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June 24, 2016

## REPORT TO HONORABLE MAYOR AND CITY COUNCILMEMBERS

### PROPOSED AMENDMENTS TO SAN DIEGO CHARTER SECTION 55.2 – INFRASTRUCTURE COMMITTEE ON JUNE 30, 2016

#### INTRODUCTION

On June 30, 2016, the Infrastructure Committee of the San Diego City Council will consider proposed amendments to San Diego Charter section 55.2 governing the allocation and use of Mission Bay Park Lease Revenues.<sup>1</sup> The City acquired a portion of Mission Bay Park in trust, as tidelands property that is operated and managed by the City pursuant to a grant from the State of California. The City's obligations with respect to tidelands trust property under State law overlap with obligations imposed on the City by Charter section 55.2. This Report is intended to address potentially incompatible obligations imposed on the City as a tidelands trustee and through the requirements of Charter section 55.2 that could result from proposed amendments to the Charter and recommend language to allow the City to reallocate Mission Bay Park Lease Revenues when necessary to comply with State law, should the City Council desire to move forward with the proposed amendments.

#### ANALYSIS

##### **I. THE TIDELANDS TRUST PROPERTY WITHIN MISSION BAY PARK IS SUBJECT TO STATE LAW GOVERNING THE CITY'S USE OF TIDELANDS AND THE REVENUES GENERATED FROM THE TIDELANDS**

The tidelands trust property in Mission Bay (hereinafter, the tidelands) was conveyed to the City by the State of California through a series of grants by statute. Cal. Stats. 1945, ch. 142; Cal. Stats. 1963, ch. 2139 § 2; *see also*, 2000 City Att'y MOL 199 (2000-07; Mar. 9, 2000). The City's interest in the tidelands is as a trustee and the City maintains and operates the property for the benefit of the public. *Id.* The City may generally use the tidelands for park and recreational purposes for the public's enjoyment and for commerce, navigation, and fishing. *Id.*

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<sup>1</sup> The Charter defines "Mission Bay Park Lease Revenues" as "all revenues collected by the City of San Diego from commercial and non-profit sources within *Mission Bay Park*, including but not limited to all monetary consideration received under leases of city owned property within Mission Bay Park, as well as revenue collected from contracts for concessions or any other revenues collected for the use of city owned property within *Mission Bay Park*." San Diego Charter § 55.2(a)(7). Mission Bay Park Lease Revenues for purposes of the Charter do not include revenue from the Mission Bay Golf Course, unless privately leased, mooring fees, tax revenue or permit fees. *Id.*

As a trustee, the City “assumes the same burdens and is subject to the same regulations that appertain to other trustees of such trusts.” *City of Long Beach v. Morse*, 31 Cal. 2d 254, 257 (1947) (quoting 3 McQuillin Mun. Corp. (2d ed. § 1230)). The tidelands and the revenue generated thereon can be used only in furtherance of the trust purpose. *Id.* at 257-58 (“If the proceeds are regarded as income from trust property, the trustee, . . . has no more right to them than it has to the corpus.”). As discussed in the attached Memorandum of Law, revenues are not restricted to the tidelands from which they were generated and may be spent on other tidelands trust property so long as the revenues are spent for trust purposes. 2000 City Att’y MOL 199 (2000-07; Mar. 9, 2000).

The City must also comply with the requirements of the California Public Resources Code governing the use and operation of the tidelands. Cal. Pub. Res. Code § 6306(a). State law requires revenues received from tidelands trust properties and all trust assets administered and collected by the City “be expended only for those uses and purposes consistent with the public trust for commerce, navigation, and fisheries, and the applicable statutory grant.” Cal. Pub. Res. Code § 6306(c). The City is also required to establish and maintain certain accounting principles with respect to revenues received from the tidelands and expenditures of those revenues. Cal. Pub. Res. Code § 6306(b). Funds received or generated from tidelands trust properties must be segregated in separate accounts from non-trust funds. Cal. Pub. Res. Code § 6306(d). City staff indicates that the City is currently in compliance with State law requirements applicable to the tidelands.

