

MEMORANDUM OF LAW

DATE: April 7, 1987

TO: Pat Frazier, Financial Management Director
FROM: City Attorney
SUBJECT: Contract with the County of San Diego for
Provision of Animal Control Services

Your memorandum of February 3, 1987 requested our advice concerning proposed revisions to the basic contract between the City and the County of San Diego for animal control services, principally for dog control and regulation. Subsequently, we responded by a memorandum of law dated March 4, 1987. Thereafter, David Flesh by memorandum of March 19, 1987 raised additional questions, the answer to which we felt justified a revision to our earlier memorandum of law dated March 4, 1987. Accordingly, we respond with this revision which incorporates those concerns into the framework which you first requested, and which cancels our memorandum of law dated March 4, 1987.

The County is proposing that the City pay for animal control services, whereas in the past the services were provided without charge. The County had retained revenues from dog licenses issued for dogs within the City limits but charged no other fees. The County retained a certain portion of property taxes to offset certain County operations applicable to the City. The County will now charge certain fees and credit the City with dog license revenues. The specific details are contained in the agreement. You estimate that the cost of the proposed contract may approximate one million dollars (\$1,000,000) per year.

By way of background, the City had its own animal control services prior to 1971. Pursuant to Resolution No. 202286 adopted March 30, 1971, the City contracted with the County to provide such services and transferred City personnel, equipment and leased real property to the County for this purpose. During 1971 the City paid the County personnel costs resulting from the transfer. Either party could terminate the agreement upon 100 days notice. We assume that the County by its memorandum of

January 9, 1987 will be providing the requisite notice. Since it is apparent that the County will be proceeding to impose some changes, we shall respond to the questions you have asked, seriatim, as follows:

1. Is it legally permissible for the County to institute the proposed changes?

Answer: It is legal for the County to charge for services it

provides to other jurisdictions pursuant to Government Code section 51350. That section authorizes a County to charge "all those costs which are incurred in providing the services so contracted or authorized," exclusive of general overhead for those services made available to all sections of the County or which are the general overhead costs of operation of the County.

Your attention is invited to Attachment B of the proposed agreement. The charges set forth there reflect the various cost elements in the County fee structure. The charges proposed should be analyzed to determine whether they represent any element of impermissible overhead reimbursement. To some extent, overhead appears to be included.

2. Is the City or the County legally responsible for animal control services and what level of service is mandated?

Answer: State law authorizes a City or a County to adopt animal control regulations and to license dogs. Government Code section 25803 and Food and Agriculture Code section 30501. State law only mandates that a County adopt ordinances for the protection of livestock, Government Code section 25800, but does not mandate control of dogs although all dogs must be licensed. Government Code section 30951. Animal control is generally considered to be a normal responsibility of a governmental entity because of the public health and safety concerns associated with unleashed canines and the threat of rabies. To this extent, animal control can be said to be a mutual responsibility of both the City and the County.

The more pertinent question is whether the City could legally require the County to provide such services without cost to the City. As noted, however, Government Code section 25803 authorizes the County to adopt ordinances providing for such levels of service as may be prescribed therein. The City would only receive those services which the County chooses to provide for.

3. Is the draft agreement appropriate?

Answer: A review of the document does not disclose any matter of a legally inappropriate or objectionable nature. We note, however, that section 8 of the proposed contract requires the City to adopt the County ordinances relating to animal control, except as to County ordinances that would not apply to the City. The City is presently considering revision to San Diego Municipal Code Chapter IV, Article 4, which will adopt the latest County animal control code with some modifications and exceptions. To the extent that the City may deem it advisable to either modify or not adopt certain sections or to add provisions directly applicable to the City, it would be preferable to amend

section 8 to allow this. We suggest adding the word "substantially" in the first sentence of that section so it reads as follows:

"Notwithstanding anything to the contrary herein contained, this contract shall be sooner terminated at any time that City fails to enact and to maintain in full force and effect, including the amount of fees provided, an ordinance substantially identical with the provisions of Chapter 6, Division 2, Title 6 of the San Diego County Code (San Diego County Animal Control Ordinance No. 7182)".
addition underlined

4. Is there any effect on the City's and/or the County's Gann limit if the City agrees to this proposal?

Yes. It would now appear that the new fee would constitute a transfer of service responsibility from the County to the City, and hence would affect the Gann limit pursuant to California Constitution Article XIII B, Section 1. The City will now be charged for a service that was previously provided by the County.

