

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: May 3, 2010
TO: The Honorable Mayor and City Council
FROM: City Attorney
SUBJECT: Pledging City-owned Property as Security for City Obligations

This memorandum is in response to a question by Councilmember DeMaio regarding the authority under which the City may pledge City-owned real property as security for its performance of contractual obligations (referred to herein as “debts”), such as granting a deed of trust to secure payments under a settlement agreement.

San Diego Charter section 77 requires “all proceeds received from the sale of city-owned real property” to be deposited in the City’s Capital Outlay Fund. The key term for analysis is the word “received.” The plain meaning of “received” indicates the actual receipt of funds. Under the “plain meaning rule,” words used in a statute should be given the meaning they bear in ordinary use, and if the language is clear and unambiguous, there is no need for construction, nor is it necessary to resort to indicia of legislative intent. *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988).

The proceeds of a foreclosure sale of City-owned real property pledged to secure the payment of City debts would not actually be received by the City. Therefore, Charter section 77 would not prohibit the City from using such property to secure its debts. In summary, upon default of a secured debt, the creditor may foreclose on the security and force a sale thereof. This is often done through a third party (a “Foreclosure Company”) that functions much like an escrow. The proceeds of the sale are received by the Foreclosure Company, who then pays the creditor. If any excess proceeds remain, the Foreclosure Company pays that balance to the debtor. Through that mechanism, only the excess proceeds of the sale are actually received by the debtor. Under such a scenario, any such excess proceeds, if actually received by the City, would be deposited into the Capital Outlay Fund per Charter section 77.

A plain reading of Charter section 77 does not prohibit the City from using its real property to secure its debts. However, real property purchased with restricted funds takes on the character of those funds, and their use as security for the City's debts may be prohibited. Charter section 77 requires that all Capital Outlay funds be used "exclusively for the acquisition, construction and completion of permanent public improvements," except with the consent of two-thirds of the qualified electors of the City, voting at a general or special election. A City Attorney Memorandum of Law dated June 22, 1987, attached hereto, titled "Capital Outlay Fund – Investment of – Use of Interest Earned for Non-Capital Outlay Fund Purposes" opines that "interest earned on Capital Outlay funds must remain in the Capital Outlay Fund and must be used for Capital Outlay purposes" (i.e., the interest follows the principal). *See* 1987 City Att'y MOL 528 (87-66; June 22, 1987). Applying that principle to property purchased with Capital Outlay funds means the property so purchased becomes Capital Outlay property, and the proceeds of the sale of such property would be restricted Capital Outlay funds, regardless of whether those funds were received by the City. Therefore, property purchased with Capital Outlay funds may not be used to secure the City's debts, because a foreclosure sale would direct the proceeds of the sale to a non-Capital Outlay purpose (i.e., paying the City's debt).

Certain Charter provisions restrict other City-owned property from being pledged to secure the City's debts. Charter section 55 prohibits the use of land formally dedicated for park, recreation, or cemetery purposes to be used for any other purpose without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose. If pledged, such property could be sold through foreclosure, with the proceeds applied to payment of the City's debt, which is not a park, recreation, or cemetery purpose. Charter section 219 prohibits the sale of City-owned Pueblo Lands situated north of the north line of the San Diego River unless first authorized by an ordinance duly passed by the Council and thereafter ratified by the electors of the City at any special or general municipal election. A foreclosure sale of Pueblo Lands without such approval would not be valid or binding under the Charter. Charter section 221 prohibits the sale or exchange of City-owned property consisting of 80 contiguous acres or more, whether or not in separate parcels, unless the sale or exchange is first authorized by ordinance of the Council and thereafter ratified by the electors of the City, or sold to or exchanged with a governmental agency for bona fide governmental purposes pursuant to a City Council ordinance. The pledging of such property, with the potential sale through foreclosure, would violate the Charter, unless ratified by the electorate or approved by ordinance as prescribed.

Deed restrictions may also restrict the use of City-owned property to secure debts. Before pledging property unrestricted by the Charter, the grant deed received by the City when the property was acquired should be reviewed to see if there are any deed restrictions that would prohibit pledging such property.

Therefore, the City may pledge City-owned real property not otherwise restricted by the San Diego Charter or the applicable grant deed as security for the payment of its debts. The Charter restricts the use of property purchased with Capital Outlay funds, property formally dedicated for park, recreation, and cemetery use, City-owned Pueblo Lands situated north of the north line of

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the San Diego River, and all or any portion of 80 contiguous acres. However, all Charter-restricted property may have such restrictions lifted by approval of the City's electorate. Deed restrictions may also restrict or prohibit using City-owned property as security for the payment of the City's debts.

JAN I. GOLDSMITH, City Attorney

By /s/ Brock Ladewig

Brock Ladewig

Deputy City Attorney

BL:mm

MS-2010-4

Attachment