MEMORANDUM OF LAW

DATE: January 26, 1990

TO: Susan Hamilton, Deputy Director, Clean Water Program, Roger Graff, Deputy Director, Engineering Division, via Milon Mills, Jr., Water Utilities Director

FROM: City Attorney

SUBJECT: Underground Pipes Through Dedicated Park Lands

In a memorandum authored by Roger Graff, dated November 9, 1989, the Water Utilities Department sought a legal opinion as to whether the proposed Third Rose Canyon Trunk Sewer can be placed (underground) through dedicated open space park lands, without a vote of the electorate. In a similar vein, a memorandum authored by Susan Hamilton, dated November 22, 1989, requested an opinion as to whether a proposed twelve inch sludge line can be routed (underground) through Mission Bay Park and Sunset Cliffs Park. Although these two memoranda arose from different factual circumstances, they both require analysis of the same issue and will be addressed jointly in this response.

All of the park lands in question are owned in fee by The City of San Diego. The Rose Canyon Open Space Park Preserve was dedicated as such by Ordinance No. O-15073, in 1979; Sunset Cliffs Park was dedicated as such by Ordinance No. O-15941, in 1983; and Mission Bay Park was dedicated as such by Ordinance No. O-8628, in 1964. Rose Canyon Open Space Park Preserve and Sunset Cliffs Park are dedicated in perpetuity for "park and recreational purposes." Mission Bay Park is dedicated in perpetuity "as a public park to be developed and maintained for such purposes."

In Hiller v. City of Los Angeles, 197 Cal. App. 2d 685 (1961), the court stated:

> The disposition and use of park lands is a municipal affair (Wiley v. City of Berkeley, 136 Cal. App. 2d 10 (1955); Mallon v. City of Long Beach, 44 Cal. 2d 199 (1955)), and a
>
> charter city "has plenary powers with respect to municipal affairs not expressly forbidden to it by the state Constitution or the terms of the charter." (City of Redondo Beach v. Taxpayers, Property Owners, etc., City of Redondo Beach, 54 Cal. 2d 126, 137 (1960)).

Id. at 689.

Section 55 of the Charter of The City of San Diego establishes a Park and Recreation Department and addresses the disposition and use of park lands. This section states in pertinent part:

> 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.

The sole issue presented is whether the placement of underground utility pipes (be they sludge or sewer) through dedicated park lands without prior voter approval would constitute a violation of section 55 of the charter.

Under a strict construction of charter section 55, one might hastily conclude that placing underground utility pipes through dedicated park lands is not a "park, recreational or cemetery use" of those lands and thus requires prior voter approval. However, in City and County of San Francisco v. Linares, 16 Cal. 2d 441, 444 (1940), the court, in quoting Slavich v. Hamilton, 201 Cal. 299 (1927), stated:

> The uses to which park property may be devoted depend, to some extent, upon the manner of its acquisition, that is, whether dedicated by the donor, or purchased or condemned by the municipality. A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less
>
> strict construction is adopted. (Harter v. San Jose, 141 Cal. 659 (1904); Spires v. City of Los Angeles, 150 Cal. 64 (1906)) (emphasis added).

Following the trend recognized by Slavich, Harter, Spires, and City and County of San Francisco, in 1985 Council Policy No. 700-17 was amended to reserve to the City Council, "authority to establish easements for utility purposes in, under, and across

the dedicated property so long as such easements and the facilities to be located therein do not significantly interfere with the park and recreational use of the property." This reservation of authority has been included in park dedication ordinances enacted after 1985. Because all three of the dedication ordinances in issue were enacted prior to 1985, the changes to Council Policy No. 700-17 are not applicable. Therefore, in determining whether or not the proposed uses of these dedicated park lands are proper, the uses must be examined in the context of the existing case law.

While the construction of buildings and roads and other surface uses in, through and across dedicated park lands has been a frequently litigated issue, the same cannot be said of subsurface uses of dedicated park lands. However, many of the principles espoused in surface use cases have analogous applicability to the issue at hand. In this regard, it has been stated that, "the real question seems to be whether the use in a particular case, and for a designated purpose, is consistent or inconsistent with park purposes." Slavich v. Hamilton, 201 Cal. 299, 303 (1927).

