

MEMORANDUM OF LAW

DATE: December 11, 1990

TO: Roger Frauenfelder, Deputy City Manager and  
the Clean Water Program Governance Advisory  
Group

FROM: City Attorney

SUBJECT: Assignment and Delegation of Sewage Disposal  
Agreements

With the formation pending of a regional wastewater district, it has been contemplated by The City of San Diego ("city") that the city's rights and duties under the existing sewage disposal contracts between the city and each of the participating agencies would be assigned and delegated to the new district. By this anticipated transfer, it is foreseen that the new district would effectively stand in the shoes of the city. You and the Governance Advisory Group have asked about the legal implications of such a transfer.

For reasons which will be more fully explained, it is our belief that an assignment can be made and that the new district would acquire all of the city's rights under the existing contracts. The area of paramount concern to the participating agencies is whether the new district would also acquire all of the city's duties under the existing contracts. A related concern is whether a participating agency has a legal basis for preventing the city from assigning its rights or delegating its duties under the existing contracts to the new district.

Assignment

"Assignment" and "delegation" are terms of art and frequently referred to in tandem. Unfortunately, assignment is often unartfully used as including the concept of delegation. Assignment and delegation are legally independent actions and evaluating the ability to accomplish either involves separate analyses.

An assignment of a right is "a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." Restatement of the Law of Contracts, 2d, section 317(1). It is a unilateral expression of the assignor. A. Corbin, Corbin on Contracts, One Volume Edition, section 866, (1952).

The current sewage disposal agreements between The City of

San Diego and each of the participating agencies are bilateral contracts in that they involve both rights and duties for each party. A bilateral contract makes each party both an obligor and an obligee. An obligor is a party with a duty and an obligee is a party with a right. In simplified terms, as an obligor the city has the duty to provide sewage treatment capacity, and as an obligee has the right to collect money; the participating agency, as an obligee, has the right to a quantified capacity in the city's sewerage system, and as an obligor has the duty to pay. Initially, we must address whether the city, as an obligee, may assign its rights under the existing contracts, thereby becoming an assignor.

At early common law the assignment of a right in contract was ordinarily ineffective. This was because "the relation between the original obligor and obligee was regarded as a vital part of the obligation which could no more be changed than any other term of the obligation . . ." S. Williston on Contracts, section 405 (3d ed. 1960).

In 1872, section 1472 of the Cal. Civil Code was enacted, thereby breaking from the common law. This statute remains unchanged and provides: "A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such."

Conceivably, an assignment can be examined from the perspective of any of the three participants -- assignor, assignee or obligor. The Restatement of the Law of Contracts, 2d (Restatement 2d) takes a narrow view and formulates the principles of assignment by emphasizing how the assignment impacts the obligor. As used in this context, the obligor would be the participating agency.

Section 317(2) of the Restatement 2d states:

A contractual right can be assigned unless

- (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
- (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
- (c) assignment is validly precluded by contract.

Under the existing sewage disposal agreements, each participating agency has the duty to pay capacity fees, reimbursement for maintenance and operation, reimbursement for

new construction, or rent for use thereof. The substitution of the right of the new district to receive these payments for the right of the city would not materially change the duty of the participating agency. The duty to pay would remain the same; the only change would be the recipient of the payment.

Similarly, the substitution of the right of the new district for the right of the city would not increase the participating agency's risk, materially impair the agency's chance of obtaining return performance, or materially reduce the value of the contract rights held by the agency. If anything, these concerns would be minimized by the fact that the new district (assignee) will be a legislative special act district, formed by the legislature or by vote of the electorate, with a board of directors comprised of members representing each of the participating agencies, thus affording each agency more control over performance. Additionally, as part of the special act district legislation, there will be a statutory provision enabling the new district to assume all of the city's rights and duties under the existing contracts.

Hence we have found no law nor identified any public policy which would forbid this assignment. California law enables the transfer of rights arising out of an obligation. The legal treatment of the rights and obligations embodied in the sewage disposal agreements should not be an exception carved from the rules merely because the parties are governmental entities. Contracts entered into by the state or its agencies or subdivisions are governed by the ordinary law of contracts. *Holtzendorff v. Housing Authority*, 250 Cal. App. 2d 596, 607 (1967).

