

**AGENDA
ITEM**

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AGENDA STAFF REPORT

DATE: November 7, 2018

TO: Mayor and City Council

APPROVED BY: David Dale, City Manager 

PREPARED BY: Ralph B. Morales, Building/Planning/Code Enforcement Manager 

SUBJECT: Second Reading and Adoption of Ordinance No. 1188 - An Ordinance Adding Chapter 1.28 of Title 1 to the Municipal Code to Recover Costs and Attorneys' Fees in Nuisance Abatement Matters

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Recommendation:

Second Reading of the City Council approval of Ordinance No. 1188 Chapter 1.28 of Title 1 to The Municipal Code recovering costs and attorneys' fees in nuisance abatement matters.

Background:

In 2017 the city deemed two properties 1233 C.N. Perry and 1235 C.N. Perry as a nuisance due to over grown weeds, trash, fire damage structure and over tree. At which time city staff conduct the cleaning of two properties costing the city crew time and material as well as attorney time to prepare and file warrants to the courts before any cleaning could be conducted. Unfortunately, attorney fees could not be recaptured since no ordinance has been set in place.

Discussion & Analysis:

The proposed ordinance will allow staff to charge the property owner attorney fees when it goes through legal process. At the Regular Meeting of October 17, 2018 the Calexico City Council introduced and waived first reading of Ordinance No. 1188.

Fiscal Impact:

None.

Coordinated With:

City Attorney.

Attachment:

Ordinance No. 1188 - An Ordinance Adding Chapter 1.28 of Title 1 to the Municipal Code to Recover Costs and Attorneys' Fees in Nuisance Abatement Matters.



ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CALEXICO, CALIFORNIA, ADDING CHAPTER 1.28 OF TITLE 1 TO THE CALEXICO MUNICIPAL CODE RELATING TO RECOVERY OF COSTS AND ATTORNEYS' FEES IN NUISANCE ABATEMENT MATTERS AND AMENDING SECTION 1.26.180

WHEREAS, the City of Calexico ("City") is authorized by California Constitution, Article XI, Section 7 to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws; and

WHEREAS, code enforcement continues to persist as a problem for the City and its departments devote significant personnel to code enforcement efforts; and

WHEREAS, with increasing population and concentration of citizens, code enforcement has become and remains a necessity for the City. With these changes comes the expectation from the citizenry for better property upkeep, which requires more action from code enforcement personnel; and

WHEREAS, code enforcement is complex and, therefore, there is a need for many tools, including cost recovery tools, to help and maintain an effective, efficient, and responsive enforcement of the City's codes; and

WHEREAS, California Government Code Section 38771 authorizes the City to declare what constitutes a nuisance; and

WHEREAS, California Government Code Sections 38773, 38773.1, and 38773.5 authorize the City to provide for abatement of nuisances at the expense of persons creating, causing, committing, or maintaining them, and provide for recovery via placement of liens on property and special assessments by following certain procedures; and

WHEREAS, California Government Code Section 38773.5 authorizes the City to enact an ordinance providing for the recovery of attorneys' fees in any action or proceeding to abate a nuisance, provided that, among other things, such ordinance allows for the recovery of attorneys' fees by the prevailing party in such action or proceeding, not just the City; and such attorneys' fees may not exceed the reasonable attorneys' fees incurred by the City in the action or proceeding; and

WHEREAS, California Government Code Section 53069.4 authorizes the City to make any violation of any ordinance subject to an administrative fine or penalty; and

WHEREAS, all other prerequisites to the adoption of this ordinance have properly taken place.

NOW, THEREFORE, the City Council of the City of Calexico does hereby ordain as follows:

SECTION 1. Amendment to Section 1.26.180 of the Calexico Municipal Code. Calexico Municipal Code Section 1.26.180 – *Recording of lien* is hereby amended to read as follows:

“1.26.180 – Recording of lien.

Thirty days following the adoption of a resolution by the city council imposing a lien the city clerk shall file the same as a judgment lien in the office of the county recorder of Imperial County, California. The lien may carry such additional administrative charges as set forth by resolution of the city council.”

SECTION 2. Addition to Title 1 of the Calexico Municipal Code. Calexico Municipal Code Chapter 1.28 is hereby added to Title 1 of the Calexico Municipal Codes to read as follows:

“Chapter 1.28 – RECOVERY OF COSTS

1.28.010 – Recovery Authorized.

