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REPORT TO HONORABLE
MAYOR AND CITY COUNCILMEMBERS

DEDICATION OF REAL PROPERTY FOR PARK AND RECREATION PURPOSES PURSUANT TO CALIFORNIA SENATE BILL NO. 1169 AND SAN DIEGO CHARTER SECTION 55

INTRODUCTION

San Diego Charter section 55 (Section 55) provides for the dedication of property owned in fee by the City for park and recreation purposes by means of a City Council ordinance or statute by the State Legislature. On September 12, 2012, California Senate Bill No. 1169 (SB 1169) was chaptered amending California Fish and Game Code section 2831. Section 2831(a) dedicates for park and recreational purposes City of San Diego lands designated as of January 1, 2013, as open space lands in a document entitled "Declaration of the Dedication of Land." The Declaration is to be approved by the City Council by a resolution. *See* SB 1169 attached as Attachment A. SB 1169 reserves to the City Council the authority to grant easements for utility purposes in, under, and across dedicated property, if those easements and facilities do not significantly interfere with the park and recreational use of the property. The City Council will be considering for approval a resolution that includes a list of designated open space property owned in fee by the City, and thereby dedicating the property for park and recreation purposes pursuant to SB 1169.

San Diego Canyonlands (SDC) presented to the City a list of approximately 11,000 acres of property that SDC recommends for dedication by SB 1169. Some of the properties proposed by SDC for dedication are outside of the City's jurisdictional limits. Some of the properties proposed by SDC for dedication do not meet the conditions outlined in Council Policy 700-17 (CP 700-17). Some of the properties proposed by SDC for dedication have been identified by SANDAG (San Diego Association of Governments) as possibly being needed for future light rail or railroad purposes. Staff from the Park and Recreation Department, the Real Estate Assets Department, and other departments as necessary, reviewed the list provided by SDC and recommended 5,881 acres for dedication at the Land Use and Housing Committee (LU&H) meeting held on October 17, 2012. At the conclusion of the discussion on this item, LU&H recommended that the City Council dedicate all of the approximately 11,000 acres proposed by SDC and any additional property recommended by the Community Planning Groups. LU&H also requested that this Office advise the City Council on issues raised at the meeting regarding permitted uses for, and restrictions on, property dedicated for park and recreation purposes.

QUESTIONS PRESENTED

1. May real property that is owned in fee by the City and located outside of the City's jurisdictional boundaries be dedicated for park and recreation purposes pursuant to Section 55?

2. May City Council waive CP 700-17, Policy on Dedication and Designation of Park Lands, to include real property that does not meet the conditions provided in CP 700-17? If so, how may the City Council waive CP 700-17?

3. May future railroads and railroad facilities be located on or across real property that is owned in fee by the City and has been dedicated for park and recreation purposes pursuant to Section 55?

4. May bikeways be located on or across real property that is owned in fee by the City and has been dedicated for park and recreation purposes pursuant to Section 55?

5. What is the City's legal recourse when real property that is owned in fee by the City and has been dedicated for park and recreation purposes pursuant to Section 55 is encroached upon?

6. Did San Diego Resolution R-256123 (Mar. 30, 1982) (Resolution) dedicate the properties identified as Fairbanks Country Club for park and recreation purposes pursuant to Section 55?

SHORT ANSWERS

1. The City does not have the authority to dedicate property that is owned in fee by the City and is located outside of its jurisdictional boundaries.

2. CP 700-17 is a policy statement of the City Council adopted by resolution. Therefore, if the City Council were to decide to dedicate property pursuant to Section 55 that does not meet the conditions outlined in the policy, the City Council may waive the policy by another resolution.

3. Future railroads and railroad facilities may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the railroad is a public utility and does not significantly interfere with the park and recreational use of the property, or if the railroad may coexist with the park purpose of the property.

4. Bikeways may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the proposed bikeway is consistent with the park and recreational use of the property or if the bikeway is on the right-of-way of a street or road that is authorized by the City Council pursuant to Section 55.

5. The City has several options available to address encroachments upon City-owned real property that has been dedicated for park and recreation purposes pursuant to Section 55 when the encroachment begins after the City acquired fee title to the property. The City's options are limited if the encroachment began prior to the City's acquisition of the property if the encroaching party can satisfy the legal elements necessary to prove adverse possession of, or an easement by prescription over or upon, the encroachment area.

6. The Resolution did not dedicate the properties known as Fairbanks Country Club for park and recreation purposes pursuant to Section 55.

BACKGROUND

Real property may be proposed for public purpose dedications by means of a private grant of property or by action of a public entity. Property proposed for dedication by private individuals is strictly construed according to the terms of the grant. On the other hand, dedication by a public entity receives a less strict construction. *Slavich v. Hamilton*, 201 Cal. 299, 303 (1927).

Section 55 provides, in part, that:

> 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.

San Diego Charter § 55. Real property owned in fee by the City may be dedicated for the purposes of park and recreation pursuant to an ordinance or State legislation. *Id.* The issue, then, is what uses are included in park and recreation purposes. A proposed use that is incidental or ancillary to park and recreation purposes is a proper use of a dedicated park if the incidental or ancillary use is consistent with park and recreation purposes. Whether a use is incidental or ancillary to the public's enjoyment of a park is determined by whether a use is consistent or inconsistent with park purposes. *Slavich*, 201 Cal. at 303. For example, museums, restaurants, hotels, zoological and botanical gardens, libraries, art galleries and conservatories are all ancillary to the full enjoyment of dedicated park property, and thereby consistent with park purposes. *Spires v. City of Los Angeles*, 150 Cal. 64, 66-67 (1906); *Slavich*, 201 Cal. at 303. On the other hand, a use that constitutes misuse or a diversion from the park use is inconsistent or unreasonably interferes with the use of the property for park and recreation purposes. *Simons v. City of Los Angeles*, 63 Cal. App. 3d 455, 470 (1976); *San Vicente Nursery School v. Los Angeles County*, 147 Cal. App. 2d 79, 85 (1956); 11A McQuillin Mun. Corp. § 33:78 (3rd ed. 2012). Use of dedicated park property for a city hall, hospital, jail, municipal buildings or offices would not be ancillary to the park purpose of promoting the recreation and pleasure of the public generally, and are thereby inconsistent with park purposes. *Spires*, 150 Cal. at 67. Therefore, any use in dedicated park property must be consistent with the park and recreation purpose.

There are also those uses of dedicated park property that have been determined to not violate the general purpose of the proposed park use as a result of changed conditions, customs, usages and improvements. *Abbot Kinney Co. v. City of Los Angeles*, 223 Cal. App. 2d 668, 675 (1963); *Griffith v. City of Los Angeles*, 175 Cal. App. 2d 331, 337 (1959). For example, when private land developers dedicated property to the City of Los Angeles in 1904 for a pleasure park or beach, the means of transportation to and from the property was by way of electric railroad cars, horse cars, bicycles and horse-drawn vehicles, but rarely by automobile. *Abbot Kinney*, 223 Cal. App. 2d at 669-71. In 1954, the city constructed an automobile parking area on a portion of the dedicated property, approximately seven percent of the total dedicated property. *Id.* at 671. The court held that the use of a portion of the property for parking of automobiles did not violate the general purpose of the grant of dedication because of the change in the mode of public transportation. *Id.* at 675. The parking area allowed for the public's new means of transportation, which allowed the public to enjoy the park and beach.

The facts of each situation must be evaluated in order to determine whether a proposed use is consistent or inconsistent with the dedicated park purpose. Accordingly, case-by-case analysis must be performed each time a use is being considered for property dedicated for park and recreation purposes.

I. THE CITY DOES NOT HAVE THE AUTHORITY PURSUANT TO THE CHARTER TO DEDICATE REAL PROPERTY IT OWNS THAT IS LOCATED OUTSIDE OF THE CITY'S JURISDICTIONAL LIMITS

Generally, a city has the power to dedicate property it owns for a public purpose. *City of Oakland v. Burns*, 46 Cal. 2d 401, 405 (1956); *Copeland v. City of Oakland*, 19 Cal. App. 4th 717, 722 (1993). However, a municipal corporation has "generally no extraterritorial powers of regulation. It may not exercise its governmental functions beyond its corporate boundaries." *City of Oakland v. Brock*, 8 Cal. 2d 639, 641 (1937). Governmental functions are those governmental powers delegated to the municipality, the police functions of a city in "conserving the health of its citizens" and the exercise of dominion and control thereof. *Chafor v. City of Long Beach*, 174 Cal. 478, 486 (1917); *Benton v. City of Santa Monica*, 106 Cal. App. 339, 343 (1930).[1]

The dedication of property for park and recreation purposes is a governmental power delegated to the City pursuant to Section 55. Further, San Diego Charter section 3 (Section 3) states, in relevant part, "The municipal jurisdiction of The City of San Diego shall extend to the limits and boundaries of said City."[2] Pursuant to Section 55 and Section 3, the dedication of property for park and recreational use is a governmental function that may be exercised only within the territorial limits of the City. As a result, the City does not have the authority to

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[1] On the other hand, a city may exercise proprietary powers as to property that it owns located outside of its corporate boundaries. *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 473 (9th Cir. 2001) (citing *Air Cal, Inc. v. City & County of San Francisco*, 865 F.2d 1112, 1117 (9th Cir. 1989)). Proprietary functions are those functions that are ordinarily exercised by private persons and do not involve conserving the health of its residents or exercising police powers; for example the buying, selling, or granting of property or matters of contract. *Chafor*, 174 Cal. at 486-87; *Benton*, 106 Cal. App. at 343.

[2] However, Section 3 does provide for the regulation, use, and government of the City's water systems within and without the jurisdictional boundaries of the City.

dedicate property that is owned in fee by the City and is located outside of its jurisdictional boundaries.

II. THE CITY COUNCIL MAY WAIVE COUNCIL POLICY 700-17 AND CONSIDER FOR DEDICATION PURSUANT TO SB 1169 ALL OF THE REAL PROPERTY RECOMMENDED BY SAN DIEGO CANYONLANDS

CP 700-17, Policy on Dedication and Designation of Park Lands, attached as Attachment B, provides a process for reviewing real property to identify property that is suitable for dedication or designation pursuant to Section 55. Section III of CP 700-17 sets forth conditions for review of land acquired for open space park purposes.

A council policy is a policy statement to guide or set forth procedures of various functions of the City that is adopted by resolution by the City Council. Council Policy 000-01. The City Council has the authority to amend or retire a council policy by resolution. *Id.* Accordingly, if the City Council were to decide to dedicate certain property that does not meet the conditions outlined in CP 700-17, it may do so by waiving CP 700-17 by separate resolution.

III. RAILROADS AND RAILROAD FACILITIES POTENTIALLY MAY COEXIST ON PROPERTY DEDICATED FOR PARK AND RECREATION PURPOSES

As mentioned above, SDC has proposed for dedication pursuant to SB 1169 certain properties that have been identified by SANDAG as possibly being needed for future light rail or railroad purposes. SB 1169 reserves to the City Council the authority to grant easements for utility purposes in, under, and across dedicated property, if those easements and facilities do not significantly interfere with the park and recreational use of the property.

