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A LAW PARTNERSHIP

MEMORANDUM

TO: MEMBERS OF THE CITY COUNCIL

CC: SERGIO GONZALEZ, CITY MANAGER

FROM: MICHAEL JENKINS, CITY ATTORNEY

DATE: FEBRUARY 22, 2018

RE: IMPROVEMENTS ON THE GREENBELT

This memorandum discusses whether material producing hardscape¹ may be placed on the Hermosa Beach Greenbelt ("Greenbelt") under the Hermosa Beach Municipal Code to make the Greenbelt accessible to those in wheelchairs. This memorandum also discusses access laws (*e.g.*, Americans with Disabilities Act) and whether City action is required to make the Greenbelt more accessible.

Introduction

The Greenbelt was developed in 1986 on an abandoned Santa Fe Railroad spur which once provided a rail connection between the Redondo Beach Wharf and downtown Los Angeles. Development of the Greenbelt as a recreational amenity commenced in the late 1980s. The City planted vegetation, installed workout stations, and added bark woodchips and mulch on the ground. As provided by contract, the City's landscape contractors regularly recycle the citywide tree trimming into chips that are placed onto the Greenbelt, which is part of the City's program to reduce green waste.

¹ For purposes of this memorandum, this type of surface, typically a decomposed compacted granite substance, will be referred to as hardscape.

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Analysis & Discussion

A. Code Permitted Improvements

The Greenbelt is zoned OS-1 RESTRICTED OPEN SPACE. The uses and improvements permitted in this zone are codified in Hermosa Beach Municipal Code ("HBMC") §§ 17.32.020 & 17.32.030. HBMC § 17.32.020 (Permitted uses) states as follows:

"Those uses permitted in the O-S zone,² except that no structure, building or improvement shall be developed, constructed or erected unless specifically authorized as a permitted improvement herein."

HBMC § 17.32.030 (Permitted improvements) provides as follows:

"Improvements permitted in the O-S-1 zone shall be as follows:

A. Only nonbuilding public improvements *relating to landscaping, beautification, erosion control and irrigation improvements* by the city which are consistent with or necessary to maintain and assure permanent open space in and for public parks and recreation purposes or relating to anti-seawater intrusion wells as an existing use;

B. Improvements to only those two existing parking areas located within the greenbelt area across from Clark Stadium and City Hall consistent with or necessary to maintain and assure designated parking spaces, without expanding the existing parking area. Such improvements shall be of a nature and material designed to enhance and preserve the existing natural landscape." (emphasis added)

When read together, the *uses* permitted on the Greenbelt are as broad as those in the O-S zone; however, the *physical improvements* permitted on the Greenbelt are limited by § 17.32.030 to the improvements stated therein. Thus, while pedestrian

² The uses permitted in the O-S zone are codified in HBMC § 17.30.020 and list 13 categories of uses (e.g., public parks, playgrounds, riding, bicycling and pedestrian walkways, transit uses, etc.)

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and bicycling walkways, by way of example, are permitted uses of the Greenbelt (by virtue of the cross-reference to HBMC § 17.30.020), physical improvement of the Greenbelt is explicitly limited by HBMC § 17.32.030 (*i.e.*, “relating to landscaping, beautification, erosion control and irrigation improvements by the city which are consistent with or necessary to maintain and assure permanent open space in and for public parks and recreation purposes”).

Chapter 17.32 was added to the HBMC by a vote of the electorate at the November 1989 municipal election, enacting Proposition “F” (adding Ordinance No. 89-1001 to the HBMC). Section 6 of Ordinance No. 89-1001 provides that “[T]here shall be no modification, amendment or repeal of any provision of this ordinance without a vote of the people.” Similarly, California Elections Code section 9217 provides that “[n]o ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city without submission to the voters, or adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance.” Hence, Section 17.32.030 can only be amended by a vote of the electorate.

The question of whether hardscape is permitted on the Greenbelt depends on whether hardscape is “landscaping” within the meaning of HBMC Section 17.32.030(A). Unfortunately, the Municipal Code does not define the word “landscaping,” and there is no dispositive definition of that word that would either include or exclude hardscape. Hence, in light of this ambiguity, it is necessary to consider extrinsic evidence to aid in the interpretation.

B. Intent of the Measure

The stated intent of Ordinance No. 89-1001 (adopted by Proposition F) was to preserve the Greenbelt “for parkland and open space purposes” as “an aesthetic oasis for all the people of the City of Hermosa Beach.” To the extent that it might assist with interpretation of the ordinance if the text is ambiguous or supports multiple interpretations, courts may turn to extrinsic sources such as ballot

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summaries and arguments in the ballot pamphlet for insight into the voters' intent. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal. 4th 310, 321.)

