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MEMORANDUM OF LAW

DATE: December 4, 2017 (Revised June 29, 2018)
TO: Gail R. Granewich, City Treasurer
FROM: City Attorney
SUBJECT: Funds Commission Jurisdiction Under Charter Section 41(a)

INTRODUCTION

Your office recently asked whether the Funds Commission must manage nine endowment funds identified by the City Comptroller. This memorandum discusses which funds the San Diego City Charter (Charter) requires the Funds Commission to manage and whether the Charter requires the San Diego City Council (Council) to place those funds into the Funds Commission's custody.

QUESTIONS PRESENTED

1. Which categories of funds does the Funds Commission manage under Charter section 41(a)?
2. Must the Council take action to place Charter section 41(a) funds into the Funds Commission's custody?
3. Should the Funds Commission manage the nine endowment funds specifically identified by the City Comptroller?

SHORT ANSWERS

1. Charter section 41(a) requires the Funds Commission to manage all restricted-use, perpetual, income-generating trust funds of the City, other than pension funds.
2. Council action is not required to place Charter section 41(a) funds into the custody of the Funds Commission. Council action is likely necessary, however, to establish special funds to administer charitable donations or funds created by contract. If the special funds are trust, perpetuity, and investment funds, the Council actions should refer to the Funds Commission's custody to describe the terms of the special fund accurately.

3. As described below, the Funds Commission should manage seven of the nine endowment funds.

BACKGROUND

Charter section 41(a) established the Funds Commission in 1931 to manage “all trust, perpetuity, and investment funds of the City and such pension funds as shall be placed in its custody. . .” The Funds Commission manages the investment of funds only. Authority to spend the funds rests with the Council. The Council appropriates money from the funds according to each fund’s governing documents. The Funds Commission currently manages the following six funds:

- Cemetery Perpetuity Fund
- Los Peñasquitos Canyon Preserve Fund
- Edwin A. Benjamin Memorial Fund
- Effie E. Sergeant Memorial Fund
- Gladys Edna Peters Memorial Fund
- Jane Cameron Fund

These funds came within the jurisdiction of the Funds Commission in various ways. The Funds Commission manages the Cemetery Perpetuity Fund because Charter section 55 specifically requires it to do so. The City established the Los Peñasquitos Canyon Preserve Fund using the proceeds from a land exchange and placed it under the supervision and control of the Funds Commission. San Diego Resolution R-267963 (Mar. 29, 1987). The Council created the other four funds to administer testamentary donations from individuals to benefit specific libraries. See San Diego Ordinance O-18973 (Sept. 10, 2001), and San Diego Resolutions R-283666 (Apr. 11, 1994), R-289063 (Aug. 11, 1997), R-300338 (May 19, 2006).

You asked our Office to determine whether the Funds Commission should also manage the following nine endowment¹ funds:

- Crescent Heights Habitat Management
- Carroll Canyon Vernal Pool Mitigation
- Zoological Society Endowment
- Sycamore Estates Endowment
- Funds to manage lands acquired from The Environmental Trust, Ind. (TET)
- Carmel Valley Sewer Maintenance Fund
- Scripps Ranch Library Fund
- Figg Urban Forestry Endowment Fund
- Phillip L. Green Memorial Fund

¹ “Endowment” is defined as a fund given to an institution for a specific purpose and usually requires that the principal be kept intact, providing investment income in perpetuity. *Black’s Law Dictionary* (10th ed. 2014).

Developers paid the City to create the first seven endowment funds listed above as conditions to development agreements.² Individuals making testamentary donations provided funding for the last two, the Figg Urban Forestry Endowment Fund and the Phillip L. Green Memorial Fund.

ANALYSIS

I. THE FUNDS COMMISSION MUST MANAGE ALL OF THE CITY'S PERPETUAL, RESTRICTED-USE, INCOME-GENERATING TRUST FUNDS.

As stated earlier, the Funds Commission manages all “trust, perpetuity, and investment funds of the City,” except pension funds.³ To determine which funds fall into these categories, we first consider the rules of statutory construction. Those rules require ascertaining the voters’ intent when adopting charter provisions. *Woo v. Superior Court*, 83 Cal. App. 4th 967, 974-75 (2000). When the ordinary and usual meaning is clear and unambiguous, courts presume that voters intended the plain language to control. *People v. Cruz*, 13 Cal. 4th 764, 782-83 (1996).

