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CITY ATTORNEY

MEMORANDUM OF LAW

DATE: February 25, 2010
TO: Ken Whitfield, City Comptroller
FROM: City Attorney
SUBJECT: Interpretation of City of San Diego Charter Section 86

INTRODUCTION

In a report dated December 30, 2009, the City Auditor noted that San Diego Charter section 86 concerning the disposition of public monies appears to conflict with California Government Code section 50050. The City Comptroller has asked this Office whether there is a conflict and, if so, which law applies.

QUESTIONS PRESENTED

1. Is there a conflict between San Diego Charter section 86 and California Government Code section 50050?
2. If a conflict exists, which law applies: San Diego Charter section 86 or California Government Code section 50050?
3. Is San Diego Charter section 86 invalid because it does not include notice provisions?

SHORT ANSWERS

1. Yes, there is a conflict between San Diego Charter section 86 and California Government Code section 50050.
2. The answer ultimately rests with a judge who must determine whether the State of California has a more substantial interest in the disposition of unclaimed city funds than the City of San Diego.

3. San Diego Charter Section 86 is not rendered invalid if it can be subsidized with the notice provisions described in California Government Code section 50050 or other applicable law.

BACKGROUND

While conducting a performance audit, the City Auditor noted that the City Treasurer is holding approximately \$778,000 in unclaimed public funds. Historical documents indicate that the City Comptroller has followed California Government Code section 50050¹ instead of San Diego Charter section 86 since at least 1977. As a result, the City Comptroller waits three years before initiating the process of transferring unclaimed public monies to the City's general fund, whereas San Diego Charter section 86 allows such a transfer to occur after the funds are held for one year. The City Comptroller has asked this Office to determine which law applies.

ANALYSIS

I. Cities Operating Under Charters Have Supreme Authority As to Municipal Affairs.

Cities either operate under their own charter or under general law. The former is called a "charter city" and the latter is called a "general law city." The City of San Diego is a charter city operating under article XI, section 5 of the California Constitution.² As such, the provisions of the San Diego Charter "have the force and effect of legislative enactments and are the supreme law of the state with respect to the government of such chartered cities." *Adams v. Wolff*, 84 Cal. App. 2d 435, 440 (1948). A court will not find a charter provision unconstitutional unless the charter section is clearly shown to violate the state Constitution. *Id.* All doubts are resolved in favor of constitutionality. *Id.*

The relationship between a charter city and state law is nicely summarized in the treatise, *California Jurisprudence*, as follows:

In addition to providing, with regard to municipal affairs, that city charters adopted pursuant to the California Constitution supersede all inconsistent laws, [citations] the Constitution provides for municipal home rule by permitting a city to adopt a charter giving it the power to make and enforce all ordinances and regulations in respect to municipal affairs, subject only to charter restrictions. [Citations]. Cities operating under home-rule charters have supreme authority as to municipal affairs, or matters of strictly local or internal concern, free from any interference by the legislature. [Citations.] The principle of home rule involves, essentially, the ability of local government (technically, chartered

¹ All references are to the California Government Code unless otherwise noted.

² San Diego Charter section 2 describes the City of San Diego's powers under the Constitution and law of the State of California.

cities, counties, and cities and counties) to control and finance local affairs without undue influence by the legislature. [Citations.] Under home rule, the state legislature's authority to intrude into matters of local concern is curtailed. [Citations.] When the home-rule charter is in conflict with general laws, and relates to municipal affairs, the provisions of the charter and the ordinances adopted pursuant to it must prevail. It is only with reference to state affairs, as distinguished from municipal affairs, that the general laws of the state take a precedence over local ordinances. [Citations.] Within its scope, a home rule charter is to the city what the California Constitution is to the state. [Citations.] Laws and regulations enacted by a city in respect to municipal affairs then become operative and controlling within the city, except to the extent the charter contains express restrictions or limitations. [Citations.]

