MEMORANDUM OF LAW

DATE: May 25, 1988

TO: Will Sniffin, Deputy Director and Richard D. Potter, Associate Civil Engineer

FROM: City Attorney

SUBJECT: Requirement for City Permits for Relocation of Sludge Program and Relocation of Aquaculture Program

By respective memorandums, we have been asked whether conditional use permits from the Planning Department would be required for the above-referenced projects. From both historical and legal precedent, we answer in the negative with the following supporting reasoning.

As is clear from San Diego Municipal Code section 101.0510, the whole purpose of conditional use permits is to provide a means for land uses, not permitted by right, to be authorized on a case by case basis and require the permittee to adhere to conditions that protect the health, safety and welfare of the public. Such conditions operate as covenants that run with the land so as to bind each permittee and their successors in interest.

The City, as both land owner and proposer of the projects, satisfies all of these concerns when it reviews the projects, the locations and the means of implementation. Therefore in the very legislative act approving each, there is a review of the desirableness of the project in conjunction with its location and safeguards for its compatible and efficient operation. It is on this basis that the general principle of law that the City is not bound by its own land regulations is based. Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 98 (1934).

It is on this principle that we have consistently exempted City projects from zoning restrictions. In 1950, we ruled a fire station could properly be built in an R-4 zone, though not authorized. San Diego City Att'y Op. 92 (1950). Moreover, in 1980 we ruled structures for the Point Loma Sewage Treatment

Plant were not subject to the thirty (30) foot height limitation. San Diego City Att'y Memorandum of Law, February 1, 1980. Likewise, an August 12, 1983 memorandum ruled that a CUP was not required for a county antenna on Cowles Mountain.

Having addressed the general rule that a CUP is not required, we turn to specific ordinance requirements to ascertain if permitting requirements have been imposed on the City by the City

itself. Section 101.0510 (C)3.b. does reference "... uses operated by a public utility or by a public body having the power of eminent domain." But such a reference is plainly meant to grant CUP authority to the Planning Commission over applicants other than the City. The City is not referenced as a required applicant and the appeals procedure would make it pointless to imply such a requirement since appeals from the Planning Commission are made directly to the City Council. San Diego Municipal Code section 101.0510 H.2.c. To imply such a requirement would do no more than replicate the very hearing the City Council conducts when it decides to establish a site and operating conditions for a public facility, i.e., that the facility not be detrimental to health, safety and general welfare and comply with relevant regulations. Hence, to imply a hearing before the Planning Commission prior to the same hearing is conducted before the City Council would impose an idle act which the law abhors. California Civil Code section 3532.

Similarly, a Hillside Review Permit is required for improvements on certain slopes. San Diego Municipal Code section 101.0454. However, the ordinance does not specifically include the City as a required applicant for a permit and hence, would be subject to the general rule of nonapplicability. This conclusion is reinforced by Section 101.0454 E wherein it provides that before issuing a permit the Planning Director "may solicit the . . . comments of . . . City Departments . . . ." If the section were meant to apply to City departments, one would be faced with the redundancy of departments commenting on their own permit.

Lastly, the recently enacted Resource Protection Overlay Zone (REPOZ) San Diego Municipal Code section 101.0461 et seq., establishes broad protection for environmentally sensitive resources. This comprehensive ordinance, however, contains an explicit exclusion for public facilities.

> 7. Park Development and Public Facilities.
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> The Resource Protection Overlay Zone shall not be applicable to any park development plan or major public facility project which has been the subject of a public hearing at the City Council and has been released by the City Council upon making findings that the plan or project under consideration contains specific development requirements and/or environmentally sensitive area mitigation measures sufficient to achieve

the general purpose and intent of this ordinance.

Section 101.0461 C.7.

Hence, this section would explicitly exclude a sludge management site that has undergone a public hearing with the requisite findings.

CONCLUSION

Both as to the aquaculture and sludge relocation projects, we find no legal requirement for a conditional use permit, nor explicit requirements for either Hillside Review or REPOZ permits. We are quick to caution, however, that finding no legal requirement does not prevent a managerial decision to submit an application for a conditional use permit to gain community or extra-departmental comment and evaluation.

JOHN W. WITT, City Attorney
By
Ted Bromfield
Chief Deputy City Attorney

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Attachments
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