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REPORT TO THE COMMITTEE ON LAND USE AND HOUSING

PROPOSED UPDATES TO FACILITIES BENEFIT ASSESSMENT AND DEVELOPMENT IMPACT FEE ORDINANCES

## INTRODUCTION

The Mayor's Office is proposing amendments to the City's Facilities Benefit Assessment (FBA) and Development Impact Fee (DIF) ordinances (Proposed Ordinance), which will, among other things, extend the deferral of all FBAs until the end of 2013. A draft of the Proposed Ordinance is attached as Attachment A. In analyzing the Proposed Ordinance, this Office identified legal issues regarding the implementation of both the existing FBA and DIF, the associated Public Facilities Financing Plans (Financing Plans) and the Proposed Ordinance.

In 2009, the City adopted San Diego Ordinance O-19893 (2009 Ordinance), which allowed for the deferral of FBAs and DIFs "under circumstances the City Council [found] promote[d] the health, safety and general welfare and stimulate[d] the local economy." Specifically, the 2009 Ordinance provided for, among other things, deferral of the payment of all DIFs for a period of up to two years, and until November 2011, deferral of the payment of FBAs for a period of up to two years. SDMC §§ 61.2210(b), 142.0640(d). Therefore, where a developer would otherwise be required to pay an FBA or DIF prior to the issuance of a building permit for its development, the developer may instead enter into a fee deferral agreement with the City and obtain a building permit without actually paying the FBA or DIF. *Id.* Under the fee deferral agreement, the developer must pay the FBAs or DIFs upon the earlier of final inspection or two years. *Id.* The Proposed Ordinance would extend the provision for the deferral of all FBAs until the end of 2013.

Historically, the City generally updated the City's Financing Plans annually to reflect increases or decreases in the actual costs of public facilities projects, changes to the scope and type of projects needed in the community, and changes to various Financing Plan assumptions to reflect current reality. However, more recently, many Financing Plans have not been updated regularly. It has been suggested that if the failure to update the Financing Plans results in a deficiency, that the money could be collected from future developers. This Report discusses potential implications that may result from the City's decision to allow for the deferral of FBAs and DIFs and its failure to annually update its Financing Plans. This Report also explains that similar to DIFs, if the Proposed Ordinance is adopted, the use of FBAs as a method of financing public facilities in the City should be subject to the Mitigation Fee Act.

## QUESTIONS PRESENTED

1. What legal implications may result from the fee deferrals?

2. What legal implications may result from the failure to annually update Financing Plans?

3. What distinguishes FBAs from DIFs?

## SHORT ANSWERS

1. This Office has long opined that fee deferrals are legally permitted with certain limitations and risks discussed in this Report.

2. State law requires annual updates to the Financing Plans for DIFs. Cal. Gov't Code § 66002(b). In addition, Financing Plans in FBA communities should be updated to ensure fairness and equity in the spread of the FBA; to ensure that sufficient funds are collected to fund all the necessary public facilities in the communities; and to limit the potential future costs to the City's other revenue sources if FBAs collected are insufficient to provide the necessary public facilities.

3. In light of existing practices and recent amendments to the City's General Plan, the need to provide different procedures to fund public facilities has become obsolete. As such, the more cumbersome FBA procedures could be repealed, in which case all funding would be in the form of DIFs. Regardless, even if the FBA process remains, the City should ensure that it complies with either the Mitigation Fee Act (if FBAs are only collected as a condition of property development) or Proposition 218 (if FBAs may be collected prior to property development).

## BACKGROUND

For both DIF and FBA communities, the Financing Plans serve as identification of the public facilities to be financed and also as the capital improvement program. In addition, the Financing Plans provide the required method by which the costs are apportioned among the parcels in FBA communities.

### I. FBAs

The City assesses FBAs under its Procedural Ordinance for Financing of Public Facilities in Planned Urbanizing Areas (FBA Ordinance). SDMC §§ 61.2200-61.2216. To implement the FBA Ordinance, the City adopts Financing Plans for each of the different FBA communities. Areas of benefit are established by resolution and designate lands that will receive "special benefits from the construction, acquisition, and improvement" of specified public facilities. SDMC § 61.2202(b). When an area of benefit is established, an FBA is also established. SDMC § 61.2208. An FBA lien is then recorded against each property within the area of benefit. SDMC § 61.2209(b). The lien is only removed after the FBA is paid, usually upon issuance of a building permit. SDMC § 61.2210(a). The FBA Ordinance requires that a description of the public facilities to be financed through the FBA be provided when the area of benefit is designated.

