MEMORANDUM OF LAW

DATE: February 3, 1997

NAME: Scott Tulloch, Deputy Director, Metropolitan Wastewater Department, Program Management Division

FROM: City Attorney

SUBJECT: Metropolitan Wastewater Funding for Curb Cuts

QUESTIONS PRESENTED

You have inquired about the Metropolitan Wastewater Department's responsibility for funding curb cuts where a thin layer of asphalt is used as an element of resurfacing a street disturbed by a sewer project. We understand that Engineering & Capital Projects is prepared to implement the curb cuts on behalf of the Metropolitan Wastewater Department. However, they have proposed accepting MWWD compensation but then implementing the cuts from a priority list. In constructing curb cuts from the proposed priority list, the cuts may or may not be directly connected to the street disturbed by the sewer project. Hence you inquire:

1. Is the Sewer Revenue Fund required to fund curb cuts in any street disturbed by a sewer project?

2. Can the Sewer Revenue Fund fund curb cuts implemented from a priority list as described above?

SHORT ANSWERS

The Sewer Revenue Fund is required to fund curb cuts only when a sewer project alters a street in a manner that affects or could affect the usability of the street. The Sewer Revenue Fund may not be used to fund curb cuts that have no nexus to the sewer project being constructed. Our reasoning follows.

ANALYSIS

While we are mindful that curb cuts (curb ramps) are mandated by the Americans with Disabilities Act ("ADA") (42 U.S.C. 12101-12213), it does not necessarily follow that curb cuts are mandated whenever a street is disturbed by a sewer project. Generally speaking, the ADA requires curb cuts under the umbrella of not excluding disabled citizens from participation in the use of public "services, programs or activities of a public entity . . . ." 42 U.S.C. 12132. The ADA directs the Attorney General to implement standards which, in relevant part, have been promulgated as follows:

> 35.151. New construction and alterations.
>
> (a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.
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> (b) *Alteration*. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.
>
> . . . .
>
> (e) *Curb ramps*. (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway. (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

28 C.F.R. 35.151 (1992) (emphasis added).

Hence streets, as existing facilities, must involve curb cuts when they are "altered" in a manner that "affects or could affect" their usability.

However, the ADA and the regulation are silent on what constitutes an "alteration." This void has been filled by the courts in Kinney v. Yerusalem, 9 F. 3d 1067 (3rd Cir. 1993), cert. denied *sub. nom.* Hoskins v. Kinney, 114 S. Ct. 1545 (1994), which held that "resurfacing" did constitute an "alteration" sufficient to trigger ADA compliance.

As such, we can only agree with the district court that resurfacing a street affects it in ways integral to its purpose. As discussed above, "resurfacing" involves more than minor repairs or maintenance. At a minimum, it requires the laying of a new asphalt bed spanning the length and width of a city block. The work is substantial, with substantial effect.

Id. at 1073.

> The court was careful to distinguish between "resurfacing" (which involves a layer of asphalt) and "patching, pothole repairs, and limited resurfacing . . . ." Id. at 1070. We are of the view that slurry sealing, which is the uniform spreading of a thin asphalt layer, is more akin to "limited resurfacing" than resurfacing. The slurry seal is principally done to cover the cement- topped trench required by sewer replacement. As such, then, it is clearly a "minor repair" and in no event can it be said to affect the usability of the street, which is the *sina qua non* for triggering the installation of curb cuts per 28 C.F.R. 35.151(b).

Inasmuch as a slurry seal is a minor repair as distinguished from a resurfacing involving substantial work as distinguished by the court in Kinney, we cannot say that the Americans with Disabilities Act compels as a matter of law the installation of curb cuts as a function of sewer projects. We are quick to caution, however, that this does not mean that the City Manager cannot provide for the work unless a thicker resurfacing is required. Given the admonition of the ADA to develop a transition plan containing a "schedule for providing curb ramps. . . ." (28 C.F.R. 35.150(d)(2)), the City Manager certainly has the discretion to include curb ramps in sewer projects since the work must eventually be accomplished.

Nor is a different conclusion compelled by state law. While California Government Code section 4456 requires public facilities to be brought up to 1994 Uniform Building Code standards (Title 24 Cal. Code Regs.), this too is triggered when there are "alterations." This term, like its federal counterpart, lacks specificity. Nor does its companion regulation offer illumination: "**ALTER** or **ALTERATION** is any change, addition or modification in construction or occupancy." 24 Cal. Code Regs. 202.16.

We are cognizant of and concur in the California Attorney General's conclusions that modernizing a city library entrance was an "alteration" (61 Ops. Cal. Atty. Gen. 555 (1978)), and seismic strengthening of a masonry building also constituted an "alteration" (71 Ops. Cal. Atty. Gen. 110 (1995)). But slurry sealing of a street we perceive as much different and more in the nature of maintenance and not alteration. Indeed the Attorney General recognized such a distinction in his earlier opinion, noting: "The facilities in question have been changed in a material manner, not merely restored to their original condition. We are not concerned here with simple maintenance, such as patching of cracks in the steps." 61 Ops. Cal. Atty. Gen. at 557 (emphasis added).

In contrast, the slurry sealing covering a sewer project is more akin to "restoration to their original condition" and "patching of cracks." Hence we conclude that state law, as well as federal law, does not compel curb cuts where the slurry seal is used to cover a sewer project.[1]

The funding of curb cuts from the Sewer Revenue Fund is a far clearer matter. The use

of the Sewer Revenue Fund is restricted by the Municipal Code, and only those curb cuts on streets where sewer repair/replacement is accomplished would be proper charges on the fund.

> 64.0403 Sewer Revenue Fund Established
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> (a) There is hereby created a "Sewer Revenue Fund." All revenues derived from the operation of the wastewater system shall be paid into the Sewer Revenue Fund.
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> (b) All revenues shall be used for the following purposes only:
>
> 1. Paying the cost of maintenance and operation of the City's waste- water system.
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> 2. Paying all or any part of the cost and expense of extending, constructing, reconstructing, or improving the City's wastewater system or any part thereof . . . .

San Diego Municipal Code 64.0403 (emphasis added).

We have historically preserved such restrictions given the fact that bond proceeds and direct sewer utility payments make up the bulk of the Sewer Revenue Fund. Hence we have long required a direct nexus between the use of sewer utility funds and a direct benefit to the utility (Memorandum of Law of February 14, 1989 approving mitigation fee directly levied on property used for sludge drying; Memorandum of August 29, 1967 disapproving any monetary transfer of sewer revenue funds to general fund without direct benefit to the utility). A plan that would place sewer revenue funds in a "Curb Ramp Fund" to fund projects selected from a priorities list rather than directly related to the sewer project would lack a required nexus and, hence, would be improper.

CONCLUSION

Lacking a clear definition of "alteration," we advise that the Americans with Disabilities Act does not mandate curb cuts on simple slurry sealing of sewer replacements/improvements. However, the policy of including such cuts as a matter of sound public policy is clearly within the City Manager's discretion and sewer revenue funding is justified so long as there is a direct nexus between the placement of the curb cut and the location of the sewer upgrade.

CASEY GWINN, City Attorney

By
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TB:mb:450:502.7(x043.2)
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