

MEMORANDUM OF LAW

DATE: June 21, 1991

TO: Councilmember Bruce Henderson

FROM: City Attorney

SUBJECT: Retroactive Rebates for Ultra-Low Flush Toilets

BACKGROUND

On December 11, 1990, the San Diego City Council adopted The City of San Diego's Urban Water Management Plan and Conservation Program, which includes eight integrated and complementary water conservation programs. The Ultra-Low Flush Toilet Rebate Program is one of the eight programs. It would promote voluntary installation of ultra-low flush toilets by providing a rebate of up to one hundred dollars (\$100) for each such toilet installed, with a limit of one rebate per household.

On March 28, 1991, the San Diego County Water Authority (CWA) authorized implementation of a regional Ultra-Low Flush Toilet Rebate Program. Under this program, The City of San Diego would contribute fifty dollars (\$50) of each rebate associated with an ultra-low flush toilet installed in the City while the Metropolitan Water District (MWD) of Southern California would contribute an additional, matching \$50 through a CWA administered rebate program. Matching funds would apply to ultra-low flush toilets installed from April 9, 1991.

On May 6, 1991, the City Council suggested making the rebate program retroactive to June 1, 1990. (In June 1990, the City Council first initiated a 10% voluntary water conservation effort.) The City Attorney was asked to research whether the City's use of public monies to provide rebates prior to the MWD cut-off date of April 9, 1991 would constitute an unauthorized gift of public funds.

QUESTION PRESENTED

Is the use of City funds to retroactively establish the rebate program for the installation of water-saving, low-flush toilets prior to April 9, 1991 (the date MWD will contribute matching funds) a gift of public funds?

DISCUSSION

A. Gifts of Public Funds Are Prohibited

The California Constitution, article XVI, section 6, provides in pertinent part that the Legislature shall have no power "to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever."

The City of San Diego is a municipal corporation organized and

existing under a freeholders' charter which was originally adopted in 1889 by a vote of the people pursuant to the provisions of article XI, section 8, of the California Constitution. In 1931 a new City Charter was ratified by a majority of the electors, and it is this Charter, as amended, under which the City is currently operating.

The City of San Diego may not give or lend its credit to aid any individual, corporation or association. San Diego City Charter section 93. The purpose of this Charter section is to prevent expenditures of public money unless a valid public need will be served.

Both California Constitution article XVI, section 6, and City Charter section 93 address the issue of gifts of public funds. Article XVI, section 6 of the California Constitution, while prohibiting the California Legislature from directly or indirectly granting to counties or cities the legal right to make a gift of public funds by recognizing the validity of past or moral consideration, is not applicable to charter cities which have plenary power over their affairs subject only to charter restrictions. *Tevis v. City and County of San Francisco*, 43 Cal.2d 190, 197 (1954). The analysis below is therefore focused upon Charter section 93.

The use of public funds for toilet rebates satisfies Section 93 elements dealing with municipal credit and aid to individuals or groups. Therefore, if rebates were considered gifts to those installing low-flush toilets, it is expected that courts in this state would hold that the City Charter, by virtue of language in Section 93, prohibits expenditures for this purpose. However, as discussed below, case law in California does not classify such expenditures as gifts if they are connected to legitimate public purposes.

B. Allocations for Public Purposes Are Not Gifts

An expenditure of public funds, if done for a public purpose, will not violate prohibitions against gifts of public funds. *San Bernardino County Flood Control District v. Grabowski*, 205 Cal.App.3d 885, 903 (1988), citing *Schettler v. County of Santa Clara*, 74 Cal.App.3d 990, 1002-06 (1977). When a proposed application of public money is questioned as a possible gift of public funds, "the primary and fundamental subject of inquiry is as to whether the money is to be used for a public or a private purpose. If it is for a public purpose within the jurisdiction of the appropriating board or body, it is not, generally speaking, to be regarded as a gift." *County of Sonoma v. State Board of Equalization*, 195 Cal.App.3d 982, 993 (1987), quoting *City of Oakland v. Garrison*, 194 Cal. 298, 302 (1924).

Determination of what constitutes a "public purpose" falls primarily within the discretion of the affected legislative agency, which need only show that it had a reasonable basis for its action. *San Bernardino County Flood Control District*, 205 Cal.App.3d at 903; *County of Sonoma*, 195 Cal.App. 3d at 993. "The concept of public purpose has been liberally construed by the courts, and the Legislature's determination will be

upheld unless it is totally arbitrary. Citations." Atlantic Richfield Co. v. County of Los Angeles, 129 Cal.App.3d 287, 298 (1982).

Accordingly, use of City funds in the rebate program may not constitute a gift if Councilmembers have a reasonable basis for believing the allocations will satisfy a public purpose. San Diego residents -- and indeed all Californians -- face severe water shortages because of a five year drought. A prospective rebate program may encourage installation of low-flush toilets which, in turn, would reduce the amount of water used. The resulting water savings could be substantial, which would benefit the public.

A retroactive rebate program might also benefit the public by serving as a strong incentive to other citizens to implement conservation measures. The value of encouraging, recognizing and rewarding persons who take steps to conserve water could be significant and, therefore, could possibly further serve a public purpose.

Whether retroactive or prospective, a program encouraging water conservation could have a valuable public purpose. The validity of a rebate program would be strengthened if the City Council specifically determines that both prospective and retroactive rebate payments will serve a valuable public purpose. As discussed above, if such a conclusion has a reasonable basis, it will fall within the City Council's discretion to provide funds for a retroactive rebate program.

C. Public Funds May Provide Incidental Benefits to Private Parties

If a public purpose is served by the expenditure of public funds, provisions against gifts of public funds are not violated even though private persons receive incidental benefits. San Bernardino County Flood Control District, 205 Cal.App.3d at 903; County of Sonoma, 195 Cal.App.3d at 993.

Providing rebates to people who install low-flush toilets provides a benefit to citizens in San Diego since their cost for purchasing these new fixtures is decreased. However, as cited above, California case law will not destroy an allocation's public purpose exception merely because private persons or entities will receive some incidental benefit. The primary purpose of the rebate program could be to reduce water use, not to subsidize new toilets for homeowners. The incidental benefit to conscientious City residents alone will not transform the rebate program into a gift of public funds.

CONCLUSION

For the reasons stated, the use of public money for an ultra-low flush toilet rebate program will not constitute an improper gift of municipal funds if used for a public purpose. Furthermore, City Council possesses the discretion to make such allocations if it has a reasonable basis for concluding that a public purpose will be served.

Prospective rebates could encourage installation of low-flush toilets, thereby reducing future water use. By rewarding and recognizing citizens

who already have taken steps to cut their water use, retroactive rebates may encourage others to install water-saving toilets. If the City Council wishes to provide retroactive rebates, it must make a reasonably based legislative finding that retroactive rebates would serve this specific public purpose.

During a time of severe drought and potential reduction in water supplies, using City funds to encourage significant water conservation appears to meet the public purpose requirement. Accordingly, a properly enacted retroactive establishment of the rebate program would not appear to be an improper gift of public funds if the City Council specifically finds that the retroactive rebate serves a valid public purpose.

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