Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: October 1, 2014

TO: Herman Parker, Director, Park and Recreation Department
Jacques Chirazi, Program Manager, Planning, Neighborhoods and Economic Development Department

FROM: City Attorney

SUBJECT: Use of Dedicated Parkland for Electric Vehicle Charging Stations

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INTRODUCTION

This Memorandum is in response to a request from the City of San Diego's Planning, Neighborhoods and Economic Development Department for a legal opinion concerning the proposed installation of permanent electric vehicle (EV) charging stations at two dedicated parks, specifically Rancho Bernardo Glassman Community Park and Carmel Valley Community Park (collectively, the Parks).[1] Since 2011, the City has operated a pilot program (Pilot Program) pursuant to which a City contractor installed a limited number of EV charging stations on specified City-owned property, which included Balboa Park and Mission Bay Park. San Diego Resolution R-307721 (Oct. 4, 2012). These EV charging stations were to operate at no charge to users and could not be used for commercial purposes. Charging Host Site Agreement between City and ECOtality North America (Agreement) at § 5 (June 6, 2011) and Resolution R-307721. The Agreement and the Pilot Program expire on December 31, 2014, at which time, the City may elect to retain or remove the EV charging stations installed during the Pilot Program. Resolution R-308689; Agreement at § 8.2.

On July 1, 2014, the San Diego City Council approved the City's participation in a grant from the California Energy Commission (CEC) to fund the installation of forty-one permanent EV charging stations on City-owned property and authorized the City to enter into several agreements with proposed subcontractors to implement the grant. At the hearing and in the Report to City Council, City staff indicated that a program that will address the operation of the permanent EV charging stations and the City's involvement in a car sharing program is being

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[1] Rancho Bernardo Glassman Community Park was set aside and dedicated in perpetuity for park and recreational purposes by Ordinance No. O-15939, on April 11, 1983. Carmel Valley Community Park was dedicated for park and recreational purposes by Ordinance No. O-18757, on February 22, 2000.

developed. 14-047 (June 2, 2014). City staff expects to bring a proposal on this program to City Council within the next year.

QUESTION PRESENTED

Is the placement and operation of permanent EV charging stations on dedicated parkland consistent with San Diego Charter section 55?

SHORT ANSWER

It is more likely that a court will uphold the placement of the EV charging stations on dedicated parkland if the stations are operated in a manner that does not interfere with the public's use of the Parks and are incidental to the public's use and enjoyment of the Parks. *See San Vicente Nursery School v. County of Los Angeles*, 147 Cal. App. 2d 79 (1956). Absent meeting that standard, a court would likely find that such use violated Charter section 55.

ANALYSIS

I. GENERAL LAW CONCERNING THE PERMISSIBLE USES OF DEDICATED PARKLAND

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).

The Parks were set aside and dedicated in perpetuity for park and recreation purposes by City Council ordinance, as provided for in Charter section 55. San Diego Ordinance O-15939 (Apr. 11, 1983) and Ordinance O-18757 (Feb. 22, 2000). Charter section 55 generally restricts the use of dedicated parkland for park and recreation purposes unless two-thirds of the City voters approve the use for other purposes. This Office has issued a number of opinions and memoranda concerning a wide range of proposed park uses.[2] A review of these opinions, as well as relevant

[2] In addition to those uses traditionally associated with public parks (see list provided in 1982 Op. City Att'y 166 (Feb. 17, 1982)), this Office has advised that some incidental and ancillary uses of dedicated parkland are permissible, including advertisements associated with park use (1992 City Att'y MOL 571 (92-76; Aug. 24, 1992)), and underground pipelines (1990 City Att'y MOL 211 (90-17; Jan. 26, 1990)).

case law addressing uses of dedicated parkland in other jurisdictions, provides some direction in determining whether a particular use will be deemed a permissible use of dedicated parkland, if challenged.

