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MEMORANDUM OF LAW

DATE: January 12, 2023
TO: Andy Field, Director of Parks and Recreation Department
FROM: City Attorney
SUBJECT: Use of Dedicated Parkland for a Safe Parking Lot

INTRODUCTION

In May 2021, San Diego residents launched an online petition for the City of San Diego (City) to allow use of a parking lot site¹ in Mission Bay Park for overnight vehicle habitation that received approximately 300 signatures as of March 2022. The petitioners believe the parking lot at Rose Marie Starns South Shores Park (South Shores) is a suitable location because it has approximately 200 parking spaces and access to public restrooms.² South Shores is located entirely within Mission Bay Park, which the City formally dedicated for park and recreation purposes in 1962 by Ordinance Number 8628. You have asked whether the City can make South Shores available for parking and sleeping overnight to individuals experiencing homelessness.

QUESTION PRESENTED

Can South Shores be used for a Safe Parking Lot?

SHORT ANSWER

The City may only use South Shores as a Safe Parking Lot if an emergency exists and only for the duration necessary to alleviate the emergency.

¹ Under the Safe Parking Program, the City funds parking sites to provide a safe place to park and sleep for individuals and families experiencing homelessness. The program's objective is to provide low-barrier access to a safe place to sleep and the critical assistance necessary for obtaining secure and stable housing. Report to the San Diego City Council No. HAR20-024 (June 4, 2020).

² In a March 14, 2019 memorandum to former Mayor Kevin L. Faulconer, Councilmember Jennifer Campbell suggested a Safe Parking Lot be located at South Shores Parking Lot.

BACKGROUND

The City has an interest in balancing the health and safety needs of those who inhabit their vehicles and the needs of all City residents, businesses, and visitors. In furtherance of that interest, the City prohibits vehicle habitation on public property and overnight parking of oversized, non-motorized, and recreational vehicles. San Diego Municipal Code (SDMC) § 86.0137; SDMC §§ 86.0139-86.0143. The City funds three safe parking lot sites for individuals and families experiencing homelessness who reside in their vehicle (Safe Parking Lots) as part of the City's Safe Parking Program launched in 2017.³ Individuals and families utilizing Safe Parking Lots are provided with a safe place to sleep and access to supportive services including basic needs assistance, coordinated housing and community resource navigation, employment development, family wellness, school success, emergency support, and financial education. The San Diego Housing Commission oversees the operation of Safe Parking Lots through third party operators. Safe Parking Lots are located in the Serra Mesa, Kearney Mesa, and Mission Valley communities of San Diego, and no Safe Parking Lot is located on dedicated parkland.

ANALYSIS

I. CHARTER SECTION 55 RESTRICTS THE USE OF DEDICATED PARKLAND FOR PARK AND RECREATION PURPOSES UNLESS A TWO-THIRDS VOTE OF THE ELECTORATE APPROVES ALTERNATIVE USES.

South Shores is wholly located within Mission Bay Park and, as set forth in San Diego Charter section 55, may only be used for park and recreation purposes. Specifically, Charter section 55 states, 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.

(emphasis added).

Charter section 55 generally restricts the use of facilities located on dedicated parkland for park and recreation purposes unless two-thirds of the City voters approve the use for other purposes.⁴ These restrictions apply to the dedicated parkland and to the facilities located on dedicated parkland, including parking lots. Generally, a permissible park use is one that is consistent with

³ The Safe Parking Program was first announced by Mayor Kevin L. Faulconer on October 16, 2017, as a City-funded strategy to address homelessness in San Diego. Report to the San Diego City Council No. HAR20-024 (June 4, 2020).

⁴ In 2022, for instance, the electorate approved the use of certain City parks for childcare.

the recreational character of a park and does not interfere with the public's enjoyment of the park. *Simons v. City of Los Angeles*, 63 Cal. App. 3d 455, 470 (1976). Parking lots and parking garages have been found to be permissible incidental uses of dedicated parkland that are necessary for the public's enjoyment of the park. See *Abbot Kinney Co. v. City of Los Angeles*, 223 Cal. App. 2d 668, 674 (1963) (parking lot is a permissible use of portion of privately dedicated parkland); *City and County of San Francisco v. Linares*, 16 Cal. 2d 441, 446 (1940) (underground parking is a permissible use of dedicated property). Dedicated parkland may not be used to establish a city hall, fire-engine station, hospital, jail, or other municipal building for the transaction of municipal business because such uses are inconsistent with and substantially interfere with the park and recreation purpose of dedicated parkland. See *Slavich v. Hamilton*, 201 Cal. 299, 306-07 (1927).

