

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

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** November 29, 2017

**TO:** Honorable Councilmembers Lorie Zapf, Chris Cate, and David Alvarez

**FROM:** City Attorney

**SUBJECT:** Recreation Councils

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**INTRODUCTION**

On November 9, 2017, you asked this Office several questions relating to the City's financial relationship with the recreation councils in order to prepare for the Public Safety & Livable Neighborhoods Committee hearing on December 6, 2017. At that hearing, committee members will consider proposed changes to the recreation councils' financial structure and governance.

**BACKGROUND**

On September 8, 2017, this Office issued a memorandum confirming prior verbal advice in which we concluded that fees collected by recreation councils are City funds.<sup>1</sup> City Att'y MS 2017-20 (Sept. 8, 2017). These funds, like all City funds, are subject to San Diego Charter (Charter) and San Diego Municipal Code (Municipal Code) requirements governing the use of City funds. The Park and Recreation Department (Department) is proposing changes to the Department's Fee Schedule and requesting authority to enable the City to take back financial responsibilities currently delegated to the recreation councils. The attached Department memorandum discusses the proposed changes in more detail. *See* Memorandum from Herman Parker, Director of the Park and Recreation Department, on Amendment to Park and Recreation Dept. Fee Schedule (Nov. 14, 2017) (attached).

**OVERVIEW OF LEGAL ISSUES**

As discussed in this Office's September 8, 2017, memorandum, the City delegated authority to administer recreational programming within certain geographical areas to individual recreation councils through Council Policy 700-42 and by issuing Special Use Permits (Permits).

This delegation of authority over City funds raises legal issues with respect to their collection and expenditure. Currently, City funds collected by recreation councils are deposited into the

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<sup>1</sup> City funds collected by recreation councils include fees collected through charges in the Department's Fee Schedule and from participants in recreation classes. These are distinguishable from funds raised by recreation councils through fundraising activities, donations, and grants.

recreation councils' own separate bank accounts, not into the City treasury as required by the Charter. *See* San Diego Charter §§ 45, 85; San Diego Municipal Code (SDMC) § 22.0704. Permits govern the recreation councils' use of City funds, but that process does not comply with the City's budgeting requirements, which are established in the Charter. *See* San Diego Charter §§ 69, 80, 84.

Additionally, when the City delegates its administrative authority to the recreation councils, the recreation councils must comply with all the same rules and regulations that apply to the City when exercising that authority. *See Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.*, 87 Cal. App. 4th 862, 873 (2001). For example:

- Recreation councils' use of City funds is subject to state and local conflict of interest laws and may require adoption of a conflict of interest code. Cal. Gov't Code §§ 1090, 87100.
- Contracts entered into by recreation councils using City funds must be competitively procured as described in the Charter and Municipal Code. San Diego Charter § 94; SDMC § 22.3203.
- Those contracts must also comply with the City's Equal Employment Opportunity Program (SDMC §§ 22.2701-22.2708), the Equal Benefits Ordinance (SDMC §§ 22.4301-22.4308), Nondiscrimination Clause (SDMC §§ 22.3501-22.3517), Living Wage Ordinance (SDMC §§ 22.4201-22.4245), and other contracting provisions.

With this background in mind, we address each of your questions, in turn, below.

**I. AS MENTIONED AT THE OCTOBER 31, 2017 CITY COUNCIL HEARING, HERMAN PARKER, DIRECTOR OF THE PARK AND RECREATION DEPARTMENT, INDICATED THE CURRENT SPECIAL USE PERMIT PROVISIONS ARE INCONSISTENT WITH THE LEGAL REQUIREMENTS APPLICABLE TO THE USE OF THE CITY FUNDS. WOULD YOU PLEASE OUTLINE THOSE INCONSISTENCIES AND ANY CORRECTIVE ACTIONS THAT CAN BE APPLIED TO THE PERMITS, MUNICIPAL CODE, AND/OR OTHER GOVERNING DOCUMENTS?**

The current financial relationship between the City and the recreation councils is legally problematic for reasons other than the language in the Permits, Municipal Code, and/or other governing documents. The current financial relationship does not meet City Charter requirements that City funds be deposited in the City treasury and it does not follow expenditure processes set forth in the Charter. San Diego Charter § 11.1. Additionally, the California Constitution does not allow a legislative body to delegate its financial responsibilities to an advisory body. Cal. Const. art. XI, § 11. The policy decisions needed to bring about compliance with the City Charter and California Constitution concern only the control and handling of City funds.

