



MEMORANDUM

Attorney Client Privileged

TO: Councilmember Dwight Worden
CC: Kristen Crane
FROM: Leslie E. Devaney, City Attorney
Barry J. Schultz, Assistant City Attorney
DATE: August 28, 2015
RE: Shores Park Questions

The purpose of this memo is to provide responses to your questions in connection with the potential uses of the Shores Park Property. The questions and responses are below:

1. What legal restraints, if any, are imposed by the 1947 Shores Property deed restriction limiting uses to "school purposes"?

Short Answer: None. This deed restriction is not enforceable due to the passage of time and the adoption of the Marketable Record Title Act as discussed below.

Generally speaking these types of deed restrictions commonly include an enforcement provision that the violation of the restriction would result in the property reverting back to the grantor. This was commonly referred to as a "reversionary" interest. In 1982 the California legislature passed the "Marketable Record Title Act" (California Civil Code 880.020, et seq) (the "Act"). The stated purpose of the Act is to facilitate real property transactions and encourage full use and development of real property. (Civil Code section 880.020) The Act abolished reverter rights and provided that every interest that would be at common law a possibility of reverter is deemed to be and is enforceable as a power of termination. (Civil Code section 885.020) If this restriction includes this enforcement mechanism it would be considered a power of termination and enforceable in accordance with the Act. The Act provides that a power of termination expires 30 years after the date the instrument reserving, transferring or otherwise evidencing the power of termination is recorded. According to the information available to date this time period has expired and the restriction would arguably not be enforceable.

2. What legal restraints, if any, are imposed by the 2007 Resolution (the "Resolution") adopted by Council?

Short Answer: The Resolution reflects the intentions of the City Council at the time of the acquisition. The current City Council is not legally bound by the Resolution and may exercise its discretion to use the property in the manner it determines is best for the City.

Councilmember Dwight Worden
Page 2
RE: Shores Park Questions

Resolutions do not have the force of law within a jurisdiction but are merely expressions of opinion or evidence of a decision made by the legislative body. *Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550, 565. A resolution may be amended or superseded by a subsequent resolution or ordinance.

In this case, the Resolution expresses the intent of the City that the Shores Property would be purchased under the terms and conditions of the Purchase Agreement which had been executed on July 30, 2007 for the purpose of preserving the current open space and recreational uses of the property. The Purchase Agreement contained specific restrictions on the use of the Property which are enforceable in accordance with their terms. (Response No. 3 below)

The Resolution also expresses the *opinion* of the City Council that the long term goal of the purchase is to maximize the open space and recreational uses on the Property and that the City Council has no intention of pursuing other uses not consistent with the purpose of the acquisition such as a new fire station or city hall. This portion of the Resolution is merely an expression of the City Council's intentions and goals relating to the Shores Park acquisition. While the current City Council may choose to be guided by these intentions and/or goals during its master planning process, it is not bound by these intentions and/ or goals and may exercise their discretion to determine the uses which best serve the City.

3. What legal restraints, if any, are imposed by the 2007 Purchase and Sale Agreement?

Short Answer: Should the City decide to use the Property for purposes other than those allowed under the Public Facilities zoning or rezone the Property the City will be obligated to pay the District additional compensation for the Property.

The 2007 Purchase and Sale Agreement is a contract between the City and the Del Mar Union School District. The Recitals reference that the City has made representations to the District as to the City's intended purpose for acquiring the Property. In essence, the City represented that its purpose in acquiring the Property was to acquire the Property for park and public purposes with the intention of continuing the uses on the Property as authorized by its current zoning.

Section 1.7 of the Agreement contains a rezone restriction which essentially provides that the purchase price will be adjusted in the event there is a change in use or zoning. This restriction is memorialized in the Grant Deed and is enforceable by the District against the City. Based on the language in the Recital referenced above, should the Property be used for a purpose inconsistent with the City's Public Facilities zoning or be rezoned to another purpose within the time frames set forth in the Agreement the District will be entitled to additional compensation in accordance with the formula set forth in the Agreement.

Councilmember Dwight Worden
Page 3
RE: Shores Park Questions

4. What legal restraints, if any, are imposed by the 2007 Grant Deed to the City which contains a condition?

See response to Number 3 above.

5. What legal restraints, if any, are imposed by the 2007 Public Facilities zoning referenced in the Purchase and Sale Agreement?

