June 18, 1986

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
MISSION BEACH PARK (BELMONT PARK) PROPOSED LEASE

On May 28, 1986, this office received the attached letter and memorandum from Attorney Richard J. Wharton, representing the Save Mission Beach Committee. Mr. Wharton raises a number of legal issues regarding the proposed lease of a portion of Mission Beach Park to Belmont Park Associates. Since Mr. Wharton provided his legal arguments against the proposed lease sufficiently before the date for Council action for this office to review and analyze his position, it was felt that a response to his memorandum should be prepared for City Council review prior to the June 23 Council meeting.

The basic contentions in Mr. Wharton's memorandum are as follows:

A. The proposed lease of Mission Beach Park to Belmont Park Associates is inconsistent with and in violation of the restriction on use of this property as established in the grants and in the City Charter and General Plan of the City of San Diego.

B. The development proposal of Belmont Park Associates cannot be approved because it is inconsistent with the City's Progress Guide and General Plan in that it is totally contrary to the City's adopted policy of historic site preservation as set forth in the Cultural Resources Element, the Redevelopment Element, and the Recreation Element of the General Plan.

C. The City Council cannot approve the proposed amendment to the Mission Beach Precise Plan because the proposed amendment is not consistent with the Progress Guide and General Plan of the City of San Diego.

D. The circumstances surrounding the lease of this invaluable oceanfront parkland and the destruction of a designated historic structure gives rise to the need to bring a taxpayer's action under C.C.P. 526a to prevent waste of City assets if the lease is approved without further request for proposals.

In response to the first contention, this office has again reviewed the background information resulting in the City's

ownership of the property proposed to be leased. The property in question was owned by Mission Beach Company, a California corporation, which company, by deed dated July 5, 1934, granted, without condition or restriction as to use, the property to the State of California. The State of California, through the State Park Commission, adopted a resolution accepting the property and declared it suitable for State park purposes. In 1939, the State granted the property to the City for park purposes and specified that the City could not sell or lease the property. (Chapter 1054 State Statutes of 1939.)

Apparently as a result of the fact that portions of the property had in fact been leased for amusement park type activities since the middle 1920's and the property was continuing to be leased for such purposes, the State Legislature amended the "no lease" provision of the 1939 statutes in 1943 specifying simply that the property be used by the City "as a part of its City park system, and administered by (the) City in accordance with the provisions of its Charter."

On August 16, 1973, by Ordinance No. 11110 the City Council officially dedicated Mission Beach Park to park and recreation use. Therefore, the property to be leased can only be used for park and recreation purposes.

Mr. Wharton apparently is arguing that the proposed lease would not provide for a valid park and recreation use and would, therefore, be illegal. Attached is a memorandum of law recently prepared by this office describing basically what are and what are not park uses in the eyes of the courts.

In helping with the negotiations on the lease, this office particularly emphasized the fact that the property is dedicated to park and recreation purposes and can only be used for park and recreation purposes. The proposed lease under Section 1.02 emphasizes this fact. Section 1.02 reads as follows:

> 1.02 Uses. It is expressly agreed that the Premises are leased to LESSEE for park and recreation uses, specifically for the construction, operation and maintenance of a park/visitor-oriented commercial and recreational center, as described in the Development Plan attached as Exhibit "C" hereto (the "Development Plan"), and for such other related or incidental purposes as may be first approved in writing by the City Manager, which approval shall not be unreasonably withheld, and for no other

> purpose whatsoever.
>
> LESSEE acknowledges that the Premises are part of a dedicated public park and agrees to use the property only for purposes as described above. LESSEE covenants and agrees to use the Premises throughout the term hereof for the above specified purposes and to diligently conduct or cause the business to be conducted thereon to produce the most gross income that can be reasonably expected. Failure to continuously use the Premises for said purposes, or the use of the Premises for purposes not expressly authorized herein, shall constitute a default under the terms hereof.

Mr. Wharton apparently feels that the commercial uses allowed are not legal park uses. While each fact situation involving commercial use of park lands must be analyzed to determine whether the commercial use is, in fact, a valid park use, it is clear there are a number of valid commercial activities which qualify as proper park and recreation uses. Examples in the City of San Diego are the various commercial activities in Balboa Park, including the zoo, the Cafe Del Rey Moro, the snack and soft drink facilities, the Starlight Opera facilities, the carousel and the miniature train. In Mission Bay Park there are several more significant commercial uses, including the various hotels and Sea World as well as restaurants and the Mission Bay Marina complex and related commercial facilities in the Quiviera Basin. Similar non-City park uses include the Bazaar Del Mundo in Old Town State Park, the County's Heritage Park in the Old Town area, and the Squibob Square portion of Old Town State Park.

The question, therefore, is not whether the use is commercial but whether the use is park and recreational and whether, if the use is not purely park and recreational, i.e., hotel, whether the facility is an appropriate facility for the purpose of providing for the needs of park visitors. Since Mission Beach Park is not a small, isolated park but is in fact immediately adjacent to the much larger Mission Bay Park and could, by a mere change of name, be made part of Mission Bay Park, it is clear that the City Council, in determining whether to proceed with the approval of the lease, may take into consideration the needs of the visitors to the adjacent Mission Bay Park in determining whether the facilities proposed in Mission Beach Park are, in fact, needed to serve the needs of the visitors to both parks as well as the

beach areas adjacent thereto.