**II. WHAT PROMPTED THE CHANGE IN INTERPRETATION OF THE CURRENT PERMITS THAT PREVENTS YOUR OFFICE FROM AUTHORIZING A NEW PERMIT WITH RECREATION COUNCILS?**

This Office has advised the Department for some time on legal concerns related to recreation council operations, including the proposed 2016 playground project discussed in the attached Department memorandum. Once we concluded that funds collected by recreation councils are City funds, and examined the manner in which these funds are handled, we determined that we could not sign contracts on behalf of the City without violating Charter section 40, which outlines this Office's responsibilities.

It is important to note that the existing Permits do not need to be extended in order for the recreation councils to continue to operate. However, the City could enter into new permits with the recreational councils if it chose to, so long as funds are handled appropriately. The City may, for example, create a new permit that provides additional guidance on the recreation councils' advisory role to augment Council Policy 700-42, or that includes a process where the City grants funds to recreation councils (just as the City might grant funds to other nonprofits where certain requirements are met) or pays the recreation councils for services. The implementation of these options is a policy decision.

**III. WHAT IS THE FEASIBILITY OF GRANTING A SHORT-TERM EXTENSION OF THE PERMITS UNTIL A SOLUTION WITH APPROPRIATE PUBLIC INPUT CAN BE PRESENTED?**

A short-term extension of the Permits that allows recreation councils to continue to collect, retain, and expend City funds, as they currently do, is not legally permissible. However, recreation councils do not need new Permits to continue to function in the advisory role established by Council Policy 700-42.<sup>2</sup> Allowing the Permits to expire will not impact the ability of the recreation councils that have nonprofit status to fundraise for park activities and projects, and will not impact their ability to retain or spend the nonprofit organization's own funds (as opposed to the surcharges collected on behalf of the City). While this Office strongly encourages recreation councils to convey to the City all City funds within their accounts, the timing and procedure for the collection of City funds is an administrative matter for policy makers to decide.

**IV. GIVEN THAT THE CITY ATTORNEY SIGNED OFF ON AT LEAST ONE PERMIT RENEWAL IN MARCH, WHY IS A TEMPORARY RENEWAL NOT POSSIBLE NOW? WHAT HAS CHANGED SINCE MARCH?**

In March, the City and recreation councils executed a document memorializing the City's exercise of a one-year option to extend Permits that expired on December 31, 2016. At the time, this Office was working closely with the Department to analyze legal issues raised by the City's relationship with the recreation councils. While the City exercised the one-year option prior to

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<sup>2</sup> The stated purpose of recreation councils in Council Policy 700-42 is to "promote the recreation programs in the community through planning, administering, publicizing, coordination and interpretation."

their expiration on December 31, 2016, the City's documentation of that action did not occur until March 2017.

**V. IN THE PAST, RECREATION COUNCILS HAVE BEEN ABLE TO CONTINUE OPERATING UNTIL THE NEW PERMIT IS SIGNED, WELL AFTER THE EXPIRATION OF THE CURRENT PERMIT. WHY IS IT NOW CRUCIAL TO STOP THE PERMITS IMMEDIATELY?**

The response to this question is addressed in the Overview of Legal Issues section, above. In addition, having no legal agreement in place protecting the City and its employees is problematic. *See* Charter §§ 93 (prohibiting gifts of public funds), 108 (establishing civil and criminal liability of City officers who willfully approve or allow unauthorized payments from City treasury).

**VI. THE CITY HAS AUTHORIZED SPECIAL USE PERMITS WITH OTHER NON-PROFITS FOR THE OPERATION OF CITY-OWNED FACILITIES. CURRENTLY, THE MAYOR HAS THE AUTHORITY TO ENTER INTO CONTRACT WITH NONPROFITS UNDER \$1 MILLION ANNUALLY. WHAT PREVENTS HIM FROM ENTERING INTO CONTRACTS WITH EACH RECREATION COUNCIL AS HE HAS WITH OTHER NON-PROFITS?**

There is no legal barrier to the City contracting with a qualified recreation council to provide services to the City; to do so, the recreation council must satisfy the requirements of Municipal Code section 22.3210 and be able to perform the services requested. A contract for recreational services would allow the City to maintain responsibility and control over City funds. For example, if the City contracted with a qualified recreation council or other nonprofit organization to provide services at a City recreation center, the City could collect fees directly from the public and would pay the recreation council or other nonprofit organization for services rendered.