## **II. CHARTER SECTION 55.2 GOVERNS THE CITY’S USE OF MISSION BAY PARK LEASE REVENUES, INCLUDING REVENUES FROM TIDELANDS WITHIN MISSION BAY PARK**

Charter section 55.2 was adopted by City voters in 2008 and governs the allocation and use of Mission Bay Park Lease Revenues. A threshold amount of Mission Bay Park Lease Revenues (currently \$20 million) must be allocated to the City’s general fund, which “may be used for any municipal purpose.” San Diego Charter § 55.2(b). Any revenues in excess of the threshold amount (excess revenues) are allocated as follows: the greater of twenty-five percent of the revenues or \$2.5 million to the Regional Park Improvement Fund (Regional Park Fund) and seventy-five percent or the remainder of the revenues to the Mission Bay Park Improvement Fund (Mission Bay Fund). San Diego Charter § 55.2(b); *see* City Att’y MS 2010-17 (Dec. 10, 2010). Funds in the Regional Park Fund may be used for non-commercial capital improvements in San Diego Regional Parks, defined as those parks “that serve regional residents and/or visitor populations as determined by ordinance of the City Council.”<sup>2</sup> San Diego Charter § 55.2(a)(9). Funds in the Mission Bay Fund may be used only for certain prioritized capital improvement projects within Mission Bay Park. San Diego Charter § 55.2(c); City Att’y MS 2009-12 (Dec. 4, 2009).

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<sup>2</sup> The definition of “San Diego Regional Parks” specifically includes Chollas Lake Park, Balboa Park, Mission Trails Regional Park, Otay River Valley Park, Presidio Park, San Diego River Park and open space and coastal parks and beaches. San Diego Charter § 55.2(a)(9).

The proposed amendment to Charter section 55.2 includes a shift in the allocation of excess revenues. Instead of receiving the greater of twenty-five percent of excess revenues or \$2.5 million, the allocation to the Regional Park Fund would increase to the greater of thirty-five percent of excess revenues or \$3.5 million. The allocation to the Mission Bay Fund would be reduced to sixty-five percent of the excess revenues or the remainder of the excess revenues after allocation to the Regional Park Fund.

The shift in allocation of Mission Bay Park Lease Revenues, along with anticipated development in the Mission Bay tidelands and a potential decrease in revenues from non-tidelands areas in Mission Bay, could result in a situation where the City would be unable to comply with the requirements of the Charter and its obligations as a tidelands trustee. For example, if the proposed development in Mission Bay Park increased revenues from the tidelands significantly and the revenues on non-tidelands decreased, the City may be required to allocate tidelands revenues pursuant to Charter section 55.2 to the Regional Park Fund and away from the purposes of the tidelands trust in violation of State law. If the City Council desires to present the proposed amendment to Charter section 55.2 to City voters, the Office of the City Attorney recommends the amendment include language that would allow the City to reallocate Mission Bay Park Lease Revenues when necessary to comply with State law.

### CONCLUSION

A portion of Mission Bay Park is tidelands trust property subject to State law requirements restricting the use of revenues generated from those tidelands. The proposed amendment to Charter section 55.2 increasing the allocation of Mission Bay Park Lease Revenues to the Regional Park Fund has the potential to direct tidelands revenues away from trust purposes. Therefore, if the City Council desires to present this amendment to the City voters, this Office recommends the amendment include language that would allow the City to reallocate lease revenues when necessary to comply with State law governing the City's use of tidelands property.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Heather M. Ferbert

Heather M. Ferbert  
Deputy City Attorney

HMF:nja  
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Doc. No. 1308371  
Attachment

cc: Katherine Johnston, Director of Infrastructure and Budget Policy, Office of the Mayor  
David Graham, Deputy Chief Operating Officer  
Andrea Tevlin, Independent Budget Analyst  
Herman Parker, Director, Park and Recreation Department