Although use of dedicated park property for railroad purposes may generally be considered an inconsistent use[3], a railroad may be considered a public utility for which an easement may be granted pursuant to SB 1169 and CP 700-17. Public utilities include common carriers. Cal. Const. art. XII, § 3; Cal. Pub. Util. Code § 216. A common carrier is defined as a person or corporation that provides transportation for compensation to or for the public. Cal. Pub. Util. Code § 211. Therefore, a railroad may qualify for a utility easement on dedicated park land pursuant to SB 1169 and section V.C of CP 700-17, so long as the railroad and its facilities do not significantly interfere with the park and recreational use of the property. However, this analysis assumes that only an easement, not a fee interest, in the City's property would be sufficient to meet the purposes of the proposed railroad. If fee title is necessary for the use of the property for railroad purposes, voter approval would be required for the City to sell dedicated property for a non-park and recreational use.[4]

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[3] Courts in other states and an opinion issued by this Office have stated that a railroad is generally an inconsistent use of dedicated park land. *To What Uses May Park Property be Devoted*, 18 A.L.R. 1246 (originally published 1922); *To What Uses May Park Property be Devoted*, 63 A.L.R. 484 (originally published 1929); 1986 City Att'y MOL 143, 145 (ML 86-15; Feb. 11, 1986).

[4] A railroad may have the power to condemn City property. In such an instance, a different analysis would be required.

In addition, the courts in three cases in California have specifically addressed the issue of a railroad on dedicated park property. In all three cases, the courts determined that it is not unlawful for a railroad use of dedicated park land or determined that the two public purpose uses may coexist. The California Supreme Court in *People ex rel. Britton v. Park & Ocean Railroad Co.*, 76 Cal. 156 (1888) held that the railroad that ran along southern and western portions of Golden Gate Park in the City of San Francisco was not unlawful (i.e. not a nuisance) because it did not interfere with the use or enjoyment of the park by the public. *Id.* at 157, 160. In that case, the City and County of San Francisco had authorized the railroad use along its streets and the Park Commissioners had authorized the railroad use in the park. The Court discussed that the portions of the park that the railroad ran through were either unused by the public, used for the purpose of a temporary nursery, were in a "state of nature," or were sandy with either great depressions or elevations, such that these portions of the park were unfrequented by visitors of the park. *Id.* at 161-62. The court also mentioned that the railroad was a means of ingress, egress and transportation for the public to enjoy the park. *Id.* at 162-63.

The court in *City of Los Angeles v. Los Angeles Pacific Co.*, 31 Cal. App. 100 (1916), addressed the issue of use of dedicated park property for railroad purposes when the City of Los Angeles condemned existing railroad and railroad facilities (i.e. power pole line over the property and subway under the property) in order to dedicate the property under its Charter for park purposes. The City of Los Angeles argued that its title to the property must be clear of any existing pole line and subway rights because the use for railroad purposes was inconsistent with the proposed use for park purposes. *Id.* at 109. The court disagreed with the city and cited *Britton* stating that it was not uncommon to have a railroad in a park, and that a railroad and a park may coexist. *Id.* The court also noted that the pole line and right-of-way for the subway were a part of a railroad that extended beyond the city's limits and was under State control. *Id.* at 110. Therefore, the city could not seek to condemn property with established rights of way, tracks and depots for the purpose of dedicating the property for park purposes and expect the court to not inquire whether both the public use for railroad and public use for park are consistent or may coexist. *Id.* Finally, the court noted that the city's charter authorizing the dedication of property as public park or parks prohibited non-park uses after acquisition of the property, but did not prohibit non-park uses that existed when the property was acquired. *Id.* at 110-11.

In the case of *Humphreys v. City & County of San Francisco*, 92 Cal. App. 69 (1928), the City and County of San Francisco imposed an assessment for the construction of a tunnel for railroad purposes through Buena Vista Park and Duboce Park and a street car line through Duboce Park to provide rapid transit between two distant sections of the city. In determining whether the assessment was proper, the court addressed whether the construction of the tunnel and street railway was an unlawful use of the parks. *Id.* at 72. The court held that the tunnel was to be entirely beneath the surface of Buena Vista Park and therefore it "could not possibly interfere with the free or customary use of the park for any or all park purposes." *Id.* at 73. The street car line was to run over the surface of Duboce Park and then enter the tunnel, and the laying of the tracks would require removal of sidewalk, curb, lawn, shrubs, trees and path. *Id.* The portion of Duboce Park for the tunnel and street railway would run along the southern boundary of the park constituting "a small fraction of the entire park area." *Id.* The court also considered testimony from city employees and park commissioners, and the trial court's findings that the park property where the tunnel and railway were proposed had been occupied by brush and shrubs, and was not frequented by the public. *Id.* at 77-78. The court determined that,

although the purpose of the tunnel and street car line was to facilitate transportation between two distant parts of the city, they would also incidentally be a medium for ingress, egress and transportation for the public to enjoy the privileges of the park. *Id.* at 78. Therefore, the court held that the public railroad use of the park was not "so inconsistent with the purposes for which the park was dedicated as to constitute an unlawful use" of Duboce Park. *Id.*

Specific proposals for future railroad and railroad facility uses over property proposed to be dedicated pursuant to SB 1169 are not available. Therefore, without a specific proposal, the analysis needed to determine whether such proposed use may legally exist on dedicated park property cannot be performed. However, as discussed above, future railroads and railroad facilities may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the railroad is a public utility and does not significantly interfere with the park and recreational use of the property, or if the railroad may coexist with the park purpose of the property.

IV. BIKEWAYS MAY BE AN INCIDENTAL USE THAT IS CONSISTENT WITH THE USE OF PROPERTY DEDICATED FOR PARK AND RECREATION PURPOSES

As discussed above, property dedicated for park and recreation purposes may include uses that are incidental or ancillary to such purpose. A bikeway is defined as a "thoroughfare for bicycles." Merriam-Webster Dictionary 87 (1997). Although there are no cases on point as to whether a bikeway is incidental or ancillary to a park and recreation purpose, common knowledge provides that bicycles are both a means of transportation and are utilized for exercise, recreation, health and enjoyment for the public. Bicycle racks have been determined to be a common amenity to recreational trails, thereby implying that riding of bicycles is an allowed recreational use of parks. *Toews v. United States*, 376 F.3d 1371, 1374 (Fed. Cir. 2004). Therefore, a bikeway may be a use consistent with the use of property dedicated pursuant to Section 55 for park and recreation purposes.

Additionally, Section 55 provides, in part,

> Whenever the City Manager recommends it, and the City Council finds that the public interest demands it, the City Council may, without a vote of the people, authorize the opening and maintenance of streets and highways over, through and across City fee owned land which has heretofore or hereafter been formally dedicated in perpetuity by ordinance or statute for park, recreation and cemetery purposes.

San Diego Charter § 55. California Streets and Highway Code section 890.4 states that a bikeway may exist on the right-of-way of streets or roads. Accordingly, if a bikeway were proposed as part of a future or existing street or road on property dedicated for park and recreation purposes pursuant to Section 55, the bikeway may be authorized as part of the street or road. Therefore, bikeways may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the proposed

bikeway is consistent with the park and recreational use of the property or if the bikeway is on the right-of-way of a street or road that is authorized by the City Council pursuant to Section 55.

V. THE CITY'S OPTIONS WHEN CONSIDERING ENCROACHMENTS ON PROPERTY DEDICATED FOR PARK AND RECREATION PURPOSES PURSUANT TO CHARTER SECTION 55 WILL DIFFER DEPENDING UPON WHEN THE ENCROACHMENT WAS ESTABLISHED

An encroachment onto City property is prohibited, and cannot ever ripen to any title, interest or right against the City if the encroachment begins after the City acquires ownership. Cal. Civ. Code § 1007. As a result, the City may seek the removal of such an encroachment on its property. However, Council Policy 700-06 (CP 700-6), Encroachments on City Property, attached as Attachment C, provides for instances when requests for intended encroachments or existing encroachments may be authorized on City property and when an enforcement action against an existing encroachment may be waived. Section I.B.2 of CP 700-06 sets forth criteria the Park and Recreation Department must consider before determining whether to authorize an encroachment on property dedicated for park and recreation purposes pursuant to Section 55. If an encroachment does not meet the criteria allowing for authorization, an enforcement action may proceed to remove the encroachment. See the memorandum entitled "Natural Gas Pipeline Through Pottery Canyon Natural Open Space Park for Service to 2737 Torrey Pines Road," dated February 1, 2012, for an analysis of encroachments on City dedicated parkland, attached as Attachment D.

It must be noted that the discussion above regarding encroachments on City property assumes that the encroachment was established after the City acquired the property. If the encroachment existed prior to the City acquiring fee title to the property, the situation may be very different. If an encroaching party can establish that an encroachment pre-existed City ownership and can establish all the elements of adverse possession[5], then the encroaching party can acquire fee simple title to the portion of the property encroached upon commencing the moment that the elements for adverse possession are established for the required time. *See Webber v. Clarke*, 74 Cal. 11, 19 (1887); *Kunza v. Gaskell*, 91 Cal. App. 3d 201, 210 (1979). In such an instance, the City would not have owned the fee title to that portion of the property with the encroachment either at the time the City attempted to acquire the property or at the time of attempting to dedicate that portion of the property pursuant to Section 55. This would result in the City having the burden to correct all documents that proposed to dedicate that portion of the property.

Similarly, if an encroachment existed prior to the City acquiring a fee title interest in a property and all the elements of a prescriptive easement[6] are met, then the encroaching party has acquired an easement by prescription to that portion of the City's property with the encroachment. In such a situation, the City would need to determine whether the prescriptive easement encumbrance on the property would be consistent with the park and recreation

[5] Adverse possession may result in the acquisition of fee title interest upon the showing of open and notorious occupation continuously for five years and taxes were paid pursuant to a claim of right (by California Code of Civil Procedure section 325) or color of title (by California Code of Civil Procedure section 322).

[6] An easement by prescription requires the showing of open and notorious use continuously for five years and in only some instances the payment of taxes, pursuant to California Civil Code section 1007.

purposes of the dedicated property. If the encumbrance were determined to not be consistent with park and recreation purposes and the City desired to sell that portion of the property to the encroaching party, voter approval would be required for the City to sell dedicated property for a non-park and recreational use.

The City has several options available to address encroachments upon City-owned real property that has been dedicated for park and recreation purposes pursuant to Section 55 when the encroachment begins after the City acquired fee title to the property. The City's options are limited if the encroachment began prior to the City's acquisition of the property if the encroaching party can satisfy the legal elements necessary to prove adverse possession of, or an easement by prescription over or upon, the encroachment area.

