

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: July 1, 2014

TO: Herman Parker, Director, Park and Recreation Department
Geoffrey Pack, Supervising Preparedness and Response Officer, Office of
Homeland Security

FROM: City Attorney

SUBJECT: Use of Park and Recreation Facilities for Temporary Emergency Shelters

INTRODUCTION

The City of San Diego's Office of Homeland Security (OHS), in the course of its emergency preparedness planning, is in the process of identifying locations for potential emergency shelters and training City staff for service during an emergency. During this process, OHS has identified facilities located in dedicated parkland¹ as potential sites for temporary emergency shelters and has asked whether Charter section 55 precludes that use in the event of a natural disaster or other declared emergency.²

¹ City-owned parkland is generally classified as either "dedicated" or "designated" parkland. Designated parkland is City-owned property that the City has determined may be utilized for park purposes, but has not legally required that such a use continue for all time. By contrast, dedicated parkland is City-owned property that has been formally dedicated for park and recreation purposes in perpetuity either by ordinance of the San Diego City Council or by a private party, when the property was granted to the City. Dedicated parkland is subject to the constraints of Charter section 55, while designated parkland is not.

² In determining whether a true emergency exists, a reviewing court may refer to the Emergency Services Act (Act). Cal. Gov't Code §§ 8550-8668. The Act generally authorizes the Governor to declare a "state of emergency" and further authorizes certain local officials to declare a "local emergency". Cal. Gov't Code § 8625; § 8630. The Act generally defines a "state of emergency" as the "proclaimed existence of a condition of disaster or of extreme peril to the safety of persons and property within the state," which because of its size is or is "likely to be beyond the control" of any single local government and require the combined forces of a mutual aid. Cal. Gov't Code § 8558(b). The Act identifies some of the conditions that could cause a state of emergency, including air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, and earthquake. *Id.* A "local emergency" is defined in generally the same manner, except that the condition occurs within the territorial limits of a city or county. Cal. Gov't Code § 8558(c).

QUESTION PRESENTED

Does Charter section 55 prohibit the City from using facilities in dedicated parkland for temporary emergency shelters during a natural disaster or other declared emergency?

SHORT ANSWER

No. Under certain types of declared emergencies and natural disasters a court would likely uphold the City's temporary use of facilities located on dedicated parkland as emergency shelters, provided that the stated emergency rose to a level that would justify the use of dedicated parkland for temporary shelters (e.g. natural disaster, war, outbreak of contagious disease) and the use was limited to the duration of the declared emergency. Since each emergency situation is unique, the proposed use of dedicated parkland should be independently evaluated for compliance with the applicable legal standards in each instance. For purposes of emergency preparedness, however, the Office of Homeland Security may consider facilities located in dedicated parkland as potential temporary emergency shelter locations.

ANALYSIS

Charter section 55 governs the use of City-owned real property dedicated for park and recreation purposes, and states, in 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.
(emphasis added).

Charter section 55 generally restricts the use of facilities located on dedicated parkland for park and recreation purposes unless two-thirds of the City voters approve the use for other purposes. These restrictions apply to the dedicated parkland and to the facilities located on dedicated parkland. As a general rule, a permissible park use is one that is consistent with the recreational character of a park and does not interfere with the enjoyment of the park by the public. *Simons v. City of Los Angeles*, 63 Cal. App. 3d 455, 470 (1976). It is a well settled principle of law that dedicated parkland may not be used to establish a city hall, fire-engine station, hospital, jail or other municipal building for the transaction of municipal business. Such uses have been held to be inconsistent with and to substantially interfere with the park and recreation purpose of dedicated parkland. *See Slavich v. Hamilton*, 201 Cal. 299, 306-07 (1927).

Historically, the courts have upheld the use of dedicated parkland for temporary shelters during emergencies and public catastrophes. *See Griffith v. City of Los Angeles*, 78 Cal. App. 2d 796

(1947). In *Griffith*, the city's use of a portion of Griffith Park for temporary emergency housing for veterans and families of servicemen returning from World War II was unsuccessfully challenged on the grounds that it was not a proper park purpose. The court looked to common usage and custom to ascertain the uses for which the dedicated parkland may be used and determined that the city was within its authority to utilize the park for temporary housing to alleviate the public emergency. *Id.* In so holding, the court stated: "[I]t has long been the custom and practice to make temporary use of park lands for the shelter and accommodation of citizens of the community who have been rendered homeless by public catastrophe." *Id.* at 800.

There are two primary considerations that should be analyzed if, in the event of an emergency, the City desires to locate a temporary emergency shelter on dedicated parkland. First, whether the emergency rises to a level that would justify the use of dedicated parkland should be considered. In *Griffith*, and the few cases addressing emergency use of dedicated parkland, the emergencies at issue resulted from natural disaster, war, or the outbreak of contagious disease. These cases are consistent with California Penal Code section 409.5 authorizing certain local and state officials³ to close off an area, including a park, to any and all persons whenever "a menace to the public health or safety" exists that was created by a calamity such as "a flood, storm, fire, earthquake, explosion, accident, or other disaster." Neither "menace" nor "calamity" is defined in the statute; however a dictionary definition of "menace" is "something that threatens to cause evil, harm, injury" and a dictionary definition of "calamity" is "a great misfortune or disaster, as a flood or serious injury." Webster's Encyclopedic Unabridged Dictionary 1199, 60 (1996). For comparison, the attached memorandum and report from this Office discuss using Balboa Park for a homeless shelter and each determine that a housing shortage does not constitute an emergency comparable to that in *Griffith*. 2009 City Att'y MS 765 (2009-8; Sept. 11, 2009); 1993 City Att'y Report 1058 (93-26; May 14, 1993).

