

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

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** April 12, 2011

**TO:** Honorable Councilmembers

**FROM:** City Attorney

**SUBJECT:** Establishment of a New Policy for Allocating Business Improvement District Assessment Revenues to the Non-profit Corporations that Administer the Districts

---

**INTRODUCTION**

The current method for allocating Business Improvement District (BID) assessment revenues to the non-profit corporations (non-profits) that administer the BIDs is accomplished through a reimbursement process. As part of the reimbursement process, the City requires the non-profits to show proof of eligible expenditures through submission of receipts and invoices prior to reimbursement. This memorandum is in response to a request by Councilmember Gloria for advice on establishing a new policy that would provide advance, direct payments of assessment revenues on a monthly basis to the non-profits that administer the City's BIDs. The proposed new process for allocating the assessment revenues would be in lieu of the current reimbursement process. This Office understands that you are concerned that the delay in getting assessment revenues to these non-profits under the current process is causing a heavy strain on the BIDs and may be hindering small business growth, prosperity, and responsibility.

**QUESTIONS PRESENTED**

1. Are Business Improvement District assessment revenues public funds?
2. By what procedure could a new allocation process be established?
3. If a new allocation process is established, what additional safeguards must be put in place to ensure accountability of the Business Improvement District assessment revenues?

### SHORT ANSWERS

1. Yes. Business Improvement District assessment revenues are public funds.
2. A new process may be established through an amendment to Council Policy 900-07 and the City Council's passage of a resolution approving the amendment.
3. The City must retain enough control over the administration of the BID assessment revenues to adequately protect the business owners and safeguard against improper use of the assessment revenues.

### BACKGROUND

A BID is a mechanism by which business owners can elect to annually levy assessments against themselves for the purpose of improving business conditions in designated geographic districts. There are a number of California statutes that authorize the formation of such districts. However, what we refer to as a BID in the City of San Diego are those districts that are authorized by the Parking and Business Improvement Area Law of 1989, contained in California Streets and Highways Code sections 36500-36551, (BID Act) for the purpose of promoting economic revitalization of older commercial areas and to improve the scenic, recreational, and cultural attraction of those areas. Cal. Sts. & High. Code § 36501.

The BID Act authorizes BID assessment revenues to be used for physical improvements and activities that benefit the businesses within the district. Cal. Sts. & High. Code §§ 36510, 36513. California Streets and Highways Code section 36510, defines the type of improvements eligible for funding with BID assessment revenues. Section 36510 states:

“Improvement” means the acquisition, construction, installation, or maintenance of any tangible property with an estimated useful life of five years or more including, but not limited to, the following:

- (a) Parking facilities.
- (b) Benches.
- (c) Trash receptacles.
- (d) Street lighting.
- (e) Decorations.
- (f) Parks.
- (g) Fountains.

Cal. Sts. & High. Code § 36510.

California Streets and Highways Code section 36513, defines the type of activities eligible for funding with BID assessment revenues. Section 36513 states:

“Activities” means, but is not limited to, all of the following:

- (a) Promotion of public events which benefit businesses in the area and which take place on or in public places within the area.
- (b) Furnishing of music in any public place in the area.
- (c) Promotion of tourism within the area.
- (d) Activities which benefit businesses located and operating in the area.

Cal. Sts. & High. Code § 36513.

The BID Act mandates that the City Council appoint an advisory board which shall make a recommendation to the City Council on the expenditure of revenues derived from the levy of assessments, on the classification of businesses, and on the method and basis of levying the assessments. Cal. Sts. & High. Code § 36530. The BID Act describes the advisory board’s responsibilities to include:

The advisory board shall cause to be prepared a report for each fiscal year for which assessments are to be levied and collected to pay the costs of the improvements and activities described in the report. The report may propose changes, including, but not limited to, the boundaries of the parking and business improvement area or any benefit zones within the area, the basis and method of levying the assessments, and any changes in the classification of businesses, if a classification is used.