When reviewing plain language, Courts look at the ordinary usage of words, as reflected in a dictionary and construed in context. *Delaney v. Superior Court*, 50 Cal. 3d 785, 798 (1990). Below are the legal definitions of Charter section 41(a)’s relevant terms:

- A “trust” is property held by a trustee for the benefit of another party. *See Black’s Law Dictionary* 1740 (10th ed. 2014).
- “Perpetuity” means continuing “for all future time.” *Black’s Law Dictionary* 1323 (10th ed. 2014)
- “Investment” means an expenditure to acquire assets to produce income. *Black’s Law Dictionary* 954 (10th ed. 2014).

The definition of “investment” as an income-generating⁴ asset is relatively clear, but the dictionary definitions of “trust” and “perpetuity” are still ambiguous in this context. A “trust” is defined by reference to a trustee, and trustees usually hold title to property for the benefit of another party. *Black’s Law Dictionary* 1748 (10th ed. 2014). All of the funds that the Funds Commission manages, however, are held by the City for the benefit of the City, rather than for the benefit of another party. Although held by the City for its own benefit, this Office has opined that Council action to establish a special fund to receive money, coupled with the donor’s intended use, creates a trust under the Funds Commission’s jurisdiction. 1983 City Att’y MOL 133 (July 7, 1983). The Charter also refers to the City holding donated funds “in trust for

² The funds to manage lands acquired from TET pay for maintenance of conservation areas required by development agreements with the City. Maintenance was initially managed by a nonprofit rather than the City, and then assumed by the City when TET filed for bankruptcy. San Diego Resolution R-302151 (Dec. 6, 2006).

³ The Board of Administration of the City’s Defined Benefit Pension Plan may also place funds in the Funds Commission’s custody, but it has never done so. San Diego Charter §§ 41(a), 140, 144, and 145.

⁴ For the purposes of this memorandum, income-generating refers to money earned from investments and does not indicate any specific type of income, such as dividends, interest, or capital gains.

charitable or other purposes,” in contrast to property donated “in fee simple” without restrictions on use. San Diego Charter § 1. Thus, the restricted use of the fund is the key characteristic for determining whether a fund meets the definition of a trust under the Funds Commission’s jurisdiction.

From the definition above, “perpetuity” appears to be synonymous with permanent. However, under state law, funds are only permanent when principal cannot be spent.⁵ Historically, the Funds Commission has managed both permanent funds and funds that allow principal to be spent. Consistent with the historical jurisdiction of the Funds Commission, we interpret perpetuity to mean funds that have no definitive end date, but are of a sufficient amount and purpose to allow for long-term investment. Under this standard, a fund will be perpetual if either, 1) it is permanent by its terms, or 2) it has no end date and a prudent investor would invest the principal for long-term-use based on its purpose and the amount, among other factors.⁶

By its plain language, Charter section 41(a) applies to funds having all three listed characteristics: “trust, perpetuity, and investment.” In ordinary usage, “and” is a conjunctive term meaning “also.”⁷ *In re C.H.*, 53 Cal. 4th 94, 101 (2011). An alternative interpretation requiring funds to only have one of the three characteristics would give the Funds Commission broad management authority over all City investments, which conflicts with the authority Charter section 45 gives the City Treasurer. The Charter requires the City Treasurer to perform all of the duties of a treasurer under state law, which includes the investment of surplus funds when that responsibility has been delegated by the Council. San Diego Charter § 45; Cal. Gov’t Code § 53607. The Council annually delegates the authority to invest surplus funds to the City Treasurer. *See* San Diego Resolution R-310821 (Dec. 16, 2016).

Because the Funds Commission only manages perpetual funds and restricted-use funds of a sufficient amount for long-term investment that allow the use of principal, restricted-use funds of an insufficient amount for long-term investment or limited-duration funds are not within the Funds Commission’s jurisdiction.

⁵ Under California’s Uniform Prudent Management of Institutional Funds Act, prohibiting use of principal creates a “fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund.” *See* Cal. Prob. Code § 18504 (c).

⁶ When principal can be spent, whether funds should be accumulated or spent is good faith determination based on a number of circumstances, including the purposes of the fund and the amount of income anticipated. Cal. Prob. Code § 18504 (c).

⁷ Part of the difficulty in interpreting the phrase “trust, perpetuity, and investment funds” is likely due to the section’s use of “attributive nouns” rather than adjectives to describe “funds.” If the words trust, perpetuity, and investment are replaced with adjectives, the meaning is much clearer; *i.e.* restricted-use, perpetual, and income-generating funds of the City.