A. Any violation of the Calexico Municipal Code is hereby determined to constitute a public nuisance. Additionally, the existence of any condition or use which poses a threat to the public health or safety or a condition that constitutes a nuisance under Civil Code sections 3479 and 3480 are hereby determined to constitute a public nuisance. In addition to any other remedy available to the city, in any civil, criminal or administrative action, proceeding or matter commenced by the city to abate such a public nuisance, to enjoin a violation of any provision of this Municipal Code, or to collect a civil or criminal penalty or other amount due to the city as the result of any such public nuisance, the city shall be entitled to recover from the defendant in any such action costs and attorneys’ fees incurred by the city in such action, proceeding or other matter.

1.28.020 – Definition of Costs

A. Definition of Costs. As used in this section, costs shall have the meaning set forth in California Code of Civil Procedure section 1033.5, as may be amended from time to time, including, without limitation, attorneys’ fees if elected by the city pursuant to section 1.28.030. In addition to such items, costs shall also include, but are not limited to, the following:

1. Personnel costs of the city, as actually incurred by the city or based on established rates of employee costs as adopted by resolution of the city council from time to time, in connection with the nuisance. Such personnel costs shall include, but not be limited to, the costs incurred by the city to pay any contractor to abate a public nuisance.

2. All costs of administrative hearings, including, hearing officer costs and reporter costs.
3. All costs to investigate or inspect a nuisance or the enforcement or abatement efforts.
4. All costs to prepare notices, specifications, contracts or any other documentation relating to the nuisance.
5. All costs incurred to rehabilitate, repair, or demolish a building, structure, or property, less any salvage value relating thereto.
6. Accrued interest at the maximum rate established by law.
7. All other expenses actually incurred that are made necessary by the City's enforcement or abatement efforts.

1.28.030 – Recovery of Attorneys' Fees

A. Attorneys' Fees. The prevailing party in any judicial action, administrative proceeding, or special proceeding to abate a nuisance may recover its incurred attorneys' fees, provided that the city elected, at the initiation of such individual action or proceeding, to recover its own attorneys' fees. In no judicial action or administrative proceeding shall an award of attorneys' fees to a prevailing party exceed the amount of reasonable attorneys' fees incurred by the city in the judicial action or administrative proceeding.

B. In addition to any other determination of prevailing party authorized pursuant to applicable law, the city shall be considered a prevailing party entitled to attorneys' fees under subsection A when it can demonstrate that:

1. Its lawsuit was the catalyst motivating the defendant to provide the primary relief sought;
2. The lawsuit was meritorious and achieved its result by "threat of victory;" and
3. The city reasonably attempted to settle the litigation before filing the lawsuit.

1.28.040 – Collection of Costs

A. Itemization of Costs. The city manager, or designee, shall keep an itemized report of the costs incurred by the City in the abatement of a public nuisance, in addition to any accrued fees and penalties due.

B. Civil Actions. In any civil action, the city may seek recovery of costs (including any costs incurred in any related administrative matter) as set forth in California Code of Civil Procedure Section 1033.5, subsection (c)(5).

C. Lien Procedure. This Section is enacted pursuant to Government Code Section 38773.1, as it now exists or may be amended from time to time, as well as any other applicable law. In the event the city decides to collect abatement costs as a lien, it shall impose such lien pursuant to this section:

1. The property owner may be invoiced for the total costs as indicated on the itemized report.

2. If payment is not received within fifteen (15) days of the invoice date, the itemized report shall be submitted in writing to the city clerk. Any such report may include the abatement costs for any number of properties and abatements, whether or not such properties are contiguous.

3. Upon receipt of the itemized report, the city clerk, or his or her designee, shall serve notice of the lien in the same manner as summons in a civil action in accordance with Code of Civil Procedure section 415.10 *et seq.* If the owner of record, after diligent search cannot be found, the notice may be served by posting a copy thereof in a conspicuous place upon the property for a period of ten days and publication thereof in a newspaper of general circulation in Imperial County. The period of notice commences upon the first day of publication and terminates at the end of the tenth day, including therein the first day. Publication shall be made on each day on which the newspaper is published during the ten-day period.

4. After notice has been served, the lien shall be recorded in the Imperial County recorder's office and, from the date of recording, shall have the force, effect and priority of a judgment lien.

5. The lien shall identify:

(a) The amount of the lien;

(b) The city as the agency on whose behalf the lien is imposed;

(c) The date of the abatement order;

(d) The street address, legal description and assessor's parcel number of the parcel on which the lien is imposed; and

(e) The name and address of the recorded owner of the parcel.