**VII. DOES YOUR INTERPRETATION OF THE LEGAL INCONSISTENCIES FOR RECREATION COUNCILS' USE OF CITY FUNDS APPLY TO OTHER PERMIT HOLDERS?**

No. This Office's September 8, 2017, memorandum analyzes the City's financial relationship with recreation councils. By contrast, nonprofit organizations that have permits for City park facilities, including senior centers, tennis clubs, and youth organizations in Balboa Park, are distinguishable from recreation councils. These nonprofit organizations are similar to City lessees, operating independently from the City, maintaining their own staff and operations, and raising their own funds. These organizations do not collect a surcharge through the Fee Schedule and are not operating under a delegation of authority from the City.

**CONCLUSION**

It is our understanding that the Department will propose changes to the recreation councils' financial structure and governance at the upcoming hearing in an effort to resolve the legal issues

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identified here and in prior memoranda. This Office stands ready to assist in clarifying the recreation councils' future role and analyzing potential operational solutions that comply with the legal requirements and protect the public funds.

MARA W. ELLIOTT, CITY ATTORNEY

By     /s/ Heather M. Ferbert      
Heather M. Ferbert  
Deputy City Attorney

HMF:nja

MS-2017-31

Doc. No.: 1635766

Attachment

cc: Honorable Mayor  
Honorable City Councilmembers  
Andrea Tevlin, Independent Budget Analyst  
David Graham, Deputy Chief Operating Officer  
Herman Parker, Director, Park and Recreation Department




THE CITY OF SAN DIEGO

M E M O R A N D U M

DATE: November 14, 2017

TO: Honorable Council President Myrtle Cole and Members of the City Council

FROM: Herman D. Parker, Director, Parks and Recreation Department  
via David Graham, Deputy Chief Operating Officer, Neighborhood Services 

SUBJECT: Amendment to Parks and Recreation Department Fee Schedule

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On October 31, 2017, the City Council held a hearing regarding an amendment to the Park and Recreation Department Fee Schedule and Appropriate Recreation Council Revenues and Fees. The City Council referred this item to the Public Safety and Livable Neighborhoods Committee scheduled for December 6, 2017. This memo will provide additional information, correct statements made at the public hearing and give an update to the City Council on steps the Department is taking in anticipation of the upcoming committee meeting.

The history leading up the City Council hearing on October 31, 2017 was not clearly articulated in the response to questions. The City Attorney's Office, as our legal advisor, was not responsible for any of the timing associated with scheduling the item for City Council hearing nor the decision to direct docket.

This is the recent history of the relationship between recreation councils and the City. The Special Use Permits (SUP) and Standard Operating Procedures and Responsibilities for Recreation Councils (SOP) with recreation councils have most recently been revised in 2007, 2011 and 2015 to address cash handling issues, strengthen internal controls, ensure consistency with the Prevailing Wage ordinance, and various other issues.

In 2016, while processing a right of entry permit for a recreation council, the Department was advised that the permit could not be issued because the intended approach to construct the playground did not comply with the Department of Public Works contracting and related requirements for projects funded with City funds. Since the notion that "recreation council funds are City funds" was inconsistent with operations at that time, the Department asked the City Attorney's Office whether the funds collected by recreation councils are "City funds" subject to applicable provisions in the San Diego Charter and San Diego Municipal Code. On September 8, 2017, the City Attorney issued MS-2017-20 a public memo that states "All funds collected by recreation councils are City funds, and therefore subject to Charter and Municipal Code requirements governing the use of City funds."

In anticipation of a public memorandum, the Department evaluated the ramifications to the current relationship with recreation councils between 2016 and 2017, considering that recreation council funds are City funds. We requested a delay of the issuance of MS-2017-20 until we could complete the development of options for recreation council and City Council consideration to reduce the disruption in our relationship with recreation councils.

The Department reviewed other parks and recreation departments from around the country to determine best management practices for partnering with nonprofit community groups in the delivery of programming and services. The current arrangement between the City and recreation councils is not replicated by any other city of comparison nor considered a best practice in the United States. The fact that recreation council funds are City funds and that the current practice of depositing City funds into private bank accounts conflicts with state and local law poses a significant potential for disruption to the existing relationship with recreation councils. The Department has engaged extensively with the City Council and the affected community including:

- Week of September 11, 2017: One-on-one phone calls with recreation council presidents
- Week of September 18, 2017: Small group meetings with recreation council board members
- September 21, 2017: Public presentation at the Park and Recreation Board
- October 19, 2017: Public presentation at the Park and Recreation Board
- October 25 and 26, 2017: Community Parks I and Community Parks II Area Committee meetings

On October 31, 2017, the Department proposed recommendations to the City Council intended to resolve conflicts with the City Charter. Those recommendations would authorize the Director of the Park and Recreation Department to establish programming fees for individual recreation programs, authorize the Chief Financial Officer to appropriate and expend recreation center area funds, restrict those funds to only be expended in the geographic area where they were collected, and grant the ability for the assumption of agreements with independent contractors. These are the near-term actions necessary to reduce the disruption of the relationship with the recreation councils. Recreation councils would continue in all other roles except they would not be the fiscal agent of the City. All other responsibilities in Council Policy 700-42 (CP 700-42), and the SOP would remain as the recreation councils would shift to an advisory body rather than an administrative group.