This Office has issued several memoranda opining that homeless shelters are not permissible park and recreation uses under Charter section 55 because they do not provide any recreational or cultural activity for the public and are not incidental to park uses. 2009 City Att'y MS 765 (2009-8; Sept. 11, 2009); 1993 City Att'y Report 1058 (93-26; May 14, 1993). This Office also opined that using public parking spaces on dedicated parkland for private vehicle storage is not a proper park use because it removes a portion of the public parking lot from public use. City Att'y MS-2007-8 (June 12, 2007). Likewise, providing free supportive services or a job skills center for the homeless on dedicated parkland is an improper use of dedicated parkland in violation of Charter section 55. 1986 Op. City Att'y 143 (86-15; Feb 11, 1986); City Att'y MOL No. 87-18 (Feb 27, 1987).

A housing shelter is akin to private residential use and is not a proper use of dedicated parkland. *City of Passaic v. State of New Jersey*, 33 N.J. Super. 37 (1954).⁵ A Safe Parking Lot is analogous to a housing shelter because it is a location made available to individuals and households experiencing homelessness to park and sleep while they work with staff to find longer term or permanent housing. Report to the San Diego City Council No. HAR20-024 (June 4, 2020). In addition to providing a safe place for people to reside in their vehicles, Safe Parking Lots provide services including basic needs, education, and food. Therefore, Safe Parking Lots are similar to other temporary housing shelters because they remove a portion of the public parking lot from public use to provide locations for private residential use and are not incidental to park uses.

When property is restricted to park use by public dedication, the municipality may not use the land in a manner that is inconsistent with the public's enjoyment of the land for park purposes. *City and County of San Francisco v. Linares*, 16 Cal. 2d at 446. If a Safe Parking Lot was located at South Shores, some portion of the site would always be utilized for restrooms and administrative space for the service provider regardless of operating hours. In addition, the Safe Parking Lot would be fenced and secured through controlled entry granted only to program participants and security staff. While the petitioner's proposal to open a Safe Parking Lot at South Shores does not indicate any operating hours, two current City-funded Safe Parking Lots are operational between 6 p.m. and 7 a.m. seven days a week, and the Mission Valley site is open every day, 24 hours a day. Even if the proposed Safe Parking Lot was only open from

⁵ Although California courts are not bound by out of state decisions, this case is instructive in interpreting how a California court may assess the proposed use.

6 p.m. to 7 a.m., that use would still conflict with park operating hours (and the public's use of the park) because South Shores is open between 4 a.m. and 2 a.m. daily. Therefore, the proposed Safe Parking Lot use would necessarily preclude the public's access to and enjoyment of South Shores for any recreational purposes in violation of Charter section 55. As currently framed, the petitioner's proposal for use of dedicated parkland in Mission Bay Park for a Safe Parking Lot to accommodate vehicle habitation and supportive services would require a two-thirds vote of approval by the electorate.

II. THE CITY MAY TEMPORARILY USE SOUTH SHORES FOR A SAFE PARKING LOT DURING CERTAIN TYPES OF EMERGENCIES.

In rare circumstances, courts have upheld the use of a temporary housing shelter on dedicated parkland. For example, after World War II, thousands of war veterans and their families returned to the Los Angeles area and faced insufficient housing due to the lack of construction during the war. In response, the City of Los Angeles allowed temporary veteran housing facilities in a portion of Griffith Park. The sole heir of the grantors of Griffith Park unsuccessfully challenged the city's use of Griffith Park for temporary emergency housing in *Griffith v. City of Los Angeles*, 78 Cal. App. 2d 796 (1947). The *Griffith* court determined that the city was justified to establish temporary housing facilities in the park to help alleviate the emergency due to the catastrophic consequence of World War II and the immediate need for shelter for the nation's heroes. *Id.* at 803.

This Office has previously opined that the City should analyze two factors when determining whether a temporary emergency shelter may be located on dedicated parkland. 2014 City Att'y MS-2014-14 (July 1, 2014). First, the City should determine whether the emergency rises to a level that justifies the proposed use of dedicated parkland, which is a fact-specific inquiry. Second, the City should consider the duration of any proposed temporary non-park use on dedicated parkland.

