MEMORANDUM OF LAW

DATE: January 24, 1995

TO: Gary K. Himaka, Associate Civil Engineer,
Metropolitan Wastewater Department

FROM: City Attorney

SUBJECT: Use of Sewer Fund to Repave Entire Street Where Only Parts of Which are Disturbed by Sewer Project

In your memorandum of December 16, 1994, you indicate that "the community" has requested that the Metropolitan Wastewater Department provide curb-to-curb repaving of all residential streets that will be impacted by the Fiesta Island Replacement Project (FIRP) sludge pipeline construction. You further state that this proposal is not wholly consistent with the department's plan to repave only the width of traffic lane which is impacted by the project. You ask whether repaving the entire width of the streets is an appropriate use of sewer funds.

This office has issued several Memoranda of Law which discuss permissible uses of the sewer fund. (See attached Memoranda of Law dated August 31, 1994, February 22, 1993, February 14, 1989.) In summary, the sewer fund may only be used for sewer facility design, construction, or operation; or for retirement of debt issued to fund those objectives. (See generally San Diego Municipal Code section 64.0403 and Charter section 90.2). Further as to the matter of debt, bonds issued to finance the sewer system contain covenants which restrict use of the sewer fund to purposes strictly related to the sewer and wastewater treatment system, i.e., for construction, operation, maintenance, and for redemption of the bonds.

Certainly, restoration of a street trenched for a sludge pipeline installation project is work that generally falls within the definition of "wastewater system construction." However, the degree and extent of work which may be properly characterized as "restoration" is a question of fact, the answer for which will largely lie in determining whether that work is truly necessary to put the street in reasonably the same condition it was in before being disturbed by the pipeline project. Arguably, it would be an improper use of the Sewer Revenue Fund to provide for work which is beyond the scope of necessary restoration. The sewer ratepayers are not obliged to subsidize general street maintenance or improvement work that is unrelated to any disturbance by

a sewer construction or maintenance project. Similarly, the investment interests of bondholders cannot be prejudiced through the diversion of sewer funds to general fund objectives such as street resurfacing, where the work in issue is factually unrelated to sewer construction.

While the issue of what work constitutes "restoration" is a factual one, we believe that the City Council, City Manager, and your department have substantial discretion in making this determination. A finding that the Sewer Revenue Fund is being misused under the rubric of "street restoration" could be made only if facts suggest a patent abuse of that discretion. In this regard, your department should remain mindful of implications of precedent and policy. An express or implied policy to provide curb-to-curb street resurfacing in every instance where sewer utility pipes are installed may be found to be abusive of discretion.

In conclusion, it will be primarily up to the Council, Manager, and department to decide the factual question whether curb-to-curb resurfacing is warranted "restoration" in regard to the FIRP sludge pipeline project. In making this determination, your department should be able to articulate a factual basis for its decision.

JOHN W. WITT, City Attorney
By
Frederick M. Ortlieb
Deputy City Attorney

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Attachments
ML-95-07