Cal. Sts. & High. Code § 36533(a).

While the provisions of the BID Act require the City Council to designate an advisory board for specific purposes related to the expenditure of the assessment revenues within the respective district, there is no State requirement that the City contract with a non-profit for management and administration of the district. However, pursuant to Council Policy 900-07, the City’s policy is to delegate the administration of the BID program to a non-profit.

Council Policy 900-07 sets out the City's policy regarding the administration of the BIDs:

Administration

- The Council, as part of the annual confirmation of the various B.I.D. budgets, shall designate an entity, generally a non-profit business or merchant's association (the association) within each district to advise the Council on the district budget, assessments and activities and to carry out the improvement program.

Selection of the entity shall be based upon its involvement in small business affairs within the district, demonstrated track record and representation of business.

- The association shall be a legally formed California non-profit corporation whose membership shall include all businesses within the district holding current business tax certificates. The association shall elect its board at an annual meeting of the membership called for that purpose and shall take affirmative [sic (text omitted in original)] to assure its board reflects the ethnic and business diversity of the community; notice of the meeting shall be provided to all eligible businesses.

Council Policy 900-07 at 2.

After the City Council designates a non-profit to administer the BID and levies the annual assessment, the assessment is included as a separate charge on the business tax certificate bill for those businesses located within that BID. Business taxes and BID assessments are due and payable on the first day of the month following the anniversary of the City's issuance of the certificate of payment. Each BID is separately accounted for in its own City fund. The cash balances of substantially all City funds, including the BID funds, are pooled and invested by the City Treasurer for the purpose of increasing interest earnings through investment activities.

Based on current policy, as the non-profits administer their respective BIDs, they submit monthly reimbursement requests to the City. Those requests are reviewed by City Planning and Community Investment Department (CP&CI) staff to ensure that the expenditures are eligible for reimbursement. Once CP&CI staff determine that the expenditure is eligible for reimbursement, staff forwards the reimbursement request to the Comptroller's Office for payment from the appropriate BID fund. City staff further oversees the non-profits' management of the BIDs by attending BID meetings, conducting random site visits, and requiring third-party annual audits. The City does not charge BIDs for the City staff or administrative costs associated with these services. Recently, there have been delays in this process due to, among other factors, the City's recent transition to a new accounting system. It is our understanding that these delays prompted

you to request advice from this Office regarding a change in policy to allow for the advance, direct payment of assessment revenues to the non-profits that administer the City's BIDs.

## ANALYSIS

### I. BUSINESS IMPROVEMENT DISTRICT ASSESSMENT REVENUES ARE PUBLIC FUNDS

In a memorandum addressed to you and Councilmember Faulconer, dated April 1, 2011, this Office opined that Maintenance Assessment District (MAD) revenues are public funds. *See* City Attorney Memorandum No. 2011-2 (Apr. 1, 2011) at 7, attached to this memorandum as Attachment 1. The analysis regarding public funds in the April 1, 2011 memorandum also applies to BID assessment revenues.<sup>1</sup> BID assessment revenues are public funds.

In the case of BID revenues, further support of the public nature of the assessment revenues collected within the BIDs is found in the plenary control the City maintains over the BIDs' assessments and activities. The City Council retains ultimate authority over the expenditure of the assessment revenues and may modify the annual report submitted by the BID advisory board, which includes the budget for the district and the improvements and activities to be undertaken. Cal. Sts. & High. Code §§ 36533(c), 36535(b). Section 36535(b) of the BID Act states:

[T]he city council may order changes in any of the matters provided in the report, including changes in the proposed assessments, the proposed improvements and activities to be funded with the revenues derived from the levy of the assessments, and the proposed boundaries of the area and any benefit zones within the area.

Cal. Sts. & High. Code § 36535(b).

