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**REPORT TO THE COMMITTEE
ON LAND USE AND HOUSING**

IN LIEU PERMIT CONDITIONS

INTRODUCTION

In its June 18, 2003, report to the Committee on Land Use and Housing, the Affordable Housing Task Force [Task Force] recommended the creation of an infrastructure bank, to offer developers more choices when complying with permit conditions. These extra choices, in the form of in lieu permit conditions, would give permittees the option to comply with their permits by completing public improvements unrelated to the impacts of their development. Typically, this would occur when a community finds that a public improvement unrelated to a development is needed more than an improvement directly related to the impacts of the development. A permit condition would then give the developer the choice of constructing the unrelated improvement in lieu of constructing the related improvement. The following discusses the legal issues concerning this proposal.

DISCUSSION

One concern raised by this proposal is whether it weakens the legal validity of other development permit conditions. Generally, conditions placed on development by cities are valid as long as they are reasonable, and a sufficient nexus or connection exists between them and the burdens the development will place on the surrounding community. *Ayers v. City Council*, 34 Cal. 2d 31, 37 (1949). The degree of connection required by courts depends on the type of condition. Here, the Task Force's proposal includes a permit condition giving a developer the option of building improvements unrelated to the impacts of the development, in lieu of constructing related improvements as required by other permit conditions. However, because such a condition will have no nexus to the burdens of the development, a court would likely invalidate it if challenged by a permittee. The remaining question is whether this lack of nexus also weakens the validity of other permit conditions, particularly those for the related improvements the in lieu condition was designed to replace. If offering an in lieu condition weakens these other permit conditions, the entire arrangement could be an improper exaction.

Unfortunately, there is no case law that definitively addresses this scenario. The closest analogous situation involves fees paid by developers in lieu of constructing public improvements. However, analysis in these cases inevitably focuses on the improvements which the fees replace. In other words, courts generally look for the required nexus between the improvements and the development when determining the validity of the in lieu fees. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996). This is because the fees and improvements focus on mitigating the same impacts caused by the development, something that does not occur for the in lieu permit conditions proposed by the Task Force.

Because the in lieu permit conditions proposed by the Task Force have no relation to development impacts, a court would likely separate them from the justifiable conditions they were designed to replace. As a result, an invalid in lieu condition should not weaken other conditions as long as an independent nexus exists between the development impacts and the original conditions. In such a case, compliance with the original condition will always be a remedy for a permittee. To be even safer, a decision maker may add severability language to a permit with in lieu conditions so that the invalidity of any permit condition would not affect the remaining provisions.

In addition to concerns about the nexus for in lieu permit conditions, separate issues also exist with both the California Environmental Quality Act [CEQA], and the findings required for discretionary permits by the Municipal Code. If the original permit condition requires the construction of an improvement as mitigation for an environmental impact caused by the development, allowing a developer to construct an unrelated improvement to satisfy the original condition will result in no mitigation of the impact under CEQA. Similarly, if the original permit condition is vital to a permit decision maker being able to make the necessary findings to approve a discretionary permit, allowing an unrelated substitute condition could call into question the overall findings for the permit. As a result, a decision maker would need to examine the impacts to CEQA and discretionary permit findings before imposing in lieu permit conditions. In other words, in lieu conditions should not replace conditions needed to satisfy CEQA or the Municipal Code.

CONCLUSION

The concept of in lieu permit conditions appears legally valid. However, decision makers should take care given the concerns over the effects of such conditions on other aspects of discretionary permits. The lack of case law addressing these types of in lieu permit conditions makes it difficult to predict how a court will decide. Nevertheless, it seems logical that in lieu permit conditions may be added to development permits without weakening the legal validity of other permit conditions as long as: 1) the decision maker assesses potential impacts on environmental mitigation and required permit findings; and 2) an independent nexus exists between the development impacts and the original conditions. Language can be added to permits

which will further separate the types of conditions and clarify that a permittee always has the option of complying with the original valid condition.

Respectfully submitted,

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