45 Cal. Jur. 3d *Municipalities* § 180 (2009).

General law cities are controlled by state law even with regard to "municipal affairs." 45 Cal. Jur. 3d *Municipalities* § 176 (2009). Thus, if San Diego was a general law city, the answers to the questions present would be clear: section 50050 would apply.

The issue here is complicated because the City has its own constitution (its charter) that controls "municipal affairs." Thus, if a genuine conflict between section 50050 and San Diego Charter section 86 exists, then we next determine whether the local legislation impacts a municipal or statewide concern. If the matter is a municipal concern, then San Diego Charter section 86 takes precedence. If a genuine conflict is presented and the state statute qualifies as a matter of statewide concern, the court next considers whether the statute is both reasonably related to the resolution of that concern, and is narrowly tailored to limit incursion into legitimate municipal interests. *Cobb v. O'Connell*, 134 Cal. App. 4th 91, 96 (2005). Finally, we discuss whether the absence of specific notice provisions in San Diego Charter section 86 invalidates that Charter provision.

II. Is There a Conflict between Charter Section 86 and California Government Code Section 50050?

Generally, the first step in determining whether a charter city's action is valid is to assess whether an actual conflict exists between a city's charter and state law. Further analysis is not required if a conflict does not exist. *California Federal Savings & Loan Assn. v. City of Los Angeles*, 54 Cal. 3d 1, 16-17 (1991).

Section 50050 concerning unclaimed funds held by local agencies states, in pertinent part, as follows:

For purposes of this article, "local agency" includes all districts. Except as otherwise provided by law, money, excluding restitution to victims, that is not the property of a local agency that remains unclaimed in its treasury or in the official custody of its officers for three years is the property of the local agency after notice if not claimed or if no verified complaint is filed and served. At any time after the expiration of the three-year period, the treasurer of the local agency may cause a notice to be published once a week for two successive weeks in a newspaper of general circulation published in the local agency

Cal. Gov't Code § 50050 (emphasis added).

Section 50050 is broad in the sense that it dispenses with "money . . . that is not the property of the local agency that remains unclaimed." It also requires a local agency to hold the unclaimed funds for three years before notifying the public that it has these funds by using a prescribed notification procedure.³ Cal. Gov't Code § 50051.

In contrast, San Diego Charter section 86 is narrow in scope, imposes a significantly shorter waiting period, and does not include notice provisions. It states:

All City officials and employees empowered to collect money for fees, permits, licenses, inspections, services, taxes or other municipal charges, shall collect the same promptly at the time they become due, turn them into the City Treasury daily, obtain a receipt therefor, and report the same to the City Auditor and Comptroller weekly; provided, however, that in the case of employees located in distant parts of the city or county who in the course of their duties collect money belonging to the City, which collections can be deposited in the City Treasury daily only with difficulty and undue cost to the City, such collections may be deposited in the City Treasury within one week after their receipt by the employee collecting the same. All such moneys and all fines or pecuniary penalties or forfeitures which may accrue to the City, and all funds which may remain in the possession of the City unclaimed after a period of one year from the date when due and payable, shall be credited to the general fund of the City, and shall be applicable to any purpose to which the Council may appropriate

³ Notice must include the amount of money held; the fund in which the money is held; and a statement that the money will become the property of the local agency on a designated date not less than forty-five days or more than sixty days after the first publication of the notice.

them and the Council shall appropriate from this fund whatever sum may be necessary to pay valid claims of more than one year's standing.

San Diego Charter section 86 applies to money collected by City officials and employees for charges related to accounts payable, payroll, pension payments, and not to money in which the City has no interest. The Charter requires the City to collect and to hold these funds for one year instead of the three year holding period prescribed by state law. If unclaimed after one year from the date when due and payable, the funds are credited to the City's general fund without requiring the City to notify the public prior to the transfer⁴.