This retention of power is not only provided for by the California Streets and Highways Code, but as held in *Epstein v. Hollywood Entertainment District II Business Improvement District*, "it is required by well-established law, which provides that a public body may only delegate the performance of its administrative functions to a private entity if it retains ultimate control over administration so that it may safeguard the public interest." 87 Cal. App. 4th 862, 873 (2001).

### II. A NEW POLICY REGARDING THE METHOD OF ALLOCATION MAY BE ESTABLISHED THROUGH AN AMENDMENT TO COUNCIL POLICY 900-07

The City Council is responsible for establishing City policies to guide the various functions of the City and, when necessary, establishing procedures by which certain functions are performed. Policies established by the City Council are often adopted by ordinance and included in the San

---

<sup>1</sup> Similarly, the analysis regarding Charter section 93 in the April 1, 2011 memorandum is applicable to BID assessment revenues.

Diego Municipal Code. Other policies may be adopted by resolution as Council Policies. Council Policy 000-01.

Council Policy 900-7 deals with BID procedural matters, including establishment, administration, modification, and disestablishment. Accordingly, a new policy regarding the method of allocating BID assessment revenues to the non-profits that administer the BIDs could be established through an amendment of the current Council Policy. Council Policy 000-01 sets forth the requisite procedure for proposing and adopting such an amendment:

1. The City Council or any standing committee or member thereof, the City Manager, non-managerial department heads, and City Boards and Commissions may originate draft policy proposals for formal consideration by the City Council.
2. The City Clerk shall be responsible for the assignment of tentative and final policy numbers and titles to a proposed policy draft. For these purposes, he shall be consulted prior to the preparation by the originating department of the draft policy. Prior to preparing the draft policy, the originating department will obtain a copy of the current policy from the City Clerk.
3. Drafts of proposed Council policies and amendments to existing policies shall be processed in accordance with the provisions of the Permanent Rules of the Council. Such drafts shall be referred to the appropriate Council Committee for discussion, analysis and preliminary action.
4. Upon approval by the appropriate Council committee, the draft policy shall be delivered to the City Attorney for preparation of a resolution of adoption. Such resolution shall be prepared and processed in accordance with Rule 28 [current rule 7.3] of the Permanent Rules of the Council. A strike-out version of the draft policy shall be prepared and forwarded with the resolution.
5. Proposed policies will then be presented for Council consideration. If Council approves a policy and directs revisions, the originating department will make the changes and forward a final draft and strike-out version to the City Attorney before publication by the City Clerk.
6. After official adoption by the City Council, the City Clerk shall be responsible for duplication of the statement of policy and distribution.

### **III. THE DELEGATION OF ADMINISTRATIVE AUTHORITY MUST BE ACCOMPANIED BY SAFEGUARDS ADEQUATE TO PREVENT ABUSE**

Every year the City Council approves an annual district budget for each BID, which outlines the activities and improvements for which the assessment revenues will be spent in the given fiscal year. The City Council, duly exercising its legislative discretion, contracts with the non-profits, as administrative agents, to perform the administrative function of expending assessment revenues in furtherance of the object for which they were collected.

As discussed above, the City may only delegate the performance of administrative functions, such as administration of the BIDs, to a non-profit if the City retains ultimate control over administration so that it may safeguard the public interest. Courts have determined that the amount of control needed to be retained includes retaining enough power to make fundamental policy decisions and ensuring that the procedure established for the exercise of the delegated power adequately safeguards those affected. *Groch v. City of Berkeley*, 118 Cal. App. 3d 518, 522 (1981). “[T]he Legislature's power to delegate its authority is not unlimited. To survive constitutional scrutiny, a delegation of legislative power must be accompanied by safeguards adequate to prevent an abuse of that power.” *Indep. Roofing Contractors v. Dep't of Indus. Relations*, 23 Cal. App. 4th 345, 354 (1994). Accordingly, an amendment to Council Policy 900-07 changing the reimbursement procedure for non-profits would have to be structured in a manner that would ensure that the revenues are properly expended.