6. In the event that the lien is discharged, released or satisfied, through either payment or foreclosure, notice of the discharge containing the information specified in subsection 5 shall be recorded by the city clerk.

7. A lien may be foreclosed by an action brought by the city for a money judgment.

8. The city may recover from the property owner any costs incurred in the processing and recording of the lien and providing notice to the property owner as part of its foreclosure action to enforce the lien.

D. Special Assessment Procedure. This Section is enacted pursuant to Government Code Section 38773.5, as it now exists or may be amended from time to time, as well as any other applicable law. In the event the city decides to collect abatement costs as a special assessment, it shall impose such special assessment pursuant to this section:

1. The property owner may be invoiced for the total costs as indicated on the itemized report.

2. If payment is not received within fifteen (15) days of the invoice date, the itemized report shall be submitted in writing to the city clerk. Any such report may include the abatement costs for any number of properties and abatements, whether or not such properties are contiguous.

3. If the invoice is not timely paid, the city clerk shall provide written notice to the property owner by certified mail, if the property owner's identity can be determined from the county assessor's or county recorder's records. The notice shall be given at the time of imposing the assessment and shall specify that the property may be sold after three (3) years by the tax collector for unpaid delinquent assessments. The notice shall inform the owner of the pending special assessment, and the date, time and location of the public hearing where the city council will consider imposing the itemized report as a special assessment against the property. The hearing shall be conducted no less than ten days from service of the notice.

4. At the hearing and after considering the relevant evidence, the city council may adopt a resolution confirming the itemized report and assessing the report as a special assessment against the property. The city clerk shall then provide all documentation necessary to the county to enter such assessment. After entry, the assessment may be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for ordinary municipal taxes. The property may be sold after three years by the tax collector for unpaid delinquent assessments. The tax collector's power of sale shall not be affected by the failure of the property owner to receive notice. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to the special assessment. However, if any real property to which the cost of abatement relates has been transferred or conveyed to a bona fide purchaser for value, or if a lien of a bona fide encumbrancer for value has been created and attaches thereon, prior to the date on which the first installment of the taxes would become delinquent, then the cost of abatement shall not result in a lien against the real property but instead shall be transferred to the unsecured roll for collection.

5. Subject to the requirements applicable to the sale of property pursuant to section 3691 of the Revenue and Taxation Code, the city may conduct a sale of vacant residential developed property for which the payment of that assessment is delinquent.

6. Notices or instruments relating to the special assessment shall be entitled to recordation.

1.28.050 – Remedies Cumulative

The remedies contained in this section are cumulative to one another and to any other remedy available by law or in equity to the city.”

SECTION 3. Effective Date. This Ordinance shall take effect thirty (30) days after its adoption.

SECTION 4. Severability. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance, or any part thereof is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion of this ordinance or any part thereof. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof, irrespective of the fact that any one or more section, subsection, subdivision, paragraph, sentence, clause or phrase be declared unconstitutional. If for any reason any portion of this ordinance is found to be invalid by a court of competent jurisdiction, the balance of this ordinance shall not be affected.

SECTION 5. Certification. The City Clerk shall certify the passage of this Ordinance and shall cause the same to be entered in the book of original ordinances of said City; shall make a minute passage and adoption thereof in the records of the meeting at which time the same is passed and adopted; and shall, within fifteen (15) days after the passage and adoption thereof, cause the same to be published as required by law, in a local newspaper of general circulation and which is hereby designated for that purpose.

SECTION 6. CEQA. The City Council finds that this Ordinance is not subject to the California Environmental Quality Act (CEQA) pursuant to Sections 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in Section 15378) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential for resulting in physical change to the environment, directly or indirectly. **PASSED, ADOPTED, AND APPROVED** by the City Council of the City of Calxico at the regular meeting this ___ day of _____ 2018.

Lewis Pacheco, Mayor

ATTEST:

Gabriela T. Garcia, City Clerk

APPROVED AS TO FORM:

Carlos Campos, City Attorney

STATE OF CALIFORNIA)
COUNTY OF IMPERIAL)
CITY OF CALEXICO)

I, Gabriela T. Garcia, Deputy City Clerk of the City of Calexico, California, do hereby certify that the foregoing Ordinance was adopted at a regular meeting of the City Council of the City of Calexico held on the ___ day of _____ 2018, by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

Gabriela T. Garcia
City Clerk