

BEFORE THE BOARD OF SUPERVISORS

OF THE

COUNTY OF FRESNO, STATE OF CALIFORNIA

RESOLUTION ADOPTING PUBLIC WORKS AND PLANNING POLICY REGARDING ENCROACHMENTS IN COUNTY RIGHTS OF WAY

WHEREAS, physical encroachments by adjoining or underlying property owners in the County’s highway rights-of-way are a nuisance *per se*, subject to abatement by the County, and can obstruct the right-of-way or constitute a safety hazard; and

WHEREAS, the Director of Public Works and Planning, as County Road Commissioner, is responsible under the California Streets and Highways Code for the maintenance of the County highway system and for addressing encroachments in the County highway rights-of-way; and

WHEREAS, the Board recognizes that some encroachments in the County’s highway rights-of-way do not obstruct the right-of-way or constitute a safety hazard; and

WHEREAS, the Board wishes to adopt a policy for addressing encroachments in the County’s highway rights-of-way which provides for a uniform approach, balances the risk of forfeiture by the property owner with public safety, and gives adequate discretion to the Department of Public Works and Planning to focus Department resources on the most serious encroachments.

NOW, THEREFORE, IT IS RESOLVED as follows:

1. The policy document attached hereto as **Exhibit A**, entitled Policies for Addressing Encroachments in the County Right-of-Way (“Policy”) is adopted effective January 1, 2021, unless this Board has not adopted fees for Steps 2 and 4 of the Policy by that date. In such case the Policy shall become effective upon the effective date of those fees.
2. The Director of Public Works and Planning is delegated authority to enter into license agreements in a manner consistent with the Step 4 of the Policy.
3. The Director of Public Works and Planning is delegated authority to initiate litigation pursuant to Streets and Highways Code section 1480, *et seq.*, as provided by Step 6 of the Policy.

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1 BE IT FURTHER RESOLVED, that this Resolution shall take effect immediately upon its
2 adoption by the Board.

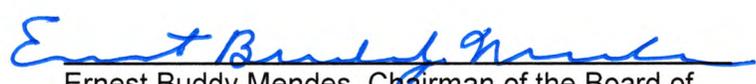
3 THE FOREGOING was passed and adopted by the following vote of the Board of
4 Supervisors of the County of Fresno this 18th day of August, 2020, to wit:

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6 AYES: Supervisors Brandau, Magsig, Mendes, Pacheco, Quintero

7 NOES: None

8 ABSENT: None

9 ABSTAINED: None

10 
11 Ernest Buddy Mendes, Chairman of the Board of
12 Supervisors of the County of Fresno

13 **ATTEST:**
14 Bernice E. Seidel
15 Clerk of the Board of Supervisors
16 County of Fresno, State of California

17 By: 
18 Deputy

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County of Fresno

Policies for Addressing Encroachments in the County Right-of-Way

Adopted: August 18, 2020

Revised: August 18, 2020

I. OBJECTIVES

Physical Encroachments by adjoining or underlying Property Owners sometimes exist in the County's Rights-of-Way. Some of these Encroachments are benign, not constituting an obstruction of the roadway or a safety hazard, but nevertheless benefitting the Property Owner. However, some of these Encroachments do obstruct the Right-of-Way or constitute a safety hazard.

An Encroachment constitutes a trespass on the County's Right-of-Way. As a nuisance *per se*, an encroachment is subject to abatement by the County. The owner of the fee title underlying the Right-of-Way is subject to the same general principles of trespass as is a member of the public. It is furthermore no less a trespass where the encroachment is on a portion of the Right-of-Way not used as a roadway.

Encroachments generally fall within the jurisdiction of the Department of Public Works and Planning, as the Director of Public Works and Planning serves as the *ex officio* County Road Commissioner. Under the Streets and Highways Code, the County Road Commissioner has authority to remove Encroachments or order the removal.

This Policy is intended to address Encroachments on a County-wide basis. The intent of the Board is to avoid a forfeiture by the Property Owner where safe and practicable, and to give the adequate discretion to the Department to focus Department resources on the most serious Encroachments.

This Policy is intended to provide for the administration of County resources. Under no circumstances shall this Policy be construed as granting an easement or any other permanent or irrevocable property right to any Property Owner for use of a Right-of-Way. Implied or prescriptive property rights cannot be obtained against the County under section 1007 of the Civil Code.

This Policy applies solely to Rights-of-Way as that term is defined below. This Policy does not apply to any other County easement or other right-of-way.

II. DEFINITIONS

"Board" means the Board of Supervisors of Fresno County.

"County" means the County of Fresno.

"Department" means the Fresno County Department of Public Works and Planning.

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“Director” means the Director of Public Works and Planning or the designee of the Director of Public Works and Planning.

“Encroachment” means any otherwise unlawful temporary or permanent physical improvement, structure, or other object in the Right-of-Way, regardless whether or not it obstructs a roadway, regardless whether it was intentionally installed or placed in the Right-of-Way, and regardless whether the Property Owner is at fault for its installation or placement.