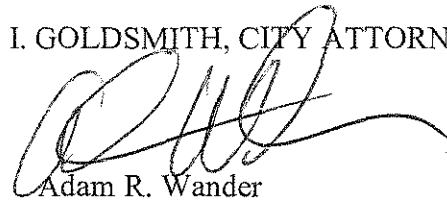
Adherence to the district annual budget is one way to gauge whether the revenues are being properly expended. However, it may be prudent to establish further measures which can be used to ensure adherence to the district budget and adequately safeguard against misuse of the assessment revenues if funds are advanced prior to authentication of the propriety of the expenditure(s). Advance, direct payment of BID assessment revenues to the non-profits that administer BIDs obviously exposes the City to additional risk by virtue of the fact that the City would have less control to ensure the proper expenditure of assessment revenues or recoupment of the funds, restricting the City's ability to safeguard the public interest. Accordingly, any new procedure would have to continue to ensure the proper expenditure of assessment revenues and, if needed, allow the City to quickly and efficiently recoup any funds which were not properly expended.

**CONCLUSION**

BIDs are special assessment districts created by the City to fund improvements and activities in public areas for the benefit of businesses located within the districts. BID assessment revenues are public funds. The City Council may establish a new procedure for allocating assessment revenues to the non-profits that administer the BIDs by way of an amendment to Council Policy 900-07. However, the City Council must be cautious when establishing such a policy because the City Council must ensure that the City retains enough control over the administration of the BID assessment revenues to adequately protect the business owners and safeguard against the improper use of the BID assessment revenues.

JAN I. GOLDSMITH, CITY ATTORNEY,

By



Adam R. Wander

Deputy City Attorney

ARW:js

cc: Jay Goldstone, Chief Operating Officer  
Beth Murray, Deputy Director, City Planning & Community Investment  
Andrea Tevlin, Independent Budget Analyst

PL#2011-05521

MS-2011-3

Attachment



Office of  
The City Attorney  
City of San Diego

MEMORANDUM  
MS 59

(619) 236-6220

**DATE:** April 1, 2011  
**TO:** Councilmember Kevin Faulconer & Todd Gloria  
**FROM:** City Attorney  
**SUBJECT:** Establishment of a New Policy for Allocating Maintenance Assessment District Assessment Funds to the Non-profit Corporations that Administer the Districts

---

**INTRODUCTION**

The current process for allocating Maintenance Assessment District (MAD) revenues to the non-profits corporations (non-profits) that administer certain MADs is done via reimbursement. As part of the reimbursement process, the City requires the non-profits to show proof of eligible expenditures through submission of receipts and invoices prior to reimbursement. Due to perceived delays in the reimbursement process, it has been suggested that a new process for allocating MAD assessment revenues be adopted. This new process would involve the City advancing such revenues to the non-profits prior to the non-profits actually incurring expenses. As part of the discussions on the feasibility and legality of the proposed new process, the issue of whether San Diego Charter section 93 prohibited such advancement of revenues was raised.

**QUESTION PRESENTED**

Does Charter section 93 prohibit advancing money to the non-profits that administer contracts for goods and services on behalf of certain Maintenance Assessment Districts?

**SHORT ANSWER**

No. Charter section 93 does not prohibit any expenditure that serves a valid public purpose or that is made in performance of a bona fide contract. In the matter at hand, the expenditure would meet both requirements.

## BACKGROUND

A MAD is a mechanism by which property owners can elect to assess themselves in order to pay for and receive services beyond what the City normally provides. MADs are governed by California Streets and Highways Code sections 22500 - 22679 (Landscaping and Lighting Act of 1972) and Chapter 6, Article 5, Division 2, sections 65.0201 - 65.0234 of the San Diego Municipal Code. The statutes contain legislative declarations that their purpose and intent is to establish a procedure for making and maintaining certain improvements, as that term is defined in State law, and to provide a method for the City Council to authorize a non-profit to assume responsibility for the administration of certain contracts within a MAD. Cal. Sts. & High. Code § 22502; SDMC §§ 65.0201(a), (e).

