

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: May 5, 2014

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Use of Environmental Growth Funds for Graywater

INTRODUCTION

Councilmember Lightner previously asked this Office to analyze whether the Environmental Growth Fund (EGF) could be used to further the use of graywater in the City of San Diego. Some possible uses for the EGF that have been identified include public education and outreach, as well as incentive or rebate programs.

BACKGROUND

The EGF was established pursuant to San Diego Charter section 103.1, added to the Charter in 1972. Charter section 103.1a requires that 25 percent of the revenue from any franchises for the transmission and distribution of gas, electricity, and steam within the City be deposited into the EGF.¹ San Diego Charter § 103.1a. The EGF may only be spent for the purpose of preserving and enhancing the environment in the City in whatever manner is deemed appropriate by the City Council; however, two-thirds of the money paid into the EGF must be used as debt service for bonds issued for the acquisition, improvement, and maintenance of open space used for park and recreational purposes. *Id.* If there are no bonds outstanding, or if two-thirds of the money paid into the EGF exceed the amount necessary to service the outstanding bonds in any fiscal year, the money set aside for debt service shall be used, if at all, exclusively for the purpose of

¹ Prior to the adoption of Charter section 103.1a in 1972, the use of 25 percent of the franchise revenues was regulated by ordinance and, just as in Charter section 103.1a, required the funds to be used for the purpose of purchasing, improving, and maintaining open space for park and recreational purposes. According to the argument in support, the purpose of the Charter amendment was to remove the ability of future City Councils to repeal the ordinance or amend it to allow the use of the funds for other purposes. City of San Diego Special Election, Argument for Proposition A (June 6, 1972).

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preserving and enhancing the environment of the City in whatever manner is deemed appropriate by the City Council. *Id.*

The City Council has by ordinance determined a priority list for the expenditure of the EGF that is not required to be used for open space bonds, and must allocate these funds each year during the budget process. San Diego Municipal Code § 63.30. These priorities are: open space maintenance, including litter removal and control; matching funds for acquiring open space in cooperation with other private or governmental entities; Regional Park maintenance; or any other purpose consistent with Charter section 103.1a. § 63.30(b)(1)-(4). Examples of past uses of the EGF are funding of park and recreational improvements such as the Westview and Maddox Neighborhood Parks, the maintenance of open space, and the San Diego River Park Master Plan. Mira Mesa Public Facilities Financing Plan, Fiscal Year 2014 at 122, 124 (Oct. 2013); SDMC § 63.30(b)(1); IBA Report No. 07-073 (Apr. 24, 2007).

Graywater is defined as “untreated wastewater that has not been contaminated by any toilet discharge, has not been affected by infectious, contaminated, or unhealthy bodily wastes, and does not present a threat from contamination by unhealthful processing, manufacturing, or operating wastes.” Cal. Health & Safety Code § 17922.12(a); Cal. Code Regs., title 24 § 209.0. Some examples of graywater are water from showers, bath tubs, and bathroom sinks, as well as from clothes washing; however, graywater does not include wastewater from kitchen sinks, dishwashers, or water used to launder diapers, similarly soiled or infectious garments, or containing any hazardous chemicals such as those involved with cleaning cars, the use of photo labs, and similar activities. Cal. Code Regs., title 24 §§ 209.0, 1602.1 (B), (F). In 2009, in response to direction in Senate Bill 1258 (Cal. Stats. 2008, ch. 172), the California Department of Housing and Community Development amended the California Plumbing Code to encourage and facilitate the greater use of graywater. Previously, graywater was subject to the same requirements as private sewage disposal. Finding of Emergency for Proposed Building Standards of the Dept. of Housing and Community Development Regarding the 2007 California Plumbing Code (June 10, 2009).

This memorandum is intended to provide general guidance regarding the use of EGF to further graywater use; however, each proposed use must be evaluated to determine whether it is consistent with Charter section 103.1a and San Diego Municipal Code section § 63.30. In addition, any use of the EGF would need to comply with other laws, such as the prohibition on the gift of public funds.

