

**ATTORNEY TO CLIENT
CORRESPONDENCE**

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: September 27, 2007

TO: Andrea Tevlin, Independent Budget Analyst
Greg Levin, Comptroller

FROM: Mark D. Blake, Chief Deputy City Attorney

SUBJECT: Funding Requirement of Charter section 91

At the July 11, 2007 and September 26, 2007 meetings of the Budget and Finance Committee the Independent Budget Analyst asked the Chief Financial Officer for an interpretation of the funding requirements of charter section 91. This question has been sent the office of the City Attorney for further review. The City Attorney has previously written opinions on charter section 91, and those opinions are attached hereto as Exhibit A. It is concluded herein that charter section 91 establishes a mandatory duty for Council to establish a General Reserve Fund that can only be drawn upon in the event of a public emergency after an affirmative 2/3s vote of the Council. Charter section 91 is permissive with respect to the funding level of the General Reserve Fund. To the extent that the City has cash on hand to cover four months of the fiscal year prior to the receipt of taxes, the charter provision would be satisfied by funding the General Reserve Fund at a fiscally prudent level of 5 to 15% of general fund operating expenditures.

Charter section 91 falls under the caption "General Reserve Fund" and reads as follows:

The Council shall create and maintain a permanent revolving fund, to be known as the General Reserve Fund, for the purpose of keeping the payment of the running expenses of the City on a cash basis. Said fund shall be maintained in an amount sufficient to meet all legal demands against the treasury for the first four months or other necessary period of each fiscal year prior to the collection of taxes. This fund may be

expended only in the event of a public emergency when it shall be determined by the affirmative vote of at least two-thirds of the members elected to the Council that such expenditures are necessary in order to insure the safety and lives and property of the City or its inhabitants.”

The scope of charter section 91 is unclear, including whether it requires the establishment of a general reserve fund covering all funds of the City or one that simply covers the City’s General Fund. The language indicates that it must be established “for the purpose of keeping the payment of the running expenses of the City on a cash basis” . . . “sufficient to meet *all* legal demands against the treasury. . . “ This language is sufficiently broad to encompass all funds of the City, including the City’s enterprise funds. The better reading of this section is that charter section 91 is only intended to apply to the City’s General Fund. The City’s enterprise funds (namely water and wastewater) are intended to be self-liquidating operation supported by fees and charges of the respective enterprise. Such fees and charges should be sufficient to provide for the operation and maintenance of such enterprises, including any necessary reserves therefore, without any expectation of emergency funding from the City’s general fund’s reserve. Accordingly, while the matter is not free from doubt, it is the view of the City Attorney that charter section 91 only requires the establishment of a General Reserve Fund for City operating expenses.

As discussed in the earlier City Attorney opinions, charter section 91 was originally authorized when the City charter was adopted in 1931. Charter section 91 was amended in 1963 to liberalize some of its provisions. A reading of the 1963 amendments to charter section 91 indicates that the drafters intended to liberalize the replenishment requirements of the General Reserve Fund, and eliminated the requirement that Council replenish the fund in the same fiscal year that the fund was drawn upon. The 1963 amendments to the charter also contained other amendments to section 69, 71, 77, 92 and 93 of the charter. This memorandum will limit its inquiry simply to an analysis of the language of charter section 91.

As written, Charter section 91 utilizes the mandatory statutory language “shall” in several of its provisions. Whenever the word “shall” appears in a statute it is generally understood that such language connotes a command and leaves little room for discretion. *People v. Municipal Court of Oxnard-Port Hueneme Judicial Dist. Ventura County* (1956) 145 Cal.App.2d 767. The test is whether to construe such words as directory would defeat the purpose of the enactment. *Id.* As such, the following mandatory directives are given to the Council: (i) the Council “*shall* create and maintain a permanent revolving fund to be known as the General Reserve Fund . . . ” (ii) , such fund “*shall* be maintained in an amount sufficient to meet all legal demands against the treasury for the first four months or other necessary period of each fiscal year prior to the collection of taxes” . . . , and (iii) monies can only be expended from the fund “only in the event of a public emergency when it *shall* be determined by the affirmative vote of at least two-thirds of the members elected to the Council that such expenditures are necessary to insure the safety and lives and property of the City or its inhabitants.”

Charter section 91 clearly commands that the Council establish a General Reserve Fund and that, once established, such General Reserve Fund must be maintained and only drawn upon in the event of a public emergency. These are not simply directory but rather impose real duties upon the Council. To read the provisions of charter section 91 as merely directory would defeat the express purpose of ensuring that the City has sufficient cash on hand to meet unexpected contingencies. No attempt will be made to define the contours of the term “public emergency.” Suffice it to say, that such term connotes an event more significant than year-in-year-out budgetary shortfalls or expenditure overages.

What is less clear is the charter section 91 funding requirement. The language of Charter section 91 provides alternative funding methodologies. The General Reserve Fund may be funded at a level sufficient to meet all legal demands against the City for “the first four months” or “other necessary period” of each fiscal year. In so doing the drafters of charter section 91 confounded and confused what appears to be competing aims of this provision. It appears that the drafters were attempting to accomplish two purposes. At one level, the drafters evidence a desire to ensure that the City has available revenues to meet “all legal demands against the City . . . prior to the collection of taxes.” But this is a cash flow concept that may be satisfied by the availability of cash on hand, though the issuance of its tax and revenue anticipation notes under charter section 92 or perhaps interfund borrowings under the authority of charter section 93.

A competing aim of charter section 91 is to create an emergency reserve that can only be drawn upon in the event of a public emergency determined by a two-thirds affirmative vote of the Council.

In City Attorney Opinion 84-3, dated February 28, 1984, this office concluded that to the extent that the legislative body approves the issuance of short term notes (under charter section 92) or authorizes temporary loans to any tax supported funds from any other funds of in the treasury pursuant to section 93, the General Reserve Fund funding requirement can be reduced. In other words, the cash flow metric of charter section 91 can be avoided by virtue of looking at whether the City has cash on hand constituting the first four months of each fiscal year.

However we part company with that opinion to the extent that it suggests that charter section 91 does not require substantial funding. It does. The charter provision evidences the legislative intent that the City Council establishes a reserve that carries over from fiscal year to fiscal year that can only be drawn upon in the occurrence of a public emergency, subject to a two-thirds affirmative vote of the Council. This reserve must be funded if not at the “first four month” level then at a level for such “other necessary period.” Regrettably the charter does not provide guidance for the alternate funding level.

Given that the Council has an obligation under Charter section 91 to establish a General Reserve Fund, it has to fund it at a prudent and fiscally sound level. This office suggests that the guidance provided by the Government Finance Officer’s Association be

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utilized, which suggests funding levels of between 5% and 15% of operating expenditures level. See the Report of the Mayor, Proposed Reserve Policy, dated September 26, 2007.

Therefore, the City Attorney concludes that the Council must discharge its legal obligations under Charter section 91 by establishing and funding a General Reserve Fund in an amount between 5% and 15% of operating expenditures. This amount would be fiscally prudent and would satisfy the spirit of charter section 91. With that said, the City Attorney also concludes that a funding the general reserve at this level may need to be increased should the City not at any time have cash on hand constituting four months of any fiscal year.

Please do not hesitate to contact me if you have any additional questions.

MICHAEL J. AGUIRRE, City Attorney

By

Mark D. Blake
Chief Deputy City Attorney

MDB:jdf

CC: Honorable Mayor
City Councilmembers
Jay Goldstone, Chief Financial Officer