“Property Owner” means all persons or entities with a legal interest in the property adjoining or underlying the Right-of-Way upon which the Encroachment lies, including without limitation any owner(s) (including all joint tenants or tenants-in-common), lessee(s) or other tenant(s), trustee(s), mortgagee(s), receiver(s), and other holder(s) of a legal interest.

“Right-of-Way” means any portion of the right-of-way comprising a “county highway” as that term is defined by section 25 of the Streets and Highways Code.

III. ROLES AND RESPONSIBILITIES

Department of Public Works and Planning

This Policy is intended to provide adequate flexibility to the Department to focus Department resources on the most serious Encroachments.

To implement this Policy, the Department may promulgate administrative regulations and forms, including form agreements and indemnity provisions, not inconsistent with this Policy.

Director of Public Works and Planning

As the head of the Department, whenever discretion is delegated by this Policy to the Department, the Director may exercise that discretion in any legal manner.

The Director also serves as the *ex officio* County Road Commissioner under section 2.52.040 of the Fresno County Code of Ordinances. Under this authority, the Director has the legal authority under Streets and Highways Code section 1480, *et seq.*, to order the removal of Encroachments from the County Right-of-Way and to seek recovery of County funds spent to remove an Encroachment.

Property Owner(s)

This Policy is intended to provide options for Property Owners who do not wish to forfeit an Encroachment in the County Right-of-Way, when said encroachment does not create an obstruction or safety hazard as determined by the Director. Failure by the Property Owner to cooperate with the Department may result in forfeiture of the Encroachment.

Other Department Heads

This Policy is not intended to impact the operation of other County Departments. The County Counsel or County Counsel's designee may review all administrative regulations and forms promulgated by the Department. Other departments may review applications and proposed actions by the Department as needed.

IV. PROCEDURES FOR CURE OF ENCROACHMENT

Step 1: Identification. The Department receives complaint of an Encroachment in or obstruction of Right-of-Way and initiates process at Department's discretion or Department initiates process on its own.

- a. Procedures. Absent identification and initiation of the process, the Department need not proceed to any subsequent step.
- b. Provisional and Parallel Actions and Remedies. At the Department's discretion, in a separate and parallel track to the process provided for by this Policy, the Department may undertake all other actions permitted by law relative to the Encroachment, the Right-of-Way, the fee underlying the Right-of-Way, or the Property Owner's property. This includes without limitation code enforcement action, construction, repairs, and the removal of encroachments under Streets and Highways Code section 1480, *et seq.*

Step 2: Analysis. The Department shall conduct a traffic safety hazard analysis to determine whether the Encroachment obstructs the Right-of-Way or constitutes a safety hazard.

- a. Summary Determination. The Department may skip this step, proceeding to step 3 upon a summary determination that the Encroachment is not an obstruction or safety hazard. Alternatively, if the Department determines summarily that the Encroachment does constitute an obstruction or safety hazard, it may proceed to step 6. The decision to make such a summary determination is subject to the discretion of the Director.
- b. Obstruction or Safety Hazard Determination. If the Property Owner fails to fully cooperate with the Department, or if analysis determines that the Encroachment is an obstruction or safety hazard, the Department shall consider the Encroachment to be an obstruction or safety hazard may proceed directly to step 6. If, following the traffic safety hazard analysis, the Department determines that the Encroachment is not an obstruction or safety hazard the Department shall proceed to step 3.
- c. Fee. The Department shall collect a fee in an amount to be determined by the Board from the Property Owner as a reasonable cost for performing this

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service. Failure by Property Owner to pay this fee shall be construed as refusal to cooperate.

- d. Revision of Determination. A determination made by the Department pursuant to this step that an Encroachment does not constitute an obstruction or safety hazard may be revisited at any time at the sole discretion of the Director if circumstances cause the Encroachment to become a safety hazard or an obstruction to vehicle, bicycle, or pedestrian traffic. Such circumstances may include, but are not limited to, changes in traffic, development, roadway, path, or sidewalk improvements or repair, whether or not initiated or needed by the County, and actions of the Property Owner.

Step 3: Cure by Permit. If the legal standard for issuing an encroachment permit under section 1460, *et seq.*, of the Streets and Highways Code is met, the Department may issue a statutory encroachment permit, upon application by the Property Owner, and close the case.

- a. Content of Application. Each encroachment permit application shall include a promise by all Property Owners to defend and indemnify the County for any injury arising from the Encroachment. The form of the promise to defend and indemnify the County may take whatsoever form the Department determines appropriate.
- b. Denial of Application or Failure to Submit. If the Department denies issuing an encroachment permit or if the Property Owner does not submit completed permit application, with promise by all Property Owners to defend and indemnify the County as provided herein above, the Department shall proceed to step 4.
- c. Expiration or Default. If permit expires or lapses or if the Property Owner violates the terms or conditions of the encroachment permit, the Department may return to step 1 at its discretion.
- d. Fee. Property Owner is responsible for the payment of all applicable fees. Failure by Property Owner to pay fees shall be construed as failure to submit a completed application.

