



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: July 11, 2007 REPORT NO: 07-119

ATTENTION: Council President and City Council
Docket of July 16, 2007

SUBJECT: Mission Bay Park Land and Water Survey

REFERENCE: Mission Bay Park Boundary Survey, Report No. 00-111
Mission Bay Park Lease Restrictions, Report No. 00-144
Mission Bay Park Boundary Survey, Report No. 00-212
Mission Bay Park Boundary Survey, Report No. 01-105

REQUESTED ACTION: Do not approve the proposed Ordinance, Amending Chapter 6, Article 3, Division 25, of the San Diego Municipal Code by amending section 63.25.1, adding language that clarifies the meaning of the Land/Water Distinction as characterized within Section 55.1 of the City Charter by redefining, “ ‘Waters of Mission Bay’ for purposes of City Charter Section 55.1 to mean and include all *wetlands*, navigable waters, and all “waters of the United States” as that term is used or defined under the Clean Water Act [Section 1251 of Title 33 of the United States Code, 33 U.S.C. 1251 et seq.]”

STAFF RECOMMENDATION:

1. Do not approve the proposed Ordinance.

SUMMARY:

On November 15, 2006 the Natural Resources & Culture (NR&C) Committee requested a clarification from the City Attorney on whether marshlands in Mission Bay Park are characterized as land or water for the purpose of complying with City Charter Section 55.1.

Uses of Mission Bay Park are subject to the limitations of Section 55.1 of the City Charter which reads as follows:

Notwithstanding any other provision of this Charter to the contrary, the total land and water area of all leases in Mission Bay Park shall not exceed twenty-five percent (25%) of the total

dedicated land area or six and one half percent (6.5%) of the total dedicated water area respectively of the park without such lease being authorized or later ratified by vote of 2/3's of the qualified electors of the city voting at an election for such purpose.

The City Attorney's office opined that marshlands/wetlands should be characterized as water and that marshlands/wetlands within Mission Bay Park should be defined pursuant to the Clean Water Act. (Marshland is considered a type of wetland environment.)

Background

In 1999, the City's Real Estate Assets Department started exploring the possibility of issuing a Request for Proposals (RFP) for development of Fiesta Island. This action opened up the discussion on the amount of leasable acreage in Mission Bay Park and the NR&C Committee requested information on the status of available leaseable acreage in the Park. (Attachment 1)

The public debate continued and on April 18, 2000 the San Diego County Grand Jury issued a report entitled "Mission Bay Park – The Truth About 'False Bay'" asking the City to complete a survey to accurately determine land and water acreages to ensure compliance with City Charter Section 55.1. As part of the report, the Grand Jury also asked the City to determine the extent of marshlands. The City Manager responded to the Grand Jury on July 17, 2000 stating that a survey was underway, but would not include a separate calculation of marshland. The City Manager stated that a separate survey of marshland is not warranted and will not provide relevant information for compliance with Charter Section 55.1. Further, in accordance with standard surveying practices and California law, the mean high water mark is the measurement used to distinguish land from water. (Attachment 2)

On June 5, 2000 the City Council authorized the City Manager to enter into a contract with Project Design Consultants for a boundary study of Mission Bay Park. The purpose of the survey was to determine the precise area of the dedicated land and water inside the boundaries of the park, the land and water leasehold areas, and to determine if the City was in compliance with City Charter Section 55.1. (Attachment 3)

During this same time period, the NR&C Committee requested a legal opinion from the City Attorney regarding the inclusion of non-profit leases in the 25% leased land limit (Attachment 4). The Committee, and later the full Council voted to revise Council Policy 700-08 (Mission Bay Park Policies) to include non-profit leases in the 25% limit on leased acreage of land in Mission Bay Park. (Attachment 5)

The survey, which was completed on October 5, 2000, quantified total dedicated land and water areas of Mission Bay Park by delineating land and water by the Mean High Water Line. The survey did not distinguish marshlands separate from land or water. The marshland areas were delineated as either land or water based on the Mean High Water Line.

