

## MEMORANDUM OF LAW

DATE: August 31, 1994

TO: Ann K. Sasaki, Senior Civil Engineer, Metropolitan  
Wastewater Department

FROM: City Attorney

SUBJECT: Transfer of Sewer Revenue Funds to Linda Vista Road  
Maintenance District

In a memorandum dated August 4, 1994, you asked this office to evaluate the legality of a proposal to "transfer" up to \$200,000 from a wastewater CIP project account to a special assessment district as "mitigation to the community" for the disruption associated with project construction. The project at issue is the Fiesta Island Replacement Project Digested Sludge and Centrate Pipelines. The project will be funded from the Sewer Revenue Fund (San Diego Municipal Code Section 64.0403). The proposed transfer would involve payment of approximately \$81,000 per year for three years, but not to exceed \$200,000 total, from the project pipeline account to the Linda Vista Road Landscape Maintenance District. You ask whether it would be legal to fund this proposed transfer, and if so, whether any conditions would need to be satisfied.

In analyzing this issue, reference is made to a recent past experience which presented the same question in regard to a different proposed wastewater project. In February 1993, there was growing opposition in Council District 2 to what then was the proposed San Diego River Outfall project, and it was contended by the Council representative from that district that the Point Loma and Ocean Beach communities were being imposed upon with more than their "fair share" of regional wastewater facilities. To ameliorate the perceived overburden, a proposal was advanced to create a "mitigation fund" that would be dedicated to Sunset Cliffs Natural Park. Although the source of funding for the proposal was not formally identified, this office was asked to provide an opinion on the matter based on the assumption that the source would be the Sewer Revenue Fund. A Memorandum of Law dated February 22, 1993 analyzed the question and supplied legal conclusions. That opinion is attached for your reference because it is equally applicable in the present instance.

In summarizing the previously stated areas of concern and applying those observations to the present question, we offer these comments:

1. State Law: Government Code section 66013 provides that capacity fees or sewer connection charges may not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed, unless a two-thirds vote of the electorate approves excess charges. We concluded that "without a two-thirds vote of the electorate, capacity fees that are deposited into the Sewer Revenue Fund may not be used for 'mitigation measures.'" (Memorandum of Law at page 2)

2. San Diego City Charter Limitations and Bond Covenants: San Diego City Charter section 90.2 and the covenants contained in sewer revenue bond indentures restrict the use of sewer revenues except as authorized in the ordinance approving a bond issue. We concluded that "unless a sufficient amount is available and restricted to satisfy the provisions of the . . . bond issues, expenditures for a park mitigation fund would not be permissible." (Memorandum of Law at page 3) This conclusion likewise applies to the proposed landscape district mitigation payments.

Subsequent to the Memorandum of Law in February 1993 and the specific bond issues it mentions, the City approved another sewer bond issue of \$250 million on October 12, 1993. The indenture for this latest issue stipulates that bond proceeds may be used only for "Acquisition Costs," or costs of acquiring, constructing, installing, or improving the project (i.e., metropolitan wastewater system). Bond proceeds cannot be used for operation or maintenance costs. The proposed mitigation for the sludge and centrate pipeline project entails paying maintenance costs of an assessment district, which would be an impermissible use of the bond proceeds. Please note that this restriction regarding use of the bond proceeds is separate from the limitation pertaining to use of the Sewer Revenue Fund, although the two restrictions are correlated. Bond proceeds may be used only for the objectives of the bond issue -- paying wastewater system capital acquisition costs and other costs related to the issue, such as deposits to an interest fund and reserve fund. The Sewer Revenue Fund may be used only for purposes allowed by Charter section 90.2, the Municipal Code, and the various bond indentures which, as noted above, have their own restrictions, and thus the correlation.

3. San Diego Municipal Code: Municipal Code section 64.0403 establishes the Sewer Revenue Fund. Sewer revenues are derived in part from capacity fees, and per Point 1 above, the charge and use of this part of sewer revenue is limited by state law to actual estimated cost of service. Sewer revenues also are partly derived from and dedicated back to bond issues, and per Point 2 above, may be restricted for this purpose as well.

Apart from these limitations, the Sewer Revenue Fund may be used only for the purposes stated in San Diego Municipal Code section 64.0403. The February 22, 1993 Memorandum of Law observed at page 3

that (as of that date) "sewer revenues can be utilized only for purposes specified in subsection (b)." These purposes include: (1) cost of maintenance and operation of the City's wastewater system; (2) cost of extending, constructing, reconstructing, or improving the City's wastewater system; and (3) any purpose authorized by Section 90.2 of the City Charter (i.e., redemption of bonds).