VI. SAN DIEGO RESOLUTION R-256123 DID NOT DEDICATE THE PROPERTY KNOWN AS FAIRBANKS COUNTRY CLUB FOR PARK AND RECREATION PURPOSES PURSUANT TO CHARTER SECTION 55

On March 30, 1982, the City Council adopted the Resolution, attached as Attachment E, that approved and adopted an amendment to the Land Use Map of the Progress Guide and General Plan for the City of San Diego. The action taken by the City Council in the Resolution is stated, in part, as follows:

> BE IT RESOLVED, by the Council of the City of San Diego that it hereby approves and adopts an amendment to the Land Use Map of the Progress Guide and General Plan for the City of San Diego, shifting those properties known as Fairbanks Country Club from Future Urbanizing to the Planned Urbanizing Area, which amendment shall become effective upon adoption of an appropriate amendment to the Progress Guide and General Plan of the City of San Diego, subject to the following conditions, ...

The Resolution provides that the amendment to shift the properties known as Fairbanks Country Club to the Planned Urbanizing Area is to become effective upon adoption of an amendment to the Progress Guide and General Plan of the City, but subject to several conditions. The first condition (Condition) states,

> That the precedential-setting value of this decision be limited to the open space only, requiring that 75% of the land be dedicated to open space in order to establish the overriding open space value of the plan. This should indicate that the Growth Management Policy is adherent and that it is only being overridden when 75% or greater dedication of open space is accomplished.

When interpreting a resolution, the courts do not go beyond the usual and ordinary meaning of the language in the resolution, unless the language is ambiguous. *City of Vista v. Sutro & Co.*, 52 Cal. App. 4th 401, 409 (1997). The Condition does *not* state that seventy-five percent of the property is actually being dedicated to park and recreation purposes. It merely

subjects the action to meeting certain conditions before shifting the properties to a certain land use designation.[7]

Even if the Resolution was intended to dedicate the property identified as Fairbanks Country Club for park and recreation purposes, the dedication would not be valid because it was not done pursuant to Section 55. Section 55 states that real property owned in fee by the City may be dedicated by either an ordinance of the City Council or by statute of the State Legislature. San Diego Charter § 55. For the property identified as the Fairbanks County Club to have been dedicated, it must have been dedicated by ordinance or the Resolution must have been passed in the manner and with the formality of an ordinance. Case law is clear that if a resolution is passed in the "manner and with the statutory formality required in the enactment of an ordinance, it will be binding and effective as an ordinance." *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 648 (1971); *see also City of Sausalito v. County of Marin*, 12 Cal. App. 3d 550, 566 (1970). The Resolution was not passed in the manner or formalities required for the enactment of an ordinance by the City Council. Specifically, the Resolution was passed and adopted on the same date, i.e. March 30, 1982. At the time, San Diego Charter section 16[8] provided that all ordinances, except for specific exceptions not applicable here, were to be passed only after a minimum of 12 days from the date of its introduction. Therefore, both the plain language of the Resolution and the adoption of the resolution pursuant to the formalities of a resolution, not an ordinance, provide that the Resolution did not serve to dedicate the property identified as Fairbanks Country Club for park and recreation purposes.

CONCLUSION

The City does not have the authority to dedicate property that is owned in fee by the City and is located outside of its jurisdictional boundaries. CP 700-17 is a policy statement of the City Council adopted by resolution. Therefore, if the City Council were to decide to dedicate property pursuant to Section 55 that does not meet the conditions outlined in the policy, the City Council may waive the policy by another resolution. Future railroads and railroad facilities may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the railroad is a public utility and does not significantly interfere with the park and recreational use of the property, or if the railroad may coexist with the park purpose of the property. Bikeways may be located on or across real property owned in fee by the City that has been dedicated for park and recreation purposes pursuant to Section 55 if the proposed bikeway is consistent with the park and recreational use of the property or if the bikeway is on the right-of-way of a street or road that is authorized by the City Council pursuant to Section 55. The City has several options available to address encroachments upon City-owned real property that has been dedicated for park and recreation purposes pursuant to Section 55 when the encroachment begins after the City acquired fee title to the property. The City's options are limited if the encroachment began prior to the City's acquisition of the property if the encroaching party can satisfy the legal elements necessary to

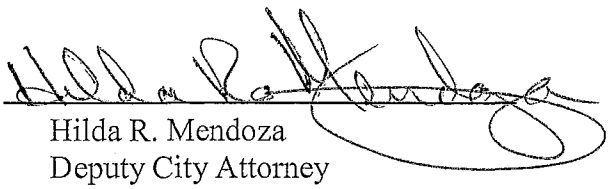
[7] Although it is unclear what the Condition means, it is clear that the only action by the Resolution is shifting the land use designation of the properties known as Fairbanks Country Club.

[8] San Diego Charter section 16 was repealed effective July 30, 2010, and replaced with San Diego Charter section 275 as a result of the strong-mayor form of government becoming permanent in the City.

prove adverse possession of, or an easement by prescription over or upon, the encroachment area. Finally, the Resolution did not dedicate the properties known as Fairbanks Country Club for park and recreation purposes pursuant to Section 55.

Whenever the City Council is considering dedicating property for park and recreation purposes pursuant to Section 55, to avoid legal complications, the property should be evaluated to ensure there are no restrictions that would prohibit the dedication of the property for park and recreation purposes, and that there are no encumbrances or other conditions on the property that would be inconsistent with the dedication of the property for park and recreation purposes. Our Office will assist staff with such an evaluation as necessary.

JAN I. GOLDSMITH, CITY ATTORNEY

By 
Hilda R. Mendoza
Deputy City Attorney

HRM:als
Attachments: Attachment A – Senate Bill No. 1169
Attachment B – Council Policy 700-17
Attachment C – Council Policy 700-06
Attachment D – City Attorney Memorandum dated Feb. 1, 2012
Attachment E – Resolution No. 256123
RC-2012-25
Doc. No. 475246_3

ATTACHMENT A

Senate Bill No. 1169

CHAPTER 275

An act to amend Section 2831 of the Fish and Game Code, and to amend Section 1 of Chapter 644 of the Statutes of 2007, relating to wildlife resources.

[Approved by Governor September 7, 2012. Filed with Secretary of State September 7, 2012.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1169, Kehoe. Natural community conservation planning.

The Natural Community Conservation Planning Act authorizes the Department of Fish and Game to enter into agreements with any person or public entity for the purpose of preparing a natural community conservation plan to provide comprehensive management and conservation of multiple wildlife species. The act requires a plan to identify and provide for those measures necessary to conserve and manage natural biological diversity within the plan area while allowing compatible and appropriate economic development, growth, and other human uses. The act requires each natural community conservation plan to include an implementation agreement governing specified matters.

Existing law exempts from specified provisions of the act any natural community conservation plan or subarea plan initiated on or before January 1, 2000, or amendment thereto, by Sweetwater Authority, Helix Water District, Padre Dam Municipal Water District, Santa Fe Irrigation District, or the San Diego County Water Authority, which the department determines is consistent with the approved San Diego Multiple Habitat Conservation Program or the San Diego Multiple Species Conservation Program, if the department finds that the plan has been developed and is otherwise in conformance with the act. Existing law deems certain lands designated as open-space lands as of January 1, 2008, to be dedicated land under the City Charter of San Diego.

This bill would deem those lands designated as open-space lands as of January 1, 2013, to be dedicated land under the city charter.

The people of the State of California do enact as follows:

SECTION 1. Section 1 of Chapter 644 of the Statutes of 2007 is amended to read:

Section 1. The Legislature finds and declares all of the following:

(a) The basis for the lands currently designated as open space by the City of San Diego is a Multiple Species Conservation Program (MSCP) for the City of San Diego.

(b) In 1997, the City of San Diego signed a 50-year agreement with the Department of Fish and Game and the United States Fish and Wildlife Service to conserve approximately 55,000 acres of open space within the City of San Diego under the MSCP. Included in the MSCP are designated and dedicated open-space parcels. The City of San Diego has identified in excess of 15,000 acres of city-owned parcels that were intended to be dedicated open space under the city charter, but have not been converted from designated to dedicated open space. Dedicated open space cannot be sold or exchanged without a two-thirds vote of the people. In 2007, the Mayor of the City of San Diego and, by a unanimous vote, the city council, passed a resolution to support this effort to convert those parcels from designated to dedicated open space. Approximately 6,600 acres were converted to dedicated open space with the filing of documents with the Office of the County of San Diego Assessor/Recorder/County Clerk prior to January 1, 2008. Approximately 10,000 acres remain on a list established by the City of San Diego in 2006 of places eligible to be converted to dedicated open-space lands. The San Diego City Council voted on January 23, 2012, to support the effort to convert additional city-owned open-space parcels from designated to dedicated open space.

(c) Therefore, in keeping with the desire of the City of San Diego to ensure that the lands currently designated as open space cannot be sold or exchanged without a vote of the people, and consistent with the Natural Community Conservation Planning Act (Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code), these lands should become dedicated land under state law and the City Charter of the City of San Diego.

SEC. 2. Section 2831 of the Fish and Game Code is amended to read:

2831. (a) Notwithstanding any other provision of law, lands designated as of January 1, 2013, as open-space lands in a document entitled "Declaration of the Dedication of Land" approved by a resolution of the San Diego City Council in the same manner in which the city council processes approval of dedicated open space, reserving to the city council the authority to grant easements for utility purposes in, under, and across dedicated property, if those easements and facilities to be located thereon do not significantly interfere with the park and recreational use of the property, and filed with the Office of the City Clerk for the City of San Diego, and, if required, at the Office of the County of San Diego Assessor/Recorder/County Clerk, are dedicated land under the City Charter of the City of San Diego.

(b) Upon filing of that document in accordance with subdivision (a), the Office of the City Clerk for the City of San Diego, and, if applicable, the

Office of the County of San Diego Assessor/Recorder/County Clerk shall make the document available for inspection by the public upon request.

O

ATTACHMENT B

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

CURRENT

SUBJECT: POLICY ON DEDICATION AND DESIGNATION OF PARK LANDS
POLICY NO.: 700-17
EFFECTIVE DATE: August 5, 1985

BACKGROUND:

Park lands are an invaluable resource for citizens of the City of San Diego. It is important to protect these lands from being converted to nonrecreational uses. Such protection is best provided in the form of dedication or designation.

PURPOSE:

To establish a policy for the protection of park lands by dedication (Section 55 of the City Charter) or designation as defined herein.

LEGAL CONSIDERATIONS:

Section 55 of the City Charter provides in pertinent part as follows:

> 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.

POLICY:

I. All land acquired for resource-based park and recreation purposes and owned in fee by the City shall be dedicated by ordinance pursuant to Section 55 of the City Charter within one year of the date that the City accepts the property deed.

II. All land acquired for population-based park and recreation purposes and owned in fee by the City shall be dedicated by ordinance pursuant to Section 55 of the City Charter upon acquisition if the following affirmative conditions exist:

The Park Service District appears to contain no other alternative park site;

The population has reached the population minimum stated in the City's Progress Guide and General Plan;

The Park and Recreation Board, City Manager and/or City Council determine that there are no unusual circumstances which indicate dedication consideration should be deferred.