The survey also found that several areas within the park boundaries were not dedicated as parkland. These parcels included excess right-of-way along Interstate 5 and Interstate 8 as well as other areas that were historically considered part of the park and that had been maintained as parkland. The dedication of these parcels did not expand the overall boundaries of the park.

The issue of surveying marshlands was raised at the time the scope of work for the survey was being prepared. Staff sought clarification from the City Attorney on whether the distinction must be made in order to determine compliance with Charter Section 55.1. On February 22, 2000, the City Attorney opined that for the purposes of determining the total land and water areas in Mission Bay, the land areas should be calculated as the area above the Mean High Water Line and the water areas as that area below the Mean High Water Line in accordance with standard surveying practices (Attachment 6). This opinion reaffirmed the September 8, 1988 Memorandum of Law opining the same. Based on that opinion, marshlands were not specifically called out in the survey.

The survey results were within one quarter of one percent (0.25%) of historic park boundary calculations. The table below compares the acreage calculations prior to the survey with those after the survey. Prior to the survey, marshlands were called out separate from land and water.

Comparison of Pre- and Post-Survey Acreage

	Pre-survey Acreage	2000 Survey Acreage	Difference
Land	1887.02*	1936.36	+49.34
Water	2228.18	2298.92	+70.74
Marshland	133.73	0	-133.73
Total	4248.93	4235.28	-13.65

* The adopted 1994 Mission Bay Park Master Plan Update cites the land acreage as 1887.74, however most of the historical studies use the 1887.02 figure.

On October 30, 2000 the City Council voted 9-0 to dedicate the 10 parcels totaling 26.84 acres which were always within the boundary of Mission Bay Park but were not formally dedicated as parkland. As stated above, the dedication of these parcels did not expand the overall boundaries of the park. The Council also directed the City Manager to return to NR&C with a discussion of the policy issues associated with the Mission Bay Park survey. As part of the motion, the Council clarified that the 25% land lease limit will be based on the historic amount of acreage, which is the 1887 figure. Also, the Council directed the City Manager to file the survey in the Office of the County Recorder. (Attachment 7)

On May 24, 2001 the San Diego County Grand Jury issued a follow-up report on the boundaries of Mission Bay Park. The Grand Jury investigated complaints regarding the accuracy of the survey and the implication that the company performing the survey had a possible conflict of interest involving the City and one of the Mission Bay Lessees. The Grand Jury determined that the survey was carried out to the highest degree of practical accuracy, the methodology of the survey was consistent with accepted surveying

parameters, and approved by federal, state and city agencies. The Grand Jury further found that there was no evidence to support the allegation of conflict of interest. (Attachment 8)

The report also stated that “concerned citizens, anxious to preserve as much of the public area in the park, contend that wetlands, obviously unsuitable for building and development, should not have been included in the total land area from which the 25% leasable area be derived.” The City Manager responded that a separate survey to determine the extent of wetlands areas in Mission Bay Park was not conducted because the City Charter and all relevant Council Policies do not speak to the “quality” of the land. To properly determine the areas in Mission Bay Park that are wetlands, a more thorough study of hydrology, soil types and vegetation communities would have to be completed. (Water, soil and vegetation are the three components to defining wetlands.) The City further responded that if it were to deduct all land “unsuitable for development”, areas with sandy beaches, least tern nesting sites, dedicated park roads, rip-rap areas above the mean high water line, land within required setbacks, public playgrounds, public right-of-way, etc. would all have to be considered. (Attachment 9)

On May 31, 2001 the NR&C Committee held a meeting to discuss the policy issues associated with the Mission Bay Park survey. The Committee heard public testimony and discussed the issue of whether marshlands should be included in the measurement of land. (Attachment 10)

After considerable discussion, Committee members commented that although further surveying to clearly define wetlands would be an interesting study, it is not necessary to determine compliance with Charter Section 55.1. Rather, it was stated that the City should focus on implementing the Master Plan. (Attachment 11)

Since that time, the City has not had to contemplate increases to leasehold areas, therefore continued discussions of the 2000 survey acreage numbers has been a moot point. Staff is aware of the direction of the October 2000 City Council and 2001 NR&C Committee to use the historical figures (1887.02 land acres and 2228.18 water acres) to determine compliance with Charter Section 55.1.

