



Town of Atherton

MEMO FROM CITY ATTORNEY'S OFFICE

TO: CITY MANAGER

FROM: CITY ATTORNEY

DATE: February 15, 2017

SUBJECT: Cost Recovery for Fallen Trees Blocking Street

I have recently discovered that the Town was not recovering for the removal of trees that fall and block a roadway. Generally the Town removes enough of the tree to allow traffic to pass and leaves the remainder for the property owner.

It is my opinion that for a variety of reasons we are required to recover the cost of providing this service for the homeowner. First, there is a Constitutional provision that prohibits local entities from making a gift of public funds. Second, obstructing the street constitutes a public nuisance, and our Municipal Code clearly indicates that the Town shall establish cost recovery procedures so that the abatement of a public nuisance is at the expense of the person creating, causing, committing or maintaining the nuisance. The tree, even after it falls, remains the personal property of the homeowner. Removal of obstructions from roads is governed by traditional nuisance and trespass laws where permission to block the road is not obtained in advance from the local agency.

Obstructing a public road is declared by law to constitute a public nuisance (Penal Code § 370; Civil Code § 3479, AMC § 8.20.020). The law and the Municipal Code permit the immediate abatement of a nuisance caused by an obstruction of a roadway (AMC § 8.20.100). Abatement in an emergency can be by Town personnel or contractors. The minimum amount of work required to make the road usable is what should be conducted.

As mentioned above, the Municipal Code is rather explicit that costs of abating public nuisances in this instance should fall on the tree owner. It is irrelevant whether the tree was diseased or damaged ahead of time, or if the tree was downed by "an act of God". Those issues relate to negligence, not nuisance, and would only be an issue if Town property was damaged as a result of the incident. This memo only addresses the removal of the obstruction and the cost recovery for our response. By analogy, when the Police

Department tows a vehicle that is blocking a roadway, the owner of the car has to pay for that service. If a vehicle strikes a tree which subsequently falls across the road, the taxpayers are not responsible for the removal of the tree—the driver is liable for such abatement.

Aside from the Municipal Code, California Constitution, art XVI § 6 states that a city may not make a gift of public funds except for a public, meaning municipal, purpose. Whether a gift constitutes a public purpose is within the purview of the City Council; however, in this instance that authority is colored by the Municipal Code provision that seems to strongly require cost recovery from public nuisance situations. Given the clear value to an individual property owner of what amounts to public taxpayer funds in a situation where the Town has done nothing inappropriate, I would not suggest that the Council find that removal of a hazard obstructing the road is in fact a municipal purpose.

Two final thoughts. I realize that insurance law essentially says that acts of God, such as when wind knocks over a healthy tree, are not covered and that each property owner is responsible for the damage to their own property that results. That does not apply in this instance, since we aren't discussing damage to Town property. We are talking about an obstruction of a road by personal property that is owned by the homeowner. If there was damage, either to Town or neighbor property, then the normal issues of negligence would apply and it would hinge on whether the tree was in disrepair prior to the storm. That is simply not a factor in abating the nuisance. Second, it is correct that there was apparently a long-standing practice of the Town responding to downed trees in the road and absorbing that cost. That being the case, it is still a fact that the Municipal Code and the CA Constitution seem to require that we recover our costs, and while I'm sorry that we may have acted in error in the past, all I can do is point out the legal requirements in the present and suggest that we comply with the law to the best of our ability.