NR&C NOV 1 5 2006 #4

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MEMORANDUM OF LAW

DATE: November 13, 2006

TO: Natural Resources & Culture Committee

FROM: City Attorney

SUBJECT: Characterization of "water" and "land" under Section 55.1 of the City Charter

INTRODUCTION

The Natural Resources & Culture [NR&C] Committee has requested that the City Attorney assist in clarifying the meaning of the land/water distinction as characterized within Section 55.1 of the City Charter.

Uses of Mission Bay Park are subject to the limitations of Section 55.1 of the City Charter which reads:

> Notwithstanding any other provision of this Charter to the contrary, the total land and water area of all leases in Mission Bay Park shall not exceed twenty-five percent (25%) of the total dedicated land area or six and one-half percent (6.5%) of the total dedicated water area respectively of the park without such lease being authorized or later ratified by vote of 2/3's of the qualified electors of the city voting at an election for such purpose.

Mission Bay Park is a dedicated park within the City of San Diego's park system and comprises over 4,000 acres, including water and land. In or about 1939, the State of California [State] granted to the City of San Diego [City] its interest in lands within Mission Bay State Park. In a separate action, in or about 1945, tidelands and submerged lands in or adjacent to Mission Bay and its entrance were granted by the State to the City. Any uses made of Mission Bay Park are generally limited to trust uses (e.g., public park, recreational and environmental resource purposes). To comprise the Mission Bay Park as we know it today, various other land and water acquisitions and changes have occurred over the years, including dredge and fill activities which have altered the water/land divide and have impacted the quality and quantity of wetlands and marshes.

QUESTION PRESENTED

Should wetlands/marshes be characterized as "water" for purposes of how one defines "water" under Section 55.1 of the City Charter?

SHORT ANSWER

Yes. Wetlands/marshes should be characterized as "water" for purposes of how one defines "water" under Section 55.1 of the City Charter.

ANALYSIS

In recent years, the City of San Diego has surveyed the water/land composition of Mission Bay Park to determine a framework for compliance with Section 55.1 of the City Charter. In conducting this survey, the City chose to characterize marshes/wetlands as "land" rather than "water." The City used the high water mark to determine the boundaries between water and land. Because marshes were defined as land, the calculation of high water mark could technically occur not where wetland/marsh touched land, but where other Mission Bay waters touched wetland/marsh. By doing so, the 25% of available land for development under Section 55.1 was now greater than if marshes had been characterized as water. This characterization is inherently flawed for the primary reasons that the wetlands/marshes of Mission Bay Park are regulated as "waters of the United States" under the federal Clean Water Act [Clean Water Act] and are public trust resources subject to inherent protections and limited uses.

Under the Clean Water Act, "waters of the United States" are regulated and protected under the jurisdiction of the U.S. Army Corps of Engineers [USCOE]. The implementing regulations of the Clean Water Act include wetlands within the definition of "waters of the United States." Wetlands are defined within these implementing regulations as:

> [T]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. 328.3(b). It would be quite difficult to claim that the marshes/wetlands of Mission Bay Park are not regulated under the Clean Water Act as "waters of the United States" within the meaning characterized in recent U.S. Supreme Court and other decisions. *See John A. Rapanos el al v. United States Army Corps of Engineers* (2006) 126 S. Ct. 2208; *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 [SWANCC]; *Northern California River Watch v. City of Healdsburg* (2006) 457 F. 3d 1023. For purposes of this

memo, the wetlands and marshes of Mission Bay Park are presumed to be "waters of the United States."

In addition, wetlands/marshes are regulated for purposes of compliance with State of California water quality and water protection laws (e.g., water quality of wetlands regulated by State Regional Water Quality Control Boards in their enforcing role under the federal Clean Water Act and state law; wetlands regulated under the California Coastal Act [Public Resources Code Section 30233(a)] within the jurisdiction of the California Coastal Commission; wetlands regulated under the Keene-Nejedly California Wetlands Preservation Act). Because Mission Bay Park's Land Use Plan for the City's Local Coastal Program has yet to be certified, the California Coastal Commission retains original permitting jurisdiction over development within Mission Bay Park.

Furthermore, whatever interpretation is given to the meaning of "water" under Charter Section 55.1 should be consistent with the purpose of the establishment of Mission Bay Park and the trust responsibilities the City has inherited from the State of California upon receipt of wetlands and marshes that were originally held in public trust by the State. *See* 1-2 California Environmental Law & Land Use Practice @ 2.06 (Matthew Bender 2006). Characterizing marshes and wetlands as "land" rather than as "water" is inconsistent with public trust purposes and inconsistent with the goals of the Mission Bay Park Natural Resource Management Plan (e.g., no net loss of marshes) and the Mission Bay Park Master Plan Update.

The public trust is more than an affirmation of a state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust. *See National Audubon Society v. Department of Water and Power of the City of Los Angeles* (1983) 33 Cal. 3d 419, 441. It is well settled in California that the public trust is not limited by the reach of the tides. *National Audubon Society,* 33 Cal. 3d at 435.

Section 102 of the California Water Code expressly states that all water within the State is the property of the people of the State, but the right to the use of the water may be acquired by appropriation in the manner provided by law. *National Audubon Society,* 33 Cal. 3d at 441. When the State of California transferred its interest in the marshes, wetlands and tidelands of Mission Bay to the City of San Diego, it did so in a manner provided by law. However, parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust. *National Audubon Society,* 33 Cal. 3d at 437. It is no where clear in historic records that title in marshes and wetlands was granted from the State of California to the City of San Diego with the intent to convey free of all trust responsibilities. *See State Lands Commission v. County of Orange* (1982) 134 Cal. App. 3d 20.

A conclusion that Mission Bay wetlands and marshes should be defined as "water" under Charter Section 55.1 is not inconsistent with the court ruling in *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10 (1935). In *Borax*, the United States Supreme Court held that it was appropriate to use the mean high water mark as the dividing factor to determine the boundaries between the ownership interests of a State in public trust tidelands and the ownership interests of adjacent private landowners. The Court in *Borax* did not have before it the question of whether wetlands/marshes were lands or water. The *Borax* case, and subsequent cases like it, do not address whether marshes held for public trust purposes may be treated or managed as if they are "land" even though under federal law they are regulated as "water." Cases like *Borax* focus on the tools available for determining disputed ownership interests. There are no disputed ownership issues to address in defining what is "water" and what is "land" in Mission Bay Park under Section 55.1 of the City Charter. It is clear that the purpose of Section 55.1 is not to determine property rights or boundaries, but to manage growth in Mission Bay Park. A definition of "land" that would expand rather than limit growth in or upon wetlands is not a reasonable reading of Section 55.1 and inconsistent with public trust interests in preserving and maintaining the quality and quantity of wetlands and marshes within Mission Bay Park.

CONCLUSION

For the reasons given above, wetlands/marshes should be characterized as "water" for purposes of how one defines "water" under Section 55.1 of the City Charter.

MICHAEL J. AGUIRRE, City Attorney

By Shirley R. Edwards
Chief Deputy City Attorney

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cc: Members of the City Council
Jerry Sanders, Mayor
Elizabeth Maland, City Clerk
James Waring, Land Use & Economic Development
Ted Martinez, Jr., Neighborhood & Customer Services
James Barwick, Director, Real Estate Assets Department
Ted Medina, Director, Parks & Recreation Department
Mission Bay Park Committee