Also attached is a copy of Exhibit 7 to the proposed lease which specifies the uses to be allowed on the property. If the City Council feels that any of the proposed uses do not in fact provide needed services and facilities to accommodate park visitors, the City Council should delete any such use from the list of approved uses. The "travel agency" use is probably the most suspect "park" use on the list, however, a small travel agency in the midst of the larger commercial facilities appeared to be a reasonably necessary and appropriate activity to service the needs of the numerous park visitors. It should be noted that the leasehold covers approximately 320,000 square feet while the commercial facilities will only take up approximately 70,000 square feet. The remainder of the property is to be developed and maintained for other park and recreation uses such as the public swimming pool and related activities; landscaping and walks, fountains, benches and plazas; public restrooms and lifeguard facilities and parking.

With regard to Mr. Wharton's question involving ownership of the roller skating rink building, it appears clear from the grant deed that the only purpose of excepting that building was to allow the grantor to continue to collect a $3,000 unpaid balance on a mortgage, as clearly specified in the grant deed.

In summary, with regard to the first issue raised by Mr. Wharton, the property to be leased is dedicated to park and recreation use and the lease requires that it be used for such purposes. Commercial uses are widely established in parks and are proper uses of dedicated parks if the commercial use is found to be appropriate to service the needs of park visitors.

With regard to the second contention in Mr. Wharton's memorandum, which relates to the alleged inconsistency of the proposed lease with the City's General Plan and specifically the Cultural Resources, Redevelopment and Recreation Elements of the General Plan, this office, being familiar with the General Plan as a whole, must conclude that the proposed lease is not, as a legal matter, inconsistent with the General Plan. The intent of the Request for Proposals for the redevelopment of Belmont Park and the intent of the proposed option and lease is to provide for new park development and at the same time allow for the retention of the basic Mission Beach plunge pool facilities. As you know, the Mission Beach plunge has, for a number of years, required a substantial subsidy by the taxpayers in order to remain open. As you also know, the remainder of the Mission Beach Park facilities are in a general state of disrepair, and the public is not now

able to utilize a substantial portion of the property for public park purposes. The proposed option and lease provide for reopening the park with new and better facilities and at the same time refurbishing the basic portions of the Mission Beach plunge.

While it was easy to argue that portions of some of the General Plan elements speak contrary to a proposal to demolish the old roller rink building and the outer portion of the plunge building in order to redevelop the park, it is equally easy to demonstrate that the end result of the redevelopment and to a large extent maintaining the "historic" nature of the plunge facilities as well as providing park and recreation activities and services for the public, are in full compliance with the basic thrust of the City's General Plan.

As a legal matter, Section 65700 of the Government Code specifies that the provisions of Section 65100 through 65650 are not applicable to charter cities except that charter cities are required to adopt a General Plan which contains mandatory elements specified in Section 65302. Section 65302 does not require a Recreation Element, a Historic Preservation Element or a Cultural Resources Management Element. Such elements can be "voluntarily" included in general plans but are not mandatory.

In any event, there is no doubt that the proposed project can be found by the City to be in general conformance to the General Plan, even though there is no legal obligation that such a finding even be made. It should be pointed out that charter cities continue to be exempt from the vast majority of the State statutes in the areas of local planning and zoning. Section 65700 of the Government Code, as stated above, specifically

exempts charter cities from the local planning provisions with the specific exception of Section 65302 and the State provisions relating to low and moderate income housing within the coastal zone and relating to the specific required contents of housing elements. Likewise, the zoning regulations as contained in Section 65800, et seq. of the Government Code are specifically not applicable to charter cities as stated in Section 65803.

Mr. Wharton's third contention is that the City cannot approve "the proposed amendment to the Mission Beach Precise Plan because the proposed amendment is not consistent with the Progress Guide and General Plan of the City." Once again, this office does not agree with Mr. Wharton's conclusion.
Mr. Wharton's basic premise is that Section 65454 of the California Government Code specifies that "no specific plan may be adopted or amended unless a proposed plan or amendment is consistent with the general plan." The basic legal answer to

such premise is that Section 65454 does not apply to charter cities, as stated in Section 65700. Another answer, of course, is that the proposed amendment to the Mission Beach Precise Plan (copy attached) is consistent with the City's General Plan. Such is apparently the conclusion of both the Planning Department and the Planning Commission since they both recommended approval of the amendment to the Council.

Mr. Wharton's last contention contained in his memorandum is as follows:

> D. The circumstances surrounding the lease of this invaluable oceanfront parkland and the destruction of a designated historic structure gives rise to the need to bring a taxpayer's action under C.C.P. 526a to prevent waste of City assets if the lease is approved without further request for proposals.

The City Property Department has been negotiating the proposed lease for a number of months. Mr. Wharton does not claim that any "financial assistance" has been given to the Property Department staff who have been negotiating the lease, including the proposed rent. In fact, the City Council additionally authorized the Property Department to retain the services of Mr. Larry Williams, an independent consultant, to determine whether the terms and conditions of the lease, including the consideration to come to the City as a result of the lease, are fair and reasonable. Mr. Williams has concluded that the lease terms are fair and reasonable. As a legal matter, it is not necessary to, as Mr. Wharton suggests, "send out new

Requests for Proposal for (the) property." The lease, as negotiated, represents substantial benefits to the City and its taxpayers and would result in Mission Beach Park being reopened to the public for park and recreation purposes and at the same time provide for the refurbishment of the plunge and the construction of needed public improvements in the area.

It should be noted that this office is not necessarily for or against the proposed redevelopment. The above discussion attempts to represent an objective review of the facts as well as to answer the basic legal contentions contained in Mr. Wharton's memorandum.

Respectfully submitted,
JOHN W. WITT
City Attorney

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Attachments
RC-86-16