MEMORANDUM OF LAW

DATE: June 7, 1994

TO: Kent Floro, Assistant Deputy Director, Water Production Division

FROM: City Attorney

SUBJECT: Joint Powers Agreement for Tijuana River Regional Park - Inclusion of Certain Water Utilities Property Within Scope

By memorandum dated May 19, 1994, you referred a question to this office concerning the inclusion of certain parcels of Water Utility property within the geographic scope of a proposed Tijuana River Regional Park (the "Park"). The Park is to be established by a Joint Exercise of Powers Agreement, pursuant to Government Code sections 6500 et seq., between The City of San Diego ("City") and the County of San Diego ("County"). A draft of the proposed Joint Powers Agreement ("JPA") was attached to your memorandum, and indicates by way of an incorporated Exhibit B that the real property proposed to be operated and maintained by the County under the JPA as part of the Park is composed in part of parcels of Water Utility land. These parcels and their present Water Utility uses are:

1. Parcel #662-020-04 - Tijuana River Pump Plant - Sewage Treatment Plant Use
2. Parcel #637-081-29 - Sewer Pump Station #08A - Sewer Pump Station Use
3. Parcel #663-010-11; 663-010-38 - Smugglers Gulch - No present designated use.

You ask whether the inclusion of these Water Utility parcels within the JPA Park would be appropriate, and if so, upon what conditions, if any. As a specific concern, your memorandum states that "properties in the Tijuana River Valley need to be reserved for drilling of wells to utilize aquifers of the San Diego Formation and the alluvial for which studies are currently occurring."

The analysis of this issue can be accomplished by reference to a few of the many opinions issued by this office over the years which address the legal uses and disposition of Water

Utility property in various factual contexts. Attached are a Report to the City Council dated November 13, 1991; a Memorandum of Law dated August 14, 1989; and an Opinion dated May 27, 1980, which collectively cite the bases and principles of law which pertain to the assets of the Water Utility. While several other memoranda are available on this subject, these perhaps come closest to addressing the present question.

In particular, the conclusion reached in the Memorandum of Law dated August 14, 1989, answered the question regarding use for park purposes:

> In conclusion, Water Utility land is held in trust by the City for Water Utility purposes. The City cannot take action which would be detrimental to the value of such Water Utility property in order to provide other non-Water Utility benefits to the City's residents. Water Utility property cannot be zoned for park or open space use and cannot be dedicated to park use without payment of fair market value for such property to the Water Utility. However, Water Utility property can be "designated" for park or open space use when such property is not otherwise presently needed for Water Utility purposes so long as the property remains freely accessible to the Water Utility as an asset to be either used directly for Water Utility purposes or to be sold for full fair market value to provide funds for the needs of the Water Utility.

In applying this conclusion to the present case, it is important to note that the proposed JPA does not provide for any changes in the title or interest in property held by either the City or the County. In fact, Section 4 expressly provides that "all right, title, and interest to property shall belong to and be vested in the acquiring public agency." Hence the Water Utility would retain its legal title and interest in its parcels if the JPA is executed.

The next question is whether the terms of the JPA may result in some devaluation of the Water Utility parcels. The

draft JPA is somewhat vague on this point, for both the recitals and Section 5 state only that the purpose of the JPA is to allow the County to "operate" the Park, and to "keep and maintain . . . those lands . . . in a good and sanitary order, condition, and repair, and in a manner acceptable to the City." Although quite general as to what "operation" will entail, this language reasonably implies that passive park uses are intended. The condition that the land be kept in "a manner acceptable to the City" ensures the City that its use interests will be maintained. Further, Section 7 expressly provides the City with the right to enter the premises to inspect and otherwise protect its interests. These provisions indicate that the value of the Water Utility parcels will not be affected nor will use be obstructed. Therefore, as concluded in the August 11, 1989 Memorandum of Law, the parcels in question may be "designated" to the Park "so long as the property remains freely accessible to the Water Utility as an asset to be used either directly for Water Utility or to be sold at fair market value to provide funds for the needs of the Water Utility."

It is recommended that some specific provision in reference to the Water Utility parcels be included in the JPA so that all parties understand that those parcels are expressly subject to special consideration for Water Utility interests, whether related to use for pump stations, pipes, groundwater aquifers, or other legitimate utility purposes.

JOHN W. WITT, City Attorney
By
Frederick M. Ortlieb
Deputy City Attorney

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Attachments
cc: Arlene Dea Deeley
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