III. All land acquired for open space park purposes and owned in fee by the City shall be dedicated by ordinance pursuant to Section 55 of the City Charter if it meets the following conditions:

A. The land either fits the criteria of resource-based parks, in that it is the site of distinctive scenic or natural or cultural features, and is intended for City-wide use; is a complete open space system or sub-system; or at a minimum is a portion of a sub-system sufficient to stand on its own. (Isolated properties designated as open space shall be dedicated only upon the City's obtaining sufficient additional adjacent land to meet this requirement.)

B. The land does not include areas which are undesirable for park purposes, would be more suitable for other purposes, or which could be traded or sold to obtain more desirable park lands or to fund park improvements. In these cases, to provide flexibility in making revisions which would be beneficial to meeting the City's open space goals, the land shall not be dedicated.

C. The deed to the property is free of restrictions which might preclude dedication as park land.

IV. All land held in City interest for park and recreation purposes, not meeting the requirements for dedication as specified in Sections I, II and III, including land held in less than fee ownership, shall be designated by resolution and thereafter be subject to public hearing process prior to any other use or disposition, except for dedication.

V. Requests for dedication or designation of a park site shall include the following information:

A. How the park site implements the Park and Recreation Element or Open Space Element of the Progress Guide and General Plan and/or the Community Plan.

B. For population-based parks, an estimate of the long term development schedule.

C. For open space park land, reservation of the City Council's authority to establish easements for utility purposes in, under, and across the dedicated property so long as such easements and the facilities to be located therein do not significantly interfere with the park and recreational use of the property.

VI. The Park and Recreation Board shall annually review the City inventory of park lands to determine the status of lands meeting the requirements for dedication or designation as specified in Sections I, II, III, and IV. Staff will subsequently report the findings of the Board to the City Council.

VII. City park lands, dedicated and designated, shall be clearly identified in any Planning Commission or Council action which affects the park site. Lands which are neither dedicated nor designated shall not be counted as satisfying any requirements or standards for park land.

VIII. Following designation of a park, nonconflicting nonrecreational uses may only be permitted upon recommendation of the Park and Recreation Board and approval of the City Council.

CROSS REFERENCE:
City Charter Sec. 55
Council Policy 100-02
Council Policy 600-23
Council Policy 700-03
Council Policy 700-07

HISTORY:

Adopted by Resolution R-186031 01/13/1966
Amended by Resolution R-193887 06/06/1968
Amended by Resolution R-218126 04/12/1977
Amended by Resolution R-254869 08/24/1981
Amended by Resolution R-263807 08/05/1985

ATTACHMENT C

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

CURRENT

SUBJECT: ENCROACHMENTS ON CITY PROPERTY
POLICY NO.: 700-06
EFFECTIVE DATE: May 24, 1999

BACKGROUND:

Many instances of unauthorized encroachments on City property are reported or discovered each year. Responsibility for the protection of City property from unauthorized encroachments and the mechanisms by which the City can enforce its property rights have not been clear. Additionally, there are currently no guidelines for City staff to use in evaluating proposed encroachments which could benefit the public and generate revenue for the City.

PURPOSE:

To establish policies related to the protection of City property from unauthorized encroachment by private parties; to establish guidelines by which requests for encroachments may be considered; to establish the responsibilities of City departments regarding the protection of City property from unauthorized encroachments; to establish policies specifically related to erosion and drainage control measures on City property; and to establish policies regarding the disposition of existing unauthorized encroachments; and to establish guidelines and an evaluation process for encroachment authorization of telecommunication facilities on parkland and open space.

DEFINITIONS:

Encroachment - development, construction on or use of City property.

City Property - land which is owned in fee title by the City excluding such land which is public right-of-way.

Detrimental - causing any of the following: significant adverse impact on sensitive resources or historic sites; impediments to access or use; a hazardous or potentially hazardous condition, a potential public liability (including economic); causing any other situation or condition which is not in the City's best interest.

Permit Issuing Authority - that department designated as responsible for determining whether or not an encroachment can be allowed - see Section 1(F) of this Policy.

Permittee - Person or entity seeking encroachment authorization pursuant to this Policy.

I. POLICIES- GENERAL

A. Unauthorized Encroachments. It is the City's policy to protect its property from unauthorized encroachment and to seek remedy, e.g., removal, repair, restoration, etc. when such activity occurs, to recover its costs related to such action to the greatest extent possible, and to purse administrative and legal actions, fines and damages when necessary and/or prudent.

B. Guidelines for Encroachment Authorization. It is the City's policy that requests for authorization to encroach on City property be considered as follows:

1. General City Property: The City may grant authorization for encroachment on its property if it is determined by the responsible department that the requested action would not violate any deed restrictions related to the City property, map requirements or other land use regulations; would not be detrimental to the City's property interests; would not preclude other appropriate use; would be consistent with the City's General Plan; and would otherwise be prudent and reasonable.

2. Dedicated or Designated Parkland and Open Space: The City may grant authorization for encroachment on dedicated or designated parkland and open space if it is determined by the responsible department that the requested action would not only meet criteria for General City property as stated above, but would also be consistent with City Charter Section 55; i.e., that it would not change or interfere with the use or purpose of the parkland or open space. Permission for encroachment on dedicated or designated parkland and open space that would benefit only a private party shall not be granted.

   a. In addition to complying with the above criteria, proposed telecommunications facilities must be disguised such that they do not detract from the recreational or natural character of the parkland or open space. Further, proposed telecommunication facilities must be integrated with existing park facilities, and must not disturb the environmental integrity of the parkland or open space.

   b. Prior to encroachment authorization, the proposed telecommunication facility must be reviewed by the Park and Recreation Department to determine whether the facility complies with the criteria of Section B. If the Park and Recreation Department determines that the proposed facility complies with Section B, the Community Planning Committee for the potentially affected parkland or open space must be notified. The proposed facility must then be reviewed by the following advisory bodies for a recommendation:

      i) Community Recreation Council for park or open space where encroachment is proposed;
      ii) Area Committee, a subcommittee of the Park and Recreation Board, or Citizens' Advisory Committee for open space area where encroachment is proposed, as appropriate;
      iii) Design Review Committee, subcommittee of the Park and Recreation Board, as appropriate; and
      iv) Park and Recreation Board, or governing open space Task Force for those areas where they exist.

c. The recommendation of the Community Recreation Council, the Area Committee or Citizen's Advisory Committee, and the Design Review Committee, as applicable, shall be submitted to the Park and Recreation Board or governing open space Task Force. The Park and Recreation Board, or governing open space Task Force, shall submit its recommendation as follows:

i) For minor telecommunication facilities, to the Park and Recreation Director, who shall determine whether the facility should be authorized.

ii) For major telecommunication facilities, to the City Council, who shall determine whether the facility should be authorized.

If the facility is authorized, the Real Estate Assets Department shall negotiate and prepare the necessary encroachment authorization.

C. Written Encroachment Authorization Required. It is the City's policy that permission to encroach on City property may be granted only by written encroachment authorization and shall be contingent upon such stipulations and conditions deemed appropriate by the City to protect its property and interests. Such stipulations shall include, but not be limited to:

1) The encroachment shall be installed and maintained in a safe and sanitary condition at the sole cost, risk and responsibility of the Permittee;

2) The Permittee shall agree to at all times indemnify and save the City free and harmless from and pay in full any and all claims, demands, losses, damages or expenses that the City may sustain or incur in any manner resulting from the construction, maintenance, use, repair or presence of the encroaching structure or development installed hereunder, including any loss, damage or expense arising out of (a) loss of or damage to property, (b) injury to or death of a person, excepting any loss, damage, or expense and claims for loss, damage or expense resulting in any manner from the negligent act or acts of the City, its contractors, officers, agents or employees;

3) When the encroachment authorization is in the form of an Encroachment Permit, the Permittee must agree to remove the encroachment within thirty (30) days after notice by the Permit Issuing Authority to do so;

4) The City shall have the authority to remove any encroachment or cause its removal if the Permittee does not comply with the thirty (30) day notice required by Section I.C.3., and all costs related to such action shall be chargeable to the Permittee;

5) The Permittee shall be required to maintain a policy of liability insurance in an amount satisfactory to the City in order to protect the City from any potential claims which may arise from the encroachment;

6) When the encroachment authorization is in the form of an Encroachment Permit, the Encroachment Permit shall be recorded in the office of the County Recorder and shall relate to the property directly adjacent to the encroachment and shall run with that property. Therefore, only an adjacent property owner can receive an Encroachment Permit; and

7) Acknowledgement that authorization by the Permit Issuing Authority and receipt of all appropriate development permits must be obtained prior to any future improvements or modifications to the encroachment.

In addition to the above stipulations, the Permittee must obtain all other relevant permits and approvals including, but not limited to, Coastal Development Permits, Sensitive Coastal Resource Permits, Hillside Review Permits, Resource Protection Permits, etc., prior to the construction of the authorized encroachment. Normal noticing requirements and community review for such discretionary permits apply.

D. Fees and Costs.

1. It is the City's policy that the Permittee shall pay an encroachment authorization fee established to recover costs associated with processing the request for encroachment authorization, and with monitoring, inspection or installation of the encroachment where appropriate. In addition, the City shall require payment of an annual encroachment fee which will include a reasonable charge for use of City property and recovery of annual inspection cost.

2. All monies received for placement of minor telecommunication facilities on parkland and open space areas shall be deposited into the Park and Recreation Department General Fund budget. All monies received for placement of major telecommunication facilities shall be deposited into an appropriate account for use within the parkland or open space area where the facility is located.

3. Telecommunication facilities receiving encroachment authorization for parkland or open space may be subject to additional costs, including but not limited to, costs associated with mitigation of visual or physical impacts to the specific park or open space site, and costs associated with complying with applicable local, state or federal law.

E. Development Permits. It is the City's policy that departments which issue development permits shall be aware of City property interests and may not issue permits for development which encroaches on City property without proof from the Permittee that written authorization has been obtained from the Permit Issuing Authority.

F. Permit Issuing Authority/Responsibilities.

1. City Council - Responsible for approving the placement of major telecommunication facilities on dedicated or designated parkland or open space.

2. Neighborhood Code Compliance Department - Responsible for the protection of City property from unauthorized encroachments and enforcement related thereto.

3. Real Estate Assets Department - Responsible for the issuance of encroachment authorization on general City property and leaseholds, and, for negotiation and preparation of encroachment authorizations for previously approved telecommunication facilities to be located on dedicated or designated parkland or open space. It is also responsible for providing the other departments with information regarding property lines, ownership and title, as necessary.

4. Park and Recreation Department - Responsible for the issuance of encroachment authorizations, and for approval by the Park and Recreation Director of the placement of minor telecommunication facilities, on dedicated and designated parkland and open space. It is also responsible, in consultation with the Planning and Development Review Department for certain coastal rights-of-way which are not used as streets.

5. Engineering and Capital Projects Department - Responsible for issuance of encroachment authorization on land owned by the Water and Sewer Funds.

