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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

SAN PASQUAL VISION PLAN IMPLEMENTATION #8

INTRODUCTION

On June 27, 2005, the City Council approved a new Council Policy, 600-45, titled "Protection of Water, Agricultural, Biological and Cultural Resources within the San Pasqual Valley." The purpose of the policy was to ensure the long-term protection of the water resources, agricultural areas, sensitive native habitats, and unique scenic qualities in San Pasqual Valley. Much of San Pasqual Valley is owned by the City. That City-owned land is an asset credited to the financial accounts of the Water Department, which is a separate enterprise fund from the City's general fund. The Council Policy sets forth eight steps to implement the protection of these resources; the eighth identifies possible ways to ensure this long-term protection. The possible options set forth in the Council Policy are: 1) presenting an amendment to the Charter to the electorate, 2) creating and conveying an agricultural conservation easement for the benefit of the public, 3) dedicating the land as parkland within the meaning of Charter section 55, and 4) analyzing the applicability of the Williamson Act to City-owned agricultural land. The Policy recognizes the City Water Department's ownership of the property and the need to reimburse the Water Department for the loss of any property rights. This report analyzes the applicability and effect of each of these options.

DISCUSSION

Either an amendment to the City Charter or an agricultural conservation easement would protect the agricultural nature of the Valley.[1] The last two options, dedication of the area as parkland pursuant to Charter section 55 and entering into contracts pursuant to the Williamson Act, are inapplicable to the use of City land for commercial agriculture.

[1]Although the Land Development Code does not define "agriculture" or "agricultural uses" in section, 113.0101, definitions, appropriate agricultural uses are set forth in the zoning regulations. SDMC § 131.0112(a)(2). These uses are agricultural processing of crops or animals grown or raised on the premises, aquaculture facilities, dairies, horticulture nurseries and greenhouses, raising and harvesting of crops for consumption or commercial purposes, and the raising, maintaining, and keeping of animals for private or commercial purposes.

Much of San Pasqual Valley is owned by the City, but more specifically by the Water Department. The Water Department is an enterprise fund pursuant to Charter section 53. As such, the financial accounts of the Water Department are maintained separately from the General Fund, and assets of the Water Department may not generally be used for General Fund purposes without compensation to the Water Department. The subject of the appropriate uses of Water Department land has been the subject of numerous opinions from this office. City Att'y MOL No. 2005-10 (May 13, 2005); 1992 MOL 493; 1980 Op. City Att'y 69; 1980 Op. City Att'y 83.

In addition to the Charter requirement that the Water Department be recompensed for any loss in value due to restrictions placed upon the land, the land is also subject to bond covenant restrictions pursuant to a Master Installment Purchase Agreement [MIPA]. These restrictions require, among other things, the payment of fair market value for any loss in value, if the property is material to the operations of the City's water system.

To properly analyze the cost of restricting the land to agricultural use under any option, appraisals would need to be conducted in accordance with the MIPA. In addition, the Water Department's operational needs would have to be assessed to determine what impact such a restriction would have. Those financial and operational analyses are beyond the scope of this report.

1. Amendment to the City Charter

A Charter amendment could be written similarly to Charter section 55, which requires a vote of 2/3 of the electorate to change the use from dedicated parkland. Section 223 of the San Diego City Charter provides for the amendment of the Charter pursuant to Article XI of the California Constitution, section 3(b) and California Elections Code section 9255(a)(2). An amendment to the City Charter would need to be approved by a majority of the qualified voters. The Council may, by ordinance, cause the proposed amendment be placed on the ballot of any general or special election. SDMC § 27.0503.

2. Creation and Conveyance of a Conservation Easement or Dedication

The California State Legislature has declared that "the preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is one of the most important environmental assets of California" and has encouraged the creation of conservation easements. Ca. Civ. Code § 815.A conservation easement is "any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominately in its natural, scenic, historical, agriculture, forested, or open-space condition." Ca. Civ. Code § 815.1. In other words, the conveyance of the interest in property must: 1) be properly executed by or on behalf of the land owner, 2) have terms binding on successive owners, and 3) be for the purpose of retaining land predominately in its natural, scenic, historical, agricultural, forested, or open-

space condition. The conveyance of the conservation easement can be made by any lawful method for the transfer of real property. Ca. Civ. Code § 815.2.

