MEMORANDUM OF LAW

DATE: November 26, 1991
TO: F.D. Schlesinger, Clean Water Program Director
FROM: City Attorney
SUBJECT: Treasury Service for Special Act District

By memorandum dated August 19, 1991, you requested an opinion on several questions relating to the treasury service needs of the impending San Diego Area Wastewater Management District ("district"). All of these questions centered on the involvement of the San Diego City Treasurer. Below we answer those questions in the order presented.

1. According to State of California Law or San Diego City Charter provisions, can the City Treasurer be the treasurer for the Special Act District?

Yes. This answer obtains from several considerations. First, it must be examined whether the legislation creating the district ("SB 1225") will permit delegation of the district's treasury responsibilities to the City Treasurer. Second, it must be determined whether the City Charter or general law preclude the City Treasurer from accepting the delegation of the district's treasury duties. Finally, we must ascertain if the dual function would result in the holding of incompatible offices. These considerations are addressed as follows:

a. The District Legislation

The district will prospectively be established under special State legislation enacted to address regional wastewater treatment and water reclamation needs. As such, the district will be a creature of the State and its purpose will plainly be a matter of statewide interest, not a municipal affair. City of Santa Clara v. Von Raesfeld, 3 Cal. 3d 239 (1970). The management of the district, including the performance of treasurer's duties, will be subject to applicable State law. The State law applicable to the administration of the district treasury will be such as is set forth in the district legislation, or alternatively by general law. A special district "has only such powers as are given to it by statute and it is an entity, the powers and functions of which are derived entirely from the Legislature." People ex rel. City of Downey v. Downey County Water Dist., 202 Cal. App. 2d 786, 795 (1962); see also Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 325-334 (1927).

SB 1225, in its present form, does not contain an express reference to the office or function of a treasurer. Instead,
SB 1225 simply gives the district's board of directors general powers to appoint officers as it deems appropriate. Section 321 of the proposed Act provides: "The board shall provide for the appointment of other

officers, attorneys, engineers, consultants, advisors, fiscal agents, and employees, as necessary." Section 322 then provides: "The board may delegate any executive, administrative, and ministerial powers to the general manager or to any other officer of the district." These provisions demonstrate that the district's board will be vested with the authority to appoint a treasurer and that all duties incidental to a treasury service could be delegated to that office. These sections do not appear to set forth any criteria, qualifications, or restrictions with respect to the appointment of officers. Hence, an officer appointment by the board of the district would amount to a discretionary act expressly authorized by the legislation. This discretion, in our view, could be exercised to appoint the City Treasurer as treasurer for the district, subject to the other considerations discussed below.

b. The City Charter

The next concern is the San Diego City Charter, and more precisely, whether the City Treasurer may act under its limitations as treasurer for a public agency other than the City. A charter city derives its "home-rule" authority from California Constitution Article XI, section 5(a), which provides in part:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.

San Diego City Charter section 45 establishes the office of the City Treasurer for the City's own municipal purposes. The City Charter is an instrument of limitation and restriction over all municipal affairs. City of Grass Valley v. Walkinshaw, 34 Cal. 2d 595, 599 (1949). In respect to municipal affairs, the City is not subject to general law except as the charter may provide. Id. Thus, despite the explanation above that the establishment and operation of the district will be a matter of State concern, the City Charter must nevertheless be reviewed to certify that there is no prohibition against the municipal office of the City Treasurer acting in the proposed extramunicipal capacity. Beyond this, general law must be searched to satisfy that the identical prohibition does not exist there, as the City Treasurer would be subject to general law in performing services for the district.

Upon review of the City Charter and pertinent ordinances enacted thereunder, we find no express provision which permits the City Treasurer to provide treasury service to other public agencies. But conversely, we do not find any express limitation or restriction on such service. Although a reading of City Charter section 45 leaves the unmistakable impression that the office of the City Treasurer exists solely to fulfill

municipal treasury needs of the City, the fact remains that the charter does not prohibit that officer from performing extramunicipal services such as those contemplated for the district.

