

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

MEMORANDUM

DATE: July 12, 2011

TO: Wally Hill, Assistant Chief Operating Officer

FROM: City Attorney

SUBJECT: Use of Land Sale Proceeds for Debt Service on Deferred Capital Bonds

You have asked if the City can use land sale proceeds for the purpose of funding debt service payments on deferred capital bonds. The Office of the City Attorney discussed this issue in a Memorandum to the Honorable Mayor and City Council dated December 11, 2009, a copy of which is attached hereto for your reference. As your question is a general one, the answer given here is also general and assumes the property sold is not otherwise restricted, such as Water Fund or Gas Tax Fund property.

As you know, land sale proceeds must be deposited into the Capital Outlay Fund as set forth in the San Diego Charter, and those funds may only be used for certain restricted purposes. Charter section 77 reads as follows:

Section 77: Capital Outlay Fund

There is hereby created a fund in the City Treasury, to be known as the Capital Outlay Fund. Into this fund each year there shall be placed all moneys derived from taxation required or needed for capital outlay expenditures and all proceeds received from the sale of city-owned real property.

The moneys in the Capital Outlay Fund shall be used exclusively for the acquisition, construction and completion of permanent public improvements, including public buildings and such initial furnishings, equipment, supplies, inventory and stock as will establish the public improvement as a going concern. This fund may also be used for the acquisition, construction and completion of real property, water and sewer mains and extensions, and other improvements of a permanent character and also the replacement or reconstruction of the same, *but not the repair or maintenance*

thereof, and shall not be used for any other purpose or transferred from said fund, except with the consent of two-thirds of the qualified electors of said City, voting at a general or special election.

No moneys in said fund shall be transferred at the end of a fiscal year, but shall remain therein as trust moneys for the purposes above outlined, and the said fund shall be used and maintained, if possible, as a cash reserve to enable the City to meet public emergencies or acquire needed permanent public improvements without the issuance of bonds.

Each year the Council may appropriate from said fund in the Annual Appropriation Ordinances, except for use of the Harbor Department, sufficient moneys to care for the needs of the various departments of the City for capital outlay expenditures of a permanent character.

(emphasis added)

Funds in the Capital Outlay Fund may be used to pay debt service on deferred capital bonds, but only to the extent that the funds are applied to expenditures allowed under Charter section 77. The payment of soft costs, such as underwriting costs, interest, and attorney fees that are part of the debt service but are not part of the actual acquisition or construction cost is not allowed by Charter section 77.

Alternatively, the use of Capital Outlay Fund monies for the payment of the entire debt service on deferred capital bonds may be allowed with the consent of two-thirds of the qualified electors of the City, voting at a general or special election.

JAN I. GOLDSMITH, City Attorney

By: 
Brock Ladewig
Deputy City Attorney

BLL:mm
PL#2011-06541
MS#2011-04

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: December 11, 2009
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Use of Capital Outlay Fund for Payment of Debt Service

This memo is in response to a question by the City Council regarding the ability of the City to use funds on deposit in the Capital Outlay Fund to pay the debt service on the \$103,000,000 Public Facilities Financing Authority of the City of San Diego Lease Revenue Bonds, Series 2009A (Various Capital Improvement Projects)[Bonds].

The Capital Outlay Fund may be used only for the acquisition and construction or replacement and reconstruction of permanent public improvements. San Diego Charter section 77 states the Capital Outlay Fund may be “used for the acquisition, construction and completion of real property, water and sewer mains and extensions, and other improvements of a permanent character and also the replacement and reconstruction of the same.” Money deposited in the Capital Outlay Fund is considered to be held in trust for those purposes.

Money set aside for a particular purpose may be spent as long as the expenditure fulfills the specified purpose. In *Rancho Santa Anita v. City of Arcadia*, 20 Cal. 2d 319 (1942), the California Supreme Court held that the City of Arcadia could appropriate funds in a bond fund that was to be used for no purpose other than for payment of related bonds where the city had already made payments on the bonds from the city’s water fund. Similarly, in *Shaw v. Chiang*, 175 Cal. App. 4th 577 (2009), an appellate court held that the State of California could use funds deposited in the state’s Public Transportation Account, which is dedicated to mass transportation purposes, to pay debt service on unrelated mass transportation bonds because the money was “being used for an identified mass transportation purpose.” (*Id.* at 610.)

The proceeds of tax-exempt governmental bonds, such as the Bonds, must be spent for appropriate governmental purposes, such as the construction and improvement of public infrastructure. The Bonds were issued on a tax-exempt basis with an opinion from Bond Counsel (Hawkins Delafield & Wood), who reviewed the intended uses of the bond proceeds.

Honorable Mayor and Councilmembers

December 11, 2009

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Moreover, the projects approved by the City Council to be funded with bond proceeds include only capital projects such as streets, sidewalks, storm water drains and facilities.

Funds deposited in the Capital Outlay Fund may be used only for certain specific purposes, primarily the acquisition and construction of permanent public improvements and the replacement or reconditioning of the same. The proceeds of the Bonds were used for the same types of projects that could have been paid for from the Capital Outlay Fund. Therefore, the purpose for which funds were placed in the Capital Outlay Fund would be fulfilled. Notwithstanding, the money in the Capital Outlay Fund may only pay principal and not interest on the Bonds, as the interest payment is not within the purpose of the Capital Outlay Fund.

JAN I. GOLDSMITH, City Attorney

By



Brant C. Will
Deputy City Attorney

BCW:jdf