6. Planning and Development Review Department - Responsible for the review and issuance of discretionary permits associated with all applications for telecommunication facilities.

II. POLICIES - EROSION CONTROL MEASURES

A. Erosion Control By City. It is the City's policy to provide erosion control measures on City property to the extent that funding is available and public improvements or public safety are jeopardized. It is the City's policy to not assume responsibility for erosion control measurers on its property to protect private property.

B. Erosion Control By Private Parties.

1. It is the City's policy to consider giving authorization to private parties for erosion control measures on City property in as reasonable a manner as possible pursuant to the other policies stated herein.

2. For purposes of determining whether or not erosion control measures by private parties will be allowed on dedicated or designated parkland or open space, an action will be considered beneficial to the parkland or open space if it

contributes to the stabilization of bluff or cliffs that are steeper than the angle at which the soil is naturally stable.

C. Mitigation. It is the City's policy that any authorization to provide erosion control measures on City property shall include provisions for visual impact mitigation and enhancement.

III. POLICIES - DRAINAGE CONTROL MEASURES

A. Drainage Control By Private Parties. For purposes of determining whether or not drainage control measures by private parties will be allowed on dedicated or designated parkland or open space, and existing encroachment will be considered beneficial if it is and remains the only reasonable method of preventing surface erosion of parkland or open space due to uncontrolled drainage; a proposed encroachment will be considered beneficial if it meets the above criteria and qualifies for all regulatory permits.

B. Mitigation. It is the City's policy that any authorization to provide drainage control measures on City property shall include provisions for visual impact mitigation and enhancement.

IV. POLICIES - EXISTING ENCROACHMENTS

A. Type of Encroachment: Erosion and Drainage Control Measures. If consistent with other sections of this policy, it is the City's policy to offer an encroachment authorization for erosion and drainage control measures. The authorization shall contain all the stipulations and requirements set forth in Section I of this Policy, including a permit fee and annual charge. In addition, a requirement to improve or bring the encroachment up to safe and acceptable standards, including aesthetic standards, as determined necessary by the City Manager may be imposed. In the coastal areas, coastal permits will be required for those encroachments placed after October of 1988.

B. Type of Encroachment: Private Use and Enjoyment. It is the City's policy that encroachments for private use and enjoyment are not appropriate on City property and may not be authorized. Such encroachments are generally construed to be detrimental to the City's interest because of the singularly private benefit that is gained from them by a private party. Examples are stairways, walls, fences, decks, antennas, and landscaping which is not necessary for erosion control and which have the appearance of private property. It is the City's policy to pursue removal or other corrective action, provided however, that if the encroachment is minor in nature; i.e., is unobtrusive and does not impede access or use of the City property, the City Manager may waive enforcement action. However, it is understood that such encroachments may be subject to a recordation of official notice of the encroachment with the County Recorder and that lack of enforcement action does not constitute authorization to encroach or surrender City property rights. This policy also does not impact requirements to obtain building or other development permits.

C. Unauthorized Encroachments. In the event that the City evaluation indicates that a particular unauthorized encroachment cannot be authorized or allowed to remain because it is hazardous or a potential liability to the City or because it is either detrimental or non-beneficial per this Policy, or in the event that the private property cannot or will not obtain the required authorization, the City shall pursue administrative and legal remedies to protect its interests and shall, to the greatest extent possible, collect damages and costs related to the enforcement of this Policy.

D. Ocean Front Walk. It is not the intent of this Policy to modify or supersede in any way the requirements of San Diego Municipal Code Section 103.0538 which apply to the Ocean Front Walk area.

HISTORY:

"Horton Plaza - Billboards"
Adopted by Resolution R-169963 03/15/1962
Repealed by Resolution R-254869 08/24/1981
(Incorp. into Council Policy 700-05 "Horton Plaza - Use Of")
"Encroachments on City Property"
Adopted by Resolution R-282396 07/26/1993
Amended by Resolution R-291658 05/24/1999

ATTACHMENT D

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: February 1, 2012

TO: Stacey LoMedico, Director, Park and Recreation Department
James Barwick, Director, Real Estate Assets Department

FROM: City Attorney

SUBJECT: Natural Gas Pipeline Through Pottery Canyon Natural Open Space Park for Service to 2737 Torrey Pines Road

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INTRODUCTION

You have asked for a legal opinion concerning the legality of installing a natural gas pipeline through dedicated parkland and Pueblo Lands. Specifically, you have asked whether the City may grant a utility easement to San Diego Gas and Electric (SDG&E) through Pottery Canyon Natural Open Space Park (Pottery Canyon Park) in order to provide service to a private home owned by Mr. Bill Allen, which is located adjacent to Pottery Canyon Park at 2737 Torrey Pines Road. Pottery Canyon Park is dedicated parkland on Pueblo Lands. In researching the issue, Real Estate Assets Department staff discovered that, although Mr. Allen has been utilizing the Pottery Canyon Park driveway, identified by signage as Pottery Park Driveway, for ingress and egress purposes to access his private property, the City never granted Mr. Allen such rights over City property. According to Mr. Allen, his family has been accessing their property via Pottery Park Driveway since his family acquired their abutting property in 1945. Accordingly, this memorandum will also address the issue of Mr. Allen's use of Pottery Park Driveway to access his property.

QUESTIONS PRESENTED

1. May the City grant an easement to SDG&E through dedicated parkland and Pueblo Lands for private use?

2. May the City authorize encroachments onto City owned property?

SHORT ANSWERS

1. San Diego Charter section 55 does not preclude the granting of such an easement; however, it would violate Council Policy 700-06 and may violate the intent of Charter section 219.

2. Mr. Allen's current use of Pottery Park Driveway is an encroachment as defined in Council Policy 700-06 and a trespass onto City property. However, pursuant to Council Policy 700-06, the Mayor may permit certain encroachments and is authorized to waive enforcement action against an encroachment if it is determined to be minor in nature.

BACKGROUND

The land that is the site of Pottery Canyon Park was originally acquired by the City of San Diego as part of the Pueblo Lands grant in 1874 and the City dedicated the land to park use pursuant to San Diego Ordinance O-11159 on January 4, 1974. The Park is located off of Torrey Pines Road in La Jolla. According to a 2010 title report, Mr. Allen owns three parcels of property adjacent to Pottery Canyon Park. On the attached aerial photo (Attachment A), the three parcels described in the title report are shown as only two parcels, Parcel Nos. 34673201 and 34654044.

Pottery Canyon Park is outlined on Attachment A in yellow and numbered 001, which encompasses Parcel No. 34675001. Cars gain access to the Park via Pottery Park Driveway, a long, narrow, paved driveway that runs along the tree line of the southern border of the Park, directly adjacent to Mr. Allen's parcels. Near the entrance to the Park, at the bottom of Pottery Park Driveway, there is a gate with a lock which crosses the Driveway. Past the gate, at the top of Pottery Park Driveway, the pavement makes a turn into Mr. Allen's private property and continues as his private driveway to his house. No documentation has been provided which demonstrates who built the gate, but presumably the purpose of the gate is to block public access to the Park during restricted times.[1] Nevertheless, Park and Recreation Department staff has stated that Mr. Allen himself often opens, closes, and locks the gate as he chooses. Mr. Allen undoubtedly has the combination to the lock on the gate because access to his private property occurs significantly past the gate and, therefore, there would be no other means for Mr. Allen to access his private property when the Park is closed. According to City staff, Mr. Allen has claimed that his family built Pottery Park Driveway and claims that his family has been using Pottery Park Driveway for ingress and egress to their property since they took ownership of their property in 1945. However, no record exists to show that the Allen family was ever granted permission to build Pottery Park Driveway or to access their private property from Pottery Park Driveway. In fact, there are numerous signs at the entrance to Pottery Park Driveway stating that the property is under video surveillance and protected by a private security firm. According to City staff, the City did not install such signs nor does it contract with the private security firm.

In addition to the three parcels mentioned above, Mr. Allen owns an easement across a fourth parcel for the stated purposes of a "road," as well as, sewer, water, gas, power, and telephone lines (Roadway Easement). His Roadway Easement runs along the northern 25 feet of Parcel

[1] Signs at Pottery Canyon Park indicate that the Park closes at 6:00pm.

No. 34654045 (*See* Attachment A) and gives Mr. Allen legal access to his property from Torrey Pines Road. However, there is currently no road or driveway located over the Roadway Easement, and instead, the Allen family has been using Pottery Park Driveway for ingress and egress to their property for many years. Furthermore, the Allen Family Trust granted a conservation easement across a sizeable portion of his parcels to the City in 1997 (Conservation Easement). On Attachment A, the Conservation Easement is outlined in yellow and numbered 002, which encompasses the majority of Parcel Nos. 34673201 and 34654044. That Conservation Easement prohibits the construction of new roadways, but allows the continued use of easements granted prior to the Conservation Easement and the undergrounding of utilities.

ANALYSIS

I. CHARTER SECTION 55 DOES NOT PRECLUDE THE CITY FROM GRANTING AN EASEMENT IN FAVOR OF SDG&E THROUGH DEDICATED PARKLAND AND PUEBLO LANDS. HOWEVER THE PROPOSED EASEMENT WOULD VIOLATE COUNCIL POLICY 700-06 AND MAY VIOLATE THE INTENT OF CHARTER SECTION 219.

A. Charter Section 55

Pottery Canyon Park was dedicated to park use within the meaning of Charter section 55, pursuant to San Diego Ordinance O-11159 on January 4, 1974. The power of a charter city, such as San Diego, over the use of dedicated parks, as over other exclusively municipal affairs, is all-embracing, limited only by the city's charter. *Simons v. City of Los Angeles*, 63 Cal. App. 3d 455 (1976). In San Diego, the use of dedicated parklands is governed by Charter section 55 which provides in pertinent part:

> All real property owned in fee by the City . . . 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.

This Office has previously opined that underground utilities are permissible uses of dedicated parkland so long as these uses do not detract from the park and recreational use of the property, and therefore do not require a vote of the electors.[2] 1994 City Att'y MOL 559 (94-64; July 26, 1994); 1990 City Att'y MOL 211 (90-17; Jan 26, 1990). In the attached Memorandum of Law dated January 26, 1990 (Attachment B), this Office addressed the question of whether underground utilities were appropriate uses of dedicated parkland. 1990 City Att'y MOL 211 (90-17; Jan 26, 1990). More specifically, the two questions addressed were whether a proposed sewer could be placed underground through Rose Canyon Open Space Park Preserve and

[2] Similarly, City Council Policy 700-17, Policy on Dedication and Designation of Park Lands, section V.C. provides that "[f]or open space park land, reservation of the City Council's authority to establish easements for utility purposes in, under, and across the dedicated property so long as such easements and the facilities to be located therein do not significantly interfere with the park and recreational use of the property."

whether a proposed sludge line could be placed underground through Mission Bay Park and Sunset Cliffs Park. 1990 City Att'y MOL 211 (90-17; Jan 26, 1990). Rose Canyon Open Space Park Preserve, Sunset Cliffs Park, and Mission Bay Park are all dedicated in perpetuity as public parks pursuant to Charter section 55. This Office determined that the pipelines would not detract from the use of the lands for park and recreation purposes, and thus would not require two-thirds voter approval as provided by Charter section 55. Please refer to the attached Memorandum for the analysis supporting this Office's determination that underground pipelines are generally permissible uses of dedicated parkland. The analysis and cited case law of that Memorandum support our determination here that the undergrounding of utilities lines through Pottery Canyon Park without a vote of the electorate would not violate Charter section 55.