SDMC § 61.2208(a). In addition, a capital improvement program, as well as an explanation of the method by which costs are to be apportioned among the parcels within the area of benefit, is also required. SDMC § 61.2208(b), (d).

The City originally adopted the FBA Ordinance on August 25, 1980 to implement general plan policies requiring designation of lands within planned urbanizing areas which would receive special benefits from the acquisition, construction, and improvement of certain public facilities and the imposition of special assessments on land related to benefits received. San Diego Ordinance O-15381 (Aug. 25, 1980). The City's 1979 General Plan established a growth management program to reverse the existing trend of rapid population growth on the periphery of the city, and the reduced and even declining growth in the central areas of the City. City of San Diego General Plan at PF-3 (Mar. 2008). To reverse that trend, the 1979 General Plan envisioned a process whereby the central business district would be revitalized while growth and development in outlying areas would be phased and sequenced in accordance with the availability of public services and facilities. *Id.* Under that growth management program, the City was divided into three tiers of growth: urbanized, planned urbanizing, and future urbanizing. *Id.* The urbanized areas were the established and developed neighborhoods and the downtown core. *Id.* In planned urbanizing areas, development was required to "pay its own way" in terms of public facilities and services, through the use of FBAs, or other financing mechanisms. *Id.* at PF-4. The future urbanizing areas were largely vacant land that required voter approval to shift to planned urbanizing in order to develop. *Id.* In 2008, the City adopted a new general plan which explains that planned urbanizing areas have been "largely completed according to the adopted community plans." *Id.* It further explains that the City has "grown into a jurisdiction with primarily two tiers: Proposition A Lands (formerly Future Urbanizing Areas) and the Urbanized Lands (formerly Planned Urbanizing Areas and Urbanized Areas)." *Id.*

In calculating the FBA, the Financing Plans explain that the amount of the FBA is based upon the collective cost of the identified public facilities projects which are to be equitably distributed over the undeveloped or underdeveloped parcels within the area of benefit. The Financing Plans also explain that the FBA amount is also affected by various assumptions including the timing of construction of the public facilities projects, the annual interest rate earned on the FBA fund balance, and annual inflationary rates to determine the future costs of facilities. *See, e.g.*, Pacific Highlands Ranch Public Facilities Financing Plan and Facilities Benefit Assessment Fiscal Year 2008 at 30-31; Del Mar Mesa Public Facilities Financing Plan and Facilities Benefit Assessment Fiscal Year 2006 at 23-25. The FBA amount increases annually by the inflationary rate until a new FBA is adopted. *See, e.g.*, Pacific Highlands Ranch Public Facilities Financing Plan and Facilities Benefit Assessment Fiscal Year 2008 at 12-14; Del Mar Mesa Public Facilities Financing Plan and Facilities Benefit Assessment Fiscal Year 2006 at 12-14.

## II. DIFs

DIFs are established by San Diego City Council resolution in accordance with the Mitigation Fee Act, California Government Code sections 66000-66025 (MFA). SDMC § 142.0640(b). The MFA requires that an agency legislatively establishing DIFs determine that there exists a reasonable relationship between (1) the DIF's use and the type of development project on which the fee is imposed; and (2) the need for the public facility funded by the DIF and the type of development project on which the fee is imposed. Cal. Gov't Code § 66001(a); *Garrick Dev. Co. v. Hayward Unified School Dist.*, 3 Cal. App. 4th 320, 336 (1992). The Financing Plans in DIF communities identify the methodology by which the DIF is determined. In most cases, various public facilities needed in the community are identified, the cost to complete all of those facilities is estimated, the total build-out under the community plan is estimated, and the costs per dwelling unit or some other equivalent unit of measure is calculated. In DIF communities, the DIF amount generally increases annually based on the one-year change in the Los Angeles Construction Cost Index. SDMC § 142.0640(c).

# ANALYSIS

## I. FEE DEFERRALS

The policy behind allowing for the deferral of FBAs and DIFs is to stimulate economic recovery in the City. *See* San Diego Ordinance O-19893 (Sept. 11, 2009). As mentioned in the Introduction Section, the 2009 Ordinance allowed for the deferral of FBAs and DIFs in certain circumstances. Specifically, the 2009 Ordinance provided for, among other things, deferral of the payment of DIFs for a period of up to two years. SDMC § 142.0640(d). The 2009 Ordinance also provided for deferral of the payment of FBAs for a period of up to two years, but only for agreements entered into prior to November 2011. SDMC § 61.2210(b). The Proposed Ordinance seeks to extend the deferral of payment of FBAs for all development through December 2013. With or without the Proposed Ordinance, DIFs are permitted to continue to be deferred for a period of up to two years.

