

MEMORANDUM OF LAW

DATE: April 7, 1992

TO: Charles Yackly, Deputy Water Utilities Director,
Services Division

FROM: City Attorney

SUBJECT: Training Facility Rental Fees

By means of your memorandum of March 10, 1992, you describe a new training facility that will have facilities available for use by other city departments and the public. Since the facility was built with both water and sewer revenue funds, you ask:

1. What discretion does the Water Utilities Department have in waiving fees and deposits for these facilities?
2. Is the Water Utilities Department precluded from charging lower fees to nonprofit organizations?

The Water Utilities Department is precluded by both Charter and covenants from waiving fees and deposits, although reduced fees that cover actual costs may be provided for nonprofit organizations. Our analysis follows.

1. WAIVER OF FEES

While we have been careful for San Diego City Charter purposes to distinguish between water and sewer fund restrictions, we need not observe that distinction here since the facilities in question were built with both water and sewer revenues. Hence the restrictions of San Diego City Charter Section 53 (Water Utility), Section 90.1 (Water Bonds) and Section 90.2 (Sewer Bonds) must be reviewed to determine if a waiver of fees is prohibited.

Fortunately this review has been conducted in numerous prior opinions from this office. (See 1980 Ops. S.D. City Atty. 69-73; 1967 Ops. S.D. City Atty. 37-40; 1966 Ops. S.D. City Attorney 157-165; 1965 Ops. S.D. City Atty. 23; 1947 Ops. S.D. City Atty. 98-100; 1933 Ops. S.D. City Atty. 526-531; 1932 Ops. S.D. City Atty 362-363; 1932 Ops. S.D. City Atty. 177-182.) Each yielded the conclusion that the water and sewer utility is "self sustaining and financially independent" and by virtue of the series of bonds it has issued, a contract with the bondholders has been formed from the bond covenants that further restrict its use of revenues.

The independent nature of the utility is well described in the attached City Attorney Opinion No. 80-6 and its August 29, 1967 attachment detailing the then-existing bond indebtedness. Hence we reaffirm the conclusion that utility owned property may not be leased to

others without payment of the reasonable value of the property. See page 4 of Opinion No. 80-6. While this opinion is based on 1958 Series A and B bond covenants that have since been retired (Schedule A-2, page 46 of 1991 Annual Financial Report), the utility has outstanding Sewer Revenue Bonds, 1961 Term Bonds and Sewer Revenue Bonds, 1966 A and B (Schedule A-2, page 78 of 1991 Annual Financial Report), both of which have similar covenants:

Section 13(8)

No Free Service

. . . No building or other real property of the sewer system and no services of the sewer system shall be furnished free to other departments of the City.

The City shall pay into the Sewer Revenue Fund the reasonable value of any such services rendered other departments of the City and the reasonable rental value of any property so used. Emphasis added.

Just as it did in 1967 (see page 5 of August 29, 1967 memorandum), so it does twenty-five (25) years later, this covenant plainly prohibits the free use of any building of the sewer utility. Hence the department may not waive fees for the use of these facilities. Moreover the fees charged must cover the reasonable value of utility investment since any lesser charge would amount to an improper subsidy in contravention of the covenant.

2. DEFERRING RATES FOR NONPROFIT ORGANIZATIONS

The requirement of a reasonable rental value of the assets, however, does not preclude a tiered rate structure. Rather, different rental rates can be applied to nonprofit corporations as long as they satisfy the "reasonable value" test of the bond covenant supra and they are uniformly applied to all nonprofit organizations. 12 McQuillin, Municipal Corporations 34.104; July 5, 1990 Memorandum of Law. Indeed the City has existing policies favoring lower rates for nonprofit corporations. Cf. Council Policy 700-4 and 700-8.

Hence we have no hesitancy in advising that a tiered fee system may favor nonprofit corporations. The caveat, rather, is that a different fee still must meet the "reasonable value" test of the bond covenants. Given the previous description of an independent utility and the "reasonable value" test, we believe that where fees to nonprofit corporations cover all actual costs and hence admit of no subsidy by the utility, this test is met. While we cannot pass on the precise amounts listed in your fee schedule, you assert they are all above "actual cost" and hence should meet this test.

CONCLUSION

Both because of its status as an independent utility under the San Diego City Charter and its outstanding bond covenants, the Water Utilities Department is precluded from waiving fees for outside use of its facilities. It may, however, establish a tiered system of fees as

long as it is uniformly applied and the fees represent "reasonable value" for revenue return to the utility.

JOHN W. WITT, City

Attorney

By
Ted Bromfield
Chief Deputy

City Attorney
TB:mb:710.6(x043.2)
Attachment:1
Opinion No. 80-6
cc Deneise Tefft
ML-92-32