MEMORANDUM OF LAW

DATE: July 5, 1990

TO: H. R. Frauenfelder, Deputy City Manager
FROM: City Attorney
SUBJECT: Procedure and Comment on Modification of Sewer Capacity Charges Mandated by San Diego Municipal Code section 64.0410

By memorandum of June 22, 1990, you requested our review of the procedure rather than the wisdom of amending San Diego Municipal Code section 64.0410 which presently imposes uniform minimum capacity charges for additional sewer connections. The question, however, does not arise in a vacuum. Rather it arises from correspondence of Councilmember Filner and Father Joe Carroll (May 14, 1990, June 11, 1990 and June 14, 1990), which shows that St. Vincent de Paul Center has utilized a wastewater discharge permit to discharge groundwater into the sewer system for two (2) years without payment of additional capacity charges. Such a two (2) year waiver is authorized by San Diego Municipal Code section 64.0410 but at the termination of the waiver period, capacity charges must be imposed at the current rate. As the waiver expires July 1, 1990, the Center seeks the following:

1. An extension of the discharge permit.
2. The procedures to obtain:
   a. A permanent discharge permit
   b. Waiver of the capacity fee
   c. Establishment of a new sewer dis-charge rate for homeless shelters.

As this request touches on both sewer service rates and capacity charges, our response must necessarily distinguish the two charges and describe the restrictions on each.

A. Sewer Service Rates

Sewer service rates are authorized by San Diego Municipal Code section 64.0404 and, while not defined by ordinance, these rates are the periodic (bimonthly) charges levied on users for the cost of operation, maintenance and replacement of the system. Since the City has utilized federal grant money in the system, it operates under revenue restrictions imposed by the Clean Water Grant Program and described in 40 C.F.R. 2130 et seq.

As we cautioned in our April 1, 1987 Report to the Committee on Public Services and Safety, a user charge system has to be based on either (a) actual use or (b) ad valorem taxes that

ensure that each user pays a "proportionate share of operation and maintenance." 40 C.F.R. 35.2140. The only exception to the proportionate use concept is the recently defined "deviation" authorized by Environmental Protection Agency Memorandum of April 25, 1988 which allows:

> I am approving a deviation from Section 35.2140(a) and (b) to allow the grantees' user charge systems to include an optional class of low income residential users with incomes below a pre-established level if approved by the delegated State official or the EPA Regional Administrator ┌emphasis addedσ.
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> The EPA definition of low income residential user is any residence with a household income below the Federal poverty level as defined in 45 CFR 1060.2 or any residence designated as low income under State law or regulation ┌emphasis addedσ. Delegated States or the EPA Regional Administrator, as appropriate, will evaluate grantees' requests to establish their own definition of a low income residential user class ┌emphasis addedσ.
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> Any user charge system establishing a lower rate for low income residential users must meet all other existing user charge system require-ments including proportionality, public notice, and hearing. Any lower user charge rate for low income residential users must be defined as a uniform percentage of the user charge rate charged other residential users. The amount of any cost reductions afforded the low income residential class must be proportionately absorbed by all other user classes. The total revenues for the proper operation and maintenance (including replacement) of the facilities
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> must not be reduced as a result of establishing a low income residential class. EPA has determined that grantees receiving construction grants after March 1, 1973 may implement this provision after providing for public notice and hearing and receiving the delegated State official's or EPA Regional Administrator's approval.

This "deviation" is obviously narrowly drawn to protect "low

income residential users," and since "residential user" is one who both occupies and resides with some reasonable permanence of fact and intention, we cannot say that transient occupants of a homeless shelter would qualify as "residential users." Dworkin v. Dunkin, 456 N.Y.S. 2d 939, 943 (1982). Hence as to the re-quest to seek an amendment to Section 64.0404 to establish a different sewer discharge rate for homeless shelters, this would be impermissible since the user charge system would not be based on proportionality of discharge and the homeless shelter is not within the "deviation" exception.

B. Capacity Charges

The capacity charges required by Section 64.0410 are wholly different than the periodic service charge. A capacity charge is a one-time charge for a new or larger connection to the system. It is a charge imposed for both the right to connect to the existing system and the need to provide new facilities in the future which will benefit the person or entity connected. California Government Code section 54991(b)(3). Unlike user charges, capacity charges -- since they deal with expansion -- are not subject to federal restrictions.

However, the imposition of capacity charges is not without restrictions.

> Sec. 54991. Water or sewer connection fees; limitations
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> (a) Notwithstanding any other provision of law, when a local agency imposes fees for water connections or sewer connections, or imposes capacity charges, those fees or charges shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed, unless a question regarding the amount of the fee or charge imposed in excess of the estimated reasonable cost of pro-viding the services or materials is submitted to, and approved by, a popular vote of two-thirds of those electors voting on the issue.
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> (b) As used in this section, the following terms mean:
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> (1) "Sewer connection" means the connection of a building to a public sewer system.
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> (2) "Water connection" means the connection of a building to a public water system, as de-fined in subdivision (e) of Section 4010.1 of the Health and Safety Code.

> (3) "Capacity charges" means charges for facilities in existence at the time the charge is imposed or charges for new facilities to be constructed in the future which are of benefit to the person or property being charged.

California Government Code section 54991

While this restriction does not deal in proportionality, it does establish the requirement of equivalency. Thus a capacity charge as imposed by San Diego Municipal Code section 64.0410 cannot exceed the cost of providing for the expansion of the sewerage system. (While it is arguable that California Government Code section 66000 imposes a similar burden, the "developer fees" are undefined. Hence we treat the specific restriction on "capacity charges" as prevailing over the general.)

To the extent, then, that a lesser capacity fee is permitted for homeless shelters, the cost of the burden on the system is necessarily diverted to other users, giving rise to the attack that their charges "exceed the estimated reasonable cost of providing the service," since they are paying for both their service and the uncompensated service afforded a homeless shelter. However, with Section 54991 not requiring proportionality and no cases construing its effect, we cannot say that different capacity charges are prohibited. Rather, different capacity rates can be imposed as long as they are based on a reasonable classification and different rates to aid charitable institutes have been upheld. 12 McQuillin, Municipal Corporations, 34.104; New York Tel. Co. v. Siegel-Cooper, 202 N.Y. 502 (1911).

Therefore, to the extent that Section 64.0410 is sought to be amended to eliminate or provide different capacity charges for homeless shelters as being a public benefit for a charitable institution, differing capacity charges could be established. We are quick to caution, however, that the restrictions of Government Code section 54991 present other affected users with an argument to the contrary.

C. Conclusion

Answering the questions posed in reverse order, we advise that an exception in sewer user rates to benefit homeless shelters would be contrary to the proportionality requirement mandated by 40 C.F.R. 35.2130 et seq. However, amending Sec-tion 64.0410 to eliminate or reduce capacity charges of homeless shelters as a public benefit would be proper. Should the Council desire such an amendment, this office would prepare the necessary

language.

JOHN W. WITT, City Attorney
By
Ted Bromfield
Chief Deputy City Attorney

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