

MEMORANDUM OF LAW

DATE: April 25, 1995

TO: Susan Hamilton, Assistant Director, Metro Wastewater

FROM: City Attorney

SUBJECT: Sewer Facility Overburdens in Council District 2

By memorandum dated March 27, 1995, the Councilmember from Council District 2 requested the City Manager to "transfer the \$5,000,000 in mitigation fees from the Point Loma Tunnel Outfall Project to another ongoing or scheduled project." In turn this request was forwarded to your department, and you have sought advice from this office regarding its legal implications.

Some factual background and basic analysis of this "sewer facility overburden" issue is found in earlier Memoranda of Law dated February 22, 1993, August 31, 1994, and January 24, 1995, which are attached. In brief review, this concept originated in early 1993 when there was growing concern in District 2 regarding a project then known as the San Diego River Outfall. The Councilmember from District 2 contended that the district was being overburdened with more than its "fair share" of wastewater projects. He accordingly proposed that a \$5,000,000 mitigation fee should be paid from sewer revenue funds for improvements to Sunset Cliffs Natural Park. This proposal faced legal impediments outlined in the Memoranda of Law mentioned above. Restrictions in state law, the City Charter, and the San Diego Municipal Code ("SDMC") generally proscribed the use of sewer funds for purposes unrelated to the construction, operation, maintenance, or financing of the wastewater system.

This obstacle prompted the Council to amend the SDMC through the addition of subsection (c) to Section 64.0403 in September 1993. This amendment is discussed at pages 3-4 in the August 31, 1994 Memorandum of Law. The ordinance changed the law to allow the expenditure of sewer revenues for mitigation purposes (i.e., objectives unrelated to wastewater collection and treatment) in limited circumstances if the Council can make several specific factual findings at the time a construction contract for the underlying project is let. The analysis of the present proposal largely involves reference to SDMC section 64.0403(c) and its requirement that the Council make specific factual findings prior to approving mitigation fees from sewer revenues. The ordinance also specifies that overburden considerations shall be made by

the Council "at the time when an award of a construction contract resulting in or adding to the overburden is being considered" (SDMC section 64.0403(c)) and limits any mitigation to no more than 2.5 percent of the value of the construction contract creating an overburden.

The proposal to approve \$5,000,000 for Sunset Cliffs Natural Park was approved in concept with the City Council's decision to plan for a Point Loma Tunnel Outfall rather than a San Diego River Outfall. The Point Loma Tunnel Outfall has itself become a project that is no longer planned. No construction contract for the Point Loma Tunnel Outfall Project has ever been considered for award by the Council, and thus no facts regarding district overburden could be found by the Council regarding the impacts of that canceled project. Moreover, even assuming that funds had been approved within the confines of SDMC section 64.0403(c) in order to mitigate an overburden created by a (subsequently canceled) tunnel outfall construction contract, simply transferring those funds to mitigate the effects of other distinct projects would be legally improper without independent specific findings regarding the other projects.

The present request is rationalized with a statement that "other projects have been scheduled in the area which pose the same types of impacts." However, this has not been fully established because (1) the impacts of the tunnel outfall project were never ascertained by formal City Council finding of fact pursuant to SDMC section 64.0403(c); and (2) the "other project(s)" have not been sufficiently identified to permit any comparison. But even if a comparison were possible, the ordinance allows use of sewer funds for mitigation only if Council findings are "based upon factual and empirical evidence of the overburden" and only if such findings "provide a clear and concise nexus between the overburden created by the project and any proposed mitigation." SDMC section 64.0403(c) (emphasis added). The express requirements of the ordinance make each finding uniquely fact dependent. Specificity with reference to both the project and the proposed mitigation will therefore be necessary in order for the Council to make defensible findings of a "clear and concise nexus" between the two. Findings respecting the impacts of one project cannot be merely transferred to an unrelated and separate project.

However, setting aside the transfer idea, let us assume that what is being proposed is independent factual consideration by the Council of the overburden impacts, if any, of the "other projects in the area." Although these are not specifically identified, it is not unreasonable to surmise that these are the improvement projects at the Point Loma Wastewater Treatment Plant which are being undertaken as part of the expansion and upgrade of the metropolitan system. Some of these construction contracts have been recently concluded, some are ongoing, and some are planned for the near future. In common, they are all

situated within the geographic boundary of the plant site. You have asked about the possible applicability of SDMC section 64.0403(c) to these plant projects, including a question as to whether that ordinance could be retroactively applied.