Short Answer: The uses allowed by the Public Facilities Zone (the "PF Zone") are set forth below. Should the City's use of the Property deviate from the allowed uses under the PF Zone, the City may owe the District additional compensation for the Property.

The Public Facilities Zone (DMMC Chapter 30.31) allows:

- A. Public schools;
- B. Private schools that are open to the public and whose primary function is providing educational programs for pre-school students and students in grades K-12; and
- C. City, county, state and federal buildings including: *"Administrative offices, Fire and police stations, Public works buildings, Public meeting rooms or chambers, Libraries, Postal offices, Public parking facilities, Public parks and playgrounds and public utility structures such as pump stations and water tanks... as well as "accessory uses incidental to these uses."*

According to the terms of the Purchase Agreement, the purchase price was established based on the allowed uses under the Public Facilities Zone (Chapter 30.31). Provided the City's use of the Property is consistent with the uses allowed under the Public Facilities Zone, no additional consideration is due from the City to the District. It should be emphasized that the City's use of the Property is restricted by the Public Facilities Zone. However, the City is not legally restricted from rezoning the Property to another use. In the case of a rezone, the Property would be reappraised based on the new zoning and the City may then owe additional consideration to the District for any increased value.

6. Are representations made by fundraisers to potential donors as to future uses binding on the City?

Short Answer: Representations made by the fundraisers to potential donors are not legally binding on the City. The City's obligations with respect to the donated funds are defined by the intent of the donor as reflected by the donor documentation.

As a general matter, a charitable contribution is a contract in which the giver provides money for a specific purpose. By accepting the money the City is committed to use it for the intended purpose. Depending on how it is documented, a donation for a specified purpose may be a

Councilmember Dwight Worden
Page 4
RE: Shores Park Questions

“conditional gift” or it may create a charitable “trust” in favor of the recipient (City). A conditional gift may be reclaimed if improperly used, a trust may not but the City would still be obligated to use the corpus of the trust for its intended purpose and could be subject to certain legal actions to ensure compliance with that intent. See generally, *L.B. Research & Educ. Found. v. UCLA Found.*, 130 Cal. App. 4th 171, 178 (2005).

Courts favor construction of directed gifts as trusts because the forfeiture remedy is harsh. Still, if a donor makes it clear that they intend to make a conditional gift, which can be reclaimed if improperly used, that intention will be honored. *Id.*

The more specific a donor’s documented intent is, the more “strings” will be attached to the donation. While courts are generally reluctant to return contributed funds, *practical* problems arise when recipients do not use funds for the purpose intended because donors will not trust those recipients and will not want to contribute to them in the future.

It is our understanding that the 2007 Resolution is the only representation made by the City in connection with the fundraising effort and that the fundraising was conducted by third parties. As discussed above, the City’s obligations with respect to the donated funds are defined by the intent of the donor as defined by the donor documentation. It is our understanding that the City did not accept any donations which included restrictions on future use of the Shores Property as part of the Shores acquisition. We expect to receive copies of the donor documentation within the coming days and will provide you with additional analysis based on our review.

7. Are representations made by the then Council in the 2007 Resolution binding?

No, see response to Number 2.

8. Does the current Council have the authority to modify any commitments found in the 2007 Resolution? For example, the Resolution implies retention of the current ball field.

Yes, see response to Number 2.

9. Given the references to “open space” and “recreational” uses in the documents and that these terms are not defined in the documents or in the city zoning code, what is the general scope of what these terms include? For example, can buildings for indoor activities, recreational or otherwise, the Alvarado House, offices for non-profits, etc. be consistent with “open space” and “recreational uses”? I look at Balboa Park, for example, and see lots of buildings and offices, including for non-profits, commercial activities (Spanish Village), a theater, museums, a zoo, and other uses.

The references to “open space” and “recreational use” in the Purchase Agreement and the 2007 Resolution appear to be made in the context of the current uses existing on the Property at the

Councilmember Dwight Worden
Page 5
RE: Shores Park Questions

time of the acquisition and the uses allowed under existing zoning designation of Public Facilities. It is our understanding that at the time of the acquisition a portion of the Property was open space, in the sense no development existed¹, and portions of the Property were used as ball fields. In light of the fact the Property is currently zoned Public Facilities, the terms “open space” and “recreational use” should be considered in the general scope of uses which are commonly considered as public parks and playgrounds including ancillary uses.

¹ As opposed to dedicated open space.