Thus, although both San Diego Charter section 86 and section 50050 allow the transfer of unclaimed public money to the local agency's general fund, section 50050 includes a broader scope and detailed notice provisions. There is no conflict in that regard. However, a conflict exists as to the amount of time a local agency must hold unclaimed money before the money escheats to the local agency.

III. Is the Issue of Unclaimed Public Money a Municipal Affair or a Statewide Concern?

Since a conflict exists, we next determine whether the issue of unclaimed public money is a municipal affair or a statewide concern. There is no exact definition of a "municipal affair" or a "statewide concern⁵." Rather, the determination is based on the facts and circumstances of each individual case.

This Office has issued several opinions concerning unclaimed funds, three of which we describe here. On April 23, 1956, the City Treasurer asked this Office whether unclaimed 1911 Improvement Act Collections would escheat to the City's General Fund. See Attachment A. Although our Office confirmed that Section 86 of the Charter of the City of San Diego regulates the disposition of public moneys, we concluded that San Diego Charter section 86 would not apply to 1911 Improvement Act assessments because assessments were not a "municipal charge." Thus, the inquiry turned on the type of collection and not the validity of the charter provision. Further, the Opinion did not discuss section 50050, although it was added in 1949.

In a City Attorney Memorandum of Law [MOL] dated September 1, 1977, and attached hereto as Attachment B, the Auditor and Controller asked this Office whether warrants that were unclaimed for one year or more may escheat to the City's General Fund pursuant to San Diego

⁴ Nevertheless, the City provides notice to the public using the procedures described in sections 50050 and 50051.

⁵ Although article XI, section 5 of the California Constitution enumerates several matters that may be covered by charters, the issue of unclaimed public money is not listed. The Court in *Adams v. Wolff*, 84 Cal. App. 2d 435, 442-43 (1948), emphasized that this list is not exclusive; the Constitution only lists "a very small part of the powers that may be set forth in a city charter."

Charter section 86. The MOL explains that San Diego Charter section 86 has “potential legal problems” because it does not include notice provisions, such as those in section 50050. It states:

[w]hile it could be argued that our method of escheating warrants issued by the City of San Diego is solely a matter of our own concern, it would appear the state has a more prevailing interest by providing a three-year time period with constitutional protections. This is so because many employees live outside the City boundaries and also many individuals travel statewide.

The MOL concludes that the City’s one-year holding period is insufficient to meet the current requirements of the law.

Finally, in a Report to the Mayor and City Council dated January 6, 1984, and attached hereto as Attachment C, this Office discusses the disposition of donations to a reward fund that were unused and unclaimed. This Office advises that the unclaimed funds should be disbursed using section 50050. The Report does not discuss or refer to San Diego Charter section 86. See 1984 City Att’y Report 499.

This area of the law has been significantly analyzed since the above-referenced opinions were issued more than twenty-five years ago. Current case law emphasizes that a matter is designated as a municipal affair or a statewide concern following an “ad hoc inquiry” by the courts. As noted in the leading case of *California Fed. Savings & Loan Assn. v. City of Los Angeles*:

[t]he idea that the content of “municipal affairs” is indefinite in its essentials is one that has taken root in our cases on the subject. We have said that the task of determining whether a given activity is a “municipal affair” or one of statewide concern is an ad hoc inquiry; that “the constitutional concept of municipal affairs is not a fixed or static quantity” (*Pac. Tel. & Tel. Co. v. City and County of S.F.* (1959) 51 Cal. 2d 766, 771 [336 P. 2d 514]); and that the question “must be answered in light of the facts and circumstances surrounding each case” (*In re Hubbard* (1964) 62 Cal. 2d 119, 128 [41 Cal. Rptr. 393, 396 P.2d 809]). “No exact definition of the term ‘municipal affairs’ can be formulated and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case.” (*Butterworth v. Boyd* (1938) 12 Cal. 2d 140, 147 [82 P. 2d 434, 126 A.L.R. 838]). But our decisions have also strived to confine the element of judicial interpretation by hedging it with a

decisional procedure intended to bring a measure of certainty to the process, narrowing the scope within which a sometimes mercurial discretion operates.