With respect to the type of emergency that supports a non-park use of dedicated parkland, the few historical instances of permissible emergency housing use were related to natural disaster, war, or the outbreak of contagious disease. For example, after the 1906 San Francisco earthquake, temporary housing facilities were established in various parks in San Francisco to accommodate unsheltered individuals until housing could be reconstructed. Similarly, two courts evaluated the temporary use during the housing shortage after World War II. In both, the courts found that the extraordinary emergency conditions caused by the necessities of the war warranted allowing temporary shelters in dedicated parks for the returning veterans. *Griffith v. City of Los Angeles*, 78 Cal. App. 2d; *Hyland v. City of Eugene*, 173 P.2d 464 (Or. 1946). And, in *City of Manhattan v. Hessin*, 81 Kan. 153 (1909), the court sustained the ability to temporarily maintain a pesthouse⁶ in a public park to guard against a threatened smallpox epidemic.

⁶ Merriam-Webster dictionary defines "pesthouse" as a shelter or hospital for those infected with a pestilential or contagious disease. Pesthouse, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/pesthouse> (last visited November 22, 2022).

Unlike the veterans returning from war and households displaced by natural disaster, individuals who use their vehicles for shelter have options in the existing Safe Parking Lots funded by the City in addition to private lots in the City and surrounding areas. This Office has previously opined that a general housing shortage and increasing homelessness in the City does not constitute an emergency comparable to that in *Griffith*. 2009 City Att’y MS 765 (2009-8; Sept. 11, 2009). The City has responded to the recent need for safe parking locations and currently funds three Safe Parking Lots. One Safe Parking Lot is located in Mission Valley, approximately six miles from South Shores and has capacity for additional vehicles.⁷ If the City determined that it needed additional Safe Parking Lots, it could attempt to find suitable locations that are not on dedicated parkland.

In addition, compared to previous permissible emergency housing examples, the number of individuals residing in vehicles in San Diego is significantly less. After the 1906 San Francisco earthquake, approximately 200,000 people were instantly left homeless. San Francisco utilized many forms of temporary shelter including parkland, which was used to temporarily house about 18,000 individuals in need. *Griffith v. City of Los Angeles*, 78 Cal. App. 2d 801. Likewise, after World War II, the City of Los Angeles set up temporary homes in a portion of Griffith Park for tens of thousands of veterans while permanent homes in residential areas were constructed. *Griffith v. City of Los Angeles*, 78 Cal. App. 2d 803. In both these cases, cities were faced with an overwhelming and unforeseeable number of individuals needing shelter and no feasible alternative location for housing. In contrast, according to the Regional Task Force on Homelessness’ 2022 Point-in-Time Count released on May 23, 2022, 713 individuals were living in vehicles county-wide despite availability in existing Safe Parking Lots.

To justify the proposed non-park use, the City must demonstrate that demand for Safe Parking Lots requires the use of dedicated parkland. The City might be able to justify the use of dedicated parkland for temporary housing if the current COVID-19 emergency necessitates the need for a quarantine center because there were no other feasible locations. Similarly, if the City was faced with enormous demand for Safe Parking Lots or similar shelters and could not find alternative locations during an emergency that threatened public health or safety, then the City could conceivably use dedicated parkland for that purpose. If a City Safe Parking Lot at South Shores is challenged, a reviewing court will assess the facts to determine whether the emergency that the City is responding to is comparable to instances in which the courts have upheld uses of dedicated parkland for housing purposes. In addition, courts will evaluate the duration of the non-park use and whether the duration is consistent with the circumstances of the emergency. Some circumstances would merit a longer duration than others. The duration of any emergency use must end when the emergency ends. *Griffith v. City of Los Angeles*, 78 Cal. App. 2d at 803; *Hyland v. City of Eugene*, 173 P.2d at 467.

⁷ Safe Parking Lot capacity fluctuates daily. On November 23, 2022, the Mission Valley Safe Parking Lot had capacity for additional vehicles.

CONCLUSION

In the absence of an emergency, the City may only use South Shores for a park and recreation purpose unless a two-thirds vote of the electorate approves a non-park use. To qualify as an emergency use, the City must identify facts that support its finding that it is necessary to temporarily establish such a non-park use to protect public health or safety and the duration of the non-park use only lasts through the emergency. If the City cannot identify facts supporting this finding, the City can attempt to find suitable Safe Parking Lot sites that are not located on dedicated parkland.

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By /s/ Marco A. Verdugo
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