The general law pertinent to city treasurers likewise does not expressly address the situation at hand. In a general law city, the office of the city treasurer is established pursuant to Government Code sections 36501 et seq. The duties of that office are defined by Government Code sections 41001 et seq. None of these statutes contain a prohibition against performing treasury services for another municipality or district. Accordingly, we have the opinion that neither the City Charter or general law preclude the City Treasurer from serving the district.

c. The Doctrine of Incompatibility

It must next be asked whether there would be any conflict or incompatibility if the City Treasurer were to also assume duties as the district's treasurer. The doctrine of incompatibility of offices has long existed in the common law and has more recently become a topic covered by statute. The common law holds that two offices are incompatible when the holder of both cannot, in every instance, discharge the duties of each. People ex rel. Chapman v. Rapsey, 16 Cal. 2d 636, 641 (1940). Incompatibility arises from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where antagonism would result in the attempt by one person to discharge the duties of both, or where the nature and duties of the two render it improper, from considerations of public policy, for one person to retain both. Id. at 641; Mott v. Horstmann, 36 Cal. 2d 388, 391-392 (1950).

The doctrine of incompatibility was codified in 1977 by Government Code section 1126. Subdivision (a) of that statute, as amended, reads in relevant part:

> ╒Aσ local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed. The officer or employee shall not perform any work, service, or counsel for compensation outside of his or her local agency employment where any part of his or her efforts will be subject to approval by any other officer, employee, board, or commission of his or her employing body, unless otherwise approved in the manner prescribed by subdivision (b).

In substance, there is no material difference in the doctrine of

incompatibility as it is described by common law or by Government Code section 1126. It has been opined that the statute is simply a codification of general common law principles. 57 Op. Att'y Gen. 492, 497 (1974).

A summary list of the City Treasurer's responsibilities, condensed from City Charter section 45, includes these duties:

-- to receive and have custody of City monies.

-- to disburse City monies upon warrant of Auditor & Comptroller.

-- to keep records of receipts, expenditures, deposits, and interest.

-- to receive daily deposits from collecting City departments (unless otherwise specified by ordinance).

-- to receive collected taxes from the County Tax Assessor.

-- to select depositories for City money pursuant to general law.

-- to collect debts, claims, or judgments owed to City.

-- to issue permits and licenses and to collect and deposit revenues these generate.

The treasurer for the district would perform many of these same functions. As noted above, the person performing treasury services for the district must do so in accord with the district legislation or with applicable general laws. Sections 607 and 611 of the proposed Act provide that County officers charged with collecting taxes will be responsible for collecting taxes and sewer standby availability charges and paying them over to the district. Presumably, this payment would be to the treasurer for the district. Section 614(a) of the SB 1225 provides that "┌tσhe collection of all fees and charges imposed by the district pursuant to this Act, shall be performed in the manner determined by the board." Subdivisions (b) and (c) of section 614 provide authority for collection of the district's fees and charges by County authorities, and for payment over to the district - again presumably to its treasurer. Thus, the treasurer's duties would involve receiving the fees, taxes, and other charges collected by the County.

The district's treasurer also would be required to deposit the funds in compliance with the general law of the Depository Act, Government Code sections 53630 et seq. The Depository Act dictates how, when, and where local agencies such as the district must deposit their funds. The City of San Diego is likewise subject to its provisions, as City Charter section 45 states that deposits must be made in conformity with general law; moreover, the Depository Act has been held to apply to charter cities. McGuire v. Wentworth, 120 Cal. App. 340, 344 (1932). Similarly, the investment of funds is the subject of general law which is applicable to the City and district alike. Government Code sections 53600 et seq. deal with the subject of when, how, and where surplus revenues may be

invested.