California Federal Savings & Loan Assn, 54 Cal. 3d 1 at 16.

The *California Federal Savings* case further cautions courts to “avoid the error of “compartmentalization,” that is, of cordoning off an entire area of governmental activity as either a “municipal affair” or one of statewide concern” *California Federal Savings & Loan Assn*, 54 Cal. 3d at 17 (1991).

In *California Federal Savings*, the court determined that a charter city may not impose local income taxes on savings banks exempted from such taxes by general statewide law. The court did not focus on whether the policy was prudent, or on whether the tax had sufficient impact on the industry’s financial health. It instead focused on “whether the income tax burden on financial corporations . . . is of sufficient extramural dimension to support legislative measures reasonably related to its resolution.” *Id.* at p. 23. It was enough that “the Legislature’s decision to modify the tax system by eliminating local taxes on savings banks finds substantial support in the relevant regulatory and historical context . . . including specific recommendations of financial and regulatory experts, and is narrowly tailored to resolve the problem at hand.” *Id.* at 24.

In *Johnson v. Bradley*, 4 Cal. 4th 389 (1992), on the other hand, the court found that a city charter provision for partial public funding of campaigns for city elective offices addressed an issue of municipal concern and was therefore beyond the reach of legislative enactment. In this case, the City of Los Angeles was sued on the ground that Proposition 73 addressed an issue of statewide concern by prohibiting the use of public money to fund political campaigns in local and statewide elections. The city prevailed. Quoting from the Court of Appeal’s decision in this case, the California Supreme Court stated: “[W]e can think of nothing that is of greater municipal concern than how a city’s tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions.” *Id.* at 407.

As noted in *California Federal Savings*, the determination as to whether a matter is a municipal affair or a statewide concern does “not necessarily rest on the conclusion that the subject matter of the former is not appropriate for municipal regulation. It means, rather, that under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city.” *California Federal Savings & Loan Assn*, 54 Cal. 3d at 18.

Here, it may be argued that the City has a more substantial interest than the state because the unclaimed public money held by the City relates to accounts payable, payroll, and pension payments. Further, the possibility that “many employees live outside the City boundaries and also many individuals travel statewide” would likely carry little weight. Relevant case law does not focus on potential inconvenience to those who must comply with a city’s charter. Finally, section 50050 directs local agencies to hold unclaimed public money for three years before

asserting ownership over these funds “[e]xcept as otherwise provided by law.” Legislative history does not reveal the meaning of this language. Arguably, it means that the legislature anticipated the existence of other laws relating to unclaimed public funds, such as those enacted by charter cities, in which case the state did not intend to occupy the field.

On the other hand, a judge may determine that the legislature enacted section 50050 with the intent of occupying this field of law. If this is the case, then San Diego Charter section 86, enacted prior to section 50050, is preempted by state law and section 50050 controls.

IV. Is San Diego Charter Section 86 Invalid Because It Does Not Include Notice Provisions?

Our MOL dated September 1, 1977, suggests that the lack of notice provisions and the short holding period in San Diego Charter section 86 may invalidate this Charter provision and cause the City to rely upon section 50050. As noted in McQuillin, *The Law of Municipal Corporations*, a conflict between a charter provision and state law does not necessarily invalidate the charter provision:

Another rule is that if there is apparent conflict between two provisions they will be so construed as to make both effective provided this can be done without doing violence to the language, but if provisions are in irreconcilable conflict, one which is later in point of position controls an earlier provision, even though both were enacted at the same time. The same is true where there appears to be a conflict between a state law and the charter. The state law and the charter will be construed to make the provisions harmonious. Likewise, the charter of a municipal corporation or a state statute will not be held to violate the constitution if any other rational interpretation or construction can be given to it.