The ballot argument in favor of Proposition F (authored by three Councilmembers – Chuck Sheldon, Jim Rosenberger and June Williams) proposes that the Greenbelt be “forever a tranquil oasis” and further states, with reference to the parking area identified in Paragraph B of Section 17.32.030, the following:

“Forget visions of concrete and asphalt though, the ordinance specifically states that parking lot ‘improvements shall be of a nature and material designed to enhance and improve the existing natural landscape.’ We’re talking woodchips, gravel, railroad ties and grass crete.”

The debate between proponents and opponents of Proposition F appeared to focus on the existing parking area just south of City Hall and whether dogs should be leashed while on the Greenbelt. There is no direct discussion of the materials to be used on the Greenbelt aside from the discussion above pertaining to the parking area. Hence, the ballot materials are of little assistance in divining the intent of the voters in passing Proposition F as regards the surface of the Greenbelt itself.

C. *Clarifying Language Elsewhere in the Hermosa Municipal Code*

The HBMC does not provide much in the way of guidance on what constitutes landscaping or beautification. In an unrelated provision of the HBMC, Chapter 8.60 (Efficient Landscaping) defines the term “Landscape area” as follows:

““Landscape area” means the total area of the landscape project (planting areas, turf areas, and water features) in a landscape design plan . . . Landscape area includes “new construction landscape” and “rehabilitated landscape.” Landscape area does not include footprints of buildings or structures, sidewalks, driveways, parking lots, decks, patios, gravel or stone walks, other pervious or impervious hardscapes, and other non-irrigated areas designated for non-development (e.g., open spaces and existing native vegetation).

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The definition above excludes hardscape from a “landscape area.” The focused purpose of the water efficient landscape chapter is to minimize water waste; this narrow purpose limits the utility of this definition in other contexts.

HBMC § 17.36.020 (permitted uses in the Open-Space Overlay Zone) lists “Landscaping (hardscape/softscape)” as a permitted use, arguably leading to the opposite treatment of hardscape as landscaping than in the water efficient regulations. This explanatory qualifier of either hardscape or softscape, while absent from HBMC § 17.32.030(A), lends some support to treating hardscape as landscaping. However, the OS Overlay designation is only used for Strand-facing property sideyard improvements where parking areas and patios are permitted, a completely different context than the Greenbelt. At bottom, nothing in the HBMC offers definitive guidance as to the meaning of “landscape” and “hardscape” for purposes of Section 17.32.030.

D. Dictionary Definitions

Various dictionary definitions also fail to provide much guidance. Landscaping is defined as (i) “the process of making a yard or other piece of land more attractive by altering the existing design, adding ornamental features, and planting trees and shrubs;” (ii) “to improve the appearance of (an area of land, a highway, etc.), as by planting trees, shrubs, or grass, or altering the contours of the ground;” and (iii) “features such as trees, stones, etc. that have been added to make a piece of land more attractive; land that has been made more attractive in this way.” These definitions do not appear to indicate that only living features (grass, shrubs, plants, etc.) qualify as landscaping.³ See Oxford Learner’s Dictionary (<http://www.oxfordlearnersdictionaries.com/us/definition/english/landscaping>); <http://www.dictionary.com/browse/landscape>.

E. The City’s Application of this Language in Other Contexts

³ Under these definitions, the bark woodchips and mulch added to the Greenbelt may not qualify as landscaping.

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Noble Park, which is zoned OS-2 RESTRICTED OPEN SPACE, is subject to an almost identical improvement restriction.⁴ Its paths consist of decomposed granite (which we have defined as “hardscape”); there is no evidence revealing whether the landscape-only restriction in the OS-2 zone was considered when the paths were installed.

F. *Common Sense Reading of the Ordinance*

Courts hold that ordinances should be given a common sense interpretation; in other words, that when reading an ordinance, a court will avoid a reading that has absurd results. See *Wotton v. Bush* (1953) 41 Cal. 2d 460, 467; *Granberry v. Islay Inv.* (1984) 161 Cal.App.3d 382, 388 (statute should be interpreted to produce a result that is reasonable and to avoid absurd result).