As a general rule, the permissible uses of parkland dedicated by the City are construed more liberally than uses of parkland dedicated by private grant.[3] *See Slavich v. Hamilton*, 201 Cal. 299, 303 (1927). A reviewing court would likely evaluate the proposed use for consistency with the recreational character of the Parks and examine whether the proposed use interferes with the public's enjoyment of the Parks. *See Slavich,* 201 Cal. at 306; *San Vicente Nursery School v. County of Los Angeles*, 147 Cal. App. 2d 79, 86-87 (1956). This is consistent with previous City Attorney opinions determining that Charter section 55 requires parks to "be utilized solely and exclusively for park and recreation and related support activities." 1986 City Att'y MOL 143 (86-15; Feb. 11, 1986) (long term lease to agency for health services and information not a permissible use).

Permissible park uses generally recognized by the courts include public libraries, hotels, restaurants, museums, art galleries, zoological and botanical gardens, conservatories, monuments and memorials. *Spires v. City of Los Angeles*, 150 Cal. 64, 66-67 (1906); *Slavich*, 201 Cal. at 306-07. Other uses, including parking lots and parking garages, have been found to be permissible incidental uses of dedicated parkland that are necessary for the public's enjoyment of the park. *See Abbot Kinney Co. v. City of Los Angeles (Abbot Kinney)*, 223 Cal. App. 2d 668, 674 (1963) (parking lot a permissible use of portion of privately dedicated parkland); *City and County of San Francisco v. Linares (Linares)*, 16 Cal. 2d 441, 446 (1940) (underground parking a permissible use of dedicated property where charter expressly authorized parking and only small portion of park surface permanently diverted for parking use). In contrast, although there is no case law directly on point, McQuillin suggests a gas station would not be a permissible use of dedicated parkland. 10 McQuillin Mun. Corp. § 28.67 (3d ed. 1990) (*citing Town of Riverhead v. County of Suffolk*, 39 A.D. 3d 537, 539 (N.Y. 2007) (fueling station in dedicated parkland warranted application of public trust doctrine)). When property is restricted to park use by public dedication, the municipality may "change the character of the use of the land so long as the contemplated use *is not inconsistent with enjoyment by the public of the land for park purposes.*" *Linares,* 16 Cal. 2d at 446 (emphasis added). The use of modern technology, such as EV charging stations, has not been addressed in any published cases; however, case law analyzing the impact of the dramatic changes in public transportation on park use suggest a willingness to consider changing technology when interpreting the purpose of the park dedication. *See Abbot Kinney,* 223 Cal. App. 2d at 675.

Even when construing restrictions on the use of privately dedicated parkland, which are read narrowly, "the courts have upheld the use of portions of property for purposes that are incidental

[3] Staff has not provided any indication that either of the Parks is subject to a private dedication; however, if an EV charging station is proposed for a privately dedicated park, the applicable grant should be evaluated to determine whether placement of an EV charging station at that particular park would be permissible under the specific terms of that grant.

to its use as a public park." *Abbot Kinney,* 223 Cal. App. 2d at 673 (*citing Vale v. City of San Bernardino*, 109 Cal. App. 102, 106 (1930)). The court in *Abbot Kinney* evaluated the city's installation of a parking lot on property restricted by private grant for a "park or beach for the use, benefit and enjoyment of the public in general." *Id.* at 669. The court upheld the city's use, finding the parking lot to be "a necessary adjunct to the use and enjoyment of the beach." *Id.* at 674; *compare Roberts v. City of Palos Verdes*, 93 Cal. App. 2d 545, 548 (1949) (parking facility for municipal vehicles violated private grant restriction that prohibited buildings on the park property that did not "*directly* contribute to the use and enjoyment of the property in question for park purposes").

By contrast, facilities that do not contribute to the use and enjoyment of the dedicated parkland have generally been found to be improper uses of that parkland. *See San Vicente Nursery School*, 147 Cal. App. 2d at 85-86 (private nursery school not proper use of park building). Courts have frequently held uses such as fire-engine stations, hospitals, jails and buildings for the transaction of municipal business to be inconsistent with and substantially interfere with the park and recreation purpose of dedicated parkland. *Spires*, 150 Cal. at 67.

