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OPINION NUMBER LO-2015-2

DATE: May 21, 2015

SUBJECT: Potential Use of Dedicated Parkland in Mission Beach Park for a Junior Lifeguard Headquarters

REQUESTED BY: Herman Parker, Director, Park and Recreation Department

PREPARED BY: City Attorney

INTRODUCTION

This Memorandum is in response to a request from the City of San Diego's Planning Department and Park and Recreation Department for a legal opinion on whether the construction of a headquarters for the City's Junior Lifeguards Program (Program) in Mission Beach Park[1] (Park) is legally permissible pursuant to San Diego Charter section 55 and San Diego Municipal Code section 63.50 (Section 63.50), also known as Proposition G.

QUESTIONS PRESENTED

1. Is the use of dedicated parkland for a Program headquarters consistent with a park and recreation purpose as required by Charter section 55?

2. Is the placement of a Program headquarters at the Park permissible under Section 63.50?

SHORT ANSWERS

1. Probably not as currently proposed, unless the use is approved by two-thirds of the City voters. Based on the information provided, a reviewing court would likely find a Program headquarters in the Park to be inconsistent with Charter section 55 because the proposed uses are a diversion from recreational activities and would not promote the public's enjoyment of the Park. Even if the Program Headquarters is not used primarily for educational and municipal-type activities, a reviewing court would likely conclude that the Program

[1] The Park was 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-11110 (Aug. 30, 1973).

headquarters would interfere with the public's use of the Park by removing limited available lawn space from public use.

2. Probably not as currently proposed, unless the use is approved by a majority of the City voters. Based on the information provided, a reviewing court would likely find a Program headquarters in the Park to be in violation of Section 63.50 because the proposed uses are not "public park and recreation uses" as required by the ordinance.

BACKGROUND

The Lifeguard Division of the City's Fire Rescue Department operates the Program, which gives youth the opportunity to learn from professional lifeguards. According to the City's website, the Program "includes ocean and beach safety, lifesaving techniques and procedures, first aid and CPR, development of swimming skills, body surfing, body boarding, surfing, snorkeling, stand-up paddle boarding, kayaking, beach games, and competition events with other junior lifeguard programs." City of San Diego, Lifeguard Services (March 6, 2015) www.sandiego.gov/lifeguards/junior/index.shtml.

The San Diego Junior Lifeguard Foundation[2] (Foundation) has proposed to fund and construct a structure in the Park to serve as a headquarters for the Program and to be operated by the Foundation and the Lifeguard Division. To date, there has been no information provided that the structure would generally be open to the public using the Park. The Foundation provided the attached depiction illustrating the suggested location of the Program headquarters on an undeveloped lawn area adjacent to Belmont Park. As depicted, the planned two-story structure would have a footprint of approximately 9,300 square feet. According to the information provided, approximately half of the proposed structure would contain multipurpose rooms and a kitchen that would be used for the Program and other aquatic educational programming operated by the Lifeguard Division and the Foundation.[3] The multipurpose rooms are suggested to be available for use by the public, on a reservation basis, when not in use by the Lifeguard Division. The remaining half of the proposed structure would contain a large storage area for Program equipment, several private offices for Program and Foundation staff use, a training lifeguard tower, first aid room, lockers and restrooms that would not be open to the public.[4]

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[2] According to a Memorandum of Understanding (MOU) between the City and the Foundation dated August 13, 2013, the Foundation is a non-profit corporation dedicated to supporting the Program through fundraising and other activities. The intent of the MOU is to "establish a cooperative effort between the Parties to support the aquatic education and safety; promote the Lifeguard Division, the San Diego Junior Lifeguard Program . . . and the Foundation to each other's mutual benefit; facilitate outreach to the San Diego community for safe aquatic recreation; reach out to the youth of San Diego . . . and promote drowning prevention to all age groups."

[3] According to the information provided by City staff, the Program generally operates from mid-June to mid-August, Monday through Friday.

