

MEMORANDUM OF LAW

DATE: March 12, 1993

TO: Pete Hogan, Legislative Services Department

FROM: City Attorney

SUBJECT: Waiver of Water and Sewer Fees

By memorandum of March 11, 1993, you requested our views on whether water and sewer capacity fees can be waived and, if so, the provisions of such a waiver. Complicating this request, however, is your desire to have an answer by March 12, 1993 in order to prepare for the Public Facilities and Recreation Committee (PF&R).

As we have reviewed this issue on numerous other occasions, your request can be accommodated. Owing to the City Charter, state law and express bond covenants, capacity fees may not be waived. The supporting authority follows.

Reviewing the authority in reverse order, there are three (3) sewer revenue bonds outstanding (Sewer Revenue Bond 1961 Term Bonds, 1966 A and 1966 B) totaling \$15,089,000. Schedule A-2, 1992 Annual Financial Report. Each have express covenants that restrict the use of all sewer revenue. The express language of the original (1961) issue provides:

Covenant 5. No Free Service. The City covenants that except for contracts and agreements existing on the effective date of this Ordinance, no service from the sewer system shall be furnished or rendered to the United States of America, the State of California, the City, any municipal or other public corporation or body or any private corporation or person free, and that, except to the extent that the City is required under contracts and agreements existing on the effective date of this Ordinance, no such service shall be rendered to the aforementioned at rates lower than those charged other

persons for similar 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. Emphasis added.

The clarity of this covenant requires no elaboration. Capacity fees are an integral part of the sewer service and they are not to be waived nor provided at a reduced rate unless done so for a similar class of service.

State law is similarly explicit as to both water and sewer fees.

Section 66013 Water or sewer connection fees; definitions.

(a) Notwithstanding any other provision of law, when a local agency imposes fees for water connections or sewer connections, or imposes capacity charges, those fees or charges shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed, unless a question regarding the amount of the fee or charge imposed in excess of the estimated reasonable cost of providing the services or materials is submitted to, and approved by, a popular vote of two-thirds of those electors voting on the issue.

(b) As used in this section:

(1) "Sewer connection" means the connection of a building to a public sewer system.

(2) "Water connection" means the connection of a building to a public water system, as defined in subdivision (e) of Section 4010.1 of the Health and Safety Code . . .

(3) "Capacity charges" means charges for facilities in existence at the time the charge is imposed or charges for new facilities to be constructed in the future which are of benefit to the person or

property being charged.

California Government Code section 66013

Hence the Government Code expressly limits the use of capacity charges to the "cost of providing the service" and Section 66006 provides for segregation of such fees to "a separate capital account." The whole import of these sections is to restrict the use of capacity fees for only capital expansion and to ensure that payers are charged only for the capital expansion attributable to them. Hence to the extent that any waiver is contemplated for one user, the charge becomes vulnerable from other users who must pay for service beyond that attributable to their discharges.

Section 53 of the San Diego City Charter has consistently been construed to require an independent Water Utility that is wholly dependent upon and must preserve its revenues for operation, maintenance and expansion of its facilities.

From the adoption of the 1931 Charter until now, this concept of a fiscally self-sufficient and self-sustaining Water Utility has been prevalent, and opinions of this office have consistently articulated that concept. (See 1932 Ops. S.D. City Atty. 177-182; 1932 Ops. S.D. City Atty. 362-363; 1933 Ops. S.D. City Atty. 526-531; 1947 Ops. S.D. City Atty. 98-100; 1965 Ops. S.D. City Atty. 23; 1966 Ops. S.D. City Atty. 157-165; 1967 Ops. S.D. City Atty. 37-40.)

From this, it needs no elaboration that a waiver of capacity fees equating to uncompensated service is an anathema to this concept. As we opined in 1980, we reaffirm today.

In summary we believe that to preserve the Water Utility's financial and fiscal integrity and meet the mandate of City Charter Section 53, the City Council, irrespective of bond covenants or restrictions and regardless of the pressure from special interest groups, must examine the disposal of any asset of the Water Utility in a manner which provides the Water Utility with full value for the asset. With this Charter mandate in mind the City Council can meet its responsibilities in accordance with the City Charter provisions.

Emphasis added.

San Diego City Attorney Opinion No. 80-8, June 25, 1980 directed to the Public Facilities and Recreation Committee.

Conclusion

Flowing from bond covenants, state law and the City Charter, capacity fees are designed to compensate for capital construction and may not be waived to provide free service to one user.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

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