II. IF THE EV CHARGING STATIONS ARE CONSIDERED INCIDENTAL TO THE PUBLIC'S USE AND ENJOYMENT OF THE PARKS, A COURT MAY FIND THAT INSTALLATION OF THE CHARGING STATIONS IN THE PARKS IS NOT INCONSISTENT WITH CHARTER SECTION 55

Based on case law, the Parks and any facilities or structures therein must be used in a manner that is not inconsistent with the public's enjoyment of the Parks. *See Slavich,* 201 Cal. at 306-7; *Linares*, 16 Cal. 2d at 446. For example, the stations in the Parks should not deprive the public from using the Parks and should not give exclusive use of part of the Parks to a few individuals or a private business. *See San Vicente Nursery School*, 147 Cal. App. 2d at 87. Since the charging stations do not fall within a recreational use already recognized by the courts, this Office recommends that City staff provide facts to establish how the stations contribute to the public's use and enjoyment of the Parks in the course of developing a permanent car sharing program and operating the EV charging stations.

If challenged, a court may also evaluate the amount of the Parks used by the stations. In *Abbot Kinney*, the court relied, in part, on the fact that only a "a small portion of the subject property" was used for the parking lot. 223 Cal. App. 2d at 672. The *Linares* court also evaluated the amount of parkland used for the incidental purpose, finding that about "six and one-half per cent of the area" would be used for permanent access to the underground parking garage. 16 Cal. 2d at 447. According to City staff, seven of the three hundred ninety-one total parking spaces at the Rancho Bernardo Glassman Community Park and seven of the one hundred eighty-four total parking spaces at the Carmel Valley Community Park would be designated for the EV charging stations. Based on the *Abbot Kinney* and *Linares* cases, a court could reasonably conclude that installation of the charging stations is not inconsistent with a park and recreation purpose because the overall impact in each of the Parks is minimal: less than five percent of the total

parking spaces available to the public would be used similar to the six and one-half percent upheld in *Linares.*

III. IF THE EV CHARGING STATIONS ARE OPERATED IN A MANNER THAT EXCLUDES PUBLIC USE OF THE PARKS, A COURT MAY FIND THE STATIONS ARE INCONSISTENT WITH CHARTER SECTION 55

In addition to evaluating the impact the installation of EV charging stations would have on the Parks, a reviewing court would evaluate the terms of the car sharing program being developed by City staff and the manner in which the stations are operated to determine whether the use is consistent with the public's use and enjoyment of the Parks. Generally, dedicated parkland may not be used in a manner that unreasonably interferes with the public's use and enjoyment of the Parks. *See San Vicente Nursery School*, 147 Cal. App. 2d 79 (1956). In *San Vicente Nursery School*, the court determined that a private nursery school was not a proper use of dedicated parkland because "the use of the park by the school did not contribute to the enjoyment of the park by the general public but contributed only to the enjoyment of the park by the few children and their parents." *Id.* at 87. For example, if the stations are allowed to be operated solely for the benefit of a commercial venture or car-sharing company, or if the parking spaces equipped with charging stations are restricted for use only by charging electric vehicles, those operations may be deemed as interfering with the public use of the Parks by a court relying on the verbiage of *San Vicente* that only a few are able to use the charging stations, therefore they are not contributing to enjoyment of the Parks by the general public. City staff has stated that the charging stations may be equipped with the ability to make reservations, and that charging an electric vehicle can take six to eight hours. Based on this information, a court could conclude that such usage interferes with the public's use of the Parks, and therefore, is not consistent with Charter section 55.

CONCLUSION

Charter section 55 requires that all uses of dedicated parkland be consistent with a park and recreation purpose. When evaluating whether the use of dedicated parkland is permissible, a court will heavily rely on the facts of the specific park and the specific use contemplated for that park. Since staff is still developing the program, it is unclear how the EV charging stations will be operated, who will be able to use them, how much of the parkland will be used, and whether the parking spaces associated with the charging stations will be restricted. In order to provide a more definitive legal analysis, this Office would need to evaluate the specific conditions of the

installation and operation of the EV charging stations, as well as any potential exclusivity that may occur as a result of the operation of the charging stations or the proposed car sharing program mentioned in the Report to the City Council (Report No. 14-047).

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