

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

PAUL F. PRATHER
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Jan I. Goldsmith
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: September 24, 2010

TO: Mary Lewis, Chief Financial Officer

FROM: Paul F. Prather, Deputy City Attorney

SUBJECT: Budgeting, Appropriation and Expenditure of Infrastructure Funds

INTRODUCTION

On June 22, 2010, an ordinance making year-end amendments to the Fiscal Year 2010 Budget transferred unexpended balances from the City Council District budgets to the Infrastructure Improvement Fund (IIF). One month later, the Fiscal Year 2011 Appropriations Ordinance attempted to appropriate any carryover monies from previous fiscal years in the IIF for the purpose of financing capital improvements and major maintenance of streetlights, sidewalks, traffic signals, libraries, parks and recreation facilities, roadways, or any other general fund purposes or activities as identified by the Mayor or individual City Council Districts. The Fiscal Year 2011 Budget adopted by the City Council did not contain any allocation to or mention of the IIF. You have requested a memorandum of law addressing whether the budgeting, appropriation and expenditure of the IIF is consistent with the San Diego Charter's budget process.

QUESTION PRESENTED

Does the City Charter allow the savings from a City department, for example the City Council, to be transferred to a special fund, such as the Infrastructure Improvement Fund, and appropriated in a future fiscal year, without going through the Charter required budget process?

SHORT ANSWER

No. San Diego Charter section 84 requires that at the end of the fiscal year all unencumbered balances revert to the fund from which appropriated. Balances remaining in any department appropriation for a particular fiscal year cannot be saved for use in an ensuing fiscal year by the device of creating a special fund and transferring such balance to it. Such a method circumvents the fiscal requirements of the Charter. Since the IIFs do not appear in the Fiscal

Year 2011 Budget and would not qualify as a continuing appropriation, they could not be appropriated in the Fiscal Year 2011 Appropriation Ordinance unless set forth in the 2011 Budget. All funds contained in the Infrastructure Improvement Account should be considered a part of the unassigned general fund balance and be subject to reappropriation in accordance with the budget process set forth by the Charter.

ANALYSIS

A. BUDGET PROCESS

The Charter specifies the process for approving the budget and appropriations for each fiscal year. Initially, the Mayor will propose a budget to the City Council no later than April 15 of each year. San Diego Charter § 265(b)(14). The budget must include a summary outline of the fiscal policy of the City for the budget year, describe the important features of the budget plan, and set forth a general budget summary showing a balance between expenditures and anticipated income contrasted with the corresponding figures for the current year. San Diego Charter § 69. As this Office opined over seventy years ago, "Each year's budget must show a complete picture of the moneys to be appropriated to each department and office of the City for use during that particular fiscal year." 1940 City Att'y MOL 162 (May 15, 1940).

Once proposed, the City Council must hold public hearings to consider the budget. The City Council may approve the budget or make modifications to the budget in whole or in part. Modifications may call for adding new items or for increasing or decreasing any item. San Diego Charter § 290(b)

If modified by the City Council, the budget is returned to the Mayor and he must approve, veto or modify any line item approved by the Council. The City Council will then have an opportunity to override any veto or modification made by the Mayor. San Diego Charter § 290(b)(2). Once the budget is approved, it becomes the controlling document for the preparation of the Annual Appropriation Ordinance. San Diego Charter § 290(b)(1)(C). The Mayor has no veto over the Annual Appropriation Ordinance. San Diego Charter § 290(d).

The Annual Appropriation Ordinance is the authorization for the Mayor to expend funds. No money may be drawn from the treasury nor any obligation for the expenditure of funds be incurred except in accordance with the Annual Appropriations Ordinance or the annual appropriation changed as authorized by Charter section 73. San Diego Charter § 84.

If an expenditure is required which differs from the budget and is not authorized by Charter section 73, then an amended appropriation is required. Since the budget is the controlling document for the Annual Appropriation Ordinance, the budget must be amended in order to amend the Annual Appropriation Ordinance. San Diego Charter § 290(b)(1)(C).