[4] The Foundation suggests that the lifeguard training tower may be available for public use by reservation when not used by the Program or other Lifeguard Division activities.

ANALYSIS

I. AS PROPOSED, A REVIEWING COURT WOULD LIKELY FIND THE LOCATING OF A PROGRAM HEADQUARTERS IN THE PARK TO BE INCONSISTENT WITH CHARTER SECTION 55

A. Charter Section 55

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 restricts the use of dedicated parkland for park and recreation purposes unless two-thirds of the City voters approve the alternate use. The Office of the City Attorney has long interpreted this to mean that the City "must jealously guard our parks against encroachment by improper use." 1982 Op. City Att'y 166 (Feb. 17, 1982). City attorney opinions construing the Charter are entitled to consideration by the courts. *See DeYoung v. City of San Diego*, 147 Cal. App. 3d 11, 18 (1983), *overruled on other grounds by Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 15 (1998). A review of opinions from this Office, as well as relevant case law addressing the use of dedicated parkland in other jurisdictions, provides some direction in determining whether a court will uphold a particular use of dedicated parkland if challenged.

"In determining what is a park purpose [courts] do not look to the type of structure erected, but rather, *to the use of that structure in relation to the park*." *Big Sur Properties v. Mott*, 62 Cal. App. 3d 99, 104 (1976) (emphasis added). As a general rule, a permissible park use is one that is consistent with the recreational character of the park and does not interfere with the public's enjoyment of the park. *Simons v. City of Los Angeles*, 63 Cal. App. 3d 455, 470 (1976); *San Vicente Nursery School v. County of Los Angeles*, 147 Cal. App. 2d 79, 84-86 (1956). Permissible park uses 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 v. Hamilton*, 201 Cal. 299, 303 (1927) (relying, in part, on lease restriction that veterans' memorial hall in dedicated parkland be used for "park pleasure purposes only"). This Office's prior opinions are consistent with case law, opining that Charter section 55 requires dedicated parks to "be utilized solely and exclusively for park and recreation and related support activities."[5] 1986 City Att'y

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[5] Commonly upheld support activities in dedicated parkland are generally those incidental uses that are necessary for the public's enjoyment of the park, the most common being public parking lots. *Abbot Kinney Co. v. City of Los*

MOL 143 (86-15; Feb. 11, 1986); *see also*, 1986 City Att'y MOL 558 (86-105; Sept. 3, 1986) (Olympic training and housing facilities not a valid use of dedicated parkland).

By contrast, courts have consistently held that buildings used for the transaction of municipal business are not permissible uses of dedicated parkland. *Slavich*, 201 Cal. at 306-07. Fire-engine stations, hospitals, jails and municipal buildings and offices have been held to be "entirely inconsistent with the use of . . . property for park purposes." *Id.* Consistent with case law, this Office has repeatedly opined that public and private offices are not a permissible use of dedicated parkland pursuant to Charter section 55. 1947 Op. City Att'y 88 (Mar. 21, 1947); 1982 Op. City Att'y 166 (Feb. 17, 1982). Educational uses, including schools and child care facilities, have also been frequently held to be an illegal diversion of dedicated parkland. *San Vicente Nursery School*, 147 Cal. App. 2d at 84-86; *City of Salem v. Attorney General*, 183 N.E.2d 859, 862 (Mass. 1962). This Office has also consistently opined that uses of dedicated parkland, or the facilities therein, for education purposes are not permissible pursuant to Charter section 55. 1979 Op. City Att'y 385 (July 23, 1979) (child care center); 1986 City Att'y MOL 621 (86-119; Oct. 3, 1986) (education and research center); City Att'y MS 2014-13 (June 26, 2014) (public high school).

