

MEMORANDUM OF LAW

DATE: July 12, 2001

TO: Ann K. Sasaki, Deputy Director, Metropolitan Wastewater Department,
Engineering and Program Management Division

FROM: City Attorney

SUBJECT: Legality of Sewer Fund Expenditures for Permanent Sound Wall

QUESTION PRESENTED

May expenditures be made from the Sewer Revenue Fund for the purpose of constructing a permanent sound wall adjacent to a sewer construction site?

SHORT ANSWER

No, expenditures from the Sewer Revenue Fund are limited to only those costs and expenses directly related to a wastewater project. However, costs of temporary sound measures normally budgeted in a wastewater construction project may be contributed toward a more permanent solution.

BACKGROUND

The Natural Resources and Culture Committee considered and approved on June 13, 2001, the City Manager's recommendation to rehabilitate Sewer Pump Stations 77A and 77B and design a brine line from Rancho Bernardo to the Penasquitos Pump Station. The latter project would divert Rancho Bernardo brine flows to the City's existing collection system through sewer mains that would, in part, impact Camino del Norte, the subject of significant noise problems.

Camino del Norte is experiencing escalating noise and traffic problems, especially during morning and evening rush hours, due to a variety of causes. Quite understandably, the citizens impacted by the noise are exploring means of funding a permanent sound wall to mitigate the noise. Accordingly, the Metropolitan Wastewater Department was asked to evaluate whether the Sewer Revenue Fund, as part of the brine line construction, could make expenditures to fund a permanent sound wall.

ANALYSIS

Over the years, this Office has been consistent in our advice that the Sewer Revenue Fund is an enterprise fund expressly limited by the legal constraints of San Diego Municipal Code section 64.0403 and the bond covenants contained in each of the Sewer Revenue Bond issues of 1993, 1995, 1997, and 1999. San Diego Municipal Code section 64.0403 is clear in its restrictions:

Sewer Revenue Fund Established

- (a) There is hereby created a "Sewer Revenue Fund." All revenues derived from the operation of the wastewater system shall be paid into the Sewer Revenue Fund.
- (b) *All revenues shall be used for the following purposes only:*
 - (1) Paying the cost of maintenance and operation of the City's wastewater system.
 - (2) Paying all or any part of the cost and expense of extending, constructing, reconstructing, or improving the City's wastewater system or any part thereof.
 - (3) Any purpose authorized by Section 90.2 of the City Charter.
 - (4) Paying the cost of mitigation of fair share overburdens within any City Council district as more fully set forth in Section 64.0403(c)

San Diego Municipal Code 64.0403 [emphasis added].

Hence the funding for a permanent wall to mitigate traffic noise must be examined against the limitations of subsections (b)(1) and (b)(2). The permanent wall, by definition, is proposed to limit traffic noise and therefore has no factual connection to either maintaining, operating, or extending the wastewater system. However, during construction of the brine line, *temporary* sound mitigation measures are to be included along Camino del Norte just as such measures would be included in any similar wastewater project. The anticipated cost of the temporary measures is approximately \$35,000 as detailed on the Wastewater Department's cost estimate (attached). Hence, to the extent the Council or Manager chooses to contribute the equivalent cost of such temporary sound mitigation measures to a permanent solution, we think the expenditure proper. Such a contribution, as documented on the attachment, substantiates the contribution as an equivalent amount that would have been professionally allocated to sound mitigation during the course of construction in this particular roadway.

This analysis is consistent with and similar to our prior limitations on Sewer Revenue Fund expenditures. A City Attorney Memorandum of Law dated February 22, 1993, found sewer revenue fund expenditures for improvements to Sunset Cliffs Natural Park to be improper, reasoning that “there is no nexus between the proposed outfall project and the park, and no wastewater or byproduct of same is impacting the park.” 1993 City Att’y MOL 137 at page 3.

Similarly, a City Attorney Memorandum of Law dated January 24, 1995, found Sewer Revenue Fund expenditures improper for “curb to curb repaving” when only a portion of the traffic lane is impacted by a sewer construction project. “The sewer ratepayers are not obligated to subsidize general street maintenance or improvement work that is unrelated to any disturbance by a sewer construction or maintenance project.” 1995 City Att’y MOL 100 at page 2. A permanent sound wall is subject to the same analysis since it would be deflecting noise long after sewer-related construction is completed.

Similar to the Sewer Revenue Fund, the City entered into a Master Installment Purchase Agreement in conjunction with the Sewer Revenue Bonds of 1993, 1995, 1997, and 1999. This agreement strictly limits the use of sewer system revenue as follows:

Allocation of System Revenues. (a) In order to carry out and effectuate the commitment and pledge contained in Section 5.01, *the City agrees and covenants that all System Revenues shall be received by the City in trust and shall be deposited when and as received in the City of San Diego Sewer Revenue Fund*, which fund was established pursuant to the Ordinances of the City Council of the City (the “Sewer Revenue Fund”) *and which fund the City agrees and covenants to maintain so long as any Installment Payments or payments due by the City under any Qualified Swap Agreement remain unpaid, and all moneys in the Sewer Revenue Fund shall be so held in trust and applied and used solely as provided herein.* The City shall pay (i) directly or as otherwise required all Maintenance and Operation Costs of the Wastewater System
.....

Master Installment Purchase Agreement 5.02 [emphasis added].

This covenant reaffirms the restriction of using sewer revenue fund monies “solely” for the maintenance and operation costs of the wastewater system. Hence, only costs that are factually related to the construction costs of the wastewater system are proper expenditures. Given this restriction, noise mitigation expenditures related only to the brine diversion project along Camino del Norte would be proper expenditures. Of course, the calculation of such expenditures is left to the department's engineers.

CONCLUSION

Expenditures for noise reduction along Camino del Norte must be directly related to the noise impacts caused by the brine line diversion system at that location. To the extent that such expenditures are properly quantified, they may be directed at temporary noise reduction measures or contributed, as an equivalent, to a more permanent solution. In either case, Sewer Revenue Fund expenditures must be limited to only those costs attributable to the expense incurred by extending, constructing, or improving” the wastewater system. San Diego Municipal Code 64.0403(b)(2).

CASEY GWINN, City Attorney

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By

Ted Bromfield
Senior Deputy City Attorney

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Attachment
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