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MEMORANDUM OF LAW

DATE: July 15, 2004
TO: Nathan Bruner, Underground Program Manager
FROM: Thomas Zeleny, Deputy City Attorney
SUBJECT: City Manager's Authority to Execute Joint Use Agreements

INTRODUCTION

We have been asked by the Underground Utility Conversion Program to review a proposed Joint Use Agreement [JUA] provided by SDG&E for a portion of Scripps Lake Drive. JUAs provide that if the work of either party affects the facilities of the other, the party doing the work will indemnify the other party against any costs associated with relocating or restoring the other's facilities. Consulting with SDG&E and various City departments, this appears to be the first time a JUA has been requested where SDG&E does not have an existing easement overlapping the public right-of-way. This Memorandum addresses the legality of the City Manager executing JUAs only in the context of relocating utilities from a utility easement in adjacent property into the public right-of-way.

QUESTION PRESENTED

May the City Manager execute a JUA in conjunction with the relocation of SDG&E facilities from a private easement into the public right-of-way without prior City Council approval?

SHORT ANSWER

No, San Diego Charter [Charter] section 11 precludes the City Manager from executing JUAs without prior approval of the City Council, in instances where SDG&E does not have an existing easement that overlaps the public right-of-way. City Council approval may be expressed by resolution, as the ordinance requirement of Charter section 99 does not apply to JUAs.

DISCUSSION

I. Background

Historically, the City and SDG&E have executed JUAs where new streets overlap SDG&E easements,¹ in most cases without seeking prior City Council approval. SDG&E and the City want to extend the use of JUAs to situations where SDG&E is abandoning an existing private easement and relocating its facilities into the public right-of-way at the City's request. The JUA proposed by SDG&E is attached. Paragraph 8 of the JUA states the terms of the JUA prevail over conflicting provisions of the SDG&E Franchise Agreement and the Municipal Code. This raises the question whether the City Manager may execute such JUAs without City Council approval.

II. The SDG&E Franchise Agreement and Municipal Code Section 62.1112

Pursuant to authority granted under state law,² Section 8 of the SDG&E Franchise Agreement provides:

Section 8. CITY RESERVED POWERS

(a) City reserves the right for itself to lay, construct, erect, install, use, operate, repair, replace, remove, relocate, regrade or maintain below surface or above surface improvements of any type or description in, upon, along, across, under or over the streets of the City. City further reserves the right to relocate, remove, vacate or replace the streets themselves. If the necessary exercise of the aforementioned reserve rights conflicts with any poles, wires, conduits, and appurtenances of Grantee constructed, maintained and used pursuant to the provisions of the franchise granted hereby, whether previously constructed, maintained and used or not, Grantee shall, without cost or expense to City within ninety (90) days after written notice from the City Manager, or his designated representative, and request to do so, begin the physical field construction of changing the location of all facilities or equipment so conflicting. Grantee shall proceed promptly to complete such required work.

(b) Irrespective of any other provision of this ordinance, Grantee's right to

¹We have previously opined that where the utility has an easement, the City must pay relocation costs. See 1999 City Att'y MOL 130. In some instances, though, if a "paper street" existed prior to the utility easement, the utility may be required to relocate at its own expense. *City of Anaheim v. Metropolitan Water District of Southern California*, 82 Cal. App. 3d 763 (1978).

²The grantee shall remove or relocate without expense to the municipality any facilities installed, used, and maintained under the franchise if and when made necessary by any lawful change of grade, alignment, or width of any public street, way, alley, or place, including the construction of any subway or viaduct, by the municipality. Cal. Pub. Util. Code § 6297.

construct, maintain and use, or remove poles, wires, conduits, and appurtenances thereto shall be subject at all times to the right of the City, in the exercise of its police power, to require the removal or relocation, to either overhead or underground locations, of said poles, wires, conduits and appurtenances thereto at the sole cost and expense of Grantee.

(emphasis added)

Similarly, San Diego Municipal Code [SDMC] section 62.1112 addresses utilities located in the public right-of-way:

- (a) All persons maintaining installations in the public right-of-way shall relocate or remove their installations whenever such relocation is necessary for a proper governmental purpose, whether or not that purpose is to be accomplished by a public entity or by a private entity on behalf of a public entity. In such cases, the cost of the relocation shall be borne by the person.

(emphasis added)

Neither the Franchise Agreement nor SDMC section 62.1112 contemplates an exception to the rule that SDG&E must relocate its facilities in the public right-of-way at its own expense. It is current practice for the City Manager to execute JUAs without City Council approval, but it does not appear this Office has ever issued a written opinion on JUAs or who has authority to approve them.

III. Charter Section 11

Whether the City Manager has authority to create exceptions to this rule that utilities must relocate their facilities at their own expense may depend on whether granting JUAs is considered a legislative or administrative function. Charter section 11 reserves legislative functions to the City Council:

All legislative powers of the City shall be vested, subject to the terms of this Charter and of the Constitution of the State of California, in the Council, except such legislative powers as are reserved to the people by the Charter and the Constitution of the State.

