

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: June 24, 2008

TO: Mary Lewis, Chief Financial Officer

FROM: City Attorney

SUBJECT: The Zoo Tax: Charter Section 77a requirements

Your memorandum of May 21, 2008 requests that this Office determine the City's obligation to support the San Diego Zoo with tax revenues, and if those revenues may be used by other organizations or for other purposes within Balboa Park. The short answers to your questions are that the City has an obligation to support the Zoo in Balboa Park, and that the revenues may not be used for any other purpose, as we explain in more detail below.

ANALYSIS

1. The City of San Diego is Obligated to Support the San Diego Zoo with a Special Tax Levy.

The City's obligation to support the San Diego Zoo in Balboa Park with tax revenues is determined by San Diego Charter section 77a. Section 77a was the result of a citizens' initiative that qualified for the ballot in the summer of 1934. 1934 Op. City Att'y 432. San Diego voters assumed the duty to pay a specified tax to support the San Diego Zoo within Balboa Park at the special election of November 6, 1934. Section 77a became operative January 21, 1935.¹ The section was amended by voters to add its second paragraph at the April 22, 1941 election, becoming operative May 8, 1941. It has remained unchanged since 1941.

Section 77a provides:

The Council shall levy annually, in addition to all other taxes provided for in this Charter, not less than two cents (\$0.02) on each one hundred dollars (\$100.00) of the assessed valuation of the real and personal property within the City, to be used

¹ This early voter action exempts this tax from the tax limitation requirements of subdivision (a) of section 1, article XIII A of the California Constitution. Cal. Const., art XIII A § 1(b); *Patton v. City of Alameda*, 40 Cal. 3d 41, 46-48 (1985).

exclusively for the maintenance in Balboa Park of zoological exhibits.

Whenever the Council deems it to be for the best interests of the City, the Council may enter into a contract, upon such terms and conditions as the Council may prescribe, for the maintenance in Balboa Park of zoological exhibits, with any organization formed primarily for the purposes of maintaining zoological gardens and zoological exhibits and conducting general zoological work; and may make available to such organization the proceeds of the special tax levy provided for in this section.

This Office applies established rules of construction to determine the meaning of City Charter provisions in the same manner as would a court. Changes to a city charter are interpreted to determine voter intent in the same way as are changes made to the state's constitution. *Woo v. Superior Court*, 83 Cal. App. 4th 967, 975 (2000). We look first to the words of the provisions, giving "the usual, ordinary, and commonsense meaning to them." *Howard Jarvis Taxpayers Ass'n v. County of Orange*, 110 Cal. App. 4th 1375, 1381(2003). If the language is clear and unambiguous, we presume the voters intended the meaning apparent on the face of the measure and end our inquiry. *Woo*, 83 Cal. App. 4th at 975.

The first paragraph of Charter section 77a provides that "[t]he Council *shall* levy annually. . . ." the additional property tax it describes. (emphasis added.) In contrast, the second paragraph of section 77a provides: ". . . the Council *may* enter into a contract . . . with any organization . . . and *may* make available to such organization the proceeds of the special tax levy provided for in this section." (emphasis added.) Absent some indication they should mean otherwise, the word 'shall' is ordinarily interpreted as mandatory, and the word 'may' is construed as permissive. *People v. Ledesma*, 16 Cal. 4th 90, 95 (1997). This is especially so where both 'shall' and 'may' are used in the same provision. *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 443 (1989); *In re Richard E.*, 21 Cal. 3d 349, 353 (1978).

In Charter section 77a, San Diego voters approved both 'shall' and 'may' in the same provision, applying them to two different actions by the City Council. There is no indication the words should be interpreted in other than their ordinary sense. This Office concludes the words of the section mean what they say. The Council is *required* to levy a tax to be used for maintenance of the zoological exhibits in Balboa Park.² The Council is *permitted* to contract with a particular type of organization to maintain those exhibits, and to provide that organization with

² The Council meets this Charter obligation by annually adopting a tax rate ordinance. S.D. Charter § 75. The San Diego County Assessor and Tax Collector makes the assessment and collects the taxes pursuant to controlling state laws. S.D. Charter § 78; *Domenghini v. County of San Luis*, 40 Cal.App.3d 689, 694-695 (1974). To be consistent with changes in those controlling state laws since 1941, the \$.02 per \$100 assessed valuation mentioned in Charter section 77a has been converted to an actual rate of 0.005 % per \$100 assessed valuation. Cal. Rev. & Tax. Code §§ 401 and 135; *also* 65 Op. Cal. Att'y Gen'l. 136, 138 n.2 (1982).

the proceeds of the mandatory tax levy. Accordingly, this Office finds the City is obligated to support the San Diego Zoo exhibits in Balboa Park by tax revenues as required by Charter section 77a.