2A McQuillin Mun. Corp. § 9.25 (3rd ed. 2006) (citing *People ex re. Seal Beach Police Officers Ass’n. v. City of Seal Beach*, 36 Cal. 3d 591 (1984)).

As discussed, the City subsidizes San Diego Charter section 86 with the notice provisions set forth in section 50051. It thus appears that no irreconcilable conflict between the charter provision and state law exists and the two may be made harmonious.

CONCLUSION

There is a conflict between the San Diego Charter and state law as relates to the length of time in which a local agency must hold unclaimed public funds before the funds escheat to a local agency’s general fund. Since a conflict exists, a court would be required to determine whether the disposition of unclaimed public money held by the City is a municipal affair or a statewide concern. This involves an ad hoc inquiry by a court of relevant facts and

circumstances and the result cannot be predicted with any certainty. Good arguments exist for and against preemption. Given this uncertainty, the City has several options:

1. The most conservative approach is for the City to continue to follow section 50050. This requires the City to wait at least three years before initiating the process of transferring unclaimed public monies to the City's general fund, rather than the one year waiting period described in San Diego Charter section 86.

2. Alternatively, the City may follow San Diego Charter section 86 and subsidize it with the notice provisions set forth in section 50051. If challenged, a court would determine whether the matter of unclaimed public money held by a City is a municipal affair or a statewide concern.

3. The City may also amend San Diego Charter section 86 to include the notice provisions set forth in section 50050.

Please contact the undersigned should you have any questions concerning this memorandum.

JAN I. GOLDSMITH, City Attorney

By



Mara W. Elliott
Deputy City Attorney

MWE:jab
ML-2010-5

April 23, 1956

Mr. J. P. Welle
City Treasurer
City of San Diego
San Diego, California

Re: Escheat of Unclaimed 1911 Improvement
Act Collections to the General Fund

Dear Sir:

You have requested this office to write you concerning the disposition of moneys held in various funds by The City of San Diego which were collected under and pursuant to 1911 Improvement Act bonds. More particularly you are interested in moneys which have been unclaimed for ten years or longer from the maturity date of the bond.

In order to answer your question it is necessary to determine the life of the lien upon the property represented by the improvement bond. Section 6446 of the Streets and Highways Code as amended by the 1955 Legislature states that the assessment shall be a lien until the assessment is fully paid, but that the lien shall in no event continue beyond four years after the due date of the last installment or of the last principal coupon attached to the bond. Section 2911 of the Civil Code must be read in conjunction with the above mentioned section. Section 2911 states that the lien for public improvement assessments is presumed to have been extinguished at the expiration of four years after the due date of the assessment bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later.

Under the provisions of the foregoing sections, bonds which have a maturity date more than four years prior to January 1, 1947, have had the lien extinguished effective January 1, 1947 (See Shaw v. McCordle, 92 Cal. App. 2d 616).

ATTACHMENT A

Bonds which have a maturity date less than four years prior to January 1, 1947, or after January 1, 1947, do not have the lien extinguished until four years from and after such maturity date.

"It is plain from its comprehensive enactments that the Legislature intended to and did provide a definite statute of limitations and a definite period of time upon the expiration of which street improvement liens would be not only unenforceable by foreclosure but also would be presumed to have been extinguished; and further that the Legislature intended its enactments to apply retrospectively, giving the holders of liens which had theretofore attached either four years or until January 1, 1947, whichever was later, in which to take action."

Ronhotis v. Pink, 89 C. A. 2d 378, at 384.

The date that the lien of a particular bond is extinguished becomes important because of the escheat provisions which are hereinafter discussed. Therefore, in each individual case it will be necessary for you to determine the time when the lien was extinguished.

Section 86 of the Charter of The City of San Diego regulates the disposition of public moneys. The first sentence therein reads in part:

"All City officials and employees empowered to collect money for fees, permits, licenses, inspections, services, taxes or other municipal charges shall collect the same . . ." (Emphasis added.)