Charter section 28 vests administrative power with the City Manager:

It shall be the duty of the Manager to supervise the administration of the affairs of the City except as otherwise specifically provided in this Charter . . . to see that the ordinances of the City and the laws of the State are enforced. . . . [A]ll other administrative powers conferred by the laws of the State upon any municipal official shall be exercised by the Manager[.]

The City Council cannot delegate legislative functions to the City Manager:³

Powers conferred on the legislative body of a city involving the exercise of judgment or discretion are in the nature of public trusts, and, as a general rule, cannot be delegated.

45 Cal. Jur. 3d (Rev.) Part 1 *Municipalities* § 294 (2000).

If it is later determined the City Manager had no authority to execute JUAs because it was an improper delegation of a legislative function, the contracts are void and unenforceable. *See* 10A McQuillin Mun. Corp. § 29.104.30 (3rd ed. 1999); *County of San Diego v. California Water and Telephone Company*, 30 Cal. 2d 817 (1947).

A review of state law and the City Charter indicates approval of JUAs is a non-delegable legislative function. Franchises can only be granted by City Council. Cal. Pub. Util. Code § 6202; Charter § 103. The terms and conditions of Franchise Agreements must also be approved by the City Council. Cal. Pub. Util. Code § 6203; Charter § 103.1. Paragraph 8 of the JUA proposed by SDG&E, a copy of which is attached, states that the terms of the JUA prevail over conflicting provisions in the SDG&E Franchise Agreement and the Municipal Code. If the City Manager alters the terms of the Franchise Agreement by executing JUAs, the City Manager is performing a legislative function. The wisdom of granting SDG&E such an interest is something the City Council should decide on a case-by-case basis, because JUAs could increase the cost of future City projects.

This conclusion is supported by the manner in which the City handles similar interests in real property. Street and easement vacations must be approved by the City Council. Cal. Sts. & High. Code § 8312. Eminent domain actions must be authorized by the City Council. *City of Sierra Madre v. Superior Court of Los Angeles County*, 191 Cal. App. 2d 587 (1961). Encroachment of underground facilities into the public right-of-way must be approved by the City Council. SDMC § 62.0303. JUAs give SDG&E an interest in real property exceeding what is granted by the City Council in the SDG&E Franchise Agreement insofar as the City would have to pay SDG&E to relocate its facilities. The interest granted by the JUA is akin to an easement, and SDG&E records JUAs with the County Recorder as an interest in real property.

IV. Charter Section 99

A JUA typically has no fixed duration, and could require the City to pay SDG&E to relocate its facilities more than five years after the date the JUA is executed. Charter section 99 provides that contracts in excess of five years duration must be authorized by ordinance approved by two-thirds of the City Council:

³*See* 1982 Ops. City Att’y 149 (advising against delegating street dedications and easement abandonments to the City Manager as an improper delegation of legislative functions.) State law was later amended to allow administrative acceptance of street dedications.

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California. . . . No contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds' majority vote of the members elected to the Council[.]

This rule is limited to contracts that call for an expenditure of funds by the City.⁴ JUAs do not require an immediate expenditure of funds. The City only has to pay if the City requires SDG&E to relocate its facilities. We have issued several memoranda interpreting Charter section 99, but none address its applicability to agreements that call for an expenditure of funds contingent on some future event.

Charter section 99 was modeled after the debt limitation provision of article XI, section 18 of the California Constitution,⁵ which has since been moved to article XVI, section 18.

No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity[.]

Cal. Const. art. XVI, § 18(a)

An exception to this rule is where the debt is contingent on a future event. 67 Op. Att'y Gen. 349, 352 (1984). "A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens." *Id.*, quoting *Doland v. Clark*, 143 Cal. 176, 181 (1904). The debt limitation provision of Charter section 99 is interpreted no more restrictively than article XVI, section 18. *Rider v. City of San Diego*, 18 Cal. 4th 1035, 1050 (1998).

Under this exception, Charter section 99 does not mandate City Council approval of JUAs by ordinance. The obligation to pay SDG&E is contingent on the City performing work in the public right-of-way that affects SDG&E facilities. The contingency is entirely within the City's control. Therefore, agreements with expenditures contingent on a future event are not agreements calling for expenditure of funds limited by Charter section 99.

⁴See 1998 City Att'y MOL 298.

⁵See 1968 Op. City Att'y 85.

CONCLUSION

In instances where SDG&E does not have an easement overlapping the public right-of-way, JUAs should be approved by the City Council. While such approval is not required under Charter section 99, City Council approval is mandated by Charter section 11. Approval of such JUAs is a legislative function: an action requiring the exercise of judgment or discretion by the City Council. This conclusion is consistent with the City Council's exclusive authority over other matters affecting interests in real property, such as eminent domain, street and easement vacations, and encroachments into the public right-of-way. Such legislative functions may not be delegated to the City Manager.

CASEY GWINN, City Attorney

By

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