

CONFIDENTIAL

ATTORNEY/CLIENT
COMMUNICATION
MEMORANDUM OF LAW

DATE: September 9, 1993

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Naval Training Center - Proposed Closure

This office was directed by the City Council to prepare a memorandum setting forth the legal aspects of the proposed closure of the Naval Training Center (NTC) and to suggest a "legal strategy" for the City to follow in connection with the proposed closure. This memorandum shall deal with the following areas:

1. The various conveyances of the property to the Navy and any use restrictions or rights of reverter contained in the deeds of conveyance.
2. The process required by federal law to be followed by the Navy in proceeding with the proposed closure.
3. Jurisdictional issues with regard to future planning and zoning to control any future use of the property.
4. The effect of the property being designated as "future urbanizing" under "Proposition A."
5. The matter of responsibility for removal of any toxic or hazardous waste which may be on the site.

1. THE VARIOUS CONVEYANCES OF THE PROPERTY TO THE NAVY
A. THE DEEDS OF CONVEYANCE

Attached as Enclosure (1) to this memorandum is a plat identifying the various deeds of conveyance and showing the parcels which have been conveyed to the Navy. The parcels which make up the area of NTC (together with acreage from several

additional small conveyances) have been determined by the City Property Department to total approximately 502 acres. The City Manager has also prepared a large plat map showing the site and improvements presently on the site.

The NTC complex includes approximately 133 acres of property outside the tidelands which were deeded to the Navy by private individuals on behalf of the San Diego Chamber of Commerce by deed dated October 10, 1919. ("Deed No. 1") The consideration was one dollar and the deed contained a provision that the property was conveyed "for the exclusive use of the United States Navy Department as a site for a naval training station." (Emphasis added.) The deed reflected that the Secretary of the Navy had been authorized by Congress to accept the deed "providing that the city of San Diego will donate to the United States government free of charge the tidelands in the Bay of San Diego adjoining said lands to the bulkhead line . . ."

Deed No. 2 is a deed from the City of San Diego to the United States of America conveying approximately 76 acres of the tidelands, from the mean high tide line to the "bulkhead line," adjacent to the property transferred by the above described Deed No. 1. Deed No. 2 contains a provision that the premises are granted "for the exclusive use of the United States Navy Department as a site for a naval training station." (Emphasis added.) Deed No. 2 is dated October 9, 1919, and was granted without monetary consideration.

Deed No. 3 is the first parcel of tidelands transferred to the Navy by handwritten deed dated December 1, 1916. That deed from the City to the United States of America specifies that property is granted "forever, for public purposes of the United States." (Emphasis added.) Deed No. 3 included approximately 55.6 acres of tidelands, between the mean high tide line and the "bulkhead line," located immediately to the south of the property described in Deed No. 1 and immediately to the east of the property described in Deed No. 2. Deed No. 3 property was granted without monetary consideration.

Deed No. 4 is a deed dated August 3, 1933, from the City of San Diego to the United States of America of approximately 95 acres of additional tidelands. Deed No. 4 involves other parcels outside of the NTC area as well and was part of an exchange of properties with the United States. The deed indicates that the property is granted "forever for national defense and the uses and purposes of the United States." (Emphasis added.) The portion of the property in the NTC area was described as encompassing approximately 95 acres between the "bulkhead line" as established in February 1912 and the "pierhead line" which was

established as of February 1912. The deed also, however, referred to the property conveyed as extending to wherever the "pierhead line" was subsequently established. The Navy thereafter placed considerable fill material which resulted in the addition of another 130.5 acres to the conveyance, and a new "combined pierhead and bulkhead line."

B. CONSTRUCTION OF THE DEEDS

None of the above deeds contain a specific "reversionary clause" reconveying any of the property to its original grantors in the event the Navy discontinues its use.

As to the particular language of the several deeds, we note that the various provisions in the deeds which reference the fact that the property is being conveyed for the government's use as a naval training station or general government purposes are contained in what is called the "habendum" to the deeds rather than being contained in the "granting clause" of the deeds.

Historically, the rule of law applicable to clauses such as these is that, when the granting clause clearly grants an unrestricted fee interest in property the fee interest is not affected by later language in the habendum clause purporting to restrict or condition the conveyance. However, the California courts have rendered some decisions in variance with the common law rule that the specific language of a granting clause controls over any inconsistent language in an habendum. *Hunt v. Lawton*, 76 Cal. App. 655 (1926). More recently, the courts have looked at the entire fact situation involved in a particular transfer and have included restrictive language in an habendum clause together with other facts involved in determining what restrictions, if any, apply to a conveyance.