With limited exceptions, at the close of each fiscal year, any unencumbered balance of an appropriation will revert to the fund from which appropriated and is subject to reappropriation in the next fiscal year. San Diego Charter § 84. For example, if \$200,000 was budgeted and appropriated from the General Fund for a particular item and only \$150,000 was expended at the

close of the fiscal year, the remaining \$50,000 would revert back to the General Fund for budgeting and appropriation in the next fiscal year.

Charter section 84 provides an exception to the end of year reversion requirement for “retirement funds, and such trust funds as may be established by this Charter . . .” and also for appropriations made “in furtherance of improvements or other objects or works which will not be completed within the year . . .” In the case of a project which would not be completed within the year, the appropriation continues in force until the purpose for which it was made shall have been accomplished or abandoned. San Diego Charter § 84.

B. INFRASTRUCTURE IMPROVEMENT FUNDS

The IIF was created in the Fiscal Year 2002 Budget. As stated in City Mgr. Report No. 01-150 (July 19, 2001):

The Infrastructure Improvement Fund is created for capital improvements and major maintenance of streets, sidewalks, park facilities, libraries and other projects identified by the Mayor and City Council. Funding is allocated for each Council District and for the Mayor for Citywide use. Monies can be used as directed by either the Mayor or each Councilmember throughout the year. The total appropriation for this fund is \$1,833,500.

This language was repeated in the section regarding important features of the Fiscal Year 2002 Budget and a line item called “Infrastructure Improvement” showed an amount of \$1,833,500. The Fiscal Year 2002 Budget was approved by the City Council and the Appropriations Ordinance appropriated the full \$1,833,500 for the purposes set forth in the Fiscal Year 2002 Budget.

At the end of the Fiscal Year 2002, approximately \$1,588,254.63 was left in the IIF. These funds had not been encumbered for any capital improvement, maintenance or other project during Fiscal Year 2002. At the end of the year, these unused IIF funds were not returned to the General Fund. Instead, they remained in the IIF account.

Charter section 84 requires at the close of each fiscal year for any unencumbered balance of an appropriation to revert to the fund from which appropriated. The amount remaining in the IIF was unencumbered at the end of Fiscal Year 2002. It was not subject to the continuing appropriation provision of Charter section 84 because the funds had not been designated for a particular project which would not be completed within the fiscal year. Therefore, by operation of Charter section 84, the \$1,588,254.63 reverted at the close of Fiscal Year 2002 to the General Fund.

In the Fiscal Year Budget for 2003, zero dollars were budgeted for the IIF. In spite of the fact that zero dollars were budgeted for the IIF, the 2003 Appropriations Ordinance contained language which attempted to authorize the appropriation of the IIF:

The Infrastructure Improvement Fund, allocated to the Mayor and eight Council Districts, is hereby appropriated for the purpose of financing capital improvements and major maintenance of streetlights, sidewalks, traffic signals, libraries, parks and recreation facilities, and roadways or other purposes as identified by the Mayor or individual Council District.

and implied, in contravention of Charter section 84, that there were carryover funds remaining in the IIF from the Fiscal Year 2002:

Any carryover monies from the previous fiscal year are hereby appropriated for the purpose for which said fund was created.

San Diego Ordinance O-19083 (July 30, 2002).

Since the \$1,588,254.63 should have reverted at the close of Fiscal Year 2002 to the General Fund, pursuant to Charter section 84, there were no carryover monies from the previous fiscal year. Therefore, zero dollars were appropriated for expenditure from the IIF in Fiscal Year 2003.

