

MEMORANDUM OF LAW

DATE: July 24, 1992

TO: Councilmember Tom Behr

FROM: City Attorney

SUBJECT: Sewer Fee Rate Structure Based on Water Use

By memorandum of July 20, 1992 you point out that the Council is scheduled to consider a proposed sewer rate structure based on water use. See City Manager's Report No. 92-241. Since the Council has been previously advised that sewer facilities that have used federal grant funds are subject to federal restrictions on rate structure, you question the legality of basing the sewer rates on water use. Since this matter is scheduled to be heard on July 27, 1992, you ask for our priority review of this issue, which we provide.

The essential background of this issue is succinctly captured in Manager's Report No. 92-241 which, due to the press of time, we quote without elaboration.

On June 19, 1990, the City Council originally approved the concept of a water use-based sewer charge. Their objectives were to provide greater equity to SFD sewer customers and to foster conservation.

The winter months water use billing structure results in a "customized" flat-rate sewer bill for each customer which is directly related to average water use during the previous winter. The winter months (December - March) are monitored because external water usage for landscape irrigation purposes is normally minimized during this period, resulting in the best approximation of the actual volume of water entering the sewer.

The winter months water use-based sewer billing rate structure (as well as the current flat rate

structure) has been approved by the State Water Resources Control Board (SWRCB). The City became subject to the regulations of the SWRCB when it accepted approximately \$20 million in grants from the Environmental Protection Agency (EPA) for the planning, engineering and construction of site improvements at the Point Loma Sewage Treatment Plant in 1980. Failure to conform to SWRCB regulatory requirements will result in forfeiture and repayment of the grants.

Manager's Report No. 92-241, page 3 emphasis in original

Hence the above quote establishes a) that a water-based sewer rate was used before without federal challenge, and b) that the State Water Resources Control Board has sanctioned the use of a water-based sewer rate. Such sanction is expressly authorized:

D. Regulations Affecting Rate Determination

1. The portion of the annual revenue requirements which constitute the cost of O&M (including replacement) of the treatment works must be recovered from users of the system by means of a user charge system based either on actual use or through an approved ad valorem tax system. The total O&M budget may, however, be offset by income derived from the operation of the wastewater facilities; such as sale of used equipment, sludge, sludge gas, power created by the effluent or from residues, renovated wastewater, farm corps sic, or other byproducts, as well as investment income from wastewater treatment related assets. The user charge system must result in the distribution of O&M costs among all users in proportion to their loadings on the treatment works. (Clean Water Act, Section 204(b)(1)(A); 40

CFR 35.2140.) A user charge based on actual use may take the form of a flat rate, unit rate on water consumption, fixture unit rate, equivalent dwelling unit, or other type of charge which recovers the cost equitably.

Revenue Program Guidelines for Wastewater Agencies, April 1983 at pages 7-8 emphasis added

As we reported to the Public Services and Safety Committee in our Report No. 87-31 on August 4, 1987, sewer charges affected by federal grant funds must be "fair and equitable." Per the Program Guidelines, this requirement is satisfied by either a fixed flat rate charge or a unit rate charge based on water consumption. Hence we opine that either charge is a valid method of establishing sewer rates and therefore within the legal discretion of the City Council.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:mb:453(x043.2)

cc H.R. Frauenfelder

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Dennis H. Kahlie

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