The section further states in part:

"All such moneys and all fines or pecuniary penalties or forfeitures which may accrue to the City, and all funds which may remain in the possession of the City unclaimed after a period of one year from the date when due and payable, shall be credited to the general fund of the City, and shall be applicable to any purpose to which the Council may appropriate them and the Council shall appropriate from this fund whatever sum may be necessary to pay valid claims of more than one year's standing."

Your attention has been directed to this section because in the opinion of the undersigned the section is not applicable to the collection of moneys under and pursuant to 1911 Improvement Act assessments. The enumeration

of the kinds of collections does not include assessments under the Improvement Act, nor can such assessment be included as an "other municipal charge."

Section 50050 et seq. of the Government Code of the State of California regulates the escheat of money unclaimed in the treasury of a local agency which is not the property of a local agency (Emphasis added). That section requires that the money be unclaimed for ten years and that any time after the expiration of the ten-year period, the treasurer may cause a notice to be published once a week for two successive weeks in a newspaper of general circulation. Section 50051 requires that the notice shall state the amount of money, the fund in which it is held, and that it is proposed that the money will become the property of the City on a designated date not less than forty-five days nor more than sixty days after the first publication of the notice. Thereafter, under the provisions of Section 50052, the money becomes the property of the City on the date designated in the notice unless a verified complaint seeking to recover all or a portion of such money in a court of competent jurisdiction within the County of San Diego is served upon the City Treasurer before the date designated in the notice.

Before you can avail yourself of these provisions of the Government Code to cause the money to be escheated to the City, you must ascertain the date upon which the lien is extinguished for each particular improvement bond concerned. There is no obligation under the provisions of the 1911 Act upon the bondholder to claim his money prior to the date upon which the lien is extinguished. Therefore, that date commences the running of the ten-year period, at the end of which you may take the necessary steps. Your attention is directed to the fact that the lien in no case has been extinguished prior to January 1, 1947, and, therefore, the earliest date upon which you can commence the proceedings under the above mentioned Government Code section is January 1, 1957.

Yours very truly

Alan M. Firestone
Deputy City Attorney

AMP:HC

APPROVED:

City Attorney

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JOHN W. WITT
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: September 1, 1977
TO: William G. Sage, Auditor and Controller
FROM: City Attorney
SUBJECT: Legality of Current Procedure to Escheat Unclaimed Warrants

By memorandum to us dated July 27, 1977, you have asked for a legal opinion concerning the legality of the current procedure by which unclaimed warrants outstanding one year or longer are escheated by the Auditor's Office and credits for the amount of the warrant are then made to the City's General Fund. This procedure is adopted pursuant to San Diego Charter Section 86 which contains no notice provision and thus no attempt is made to notify the named payees of these warrants.

Your initial request concerned pension warrants identified during an audit of the Retirement System. Since that written request, we have discussed the existing procedure as also being applicable to many other City warrants. Further, you understand unclaimed pension warrants are not governed by Charter Section 86 but by Charter Section 145 pursuant to a legal opinion dated May 29, 1950 by then Assistant City Attorney Shelley Higgins, a copy of which is attached, to which we still subscribe. (See Op.S.D.City Atty. 175 (1950).)

Although no question remains concerning retirement warrants, we believe it necessary to discuss Charter Section 86 and its applicability to nonpension warrants as a result of potential legal problems discovered during our research.

City Charter Section 86 deals with the disposition of public moneys and provides:

All City officials and employees empowered to collect money for fees, permits, licenses, inspections, services, taxes or other municipal charges, shall collect the same promptly at the time they become due, turn them into the City Treasury daily, obtain a receipt therefor, and report the same to the City Auditor and Comptroller weekly; provided, however,

that in the case of employees located in distant parts of the city or county who in the course of their duties collect money belonging to the City, which collections can be deposited in the City Treasury daily only with difficulty and undue cost to the City, such collections may be deposited in the City Treasury within one week after their receipt by the employee collecting the same. All such moneys and all fines or pecuniary penalties or forfeitures which may accrue in the City, and all funds which may remain in the possession of the City unclaimed after a period of one year from the date when due and payable, shall be credited to the general fund of the City, and shall be applicable to any purpose to which the Council may appropriate them and the Council shall appropriate from this fund whatever sum may be necessary to pay valid claims of more than one year's standing. [Emphasis added.]