It is therefore clear that the duties of the City Treasurer and the district treasurer will be identical in most respects, and that only their clients will differ. It is this difference in clients, however, that might result in incompatible offices if the functions of deposit and investment were performed by the same officer. For instance, if there is a limited investment opportunity, the City Treasurer acting in a dual capacity might be put to a choice whether to invoke the opportunity on behalf of the City or the district. Although seemingly slight, the possibility of such a divided allegiance indicates that one officer might not, in every instance, be able to faithfully discharge the duties of each office. The offices are therefore arguably incompatible with respect to the duties of deposit and investment.

We believe this question is obviated, however, if the City Treasurer has only one fund to invest. If the district's funds are commingled and consolidated with City funds, there could be no incompatibility in choosing depositories or investments for the single fund. Such commingling of funds would of course require that separate books be kept on contributions made by the City and the district respectively, as each would be entitled to its proportionate principal and interest earned thereon. Pomona City School District v. Payne, 9 Cal. App. 2d 510, 516 (1935). Consolidation of funds would thus appear to eliminate the potential for incompatibility, and might furthermore work to the advantage of all interested due to the compoundment and enlargement of the principal fund.

To conclude this response, we believe that the City Treasurer could act as treasurer for the district so long as incompatible functions are not imposed. The possible manner of establishing such a relationship will be discussed in answer to your other questions.

2. Can the Special Act District contract with the City Treasurer to provide full treasury service?

Yes. Such a contractual relationship could be established pursuant to the Joint Exercise of Powers Act, Government Code sections 6500 et seq. Under the provisions of that act, two or more public agencies by agreement may jointly exercise any power common to the contracting parties if authorized by their legislative or governing bodies. Government Code section 6502.

Both the City and the prospective district are "public agencies." Government Code section 6500. Both the City and the prospective district have in common the power to appoint a treasurer, who in turn has the authority to perform the functions usually associated with that office. For the City, this power is based in City Charter section 45. For the district, the power would be found in sections 201, 321, and 322 of SB 1225. It is therefore clear that the district could contract with the City to perform its treasury service and thereby avoid the necessity of

managing its own treasury. This contract could provide that the City shall provide treasury service to the district in return for payment by the district. After all, "╒tσhe ╒Joint Exercise of Powers Actσ means nothing if it does not mean that cities (or other public agencies) may contract in effect to delegate to one of their number the exercise of a power or the performance of an act in behalf of all of them, and which each independently could have exercised or performed." City of Oakland v. Williams, 15 Cal. 2d 542, 549 (1940).

In regard to the provision for "full" treasury service, as opposed to limited service, we refer to the answer to your first question. The contract could provide for full service, so long as no incompatibility of office results.

3. If full treasury service contracting is not allowed, can partial services be performed, such as collections?

As reflected in the answers to Questions 1 and 2, full treasury service could be contracted, or the contract could be selective as to the service to be provided, such as covering only collections.

On the issue of collections, however, we recall that SB 1225 sections 607 and 611 require the County's officers to collect taxes and standby availability charges on behalf of the district, and that section 614 provides that the district may also require the County to collect fees and charges. The legislation already contemplates that the County will perform root level collections from tax and rate payers. Thus, if the district were to contract with the City Treasurer, the services most likely to be required under the contract would involve deposit, investment, and disbursement of the district's funds. Certainly under SB 1225 the district could ignore the permissive suggestion of section 614(b), which states that the district "may" require the County to collect fees and charges, and instead contract with the City to also perform this function. But the district could not contract with the City for the collection of taxes and standby charges, for sections 607 and 611 are mandatory in stating that a County officer "shall" perform these functions. Since the legislation clearly is structured to have the district's root collections performed by the County, the remaining services required would be receipt of the County's remittances, deposit, investment of surplus, disbursement upon warrant, and record keeping. These services could be contracted with the City if district funds are commingled with City funds for deposit and investment purposes.