Step 4: Cure by License. The Director may enter into a license agreement on behalf of the County with each Property Owner to allow the Encroachment to remain, and close the case.

- a. Content of Agreement. Although the Director is authorized to use any form which the Director deems appropriate, a license agreement must include, at a minimum, the following terms:

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1. The license agreement shall describe the Encroachment with sufficient particularity to enable enforcement of the terms of the agreement.
 2. Property Owner acknowledges that the Encroachment was made unlawfully, that the Encroachment is subject to code enforcement action by the County, and that the County may order the Encroachment removed or may remove the Encroachment at Property Owner's sole expense.
 3. Property Owner acknowledges that the County has initiated code enforcement action against the Property Owner due to the Encroachment, and that the License Agreement operates in part to temporarily stay that code enforcement action.
 4. Property Owner acknowledges that the County may record a notice of pending code enforcement action against the Property Owner's parcel. The County is not required to remove the notice of pending code enforcement action until the Property Owner's property is in compliance.
 5. Property Owner shall inform Property Owner's successor in interest of the existence and unlawful nature of the Encroachment and shall inform any subsequent purchaser of the existence of the license agreement. Failure to so inform a successor in interest shall constitute a breach of the license agreement by the Property Owner.
 6. Property Owner will defend and indemnify the County against damages, costs, and fees alleged to have arisen in whole or in part from the Encroachment.
 7. Breach of the license agreement by Property Owner entitles the County to immediate cancellation of the license agreement, immediate removal of the Encroachment and costs for removal, damages, and any other remedy available at law or equity.
 8. The license agreement is personal to the Property Owner and does not inure to the benefit of third-parties, including any successor in interest.
 9. The Director may cancel the license agreement and order the removal of the Encroachment on five days' notice. If the Encroachment presents a safety hazard or obstruction, in the sole discretion of the Director, the Director may immediately cancel the license agreement and employ whatever remedies are available at law or equity.
 10. The agreement must be executed by every Property Owner. The Director may enter into new agreements with any successive Property Owner on identical terms as the original agreement so long as the determination that the encroachment does not constitute a safety hazard or obstruction remains unchanged.
 11. Any other term necessary to protect the interests of the County.
- b. Directory may Decline Agreement. The Board acknowledges that circumstances particular to an Encroachment or Right-of-Way may not warrant

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the agreement described in this Step 4. If the Director, in the Director's sole discretion, declines agreement, the Department shall proceed to step 5.

- c. Expiration or Default. If agreement expires or lapses or if an event of default occurs, the Department shall follow procedures in the agreement and may return to step 1 at its discretion.
- d. Fee. The Department shall collect a fee in an amount to be determined by the Board from the Property Owner as a reasonable cost for preparation and administration of the agreement. Failure by Property Owner to pay this fee shall be construed as refusal to cooperate.
- e. Failure by Property Owner to Cooperate. In the event the Property Owner fails to cooperate in any way, including without limitation by refusal of any Property Owner to execute the agreement or by failure to pay the fee identified in the immediately preceding paragraph, the Department may, in sole discretion of the Director, may proceed either to step 5 or to step 6.

Step 5: Cure by Vacation. If the legal criteria for vacation are met, the Department or property owner may petition the Board to vacate or partially vacate the Right-of-Way. Vacation of the Right-of-Way by the Board results in a case closure.

- a. Considerations by Department. The Department should consider, when determining whether to pursue a vacation, the likelihood of needing the portion of the Right-of-Way to be vacated, projected need for additional right-of-way, the nature of Encroachment, compatibility of vacation with the General Plan or other specific or community plans, traffic studies, potential population growth and further development, etc.
- b. Declination by Department. If the Department declines to pursue a vacation, it may proceed to step 6 once it has notified the Property Owner of the option to petition the Board for vacation.
- c. Further Action while Vacation Pending. Unless directed to the contrary by the Board, the Department need not wait until Board has ruled on any application for vacation in order to proceed to step 6.
- d. Declination by the Board. If Board declines to vacate Right-of-Way or a portion thereof, the Department shall proceed to step 6.
- e. Fee. Property Owner is responsible for the payment of all applicable fees.

Step 6: Cure by Removal. Director, as the County Road Commissioner, may order the removal of the encroachment or remove it at the Property Owner's expense under Streets

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and Highways Code section 1480, *et seq.* Removal of the encroachment results in case closure.

- a. Removal Inappropriate. If Director, in the Director's discretion, declines to remove the encroachment or order its removal, the Department shall proceed to step 7.
- b. Civil Proceedings. If the encroachment is removed at County expense, the Director may institute a civil action to recover costs pursuant to Streets and Highways Code section 1480.5 without direction from the Board.

Step 7: Documentation. The Department shall document the steps taken in whatsoever form the Department elects, and may close the case.

V. APPEAL

Except as otherwise provided by the County Code of Ordinances or by other law, no action by the Director or Department under this Policy is appealable, regardless whether that action arises from an exercise of discretion.