California Streets and Highways Code section 22525, defines the type of improvements eligible for funding with MAD assessment revenues. Section 22525 states:

“Improvement” means one or any combination of the following:

- (a) The installation or planting of landscaping.
- (b) The installation or construction of statuary, fountains, and other ornamental structures and facilities.
- (c) The installation or construction of public lighting facilities, including, but not limited to, traffic signals.
- (d) The installation or construction of any facilities which are appurtenant to any of the foregoing or which are necessary or convenient for the maintenance or servicing thereof, including, but not limited to, grading, clearing, removal of debris, the installation or construction of curbs, gutters, walls, sidewalks, or paving, or water, irrigation, drainage, or electrical facilities.
- (e) The installation of park or recreational improvements, including, but not limited to, all of the following:
  - (1) Land preparation, such as grading, leveling, cutting and filling, sod, landscaping, irrigation systems, sidewalks, and drainage.

(2) Lights, playground equipment, play courts, and public restrooms.

(f) The maintenance or servicing, or both, of any of the foregoing.

(g) The acquisition of land for park, recreational, or open-space purposes.

(h) The acquisition of any existing improvement otherwise authorized pursuant to this section.

(i) The acquisition or construction of any community center, municipal auditorium or hall, or similar public facility for the indoor presentation of performances, shows, stage productions, fairs, conventions, exhibitions, pageants, meetings, parties, or other group events, activities, or functions, whether those events, activities, or functions are public or private.

Cal. Sts. & High. Code § 22525.

Under the San Diego Municipal Code, if a non-profit wishes to establish the right to administer contracts for goods and services on behalf of a MAD, that non-profit must provide written documentation verifying that property owners representing "at least a majority of the parcel area" of the MAD support the non-profit assuming responsibility for administration. SDMC § 65.0212(a). Upon submission of such documentation, the Mayor will docket for City Council review a resolution authorizing the Mayor to enter into an agreement with the non-profit for administration of the MAD. SDMC § 65.0212(c). MADs in which a non-profit administers the contracts for goods and services are referred to in the City as "self-managed" MADs or "self-administered" MADs.

After a MAD is successfully formed, City staff prepares the annual enrollment and delivers it to the County Assessor to be included on property tax statements to property owners within the MAD boundaries. MAD assessment revenues are collected by the County Tax Collector at the same time and in the same manner as property tax revenues. The County receives the majority of MAD assessment revenues in December and April. The County then transfers the MAD revenues to the City approximately one month after the County receives it. Each MAD is separately accounted for in its own City fund. The cash balances of substantially all City funds, including the MAD funds, are pooled and invested by the City Treasurer for the purpose of increasing interest earnings through investment activities.

As the non-profits administer their respective MADs, they submit monthly reimbursement requests to the City. Those requests are reviewed by City Planning and Community Investment Department (CP&CI) staff to ensure that the expenditures are eligible for reimbursement. Once CP&CI staff determines that the expenditure is eligible for reimbursement, staff forwards the request to the Comptroller's office for payment from the appropriate MAD fund. Recently, there have been delays in this process due to, among other things, the City's recent transition to a new accounting system. These delays have led to discussions on advancing assessment revenues to the non-profits in order to streamline the process.