Having examined the law, and finding no basis for prohibiting an assignment, the only other basis would be provision in the contracts themselves. No preclusion of assignment (or delegation) is expressed or implied anywhere in the sewage disposal agreements.

#### Delegation

Having concluded that the city can assign its rights under the sewage disposal agreements, we have introduced two additional sets of relationships into the initial agreement between the city and the participating agency. The city now has an assignor-assignee relationship with the new district, and the district has an assignee-obligor relationship with the participating agency. However, there is yet to be a readjustment of rights and duties under the sewage disposal agreements to produce a bilateral relationship between the new district and the participating agency. The assignment of the city's rights does not extinguish

the performance of the city's duties.

Section 1457 of the Civil Code addresses the delegation of duty, and states in pertinent part, "The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise . . . ." Viewed restrictively, this section would hold that the city cannot delegate the performance of its duties to the new district without the consent of the participating agency(ices). Under this interpretation any or all of the participating agencies would be in a position to demand that performance be made only by the city, preventing any delegation of the city's duties to the new district. The courts have not viewed section 1457 in this manner.

In *Baer v. Associated Life Ins. Co.*, 202 Cal. App. 3d 117 (1988), the court elaborated on section 1457, and stated:

This section was enacted in 1872, and from its inception has been interpreted to mean that the assignor of the contract cannot be released from his/her burden of obligation to the other contracting party absent a novation. (Citations omitted.) Throughout the years our courts have interpreted this statute liberally and held that: "The obligations of an assignor of a contract continue to rest upon him and he will be required to respond to the other party to the contract in the event of a default on the part of the assignee." (Citations omitted.)

*Id.* at 123.

Section 1457 of the Civil Code does not prohibit the new district from assuming and performing the contractual obligations imposed upon the city, it merely prohibits the district from relieving the city of the duty to perform, without the consent of the participating agency(ices). See *La Rue v. Groezinger*, 84 Cal. 281 (1890) and *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574 (1890). In this sense, the contractual duty to perform can be differentiated from the actual rendering of performance; although the latter can be assumed by the new district, the assumption will not operate to relieve the city of the former.

While the legal distinctions are subtle, the practical effect is direct. The new district will be performing under the terms of the contracts; the participating agency(ices) will be receiving the benefit of that performance; and, because of the assignment of the city's rights, the new district will be entitled to the benefit of the participating agency(ices) performance of their reciprocal duty to pay. Although direct privity of contract is lacking between them, there is nonetheless created a de facto bilateral relationship between the

new district and the participating agency(ices), since each has acquired the role of both "obligor" and "obligee."

In the final analysis, the rights and remedies of the participating agencies which are embodied in their contracts with the city are not threatened or impaired. Assuming the city has not been relieved of its duty to perform, if the new district fails to perform, the participating agency(ices) may demand performance from the city and bring an action against the city for lack thereof. See *Brady v. Fowler*, 45 Cal. App. 592, 595 (1920).

Similarly, the new district is not without its rights and remedies. By operation of the assignment, the district has all the same remedies against a non-performing agency that the city would have had. See *Chatten v. Martell*, 166 Cal. App. 2d 545 (1959). Finally, the city is not without its rights and remedies. Should the city incur damages resulting from the district's failure to perform, the city may bring an action against the district. See *Cutting Packing Co, v. Packers' Exchange*, 86 Cal. 574, 577 (1890).

The de facto relationship between the new district and the participating agency(ices) could continue in force until the expiration of the original contracts, or until a novation occurred. Novation is the substitution of duty or party by agreement with the intent to eliminate the original party or

duty. Hence the complexities of assignment and delegation can be completely avoided by way of a novation replacing the new district for the city. Novation differs from assignment and delegation in that the city would be eliminated as a party to the original contract, and replaced by the district. As such, novation requires the assent of the city, new district and participating agency(ices), and it would also enable the renegotiation of terms between the new parties.

#### CONCLUSION

Both by the nature of the existing contracts and the contemplated manner of assignment and delegation, we conclude that the city may by assignment and delegation transfer the existing agreements between it and the participating agencies to

the special act district with no adverse consequences to the participating agencies. Such a substitution could be also accomplished by novation, but is not legally required.

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By

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