The facts with regard to the three City conveyances of tidelands in 1916, 1919 and 1933 are as follows:

1916 TIDELANDS CONVEYANCE

In 1913 the State Legislature authorized cities to convey tidelands and submerged lands to the United States "for public purposes of the United States" subject to approval by a majority vote of the electorate. (Emphasis added.) Statutes of California 1913, Chapter 250, page 437.

In 1916 the City's electorate voted in favor of the following proposition:

Shall The City of San Diego
grant to the United States for public
purposes five hundred acres of
tidelands described in Document No.
103721, on file in the office of the
City Clerk of said City, commonly

referred to as Dutch Flats, and situated within the boundaries of said City? (Emphasis added.)

The proposition was placed on the ballot by Council Resolution No. 22038, adopted November 6, 1916, which resolution authorized the transfer of the property to the United States "for public purposes of the United States." (Emphasis added.) This authorization allowed for the conveyance of the 55.6 acres of tidelands described above as being conveyed by Deed No. 3.

1919 TIDELANDS CONVEYANCE

By Senate Concurrent Resolution No. 25 (May 4, 1917) the State Legislature authorized the City to convey about 500 acres of tidelands to the United States free of public trusts. The State Legislature in 1919 approved a City Charter amendment which created a City Harbor Commission to which general jurisdiction of the San Diego Bay tidelands was delegated. The Charter amendment was thereafter approved by the City voters. The Harbor Commission, on October 8, 1919, authorized and directed the Mayor and the City Clerk to grant certain additional tidelands to the United States of America. The resolution included a provision as follows:

The property above described is to be used exclusively by the United States Navy Department as a site for a naval training station. (Emphasis added.)

By Resolution No. 24911, adopted by the Council on October 9, 1919, the Council authorized the conveyance of certain additional tidelands to the United States specifying that the property "is to be used exclusively by the United States Navy Department as a site for a Naval Training Station." (Emphasis added.)

The City Council by Resolution No. 25027, enacted November 19, 1919, requested the State Legislature to adopt a senate concurrent resolution authorizing and ratifying the act of the City of San Diego in granting certain tidelands "for the exclusive use of the United States Navy Department as a site for a naval training station . . ." (Emphasis added.)

By Resolution No. 25028, the City Council adopted a resolution submitting the question of "ratifying a certain deed granting to the United States of America tide lands in the bay of San Diego for the exclusive use of the United States Navy Department as a site for a naval training station." (Emphasis added.) The matter was, in fact, placed before the voters in November 1919 as follows:

Shall the indenture of deed .
. . conveying tidelands to the United
States . . . exclusive use of
the United States Navy Department as
a site for a naval training station
be ratified . . . (Emphasis added.)

The measure passed and was the basis for the conveyance in 1919 of the approximately 76 acres of tidelands property described above as being the subject of Deed No. 2.

1919 NON-TIDELANDS CONVEYANCE

Parenthetically and as noted above, there was a concurrent conveyance of approximately 133 acres of non-tideland property from private individuals acting on behalf of the Chamber of Commerce which also contained a provision that the property was conveyed "for the exclusive use of the United States Navy Department as a site for a naval training station." (Emphasis added.)

1933 TIDELANDS CONVEYANCE

In 1929, the State Legislature enacted a law authorizing municipalities generally to grant tidelands to the United States "for public or governmental (including military or naval) purposes." (Emphasis added.) Chapter 808, Statutes 1929.

At an election held on November 4, 1930, the City electorate authorized fee transfer pursuant to the following ballot language:

Shall The City of San Diego
grant to the United States of America
certain tide lands on the north side
of San Diego Bay between the bulkhead
line as established by the United
States War Department in February,
1912, and the pierhead line, as the
same has been or may hereafter be
established by the United States, and
between the prolongation of the
northwesterly line of Bean Street and
the prolongation of the northeasterly
line of Lowell Street, in exchange
for certain portions of the tide
lands now occupied by the Marine
Corps Base, lying between the
easterly boundary thereof and the
prolongation of the northwesterly
line of Bean Street?

On February 16, 1931, the Board of Harbor Commissioners

adopted a resolution authorizing the Mayor and the City Clerk to convey certain tidelands to the United States of America reflecting that the conveyance was pursuant to the above described act of the State Legislature authorizing the conveyance "for public or governmental (including military or naval) purposes." (Emphasis added.)

By Resolution No. 55903 the City Council, on February 16, 1931, authorized the Mayor and City Clerk to execute a deed conveying certain tidelands to the United States. This resolution also reflected that the conveyance was made pursuant to the authorization of the State Legislature authorizing such grants to the United States "for public or governmental (including military or naval) purposes." (Emphasis added.)