## ANALYSIS

### I. THE CITY CHARTER GOVERNS THE MANNER IN WHICH THE CITY MAY APPROPRIATE AND EXPEND FUNDS

San Diego is a charter city. *Mira Development Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1214 (1988). City charters, adopted pursuant to the authority of article XI, section 5 of the California Constitution (Constitution), are not grants of power but act as limitations, and a charter city may exercise all powers in regards to municipal affairs unless specifically and explicitly limited by its charter. See *Taylor v. Crane*, 24 Cal. 3d 442, 450 (1979); *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598-99 (1949). The determination of fiscal policies and procedures is a municipal affair. *Cramer v. City of San Diego*, 164 Cal. App. 2d 168, 171 (1958). The exercise of power by a charter city is favored against any limitation or restriction on that exercise "which is not expressly stated in the charter. . . . So guided, reason dictates that the full exercise of the power is permitted except as clearly and explicitly curtailed. Thus, in construing the city's charter, a restriction on the exercise of municipal power may not be implied." *City of Grass Valley*, 34 Cal. 2d at 599. Accordingly, the Charter provides the authority for, and limitations upon, the manner in which the City may appropriate and expend funds.

### II. THE CITY MAY MAKE AN EXPENDITURE FOR A VALID PUBLIC PURPOSE OR IN PERFORMANCE OF A BONA FIDE CONTRACT

Several limitations exist in the Charter regarding the City's ability to expend funds. For example, the City may not incur indebtedness beyond its fiscal year without a vote of the electorate nor enter into contracts for more than five years without a two-thirds vote of the City Council. San Diego Charter § 99. These limitations are not applicable to the question presented here. Charter section 93, however, sets forth the relevant limitation that may apply. It provides, in pertinent part: "The credit of the City shall not be given or loaned to or in aid of any individual, association or corporation; except that suitable provision may be made for the aid and support of the poor." The City Attorney has previously opined that this provision is similar to article XVI, section 6 of the Constitution, and the cases interpreting that constitutional provision

are relevant in interpreting the Charter provision.<sup>1</sup> See 1979 Op. City Att’y 8 (79-2; Mar. 2, 1979); 1979 City Att’y MOL 168 (Sept. 4, 1979); 1952 Op. City Att’y 23 (Feb 27, 1952).

Article XVI, section 6, is generally referred to as prohibiting a “gift of public funds.” See, e.g., *California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575, 582-83 (1976); *County of Alameda v. Carleson*, 5 Cal. 3d 730, 745 (1971). An exception to this prohibition exists if a “public purpose” is served by the expenditure. “Money spent for public purposes is not a gift. . . .” *Community Memorial Hospital v. County of Ventura*, 50 Cal. App. 4th 199, 207 (1996). See also *White v. State of California*, 88 Cal. App. 4th 298, 311 (2001).

In *Carleson*, one of the leading cases concerning the prohibition against the making of gifts or the lending of credit, the court explained the meaning of the proscription:

It is generally held that in determining whether an appropriation of public funds is to be considered a gift, the primary question is whether the funds are to be used for a ‘public’ or ‘private’ purpose; the benefit to the state from an expenditure for a public purpose is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom. The determination of what constitutes a public purpose is primarily a matter for the Legislature, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis.

*Carleson*, 5 Cal. 3d at 745-46 (citations omitted).

*Carleson* has been followed by numerous court decisions (See, e.g., *Elliot*, 17 Cal.3d 575; *Winkelman v. City of Tiburon*, 32 Cal.App.3d 834 (1973)) and courts have been liberal in deciding what constitutes a public purpose for which expenditures may be made. In *Elliot*, the California Supreme Court held that the Housing and Home Finance Act and resolutions promulgated thereunder, which authorizes, among other things, a public agency to make loans to private housing sponsors and mortgage lenders at below-market rates, do not amount to a gift of public funds. Citing *Carleson*, the Court gave great weight to the public purposes found by the Legislature regarding the shortage of housing for low and moderate income families. *Elliot*, 17

---

<sup>1</sup>Article XVI, section 6 provides: “The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; . . . .” However, because of a charter city’s control over its fiscal affairs, which, as discussed above, are considered solely “municipal affairs,” the courts have held that Article XVI, section 6 is not applicable to charter cities. *Tevis v. City & County of San Francisco*, 43 Cal. 2d 190, 196-97 (1954); *Mullins v. Henderson*, 75 Cal. App. 2d 117, 132-33 (1946); *Los Angeles Gas & Electric v. City of Los Angeles*, 188 Cal. 307, 317 (1922).