B. Council Policy 700-06

While granting an easement to SDG&E through Pottery Canyon Park for underground utilities may be consistent with Charter section 55, Council Policy 700-06 prohibits granting encroachments that benefit only a private party. Section I.B.2. of Council Policy 700-06 states: "Permission for encroachment on dedicated or designated parkland and open space that would benefit only a private party shall not be granted." Therefore, the easement contemplated would violate Council Policy 700-06. In light of this, the City Council must waive that portion of the Council Policy before staff may grant an easement through Pottery Canyon Park. However, this Office would caution staff to consider the ramifications of establishing a practice of granting utility easements through dedicated parks which benefit only a single private property owner. To allow it even once may weaken the City's position to decline allowance of such easements in the future and years down the road there could be any number of private utility easements running through City parklands.

C. Charter Section 219

According to Real Estate Assets Department staff, Pottery Canyon Park is comprised of Pueblo Lands as defined by Charter section 219. Charter section 219 limits what the City may do with respect to such Pueblo Lands in a number of ways.

> No sale of Pueblo Lands owned by The City of San Diego which are situated North of the North line of the San Diego River shall ever be valid and binding upon said City unless such sale shall have been first authorized by an ordinance duly passed by the Council and thereafter ratified by the electors of The City of San Diego at any special or general municipal election. The City Manager shall have authority to lease Pueblo Lands, provided that any lease for a term exceeding one year shall not be valid unless first authorized by ordinance of the Council. No lease shall be valid for a period of time exceeding fifteen years.

San Diego Charter § 219.

Charter section 219 contains no explicit constraints with respect to the City granting easements over, under, or through Pueblo Lands. An easement is not a conveyance of title and, therefore, is not a sale. *Mehdizadeh v. Mincer*, 46 Cal. App. 4th 1296, 1305-06 (1996). Accordingly, a grant of an easement over, under, or through Pueblo Lands would not violate Charter section 219 with respect to the prohibition against the sale of Pueblo Lands. The issue is then whether an easement is a lease.

An easement and a lease are distinguishable. A lease grants to the tenant the rights of exclusive possession and use of real property for a specified period of time. It is both a conveyance of an estate in the land and a contract for the possession and use of the property in exchange for rent. A lease vests a possessory estate in real property against all persons, including the owner of the fee. Witkin, Summary of California Law, vol. 12, *Real Property* §§ 504, 517 (10th ed. 2005). An easement, on the other hand, is an interest in the land of another, which entitles the owner of the easement to a limited use of the other's land. An easement creates a non-possessory right to enter and use land of another and only restricts the owner of the underlying fee from interfering with the uses authorized by the easement. Witkin, Summary of California Law, vol. 12, *Real Property* § 382 (10th ed. 2005). The owner of the underlying fee retains every other incident of ownership that is not inconsistent with the easement. *Id.* Thus, a lease creates an estate in real property, but an easement merely creates an interest in real property that is not an estate.

However, while easements and leases may be technically and legally distinguishable because fee owners retain some of their property rights in the easement areas, utility easements such as the one contemplated here generally include numerous restrictions upon the owner of the underlying property. Such restrictions can result in the loss to the City of virtually all control over the easement area. Utility easements generally restrict what the underlying fee owner can build, the planting of trees and vegetation, how trees and vegetation may be maintained, and generally what activities the owner of the underlying fee can carry out on and over the easement. As such, it could be argued that a grant by the City of such a large bundle of rights and the restrictions that the utility easement would put on the City's use of the property is contrary to the intent of Charter section 219.

On the other hand, a valid counter-argument would be that such a reading of the Charter would violate the canon of statutory construction, *expressio unius est exclusio alterius* ("to say one thing is to exclude another"). "'While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.'" *Arden Carmichael*, 93 Cal. App. 4th at 516 (citing 2A Singer, Sutherland Statutes and Statutory Construction, *Literal Interpretation*, § 46.06, at 192 (6th ed. 2000)). The drafters of the Charter specifically did not discuss easements with regard to Pueblo Lands. It is unclear which argument a court would find more persuasive. The most cautious approach would be to not grant a utility easement over, under, and through Pottery Canyon Park, which is on Pueblo Lands.

II. MR. ALLEN DOES NOT HAVE A LEGAL RIGHT OF ACCESS TO HIS PROPERTY VIA POTTERY PARK DRIVEWAY.

A. Mr. Allen Cannot Establish Abutter's Rights or Prescriptive Rights to Pottery Park Driveway.

Courts have long recognized a number of "abutter's rights" enjoyed by property owners along public roads. *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 39 Cal. 4th 507, 517 (2006). Abutting property owners may have certain private rights in existing public streets, including the ability of the abutting landowner to enter and leave his premises by way of the street. *Rose v. California*, 19 Cal. 2d 713, 728 (1942). No such rights exist with respect to driveways.

> These rights, described as being in the nature of easements and "deduced by way of consequence from the purposes of a public street" (Perlmutter v. Greene (1932) 259 N.Y. 327, 182 N.E. 5, 6), include the right of access to and from the road, and the right to receive light and air from the adjoining street. (See Eachus v. Los Angeles etc. Ry Co. (1894) 103 Cal. 614, 617–618, 37 P. 750; Barnett v. Johnson (1863) 15 N.J.Eq. 481, 487–488; 10A McQuillin, The Law of Municipal Corporations (3d ed.1999) §§ 30.65 at p. 426; Pepin, *California and the Right of Access: The Dilemma Over Compensation* (1965) 38 So.Cal. L.Rev. 689, 690.) Judicial recognition of these rights derives from the perceived expectations of those who own or purchase property alongside a public street, to the effect that the land enjoys certain benefits associated with its location next to the road.

Id. (emphasis added). *See also Rose v. California*, 19 Cal. 2d 713 (1942). Pottery Park Driveway is located on City property. Although the Driveway is owned by the City and appears to have been built to provide access into the Park, there is no evidence that the Driveway was ever dedicated as a public street and accepted into the City's street system. The use of the word "Driveway" in the name further supports the idea that it is a City-owned driveway and not a public street. Thus, Mr. Allen does not have an abutter's right of access to his private property from Pottery Park Driveway, since it is not a public street.

Furthermore, the Allen family's long time use of Pottery Park Driveway as access to their property does not establish any right to continue using the Driveway for access. Since 1935, California Civil Code section 1007 has specified that no person can obtain prescriptive rights against any City-owned property.

> Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, but no possession by any person, firm or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or

> owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof.

Cal. Civ. Code § 1007.

Therefore, neither the fact that Pottery Park Driveway was built abutting Mr. Allen's property nor the fact that the Allen family has been using the Driveway for access to their private property for many years establishes Mr. Allen's legal right to use the Driveway in such a manner.

B. Pursuant to Council Policy 700-06, the Mayor may permit certain encroachments onto City parkland and is authorized to waive enforcement action against an encroachment if it is determined to be minor in nature.

Mr. Allen has admitted to City staff that he does not have documentation providing him legal access over Pottery Park Driveway to his private property. Accordingly, his continued use of Pottery Park Driveway during non-park hours is a trespass onto City property.[3] His use is also an encroachment for purposes of Council Policy 700-06.[4] Council Policy 700-06 allows for the City to grant authorization for encroachment on dedicated parkland if it is determined by the Park and Recreation Department that the requested action would not only meet the Policy's criteria for granting such authorization over general City property, but would also be consistent with Charter section 55, "i.e., that it would not change or interfere with the use or purpose of the parkland or open space." Council Policy 700-06 I.B.2.

There has been at least one case in California dealing with the issue of whether a government agency may properly grant permission to a private property owner to access their private property through a dedicated park. In *Big Sur Properties v. Mott*, 62 Cal. App. 3d 99 (1976), a plaintiff residential property owner sought to compel the director of the California Department of Parks and Recreation to consider its application for a permit under California Public Resources Code section 5003.5. California Public Resources Code section 5003.5 gives the State Department of Parks and Recreation discretion to grant a permit for a right-of-way across a park to an owner whose property is separated from a highway or road by the park. The court in *Big Sur* held that because the deed dedicating the property as State parkland was from a private individual and was exclusively for public park purposes and uses incidental to those purposes, the property cannot be used for other purposes without violating the public trust, and that a right-of-way for private access to private property outside the park is not an incidental use. *Id.* at 104. The court also held that California Public Resources Code section 5003.5 must be construed consistently with the public trust, in that it may be applied to dedications by the public, but not to dedications by private donors. *Id.* at 105.

The holding in *Big Sur* is consistent with the long-established difference in construction and treatment between dedications by private donors and dedications by the public. *Slavich v. Hamilton*, 201 Cal. 299, 303 (1927). Where property is acquired through private dedication, the permissible uses of that property outlined in the dedication document are strictly construed. In

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[3] A trespass may occur if a person, entering property pursuant to a limited consent as to the purpose for entry, exceeds those limits. *Civic Western Corp. v. Zila Industries, Inc.*, 66 Cal. App. 3d 1, 17 (1977).

[4] Council Policy 700-06 defines "encroachment" as "development, construction on or use of City property."

contrast, where the City dedicates its City-owned property, the permissible uses may not be as strictly construed. Here, the City dedicated its own property as parkland, and therefore, a court could more liberally construe the permissible uses of that parkland. A narrow reading of the *Big Sur* case would allow for it to be distinguished from the issue at hand, in that: (1) the deed granting the park in the *Big Sur* case explicitly restricted the granting of a permit for right-of-way through the park, whereas no such explicit restriction exists here; and (2) to grant the permit in the *Big Sur* case would have required a 600-foot extension of an existing road, whereas no extension of Pottery Park Driveway is required here. Therefore, an argument could be made that the issue at hand is factually distinguishable from the *Big Sur* case. A court may not disapprove of Mr. Allen's use of Pottery Park Driveway to access his property where the Park was dedicated by the City itself and no modifications to the existing Park are required. Conversely, a court will also consider the City's practice to strictly construe the permissible uses of dedicated parkland.

Council Policy 700-06 requires that permission to encroach on City property must be granted by written encroachment authorization containing stipulations and conditions deemed appropriate by the City to protect its property and interests, and sets forth a number of such stipulations and conditions that must be contained in the written authorization. However, as discussed above, Council Policy 700-06 does not allow for the authorization of encroachments on dedicated parkland or open space that would benefit only a private party. Council Policy 700-06 I.B.2. Thus, if the Park and Recreation Department determines that Mr. Allen's use of Pottery Park Driveway is consistent with Charter section 55 – that it would not change or interfere with the use or purpose of the parkland – and wishes to grant authorization for Mr. Allen to encroach on Pottery Canyon Park, the Council must first waive the section of Council Policy 700-06 prohibiting encroachments that benefit only a private party.

