

MEMORANDUM OF LAW

DATE: March 17, 1989

TO: Ruth Ann Hageman, Citizens Assistance
Director

FROM: City Attorney

SUBJECT: City Publication Cost Recovery via Advertising
Sales

In your memorandum dated January 20, 1989, you asked this office to advise you of the feasibility of your office selling advertising space in City publications to recoup publishing costs. In the alternative, you asked if your office could solicit sponsors who would donate publication costs in exchange for advertising space in City publications. The City publishes several publications each year. These publications include guides to City government and similar informational booklets. The publications are distributed free of charge. Recently the cost of printing the publications has risen and your office is seeking methods of recovering publication costs.

San Diego is a charter city and derives its power from municipal home rule. The sources of municipal home rule power are found in Cal. Const. Art. XI, sections 3, 5. Section 3(a) authorizes cities to adopt a charter and states in pertinent part: "County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments."

Section 5(a) further explains what charters may provide for by stating:

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject

to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

These statutes have been interpreted by the courts to mean:

A municipal corporation is invested with

full power to do everything necessarily incident to a proper discharge of its public functions but no right to do more can be implied, and in the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals. Emphasis Added.

Ravettino v. City of San Diego, 70 Cal.App.2d 44 (1945).

In determining whether a City has the power to engage in independent business enterprises, such as advertising, "the powers of such a City are strictly construed, so that 'any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation.'" Norsco Enterprises v. City of Fremont, 54 Cal.App.3d 488, 493 (1976). Irwin v. City of Manhattan Beach, 65 Cal.2d 13 (1966).

Advertising is a business normally engaged in by private enterprise. A City may expend public money for advertising for municipal purposes. For example, it may advertise to extol the beauties and virtues of the City to stimulate tourism or for other similar municipal purposes. This form of self advertising is a public function because it seeks to raise revenue for the City and does not promote any private enterprise. Selling commercial space in City publications is a type of advertising that goes beyond the purview of a municipal function. The power to sell advertising to raise revenue is not expressly granted to the City by either the legislature or the City charter. Advertising will be permitted only if it is a power that can be implied from an express power. It must be an indispensable function as distinguished from merely useful or convenient. McQuillan, Municipal Corporations Volume 2, Section 10.12 p. 1020. It appears that selling advertising is a convenience that would solve your office's revenue shortages, but it is not a necessary or essential function of the City.

There is a second impediment to the sale of advertising by the City. San Diego City Council Policy 000-23 and San Diego Administrative Regulation 95.65 (see attached copies) prohibits City employees in their capacity as a City employee from impliedly or directly endorsing any commercial product. Presumably, the policy would extend to implied City endorsement of a product through advertisements in City publications. Conflicts with the Council Policy and Administrative Regulation might be avoided by including disclaimers of any City endorsement of a product advertised in a City publication, but disclaimers are frequently not read, or heeded, by the general public. The

appearance of product endorsement by the City, even though a disclaimer is included in the ad, would probably violate the Council Policy.

Donations to cover publishing costs may be accepted pursuant to Council Policy 100-2. (A copy of the Policy is attached.) The type of donation you have suggested would be a restricted donation specifically to cover publication costs. According to the Council Policy, there would be no bar to your office accepting such donations. Donations to a municipal corporation are deductible pursuant to 26 U.S.C.A. section 170 and California Revenue and Taxation Code section 17042.5. There is, however, a danger that recognition of the donors in the publications could be interpreted as an implied endorsement of their product, so it would again run counter to the Council Policy forbidding private endorsements by the City. If the recognition of the donors was limited strictly to an acknowledgement of the donation, i.e., costs for this publication donated by . . . , there should be no conflict with either the Council Policy or regulation. Also, it is possible to introduce a resolution to the Council waiving the policy and regulation constraints for purposes of acknowledging donations to cover the cost of your publications.

A third avenue to pursue to obtain potential revenue would be the sale of the publications themselves. A fee could be charged to any groups that purchase large numbers of the publications. It appears from our conversation that these publications are beneficial to certain business groups, particularly real estate brokers. Such groups might be willing to absorb some or all of the costs of the publications by buying the publications. This would avoid the potential problems of a City office engaging in activities that go beyond its express corporate powers or counter to Council Policies.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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Attachments

ML-89-30