

MEMORANDUM OF LAW

DATE: August 29, 1994

TO: Susan C. Hamilton, Assistant Metropolitan Wastewater
Department Director

FROM: City Attorney

SUBJECT: Tentative Map Condition for Reclaimed Water Use

By means of a recent memo, you asked a series of questions framed from Ordinance No. O-17327 (New Series) regarding water reclamation. This ordinance was designed inter alia to facilitate the use of reclaimed water where available, and where appropriate to require the integration of facilities designed to accommodate the use of reclaimed water in certain development water service areas.

To this end, conditions to require a reclaimed water distribution system for irrigation have been inserted into approximately 250 tentative maps. However, you correctly point out that the delivery of reclaimed water is in a state of flux. While reclaimed water was widely embraced in 1989, the modified Consumers' Alternative now envisions one (1) northern reclaimed water facility and the department is currently exploring the feasibility of utilizing a program of water repurification by which reclaimed water will, if permitted by the State Department of Health Services, be introduced directly into potable water reservoirs and distributed directly through the existing conventional distribution system.

In the face of these potential developments, you ask a series of questions principally focused on the advisability and legal exposure of continuing to impose dual irrigation conditions on tentative maps. Specifically you ask:

1. Does the City have an obligation to provide reclaimed water to those projects which have constructed the required facilities pursuant to conditions of approval?
2. What are the consequences if we do not provide reclaimed water to these parcels?
3. Should future projects located within questionable service areas (areas which could potentially be excluded from reclaimed water service) continue to be conditioned for re-claimed water use?
4. As an alternative to requiring the construction of the reclaimed water system at the time of

project development, would it be feasible to require the project proponent to deposit cash or post a bond for future retrofitting, which would be done only if and when reclaimed water becomes available? Or, since future retrofitting would be more expensive, could the project proponent be given the options of constructing the potentially required facilities at the time of development or depositing cash or a bond for future retrofitting?

5. If we do not condition certain otherwise qualifying projects for reclaimed water due to their location in a questionable service area, and then reclaimed water does become available at a future date, may we then require the property owners to retrofit their water systems?

We shall answer these questions seriatim after an initial observation. Unquestionably the City of San Diego has plenary authority to maximize the beneficial use of water and to minimize the unreasonable use of water. California Constitution, article 10, section 2; San Diego City Charter section 3; and San Diego Municipal Code section 67.01 et seq. Moreover we are mindful of California's "big thirst" ("State Report warns that demands for water may make shortages common by the year 2020." Los Angeles Times, December 2, 1993, page A-3). With such a broad mandate, the City of San Diego has wide latitude in how to implement this mandate. One such tool is to restrict the use of potable water for irrigation, which is precisely the current thrust of the condition placed on tentative maps, sample wording of which follows:

All common areas and/or open spaces that require irrigation shall be irrigated with reclaimed water as specified in City Council Ordinance O-17327. The developer shall design and install a reclaimed water distribution system within the subdivision in accordance with "Rules and Regulations for Reclaimed Water Use and Distribution within the City of San Diego." The irrigation system shall initially be supplied from the potable water system until reclaimed water is available. The system shall be designed to allow the conversion from potable to reclaimed water service and avoid any cross connections between the two systems. If you have any questions concerning this condition, contact Cesar Lopez of the Metropolitan Wastewater Department, at 235-1959.

Such conditions are arrived at in accordance with the ordinance which, before imposition of such conditions, requires the preparation of a water reclamation master plan and the designation of reclaimed water service areas.

Section 64.0806 Water Reclamation Master Plan

(a) GENERAL: Upon adoption of this ordinance, the City shall prepare and adopt a Water Reclamation Master Plan to define, encourage, and develop the use of reclaimed water within its boundaries. The Master Plan shall be updated every five years. The Master Plan may be one or more documents covering specific portions of the planning area.

(b) CONTENTS OF THE RECLAMATION MASTER PLAN: The Master Plan shall include, but not be limited to, the following:

(1) PLANTS AND FACILITIES. Evaluation of the location and size of present and future reclamation treatment plants, distribution pipelines, pump stations, reservoirs, and other related facilities, including cost estimates and potential financing methods.

(2) RECLAIMED WATER SERVICE AREAS. A designation, based on the criteria set forth in Section 64.0802 and the information derived from Sections 64.0806(b)(1) and (b)(2) of the areas within the City that can or may in the future use reclaimed water in lieu of potable water. Reclaimed water uses can include, but are not limited to, the irrigation of greenbelt and agricultural areas, filling of artificial lakes, and appropriate industrial and commercial uses

.....

San Diego Municipal Code section 64.0806

It is only after such a plan and designated service areas that the ordinance provides for the implementation of conditions.