DISCUSSION:

The primary question that has been raised is if the City is currently in compliance with City Charter Section 55.1. The answer is yes. The following two tables illustrate the leasehold status based on acreage numbers prior to the survey compared with the survey results.

Acreage Limits Based on Pre-Survey Numbers

	Total Acreage	Charter Section 55.1 Limits	Current Leasehold Acreage	Remaining Acreage	Current %
Land	1887.02*	471.76	418.99	52.77	22.20%
Water	2228.18	144.83	97.65	47.18	4.38%
Marshland	133.73	0	0	0	
Total	4249.01	616.55	516.64	99.19	

* The adopted 1994 Mission Bay Park Master Plan Update cites the land acreage as 1887.74, however most of the historical studies use the 1887.02 figure.

Acreage Limits Based on 2000 Survey

	Total Acreage	Charter Section 55.1 Limits	Current Leasehold Acreage	Remaining Acreage	Current %
Land	1936.36	484.09	418.99	65.10	21.64%
Water	2298.92	149.43	97.65	51.78	4.25%
Marshland	n/a	0	0	0	
Total	4235.28	633.52	516.64	116.88	

Under both scenarios the current leasehold acreage amounts for water and land are well under the Charter Section 55.1 limits.

Another question raised is whether any proposed new development would exceed the 25% lease limitation. The answer is no. Any new proposals would require compliance with the Master Plan, City Council approval and Coastal Commission approval. The Master Plan anticipates expanded leaseholds in certain areas and reduced leaseholds in others. Further, the Master Plan’s intent is not to “reach the limit” of allowable dedicated lease area. Rather, lease areas are to be considered in balance with public recreation needs, environmental objectives, and revenue generation.

There are only four commercial areas identified in the Master Plan that would involve changes to current leasehold sizes. There are no current proposals in the City’s planning process at this time. Even with the full build-out of Mission Bay Park, including the 12 additional acres listed below, the leased acreage would be under the City Charter limits.

1. Quivira Basin: potential lease area expansion of 10 acres.
2. Bahia Hotel: potential lease area expansion of 1 acre.
3. Dana Landing: potential lease area expansion of 1 acre.
4. De Anza Mobile Home Park: subject to further study under the De Anza Special Study Area, out of the existing 76 acres, 60 acres could be developed as guest housing (hotel).

In addition to the four commercial lease areas listed above, the Master Plan identifies the potential of an 18-acre area for primitive camping on Fiesta Island with a footnote that the lease area could be non-profit. Because amendments to Council Policy 700-08 include non-profit leases in the overall calculation of lease area, if the 18-acre primitive camping site were to be implemented it would be included in the total leased areas bringing the total additional lease areas to 30 acres, still under the City Charter limits.

While the City Council in 2000 and the NR&C Committee in 2001 stated that the historical acreage numbers should be used to determine compliance with Charter Section 55.1, the question of using the survey results still remains. Even if the current City Council decides to use the historical numbers for the total park acreage, the survey acreage numbers for the individual leases are valuable in verifying the exact areas of land and water under leasehold interest.

The 1994 Mission Bay Park Master Plan Update process involved a multi-year planning process, extensive public outreach, numerous public meetings, and hundreds of hours of community participation. While the Master Plan uses acreage figures that were calculated prior to the official boundary survey in 2000, the Master Plan is consistent with most of the historical acreage figures that excluded marshlands from the calculations of land and water. For these reasons, staff recommends utilizing the acreage numbers identified in the Master Plan as the overall guiding policy for development of Mission Bay Park.

