

MEMORANDUM OF LAW

DATE: September 8, 1988

TO: George Loveland, Director, Park and
Recreation Department

FROM: City Attorney

SUBJECT: Mission Bay Park - Issues Relating to the
Twenty-five Percent Commercial Use Limitation

You have requested our comments on several questions arising out of the passage of Proposition D on the November 3, 1987, ballot. Proposition D amended the City Charter by adding section 55.1 to read as follows:

SECTION 55.1 - MISSION BAY PARK - RESTRICTIONS
UPON COMMERCIAL DEVELOPMENT (emphasis added).

Notwithstanding any other provision of this Charter to the contrary, the total land and water area of all leases in Mission Bay Park shall not exceed twenty-five percent (25%) of the total dedicated land area or six and one-half percent (6.5%) of the total dedicated water area respectively of the park without such lease being authorized or later ratified by vote of 2/3's of the qualified electors of the City voting at an election for such purpose.

The language of the Charter was derived from Council Policy 700-8 which, for a number of years, has contained the following language:

POLICY STATEMENTS

A. GENERAL

....

7. It is the policy of the City Council that every effort shall be made to provide sufficient revenue from leases to cover the City's operating expenses for Mission Bay Park.
8. It is the policy of the City Council that the total land area of all leases in Mission Bay Park shall not exceed twenty-five percent (25%) of the total dedicated land area of the park. Any new commercial leases approved after August 24, 1981 shall be limited to land adjacent

to rock revetments or non-water oriented areas.

9. It is the policy of the City Council that the total water area of all leases in Mission Bay Park shall not exceed six and one-half percent (6.5%) of the total dedicated water area in the Park.

You asked the following questions:

1. What is the meaning of the word "commercial" as it applies to Proposition D and Council Policy 700-8?
2. Is a nonprofit organization/corporation lease considered commercial? For example, would any of the following nonprofit organizations be classified "commercial" under existing interpretation of Proposition D or Council Policy 700-8: (1) The San Diego-Mission Bay Boat and Ski Club leases 4.01 acres of land and 0.25 acres of water; (2) Mission Bay Yacht Club leases 6.10 acres of land and 5.65 acres of water; (3) San Diego State University and the University of California San Diego lease 0.48 acres of land; (4) the San Diego Rowing Club leases 0.07 acres of land; and (5) the United States Government leases 1.89 acres of land.
3. A Record of Survey, R.O.S., is proposed for Mission Bay Park; however, a definite

line is needed for the separation of land from water. The passage of Proposition D on November 3, 1987, defines a date for the separation of land and water. Would it be acceptable to use the mean high tide as the separation of land from water? . . .

4. Over 130 acres of Mission Bay Park are marshland. The separation of the marshland into what is water and what is land has not been relevant. The passage of Proposition D requires a separation of land and water and a concise acreage for determination of leasable property. What is the definition of the words marsh,

wetland and tidelands as they refer to the separation of land and water in Mission Bay Park?

5. Is the land located between a leaseline and the waterline open to the general public or considered a portion of the lease? Example: The De Anza Harbor, Inc. lease of land is defined as elevation +10.5, Port District datum.
 - (a) Is the beach between this leaseline and the waterline available for general public use?
 - (b) In the case where the water lease reaches the +10.5 elevation, is the beach considered a portion of the water lease for calculations of percentages?
 - (c) If the beach in question, (b) above, is not a portion of the water or land lease, is it open to the general public?

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In answer to your first question, it seems to us that the word "commercial" as it appears in the title of Charter section 55.1 and as it was used in the argument in favor of Proposition D means "commercial" in its normal sense.

"Commercial" is defined by Webster's Third New International Dictionary as "of, in or relating to commerce" and "from the point of view of profit."

The argument in favor of Proposition D reads in part:

Upon passage of Proposition D, the San Diego City Charter will be amended to allow that no more than 25% of the park's acreage be leased for commercial (emphasis ours) purposes.

Additionally, no more than 6.5% of the park's water surface will be allowed for commercial (emphasis ours) purposes. . . .

Although City Council policy provides for these limits, we are rapidly approaching the maximum allowable commercial (emphasis ours) development. A yes vote on Proposition D will incorporate these limits into the City Charter and ensure that current limits on hotel and other commercial (emphasis ours) development can be exceeded only by a two thirds vote of the people.

A copy of the full text of Proposition D together with the

argument in favor is attached hereto as Attachment 1. No argument was filed against Proposition D.