The most significant risk to the City in authorizing Mr. Allen's encroachment would come in the form of a challenge to the City's determination that the encroachment is consistent with Charter section 55. However, as discussed above, the City dedicated Pottery Canyon Park. Therefore, a court would more likely construe the permissible uses more liberally. Further, the risk may be mitigated to some extent by including in the encroachment agreement a requirement that Mr. Allen indemnify and hold the City harmless against such a challenge.

In lieu of the City granting authorization for an encroachment, Council Policy 700-06 allows for the Mayor to waive enforcement action against an existing encroachment if "the encroachment is minor in nature; i.e., is unobtrusive and does not impede access or use of the City property . . . ." Council Policy 700-06 IV.B. Here, Mr. Allen is using Pottery Park Driveway for ingress and egress to his private property which abuts the Driveway. A fair argument could be made that such use is unobtrusive and does not impede access or use of the City property, and if that is the case, the Mayor could waive any enforcement action against Mr. Allen. Should the Mayor decide to waive enforcement action against Mr. Allen, section IV.B. of Council Policy 700-06 clarifies that "it is understood that such encroachments may be subject to a recordation of official notice of the encroachment with the County Recorder and that lack of enforcement action does not constitute authorization to encroach or surrender City property rights." The City's waiver of enforcement against Mr. Allen, if the City chose to do so, would not be granting permission for Mr. Allen to access his property via Pottery Park Driveway. On the contrary, it would be recognition of his unlawful trespass and encroachment onto City property and merely a

declination to currently pursue enforcement. This same argument under section IV.B. of Council Policy 700-06 could not be made with respect to Mr. Allen's closing and locking of the gate allowing access to Pottery Canyon Park, particularly if Mr. Allen does so at times when the Park is supposed to be open. That type of private use and control over City property would be obtrusive and would impede access and use of the City property. Accordingly, if a waiver of enforcement is granted, such acts by Mr. Allen should not be allowed to continue. Furthermore, all non-City signs referencing video surveillance and private security patrol should be removed at Mr. Allen's expense and the City should determine whether any video surveillance equipment has been unlawfully placed on City property.

III. THE CONSERVATION EASEMENT OVER MR. ALLEN'S PROPERTY, AS CURRENTLY WRITTEN, DOES NOT ALLOW THE CONSTRUCTION OF A NEW DRIVEWAY.

As mentioned earlier in the Background section of this memorandum, the Willis M. Allen 1988 Family Trust granted to the City of San Diego a conservation easement pursuant to a Deed of Conservation Easement dated September 12, 1997. The Conservation Easement covers all of the land that lies between Mr. Allen's house and the Roadway Easement that would allow him to build a driveway. Attachment A depicts Mr. Allen's house located on Parcel No. 34673201 and his Roadway Easement for a driveway that lies on Parcel No. 34654045. The Conservation Easement (identified as "the Property" in the Deed of Conservation Easement) covers all of the area between the two, including all of Parcel No. 34654044.

Section 1 of the Conservation Easement explains the purpose of the Conservation Easement as follows:

> 1. Purpose. It is the purpose of this Easement to assure that the Property will be managed and maintained in a manner that is, to the maximum extent possible, in its natural, undisturbed scenic and open space condition and to prevent any use of the Property that will significantly impair or interfere with its conservation values. [Grantor intends that this Easement will confine the use of the Property to activities such as those involving pasturing, scenic enjoyment, and passive recreational use, that are consistent with the purpose of this Easement.]

Section 4 of the Conservation Easement lists the prohibited uses. It states:

> 4. Prohibited Uses. Except as expressly set forth in this Easement, any activity or use of the Property inconsistent with the conservation purpose of this Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited:
>
> . . .
>
> k. The construction of any new roadway, provided however, that the reconstruction or relocation of any existing roadway shall be permitted as long as it is planned to minimize or mitigate its impact on the conservation values of the Property.

Therefore, under the existing terms of the Conservation Easement, it is unlikely that Mr. Allen could construct an "alternative" driveway from his property to Torrey Pines Road without violating the express language in the Conservation Easement.

CONCLUSION

While granting an easement to SDG&E through Pottery Canyon Park for underground utilities that will serve only Mr. Allen's private property may be allowable under Charter section 55, it violates Council Policy 700-06, and may violate the intent of Charter section 219. Ultimately, the determination of whether to allow the easement will be a policy decision, but the City should take caution and consider the ramifications of establishing a practice of granting utility easements through dedicated parkland and Pueblo Lands which benefit only a single property owner. Such a practice could result in more private utility easements running through City parklands.

With respect to Mr. Allen's access to his property, there is no documentation showing that Mr. Allen may legally access his private property via Pottery Park Driveway. Pottery Park Driveway is not a public road, and therefore, Mr. Allen cannot properly claim abutter's rights of ingress and egress to his property from Pottery Park Driveway. Furthermore, Mr. Allen cannot claim prescriptive rights to use Pottery Park Driveway in such a manner. Mr. Allen's current use of Pottery Park Driveway is an encroachment as defined in Council Policy 700-06 and a trespass onto City property. However, the City may be able to grant authorization for such an encroachment. The most significant risk to the City in authorizing Mr. Allen's encroachment would come in the form of a challenge to the City's determination that the encroachment is consistent with Charter section 55. The City may further mitigate the risk by including in the encroachment agreement a requirement that Mr. Allen indemnify and hold the City harmless against such a challenge. If the City does not wish to authorize the encroachment but also does not wish to pursue enforcement at this time, the Mayor is authorized to waive enforcement action against such an encroachment if it is determined to be minor in nature. Furthermore, it appears that Mr. Allen is not permitted to construct a driveway from his property to Torrey Pines Road without violating the express terms of the Conservation Easement.

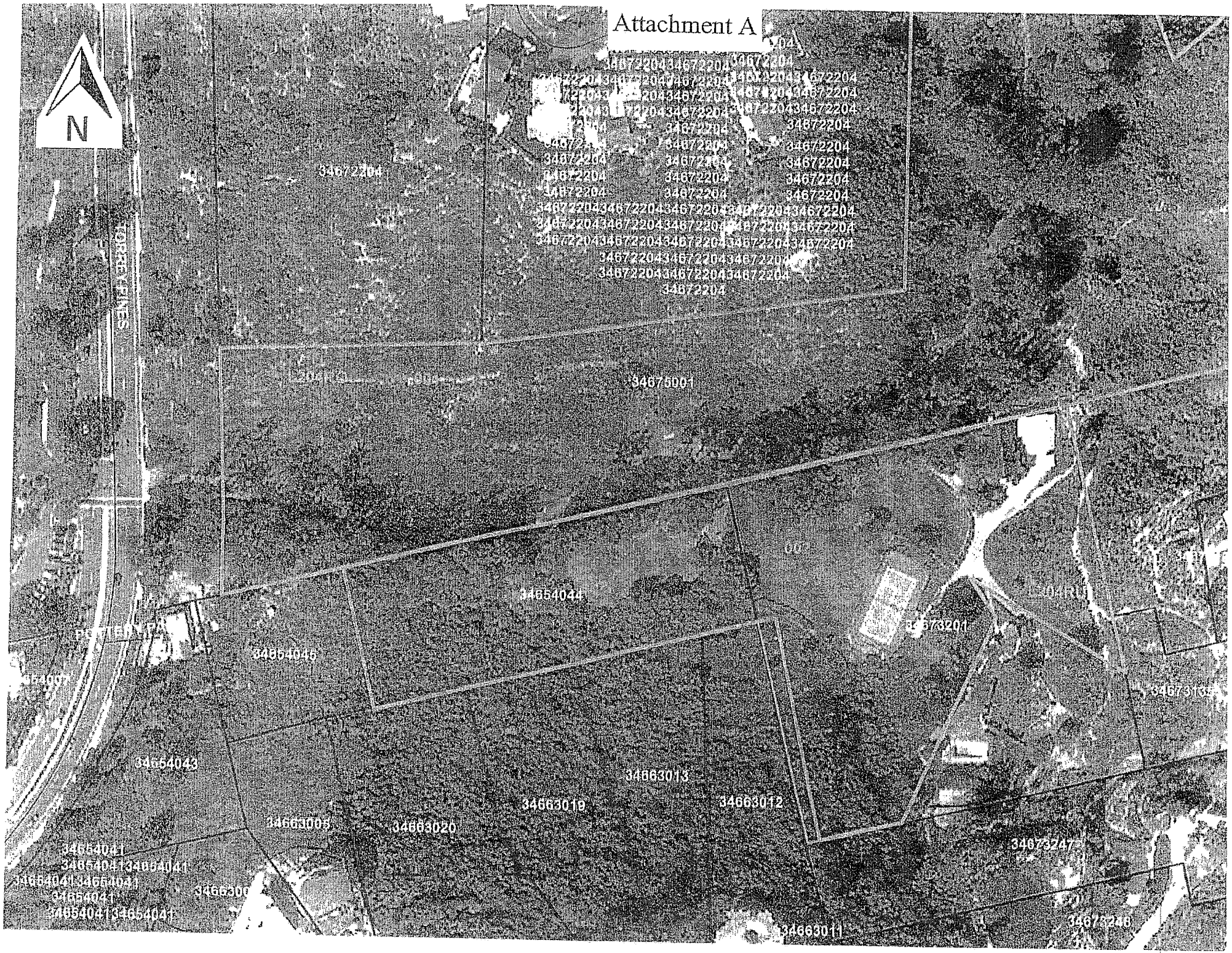
JAN I. GOLDSMITH, CITY ATTORNEY,

By
Adam R. Wander
Deputy City Attorney

ARW:js
cc: Sherri Lightner, Councilmember, District 1
Carl DeMaio, Councilmember, District 5

PL#2011-07560
Attachments

Attachment A



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ASSISTANT CITY ATTORNEY
(SPECIAL PROJECTS)

MEMORANDUM OF LAW

DATE: January 26, 1990

TO: Susan Hamilton, Deputy Director, Clean Water Program, Roger Graff, Deputy Director, Engineering Division, via Milon Mills, Jr., Water Utilities Director

FROM: City Attorney

SUBJECT: Underground Pipes Through Dedicated Park Lands

In a memorandum authored by Roger Graff, dated November 9, 1989, the Water Utilities Department sought a legal opinion as to whether the proposed Third Rose Canyon Trunk Sewer can be placed (underground) through dedicated open space park lands, without a vote of the electorate. In a similar vein, a memorandum authored by Susan Hamilton, dated November 22, 1989, requested an opinion as to whether a proposed twelve inch sludge line can be routed (underground) through Mission Bay Park and Sunset Cliffs Park. Although these two memoranda arose from different factual circumstances, they both require analysis of the same issue and will be addressed jointly in this response.

