

MEMORANDUM OF LAW

DATE: July 15, 1992

TO: Roger C. Graff, Deputy Director, Engineering  
Division, Water Utilities Department

FROM: City Attorney

SUBJECT: Sewer and Water Capacity Charges

Pursuant to the San Diego Municipal Code ("SDMC") sections 64.0410 and 67.72, the Clean Water Program ("CWP") and the Water Utilities Department ("Department") charge a one-time capacity fee for a new or larger connection to the sewer or water systems. Due to increasing concerns regarding the supply of water for the San Diego area a number of commercial businesses have begun to install water saving devices, such as grey water recycling units. Having no previous data on the water usage of these recycling units, the Department has used the manufacturer's calculations on water usage to determine the customer's capacity, and notified the customer that the Department has the right to reevaluate the capacity and adjust it upward if necessary. You have asked our office to evaluate the method by which the Department currently is collecting capacity charges and whether it conflicts with the Municipal Code. The analysis which follows is equally applicable to the procedures employed by CWP for determining sewer capacity.

ANALYSIS

SDMC section 67.72 provides that a capacity 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 . . . ." This charge is due and payable at the time the building permit fees or water connection fees are paid. SDMC Section 64.0410 has similar provisions regarding capacity charges for new or additional sewer connections or a connection which in any other way increases a business' flow into the sewer system. This capacity charge also is due and payable at the time the building permit fees are paid or at the time the sewer connection fees are paid.

SDMC section 64.0300 provides that "any powers granted or duties imposed upon the City Manager may be delegated by the City Manager to persons in the employ of the City." The City Manager is further granted the authority to make and enforce regulations

necessary to the administration of the SDMC. With respect to the administration of water and sewer capacity charges, the City Manager has delegated those duties to CWP and the Department. Accordingly, CWP and the Department have undertaken procedures for enforcing SDMC sections 64.0410 and 67.72. The question the Department has raised is whether those procedures are proper. Specifically, whether the Department may reevaluate the capacity charges of a customer after they have been paid by the customer.

The administration of regulations by a government agency is a quasi-legislative act. *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 34 n.2 (1974). The review of quasi-legislative acts of an administrative agency "is limited to an examination of the proceedings before the agency to determine whether its action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and give the notices required by law." *Brock v. Superior Court*, 109 Cal. App. 2d 594, 605 (1952); *Pitts v. Perluss*, 58 Cal. 2d 824, 833 (1962).

With respect to the procedures adopted by the Department, it is clear they are not arbitrary, capricious, or totally lacking in evidentiary support. At the time the capacity charge is determined, the Department must rely on information provided by the manufacturers of the water saving devices. Thus, there is insufficient information at the time the capacity charge is paid to determine if the manufacturer's estimate is in fact correct. Consequently, more information is needed after the devices are installed and used to verify that the capacity into the system is accurate. Moreover, customers subject to this reevaluation procedure are given sufficient notice of the Department's actions. At the time a customer pays its capacity charge, the Department provides notification that this charge will be reevaluated to verify the manufacturer's estimate. The reevaluation is based upon actual flow into the system over an extended period of time. The reevaluation procedure therefore is not lacking in evidentiary support.

In order to safeguard the rights and interests of the customer, we would suggest the Department review its procedures to insure uniformity in enforcement. First, we would suggest the Department obtain a written agreement from each customer who will be subject to a reevaluation acknowledging it has received notice of the reevaluation procedure and that the City has the right to adjust its capacity charge based upon actual water use. This agreement may take the form of an actual contract between the customer and the City.

Second, we would suggest the Department clearly define which customers will be subject to this reevaluation process and

establish specific criteria for making that determination. Only those customers whose capacity in the system reasonably can not be verified at the time the capacity fee is charged should be subject to reevaluation. Ad hoc decisions subject the procedure to claims that it is arbitrary and capricious.

Finally, these same suggestions apply to CWP in its administration of SDMC section 64.0410. If CWP employs a reevaluation procedure in the administration of capacity charges, it should obtain a written agreement from the customer and establish clear guidelines for enforcement.

#### CONCLUSION

The current procedures established by the Water Utilities Department for enforcing capacity charges do not conflict with the SDMC. Additionally, the procedures are not arbitrary or capricious, but are founded upon evidentiary support. However, in order to insure that customers are given sufficient notice that their capacity charges may be subject to an increase, the Department should obtain a written agreement from customers. Finally, the Department should establish specific criteria for determining which customers are subject to the reevaluation process.

We hope this information will be helpful to you. If you have any additional questions however, please do not hesitate to contact our office.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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