

November 26, 1990
Docket of November 27, 1990
Item No. 336

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
POINT LOMA NAZARENE COLLEGE - CONDITIONAL USE PERMIT -
ENCROACHMENTS ON PUBLIC PARK LAND - DRAINAGE PROBLEMS -
ITEM 337, DOCKET OF OCTOBER 16, 1990 - CONTINUED TO
DOCKET OF NOVEMBER 27

At the Council meeting on October 16, 1990, a proposed amendment to the Point Loma College Conditional Use Permit was discussed. The amendment would allow for the construction of additional buildings and other improvements on the campus.

After public testimony Councilmembers Roberts and Bernhardt asked several questions of this office regarding the legal aspects of the road, parking lot and playing field located on dedicated park land adjacent to the college and also regarding erosion problems which exist on the City park property downhill from the college property.

The specific questions to be answered by this office are:
(1) Can the City legally prohibit further use by the college of the road and other facilities in the park? and, (2) can the City hold the college responsible for past erosion on the City land or for curing the continuing erosion problem?

CONCLUSIONS

Loop Road and Parking Lot

Attached as Enclosure 1 is a copy of our memorandum of February 1989 on the subject of the road and other encroachments. It is our conclusion that the college has no legal right to continue using the road, parking lot or the playing field in the event the City wishes to preclude such continued use. On the other hand, it appears, from a legal standpoint, that such continued use could legally be allowed, since part of the transaction involves the college's guaranteeing a right of public access across the private college property to the loop road and

parking lot in the park. A public road for access to a public park is, of course, an allowable park use, as is a parking lot which would accommodate public visitors to the park. The fact that the college students would also be using the park road would not appear to violate Charter section 55. The road and parking lot must, of course, be primarily needed for and available to

park visitors.

Drainage and Erosion Issue

With regard to the drainage problem, attached as Enclosure 2 is a plat showing the boundary line between the college and the park together with the location of the road and the drainage culvert which was apparently constructed in part subsequent to the City's acquisition of the park property and also apparently without the benefit of any City permits. A significant portion of the storm drain facilities are on the City park land.

We are informed by the Park and Recreation staff engineers that the storm drainage improvements on the college property and the City property channelize the runoff which results in both increased velocity and volume of water being transported from the college property to the City's park, thus increasing the erosion problems on the park parcel.

Our tentative conclusion is that, while much of the erosion may be the result of past City approved drainage improvements on the college property, the college may be held responsible for erosion damages which have resulted from construction of drainage facilities on the City land which were not approved by the City to the extent such improvements can be shown to have increased the erosion damages. It is also our conclusion that the City may legally condition its approval of any amendment to the existing CUP upon the college's agreement to help solve the erosion problem.

ANALYSIS

Loop Road and Parking Lot

Subsequent to the Council meeting on October 16, 1990, Mr. Jay Hanson of the law firm of Gray, Cary, Ames & Frye prepared, on behalf of the college, substantial legal documentation analyzing the various issues including the matter of whether the college has a continuing legal right to use the loop road. The documents state the college's position that the college has such a continued right under the doctrine of "implied easement." The documents explain the history of the loop road. The road was apparently initially graded in about 1966. At that time, the

United States International University ("USIU") owned and operated the entire 135-acre site and constructed the road to support the newly constructed dormitories at the southwest corner of the campus. In 1973 USIU divided the property and sold the easterly 87 acres to Pt. Loma Nazarene College ("PLNC") and the westerly 48 acres to the City of San Diego. While no reference was made to the road in any of the legal documents affecting the lot split and conveyances, the college's position is that the loop road "was an essential and necessary element for college

traffic circulation" and that, therefore, the college obtained an "implied easement." A copy of Mr. Hanson's legal opinion is available from Mr. Valderhaug in our office.

Our initial review of Mr. Hanson's legal arguments, together with an additional review of the facts, leads us to conclude that no "implied easement" in fact was created at the time the property was split and sold to the City and the college. The reasons for our conclusion are that the loop road was part of the pre-1973 conditional use permits for USIU but was specifically deleted when PLNC acquired the property and was not again included in the conditional use permit until the 1982 amendment at which time PLNC had entered into an encroachment renewal agreement with the City. The background letters and documents seem to clearly indicate that neither the college nor the City intended or expected an "implied easement" to have been created in connection with the lot split. The City in fact took over the maintenance of the road and the college attempted to purchase the property on which the road exists or, in the alternative, to exchange other property for the road property, both of which proposals were rejected by the City.

A review of the law of implied easements as contained in chapter 15 of Miller and Starr's California Real Estate 2d, commencing at section 15:19, indicates that implied easements can only be created where two or more parcels are split from a single parcel and thereafter the owner sells or leases a parcel upon which a road or similar facility exists. An implied easement can only be created where a court finds that it was a clear intent of the grantor and the grantee that the easement be created. Implied easements are not favored by the law and a court must find from all the facts of the circumstances of the transaction such clear intent.

In our fact situation the grantor was USIU. We have seen absolutely no evidence to support a finding that USIU intended to create an implied easement in favor of itself when it conveyed the westerly parcel to the City. Likewise, when USIU conveyed the easterly parcel to Point Loma Nazarene College, there has been no evidence to indicate an intent to create an easement for

the loop road. On the contrary, as stated above and as more specifically described in Enclosure 1 commencing at page 6, the facts prior and subsequent to the sale of the parcel to the City and college indicate an intent that the loop road not be a part of the CUP area. As also noted in Enclosure 1, the actions of the City and the college subsequent to the 1973 property acquisitions all indicate an intent that the City is not subject to an implied easement for the loop road and that any continuing

use of the loop road by the college be subject to approval by the City.

