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MEMORANDUM OF LAW

DATE: April 3, 2007

TO: Honorable Mayor Jerry Sanders and City Councilmembers

FROM: Raymond C. Palmucci, Deputy City Attorney

SUBJECT: Legal Analysis of Proposed Low-Income Ratepayer Assistance Program

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INTRODUCTION

Councilmember Toni Atkins has asked the Mayor to explore establishing a program to help low income residents pay their water and sewer bills. As explained in a Memorandum to Mayor Sanders dated March 1, 2007 (attached), Councilmember Atkins proffered that such a program would allow individual ratepayers to voluntarily request that their monthly payment assessment be rounded up to the nearest dollar, with the proceeds going to fund a program to assist those residents whose limited incomes make it difficult for them to pay their bills. The Water Department has requested that this office analyze whether the City presently has the legal authority to fund such a program, while other departmental staff determine the feasibility of such a program. Accordingly, we have limited our analysis to whether such a program is legally permissible.

QUESTION PRESENTED

Does the City of San Diego have the legal authority to implement a voluntary low-income ratepayer assistance program for customers of the Water Department and Metropolitan Wastewater Department [MWWD]?

SHORT ANSWER

Yes, but only if the program generates enough voluntary funds to be entirely self-sufficient, or if the program is supplemented with General Fund non-utility revenue. San Diego Charter §§ 53 and 90.1 set forth the permissible uses of the revenues currently deposited into the Water Utility Fund. Past City Attorney opinions have concluded that the revenues deposited into the Water Utility Fund are held in trust to guarantee sufficient revenues for the provision of water and water utility services. Similarly, San Diego Charter § 90.2 and San Diego Municipal

Code [SDMC] § 64.0403 provide that all revenues from the operation of the wastewater system must be deposited into Sewer Revenue Fund. The City Attorney has previously opined that the restrictions contained in § 64.0403(b) are similar in import to those contained in San Diego Charter § 53. These revenues are restricted to specific purposes, which do not include the funding and operation of a low-income ratepayer assistance program.

ANALYSIS

I. Characteristics of Low-Income Ratepayer Assistance [LIRA] Programs.

Public Utilities Code § 739.8 allows the California Public Utilities Commission [CPUC] to authorize a LIRA, or rate relief program, for low-income water utility ratepayers.[1] Although the Water Department and MWWD are operated by a municipality and thus not regulated by the CPUC, it is presumed for purposes of our analysis that the type of program contemplated herein would have similar audit, management, oversight and budgeting requirements as the LIRA programs authorized by the CPUC. (*See,* CPUC Decision 06-11-052, 206 Cal. PUC LEXIS 491.)

Typical LIRA programs are subsidized by non-low-income utility customers. Section 739.8 (d) of the Public Utilities Code states: "In establishing the feasibility of rate relief and conservation incentives for low-income ratepayers, the commission may take into account … the ability of communities to support these programs." Therefore, the cost effectiveness and ability of non-low-income customers to pay for the assistance program must be determined in the assessment of any proposed program (along with the cost of the program, ability of remaining customers to pay for it, policy goals of the utilities and the City, and relevant legal authority).

As contemplated, the LIRA would be funded through voluntary contributions by non-low-income customers to subsidize low-income customers. Based upon this voluntary nature, it cannot be determined if the proposed LIRA program would be self-funding, self-sustaining or provide a consistent, dependable subsidy. If insufficient voluntary funds were received during any given billing period, another source of revenue would have to be expended to pay Water Department and MWWD employees to monitor, audit, manage and budget costs for the LIRA program.

II. City Enterprise Funds Cannot be Used to Fund a LIRA Program.

Enterprise funds are a form of special account created and restricted by statute (or city charter) where the governing body has decided to impose specified limitations on the deposit or expenditure of funds. Generally, the determination of whether the use of these monies is proper turns on whether the funded department receives a benefit from the expenditure of the monies:

> Special funds are often created for the payment of a particular class of claims, or for a particular class of expenditures or for a

[1] § 739.8 (a) Access to an adequate supply of healthful water is a basic necessity of human life, and shall be made available to all residents of California at an affordable cost.
(b) The commission shall consider and may implement programs to provide rate relief for low-income ratepayers.
(c) The commission shall consider and may implement programs to assist low-income ratepayers ….