Second, the duration of any temporary emergency shelter located on dedicated parkland should be considered. Existing case law suggests that a court would defer to local officials to determine when the emergency ended, provided that the officials act in good faith and not capriciously or arbitrarily deprive the public of the use of the park. *Hyland v. City of Eugene*, 173 P.2d 464, 467 (Or. 1946) (upholding temporary housing for World War II veterans during the same emergency at issue in *Griffith*). The duration of a temporary use of dedicated parkland to provide shelter for citizens impacted by a declared emergency would have to be based on the circumstances of the individual emergency. Some circumstances would merit longer temporary use than others, but in order to be consistent with Charter section 55 any such use of dedicated parkland for temporary emergency shelters must only be for that period of time actually necessary to reasonably alleviate the emergency.

³ Among the local and state officials authorized to close off an area are officers of the Department of the California Highway Patrol; police departments; marshal's office or sheriff's office; peace officers of the Department of Forestry and Fire Protection, Department of Parks and Recreation, Department of Fish and Game; and any publicly employed full-time lifeguard or publicly employed full-time marine safety officer while acting in a supervisory position in the performance of his or her official duties. Cal. Penal Code § 409.5

Herman Parker, Director
Geoffrey Pack, Supervising Preparedness and Response Officer
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CONCLUSION

Each emergency situation is different and the facts of each situation should be analyzed before the City elects to use dedicated parkland for a temporary emergency shelter; however, this would not prevent the OHS from identifying facilities in dedicated parkland for possible temporary emergency shelters should the need arise. In certain declared emergencies (e.g. natural disasters, war, outbreak of a contagious disease), the City's use of dedicated parkland for temporary emergency shelters would be a proper park use consistent with Charter section 55, provided that the use is not continued beyond a reasonable time period necessary to alleviate the emergency situation.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Heather M. Ferbert

Heather M. Ferbert
Deputy City Attorney

HMF:nja

Attachment

cc: Andrea Tevlin, Independent Budget Analyst

Andrew Field, Assistant Director Park and Recreation Department

MS-2014-14

Doc. No.: 796854_5

**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.

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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.

JAN I. GOLDSMITH, City Attorney

By



Kimberly Ann Davies
Deputy City Attorney

KAD:js:cw
MS-2009-8

cc: Stacey LoMedico, Director, Park and Recreation Department
Andrea Tevlin, Independent Budget Analyst
Jeff Sturak, Deputy Director, Office of the Independent Budget Analyst

OFFICE OF
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May 14, 1993

REPORT TO THE COMMITTEE
ON PUBLIC SERVICES AND SAFETY

ESTABLISHING A HOMELESS SHELTER IN BALBOA PARK

You recently requested a legal opinion as to the legality of providing a temporary shelter for homeless persons in a portion of Balboa Park.

Balboa Park is a dedicated public park and under Section 55 of the City's Charter may be used only for park and recreation purposes. To use dedicated park land for other than a park and recreation purpose would, under section 55, require a two-thirds vote of the electorate approving such nonpark use.

Private residential use is not a proper use of dedicated park land. Passaic v. State, 33 N.J. Super 37, 109 A.2d 294. Therefore, any proposal to use a portion of Balboa Park for private residential use to accommodate otherwise homeless persons would normally require a two-thirds vote of approval by the electorate.

Our understanding is, however, that you feel that the present lack of adequate shelter for homeless persons in San Diego may constitute an "emergency" situation justifying extraordinary action by the City Council.

Section 17 of the City Charter authorizes the City Council to adopt an emergency ordinance in order "to provide for the immediate preservation of the public peace, property, health, or safety, in which the emergency claimed is set forth and defined" in the ordinance. Section 17 further states "no situation shall be declared an emergency by the Council except as defined in this section, and it is the intention of this Charter that compliance with such definition shall be strictly construed by the courts." Section 17 requires a two-thirds vote by the City Council for passage of any emergency ordinance.

Providing temporary shelter for homeless persons in public parks has occurred in the past in emergency situations. For example, after the 1906 San Francisco earthquake housing facilities were established in various parks and public areas in San Francisco to accommodate homeless persons until housing could be reconstructed. Also, after World War II thousands of war veterans returned to the Los Angeles area and, as there was no housing available to accommodate the veterans, the city allowed temporary housing facilities for the veterans to be established in Griffith Park. The action of the council was challenged and in the case of Griffith v. City of Los Angeles, 78 Cal.2d 796 (1947) the court decided that the housing facilities in the park were justified on the basis that an emergency situation existed and that the use was "temporary." Similarly, in the case of Hyland v. City of Eugene, 179 Or. 567 (1946) the court upheld a temporary veteran housing project in a park in Oregon on the basis of an emergency resulting from an acute housing shortage with the additional condition that the temporary use not "substantially or materially interfere" with the public's use of the park.

It is our opinion that, in the absence of a two-thirds vote of the electorate, establishing a homeless shelter in Balboa Park can be legally justified only if there are substantial and relevant facts to support a finding by the City Council that an emergency situation exists and that it is, therefore, necessary to establish such a shelter in order to protect the public health or safety in accordance with Charter Section 17. In addition, it would be necessary to also show that the proposed use would be "temporary" rather than permanent.

While the word "temporary" is obviously somewhat ambiguous, we note that in both the Griffith case and the Hyland case the proposed "temporary" use upheld by the courts was approximately three years.

If substantial and relevant facts exist to support such a finding by the Council and there is a clear indication that the use will be temporary only, pending some permanent solution to the homeless problem, we feel that a court would uphold a decision of the City Council to establish a temporary shelter for homeless persons in the park.

Respectfully submitted,


JOHN W. WITT
City Attorney