(d) DEVELOPMENT AND WATER SERVICE APPROVALS:

(1) CONDITIONS. Upon application by a developer, owner or water customer (herein re-ferred to as "applicant") for a tentative map, subdivision map, land use permit, or other development project as defined by Government Code section 65928, the City Manager shall review the Master Plan and make a preliminary determination whether the current or proposed use of the subject property requires it to be serviced with reclaimed water or to include facilities designed to accommodate the use of reclaimed water in the future, due to its location within an existing or proposed re-claimed water service area. Based upon such determination, a permit for such use may be required as a condition of approval of any such application, in addition to any other conditions of approval or service.

San Diego Municipal Code section 64.0807(d)(1)

Within this framework, we answer your questions as follows:

1. DOES THE CITY HAVE AN OBLIGATION TO PROVIDE RECLAIMED WATER TO THOSE PROJECTS WHICH HAVE CONSTRUCTED THE REQUIRED FACILITIES PURSUANT TO CONDITIONS OF APPROVAL?

No. The condition of the subdivision map expressly provides for conversion from potable to reclaimed water service only when "available" and expressly allows the use of potable water to be used until such time. Given the condition and the forward looking language of the ordinance ("may in the future use reclaimed water," Section 64.0806(b)(2)), we find no affirmative promise or commitment that the City has an obligation to provide reclaimed water.

2. WHAT ARE THE CONSEQUENCES IF WE DO NOT PROVIDE RECLAIMED WATER TO THESE PARCELS?

The consequences of not providing reclaimed water would be, of course, the continued use of potable water. Construing this question to extend to compensation or other remediation, we do not believe any such award would be justified since, as stated above, neither the ordinance nor the condition is an express promise or obligation of delivering reclaimed water.

3. SHOULD FUTURE PROJECTS LOCATED WITHIN QUESTIONABLE SERVICE AREAS (AREAS WHICH COULD POTENTIALLY BE EXCLUDED FROM RECLAIMED WATER SERVICE) CONTINUE TO BE CONDITIONED FOR RECLAIMED WATER USE?

The imposition of the condition to require dual piping for irrigation should be imposed only in reclaimed water service areas as detailed in the Reclaimed Water Master Plan. San Diego Municipal Code sections 64.0806(b)(2); 64.0807(d)(1). Moreover the Master Plan "shall be updated every five years." Section 64.0806(a). Given this mandatory language (the use of the word "shall"), future projects should be conditioned only where they are located within such a reclaimed water service area. Hence revisions of size, location and distribution of reclaimed water must be based on the forecast of reclaimed water availability as evidenced in a revised master plan.

4. AS AN ALTERNATIVE TO REQUIRING THE CONSTRUCTION OF THE RECLAIMED WATER SYSTEM AT THE TIME OF PROJECT DEVELOPMENT, WOULD IT BE FEASIBLE TO REQUIRE THE PROJECT PROPONENT TO DEPOSIT CASH OR POST A BOND FOR FUTURE RETROFITTING, WHICH WOULD BE DONE ONLY IF AND WHEN RECLAIMED WATER BECOMES AVAILABLE? OR, SINCE FUTURE RETROFITTING WOULD BE MORE EXPENSIVE, COULD THE PROJECT PROPONENT BE GIVEN THE OPTIONS OF CONSTRUCTING THE POTENTIALLY REQUIRED FACILITIES AT THE TIME OF DEVELOPMENT OR DEPOSITING CASH OR A BOND FOR FUTURE RETROFITTING?

San Diego Municipal Code section 64.0807(d)(1) gives the City Manager broad discretion in imposing a water reclamation condition.

Indeed even if the project is within a reclaimed water service area, the section reads permissibly rather than mandatorily ("a permit for such use may be required" emphasis added). Hence by giving such permissive discretion to the City Manager to even impose the condition, the nature of the condition is certainly within the Manager's discretion. Hence we think the Manager is free to fashion the condition as either actual construction or other reasonable alternatives to construction such as a deposit or other means of guaranteeing performance.

5. IF WE DO NOT CONDITION CERTAIN OTHERWISE QUALIFYING PROJECTS FOR RECLAIMED WATER DUE TO THEIR LOCATION IN A QUESTIONABLE SERVICE AREA, AND THEN RECLAIMED WATER DOES BECOME AVAILABLE AT A FUTURE DATE, MAY WE THEN REQUIRE THE PROPERTY OWNERS TO RETROFIT THEIR WATER SYSTEMS?

Reclamation conditions that are not imposed at the time of subdivision approval may not be retroactively imposed. California Government Code section 66474.2. In determining whether to approve or disapprove a tentative map, the agency must apply only the ordinances, standards and policies in effect on the date on which the tentative map is complete. Daniel Curtin, California Land Use and Planning Law 85 (1994 Ed.).

I trust this is responsive to your five (5) questions and gives you sufficient guidance in implementing the water reclamation conditions.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:mb:(x043.2)

ML-94-70