B. Based on the Suggested Uses of a Program Headquarters, a Reviewing Court Would Likely Determine that the Structure Will Not be Used for Park and Recreation Purposes and Will Not Contribute to the Public's Enjoyment of the Park

While it logically may seem that a structure for use by the Junior Lifeguards in a park adjacent to Mission Beach is appropriate, the law places special limitations on the use of dedicated parkland.[6] Facilities in the Park generally must be used in a manner that contributes to the enjoyment of the Park by the public. *San Vicente Nursery School*, 147 Cal. App. 2d at 84-86; *see also*, 1989 City Att'y MOL 62 (89-13; Feb. 8, 1989) (weekly church services not a permissible use of public meeting room in dedicated park). In order to determine if the Program headquarters would be consistent with Charter section 55, a court would likely evaluate whether the Program headquarters "constituted a diversion from the uses for which the park was dedicated, was inconsistent with use of the land by the public for recreational purposes or constituted an invasion of public right." *Simons*, 63 Cal. App. 3d at 470; *see, Spires*, 150 Cal. at 66-67; *Slavich*, 201 Cal. at 303; *Big Sur Properties*, 62 Cal. App. 3d at 104.

Angeles, 223 Cal. App. 2d 668, 674 (1963); *City and County of San Francisco v. Linares*, 16 Cal. 2d 441, 446 (1940). As a general rule, incidental uses upheld by the courts occupy a small portion of the parkland and are necessary for the public's enjoyment of the park. *Id.*; *see also*, City Att'y MS 2014-21 (Oct. 1, 2014) (electric vehicle charging stations); 1992 City Att'y MOL 571 (92-76; Aug. 24, 1992) (advertisements).

[6] In contrast to the Junior Lifeguards, the City's Lifeguards have been present in the City's beaches since 1918. City of San Diego, Lifeguard Services (May 8, 2015) http://www.sandiego.gov/lifeguards/about/history.shtml. The first lifeguard station in Mission Beach was established in 1927. *Id.* With respect to Charter section 55, lifeguard facilities on dedicated parkland may be considered an incidental use of the Park that is necessary for the public's enjoyment and well-being in this unique park adjacent to Mission Beach. Nevertheless, the functions of the City's lifeguards is distinguishable from the Program generally focused on educating and training youth.

1. The Suggested Uses of the Program Headquarters Would Likely Be Considered a Diversion of Dedicated Parkland in Violation of Charter Section 55 Because the Uses are Primarily Education and Municipal (Office Space and Equipment Storage)

As discussed above, educational and municipal uses that do not aid in the public's enjoyment of the parkland are generally found to be impermissible diversions of dedicated parkland. *San Vicente Nursery School*, 147 Cal. App. 2d at 84-86; *Spires*, 150 Cal. at 67. In *San Vicente Nursery School*, the court held that a private nursery school was an improper use of a building in 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 (emphasis added). In *Spires*, the court held that a library aided the public's enjoyment of the park and was a permitted use of dedicated parkland. 150 Cal. at 70. In so holding, the court specifically found the library building to be "in aid of and for the better enjoyment of the public." *Id.* at 69. However, the court limited the use of the library structure, finding that "[w]hile the municipality has the right to establish upon the public park a public library *it cannot devote any of the rooms therein to administration purposes*." *Id.* at 70 (emphasis added).

Based on the information provided, the Program headquarters would be primarily used for classroom and training space in the multipurpose rooms and training tower, nearly 3,000 square feet of storage space for Program equipment (including rescue boards, buoys, fins, uniforms, recreational materials and City equipment)[7], and locker rooms and office space for the Program, Foundation staff and Lifeguard Division staff. Use of the Program headquarters would be focused on the Program's educational component of instructing participants in beach safety, ocean and wave education, area familiarity, first aid and CPR, water rescue techniques, the importance of physical fitness and other topics related to lifeguarding. City of San Diego, Lifeguard Services (March 6, 2015) www.sandiego.gov/lifeguards/junior/index.shtml. The Program's recreational activities (body boarding, surfing, snorkeling, paddle boarding, kayaking, beach games and competition) necessarily occur on the beach or in the ocean, not within the Park or the Program headquarters. *Id.* Even though a youth program focused on water activities at the nearby beach would logically seem to be a permissible use of dedicated parkland, based on these facts, a court would likely conclude that the Program headquarters is similar to the improper educational and municipal uses contemplated in the *San Vicente Nursery School* and *Spires* cases. Furthermore, a court could find similarities with the *San Vicente Nursery School* case and reasonably conclude that the Program headquarters only contributes to the enjoyment of the Park by the Program participants and would not contribute to the public's enjoyment of the Park.