In June 1933, the United States Congress enacted H.R. 1767 authorizing the Secretary of the Navy to accept certain City tidelands, and to transfer to the City in exchange, certain other lands previously contained within the Marine Corps base. HR 1767 specified that the property to be conveyed to the Navy consists of "lands being desired by the Navy Department for national defense and for use in connection with existing naval activities . . ." (Emphasis added.)

The actual conveyance, which occurred in 1933, and included approximately 95 acres, is described above as the subject of Deed No. 4. The deed itself contained language that the property was granted "forever for national defense and the uses and purposes of the United States." (Emphasis added.)

ANALYSIS OF THESE CONVEYANCES

It appears to this office that the above language, the authorizations from the State Legislature and the authorizations by the City's electorate provide the City with a valid argument that the conveyances were conditioned upon both initial and continued use of the properties for the United States governmental purposes. There is no indication that the State Legislature intended to allow the property to be transferred to the federal government and used for non-tidelands purposes except during the time that the property is actually used for federal government purposes.

In fact, in connection with the 1919 transfer, an assistant Attorney General, by memorandum dated January 21, 1920, reviewed the conveyance and rendered an opinion that the conveyance had occurred in a manner complying with applicable laws and concluded that the acceptance "of a duly executed deed . . . will vest in the United States title to the upland and tidelands, qualified, however, and limited to 'the exclusive use of the United States Navy Department.'"

While there is no certainty as to how the courts would rule if the federal government attempted, over the City's objections, to convey the tidelands property for use by other than a federal governmental agency, it does appear, as noted above, that the City has a reasonable argument that the federal government is precluded from making such a transfer and that if the property is not to be used for federal government purposes it should revert to the City for development consistent with the tidelands trust.

As noted above, only about 135 acres of the property, which was transferred by private individuals on behalf of the Chamber of Commerce to the Navy in 1919, was not tidelands. With regard to the approximately 370-acre balance of the property, such property consists of tidelands which have been filled. There is no indication that the 1916 transfer of approximately 55.6 acres included any intention on the part of the State Legislature to permanently remove that parcel from the tidelands trust. Likewise, with regard to the 1919 transfer of approximately 76 acres of tidelands. As to the 1933 conveyance, there was language contained in the State Statutes of 1929 at page 1058, which state legislation was preparatory to the 1933 tidelands transfer, and which contained the following language: "All of the land described in this act . . . is hereby declared to have ceased to be tidelands and to be free from all trusts and restrictions . . . except that said city or its successors shall not at any time grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsoever . . ." (Emphasis added.)

The 1929 Statutes also specifically authorized the City or its successors to lease the property for up to 50 years "for any and all purposes which shall not interfere with the use of the tidelands of said bay, lying bayward of said bulkhead line." Therefore, the City, if it reacquires the property conveyed in 1933 will be allowed to lease the property for non-tidelands purposes so long as such purposes do not interfere with the use of the tidelands adjacent to the property.

Therefore, it appears that of the approximately 502 acres conveyed, approximately 135 acres have never been subject to the tidelands trust, approximately 130.6 acres were and continue to be subject to the tidelands trust and the balance of approximately 237 acres has been officially removed from the tidelands trust but is restricted in that it may not be deeded to any private person or corporation and it must be developed and used in such a way as to not interfere with the use of adjacent tidelands.

It is, therefore, our position that none of the tidelands

conveyed by the City to the Navy may be conveyed in fee for private use and approximately 130.6 acres remain subject to the tidelands trust.

Please see Enclosure (2) which provides a more specific description of the courts' decisions in the area of deed restrictions.

Attached as Enclosure (3) is a summary of the above described deeds for reference.

2. PROCESS REQUIRED TO BE FOLLOWED BY THE NAVY PRIOR TO CONVEYANCE OF THE PROPERTY TO THE CITY

Attached as Enclosure (4) is a summary of the legal restrictions applicable to the federal government's disposal of NTC property. Basically, the Navy is required to first offer the property to other federal agencies. If no other federal agency wishes to acquire the property, the Navy must then assess the suitability of the property for use in providing housing for homeless persons. Next, the Navy may negotiate a sale or transfer of the property to interested state and local governments "as long as the Navy receives fair market value for the property." Sales of surplus real property may be made at less than fair market value when the property is to be used as a public airport, for education or health purposes, for parks and monuments, and for correctional facilities.

3. JURISDICTION

Another issue which has been raised is whether the NTC property, if conveyed to a private or public entity, would come under the ownership and control of the San Diego Unified Port District.

While no decisions have been made as to what portion of NTC will be transferred and what portion may remain in Navy use, Enclosure (1) has been marked to show the area presently anticipated to be transferred by the Navy.

