

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: June 20, 2007

TO: Councilmember Donna Frye
Natural Resources and Culture Committee

FROM: City Attorney

SUBJECT: Nighttime Rope Barrier at Children's Pool Beach

INTRODUCTION

On December 5, 2006, the City Council of San Diego adopted a resolution directing the annual placement of a rope barrier at the Children's Pool Beach from December 15th through May 15th. In addition, the Council directed the City Attorney to determine whether any permits would be necessary for the placement of the rope barrier, and if so which ones. The City Attorney determined, as outlined in the Memorandum of Law [MOL] issued on December 15, 2006 (attached hereto as Attachment A), that a Coastal Development Permit [CDP] and a Site Development Permit [SDP] would be required for the annual placement of the rope barrier. The December 15, 2006 MOL also established that based on the specific circumstances present at that time, an emergency existed for the placement of the rope barrier without an SDP and with an emergency CDP.

Currently, the Hearing Officer is scheduled to make a determination on the regular CDP and SDP required for the annual placement of the rope barrier sometime this year, in time for the rope barrier to be placed for the December 15th through May 15th timeframe. However, the Hearing Officer is awaiting a recommendation from the La Jolla Community Planning Group prior to holding a hearing on the permits. Also, Councilmember Donna Frye's Office met with representatives from the Animal Protection and Rescue League [APRL] who presented information to be docketed on the Natural Resources and Culture Committee agenda for June 22, 2007. The APRL information addresses the year-round placement of the rope barrier at Children's Pool Beach at nighttime in order to reduce human conflict over the appropriate

distance to remain from the seals, prevent humans from possible seal bites, and to protect the seals from harassment at night. Councilmember Frye requested that the City Attorney's Office prepare a memorandum addressing the legal issues pertaining to the placement of a year-round nighttime rope barrier at the Children's Pool Beach. Councilmember Donna Frye Natural Resources and Culture Committee June 20, 2007 Page 2

QUESTIONS PRESENTED

- 1 Is it legally advisable to place a year-round nighttime rope barrier at the Children's Pool Beach?
- 2 What permits are required for the year-round nighttime placement of a rope barrier at the Children's Pool Beach?

SHORT ANSWERS

- 1 Yes. The rope barrier serves to remind the public when they may be in violation of the Marine Mammal Protection Act [MMPA], which prohibits harassment of harbor seals or the San Diego Municipal Code section 63.0102(b)(10), which prohibits the disturbance of harbor seals on public beach areas.
- 2 A Site Development Permit is required for the placement of the rope barrier because it is proposed development on a coastal beach. In addition, a CDP is required because the rope barrier is considered coastal development that would be placed in the Coastal Overlay Zone. The application for the annual placement of the rope barrier could be amended to include the year-round nighttime placement of the same rope. The circumstances at this time are not such that an emergency CDP or emergency work without an SDP would be appropriate.

ANALYSIS

As previously discussed in the City Attorney's November 13, 2006 Memorandum [Memo] (attached hereto as Attachment B) to the Natural Resources and Culture Committee, posted signs are not always effective at deterring people from harassing or disturbing the seals at Children's Pool Beach. The Memo also explains the types of actions that are considered unlawful within the meaning of the MMPA and the San Diego Municipal Code section 63.0102(b)(10). In addition, the Memo explains that the placement of the rope barrier serves to deter unlawful harassment and disturbance, and therefore, the placement of the rope barrier is legally supportable. Moreover, the MOL issued on December 15, 2006, explains that the rope barrier also serves to reduce conflicts between people about the appropriate distance to keep from the seals and to reduce the chance of an aggressive reaction by a seal against a person getting too close. Therefore, the placement of a nighttime rope barrier at Children's Pool Beach would be advisable.

The placement of the nighttime rope barrier on the beach triggers the requirement for a Coastal Development Permit because it is coastal development proposed in the Coastal Overlay Zone, and it would trigger the requirement for a Site Development Permit because it is proposed development on a coastal beach under the Environmentally Sensitive Lands Regulations of the Municipal Code. See SDMC §§ 126.0702(a), 132.0402, Diagram 132-04A, 126.0502(a)(1), 143.0110(a)(3). These are the same permits required for the annual placement of the rope barrier. Councilmember Donna Frye Natural Resources and Culture Committee June 20, 2007 Page 3

barrier. As those permits have not yet been decided on by the Hearing Officer, it would be possible for the Park and Recreation Department to amend the application for the annual rope barrier to include the placement of the rope barrier year-round at night. Unlike the circumstances that existed when the MOL was issued by the City Attorney's Office in December of 2006, there is no emergency justification for proceeding without the standard SDP or for requesting an emergency CDP. The City has not received new or unexpected information, there has been no new direction from the National Oceanic and Atmospheric Administration, the nighttime rope barrier has no impact on the ability of the City Lifeguards to provide essential public services because they do not watch the water at night, and the critical time of pupping season is now over.

CONCLUSION

The rope barrier serves to remind the public when they may be in violation of the MMPA that prohibits harassment of harbor seals or the San Diego Municipal Code section 63.0102(b)(10) that prohibits the disturbance of harbor seals on public beach areas. A Site Development Permit is required for the placement of the rope barrier because it is proposed development on a coastal beach. In addition, a CDP is required because the rope barrier is considered coastal development that would be placed in the Coastal Overlay Zone. The application for the annual placement of the rope barrier could be amended to include the year-round nighttime placement of the same rope. There is no legal justification for emergency permitting procedures at this time.

MICHAEL J. AGUIRRE, City Attorney

By

Nina M. Fain
Deputy City Attorney

:NMF
Attachment