[7] This equipment is not currently stored in Mission Beach or the Park.

2. Even if the Program Headquarters Was Not Used Primarily for Educational and Municipal Uses, a Reviewing Court May Still Conclude that the Program Headquarters is Inconsistent with the Public's Use of the Park in Violation of Charter Section 55

Assuming the Program headquarters was not used primarily for educational or municipal purposes, a reviewing court would consider whether the proposed use "tends to further and promote the enjoyment of the people under the general dedication of the [Park] for their benefit" or whether it is inconsistent with use of the land by the public for recreational purposes. *Spires*, 150 Cal. at 67; *Simmons*, 63 Cal. App. 3d at 470. In doing so, a court would likely weigh the character of the Park and the proposed structure in relation to the Park and its uses. *See Big Sur Properties*, 62 Cal. App. 3d at 104. This Office has previously opined that uses that "tend to promote the use of the park and add to the convenience and comfort of the public using such park" are consistent with a dedication for public park purposes. 1925 City Att'y Op. 171 (Oct. 20, 1925). Additionally, this Office has determined that a use that results in the permanent closure of a park, or a portion thereof, to public use would violate Charter section 55 unless the use was "merely incidental, and related to and necessary to the proper functioning of a valid park facility." 1986 City Att'y MOL 558 (86-105; Sept. 3, 1986) (Olympic training facilities for exclusive use by and housing of Olympic athletes was not a permissible use of dedicated parkland).

According to the information provided, the Program headquarters would be located on approximately 9,300 square feet of narrow lawn abutting Mission Beach, adjacent to Belmont Park and an existing comfort station, as depicted in the attached drawing. This lawn is frequently used as a picnic location and is one of the public access points to the beach and boardwalk. Furthermore, approximately half of the Program headquarters – the proposed storage areas, offices, lockers, and restrooms – is suggested to be permanently closed to the public. When not in use by the Program or other Lifeguard activities, the remaining half of the Program headquarters – the multipurpose rooms and training tower – could be made available for public use, by reservation. Based on these facts, a reviewing court would likely conclude that the Program headquarters interferes with the public's use of the Park and does not add to the convenience and comfort of the public using the Park. *See San Vicente Nursery School*, 147 Cal. App. 2d at 84-86. Nevertheless, compliance with Charter section 55 potentially could be accomplished in several ways, including, locating the structure in a manner that has less impact on public use of the Park, establishing more recreational uses of the Program headquarters, restricting use of the Program headquarters to park and recreation purposes, or seeking voter approval for the construction of the Program headquarters in the Park.

II. A REVIEWING COURT WOULD REASONABLY DETERMINE THAT THE PROPOSED USE OF THE PARK FOR A PROGRAM HEADQUARTERS IS NOT A PARK AND RECREATION USE AS REQUIRED BY SECTION 63.50

In 1987, voters adopted Section 63.50, which restricts the permissible uses of the Park and generally restricts use of the Park to public park and recreation uses and historical preservation uses. Section 63.50(a) states:

From and after the effective date of this measure, the Mission Beach Park property owned by the City of San Diego shall be restricted to the following uses:

(1) *Public park and recreation uses such as grass, picnic areas, public open space, public parking, public recreation and meeting facilities*. Expressly excluded are retail and commercial uses except within a historically rehabilitated Plunge Building which would serve park and beach visitors, such as restaurants, fitness center and the like.

(2) Historical preservation uses, such as preservation and rehabilitation of the historic Plunge Building, Roller Rink Building and Roller Coaster where economically feasible.