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**MEMORANDUM OF LAW**

**DATE:** March 9, 2000  
**TO:** Philip D. Phillips, Accounting Division Manager, Auditor and Comptroller  
**FROM:** City Attorney  
**SUBJECT:** State Tidelands Grant Issues

**QUESTIONS PRESENTED**

1. Is the City required to identify transient occupancy taxes, property taxes, or sales taxes as revenue of tidelands property for the purposes of either the City's 1963 tidelands agreements with the State or the City's annual statement of tidelands revenues and expenditures?
2. When the City has reimbursed the State for improvements to certain tidelands properties as required by the City's 1963 tidelands agreements with the State, can the City use the revenues generated from the reimbursable tidelands grant areas on other tidelands grant areas?
3. When the City has reimbursed the State for improvements to certain tidelands properties as required by the City's 1963 tidelands agreements with the State, can the City report a single combined tidelands grant column on its annual statement of revenues and expenditures for tidelands property, rather than reporting separate columns for each tidelands grant?

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### SHORT ANSWERS

1. No. Taxes are not tidelands revenues for the purposes of the tidelands trust, the City's 1963 tidelands agreements with the State, or the City's annual statement of revenues and expenditures for tidelands property.
2. Yes. When the City has reimbursed the State as required by the 1963 agreements, the City may expend revenues generated from one tidelands grant area on any other tidelands grant area so long as the revenues are expended for tidelands trust purposes.
3. Probably not. The City should report the revenues and expenditures of each tidelands grant area in a separate column unless the tidelands grant areas are operated as a single integrated entity.

### INTRODUCTION

The State of California has granted tidelands property in trust to the City of San Diego. Certain tidelands trust property located in the Mission Bay/Beach and Ocean Beach areas was granted to the City in or about 1963.<sup>1</sup> Pursuant to the terms of the statutory grants, the City and the State entered into agreements regarding the use of the lands and reimbursement to the State of its investment in the property conveyed.<sup>2</sup> Among other things, the agreements require the City to reimburse the State from revenue realized from the operation of Mission Bay and Ocean Beach that is over and above the City's costs of maintenance, operation, and capital investment. Because the tidelands property is held in trust by the City, all revenue generated from the property must be used for trust purposes.

### DISCUSSION

#### **I. Transient Occupancy Tax, Property Tax, and Sales Tax Proceeds Need Not be Expended on Tidelands Trust Purposes.**

The public trust in the tidelands does not require that tax proceeds be expended on tidelands trust purposes. Similarly, the City's agreements with the State regarding the 1963 tidelands grants do not require the City to report tax proceeds as tidelands revenue. In addition,

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<sup>1</sup>Copies of the 1963 statutes granting the tidelands to the City are attached to this Memorandum as Attachment Nos. 1 and 2.

<sup>2</sup>Copies of the agreements are attached to this Memorandum as Attachment Nos. 3 and 4.

the City is not required to report tax proceeds as revenue in its annual statement of revenues and expenditures for tidelands trust property.

**A. The Public Trust in the Tidelands Does Not Require That Tax Proceeds be Expended on Trust Purposes.**

When California was admitted to statehood in 1850, it succeeded to title in the tidelands within its borders not in its proprietary capacity, but as trustee for the public. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (1980). The permissible range of public uses of tidelands includes the right to hunt, bathe, or swim, and the right to preserve the tidelands in their natural state as ecological units for scientific study. *Id.* When the State of California transfers its interest in the tidelands in trust to a city, the city is a trustee and as such assumes the same burdens and is subject to the same regulations that pertain to other trustees of such trusts. *City of Long Beach v. Morse*, 31 Cal. 2d 254, 257 (1947).

A trust can be created only if there is trust property, which can be real or personal property. Cal. Prob. Code § 62. A trustee must administer the trust solely in the interest of the beneficiaries. Cal. Prob. Code § 16002(a). As such, the proceeds of trust property, whether regarded as principal or income, can be used only in furtherance of the trust purpose. *Morse*, 31 Cal. 2d at 257-58; 60 Cal. Jur. 3d (Rev), *Trusts* § 160 (1994) (citing *Morse*).