The conveyance of a conservation easement can only be made to specific parties: 1) a tax exempt organization pursuant to section 501(c)(3) that is qualified to do business in this state and which has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use; 2) any state, city, or county entity otherwise authorized to acquire and hold title to real property if the conversation easement is voluntarily conveyed; or 3) a federally recognized California Native American tribe or non-federally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission. Ca. Civ. Code § 815.3. The City of San Diego clearly falls in the second category. The City of San Diego is authorized to "own and acquire property within or without its boundaries for either governmental or proprietary, or any municipal purpose…." San Diego Charter § 1. In addition, cities are authorized to purchase, lease, receive, hold, and enjoy real and personal property, and control and dispense of it for the common benefit. Ca. Gov. Code § 37350.

Conservation easements are perpetual. Ca. Civ. Code § 815.2. The City of San Diego's Water Department, as grantor, would retain all interests in the land and rights of use that were not transferred and conveyed. Ca. Civ. Code § 815.4. However, since the use of the property would become limited by the terms of the easement, the Water Department's Enterprise Fund must be reimbursed for any reduced value of the property. City Att'y MOL No. 2005-10 (May 13, 2005). Pursuant to the California Farmland Conservancy Program Act, the California Department of Conservation has some grants available to fund preservation of agricultural lands. *See*, Ca. Pub. Res. Code § 10200 et seq.; www.consrv.ca.gov/DLRP/qh_grants.htm. Finally, the document creating the easement must be recorded in the County Recorder's office. Ca. Civ. Code § 815.5. A sample deed of agricultural conservation easement from the California Department of Conservation is attached.

Because an easement is an interest in the land of another, generally a person cannot have an easement on his or her own land. The two interests are deemed to have merged, thereby extinguishing the easement. Miller & Starr, California Real Estate 3d, § 15:75 (2000). However, an important exception occurs when the interests are unequal. In that case, the interests do not merge. Ownership in fee and ownership of a conservation easement for the public benefit are unequal interests, such that these two interests do not merge. The City can both own real property in fee simple, through its Water Department, and record easements, such as an agricultural conservation easement, for a public benefit without the fee simple title merging with the easement. 1996 MOL 481. It is not known if the perpetual nature of the easement can be removed; the statute states the easement is "perpetual in duration." Ca. Civ. Code § 815.2(a). This permanency has yet to be challenged.

3. Dedication of City-owned Portions of San Pasqual Valley as Parkland

Dedicated parkland is City-owned land that has been dedicated for use as parkland by ordinance. Pursuant to Charter section 55, land that has been dedicated as parkland may only be used for those purposes. The pertinent portion of Charter section 55 specifies:

> All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose. However, real property which has been heretofore or which may hereafter be set aside without the formality of an ordinance or statute dedicating such lands for park, recreation or cemetery purposes may be used for any public purpose deemed necessary by the Council.

The question is whether agricultural land is a proper use of dedicated parkland. The legal uses of dedicated parkland have been the subject of numerous opinions from this office. Two of the more comprehensive opinions regarding permissible uses are 1986 City Att'y MOL 561 and Memo to Marcia McLatchy, October 28, 1997 (attached). The general rule is that dedicated parkland must be used solely for park and recreational purposes. Some of the many uses upheld by the courts are hotels, restaurants, museums, art-galleries, zoological and botanical gardens, and conservatories. Generally speaking, the courts have tended to uphold recreational and cultural uses that furthered the public's enjoyment of the park. 59 Am. Jur. 2d § 19; *Spires v. City of Los Angeles*, 150 Cal. 64 (1906), upholding the erection of a library in a dedicated park. Cases analyzing the leasing of dedicated parkland to businesses have upheld those leases that did not restrict the public's enjoyment of the parkland. 18 ALR 1246, 1262-1264; 63 ALR 484, 489-490; *Harter v. San José*, 141 Cal. 659 (1904), upholding a hotel lease on dedicated parkland. Therefore, the use of dedicated parkland for a garden open to the public would be a permissible use of dedicated parkland, however, the operation of a private commercial agricultural business, closed to the public, would not be.[2]