The San Diego Unified Port District Act is contained in Appendix 1 of the California Harbors and Navigation Code. Section 5 of the San Diego Unified Port District Act specifies in part:

The jurisdiction of the Port district to exercise its powers shall extend only over the following areas:

- (a) The tidelands and submerged lands granted to the district pursuant to this act or any other act of the Legislature.
- (b) Any airport or airports

now or hereafter owned and operated by any of the above-named cities which establish the district, or San Diego County, and which conveyed to the district by such city or cities or San Diego County.

(c) Any other lands conveyed to the district by any city or by the County of San Diego.

When the District was created in 1962, the City of San Diego did in fact convey all of the City's interest in tidelands it then owned in San Diego Bay to the Port District. However, as noted in the above discussion, all of the tidelands granted by the City to the Navy were granted long before 1962. Therefore, it is our strong view that the 1962 grant to the Port District did not, nor can it be construed to, include the property previously conveyed to the Navy.

Our conclusion, therefore, is that if the Navy conveys the NTC property to the City or any private entity, the City will have the authority within its planning and zoning powers to control the future development and use of the property.

4. THE "FUTURE URBANIZING" ISSUE

Enclosure (5) is a brief description of the effect of Proposition A, the managed growth initiative approved by the voters in 1985, which designated the NTC property and other federally-owned parcels in the City as "future urbanizing." A review of City records indicates that none of the NTC property is presently zoned. Proposition A specifies that: "Any shifts from future urbanizing area, as the same existed in the Progress Guide and General Plan on August 1, 1984, to another designation must be approved by the voters." A copy of Proposition A is attached to Enclosure (5).

The state laws applicable to charter cities include the Subdivision Map Act. The Subdivision Map Act specifies that the City Council may not approve a proposed subdivision map if the map is inconsistent with the City's general plan. Therefore, if the NTC property were transferred to private ownership any future subdivision would, under Proposition A, require prior voter approval.

However, governmental uses are not subject to Proposition A and, if the City, or another public entity not subject to the City's planning and zoning restrictions, were to acquire the NTC property for a governmental purpose, such governmental purpose could be accomplished without a vote.

5. TOXIC WASTES

There have been indications that there may be toxic or hazardous wastes located on portions of the NTC property. Under the federal law, the federal government is required to resolve and mitigate any toxic or hazardous waste problem prior to disposing of its property. Comprehensive Environmental Response, Compensation and Liability Act of 1980, P.L. 96-510 (1980). 42 U.S.C.S.

Section 9620(h)(3)(B) Law Co-op (1989). The nature and extent of any hazardous or toxic materials on the site have yet to be determined. Therefore, there is no method to reasonably estimate the cost or timing which would be involved in correcting any such waste problem.

Attached as Enclosure (6) is a more in depth discussion of the toxic waste regulations as they apply to federal agencies.

SUMMARY

In summary:

- a) There are, in our view, no restrictions or provisions in the deeds conveying the property to the Navy which automatically require the return of the property to the grantors without consideration once the NTC use is discontinued.
- b) However, there were numerous references in the conveyances and transactions by the federal government, by the State Legislature, by the Board of Harbor Commissioners, by the City Council, and the language on the ballot which ratified the conveyances, that the property transferred to the Navy was to be limited in use to naval training station and other federal governmental purposes. Therefore, the City does have substantial and persuasive legal and equitable arguments that the property should be returned to the City if it is no longer needed for the Navy's purposes.
- c) The total area of the NTC property is shown on the attached plat and related map and consists of approximately 500+ acres.
- d) The Navy is required to follow a specific process prior to making the property available to the City.
- e) The Navy may legally convey the property to the City for specified public purposes without the necessity of payment of fair market value.
- f) The Port District has no sustainable legal or equitable right to the property.
- g) The City now has and will retain planning and zoning jurisdiction over the property if it is developed for any private use.
- h) Future development for private use would require a vote of the electorate under Proposition A, while future public use

would not require such a vote.

i) The issue of toxic waste or any hazardous waste on the site must be addressed and corrected by the federal government prior to transfer of the property.

j) The area presently anticipated for possible transfer to the City is shown on Enclosure (1) and the related aerial photograph and large plat prepared by the City Manager.

POTENTIAL "LEGAL STRATEGY"

It is our understanding that representatives of the Navy and other federal governmental representatives have, to this point, indicated a willingness to work with the City towards a potential reconveyance of the unneeded NTC property to the City. So long as the federal government continues to cooperate with the City's desire to have the property returned, it does not seem necessary or appropriate to take legal action with regard to any obligation the federal government may have to return the property. Our recommendation is that the present process involving a task force be used to expedite the proposed return of the property to the City.

JOHN W. WITT, City Attorney

By

Harold O. Valderhaug

Chief Deputy City Attorney

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Enclosures - (6)

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TOP