

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Michael J. Aguirre
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: July 14, 2005

TO: Councilmember Donna Frye, Council District 6

FROM: City Attorney

SUBJECT: City's Rights Pertaining to the Animals in the Custody of the San Diego Zoological Society

INTRODUCTION

In a memorandum dated April 21, 2005, Councilmember Donna Frye requested the City Attorney's opinion regarding the City's rights under the current lease agreement [the Zoo Lease] between the City of San Diego and the San Diego Zoological Society [the Society] with respect to the movement and disposition of animals. The question was prompted by public outcry over the transfer of Wankie, a thirty-six year old female African elephant, from the Lincoln Park Zoo in Chicago to the Hogle Zoo in Salt Lake City. Wankie had been transferred to Chicago by the Society from the San Diego Wild Animal Park in 2003. The Society participated in the decision to move Wankie to the Hogle Zoo after the death of her two herd-mates at the Lincoln Park Zoo from old age and cancer. Wankie died on May 1, 2005, shortly after arriving at the Hogle Zoo.¹

QUESTIONS PRESENTED

1. Does the City of San Diego own the animals in the custody of the San Diego Zoological Society?
2. Does the City of San Diego have the right to intervene in decisions regarding the sale, transfer, or other disposition of those animals?

¹ Based on a postmortem examination, veterinarians determined that Wankie had a mycobacterial infection that had caused lesions in her lungs and reduced her lung capacity. Wankie experienced breathing trouble and collapsed after arriving at the Hogle Zoo, and was euthanized shortly thereafter. Associated Press, May 18, 2005.

SHORT ANSWERS

1. Yes, under the 1979 Lease, the City is the owner of “all animals, birds, reptiles, plants, exhibits and tangible personal property in the custody and possession” of the Society, including those at the San Diego Zoo, the San Diego Wild Animal Park, or at other facilities by arrangement with the Society.
2. No, not under the terms of the Zoo Lease. As a term and condition of the Zoo Lease, the City transferred control of the animals to the Society for the duration of the Lease. Even though the City retains title to the animals, the City has vested the Society with the right to manage and control the animals, including the right to sell, transfer, and exchange the animals in the course of its operations. The City and the Society could mutually agree to amend the Zoo Lease to allow the City Council to participate in the decision-making process.

BACKGROUND

The relationship between the City and the Society dates back to the time of the Society’s formation after the 1916 Panama-California Exposition. As part of the Exposition, the City had acquired exotic animals for display. The Society was formed to create a zoo and permanent home for the animals in San Diego. Marjorie Betts Shaw, *The San Diego Zoological Garden: A Foundation to Build On*, 24 J. of San Diego Hist., No. 3 (Summer 1978) (<http://www.sandiegohistory.org/journal/78summer/zoo.htm>); Dusty Walton-Brown, History of the San Diego Zoo (May 1998) (<http://history.acusd.edu/gen/local/zoo/dusty.html>).

The City has had a variety of agreements with the Society over the past ninety-four years. Currently, the Society operates the San Diego Zoo pursuant to the Zoo Lease between the City and the Society dated July 23, 1979, for a term of fifty-five years, expiring July 24, 2034. The Zoo Lease governs not only use of the real property on which the Zoo is located, but also care of “all animals, birds, reptiles, plants, and their progeny and product.” Essentially, under Articles IV and V of the Zoo Lease, the City agreed to lease the real property in Balboa Park together with its improvements to the Society in exchange for the Society agreeing to take custody of and care for the City’s plants, animals, and personal property related to the Zoo. Article IV, entitled “Consideration,” provides:

Subject to the provisions of Article V, paragraph 4 of this lease authorizing the sale or exchange thereof by SOCIETY, title to all such animals, birds, reptiles, plants, progeny and product thereof and exhibits and personal property shall always be vested in CITY.

Likewise, Article V, paragraph 4, while permitting the Society to sell, loan, or exchange animals, maintains ownership of the animals, until sold or exchanged, in the City.

SOCIETY may sell, loan or exchange excess exhibits, all animals, birds, reptiles and plants and all personal property in its custody.

Pending a sale or exchange thereof by SOCIETY, title to all animals, birds, reptiles, plants, exhibits and tangible personal property in the custody and possession of SOCIETY, whether heretofore or hereafter acquired, shall always be vested in CITY.

The Zoo Lease also allows the Society to move animals, plants, and exhibits between the Zoo and the Wild Animal Park in the Society's discretion. Zoo Lease, Art. V, para. 4. The Society operates the Wild Animal Park in the San Pasqual Valley, formerly referred to as the Wild Game Preserve, under a separate but related Operating Agreement dated March 3, 1969, and seven subsequent amendments [the Preserve Agreement]. The Preserve Agreement grants the Society a license to use the land and its improvements for the purpose of establishing and operating a wild game preserve, and custody of the animals and plants located there. Specifically, the Preserve Agreement provides:

3. . . . City grants the right to Society to have custody of all animals, birds, reptiles and plants now or in the future to be contained in or about the Preserve. . . .

5. Society may, in its discretion, exchange or move animals, birds, reptiles or plants or personal property in its custody now located in the Gardens to the Preserve . . . [and] may freely exchange exhibits or personal property between the Gardens and the Preserve.