Like Fiscal Year 2003, the Fiscal Year 2004 Budget showed an allocation of zero to the IIF. Therefore, the IIF remained without any funds for the City Council to appropriate. In the Fiscal Year 2005 Budget, there was not even a reference to the IIF. It was completely omitted from the Budget. However, language still appeared in the Appropriations Ordinance attempting to appropriate carryover funds. Since there were no funds budgeted to the IIF, the Appropriations Ordinance, which must be based upon the budget, could not appropriate any funds for the IIF.

On June 2, 2005, City Manager Lamont Ewell provided a Manager's Report titled "Fiscal Year 2005 Year-End Budget Adjustments." The Report showed that for Fiscal Year 2005 the City Council Districts combined spent nearly \$700,000 less than the amounts budgeted for the Council Districts. The Report requested the City Council authorize the City Manager to transfer these savings to the IIF. This request was approved by the City Council on June 13, 2005. San Diego Ordinance No. O-19388 (June 13, 2005).

The 2005 Fiscal Year ended on June 30, 2005. Pursuant to O-19388, the nearly \$700,000 in savings from the budgets of the City Council Districts would have been transferred to the IIF. But, since none of the IIF funds were encumbered, the savings from the City Council budgets should have, pursuant to Charter section 84, reverted back to the General Fund.

Instead of transferring the funds back to the General Fund as mandated by Charter section 84, the funds continued to be maintained in the IIF account. This same pattern, no budget proposal for IIF, a year-end request to put City Council District savings into the IIF, and a

subsequent Appropriation Ordinance attempting to appropriate carryover funds, occurred each fiscal year from 2006 through 2011. Today, the IIF account contains over \$2,000,000. Funds which, pursuant to Charter section 84, should have reverted to the General Fund for reappropriation.

As early as the 1930's, this Office opined that the Charter required all balances remaining in an appropriation be transferred back into the General Fund at the close of the fiscal year for reappropriation in the next fiscal year. 1930 City Att'y MOL 388 (July 3, 1934). Six years later, in a matter concerning a request to appropriate and transfer funds from the Fiscal Year 1940 budget for use in installing cathodic protection in pipe lines, our Office stated that:

[B]alances remaining in any department appropriation for a particular fiscal year cannot be saved to it for use in an ensuing fiscal year by the device of creating a special fund and transferring such balance to it.

Obviously, if this could legally be accomplished, the result would be to circumvent and therefore nullify important requirements of the fiscal system provided by the Charter. Each year's budget estimates and each year's annual appropriation ordinance must show a complete picture of the moneys appropriated to each department and office of the City for use during that particular fiscal year, subject, of course, to transfers during the year from one department to another or from the Unappropriated Balance Fund. (emphasis added).

1940 City Att'y MOL 162 (May 15, 1940)

The IIF was initially created as a special fund. Since 2005, the Annual Appropriation Ordinance has contained language attempting to transfer the unexpended balances from the Mayor, City Council or both departments' budget to the IIF in an attempt to save these funds for use by the Mayor and City Council in the next fiscal year without budgeting the funds as required by the Charter. Such an attempt is in conflict with the Charter and is void. Since the 2011 Budget does not contain a line item for the IIF, there is no authority to appropriate or expend monies contained in the IIF. Such funds, until budgeted and appropriated, are considered a part of the unassigned general fund balance.

CONCLUSION

Charter section 84 requires that at the end of the fiscal year all unencumbered balances revert to the fund from which appropriated. Transferring a department's unexpended budget balance at the end of the fiscal year into a special fund, such as the IIF, and attempting to appropriate those funds in the next fiscal year violates Charter section 84 and the Charter

established budget process. All funds contained in the IIF accounts should be transferred to the General Fund, considered a part of the unassigned general fund balance, and be subject to reappropriation in accordance with the budget process set forth by the City Charter.

JAN I. GOLDSMITH, City Attorney

By _____

Paul F. Prather
Deputy City Attorney

PFJ:jab
ML-2010-19

cc: Mayor and City Councilmembers
Andrea Tevlin, Independent Budget Analyst
Jay Goldstone, Chief Operating Officer