> particular purpose, and in such case the general rule is that they cannot be used for any other purpose, unless a special provision is made. Claims payable out of a special fund are usually not payable out of any other fund, and therefore the municipality is ordinarily not liable outside of such fund. Whether municipal officers are personally liable for use of funds for a purpose other than for which they are designated is a matter of conflict. Undoubtedly, the circumstances as well as local statutes or laws must be taken into account. Irrespective of statute, a fund raised by a municipality for a special purpose is a trust fund, and equity will, in a proper case, interfere to prevent its diversion, or will entertain an action for an accounting. 15 Eugene McQuillin, The Law of Municipal Corporations, § 39.45 (3rd ed. 1995) (footnotes omitted).

The City has established a number of enterprise funds under the Charter, Municipal Code or by ordinance. The Water Utility Fund was established by Charter § 53 (and further provided for under Charter § 90.1) and the Sewer Revenue Fund was established under SDMC § 64.0403. Historically, this Office has followed the "trust fund" concept posited by McQuillin when asked to interpret whether the expenditure of moneys from these funds is proper. *See, e.g.,* 1991 City Att'y MOL 91-2 (denying the use of water revenue funds for the installation of water backflow devices in park facilities); 1992 City Att'y MOL 92-113 (approving the use of water revenue funds for water fixtures used in City parks); 1994 City Att'y MOL 94-72 (denying the transfer of sewer revenues to a maintenance assessment district for impacts caused by new sewer facilities).

III. Water Utility Fund and Sewer Revenue Fund Restrictions.

A. Local Restrictions.

The City Charter reflects a concern that the provision of water and water utility services to City residents is of primary importance. The Charter contains unique provisions designed to guarantee the availability of funds for water services. Further, the City establishes water fees based upon the costs incurred by the City to meet customer demand for water. (SDMC §§ 67.0502, 67.0508.) Similarly, the Municipal Code restricts the use of wastewater revenues to guarantee the provision of wastewater collection and treatment services. The City also establishes separate water and sewer capacity charges for individuals who connect to the City's water and sewerage systems. (SDMC §§ 67.0513, 64.0410.) The capacity charges are imposed as a means of recovering all or a portion of the cost of constructing facilities necessitated by such additional demand. (Cal. Gov't Code § 66013(a) (3).)

San Diego Charter § 53 sets forth the permissible uses of the revenues deposited into the Water Utility Fund. Section 53 ensures that sufficient revenues are deposited into the Water Utility Fund for the provision of water and water utility services and that these revenues are first used to fulfill the requirements of the Water Department, including the payment of operation and maintenance expenses. The relevant provisions of § 53 state:

> All revenues of the Water Utility shall be deposited in a Water Utility Fund. The Manager shall include in the annual budget the estimated expenditure and reserve requirements of the Water Utility Fund. The City Council using such estimates as a basis shall include in the annual appropriation ordinance for the Water Utility Fund provision for operating and maintenance costs; replacements, betterments, and expansion of facilities; payments necessary for obtaining water from the Colorado River; any other contractual obligations; reserves for future expansion of water utility plant; reserves for future water purchases. (San Diego Charter § 53.)

The City Attorney has written numerous opinions and memoranda of law on § 53. The recurring conclusion is that the Water Department must remain a self-sustaining, financially independent water utility and that the revenues deposited into the Water Utility Fund are held in trust to guarantee sufficient revenues for the provision of water and water utility services. (1932 Op. City Att'y 177; 1932 Op. City Att'y 362; 1933 Op. City Att'y 526; 1965 Op. City Att'y 23; 1966 Op. City Att'y 157; 1967 Op. City Att'y 37; 1980 Op. City Att'y 69; 1980 Op. City Att'y 83.)