(Amendment voted 4-22-41; effective 5-8-41.)

The section concerning us is the emphasized sentence that provides unclaimed funds to be credited to the City's General Fund after one year and to which the Council may appropriate from this fund for any purpose.

Research discloses this sentence was added to the 1931 Charter and did not appear in any former Charter. Further, the California Constitution in effect in 1930 did not require any such time provision to be placed in city charters. While some question may remain as to the derivation of one-year time period, we believe it was added to the 1931 Charter at the same time Section 111 requiring an annual audit of accounts was adopted which may account for its inclusion.

This significance of the one-year term first appearing in the 1931 Charter lies in the fact that California had no specific legislation authorizing a local government to retain unclaimed personal property until 1939 when California Political Code Section 4087(b) was added to our laws. Prior to this section's implementation, unclaimed property escheated to the State of California pursuant to California's Unclaimed Property Law. Code of Civil Procedure Section 1300 et seq.

Political Code Section 4087(b) was subsequently recodified into Government Code Section 50050 in 1949 and provided the local agency must hold unclaimed property for ten years after which the property could be transferred to the General Fund by the legislative body if adequate notice was made.

By a 1969 amendment, Government Code Section 50050 now reads:

For purposes of this article "local agency" includes all districts. Except as otherwise provided by law, money not the property of a local agency which remains unclaimed in its treasury or in the official custody of its officers for * * * three years in the property of the local agency after notice if no verified complaint is filed and served. At any time after the expiration of the * * * three-year period the treasurer of the local agency may cause a notice to be published once a week for two successive weeks in a newspaper of general circulation published in the local agency.

Following newspaper publishing of appropriate notice, Government Code Section 50053 provides that once the property has become the property of the local agency only then may the legislative body transfer it to the general fund.

The term "escheat" is one that had vast significance at common law but is now used to embrace almost every case of property falling to the sovereign power for want of an owner. (30A Corpus Juris Secundum, Escheat 915.) The stated purpose behind California escheat statutes is to provide for the receipt, custody, investment, management, disposal, and permanent escheat of classes of unclaimed property to which the state is or may become entitled. (Code of Civil Procedure Section 1305.) Thus, the reasons for the complex procedures include not only the ultimate ownership by the state, but also the interim protection and management of the asset pending final disposition to an ultimate owner, i.e., a proper claimant or the public entity itself. By comparison, Section 86 solely provides that the general fund is credited with these unclaimed funds after one year provided valid claims of more than one year's standing can be paid. No attempt is made to manage or protect the asset but it is simply lumped in with other funds.

Further, as you are probably aware, by a series of court cases in 1969-1971, both the United States Supreme Court and the California Supreme Court have clarified the requirements and meaning of procedural due process. (Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L.Ed.2d 349 (1969); Randone v. Appellate Department, 5 Cal.3d 536, 488 P.2d 13 (1971).) While these cases were directly concerned with creditors' remedies, their significance lies in the fact that fair play and substantial justice mandate minimum notice with a right to a hearing prior to a person's property being taken through state action.

William G. Sage

-4-

September 1, 1977

Section 86 does not provide any notice provision except that all unclaimed money shall be credited to the general fund after one year. This does not comport with procedural due process and is likely to be found unconstitutional.