Drainage and Erosion

Mr. Hanson also recently presented to this office on behalf of the college a masterful legal discussion supporting his conclusion that PLNC is in no manner responsible or liable for any damages which the City has in the past or may in the future suffer as a result of the existing or proposed drainage facilities constructed on the college's property and on the City's property adjacent to the college's property. A copy of Mr. Hanson's opinion is available upon request.

Basically, Mr. Hanson references the environmental impact report prepared in connection with the CUP amendment which states that between 1900 and 1973 the total surface water runoff from the college acreage "increased only 4.5 percent, from 72.8 cubic feet per second (CFS) to 76 CFS; existing site conditions have not changed since 1973." The environmental impact report further states that the proposed improvements under the amended CUP "would result in an insignificant increase in impervious surfaces over time (i.e., 0.1 percent of the total campus area)," and that increased landscaping required in connection with the amended CUP would fully mitigate any potential increased runoff. Mr. Hanson concluded that the college has acted reasonably in designing and maintaining its drainage facilities and that the City has not acted reasonably in that the City has not taken any action to reduce or minimize the erosion damage on the City's property.

The law in California for surface drainage stated generally is that "the owner of an upper, or dominant, estate is entitled to discharge surface water from his land as the water naturally flows. As a corollary to this, the upper owner is liable for any damage he causes to adjacent property by the discharge of water in an unnatural manner. In essence, each property owner's duty is to leave the natural flow of surface water undisturbed." *Keys v. Romley*, (1966) 64 Cal.2d 396 at 405, 50 Cal.Rptr. 273, 412 P.2d 529.

It is difficult to understand the above conclusions as contained in the environmental impact report. It appears fairly obvious that the erosion problems have increased in recent years and that the erosion is largely the result of surface runoff from the college property. However, it must also be acknowledged that the development of the college facilities has been accomplished in accordance with a series of conditional use permits approved by the City.

Some portion of the erosion problem almost certainly commenced prior to the 1973 lot split. Since grading plans and

drainage facilities are in effect approved by the City in connection with the CUP process, it may be difficult for the City to establish any legal liability on the part of the college for some of the past erosion damages.

On the other hand, there is the matter of the particular storm drain structure and "improvements" which have been installed adjacent to the loop road on the City park land. The background information on these improvements is not totally clear, however, it appears the City installed the existing 32-inch drain pipe under the road in about 1978, presumably to prevent the water flowing from the college property from washing out the road. Subsequently, the college requested that the City install additional drainage improvements in the area to protect the road and was informed that the City did not have available budgeted funds for such purpose. It appears that thereafter the college, at its own cost, installed cement storm drain improvements on the City's property both easterly and westerly of the 32-inch drain pipe under the road and the college also caused the installation of riprap westerly of the cement structure to somewhat reduce the speed and concentration of the storm drain water. There is an indication that a substantial portion of the erosion problem has resulted from the concentration of surface water flowing from the college property on to the City property through the cement storm drain improvements under the road and westerly under the unimproved park land. Mr. Hanson indicated in his documentation that the erosion problem has substantially increased as a result of uncompacted fill having been placed on the City land at some point in the past.

While additional review to attempt to ascertain the actual facts would be helpful, it appears to this office that the responsibility for past erosion damages may be blamed, at least in part, upon the college's activities in channelizing and increasing the speed and volume of water where it flows onto the City land. Substantial additional investigation would be necessary to reach any definite legal conclusions however.

With regard to the pending application for a conditional use permit amendment and with regard to future erosion problems which will continue to occur in the absence of some action to change the existing drainage system, we feel that the City can reasonably condition its approval of the CUP amendment upon the college taking actions to help avert further erosion damages. A conditional use permit is, of course, a "privilege" that may or may not be granted to a property owner by the City. No property owner has an absolute right to obtain a conditional use permit or an amendment to a conditional use permit from a city. In order

to grant a CUP or an amendment to a permit, the City must make the following two findings:

a. The proposed use will not adversely affect the neighborhood, the General Plan, or the Community Plan, and, if conducted in conformity with the conditions provided by the permit, will not be detrimental to the health, safety and general welfare of persons residing or working in the area; and

b. The proposed use will comply with all the relevant regulations in the Municipal Code.

Only if the City Council makes such findings can it grant a conditional use permit or amendment to a conditional use permit. The City can impose any conditions it feels appropriate in connection with the issuance of a CUP to alleviate potential detrimental impacts to the general welfare which may result from issuance and, of course, the property owner can always determine to not exercise the special privileges granted under the CUP if the property owner feels the conditions imposed are excessive.

Therefore, in the present fact situation, the City may decline to grant the requested amendment to the CUP or, in the alternative, the City may, in its discretion, require the college to construct either onsite or offsite improvements to mitigate the continuing erosion problem obviously caused in large part from surface water being channelized and flowing from the college property. The fact that storm drain improvements allowed in connection with such past conditional use permits has not resulted in adequate storm drain facilities to protect the City's downhill property does not preclude the City from attempting to reduce the storm drainage problem in connection with any new or amended CUP application.

SUMMARY

Two basic questions were posed to this office in connection with the request for an amendment to the Point Loma Nazarene College CUP: (1) Can the City preclude the college's further use of the road which extends through the City park property? and (2) Can the college be held responsible for past erosion damages or may the City require storm drain improvements to reduce future erosion problems on the City property as a condition to approving the CUP amendment?

As stated above, we have concluded that the college has no legal right to continue use of the road on the City park property

and that the City may impose requirements for additional erosion mitigation improvements as a condition to approving any CUP amendment.

Respectfully submitted,
JOHN W. WITT
City Attorney

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Enclosures 2

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