Councilmember  
Kevin Faulconer  
& Todd Gloria  
April 1, 2011  
Page 6

Cal.3d 575 at 583. The Court also found that other public purposes were served such as increasing safe and decent housing and the avoidance of ethnic, economic, and racial isolation. *Id.* at 583-85. “Given the broad public purposes supporting the program and the close relationship between the elements of the program and these purposes, we conclude that the Act, and the Agency’s resolutions thereunder, do not violate the constitutional prohibition against the gift of public funds and extension of public credit.” *Id.* at 586

In *Winkelman*, the City of Tiburon proposed to construct an affordable housing project on land it owned and offered to sell the property well below the market-rate to a private non-profit which would build the project. Adjacent property owners challenged that decision on the grounds that the sale of the property to the non-profit corporation constituted an illegal gift of public funds. The trial court rejected that challenge and the appellate court affirmed, stating that so long as the consideration for the sale was plainly substantial and not nominal, there was no gift of public funds. *Winkelman*, 32 Cal.App.3d at 844-45.

Under *Winkelman*, there is no unconstitutional gift if the transfer promotes a public purpose, therefore providing a benefit to the state “in the nature of consideration,” or if the consideration given in exchange is “‘adequate,’ so as to evidence a bona fide contract.” *Winkelman*, 32 Cal.App.3d at 844-46. The notion that performance of a “bona fide contract” does not amount to a gift of public funds is consistent with past cases such as *People v. City of Long Beach*, 51 Cal.2d 875 (1959), in which the Supreme Court stated, “[i]t is clear, however, that the performance of a bona fide contract by a public body is not the making of a gift. . . .” *City of Long Beach*, 51 Cal.2d 875 at 881.

Therefore, it appears there are at least two tests to determine whether a particular expenditure is a gift of public funds. The first is whether the expenditure promotes a public purpose. If a public purpose is promoted by the expenditure, the public benefit received amounts to consideration in return for that expenditure, and thus, it is not a gift. The second test is whether the expenditure is performance under a bona fide contract. To be considered a bona fide contract, the public agency must receive adequate consideration in return for the expenditure. When determining whether adequate consideration is received or not, it is not necessary to weigh the expenditure against the benefit on a scale. Instead, the public agency need only receive a benefit that is not nominal and plainly substantial. “The law, however, does not require a weighing of the quantum of benefit received by a promisor or of the detriment suffered by a promisee where the consideration is plainly substantial.” *Winkelman*, 32 Cal.App.3d at 845.

As stated above, MADs are formed for the purpose of installing, constructing, and maintaining public improvements, parks, open space, and public facilities beyond what the City normally provides. A strong argument can be made that installing, constructing, and maintaining public improvements, parks, open space, and public facilities at no cost to the taxpayer in this challenging economic environment is a public purpose. Given the deference accorded to legislative bodies, it is unlikely that a court would invalidate a City Council determination that

advancing funds to the non-profits for such improvements constitutes a public purpose. No court has addressed whether the law requires the City to make a formal finding of public purpose. However, this Office advises that City staff include the facts relied upon to determine the public purpose in the staff report, should the City Council decide to adopt a process of advancing revenues to the non-profits. Furthermore, any funds that may potentially be advanced to the non-profits would be in exchange for the non-profits fulfilling their contractual duties to undertake the improvements. Such an undertaking on the part of the non-profits is substantial and more than nominal consideration. Therefore, both tests are met and the advance of funds to the non-profits administering the MADs would not be a violation of Charter section 93.