All of the park lands in question are owned in fee by The City of San Diego. The Rose Canyon Open Space Park Preserve was dedicated as such by Ordinance No. O-15073, in 1979; Sunset Cliffs Park was dedicated as such by Ordinance No. O-15941, in 1983; and Mission Bay Park was dedicated as such by Ordinance No. O-8628, in 1964. Rose Canyon Open Space Park Preserve and Sunset Cliffs Park are dedicated in perpetuity for "park and recreational purposes." Mission Bay Park is dedicated in perpetuity "as a public park to be developed and maintained for such purposes."

In Hiller v. City of Los Angeles, 197 Cal. App. 2d 685 (1961), the court stated:

> The disposition and use of park lands is a municipal affair (Wiley v. City of Berkeley, 136 Cal. App. 2d 10 (1955); Mallon v. City of Long Beach, 44 Cal. 2d 199 (1955)), and a charter city "has plenary powers with respect

> to municipal affairs not expressly forbidden to it by the state Constitution or the terms of the charter." (City of Redondo Beach v. Taxpayers, Property Owners, etc., City of Redondo Beach, 54 Cal. 2d 126, 137 (1960)).

Id. at 689.

Section 55 of the Charter of The City of San Diego establishes a Park and Recreation Department and addresses the disposition and use of park lands. This section states in pertinent part:

> 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.

The sole issue presented is whether the placement of underground utility pipes (be they sludge or sewer) through dedicated park lands without prior voter approval would constitute a violation of section 55 of the charter.

Under a strict construction of charter section 55, one might hastily conclude that placing underground utility pipes through dedicated park lands is not a "park, recreational or cemetery use" of those lands and thus requires prior voter approval. However, in City and County of San Francisco v. Linares, 16 Cal. 2d 441, 444 (1940), the court, in quoting Slavich v. Hamilton, 201 Cal. 299 (1927), stated:

> The uses to which park property may be devoted depend, to some extent, upon the manner of its acquisition, that is, whether dedicated by the donor, or purchased or condemned by the municipality. A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted. (Harter v. San Jose, 141 Cal. 659 (1904); Spires v. City of Los Angeles, 150 Cal. 64 (1906)) (emphasis added).

Following the trend recognized by Slavich, Harter, Spires, and City and County of San Francisco, in 1985 Council Policy No. 700-17 was amended to reserve to the City Council, "authority to establish easements for utility purposes in, under, and across the dedicated property so long as such easements and the facilities to be located therein do not significantly interfere with the park and recreational use of the property." This reservation of authority has been included in park dedication ordinances enacted after 1985. Because all three of the dedication ordinances in issue were enacted prior to 1985, the changes to Council Policy No. 700-17 are not applicable. Therefore, in determining whether or not the proposed uses of these dedicated park lands are proper, the uses must be examined in the context of the existing case law.

While the construction of buildings and roads and other surface uses in, through and across dedicated park lands has been a frequently litigated issue, the same cannot be said of subsurface uses of dedicated park lands. However, many of the principles espoused in surface use cases have analogous applicability to the issue at hand. In this regard, it has been stated that, "the real question seems to be whether the use in a particular case, and for a designated purpose, is consistent or inconsistent with park purposes." Slavich v. Hamilton, 201 Cal. 299, 303 (1927).

In McQuillin's treatise on municipal corporations, it is stated that: "[a] dedication is always subject to preexisting rights . . . ." and "[t]o constitute misuser or diversion, the use made of the dedicated property must be inconsistent with the purposes of the dedication or substantially interfere with it." McQuillin, The Law of Municipal Corporations, volume 11, sections 33.70, 33.74 (3d Ed. 1971). This addresses also the peripheral question raised by Mr. Graff's memorandum pertaining to the status of those pipes in Rose Canyon which were emplaced in the land prior to its dedication as park lands.

In City and County of San Francisco v. Linares, 16 Cal. 2d 441 (1940), the issue was examined as to whether or not a proposed use of Union Square Park would substantially interfere with the use of the land as a park. In that case, the court ruled that the construction and operation of a subsurface parking garage, as proposed, did not interfere with the surface use of the land as a park. In Best v. City and County of San Francisco, 184 Cal. App. 2d 396 (1960), a similar ruling was made based on a similar use of Portsmouth Square (a dedicated park).

It should be pointed out that the City and County of San Francisco has a charter provision whereby the Board of Park Commissioners may lease "sub-surface space under any public park

and the right and privilege to conduct and operate therein a public automobile parking station, provided that said construction . . . and operation will not be, in any material respect or degree, detrimental to the original purpose for which said park was dedicated . . . ."

Although The City of San Diego has no specific charter provision directly enabling the placement of underground pipes in dedicated park lands, the San Francisco cases are still applicable to the extent that they identify criteria which were considered by the courts when determining whether a subsurface use causes interference with the use of the land for the dedicated purpose. In that regard the court identified as determinative, "the restoration of the surface to its previous condition as a public park, with attractive landscaping and the usual public park facilities and conveniences." Linares, 16 Cal. 2d at 447.

In People ex rel. State Lands Commission v. City of Long Beach, 200 Cal. App. 2d 609, 621 (1962), the court cited Central Land Co. v. City of Grand Rapids, 302 Mich. 105, 4 N.W. 2d 485 (1942), in which the Michigan Supreme Court ruled that the erection and operation of oil wells on dedicated park lands did not substantially interfere with the use of the land as a park because, "defendants [had] taken rather extraordinary care in so operating the oil wells on park property that this activity [did] not materially impair the use of the land [as a park]." The court identified as a significant factor in its determination that no material impairment occurred, the fact that the pipelines leading from the wells to the storage tanks were contained wholly underground.

With this backdrop, we must determine whether or not placement of an underground twelve inch sludge line and an underground seventy-two inch trunk sewer line constitute uses which are inconsistent with the purposes of the dedication or substantially interfere with it.

While it is true that during construction of the proposed pipelines, there will be a disturbance of the surface, this disturbance is brought about by reason of necessity and is an unavoidable incident of a purely temporary nature. This type of temporary disturbance was dismissed as diminimus by the court in Linares. The court's primary concern was any interference with use of the land as a park, which would be caused by existence of the completed project.

It is difficult to imagine how the existence of underground pipes would in any way interfere with the surface use of the land for park and recreation purposes (particularly in unimproved open

space dedicated park lands). It seems axiomatic that where the use creates no interference, the use is not inconsistent with the dedicated purpose.

Additionally, it is noteworthy that section 55 of the charter provides that the City Council, upon recommendation by the City Manager and when the public interest demands, "may without vote of the people, authorize the opening and maintenance of streets and highways over, through and across City fee-owned land which has heretofore or hereafter been formally dedicated in perpetuity by ordinance," for park and recreation purposes.

The power to construct and maintain sewers is incidental to the power to construct and maintain streets. Harter v. Barkley, 158 Cal. 742, 745 (1910). Because the charter already authorizes the construction and maintenance of streets and highways through dedicated park lands, by implication it authorizes the lesser incidental use of placing water utility pipes thereunder, which by themselves constitute less of an impact upon the surface use of the land for the dedicated purpose.

The proposed underground pipelines may not enhance the use of the dedicated lands as parks, but if they are contained wholly underground, with no surface appurtenances, and the surface of the land is restored to its original condition, emplacement of the proposed pipelines certainly would not detract from the use of the lands for park and recreation purposes. As such, it is our conclusion the proposed pipelines are not uses requiring prior voter approval as provided by Charter section 55.

JOHN W. WITT, City Attorney

By Richard L. Pinckard
Richard L. Pinckard
Deputy City Attorney

RLP:mrh:460:710.2(x043.2)
ML-90-17

ATTACHMENT E

(R-82-1004)
REV.

RESOLUTION NUMBER R- 256123

Adopted on MAR 30 1982

WHEREAS, the Planning Commission held a public hearing on November 19, 1981 and December 3, 1981, to consider an amendment to the Land Use Map of the Progress Guide and General Plan for the City of San Diego for the purpose of shifting those properties known as the Fairbanks Country Club from Future Urbanizing to Planned Urbanizing, and recommended such action to the City Council; and

WHEREAS, the City Council considered the Planning Commission recommendations at a public hearing conducted on December 8, 1981; and

WHEREAS, the proposal conforms to the guidelines and requirements of the Progress Guide and General Plan of The City of San Diego for effecting a shift from the Future Urbanizing to the Planned Urbanizing Area; and

WHEREAS, the proposal conforms to City Council Policy No. 600-30 which specifies the guidelines and requirements for effecting a shift of land from the Future Urbanizing to the Planned Urbanizing Area. NOW, THEREFORE,

BE IT RESOLVED, by The Council of The City of San Diego that it hereby approves and adopts an amendment to the Land Use Map of the Progress Guide and General Plan for the City of San Diego, shifting those properties known as Fairbanks Country Club from Future Urbanizing to the Planned Urbanizing Area, which

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amendment shall become effective upon adoption of an appropriate amendment to the Progress Guide and General Plan of the City of San Diego, subject to the following conditions:

1. That the precedential-setting value of this decision be limited to the open space only, requiring that 75% of the land be dedicated to open space in order to establish the overriding open space value of the plan. This should indicate that the Growth Management Policy is adherent and that it is only being overridden when 75% or greater dedication of open space is accomplished.

2. That facilities and services of surrounding properties in the future urbanizing areas should be maintained at a rural level of services as opposed to an urbanizing level of services; i.e.: road systems, fire, police, ambulance and care, etc. that is brought to the property, does not have to be brought up to an urbanizing level of services if it is brought to a future urbanizing area.

3. That the City Council, under Council Policy 600-29, can limit the development of the project to a certain number of units per year, and to phasing of those units if it feels that such phasing would accomplish a limitation of impact on the surrounding area, and upon Council's policies and goals.

R-256123

01686

APPROVED: John W. Witt, City Attorney

By _____
Frederick C. Conrad
Chief Deputy City Attorney

FCC:clh:630
12/7/81
REV.4/20/82
Or.Dept:Plan.
R-82-1004

R- 256123

01687

Passed and adopted by the Council of The City of San Diego on MAR 30 1982
by the following vote:

Councilmen	Yeas	Nays	Not Present	Ineligible
Bill Mitchell	☐	☑	☐	☐
Bill Cleator	☑	☐	☐	☐
Susan Golding	☑	☐	☐	☐
Leon L. Williams	☑	☐	☐	☐
Ed Struiksma	☑	☐	☐	☐
Mike Gotch	☐	☑	☐	☐
Dick Murphy	☑	☐	☐	☐
Lucy Killea	☐	☑	☐	☐
Mayor Pete Wilson	☐	☐	☑	☐

AUTHENTICATED BY:

PETE WILSON
Mayor of The City of San Diego, California.

(Seal)

CHARLES G. ABDELNOUR
City Clerk of The City of San Diego, California.

By June A. Blackwell, Deputy.

Office of the City Clerk, San Diego, California

Resolution Number R- 256123 Adopted MAR 30 1982

CC-1070 (REV. 1-81)

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