(3) Incidental and related uses to those uses authorized by (a) and (b) above provided such incidental and related uses are clearly subordinate to the authorized uses and are minor in nature. (Emphasis added.)

As a voter initiative, Section 63.50 can only be amended or repealed "by a majority of the voters voting in an election therein." SDMC § 63.50(f); *see also*, SDMC § 27.1049. Therefore, any proposed use of the Park must comply with Section 63.50.[8]

The principles that govern statutory construction also govern the interpretation of a voter initiative like Section 63.50. *Professional Engineers in California Government v. Kempton*, 40 Cal. 4th 1016, 1037 (2007). In hearing a challenge to the City's use of the Park under Section 63.50, the court's "paramount task is to ascertain the intent of those who enacted it." *Id.* The opening statement of the argument in favor of enacting Section 63.50 demonstrates the voters' intent to preserve the Park for recreational purposes, stating "[c]ommercial development in Mission Beach Park must be *limited to truly recreational and visitor-serving parkland uses*." Ballot Pamp., Gen. Elec. (Nov. 3, 1987), argument in favor of Proposition G (emphasis added).

Examples of permissible park and recreation uses indentified in Section 63.50 are "grass, picnic areas, public open space, public parking, *public recreation and meeting facilities*." SDMC § 63.50(a)(1). By authorizing public recreation and meeting facilities, Section 63.50 clearly allows the City to erect structures in the Park. SDMC § 63.50(a)(1). However, the plain language of Section 63.50 further restricts the use of any structures in the Park to public park and recreation uses. *See* SDMC § 63.50(a)(1). The issue here is whether the proposed Program headquarters is a "public park and recreation use" consistent with Section 63.50.

Although there is no case law interpreting Section 63.50, based on the similarity between restrictions on use of the Park pursuant to Section 63.50 and Charter section 55, a reviewing court could reasonably look to case law governing the use of dedicated parkland to determine what constitutes a "public park and recreation use." As discussed at length above, a reviewing

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[8] Development and redevelopment proposals that obtained vested rights as of the effective date of Section 63.50 are exempt from the use restrictions. SDMC § 63.50(f). This Office has not been provided with any information indicating that vested rights for development of a Program headquarters in the Park existed prior to the effective date of Section 63.50.

court would likely find the proposed use of the Park for a Program headquarters interferes with the public's use of the Park and does not add to the convenience and comfort of the public using the Park. Based on the information provided and the legal analysis with respect to Charter section 55, a court could reasonably find that the proposed use of the Park is not a "public park and recreation use" as required by Section 63.50.

CONCLUSION

Relying on case law and past opinions from this Office, a reviewing court would likely find that a Program headquarters in the Park will not be used for park and recreation purposes as required by Charter section 55 and Section 63.50 because the Program headquarters is proposed to be used for educational and municipal purposes. Even if the Program headquarters was primarily used for park and recreation purposes, a reviewing court would likely conclude that the Program headquarters, as proposed, interferes with the public's recreational use and enjoyment of the Park by removing a portion of the lawn area frequently used by the public. Therefore, unless the Program headquarters in the Park was first approved by the voters, it would likely be found inconsistent with Charter section 55 and in violation of Section 63.50. In the alternative, compliance with Charter section 55 and Section 63.50 may potentially be accomplished in other ways, including, locating the structure in a manner that has less impact on public use of the Park, establishing more recreational uses of the Program headquarters, or restricting use of the Program headquarters to park and recreation purposes.

