

MEMORANDUM OF LAW

DATE: July 12, 1991  
TO: Milon Mills, Jr., Water Utilities Director  
FROM: City Attorney  
SUBJECT: Capacity Charge Waivers

You requested that this office review the temporary capacity fee waivers granted to certain properties in the instance of temporary irrigation or preliminary development. These waivers have had a two year term with the option of a one year extension. Many have expired without any action being taken by either the City or the waiver applicant to 1) extend the waiver, 2) remove the water meter, or 3) collect the water capacity fee.

The question currently posed with regard to expired temporary waivers is at what rate should the water capacity fee be paid assuming the waiver applicant elects to make the connection "permanent" and avoid removal of the water meter. It should be noted that the waiver itself does not indicate the rate to be charged upon expiration of the waiver.

The waiver applicant has enjoyed the benefit of water services without paying the capacity fee imposed by San Diego Municipal Code section 67.72, which states:

Section 67.72 Capacity Charge

A minimum capacity charge shall be established from time to time by a resolution of the City Council; provided, however, that prior to considering any change in said capacity charge by resolution as aforesaid, a notice of the proposed change shall be posted by the City Clerk at least ten (10) days prior to consideration of such a resolution by the City Council. Said charge shall be paid when any person, firm, corporation or other entity shall request a new water connection or in any way cause

an increase in the water usage by the addition of any type of dwelling, commercial or industrial unit based upon an increase in the water consumption as measured by equivalent family unit or units or portion thereof. Said measurement shall be made by the City Manager or his authorized representative and for the purposes of this section an equivalent family unit shall equal consumption of 500 gallons of water per day.

The water capacity charge shall be due and payable at the time the building permit fees or connection fees are paid, or if a building permit is not required, at the time the water connection

fees must be paid. In any case, this water capacity charge must be paid before the water use (flow) increase is accomplished.

Notwithstanding anything contained in this section, no minimum capacity charge shall be required with respect to a request for the addition of any equivalent family unit or units when a building permit application for such addition was filed with the City prior to March 19, 1974.

Upon approval by the City Manager the capacity charge may be waived or delayed for a specific period of time for the purposes of temporary irrigation or preliminary development.

This one-time fee, which is levied upon any new connection to the system, is used to finance expansion of the water system. The waiver applicant has thus benefited by being connected to the system without sharing in the expense incurred to accommodate his use. The waiver applicant, in signing the waiver, asserts that his use is temporary pursuant to San Diego Municipal Code section 67.72. "Upon approval by the City Manager the capacity charge may be waived or delayed for a specific period of time for the purpose of temporary irrigation or preliminary development." San Diego Municipal Code section 67.72.

The use is no longer "temporary" following expiration of the waiver. The waiver applicant continues to reap the benefit of essentially free capacity since the meter remains in place. It is, therefore, this office's recommendation that you seek compensation at the current capacity fee rate in light of the benefit received by the waiver applicant.F

Of additional interest, and analogous to the present situation, is Ordinance No. O-17576 (New Series) which was adopted on January 9, 1991. This ordinance, which amended San Diego Municipal Code section 64.0410 dealing with sewer capacity charges, reads in pertinent part:

Any person, firm, corporation, or other entity pumping groundwater to the sewerage system, under the guidelines established by Division 5, Industrial Wastewater, shall be eligible for an industrial users wastewater discharge permit issued by the City Water Utilities Department Industrial Waste Program, and a waiver of capacity charges, for a period of one (1) year. Upon expiration of the discharge permit issued by the City and the original waiver of capacity charges, an extension of the waiver of capacity charges for up to a two (2) year period or any part thereof may be granted by the City Council if the individual, firm, corporation, or other entity has applied for a National Pollutant Discharge Elimination System (NPDES) Permit from the Regional Water Quality Control Board and demonstrates that the discharge will not adversely

affect the publicly owned treatment plant. Such waivers shall run with the land to prevent subsequent waivers upon the sale or exchange of the property by the permit holder. If, upon expiration of the original permit issued by the City and the waiver of capacity charges (including any extension if applicable), the discharge continues, capacity charges will be levied at the then current rates. Additional extensions of capacity charge waivers are not allowed. Capacity charges are not refundable. Emphasis added.

We caution that waiver applicants could potentially raise the defense of equitable estoppel. The waiver states that "the water meter will be removed at the end of the waiver term unless the waiver is renewed or the water capacity fees have been paid." At the time of expiration, the City did not remove the water meters. In order to successfully raise the defense of equitable estoppel, the applicant would have to meet four requirements: " (1) The party to be estopped knows the facts, (2) he intends his conduct to be relied upon, (3) the other party is ignorant of the facts, and (4) the other party has relied upon the conduct to his injury. Citations omitted." *Lix v. Edwards*, 82 Cal.App.3d 573, 580 (1978).

We recognize that the imposition of current capacity fees on expired waiver applicants could present serious financial consequences for them. San Diego City Charter section 93 states, in pertinent part: "The credit of the City shall not be given or loaned to or in aid of any individual, association or corporation . . . ." Absent the establishment of an equitable estoppel circumstance, this Charter section would preclude the adoption of an installment payment plan. Consequently the waiver applicant must pay the present capacity fee or suffer removal of the water meter.

We recommend that you provide waiver applicants sixty (60) days notice, to conform with the department's normal billing period, stating that water meters will be removed if the capacity fees are not paid.

We recognize this to be a sensitive issue and look forward to assisting you in redrafting the waiver application to avoid future problems of this nature.

JOHN W. WITT, City Attorney

By

Marguerite S. Strand

Deputy City Attorney

MSS:pev:mb:427(x043.2)

ML-91-51