

CALIFORNIA STATE LANDS COMMISSION

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April 18, 2017

VIA EMAIL & REGULAR MAIL (zcowan@cityofberkeley.info)

Zach Cowan
City Attorney, City of Berkeley
2180 Milvia Street, Fourth Floor
Berkeley, California 94704

RE: Request for Advice: Potential Use of Public Trust Lands at the Berkeley Marina for a Homeless Encampment

Dear Mr. Cowan:

This letter is in response to your January 10, 2017 letter requesting advice about whether the use of lands at the Berkeley Marina for a homeless encampment would be consistent with the City of Berkeley's grant and the common law Public Trust Doctrine. Your letter states that the City is considering allowing homeless persons to camp at a site located outdoors in the Marina. As you describe it, the camp would have sanitary facilities, social services, and food services. Your letter notes that the size of the camping area has not been determined and that individual campers would likely stay 15 to 60 days; but you also indicate that it is not possible to know the overall life of the encampment.

As background, in 1913, the Legislature granted the City of Berkeley, "...all salt marsh, tide and submerged lands, whether filled or unfilled, within the present boundaries of said city...."¹ The City's grant has been amended several times since and currently requires that the lands be held in trust for specified uses in which there is a general statewide benefit, including wharves, docks, piers, slips, commercial and industrial purposes, aviation facilities, transportation and utility facilities, public buildings, parks, playgrounds, marinas, snack bars, cafes, restaurants and motels.² A full list of the permitted uses is in the attached copy of the City's granting statute. The City is required to manage its sovereign tide and submerged lands subject to its legislative grant, the California Constitution, and the common law Public Trust Doctrine.

¹ Stats. 1913, ch. 347, §1, p. 45.

² Stats. 1962, ch. 55, §1, p. 343-344

Under the general principles of the Public Trust and specific language of the grant itself, use of the land is limited to purposes in which there is a general statewide interest. The California Supreme Court has noted that Trust uses may evolve over time to address "changing public needs".³ Activities now considered consistent with the Trust include swimming, boating, water recreation, and environmental protection.⁴ Although allowable Trust uses evolve, it has always been an essential requirement that they be public, water-dependent uses that serve a statewide purpose.⁵ The California Supreme Court has found that purely municipal facilities and uses such as libraries and hospitals are not of general statewide interest.⁶

The encampment appears not to be a use consistent with the Public Trust, and it appears that it would interfere with uses that are consistent with the Public Trust. The area designated for the encampment would be exclusively reserved for the purpose of a sanctioned homeless encampment. The public would be impeded or barred from accessing the area. Unlike visitor-serving hotels, which provide a venue for the public to visit, experience, and enjoy Public Trust lands, facilities for the City's homeless population are a municipal service that are available only to local residents. An encampment would likely block off a significant portion of the Marina to the public. Moreover, a homeless encampment is neither a water dependent use nor an amenity that draws people to the waterfront. While serving the transient population is undeniably meritorious and provides public benefits, those benefits are focused on the local populace, similar to hospitals and libraries and do not provide a direct benefit to the statewide public. As long as the encampment is in place, the public cannot enjoy the Trust land it occupies. Because the proposed encampment interferes with other Public Trust uses, is not water dependent, appears to be a purely municipal use, and does not provide a statewide benefit, Commission staff concludes that it is not consistent with the Public Trust.

Additionally, the encampment does not appear to be consistent with the specific language of the City's granting statute. The list of permitted uses under the grant is long, but it does not include all potential uses. The list further must be construed in light of the Public Trust, as explained above. Given that, a homeless camp does not appear to come under any of the uses expressly permitted by the grant language.

Insofar as a homeless encampment as generally described in your letter would appear to be inconsistent with the City's grant, both with respect to the Public Trust and to the

³ *Marks v. Whitney* (1971) 6 Cal. 3d 251, 259.

⁴ *Id.*

⁵ January 10, 1978 Letter from William Northrop, Commission Executive Officer to Senator Denis Carpenter; November 1985 Letter from California State Lands Commission Chief Counsel, Robert Hight to San Francisco Bay Conservation and Development Commission Chair, Robert F. Tufts.

⁶ *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199.

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specific language of the grant itself, the camp cannot be considered a permitted use of the land.

If you have questions regarding these conclusions, please contact the attorney assigned to this matter, Jamie Garrett, at (916) 574-0398 or at jamie.garrett@slc.ca.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mark A. Meier".

Mark A. Meier
Chief Counsel

cc: Sheri Pemberton, Chief, External Affairs and Legislative Liaison
Reid Boggiano, Public Land Management Specialist, External Affairs Division
Jamie Garrett, Staff Attorney
via email: zcowan@cityofberkeley.info