In McQuillin's treatise on municipal corporations, it is stated that: "╒aσ dedication is always subject to preexisting rights . . . ." and "╒tσo constitute misuser or diversion, the use made of the dedicated property must be inconsistent with the purposes of the dedication or substantially interfere with it." McQuillin, The Law of Municipal Corporations, volume 11, sections 33.70, 33.74 (3d Ed. 1971). This addresses also the peripheral question raised by Mr. Graff's memorandum pertaining to the status of those pipes in Rose Canyon which were emplaced in the land prior to its dedication as park lands.

In City and County of San Francisco v. Linares, 16 Cal. 2d 441 (1940), the issue was examined as to whether or not a proposed use of Union Square Park would substantially interfere with the use of the land as a park. In that case, the court ruled that the construction and operation of a subsurface parking garage, as proposed, did not interfere with the surface use of the land as a park. In Best v. City and County of San Francisco, 184 Cal. App. 2d 396 (1960), a similar ruling was made based on a similar use of Portsmouth Square (a dedicated park).

It should be pointed out that the City and County of San Francisco has a charter provision whereby the Board of Park Commissioners may lease "sub-surface space under any public park and the right and privilege to conduct and operate therein a public automobile parking station, provided that said

construction . . . and operation will not be, in any material respect or degree, detrimental to the original purpose for which said park was dedicated . . . ."

Although The City of San Diego has no specific charter provision directly enabling the placement of underground pipes in dedicated park lands, the San Francisco cases are still applicable to the extent that they identify criteria which were considered by the courts when determining whether a subsurface use causes interference with the use of the land for the dedicated purpose. In that regard the court identified as determinative, "the restoration of the surface to its previous condition as a public park, with attractive landscaping and the usual public park facilities and conveniences." Linares, 16 Cal. 2d at 447.

In People ex rel. State Lands Commission v. City of Long Beach, 200 Cal. App. 2d 609, 621 (1962), the court cited Central Land Co. v. City of Grand Rapids, 302 Mich. 105, 4 N.W. 2d 485 (1942), in which the Michigan Supreme Court ruled that the erection and operation of oil wells on dedicated park lands did not substantially interfere with the use of the land as a park because, "defendants ╒hadσ taken rather extraordinary care in so operating the oil wells on park property that this activity ╒didσ not materially impair the use of the land ╒as a parkσ." The court identified as a significant factor in its determination that no material impairment occurred, the fact that the pipelines leading from the wells to the storage tanks were contained wholly underground.

With this backdrop, we must determine whether or not placement of an underground twelve inch sludge line and an underground seventy-two inch trunk sewer line constitute uses which are inconsistent with the purposes of the dedication or substantially interfere with it.

While it is true that during construction of the proposed pipelines, there will be a disturbance of the surface, this disturbance is brought about by reason of necessity and is an

unavoidable incident of a purely temporary nature. This type of temporary disturbance was dismissed as diminimus by the court in Linares. The court's primary concern was any interference with use of the land as a park, which would be caused by existence of the completed project.

It is difficult to imagine how the existence of underground pipes would in any way interfere with the surface use of the land for park and recreation purposes (particularly in unimproved open space dedicated park lands). It seems axiomatic that where the

use creates no interference, the use is not inconsistent with the dedicated purpose.

Additionally, it is noteworthy that section 55 of the charter provides that the City Council, upon recommendation by the City Manager and when the public interest demands, "may without vote of the people, authorize the opening and maintenance of streets and highways over, through and across City fee-owned land which has heretofore or hereafter been formally dedicated in perpetuity by ordinance," for park and recreation purposes.

The power to construct and maintain sewers is incidental to the power to construct and maintain streets. Harter v. Barkley, 158 Cal. 742, 745 (1910). Because the charter already authorizes the construction and maintenance of streets and highways through dedicated park lands, by implication it authorizes the lesser incidental use of placing water utility pipes thereunder, which by themselves constitute less of an impact upon the surface use of the land for the dedicated purpose.

The proposed underground pipelines may not enhance the use of the dedicated lands as parks, but if they are contained wholly underground, with no surface appurtenances, and the surface of the land is restored to its original condition, emplacement of the proposed pipelines certainly would not detract from the use of the lands for park and recreation purposes. As such, it is our conclusion the proposed pipelines are not uses requiring prior voter approval as provided by Charter section 55.

JOHN W. WITT, City Attorney
By
Richard L. Pinckard
Deputy City Attorney

RLP:mrh:460:710.2(x043.2)
ML-90-17