We have considered whether the procedure provided by Charter Section 86 is solely of sufficient local interest to be considered a "municipal affair" pursuant to Bishop v. City of San Jose, 1 Cal.3d 56 (1969), which is the seminal case in defining the power of charter cities. While it could be argued that our method of escheating warrants issued by The City of San Diego is solely a matter of our own concern, it would appear the state has a more prevailing interest by providing a three-year time period with constitutional protections. This is so because many employees live outside the City boundaries and also many individuals travel statewide. We are aware that numerous City retirees leave both the City and the State upon termination and it seems proper that one statewide law should recognize this propensity to travel rather than numerous individual laws.

CONCLUSION

In light of the history of Charter Section 86, first appearing in our laws at least eight years before the general legislation now found in Government Code Section 50050 to govern the procedure by which a local agency should dispose of unclaimed funds, we believe that the present one-year period is insufficient to meet the current requirements of law. Further, because of the lack of notice to claimants, we feel the current procedure is constitutionally defective and should be changed to reflect the procedures outlined in the Government Code.

We would be happy to work with you to take whatever steps should be necessary before escheating property.

JOHN W. WITT, City Attorney

By


David W. Ryan
Deputy City Attorney

DWR:vl

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January 6, 1984

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCILITEM S405, SUPPLEMENTAL DOCKET OF JANUARY 9, 1984,
"OFFICER KIRK LELAND JOHNSON REWARD FUND"

At the Council meeting of January 3, 1984 you considered the matter of adoption of a resolution in connection with the "Officer Kirk Leland Johnson Reward Fund." On February 28, 1983, the City Council adopted Resolution No. R-258037 establishing said Fund to serve as a repository of donated money to be paid as a reward for information leading to the arrest and conviction of Officer Johnson's assailant(s). Inasmuch as the prosecution of the case has been successfully completed, the Police Chief has recommended to the City Manager that the reward not be issued since the suspect information was provided by an accomplice to the crime. Therefore, the City Manager is recommending that a resolution be adopted withdrawing the offer of reward and authorizing the City Auditor and Comptroller to return the funds to those persons who made such donations to said Fund. The resolution further provides that after exhausting all reasonable efforts to return the donations, any money remaining shall be placed in the General Fund. This matter was continued to the Council meeting of January 9 for an opinion on the legality of giving any money remaining after all reasonable efforts to return donations have been exhausted to Officer Johnson's family instead of being placed in the General Fund.

No disposition of the funds remaining after exhausting all reasonable efforts to return them to the donors may be made for three years. These funds are unclaimed funds not the property of The City of San Diego. Government Code Sections 50050 through 50053 provide for the disposition of unclaimed money not the property of a local agency. Those sections provide that unclaimed money must be kept for three years before it becomes the property of the local agency. Section 50053 provides that when any such money becomes the property of the local agency and is in a special fund the legislative body may transfer it to the General Fund.

Any money remaining in the Fund three years after exhausting all reasonable efforts to return the donations may be given to Officer Johnson's family provided that the City

ATTACHMENT C

REPORT TO HONORABLE
MAYOR AND CITY COUNCIL

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January 6, 1984

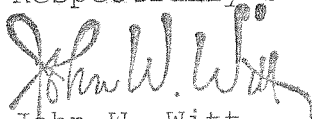
Council finds that such gift is for a public purpose. The legislative body has the power to determine what is a public purpose. As is stated in McQuillan, Mun. Corp. §10.31 (3rd Ed.):

What is a public use or purpose has given rise to much judicial consideration, and courts, as a rule, have attempted no judicial definition of a public as distinguished from a private purpose but have left each case to be determined by its own peculiar circumstances.

In the case of Ravettino v. City of San Diego, 70 Cal. App.2d 47 (1945), the court stated:

Of course, it is necessary that the power conferred be exercised for a public use or purpose. What is a public use or purpose is not capable of absolute distinction. The courts, as a rule, have attempted no judicial definition of a public, as distinguished from a private purpose, but have left each case to be determined by its own peculiar circumstances. The modern trend of decision is to extend and liberally construe the term in considering the municipal activities sought to be brought within its meaning.

Respectfully submitted,



John W. Witt,
City Attorney

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