It is clear from the title of section 55.1 and the argument in favor of Proposition D that the twenty-five percent limit only applies to "commercial leases" as opposed to "noncommercial" leases.

In answer to your second question, it does not appear to us that leases to nonprofit organizations can ordinarily be classified "commercial" leases since such lessees obviously do not operate "from the point of view of profit." The five existing nonprofit lessees listed in your question No. 2 would, therefore, not in our opinion be considered "commercial" lessees. The boat and ski club operation, the rowing club, the university aquatic facilities leases and the yacht club lease, are all types of uses which could logically be operated by the City itself for the public's benefit in the absence of a nonprofit lessee. Likewise, the United States government lease has a purely governmental function and is obviously not a "commercial" lease.

On the other hand, it is not inconceivable that a nonprofit lessee could be considered a commercial lessee in certain circumstances. For example, if Sea World became a nonprofit lessee, or if a hotel were leased to a nonprofit organization, it would seem that the mere absence of a "profit" motive would not

justify a conclusion that such lessees would not constitute "commercial" lessees within the spirit and intent of Charter section 55.1.

As to your third question, we agree that a survey should be made by the City to establish the line between the land and the water areas in Mission Bay Park. It is suggested that the line be established as it existed in 1987 when the matter was voted upon. The mean high water mark should be used as the line between land and water.

Subject to such a survey, it is our understanding that, using 800-1 maps, the total area of Mission Bay Park has been computed to be 4,246.27 acres, that the land area, exclusive of the approximately 130.35 acres of marshland, has been tentatively computed to be 1,887.74 acres, and that the total present leased land acreage, excluding the 12.55 acres leased to the nonprofit users, is 423.07 acres. Therefore, pending an accurate survey, including a determination of what portion of the 130 acres of marshland constitutes land as opposed to water area, there is an apparent margin of approximately 48.86 acres ($\frac{1}{4} \times 1,887.74$ minus 423.07) which could legally be leased to commercial users within the limitations of Charter section 55.1.

The above figures of available acreage for commercial lessees

includes the approximately 33.13 acres previously under option for lease for hotel purposes in the South Shores area. We are informed that no portion of the approximately 130 acres of marshland is included in the acreage presently defined as land area and that, therefore, if the survey shows that a significant portion of the marshland is, in fact, above the mean high water mark, there may be additional land area legally available for commercial lessees within the limitations of the Charter section.

As to your fifth question, regardless of how we classify "land" and "water" areas in the various leases, the actual line of mean high water, as determined by the City, should be used to establish the "land" and "water" areas. Property which is not actually within the boundaries of a defined leasehold, such as any sand areas between the water and lease line, should not be included in determining the total amount of land or water under lease. Any such land not under lease is, of course, open to the general public. Leased land must also, of course, be open to the general public, with the distinction being that reasonable fees may be charged for use of lease land in connection with the approved lease uses.

In summary, "commercial" as it applies to section 55.1 of the Charter means, generally, lessees which operate "from the point of view of profit." For the reasons stated in the above text, the four existing nonprofit lessees do not constitute "commercial" lessees. While nonprofit lessees of whatever nature would not normally be considered to be operating "from the point of view of profit," we feel that the spirit and intent of Proposition D would, at least arguably, include nonprofit lessees utilizing a leasehold for a function which would have the appearance of a "commercial" operation so that the limitations imposed by Charter section 55.1 should, in exercising abundant legal caution, be considered applicable to leases for typical commercial uses, i.e., hotels, restaurants or tourist attractions such as Sea World, even though a future lessee for such a use may technically be a nonprofit corporation. A survey of Mission Bay Park should be made to establish the mean high water mark throughout the Bay, including the marshland area. At present the estimated land area in Mission Bay Park is 1,887.74 acres (not including any of the approximately 130.35 acres of marshland). Twenty-five percent of the 1,887.74 acres is approximately 472 acres. The total lease land area in Mission Bay Park (excluding the 12.55 acres leased to the five nonprofit lessees) is 423.07 acres. Therefore, assuming the present figures are correct, an additional 42.41 acres, plus the 12.55 acres represented by the nonprofit lessees, plus any portion of the 130 acres of marshland

determined by survey to be above the mean high water mark, are
legally available for lease to commercial users.

JOHN W. WITT, City Attorney

By

Harold O. Valderhaug

Deputy City Attorney

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Attachment

ML-88-82