4. Must the Special Act District have separate bank accounts from those of the City of San Diego?

No. On the contrary, the funds of each entity should be consolidated for purposes of deposit and investment to eliminate any possible conflict of obligation. Separate account books must be kept by the City Treasurer, however, so that the City and district remain accurately informed about their proportionate interests in these deposits and

investments. The Joint Exercise of Powers Act emphasizes the importance of accounting in requiring the agreement to provide for strict accountability of all funds and for reporting of all receipts and disbursements. Government Code section 6505.

5. Should the proposed Special Act District legislation be modified to allow the City Treasurer to serve as treasurer for the district?

As discussed above, the City Treasurer would be "allowed" to provide certain services to the district in the sense that there exists no legal prohibition against it, and the Joint Exercise of Powers Act provides a statutory mechanism for establishing such a service relationship. Therefore, we believe that it would not be necessary to amend SB 1225 to "allow" the City Treasurer to serve the district.

But if what is meant by this question is rather: "Should the special act be amended to require the City Treasurer to serve the district?," we still believe the answer is no. Such a provision would establish an ex officio service, which is defined as a "service which the law annexes to a particular office and requires the incumbent to perform." Black's Law Dictionary, 6th Ed. at 575 (1991). Although the legislation probably could be amended to this effect, it could only be done with the City's consent. Recall that the City Treasurer is a municipal officer of a charter city, and the functions of the office are set forth in Charter section 45. The functions of that office are municipal affairs, and thus the State legislature would lack authority to impose special extramunicipal duties on the officer unless the City consented to it. And assuming that the City would consent, we still believe that legislation may be too rigid a means of establishing the relationship because once consent is given, the matter would pass entirely to the jurisdiction of the State legislature. It might be far easier and more flexible in the event of changed circumstances or intent to have the commitment to the relationship retained in the City's own hands. A Joint Exercise of Powers Agreement would better accommodate this concern, as it could be drafted to contain whatever provisions are most mutually desireable, including conditions for termination.

If, however, a legislative solution is sought, we would recommend that the special act provide for the County Treasurer to be the ex officio district treasurer. Already the act provides for tax and standby charge collections to be performed ex officio by the County, so it would be consistent to likewise provide for other services relating to the district treasury. Further, the County is a legal subdivision of the State. California Constitution Article XI, section 1(a). And although also chartered, a county as a State subdivision differs from a charter city in that a county charter must provide for "the performance of functions required by statute." California Constitution Article XI section 4(d). It is therefore quite common for legislative acts creating regional special districts to provide for essential services to be

provided ex officio by county officers.

In reviewing other special district legislation, we encountered numerous instances where a county treasurer is designated to be an ex officio officer of the district. The uncodified acts of the Water Code are replete with examples of districts which are served ex officio by county officers. Such provisions are also common to legislation contained in the Education Code relating to school districts. On the other hand, we are aware of no special district legislation in California which provides for city officers to serve a district in an ex officio capacity.

This situation is not difficult to explain insofar as special act districts are usually formed to address regional as opposed to purely municipal needs. Also, there is the aforementioned limitation concerning the legislature's lack of authority to impose extramunicipal duties on the municipal officers of chartered cities. This limitation does not exist with respect to counties, as the State Constitution is structured so that the legislature may impose ex officio duties on counties on behalf of special districts operating in those counties.

CONCLUSION

If it is desired that the City Treasurer serve the district, a Joint Exercise of Powers agreement would be a preferable means of accomplishing the objective. The agreement could provide for compensation for the City's performance of all treasury functions which the district itself could perform, including deposit and investment, provided the funds of the two entities could avail the same opportunities for these purposes.

Alternatively, we believe it is worth considering an amendment to SB 1225 making the County Treasurer an ex officio district officer. Such a provision would be in consonance with existing sections of SB 1225 which direct County officers to perform collections for the district. Also, this arrangement is quite common to many special act districts, and the County would thus likely be experienced and equipped to perform the services required.

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cc Conny Jamison, City Treasurer