

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: September 11, 2009
TO: Honorable Mayor and City Councilmembers
FROM: City Attorney
SUBJECT: Proposed Homeless Shelter in Balboa Park

INTRODUCTION

One of the homeless shelter sites presented for your consideration is in Balboa Park, which is dedicated parkland within the meaning of San Diego Charter section 55. The question has been raised as to the legality of providing a temporary shelter for homeless persons in Balboa Park.

QUESTION PRESENTED

May the City Council approve the use of a portion of Balboa Park as a temporary homeless shelter?

SHORT ANSWER

No. San Diego Charter section 55 ("Charter section 55") provides that a dedicated park may only be used for park and recreation purposes. To use dedicated park land for other than park and recreation purposes would, under Charter section 55, require a two-thirds vote of the electorate approving such nonpark use.

ANALYSIS

On at least two occasions, this office has opined on the legality of the establishment of a homeless shelter in Balboa Park. *See* City Attorney Report to the Committee on Public Services and Safety regarding: "Establishing a Homeless Shelter in Balboa Park," dated May 14, 1993

(1993 City Attorney Report 1058); City Attorney Memorandum to Mayor and City Council regarding: "Item 330: Site Location of the Single Adult Shelter FY 2008 Homeless Emergency Winter Shelter Program," dated September 7, 2007. The memorandum contains further analysis of this issue.

Charter section 55 provides in pertinent part as follows:

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.

San Diego Charter section 55.

Balboa Park is dedicated parkland. Under Charter section 55, it may only be used for park, recreation or cemetery purposes. To use Balboa Park for other than a park, recreation or cemetery purpose would, under Charter section 55, require a two-thirds vote of the electorate approving such nonpark use.

According to well-established caselaw, parks are for the enjoyment of the public. Permissible uses are only those which provide recreational, educational or cultural activities for the public or those uses that are incidental to such park uses. In the seminal case of *Spires v. City of Los Angeles*, 150 Cal. 64 (1906), the California Supreme Court held that a library was a valid park use, but a meeting room for the board of education was not. "If any part of such a building could be used for one administration purpose, it might gradually be devoted to another. . . [S]o the building which the city has a right to erect as a library solely in aid of the public enjoyment of the park may be gradually invaded for administration purposes and ultimately devoted to those purposes." 150 Cal. 64 at 70-71.

Other cases have also discussed permissible park uses. The court in *San Vicente Nursery School v. County of Los Angeles* held that a proposed use cannot interfere with use by the public. *San Vicente v. County of Los Angeles*, 147 Cal. App. 2d. 79 (1956). While this office has not evaluated any specific proposal for a homeless shelter in Balboa Park, it is reasonable to assume that a homeless shelter of any size would interfere with the right of the public to use the park.

Parkland cannot be diverted for a non-park use to meet a pressing non-emergency public need. In *City of Wilmington v. Lord*, 378 A.2d 635 (1977), the City of Wilmington argued that a water tower was a legal use of parkland because it would also benefit the park, and because the storage of water was needed by the community. The Supreme Court of Delaware held the water tower was not a permissible use and constituted a breach of the public trust. Further, a homeless shelter does not provide any recreational or cultural activity for the public. It is not incidental to park uses. Private residential use is clearly not a proper use of dedicated parkland. *City of Passaic v.*

State of New Jersey, 33 N.J. Super. 37 (1954). Therefore, any proposal to use a portion of Balboa Park for private residential use to accommodate otherwise homeless persons would require a two-thirds vote of approval by the electorate.

In rare circumstances, the courts have upheld the use of a temporary shelter on parkland. The two cases dealt with a housing shortage after World War II. In both, the courts found that the *extraordinary emergency* conditions caused by the necessities of the war warranted allowing temporary shelters in dedicated parks for the returning veterans.

In *Griffith v. City of Los Angeles*, 78 Cal. App. 2d 796 (1947), a citizen sought an injunction to restrain the City of Los Angeles from allowing temporary housing for veterans in Griffith Park. Tens of thousands of returned veterans and their families were homeless. The City had commenced construction of temporary housing in the Park. The court decided that the housing facilities were justified because an emergency situation existed and the use was temporary.

In *Hyland v. City of Eugene*, 179 Ore. 567 (1946), abutting owners sought an injunction to restrain the City of Eugene from using dedicated parkland to house war veterans. The City had applied to the U.S. government for a loan of 100 trailer homes, sixty percent of which had been installed and were occupied when the case was filed. The agreement between the City and the U.S. government was for a term of two years with a one year option. When the emergency ended, the trailers would be returned to the government. The court stated "If the project involved herein were of a permanent nature, we would have no hesitancy, in the light of the above legal principles, to grant injunctive relief to these abutting owners." However, the court found that because a public emergency existed – "creating a condition inimical to the public welfare" and because the project was of a temporary nature, it was not a misuse of the park. *Id.* at 570.

The courts in *Griffith* and *Hyland* dealt with very different factual situations than is presented here. WWII had just ended and veterans were returning to Los Angeles and Eugene, a situation that the staff and legislators of those cities could not have foreseen. Both *Griffith* and *Hyland* involved requests for injunctive relief, an extraordinary remedy, after erection of the housing had begun. In the *Hyland* case, many veterans and their families had already moved into the trailer homes. According to the *Hyland* court, it would be "shocking to the conscience of a court of equity" to compel them to leave by mandatory injunction under these circumstances. *Hyland*, 179 Ore. 567 at 573.

San Diego Charter section 295(e) allows for an emergency ordinance to provide for the immediate preservation of the public peace, property, health, or safety. "[I]t is the intention of this Charter that the courts shall strictly construe compliance with such definition." San Diego Charter section 295(e).

The City of San Diego designates a site for a homeless shelter on an annual basis. Therefore, the need to site a homeless shelter is foreseeable and the City of San Diego can avoid siting a non-park use in Balboa Park. Further, it appears that the facts as presented do not rise to the level of an emergency as defined in the Charter.

CONCLUSION

The City Council may not approve the use of a portion of Balboa Park for a homeless shelter. San Diego Charter section 55 provides that a dedicated park may only be used for park, recreation and cemetery purposes. A homeless shelter is not a park, recreation or cemetery use. To use a portion of Balboa Park for a homeless shelter would, under Charter section 55, require a two-thirds vote of the electorate approving such nonpark use. The facts establishing the validity of any emergency ordinance to provide for the immediate preservation of the public peace, property, health, or safety, or the declaration of a shelter crisis, would need to be evaluated on a case-by-case basis. The definition of an emergency pursuant to this Charter section shall be strictly construed.

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By



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Deputy City Attorney

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cc: Stacey LoMedico, Director, Park and Recreation Department
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