II. COUNCIL ACTION IS NOT REQUIRED TO PLACE FUNDS IN THE CUSTODY OF THE FUNDS COMMISSION

The phrasing of Charter section 41(a) has caused confusion as to whether the Council must take some action to affirmatively place funds in the Funds Commission's custody. By its plain language, the Funds Commission manages:

- **all** trust, perpetuity, and investment funds *of the City*; and
- **such** pension funds *as shall be placed in its custody*.

San Diego Charter § 41(a) (emphasis added). Grammatically, "as shall be placed in its custody" applies only to "pension funds." If the drafters intended that the qualifying language apply to all funds, "such" would precede "trust, perpetuity, and investment funds of the City." This interpretation is also consistent with Charter sections 144 and 145, which allow the Board of Administration of the City's Defined Benefit Pension Plan to place the City Employees Retirement Fund into the Funds Commission's custody. *See also* San Diego Charter § 140. These are the only Charter sections that give discretion to assign custody of funds to the Funds Commission.

Although the Council is not required to affirmatively place funds in the custody of the Funds Commission, Council action is usually necessary to create trust funds that fall within its scope. An individual bequest to the City may be distributed from a trust, but the money received by the City is only a restricted-use donation until the Council creates a special fund for administration. *See* 1983 City Att'y MOL 133 (July 7, 1983). For example, Edwin A. Benjamin left the bulk of his estate to the City to be used for library purposes. *Id.* The Council adopted an ordinance to establish a fund to carry out the donor's intent, which was sufficient to create a trust under the Funds Commission's jurisdiction. *Id.*

Council action is also necessary to appropriate funds received in the middle of a fiscal year. The annual appropriation ordinance requires Council action to establish special funds and their terms when they are not included in the current fiscal year's budget. Although an express assignment to the Funds Commission is not necessary, the Council action must direct Funds Commission management to comply with Charter section 41(a).

To ensure that the Funds Commission manages all trust, perpetuity, and investment funds moving forward, however, the City should amend the Council Policy 100-02 concerning donations to include procedures for creating new restricted-use, perpetual funds and clarify the Funds Commission's jurisdiction to manage those funds.

III. THE FUNDS COMMISSION SHOULD MANAGE SEVEN OF THE NINE ENDOWMENT FUNDS IDENTIFIED BY THE COMPTROLLER.

All but two of the nine endowment funds identified by the City Comptroller are likely "trust, perpetuity, and investment funds" that should be managed by the Funds Commission. The funds fall into three categories: charitable donations, mitigation endowments, and other funds established as conditions of development.

A. The Funds Commission Should Manage Special Funds Created to Administer Charitable Donations.

The Funds Commission should manage both the Figg Urban Forestry Endowment Fund and the Phillip L. Green Memorial Fund, because both are perpetual, restricted-use funds. San Diego Resolution R-297476 (Dec. 9, 2002).^{8,9} Once the Council acts to create a trust by resolution, the Phillip L. Green Memorial Fund will be within the Funds Commission's jurisdiction.¹⁰

B. Conservation Endowments Must Be Reviewed Under State Law Governing Conservation Endowments to Determine Funds Commission Jurisdiction.

Five of the funds identified by the City Comptroller are endowment funds created by development agreements to maintain conservation mitigation property. These funds meet all three criteria required under Charter section 41(a) and fall within the Funds Commission's jurisdiction. Conservation endowments are trusts governed by the California Government Code and conveyed solely for the long-term stewardship of a mitigation property. Endowment funds are held as charitable trusts that are permanently restricted to paying the costs of long-term management and stewardship of the mitigation property for which the funds were set aside." Cal. Gov't Code § 65965. Mitigation endowments are also perpetual and investment funds. Cal. Gov't Code §§ 65965-66.

C. Funds Created by Development Agreements for Reasons Other than Conservation Mitigation Likely Fall Outside of the Funds Commission's Jurisdiction.

1. Scripps Ranch Library Fund

The Funds Commission should not manage the Scripps Ranch Library Fund because it is not perpetual and it does not appear that the City created a trust. Developers contributed funds for the Scripps Ranch Library Fund as a part of a development agreement (Agreement) with the City. There is no specific limitation on using the principal other than the use of the term "endowment." Without limitation on the use of principal, this Fund is not perpetual under state law and should not be managed by the Funds Commission.