The Gann limit established by California Constitution Article XIII B, Section 1 provides that the total annual appropriation which is subject to limitation shall not exceed the appropriations limit for the prior year, with certain adjustments. Adjustments are authorized when one governmental entity transfers the financial responsibility for providing services to another governmental entity. Pursuant to section 3(a), the appropriations limit of the transferee (the City) shall be increased and that of the transferor decreased by such reasonable amount as the entities mutually agree upon.

In the case at hand, the County had provided these services without cost to the City, based on the County's receipt of property taxes and the retention of license fees. Under the new proposal, the County will credit the City with license fee revenues, but will charge the City for basic animal control services irrespective of property taxes. In this regard, we can say that the City will be paying for a service, irrespective of the source or method of payment or credits applicable thereto and irrespective of tax revenues.

Therefore, it is our conclusion that the Gann limit should be adjusted by the amount of money that the City will have to pay pursuant to paragraph 9 of the proposed agreement. The agreement should be amended to so provide and not be executed by the City without the clear written understanding of both parties.

5. What factors do you see as being subject to negotiation

with the County?

Answer: As noted in number 1 above, the service fee may be subject to negotiation vis a vis the amount to be treated as a direct cost versus overhead, assuming your analysis establishes that impermissible overhead has been included.

There are two other factors that may be considered during fee negotiations. The first is the issue regarding fair market rental for the leased City-owned animal control facility the County is now using; the second is the property tax allocation which, in the past, offset County costs for City animal control. Under the new proposal, the City is to receive credit for license fees applicable to City dog licenses and no reference is made to any credit from real property taxes which proportionately fund general County services applicable to City animal control. You may therefore wish to address these issues during negotiations as they relate to the decrease in the service fee.

You may also wish to relate this to issue number 4 above as it concerns the Gann limit. If the Gann limit is not amended, or is amended only to some amount that does not fully represent the City's change in appropriations limit, you may wish to negotiate a reduction in the service fee based on this factor.

We believe that this answer is also responsive to your memorandum of February 18, 1987 concerning a division of property tax revenues for animal control. The Legislature established an allocation formula applicable to real property taxes collected by the County as set forth in Revenue and Taxation Code, Division 1, Part 0.5, Chapter 6, beginning with section 95 et seq. Under

that formula there is no room for negotiation as to the transfer of property taxes. It is our recollection that in formulating the apportionment ratios the legislature did take into consideration the various kinds of services performed by the various entities. It is questionable whether the amounts involved for animal control would be so significant as to call for a change in the statutory apportionment formula. As we have indicated above, however, you may address this indirectly through a possible decrease to the service fee for animal control services.

6. What course of action do you advise?

Answer: Your negotiations should consider all the above points. However, unless the City wishes to again assume responsibility for animal control in the City, the County may be in a superior bargaining position. Absent dissatisfaction with the level or quality of services rendered, there can be a real advantage to the City by performance of this responsibility by the County.

As a postscript to your memorandum request, we have also been provided a copy of a revised draft agreement dated February 13, 1987. This draft was furnished by Mike Shontz from County Animal Control. It incorporates some additional changes that have been proposed by the County. A copy is attached for reference.

The changes are basically editorial, except for page 2, second full paragraph, which reads as follows: "The Director of Animal Control of the County has discretion in determining how the terms of this contract shall be performed by the County." We recommend exception be taken to this language and the earlier language (that which is shown on the February 13, 1987 draft in parentheses) be used instead. The problem that we see with the language (but not necessarily the intent or bona fides of the County) is that the contract is rendered subject to discretionary performance. Granted, we will pay only for what we receive but the contract allows the County the discretion as to how much will be provided. You may wish to consider this aspect during negotiations.

We also recommend adding the word "defend" to section number 7 so that the indemnification clause reads as follows:

"County shall defend, indemnify, protect, and hold City and its agents, officers and employees harmless from and against any and all claims asserted or liability established

for damages or injuries to any person or property, including injury to County's employees, agents or officers which arise from or are connected with or are caused or claimed to be caused by the acts of omissions of County, and its agents, officers or employees, in performing the agreement or services herein, and all expenses of investigating and defending against same; provided, however, that County's duty to indemnify and hold harmless shall not include any claims or liability arising from the misconduct of the City its agents, officers or employees."

We shall be pleased to answer any further questions you may have, or review any other revised drafts. Please feel free to contact the undersigned.

JOHN W. WITT, City Attorney

By

Rudolf Hradecky

Deputy City Attorney

RH:mrh:540(x043.2)

Attachment
ML-87-37