“Income” of a trust is defined as: “money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset. . . .” Cal. Prob. Code § 16324. “Fiduciary” means a trustee. *Id.* § 16323. An example of income is an amount received by the trustee as rent of real or personal property. *See id.* § 16356.

In contrast, a tax is “a contribution for the support of a government required of persons, groups, or businesses within the domain of that government.” The American Heritage Dictionary of the English Language 1839 (3d ed. 1992).<sup>3</sup> The transient occupancy tax is a tax imposed on, among other things, occupants of hotel rooms. *See San Diego Municipal Code [SDMC]*

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<sup>3</sup>“Taxed” is defined as: “To place a tax on (income, property, or goods). The American Heritage Dictionary of the English Language 1839-40 (3d ed. 1992).

§ 35.0103. Property taxes are generally imposed on owners of real property, and sales taxes are imposed on purchasers of goods or services.<sup>4</sup> None of the foregoing taxes are imposed on, or received by, the City as trustee of the tidelands property.<sup>5</sup>

Thus, transient occupancy, property, and sales taxes are not principal assets or income of the tidelands trust that must be used for trust purposes. In contrast to lease or rental payments, the taxes are not income to the City as trustee because they are not a return to the City from a principal asset. The City does not receive any tax proceeds in its capacity as trustee of the tidelands trust property. Further, it is not reasonable to conclude that either the courts or the legislature intend that all tax proceeds, including those proceeds accruing to the state, county, or other jurisdictions, be confined to tidelands trust purposes.<sup>6</sup>

**B. The City's 1963 Tidelands Agreements with the State Do Not Require the City to Report Taxes as Tidelands Revenue.**

In 1963, the State granted certain sovereign state tidelands, located in the vicinity of Mission Bay and Ocean Beach, in trust to the City.<sup>7</sup> *See* Stats 1963 ch 2139, 2140. Pursuant to the terms of the grants, the conveyance of the lands would not take effect until the City and the State executed agreements setting forth the conditions of the conveyance. *See* Stats 1963 ch 2139§ 2(b)(2); Stats 1963 ch 2140§ 2(b)(2). In 1964, the City and State executed agreements for the Chapter 2139 grant [2139 Agreement] and the Chapter 2140 grant [2140 Agreement]

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<sup>4</sup>In the case of tidelands trust property, property taxes are not imposed on the City. Instead, a "possessory interest tax" is imposed on certain users of trust property, for example, lessees of the property. The City may, however, be responsible for the payment of a possessory interest tax if the City fails to notify a lessee or other responsible user of tidelands property that it must pay a possessory interest tax.

<sup>5</sup>The transient occupancy tax is paid by the operator of a hotel to the City in its capacity as taxing authority, not in its capacity as trustee. Similarly, property and sales taxes, if any, are obligations of third party users of the trust property (for example, lessees), and are paid to taxing authorities other than the City.

<sup>6</sup>In fact, under the San Diego Municipal Code, transient occupancy taxes must be spent as directed by the City Council, which includes expending the taxes for the purpose of promoting the City. SDMC § 35.0101(b). Similarly, a certain percentage of sales and property taxes that accrue to entities other than the City must be spent as directed by the state legislature.

<sup>7</sup>*See* Attachment No. 5, Approximate Limits of Grants to City of San Diego Mission Bay.

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[collectively, Agreements]. See Attachment Nos. 3 and 4. Condition 4 of the 2139 Agreement provides:

*That all revenue realized from the operation of Mission Bay by CITY over and above the cost to CITY for maintenance and operation and capital investment shall be prorated between CITY and STATE on the basis of revenue assignable to a unit acre of property located within Mission Bay on the date of this agreement until such time as STATE regains its investment of ONE HUNDRED FORTY FIVE THOUSAND, THREE HUNDRED DOLLARS (\$145,300) in subject property. In any proration of revenue. . .*

CITY shall furnish STATE within ninety (90) days following the close of the fiscal year, a financial statement covering the operation of Mission Bay which shall include the CITY's total estimated annual cost of operation and maintenance as well as a compilation of all gross receipts.