6. Society may sell, loan or exchange excess exhibits, all animals, birds, reptiles and plants and all personal property in its custody. Title to all such exhibits and personal property shall always be vested in City.

The language in the Zoo Lease and the Preserve Agreement reserving title to the City and placing control of the animals with the Society is consistent with Ordinance No. 6605 (New Series) adopted by the City Council on August 2, 1955 [the 1955 Ordinance]. The 1955 Ordinance reaffirms and expands the Society's use of property in Balboa Park and reaffirms the Society's custody of "all of the birds, animals and reptiles which the City owns" provided that the Society assumes the responsibility and obligation to operate the Zoo, use all revenue for development, operation, maintenance, and research and education, and provided that:

(c) The title to all animals, birds or reptiles hereafter acquired by the Society by purchase or donation . . . shall be immediately vested in the City of San Diego, and shall thereupon be subject to the provisions of this Ordinance.

(d) The Society may sell or exchange any excess or undesirable specimens of the zoological exhibits covered by this Ordinance, provided that such specimens received by the Society

in exchange shall likewise immediately vest in the City and become subject to the provisions of this Ordinance.

The 1955 Ordinance superceded Ordinance No. 1845 (New Series) adopted by the City Council on May 14, 1940 [the 1940 Ordinance]. The 1955 Ordinance includes most of the language of the 1940 Ordinance with one notable exception. The 1940 Ordinance specifically provided that “the Society may apply to the City Council for leave to sell or exchange” specimens, and “the City Council shall by resolution either grant or deny such request.” This procedure for obtaining the City Council’s permission for the sale or transfer of animals was abandoned in the 1955 Ordinance in favor of subparagraph (d), quoted above, giving the Society the ability to sell or exchange specimens at its discretion.

The 1955 Ordinance was actually a return to the rights exercised by the Society under the original Resolution adopted by the City’s Park Board on February 15, 1918. *See* 1967 City Att’y MOL 254 (Oct. 26, 1967). In that Resolution, the City gave the Society “the right to sell all excess specimens . . . and the right to trade excess specimens for other specimens . . . , title to all specimens so acquired to be vested in the Park Department of The City of San Diego. *Id.* at 256.²

ANALYSIS

Under California law, the Zoo animals are personal property. Cal. Civ. Code §§ 655, 656, 663. The ownership of property gives one or more persons the right to possess and use that property to the exclusion of others. Cal. Civ. Code § 654. A property owner can, however, place property in the custody of another with the right to sell or transfer the property. *See, Shafer v. Lacy*, 121 Cal. 574 (1898); *see also, South Beverly Wilshire Jewelry & Loan v. Superior Court*, 121 Cal. App. 4th 74 (2004). In that event, the owner of the property cannot claim title to the property after it has been transferred. *Shafer*, 121 Cal. at 577.

In the 1955 Ordinance, the Zoo Lease, and the Preserve Agreement, the City, in consideration for the Society’s operation of the Zoo and Wild Animal Park and care of the animals, conferred its right to sell or trade the animals it owns to the Society as part of the Society’s operation of the Zoo and Wild Animal Park. The City clearly contemplated retaining discretion in decisions relating to the disposition of animals (as reflected by the 1940 Ordinance), but in adopting the 1955 Ordinance, affirmatively acted to place that discretion with the Society. The City requires the Society to reinvest all proceeds from the sales of animals in Zoo operations, and place title to any new animals acquired in the City. The Zoo Lease and the

² According to one historian, title to the animals was vested in the City at the suggestion of the City Attorney to avoid red tape in the Society’s operation of the Zoo on City property. Marjorie Betts Shaw, *The San Diego Zoological Garden: A Foundation to Build On*, 24 J. of San Diego Hist., No. 3 (Summer 1978) (<http://www.sandiegohistory.org/journal/78summer/zoo.htm>).

Preserve Agreement reflect these conditions and the City's decision to give the Society the right to sell or transfer the City's animals.

The City has not retained and consequently does not have the contractual right to interfere with the Society's decisions to sell or transfer animals; the City has agreed that the Society may make those decisions independent of the City. To change that aspect of the parties' relationship, the City would need to renegotiate the terms of its contracts, and with the mutual agreement of the Society, amend the contracts and the Ordinance.

CONCLUSION

The City of San Diego has a longstanding relationship with the San Diego Zoological Society whereby the Society develops, operates, and maintains the Zoo and the Wild Animal Park and the City provides the land and other support for those operations. Under the agreements between the City and the Society, the City owns the animals and the Society has custody of them, cares for them, and may sell or exchange them without first obtaining the City's permission or input. The City and the Society could mutually agree to amend the terms of these agreements, if they so desired, to govern sales and exchanges by, for example, establishing guidelines or providing the City an opportunity for review and comment.

Alternatively, the City could conduct a review of federal, state, and local laws and regulations pertaining to the treatment and handling of animals in captivity, particularly with respect to elephants, and propose appropriate changes to those laws. Please contact our Office if you require assistance in that regard.

MICHAEL J. AGUIRRE, City Attorney

By

Carrie L. Gleeson
Chief Deputy City Attorney

CLG:clg:pev

cc: Will Griffith, Director, Real Estate Assets Department

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