⁸ The Council established the Figg Urban Forestry Endowment Fund to administer a donation intended for planting and maintaining jacaranda trees.

⁹ The resolution limits the fund's use to income, which under the California's Uniform Prudent Management of Institutional Funds Act, creates a "fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund." Cal. Prob. Code § 18504 (c)(1).

¹⁰ Phillip L. Green donated funds to the City upon his death as an endowment for "purchasing, planting, replacing, and maintaining trees and shrubs in Balboa Park." Second Amendment to Trust Agreement for the Phillip L. Green Revocable Trust. The money donated from this Trust is currently in a donation clearing fund pending Council action.

It is also unclear whether there was a Council action creating a trust.¹¹ All substantive actions of the Council require the adoption of an ordinance or resolution. San Diego Charter § 270(c). Although the Council approved the execution of the Agreement by San Diego Ordinance O-18974 (Sept. 10, 2001), neither the ordinance, nor any of the accompanying resolutions, nor resolutions approved in companion items establish a special fund. Only meeting minutes indicate that the motion for a companion item included a directive to establish all special funds required by the Agreement, including the Scripps Ranch Library Fund.¹² Minutes of the Council of the City of San Diego for the Regular Meeting of Tuesday, August 7, 2001. The lack of Council action to create a trust and the absence of language limiting the use of principal of the Fund preclude Funds Commission management.

2. Carmel Valley Sewer Maintenance Fund

The Funds Commission should not manage the Carmel Valley Sewer Maintenance Fund because it is of limited duration. Like the Scripps Ranch Library Fund, it is also unclear whether the Council acted to create a trust. Pardee Homes donated funds to create the Carmel Valley Sewer Maintenance Fund to maintain a sewer system supporting a new development for 50 years. While the Treasurer's Office provided correspondence from legal counsel for Pardee Homes that included a check to establish this Fund, our Office was unable to locate any subsequent Council action or agreement with legal authority for creating the fund. Staff should review this Fund for compliance with the relevant development agreements. The 50-year duration, however, is sufficient to preclude Funds Commission management.

CONCLUSION

The Funds Commission must manage all of the City's perpetual, restricted-use, income-generating trust funds, other than pension funds. The Funds Commission has no jurisdiction over restricted-use funds of an insufficient amount for long-term investment and with no limitations on the use of principal or limited duration funds. Although the Funds Commission's jurisdiction is automatic, Council action is often necessary to establish special funds to administer donations according to the donor's intent or required by an agreement for specific uses. When the special funds created are trust, perpetuity, and investment funds, those Council actions should direct the Funds Commission's management in order to describe the terms of the funds accurately. The

¹¹ The only legal authority for this fund is an ambiguous paragraph in the Agreement. Unlike other City funds benefitting libraries, the income from this fund is payable to the San Diego Community Foundation (Foundation), rather than to the library directly. It is unclear why the Agreement requires the City to manage the principal and then turn over the income to an intermediary rather than directly disbursing to the library. Generally, the Foundation manages endowed funds providing income to the intended recipients, rather than merely dispersing income from funds managed elsewhere. Staff should review the actual operation of this fund to determine how earnings flow through the Foundation. If the principal is intact and generates sufficient earnings, the fund's operation may provide evidence that the endowment should be a perpetual trust. If so, the Funds Commission may have jurisdiction. If the Foundation reinvests the earnings received, this may violate Charter section 41(a). See 1983 City Att'y MOL 133 (July 7, 1983). We are happy to provide additional guidance if staff gets more information about the fund.

¹² This Agreement also established the Sycamore Estates Endowment, one of the five mitigation endowments discussed above. Because it is a conservation endowment, however, it is a perpetual trust under state law. Cal. Gov't Code §§ 65965-66.

Funds Commission should manage the two charitable donation funds noted by the City Comptroller, Figg Urban Forestry Endowment Fund and the Phillip L. Green Memorial Fund, and may have jurisdiction over the mitigation endowments. The other funds noted by the City Comptroller, Carmel Valley Sewer Maintenance Fund and the Scripps Ranch Library Fund, are not perpetual and likely do not fall within the Funds Commission's jurisdiction.

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By /s/ Jennifer L. Berry
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ML-2017-9 (REV. 06/29/2018)
Doc. No. 1780636_3.docx
cc: Honorable Mayor Kevin Faulconer
City Councilmembers