2. The City of San Diego May Not Divert Charter Section 77a Tax Revenues to Other Organizations or for Other Balboa Park Purposes.

Whether the City may divert the special taxes levied under section 77a for some other purpose, or to organizations other than one meeting section 77a requirements, is also determined by the plain language of the section. The special tax authorized by the section is very particularly described as one that must “be used *exclusively* for the maintenance in Balboa Park of zoological exhibits.” San Diego Charter § 77a (emphasis added). Courts have determined that when tax proceeds are designated to “be used exclusively for” one purpose, they “shall not be used for others. ‘Exclusively’ means to the exclusion of all others. . . . ‘Exclusively’ means ‘only,’ ‘solely,’ ‘purely,’ ‘wholly,’ to the exclusion of other things.” *South Dakota Auto. Club, Inc. v. Volk*, 305 N.W.2d 693, 700 (S.D., 1981.), citing to *Standard Oil Co. of Texas v. State*, 142 S.W.2d 519, 522 (Tex. Civ. App. 1940), and *Weiprecht v. Gill*, 191 Md. 478, 485, 62 A.2d 253, 256 (1948).

When the Council decides it is “for the best interests of the City,” the Council may contract to maintain the Balboa Park zoological exhibits with any organization that meets section 77a’s requirements. *Ibid*. The organization must be one “formed primarily for the purposes of maintaining zoological gardens and zoological exhibits and conducting general zoological work.” *Id*. The contract may only be “for the maintenance in Balboa Park of zoological exhibits” and the Council is entitled to set the “terms and conditions” of the contract. *Id*. After there is a contract with a qualifying organization, the Council has authority to “make available to such organization *the* proceeds of the special tax levy provided for in this section.” *Id*. (emphasis added)

This Office has previously decided that the proceeds of the special tax levy may not be used for other City purposes. 1941 Op. City Att’y 1 (surplus funds may not be transferred to the general fund); 1948 Op. City Att’y 142 (increase in tax levy due to higher property values is “trust fund” for zoological exhibits in Balboa Park and “can be utilized for no other purpose.”). We agree with the conclusions of these earlier opinions. Section 77a is clear and unequivocal. The proceeds of the special tax levy required by section 77a must be used “exclusively” for the maintenance in Balboa Park of zoological exhibits. Moreover, if the City decides to contract for the maintenance of the Balboa Park zoological exhibits, it may only provide the tax revenues collected for this specific purpose to an organization meeting the section’s eligibility requirements, and only for the maintenance of the Balboa Park zoological exhibits.

Accordingly, this Office concludes that the City may not divert any of the special tax levy required by section 77a to any purpose other than the maintenance of Balboa

Mary Lewis, Chief Financial Officer

June 24, 2008

Page 4

Park zoological exhibits, or to any organization other than one with whom the City has a contractual agreement meeting section 77a's requirements.³

CONCLUSIONS

San Diego Charter section 77a obligates the City to levy a special tax to support the San Diego Zoo in Balboa Park. The proceeds from the special levy must be used "exclusively for the maintenance in Balboa Park of zoological exhibits." The City may contract with an eligible organization to provide the maintenance of the Balboa Park exhibits and provide the organizations with proceeds of the special tax levy for that purpose. The City currently has a long-term contract with the San Diego Zoological Society that meets the requirements of the section. None of the special tax levy may be used by the City or the Zoological Society for any purpose other than the maintenance of zoological exhibits in Balboa Park, nor may the tax levy be used by any organization other than one contracting with the City pursuant to the requirements of section 77a.

MICHAEL J. AGUIRRE, City Attorney

By

Josephine A. Kiernan
Deputy City Attorney

JAK:nda

MS-2008-7

cc: Mayor and City Councilmembers
Independent Budget Analyst

³ The City has a 55-year lease-operating agreement with the San Diego Zoological Society executed on July 23, 1979 (Doc. No. 767195) in accordance with Resolution No. 224068 (July 23, 1979) that gives the Society access to the Charter section 77a tax revenues for maintenance of the zoological exhibits in Balboa Park.