See Attachment No. 3, p. 14 (emphasis added). Similarly, Condition 4 of the 2140 Agreement provides:

*That all revenue realized from the operation of Ocean Beach by CITY over and above the cost to CITY for maintenance and operation and capital investment shall be prorated between CITY and STATE on the basis of revenue assignable to a unit acre of property located within Ocean Beach on the date of this agreement until such time as STATE regains its investment of FOUR HUNDRED SIXTEEN THOUSAND EIGHT HUNDRED SEVENTY SIX DOLLARS (\$416,876) in subject property. In any proration of revenue. . .*

CITY shall furnish STATE within ninety (90) days following the close of the fiscal year, a financial statement covering the operation of Ocean Beach which shall include the CITY's total estimated annual cost of operation and maintenance as well as a compilation of all gross receipts.

See Attachment No. 4, pp. 4-5 (emphasis added).

Thus, the Agreements require the City to reimburse the State, on a pro-rata basis, from net revenue realized by the City from the operation of Mission Bay and Ocean Beach. The Agreements do not define the term "revenue." The term is, however, defined in the dictionary as: "Yield from property or investment; income." The American Heritage Dictionary of the English Language 1543 (3d ed. 1992).

Transient occupancy taxes, property taxes, and sales taxes are not revenues within the meaning of the Agreements. The Agreements were written in the context of the tidelands property being subject to the public trust. As explained in Section I.A. above, the public trust requires that all income realized from the operation of trust property be used solely for trust purposes. In that context, the term "revenue" logically refers to income of the tidelands property.

Here, the Agreements do not require the City to report taxes as revenue of the tidelands property because the taxes are not income of the trust. As explained in Section I.A. above, the taxes are not a return to the City as trustee on a principal asset of the trust. To conclude otherwise would contravene legislative intent with respect to the imposition of the taxes.

**C. The City is Not Required to Report Taxes as Revenue on the City's Annual Statement of Tidelands Revenues and Expenditures.**

In addition to the public trust requirements, State statutory law imposes restrictions and obligations on the City with respect to tidelands trust property. Specifically, the Public Resources Code [Code] provides:

- (a) Notwithstanding any other provision of law, every . . . city . . . to which sovereign trust lands, including tidelands, submerged lands, or the beds of navigable waters, have been, or in the future are, granted, conveyed, or transferred by statute, shall establish and maintain accounting procedures, in accordance with generally accepted accounting principles, providing accurate records of all revenues received from the trust lands and trust assets and of all expenditures of those revenues. . .

....

- (c) Unless otherwise prescribed by law, on or before October 1 of each year, commencing October 1, 1986, each trust grantee shall file with the commission a detailed statement of all revenues and expenditures relating to its trust lands and trust assets, including obligations incurred but not yet paid, covering the fiscal year preceding submission of the statement.

Cal. Pub. Res. Code § 6306.

Thus, the Code requires the City to provide accurate records of all revenues received from trust lands and trust assets and of all expenditures of those revenues. The Code also requires the

City to file with the State a detailed annual statement of all revenues and expenditures relating to its trust lands and trust assets. As with the Agreements, however, the Code does not define the term "revenue."

Here, the revenue received from the tidelands trust lands or its assets does not include transient occupancy, property, or sales tax. As explained in Sections I.A. and I.B. above, in the context of public trust lands, revenue means income realized from the trust property or its assets. The taxes are not income because they are not a return on a principal asset of the trust.