While there are numerous construction contracts associated with the plant improvements at Point Loma, they are all part of a singular objective to expand the plant to a 240 million gallons per day ("MGD") capacity. And since the plans to expand the plant to a 240 MGD capacity confine all improvements to the existing plant footprint, an issue perhaps could be raised whether the improvements should be regarded as one or as several projects. However characterized, the basic plans for all improvements to expand to 240 MGD capacity were developed and approved well prior to the date that the overburden mitigation ordinance was added to the SDMC. Indeed, several of the most significant improvement contracts were already complete before the ordinance was adopted. This fact lends support to a conclusion that overburden issues arise only with projects beyond the 240 MGD capacity footprint.

The legislative history behind the overburden ordinance further bears this out, for the legislative impetus was the tunnel outfall, a project that was to be situated outside the geographic bounds of the Point Loma plant. The construction of a municipal ordinance is governed by the same rules governing construction of statutes. In *re Yick Wo*, 68 Cal. 294 (1885). The primary rule of statutory construction, to which all other such rules are subject, is that courts must ascertain the intent of the legislature. *Rushing v. Powell*, 61 Cal. App. 3d 597 (1976). Courts will turn first to the statutory language for an answer to determine whether the words used unequivocally express the legislature's intent. In *re Andrews*, 18 Cal. 3d 208 (1976). But when the intent is not expressed or the language is not clear, it is to be ascertained from all the circumstances. *Estate of Ryan*, 21 Cal. 2d 498 (1943); *Smith v. Mt.Diablo Unified School Dist.*, 56 Cal. App. 3d 412 (1976).

Applying these rules to SDMC section 64.0403(c), it is plain that the ordinance makes no express reference to the planned improvements at the Point Loma plant, nor any other project for that matter. We then turn to the circumstances surrounding its adoption. As noted above, and as recognized in the present request from Council District 2, the circumstances primarily involved the tunnel outfall, a project which arguably would have burdened District 2 beyond the existing 240 MGD footprint for the plant. At the time the ordinance was adopted, some of the planned expansion improvements upon the plant footprint had already begun, and some significant ones had even been completed, without any previous legislative attention to the question regarding additional burden upon the Council district. Judging only from the circumstances then, it could be well asserted that the ordinance was not intended by the Council to apply to projects within the plant footprint.

If all contracts contained in the plan to expand the plant capacity to 240 MGD are considered to be parts of a single project, it would appear that the legislative intent behind the overburden ordinance precludes application of that ordinance to all of those contracts. This is because ordinances will be given prospective rather than retrospective operation, unless a contrary intent is expressed. *Stanford v. Bailey, Inc.*, 132 Cal. App. 2d 725 (1955). There is no such express provision for retroactive application in SDMC section 64.0403(c), and thus the ordinance should be given prospective construction. The Council, of course, may legislate this matter further to provide a clear expression of intent.

On the other hand, if the various projects planned for the immediate future within the Point Loma plant footprint are each independently viewed to be contributing additional sewage system burdens to the Council district, an argument may perhaps be made that these future projects could serve as a basis for mitigation considerations. If so, these considerations would have to be made separately for each future project at the plant as construction contracts are awarded, as is required according to the ordinance. The planned projects could not be aggregated for mitigation consideration under the provisions of SDMC section 64.0403(c). The piecemeal result that would follow from this perspective of the plans to expand the plant to 240 MGD is inconsistent with the request to immediately transfer \$5,000,000 to mitigate "other projects in the area." Although the legislative history of the overburden ordinance more reasonably leads to the conclusion that the plans to expand the Point Loma plant to 240 MGD capacity should be considered as a whole rather than part and parcel, if a contrary view is advanced, the mitigation issues would have to be addressed one project at a time.

We have the opinion that the overburden ordinance was not intended to apply to projects within the Point Loma plant projects merely by deference to its legislative history. We hasten to emphasize that this history is subject to further clarification or revision by the City Council.

JOHN W. WITT, City Attorney

By

Frederick M. Ortlieb

Deputy City Attorney

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Attachments

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