In discussing the permissible uses of the Sewer Revenue Fund, the February 22, 1993 Memorandum of Law distinguished an earlier opinion of this office which approved expenses paid to Mission Bay Park to mitigate continuing Fiesta Island sludge operations from the matter then at hand concerning the proposed San Diego River Outfall and payment to Sunset Cliffs Natural Park. In drawing this distinction, we noted at page 3 an absence of any direct "nexus between the proposed outfall project and the park, and no wastewater or byproduct of same is impacting the park." Similarly, in the present case it could be questioned whether a direct nexus exists between the proposed sludge and centrate pipelines and the landscaping which is the subject of special assessments. This, however, is a factual question to be answered by the City Council, for reasons which follow.

The February 22, 1993 Memorandum of Law concluded that section 64.0403 as it was then written precluded payment from the Sewer Revenue Fund to Sunset Cliffs Natural Park, but it also indicated that nothing precluded City Council approval of an amendment to that ordinance in order to permit such payment. Accordingly, an amendment was adopted by the City Council on September 27, 1993, which added a subsection (c) to section 64.0403, in direct response to this issue. The new subsection will be largely dispositive of the present question. It provides:

Fair share overburdens and mitigation therefrom shall require specific findings by the City Council that a City Council district has been or will be overburdened by more than its fair share of wastewater projects that have been located or constructed, or will be located or constructed, within its territorial boundaries. City Council findings shall be based upon factual and empirical evidence of the overburden and shall require and provide a clear and concise nexus between the overburden caused by the project and any proposed mitigation. Such matters shall be considered at the time when an award of a construction contract resulting in or adding to the overburden is being considered by the City Council. Under no circumstances shall the mitigation compensation require the use of Sewer Revenue

Funds in excess of 2.5% of the estimated construction cost of the project.

Applying these provisions to the present proposal, it appears that the following requirements would need to be satisfied:

- A) The City Council would have to make a specific finding that Council District 5 (where the sludge and centrate lines are proposed) is or will be overburdened by more than its fair share of wastewater projects.
- B) The specific Council finding would also need to be based on factual and empirical evidence showing a clear and concise nexus between the sludge and centrate pipeline project and the proposed mitigation payments to the landscape maintenance district. This means that all foreseeable impacts of the project must be discerned and weighed by the City Council. Consideration must be given to alignment, size, nature, and construction techniques, among other factors likely to bear on the question of project impact and nexus to the landscape maintenance district.
- C) The findings required by Points A and B above may be made by the Council only concurrently with the Council's consideration of the award of the construction contract for the sludge and centrate pipeline project which will result in or add to an overburden. The decision on mitigation must be conjunctive with the decision to contract for construction. For example, a construction contract for the San Diego River Outfall Project was never before the City Council for consideration, so it now would not be permissible under section 64.0403(c) for the Council to even consider payment to Sunset Cliffs Natural Park. Similarly, until the sludge and centrate pipeline construction contract is before the City Council for consideration, no findings regarding "overburden mitigation" may be made under the present code.
- D) The overburden mitigation payment, if any, may not exceed 2.5 percent of the estimated construction cost of the sludge and centrate pipelines. We have not been furnished with

information on this estimated cost, but to the extent that the proposed \$200,000 total payment may exceed 2.5 percent of that cost, the ordinance would be violated.

Points A through D above summarize the provision of the Municipal Code which pertains to overburden mitigation payments, but the authority of that section remains subject to the other restrictions discussed above relating to use of capacity charges, Charter section 90.2, and bond indentures.

#### CONCLUSION

Payment from the sludge and centrate pipeline CIP account may be paid to the landscape district if all of the following conditions are satisfied:

1. The funds to be transferred do not have capacity charges as their source of origin, unless a two-thirds vote of the electorate approves otherwise.
2. The transfer of the proposed \$200,000 would not create an insufficiency in the Sewer Revenue Fund in regard to meeting the requirements of Charter section 90.2 and the covenants contained in bond indentures.
3. Provided that conditions 1 and 2 of this conclusion are satisfied, the question of "overburden mitigation" may be considered by the City Council under Municipal Code section 64.0403(c), which requires: a specific finding that the subject Council District is overburdened by wastewater projects; a finding that there is a direct nexus between the proposed project and the proposed mitigation; conjunctive and concurrent Council consideration of the construction contract and the proposed mitigation; a mitigation limit of no more than 2.5% of estimated construction cost.

This concludes the analysis of your principal question. As an ancillary matter and subject to satisfaction of the above conditions relating to the legality of the transfer, you also asked if the funds should be paid in lump sum for \$200,000 or whether the transfer should be accomplished on an annual basis as district assessments become due. The estimated annual assessments are about \$81,000. In reply, we believe this question is largely one of policy, and the issue could be considered by the Council under Municipal Code section 64.0403(c) at the same time it might deliberate on the letting of the pipeline contract and proposed mitigation for same.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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Attachment

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