This Opinion is based on certain facts provided to this Office for analysis. If additional facts become available or the proposed uses of the Program headquarters change, the conclusions contained in this Opinion could differ.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Heather M. Ferbert
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Deputy City Attorney

HMF:nja
LO-2015-2
Doc. No.: 968467
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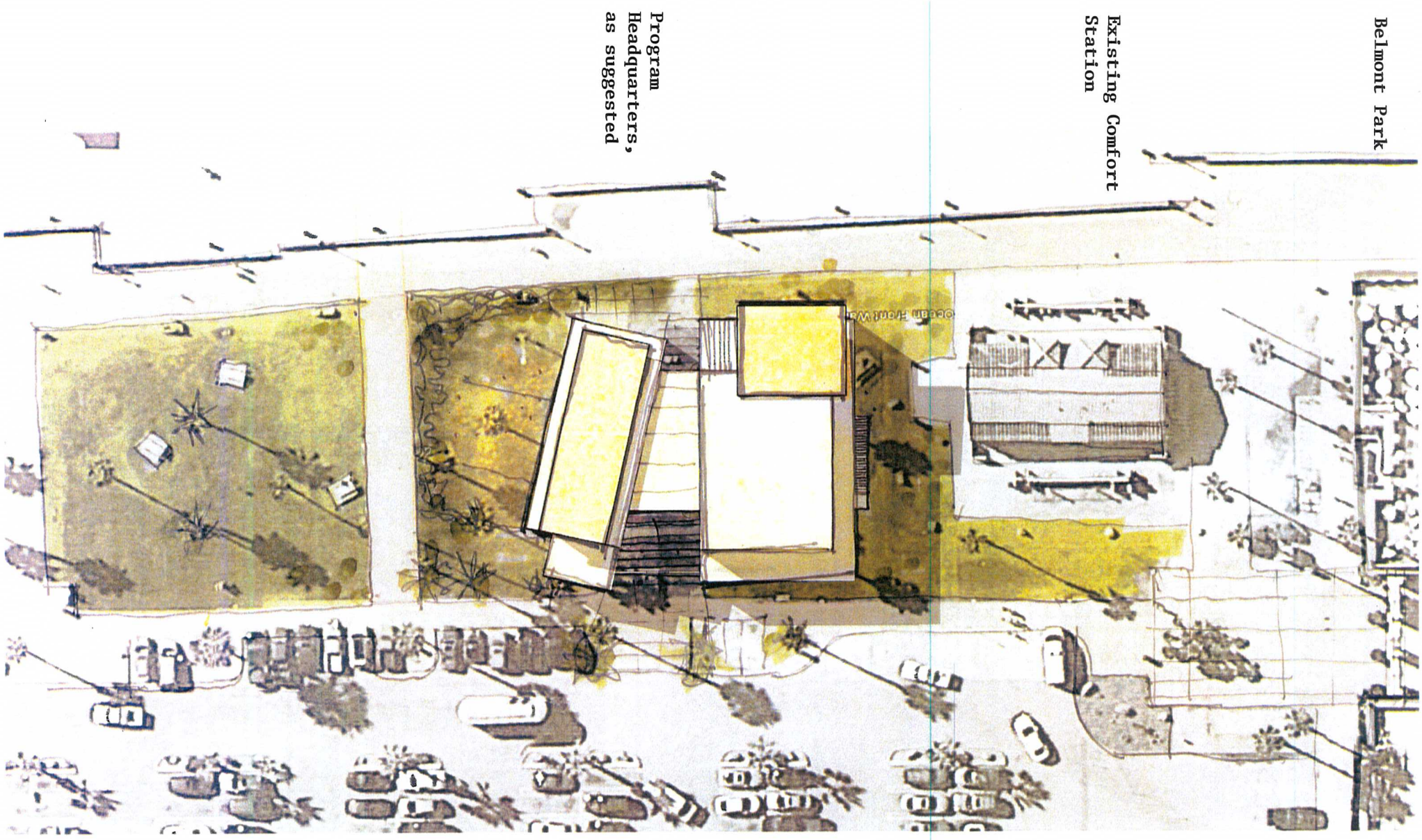

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SAFDIE RABINES ARCHITECTS
925 Fort Stockton Drive, San Diego, Ca 92103

SITE PLAN

1" = 30'-0"

JUNIOR LIFE GUARD BUILDING

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Attachment