## **II. The City May Use Revenues Generated from One Tidelands Trust Grant on Any Other Tidelands Trust Grant.**

As explained in Section I above, the public trust in the tidelands requires that all revenues received from trust lands be expended on trust purposes. Additionally, the Code provides: "[a]ll revenues received from trust lands and trust assets shall be expended only for those uses and purposes consistent with the public trust for commerce, navigation, and fisheries, and the applicable statutory grant or grants." Cal. Pub. Res. Code § 6306 (b). The Code is silent, however, on whether income generated from one tidelands grant area may be expended on other tidelands grant areas.<sup>8</sup>

Because there is no clear legal requirement that revenue earned from a particular land grant area must be spent solely on that land grant area, it can reasonably be concluded that the City may use revenues generated from one land grant on another land grant area. This Office has previously opined that revenues from tidelands trust property may be spent on other tidelands trust property so long as the revenues are spent for trust purposes. *See, e.g.*, 1985 City Att'y MOL 85, 86-87 (revenues from Mission Bay tidelands need not be spent solely for Mission Bay tidelands improvements or operations so long as revenues not spent in Mission Bay are spent on other City tidelands); 1989 City Att'y MOL 316, 317 (excess revenues generated from one portion of tidelands granted to City can be used on another portion of tidelands granted to City).

Thus, when the City has reimbursed the State as required by the Agreements, the City may use revenues from the reimbursable tidelands grant areas on any other tidelands grant area. As set forth in Section I.B., the City is required to reimburse the State on a pro-rata basis from net revenue realized by the City from the operation of Mission Bay and Ocean Beach. When the

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<sup>8</sup>The legislative history of Section 6306 sheds no light on this issue. *See* Stats 1970 ch 250 § 1; Stats 1985 ch 923 (SB 598).

City has fulfilled its reimbursement obligations, the net revenues from the Mission Bay and Ocean Beach tidelands may be used on any other tidelands grant area.

### **III. The City Probably Cannot Use a Single Column for All of its Tidelands Grant Properties in its Annual Statement of Tidelands Revenues and Expenditures.**

The Code requires the City to establish and maintain accounting procedures providing accurate records of all revenues received from its trust lands and assets, as well as expenditures of those revenues. Cal. Pub. Res. Code § 6306(a). The City is not required to separate accounting records of several trust grants when the granted lands are operated as a single integrated entity. *Id.* The Code also requires the City to file an annual detailed statement, prepared in accordance with generally accepted accounting principles, of all revenues and expenditures relating to its trust lands and trust assets. *Id.* § 6306(c).

Because the Code permits the City to combine accounting records of tidelands operated as a single integrated entity, the Code impliedly requires the City to separate the accounting records of tidelands that are not operated as a single entity. The Code is silent, however, on whether the annual statement must separate revenues and expenditures for several trust grants.<sup>9</sup> It can be reasonably inferred, when reading Section 6306 as a whole, that the annual statement must also separate tidelands grant areas that are not operated as a single integrated entity. Because the Code is not definitive on this issue, the Auditor and Comptroller may desire to consult with the State on whether a combined tidelands grant column is acceptable.

### **CONCLUSION**

First, transient occupancy taxes, property taxes, and sales taxes are not revenues that must be expended for tidelands trust purposes. Revenues are income received by the trustee as a return on trust assets. The taxes are not a return on trust assets nor are the taxes received by the City in its capacity as trustee.

Second, when the City has reimbursed the State as required by the Agreements, the City may expend revenues generated from the reimbursable tidelands grant areas on any other tidelands grant area. The tidelands revenues must, however, be used for tidelands trust purposes. There is no clear legal restriction on using revenue from one tidelands grant area to benefit another tidelands grant area.

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<sup>9</sup>The legislative history of Section 6306 sheds no light on this issue. *See* Stats 1970 ch 250 § 1; Stats 1985 ch 923 (SB 598).

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Finally, the City probably cannot combine its tidelands grant accounting records into a single column on its annual statement of tidelands revenues and expenditures. The Code impliedly requires that tidelands trust grants that are not operated as a single integrated entity be reported in separate columns on the annual statement. Because the Code does not explicitly require separate columns for each tidelands grant area, the Auditor and Comptroller may desire to consult with the State as to whether a single column is acceptable.

CASEY GWINN, City Attorney

By 

Lori W. Girard  
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