### **III. THE CITY RETAINS CONTROL OVER THE ASSESSMENT REVENUES, AND THUS, HAS RESPONSIBILITY FOR THE PROPER EXPENDITURE OF THOSE REVENUES**

As a word of caution, it is important to note that no matter what method of allocating MAD assessment revenues to the non-profits is used, those revenues are public funds, and as such, the City is responsible for ensuring that the funds are spent properly. There are only a few court cases which touch upon the issue of assessment district funds being public funds. One such case is *Epstein v. Hollywood Entertainment District II Business Improvement District*, 87 Cal. App. 4th 862 (2001). In *Epstein*, a non-profit corporation administered the funds that the city raised through assessments on businesses in a special assessment district. A property owner within this district brought an action seeking declaratory and injunctive relief to establish that the non-profit was required to comply with the Ralph M. Brown Act and the City's competitive bidding requirements for contracts. The trial court denied plaintiff's motion for a preliminary injunction. The Court of Appeal reversed and remanded, directing the trial court to enter a preliminary injunction in plaintiff's favor. The court held that the non-profit was subject to the Brown Act and stated, in dicta, that the funds involved were public funds. "Very simply, the Brown Act contains no exemptions for decisions about expenditures of *public funds* for 'supplemental services.'" *Epstein*, 87 Cal. App. 4th at 875 (emphasis in original).

The City, as the elected legislative body, retains plenary decision-making authority over the MADs' council activities, in that the City Council may modify any particular contained in the MADs' engineers' reports and budgets. Cal. Sts. & High. Code §§ 22586; 22591; 22623; 22630. This retention of power is not only provided for by California Streets and Highways Code, but it is required by well-established law. The City may only delegate the performance of administrative functions, such as administration of the MADs, to a non-profit if it "retains ultimate control over administration so that it may safeguard the public interest." *Chamber of Commerce v. Stephens* 212 Cal. 607, 610 (1931); *County of Los Angeles v. Nesvig* 231 Cal. App. 2d 603, 616-617 (1965). Advancing funds to the non-profits that administer MADs obviously exposes the City to additional risk by virtue of the fact that the City would have less control to

Councilmember  
Kevin Faulconer  
& Todd Gloria  
April 1, 2011  
Page 8

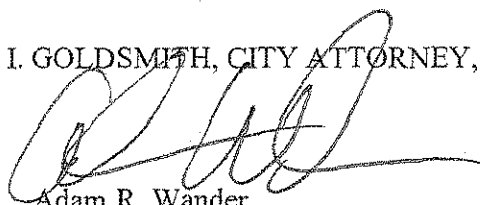
ensure the proper expenditure of assessment revenues and would restrict its ability to safeguard the public interest.

### CONCLUSION

Charter section 93 does not prohibit advancing funds to the non-profits that administer MADs if the City Council finds that a valid public purpose is served by such an advance and a reasonable basis exists to support the finding. A strong argument can be made that the improvements provided by the MADs at no cost to the taxpayer in this challenging economic environment is a public purpose. Given the deference accorded to legislative bodies, it is extremely unlikely that a court would invalidate a City Council determination that advancing funds to the non-profits for such improvements constitutes a public purpose. Furthermore, the advancing of funds would be in performance of a bona fide contract, in that the non-profits' undertaking of those improvements in exchange for the advanced funds is substantial and more than nominal consideration. Therefore, the advance of funds to the non-profits administering the MADs would not be a violation of Charter section 93. However, this Office cautions the City Council that further advancing funds to the non-profits exposes the City to additional risk by virtue of the fact that the City would have less control to ensure the proper expenditure of assessment revenues which could restrict its ability to safeguard the public interest.

JAN I. GOLDSMITH, CITY ATTORNEY,

By



Adam R. Wander  
Deputy City Attorney

ARW:js

cc: Beth Murray, Deputy Director,  
City Planning & Community Investment

PL#2011-05523  
Doc No. 154547  
MS-2011-2