

MEMORANDUM OF LAW

DATE: September 17, 1991

TO: Mary Lee Balko, Deputy Planning Director,
Long Range Planning Division

FROM: City Attorney

SUBJECT: Access to Point Loma Treatment Facility and
Eastgate Technology Park

By memorandum of September 13, 1991, you asked two (2) questions for which you needed written responses before the September 19, 1991 Planning Commission meeting. Owing to the press of time, we will give you the written responses desired but the first question of necessity is qualified because of the time restrictions.

In order of presentation, you ask:

1. Does the United States Government (Cabrillo National Monument) have the right to revoke access to the southern portion of Point Loma including the Point Loma Wastewater Treatment Plant?
2. Because the Eastgate Technology Park is located on Pueblo Lands, and a vote of the people was required back in 1979 in order to authorize its lease, sale and specific uses, would a vote of the people be required in order to construct sludge processing facilities on that site?

1. REVOCATION OF ACCESS

The City of San Diego has a right-of-way permit across federal land for "the sole purpose of providing access to the City's wastewater treatment plant" Document No. RR-261520. The permit is for a period of twenty (20) years running from September 10, 1984.

Of particular concern, however, is condition 18, which reads as follows:

- (18) This permit may be terminated upon breach of any of the conditions herein or at the discretion of the Director, National Park Service, upon 120 days written notice to Permittee.

Permit, p. 5.

This provision purports to allow the Director of the National Park Service to terminate upon 120 days notice, thus seeming to require a "yes" answer to your first question. However, we think a court would invoke the principle of equitable estoppel to prevent a termination absent a showing of material breach of the conditions of the permit.

Where a permittee expends capital and labor (here the costly improvements to the treatment plant), the permittor may be estopped to revoke a permit thereby jeopardizing the investment of the permittee and, indeed, the public health of the entire metropolitan sewerage area. *Hammond v. Mustard*, 257 Cal.App.2d 384, 388 (1967); *Ogden's Revised California Real Property*, Vol. 1, section 13.2.

Further, the land at the treatment plant was deeded to the City by the federal government in fee simple defeasible so long as it is used as a treatment plant. A conveyance of land as such carries with it by implication all incidents belonging to and essential to use of the land. The federal government would be hard pressed to assert that the land had to be used as a treatment plant but deny access to the plant for the very products necessary to its operation. *Ogden's*, supra, at section 3.65.

2. USE OF EASTGATE TECHNOLOGY PARK

Your second question was expressly answered by our Memorandum of Law of May 23, 1989 (attached), advising that no restrictions were passed by Ordinance No. O-12685 unless the Pueblo Land is sold or leased to an outside party and "does not restrict their use by the City itself."

I trust this is responsive to your questions within the time constraint imposed.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:mb:757(x043.2)

Attachment

ML-91-70