MEMORANDUM OF LAW

DATE: November 19, 1985

TO: Roger Graff, Deputy Director Water Utilities

FROM: City Attorney

SUBJECT: Wastewater Recycling Facility in Balboa Park

By memorandum of September 12, 1985, you outlined plans for a proposed wastewater recycling facility in Balboa Park that will provide recycled irrigation water for the park. In light of park restrictions imposed by San Diego City Charter section 55, you ask if this is a proper use of park property.

San Diego City Charter section 55 provides 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 . . . .

Hence a vote would be required unless it can be said that the wastewater recycling facility is a park or recreation purpose. Given the direct irrigation benefit to the park, the ability to provide more water intensive features for the park and ability to add a recycled water reservoir for recreational purposes we believe the facility is clearly a park and recreation purpose as contemplated by the Charter.

The City of Los Angeles was challenged for the use of Elysian Park, a dedicated public park, when it was used for the training of police recruits. In upholding such a use as consistent with park purposes the court said:

> The cases upon which Simons relies make it clear that in order to deprive police recruits of use of Elysian Park it must be shown that such activities constituted a diversion from

> the uses for which the park was dedicated, were inconsistent with use of the land by the public for recreational purposes, or constituted in invasion of public right. (See, e. g., Spires v. City of Los Angeles (1906) 150 Cal. 64 (87 P. 1026); Kelly v. Town of Hayward (1923) 192 Cal. 242 (219 P. 749); Slavich v. Hamilton, supra, 201 Cal. 299.)
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> The trial court concluded, on substantial evidence, that use of the park by police recruits did not constitute a diversion from park purposes, was consistent with the recreational character of the park, and constituted no interference with the enjoyment of the park facilities by the public.
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> Simons v. City of Los Angeles, 63 Cal.App.3d 455, 470 (1976) (Emphasis added.)

Similarly a recycling facility is not a diversion from park purposes, is consistent with the recreational character of Balboa Park and will enhance rather then interfere with the enjoyment of the park by the public.

Indeed the only interference likely to be encountered is during the constriction of the facility. Such temporary interference is not enough to prohibit the use. The City of San Francisco holding Union Square under a restriction as a "public reserve" sought to lease the subsurface for the purpose of constructing a public garage. In approving of such a use the court held:

> It is the contention of the respondent that in the foregoing respects the construction and operation of the proposed improvement will be in a "material respect or degree, detrimental to the original purposes for which said park was dedicated" and in contravention of the grant under which the park property was received, and therefore unlawful. While it is true that during construction there will be an
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> interference with the surface use, this interference will not be permanent and will continue only for a period of about ten months. Such a temporary interference would appear to be an unavoidable incident in carrying out the purposes of the plan.

> Likewise, the permanent use of about six and one-half per cent of the area of the square for ingress and egress is unavoidable and should not block the proceedings. The underground garage and parking station would be useless without an entrance and exit.
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> City and County of San Francisco v. Linares, 16 Cal.2d 441, 447 (1940) (Emphasis added.)

Since this facility will enhance the park and recreational nature of Balboa Park, we find no Charter restriction to its construction in the park.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

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