QUESTION PRESENTED

May the EGF be used to further the use of graywater in the City of San Diego?

SHORT ANSWER

Yes, if the City Council determines that the proposed use preserves and enhances the environment. Evidence supporting such a determination could include the purposes of the State

of California graywater regulations, which include the conservation of water, as well as other evidence of the environmental benefits of graywater use. In addition, the use of EGF must comply with other applicable laws.

ANALYSIS

Emergency graywater regulations were adopted in 2009 by the State of California, Department of Housing and Community Development and made permanent on January 27, 2010, after completion of the Administrative Procedure Act rulemaking process. Cal. Code Regs., title 24, chapter 16. The intent of the regulations is to:

1. Conserve water by facilitating greater reuse of laundry, shower, lavatory, and similar sources of discharge for irrigation and/or indoor use.
2. Reduce the number of non-compliant graywater systems by making legal compliance easily achievable.
3. Provide guidance for avoiding potentially unhealthful conditions.
4. Provide an alternative way to relieve stress on a private sewage disposal system by diverting the graywater.

Id.

The first of these stated reasons for the regulations, conserving water, has the most obvious and direct relationship to preserving and enhancing the environment. Although Charter section 103.1a does not define any of the terms used, words in a statute are generally given their plain meaning and, to determine the plain meaning, courts will typically use dictionaries. 58 Cal. Jur. 3d *Statutes* § 135 (2014); *Arocho v. California Fair Plan Ins. Co.*, 134 Cal. App. 4th 461, 466 (2005).

Dictionary definitions for “preserve” are “to keep alive or in existence; make lasting” and “to keep safe from harm or injury; protect or spare.” Webster’s Encyclopedic Unabridged Dictionary 1530 (1996). A dictionary definition for “enhance” is “to raise to a higher degree; intensify; magnify” and “to raise the value or price of.” *Id.* at 646. “Environment” is defined as “the aggregate of surrounding things, conditions, or influences; surroundings; milieu” as well as “the air, water, minerals, organisms, and all other external factors surrounding and affecting a given organism at any time.” *Id.* at 650. Therefore, the provisions of Charter section 103.1a may be restated as allowing the use of the EGF to protect and improve the physical conditions surrounding us.

Evidence that the use of graywater preserves and enhances the environment could include the stated intent of the State of California graywater regulations, which is to conserve water through facilitating the reuse of water. In addition, the reuse of water, such as is done through graywater use, protects and improves the environment by providing a local, dependable water supply which

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may decrease the diversion of water from sensitive ecosystems, decrease wastewater discharge, reduce and prevent pollution, enhance wetland and riparian habitats, and conserve energy otherwise spent on extracting, treating, and transporting water. U.S. Environmental Protection Agency, *Water Recycling and Reuse: The Environmental Benefits*, California Energy Commission, *California's Water-Energy Relationship*, 28-30 (Nov. 2005). Pursuant to Charter section 103.1a, Council may determine that furthering the use of graywater is an appropriate use of the EGF.

CONCLUSION

Charter section 103.1a requires that the funds deposited in the EGF be used in at least two-thirds part for the debt service for bonds for the acquisition, improvement, and maintenance of open space for park and recreational purposes, unless there is no debt service, in which case all funds shall be used, if at all, exclusively for the purpose of preserving and enhancing the environment of the City in whatever manner is deemed appropriate by the City Council. By ordinance, the City Council has determined various appropriate uses for the EGF, including purposes consistent with Charter section 103.1a.

It is within the Council's discretion to determine that the conservation of water preserves and enhances the environment, and thus, the use of the EGF for purposes relating to the use of graywater is consistent with the requirements of Charter section 103.1a and San Diego Municipal Code section 63.30(b)(4). However, each specific proposed use must be evaluated to ensure legal compliance.

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