil Code Section 1002 authorizes the Ryland HOA to use eminent domain to acquire a right of entry over the Adjacent Property to perform repairs to Ryland Mews to prevent water leakage in exterior walls. Pursuant to California Code of Civil Procedure Section 1245.326, the Ryland HOA would be deemed to be a "quasi-public entity" for purposes of using the power of eminent domain under these circumstances.

(b) The Ryland HOA has requested a temporary right of entry to use up to 22 parking spaces in the parking lot of the Adjacent Property located at 440 North First Street. The applicable spaces would be used to erect scaffolding to apply an elastomeric coating to prevent future water intrusion in Ryland Mews and to provide access to and from such scaffolding.

(c) Based on the information provided by the Ryland HOA and the subsequent due diligence by City staff, it does appear that each of the conditions required by Section 1002 does exist.

1. It appears, among other things, that there is a necessity to perform such work to prevent further water intrusion into the Ryland Mews exterior masonry walls and the cost of performing the repair work would be substantially higher without entry onto the Adjacent Property since there is virtually no exterior access to the applicable exterior walls available to the Ryland HOA to perform such repair work and

the subsequent potential failure of the exterior walls of Ryland Mews will adversely affect the health and welfare of hundreds of residents.

2. It appears that by using only a portion of the parking lot of the Adjacent Property and performing all the required work within a short period of time, the right of entry upon the Adjacent Property will be exercised in a manner which provides the least damage to the Adjacent Property and the least inconvenience or annoyance to the occupants and owners of the Adjacent Property.

3. It appears that the hardship on the Ryland HOA of not being able to make repairs to prevent further water intrusion into Ryland Mews clearly outweighs the limited intrusion onto the parking area of the Adjacent Property.

Based on the above, the City Council may consent to the use of eminent domain by the Ryland HOA under these circumstances.

PUBLIC OUTREACH/INTEREST

Our Office did contact the Adjacent Property owner and inform their attorney that the Ryland HOA had requested that the City consent to the use of eminent domain to obtain a temporary right of entry involving their property. Our Office also provided the Adjacent Property owner with copies of the documentation provided by the Ryland HOA. Furthermore, as required under CCP Section 1245.350, the Adjacent Property owner was provided written notice of the public hearing on this matter by first class mail not less than fifteen (15) days prior to the date of the hearing. This matter is not considered of "Significant Public Interest", and no additional outreach was done.

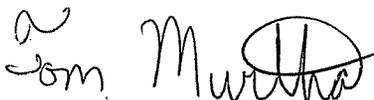
COORDINATION. This matter was coordinated with the City Manager's Office and with Planning, Building and Code Enforcement.

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BUDGET REFERENCE Not Applicable.

CEQA. Not a Project.

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By 
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cc: Debra Figone

For questions please contact Tom Murtha, Supervising Senior Associate Counsel, at 535-1200.