The current activities of the recreation councils are governed by CP 700-42, the SUP and SOP. Although the SUP will expire on December 31, 2017, CP 700-42 remains in effect which includes the following indemnification provision:

*City, in consideration of the volunteer services rendered by recreation councils; does hereby agree to provide legal defense to and indemnify such members from liability for acts of such members performed while engaged in assisting the Park and Recreation Department community recreation programs when such acts are done under the direction, control or supervision of Park and Recreation personnel. The City shall further provide a legal defense to, and indemnify such members from liability for acts of such members performed in connection with recreation councils acting as a body within the policy guidelines of the City of San Diego.*

*The City shall not, however, defend or indemnify any member of recreation councils for any act or acts with regard to damages or liability resulting from same, alleged to have occurred as a result of any criminal act of any such members.*

Recreation council members will continue to be indemnified under CP 700-42 even after the expiration of the SUP.

The Department remains committed to recreation councils and is taking the following actions to ensure they remain a vital part of our work. The Department has set up geographically restricted special funds that will accept deposits of city funds that were previously deposited in recreation council private bank accounts. These funds will be expended based on a budget annually approved by each recreation council. The City will not write checks or provide funds to recreation councils, but rather directly contract and procure special recreation services/programs and recreation supplies to execute the programs and events which were approved by the recreation councils in the annual budget process. The Department will be reaching out to independent contractors that are currently providing contract service classes to determine how that programming can continue after the expiration of the SUP. The Department is reviewing and will revise any policies authorized under CP 700-42 to ensure that recreation councils can continue to work cooperatively in the planning, promoting and development of community recreation programs.

While CP 700-42 remains in effect, an update will be necessary. The Department has collected input from extensive outreach efforts and is beginning the process of creating a community working group to make recommendations on revising the policies and procedures for recreation councils. The working group will be comprised of members recommended from City Council, the Park and Recreation Board, and the community. The Department is soliciting information from interested individuals with the expectation that the group will be empaneled in December with the first meeting occurring in January.

As the City Council deliberates on the proposed Amendment to Park and Recreation Department Fee Schedule and related items, the recreation councils will continue to serve as the recognized conduit and sponsor for community input regarding park and recreation programs and facilities and park development projects. Per CP 700-42, the City will work cooperatively with recreation councils in the planning, promoting and development of community recreation programs. The adopted bylaws that are in accordance with the terms of the SOP will remain in effect. The activities of the recreation council 501(c) 3 organizations will operate like any other non-profit, separate from the City, unless otherwise engaged through a contractual agreement.

Before the Public Safety and Livable Neighborhoods Committee scheduled for December 6, 2017, the Department intends to provide additional public presentations regarding proposed changes to recreation councils. These meetings include the Park and Recreation Board meeting of November 16, 2017, and a special joint Area Committee meeting on November 29, 2017.

The Department respects the decades of work that has been performed by recreation councils. San Diego is unmatched in its integration of community input in the operations of

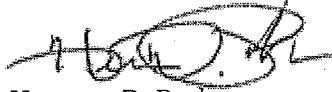


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the City. Recreation councils are vital to the success of our City and will remain a crucial voice in the delivery of recreation in our City.



Herman D. Parker

Director, Parks and Recreation Department

cc: Mara Elliott, City Attorney, City Attorney's Office  
Aimee Faucett, Chief of Staff, Office of the Mayor  
Mike Hansen, Deputy Chief of Staff/Policy Advisor, Office of the Mayor  
Matt Awbrey, Deputy Chief of Staff & Chief of Communications, Office of the Mayor  
Marshall Anderson, Director of Council Affairs, Office of the Mayor  
Jack Straw, Director of Land Use and Economic Development, Office of the Mayor  
Scott Chadwick, Chief Operating Officer  
Stacey LoMedico, Assistant Chief Operating Officer  
Andrea Tevlin, Independent Budget Analyst  
Rolando Charvel, Chief Financial Officer  
Paz Gomez, Deputy Chief Operating Officer, Infrastructure/Public Works  
Ronald H. Villa, Deputy Chief Operating Officer, Internal Operations  
Kris Michell, Deputy Chief Operating Officer, Special Projects