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[2]Although one court has held that the use of the interior of a mile racetrack for agricultural purposes was not inconsistent with the dedication of the park to the public; the opinion is scarcely half a page long and there is no analysis of the facts or issues. *Huff v. City of Macon*, 117 Ga. 428 (1903). Because there is no presentation of facts or analysis of such issues as whether the agriculture was in support of a public purpose (such as fodder for the race horses); whether it was infeasible to use the land, given its placement in the middle of the track, for any other public purpose; whether the agricultural use was permanent or temporary; and whether the agriculture was open to the public and in some way in furtherance of a public recreational or

In addition, as discussed earlier, Water Department assets, including land, must not be used for any purpose that reduces their value to the Water Department, without compensation to the Water Department Enterprise Fund. This Office has previously opined that Water Department property may be "designated" for passive park use, when the property is not presently needed for Water Department purposes. 1991 Report to Mayor and Council 1580, 1582-1583. The difference between "designation" and "dedication" of parkland is that a "designation" is an action taken by Council by resolution and a "dedication" is an action taken by Council by ordinance. Council Policy 700-17; San Diego Charter § 55. An action taken by resolution requires only one Council hearing, at which time the item passes by a majority vote and is effective immediately. San Diego Charter §§ 15; 16; 17. Therefore, the designation or un-designation of land as parkland is a fairly simple legislative action taken by the Council. However, an action taken by ordinance is passed only after an introduction that occurs at least twelve days prior and is not effective until 30 days after its passage. San Diego Charter §§ 15; 16; 17. Further, once land has been dedicated by the Council as parkland, a vote of two-thirds of the electorate is required to release the land from that dedication. Therefore, dedicating land as parkland pursuant to Charter section 55 is a more permanent change in the use of the land than a designation. As set forth in the above mentioned 1991 Report, such a permanent change in the use would require compensation to the Water Department.

4. Application of the Williamson Act to Publicly-owned Agricultural Land

The Williamson Act, codified at Government Code section 51200 et seq., was enacted for the purpose of allowing cities and counties to preserve agricultural land via voluntary contracts with the landowners. The process requires public notice of the intent to establish the preserve, including a legal description or an assessor's parcel number. The preserve must be at least 100 acres, unless the city or county finds that smaller preserves are necessary due to unique characteristics of the agricultural enterprises in the area and that the establishment of the smaller preserves is consistent with the general plan.

The landowner receives the benefit of having the land taxed at a rate consistent with its actual use, instead of the potential market value. Ca. Const. art. 13, § 8. However, the City of San Diego is already exempt from paying taxes on property it owns. Ca. Const. art. 13, § 3(b). Therefore, the benefits of the Williamson Act do not apply to the City of San Diego. Additionally, the City can direct the uses of City-owned property through the terms of the leases it approves.

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cultural use, this lone ruling is not dispositive of this issue. The opinion was relied upon in a few cases as part of string of cited cases, but has not been cited in any California case.

CONCLUSION

There are two options that would insure the long-term protection of the resources of the San Pasqual Valley: an amendment to the City Charter or an agricultural conservation easement. Amending the City Charter as proposed would require a two-thirds vote of the people to allow any changed use. For this same reason, this option will be more difficult to implement, as it requires a majority vote of the electorate to become effective. The creation of an agricultural conservation easement can be accomplished by any legal instrument capable of transferring an interest in real property, such as a grant deed and is perpetual in nature. The dedication of the land as parkland under Charter section 55 is inconsistent with the use of the land for agriculture. Finally, the Williamson Act is inapplicable to City-owned land. There is no tax-benefit to the City, and the use of our own property can be controlled through the leases that are approved for that property. Any action that is taken to limit the use of the land in San Pasqual Valley must consider the operational impact to the Water Department, as well as provide for financial compensation to the Water Department.

Respectfully submitted,

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