Further, the proposed Ordinance, as drafted could actually have a greater impact to the amount of water area that could be leased. If marshland/wetlands areas are to be considered as water, the total amount of water acreage in the park would be larger therefore allowing more area of water to be leased.

FISCAL CONSIDERATIONS: None with this action.

PREVIOUS COUNCIL and/or COMMITTEE ACTION:

1. November 3, 1999 - NR&C Committee – Information Report on Available Commercially Leaseable Acreage in Mission Bay Park.
2. June 5, 2000 - City Council approved the contract with Project Design Consultants to perform a Boundary and Acreage Survey of Mission Bay Park.
3. July 19, 2000 - NR&C voted 5-0 to revise Council Policy 700-08 (Mission Bay Park Policies) to include non-profit leases in the 25% limit on leased acreage of land in Mission Bay Park.
4. October 16, 2000 - City Council approves revisions to Council Policy 700-08 to include non-profit leases in the 25% limit on leased acreage of land in Mission Bay Park.
5. October 23, 2000 - City Council continued the issue of the Mission Bay Park Boundary Survey.
6. October 30, 2000 - City Council voted 9-0 to dedicate 10 parcels totaling 26.84 acres which were always within the boundary of Mission Bay Park but were not formally dedicated as parkland. The Council also directed the City Manager to return to NR&C with a discussion of the policy issues associated with the Mission Bay Park survey; and that the 25% will still be based on the historic amount of acreage that everyone understood it to be, which was the 1887 figure; and direct the City Manager not to suspend finalizing the survey but to file the survey.
7. May 30, 2001 - NR&C voted to follow the Mission Bay Park Master Plan.
8. November 15, 2006 – NR&C voted to forward this item to the full City Council for action.
9. May 15, 2007 – Council voted to continue this item to July 16, 2007, at the request of the Mayor’s Office for clarification regarding land/water distinctions within the City Charter.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: Mission Bay Park Committee and the Mission Bay Lessee Association.

KEY STAKEHOLDERS AND PROJECTED IMPACTS: Mission Bay Park Committee and the Mission Bay Lessee Association.

Beth Murray, Assistant Deputy Chief
Land Use & Economic Development

James T. Waring, Deputy Chief
Land Use & Economic Development

Attachments:

1. November 13, 2006 Memorandum of Law on the Characterization of “Water” and “Land” under Section 55.1 of the City Charter
2. April 18, 2000 San Diego Grand Jury Report: “The Truth About False Bay” and City Manager’s Response
3. Manager’s Report No. 00-111, Mission Bay Park Survey
4. May 5, 2000 Memorandum of Law, Charter Section 55.1
5. Manager’s Report No. 00-144, Mission Bay Park Lease Restrictions
6. February 22, 2000 Memorandum of Law on the Mission Bay Park Survey Scope of Work
 - a. April 14, 2000 City Attorney follow-up Memorandum on the Mission Bay Park Survey
 - b. September 8, 1988 Memorandum of Law, Mission Bay Park – Issues Relating to the 25% Commercial Use Limitation (as referenced in the 2/22/00 MOL)
7. Manager’s Report No. 00-212, Mission Bay Park Boundary Survey
 - a. Council Meeting Transcript
8. May 24, 2001 Grand Jury Report
9. City Manager’s Response to the May 24, 2001 Grand Jury Report
10. Manager’s Report No. 01-105, Mission Bay Park Boundary Survey
11. NR&C Committee Meeting Minutes
12. Mission Bay Park Land/Water Survey Timeline

NOTE: Due to the size of the attachment(s), the distribution will be limited to the Council Docket binders. A copy is available for review in the Office of the City Clerk or on-line by going to the following City Clerk link.

http://clerkdoc.sannet.gov/RightSite/getcontent/local.pdf?DMW_OBJECTID=090014518011e734