It is reasonable from a policy point of view that a non-building improvement that advances or facilitates a permitted use of the Greenbelt could be allowed. Section 17.32.020 expressly allows all of the uses enumerated in Section 17.30.020, which include “[r]iding, bicycling and hiking trails and pedestrian ways.” Alternatively, the intent of Section 17.32.030 was to preserve the Greenbelt in as natural a state as possible, thereby allowing riding, bicycling and hiking/walking on the natural surface of the ground, but precluding the addition of materials that would create a road-like surface and fundamentally alter its character.⁵

A relevant consideration in the common sense interpretation of Section 17.32.030 is the compatibility of uses on the Greenbelt. The placement of decomposed granite or similar hardscape surface on all or substantially all of the Greenbelt will not just make the Greenbelt accessible to the disabled but will also facilitate cycling, roller skating/blading and similar recreational activities, all of which are permitted on the Greenbelt by virtue of Section 17.32.020.⁶ These are not necessarily compatible activities on a single path of travel. Attempting to create a

⁴ Only non-building public improvements relating to landscaping, beautification: grass, trees, flowers, plants, soil, unobtrusive park lighting, some benches to view the ocean, existing public utilities, one flag pole for the American Flag, and erosion and irrigation improvements to assure permanent open space for park purposes shall be permitted.

⁵ Such a limitation, aggravated by the addition of woodchips, creates a barrier to use of the Greenbelt by some people with disabilities.

⁶ Those activities cannot be banned from the Greenbelt without passage of an ordinance by the electorate.

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safe multi-modal hard surface pathway with adequate separation of cyclists from pedestrians and including specifications to accommodate disabled users would require modification of the existing vegetation protected by Ordinance No. 89-1001 to preserve the Greenbelt in a relatively natural state as a tranquil “aesthetic oasis.” Proposition F was not intended to convert the Greenbelt into a regional bicycle path; hence, if decomposed granite were to be placed on the surface, it would have to be accomplished in a manner that preserves the Greenbelt as a tranquil, safe, vegetated open space environment.

G. *Role of the City Council Interpreting City Ordinances*

Ultimately, interpretations of the Zoning Ordinance rest with the City Council. *City of Berkeley v. City of Berkeley Rent Stabilization Bd.* (1994) 27 Cal.App.4th 951, 962. The City Council’s interpretation of its own laws is given deference by the courts and will be upheld if not manifestly unreasonable. *Robinson v. City of Yucaipa* (1994) 28 Cal.App.4th 1506 (“construction of the law need not be the only reasonable interpretation, and its application of the law will be upheld unless it is arbitrary, capricious, lacks any rational basis, or disregards the plain meaning of the ordinance”). Increasing the accessibility of the Greenbelt is one plausible basis for the Council to conclude that limited hardscape is consistent with the limitation on improvements on the Greenbelt so long as it does not alter the fundamental character-defining attributes of the facility.

H. *Accessibility Requirements*

The City engaged the firm of M6 Consulting to analyze the accessibility of the Greenbelt. That analysis concludes that the grade transitions (i.e. slopes) in certain (but not all) locations hinder entry to and exit from the Greenbelt by disabled persons. Further, the analysis concludes that the surface of the Greenbelt (consisting of wood chips and mulch) is not sufficiently firm, stable or slip resistant to qualify as accessible to the disabled under regulatory standards.

The City is subject to the disabled access provisions of the 2010 federal Americans with Disabilities Act and related provisions of Title 24 of the California Code of Regulations, the intent of which is to eliminate barriers to access to public facilities. A city’s duty to eliminate barriers arises only in the event alterations are

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made to the facility. Thus, the City has no legal obligation to improve the accessibility of the Greenbelt unless it undertakes a project to alter or modify it. See United States Access Board's (federal agency responsible for developing accessibility guidelines for the construction and alteration of facilities covered by the ADA) Guidelines and Standards for Trails (<https://www.access-board.gov/guidelines-and-standards/recreation-facilities/outdoor-developed-areas/background/committee-report/trails>); *see also* 28 CFR §35.150.

As of the date of this Memorandum, there are no applicable guidelines for trail facilities like the Greenbelt. The United States Access Board has indicated that it will develop guidelines potentially applicable to non-federally owned sites like the Greenbelt at some time in the future.⁷

Conclusion

In sum, the City may only improve the Greenbelt with a hardscape pathway if it finds that the path is landscaping consistent with the open space designation. One benefit of hardscape might be that it increases accessibility of the Greenbelt. The City is not obligated by State or federal law to undertake such improvements unless the City is making other improvements. However, there currently are no standards to determine what improvements would achieve a level of accessibility to comply with the ADA.

⁷ <https://www.access-board.gov/guidelines-and-standards/recreation-facilities/outdoor-developed-areas>