The Sewer Revenue Fund is established pursuant to SDMC § 64.0403. All revenues from the operation of the wastewater system must be deposited into this fund. (SDMC § 64.0403(a).) Under § 64.0403(b), these revenues are restricted to 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 costs and expense of extending, constructing, reconstructing, or improving the City's wastewater system or any part thereof.
> (3) Any purpose authorized by § 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 § 64.0403(c).

The City Attorney has previously opined that the restrictions contained in § 64.0403(b) are similar in import to those contained in San Diego Charter § 53. Ultimately, these opinions conclude that sewer revenues may only be used for those purposes identified in § 64.0403(b). (1993 City Att'y MOL 93-29; 1994 City Att'y MOL 94-72.)

Due to the voluntary nature of the proposed LIRA program, enterprise fund departments could not insure that adequate funds would be available for proper oversight and administration of the LIRA program. The City cannot simply impose costs on enterprise funds that provide no benefit to the funds and have nothing to do with the cost of delivering water or sewer service.

B. Proposition 218.

Proposition 218 added Articles XIIIC and XIIID to the State Constitution, which contain a number of interrelated provisions affecting the ability of the City to levy and collect existing and future taxes, assessments, fees and charges. Of relevance here, Proposition 218 (Article

XIIID) adds several provisions affecting "fees" and "charges" to mean "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by a [local government] upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." Proposition 218 requires that fees and charges cannot:

> (i) generate revenues exceeding the funds required to provide the property related service;
> (ii) be used for any purpose other than those for which the fees and charges are imposed;
> (iii) exceed the proportionate cost of the service attributable to the parcel;
> (iv) be used for a service not actually used by, or immediately available to, the owner of the property in question; or
> (v) be used for general governmental services, including police, fire or library services, where the service is available to the general public at substantially the same manner as property owners.

Article XIIID, § 6(d) states quite clearly that "all fees and charges" must comply with Proposition 218. See also Government Code Section 50076, adopted to implement Proposition 13, which provides that "… 'special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." As such, the ability to assess such enterprises with indirect costs or City overhead costs are circumscribed by the limitations that the ultimate fees must represent the proportionate cost of delivering water or sewer service.

Article XIIID, section 6(b) (3) also establishes certain requirements that fees not exceed the reasonable cost of providing the service for which the fee or charge is imposed. Proposition 218's requirements that revenues from the fee "shall not exceed the funds required to provide the service" and that revenues "shall not be used for any purpose other than that for which the fee was imposed" constitutionally restrict the use of these funds. Thus, revenues raised from these sources cannot be involuntarily used to subsidize low-income ratepayers, as it would result in those customers paying more that what it cost to serve them - an unconstitutional surcharge.

CONCLUSION

The City's Charter, Municipal Code and Proposition 218 provide legal constraints to the ability of the City to allocate costs to the enterprise funds. San Diego Charter §§ 53, 90.1 and 90.2 set forth the permissible uses of the revenues deposited into the Water Utility Fund and Sewer Revenue Fund. As these revenues are held in trust to guarantee sufficient funds for the provision of water and sewer services, they cannot be used to fund and operate a LIRA program.

Rates and charges imposed by the enterprise funds (i.e., water and sewer) must be designed to recover from each class of customers the proportionate cost of providing water and sewer service, and these costs should include the proportionate costs of providing water and sewer service to ratepayers. Thus, the provision of a subsidy by the enterprise funds to low-income ratepayers through administration of a LIRA program would run afoul of Proposition 218, the City Charter and applicable provisions of the Municipal Code.

Therefore, to adopt a LIRA program, the City would likely be forced to identify available General Fund or other non-enterprise fund revenues to supplement voluntary contributions (if any) to the program. We defer to City staff on the potential costs of implementing and administering a LIRA program, the amount of potential contribution, and the source of potential funding outside of the enterprise funds to cover project costs that exceed voluntary contributions.

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