This Office has previously advised that DIFs and FBAs may be deferred pursuant to an ordinance "so long as the deferred process does not result in other property owners in the area picking up a portion of the costs which were to have been paid by the property owner with the deferred fees." 1994 City Att'y MOL 551, 551(94-62; July 20, 1994). We cautioned that when DIFs or FBAs are deferred, "provision should be made for reasonable interest to be paid on such deferred fees" or alternatively, the fees that are ultimately collected "are the fees in effect at the time of ultimate payment." *Id.* However, the 2009 Ordinance requires payment in the amount set forth in the fee schedule in effect when the fee deferral agreement is *executed*, subject to inflationary increases. SDMC §§ 61.2210(b), 142.0640(c)(4) (emphasis added). The deferred fee is not required to be paid until a developer requests a final inspection, or two years from the date of the fee deferral agreement, whichever is earlier. *Id.* There is also no provision for the payment of interest although it is subject to inflationary increases. The Proposed Ordinance contains similar provisions.

The obvious risk in allowing a fee deferral is that it could result in public facility deficiencies. A fee deferral that results in the payment of a fee that is lower than the fee schedule in effect at the time of payment – and that lower amount does not reflect the actual impact of the development – could ultimately result in deficiencies in public facilities. The cost of the deficiencies in public facilities would be legally impossible to recover from future developers. *See* Cal. Gov't Code § 66001(g); *Ehrlich v. City of Culver* City, 12 Cal. 4th 854, 867 n.5 (1996).

The Financing Plans in DIF communities rely on assumptions that DIFs will be paid by the developer at the time of building permit issuance and that DIF funds will be placed in a separate interest bearing fund with interest earnings accumulated for use in that community. *See, e.g.*, Mission Valley Public Facilities Financing Plan Fiscal Year 2006 at 11; Tierrasanta Public Facilities Financing Plan Fiscal Year 2008 at 5. The Financing Plans should be updated to reflect the more current realistic assumptions such as, that under the 2009 Ordinance, collection of DIFs can be delayed by up to two years subject to inflationary increases.

## II. FINANCING PLAN UPDATES

With respect to FBAs, the San Diego Municipal Code (Municipal Code) provides that the City Council "may . . . *annually* . . . cause an adjustment to be made in the [FBAs] . . . [to] reflect increases or decreases in the actual cost of [a] [p]ublic [f]acilities [p]roject or . . . the estimated cost of the proposed capital improvements . . . or any other indices as the City Council may deem appropriate . . . [and] changes in the improvements proposed to be constructed as well as the availability or lack thereof of other funds with which to construct the capital improvements." SDMC § 61.2212 (emphasis added). In addition, Council Policy 600-36 "establish[es] guidelines for *an annual review* of FBA and for modifications to liens or the imposition of additional liens by the City based upon *the annual review*." Council Policy 600-36 at 2 (emphasis added). Specifically, Council Policy 600-36 obligates the City Manager to prepare an Annual Review Report for each FBA area. *Id.* The purpose of the annual review is to review, among other things, the amount and type of development that has actually occurred, the need for changes in the current public facilities within the area of benefit, and changes in the cost estimates of the public facilities projects. *Id.*

Additionally, annual updates ensure the continual accuracy of the Financing Plans, as well as to ensure fairness and equity in the spread of the FBA. 1985 City Att'y MOL 205, 207 (85-44; Aug. 8, 1985). This Office has previously advised that "[w]hile annual reviews [of FBAs] are not mandated by [the] Municipal Code . . . a significant change in proposed improvements legally requires some review to maintain valid and equitable assessments." *Id.*

With respect to DIFs, under the MFA, capital improvements plans, which indicate the approximate location, size, time of availability, and cost estimates for the facilities to be financed with DIFs "shall be adopted by, and *shall be annually updated* by, a resolution of the governing body of the local agency adopted at a noticed public hearing." Cal. Gov't Code § 66002(a)-(b) (emphasis added). The Financing Plans serve as the capital improvement programs required under the MFA.

Financing Plans are best estimates of public facility requirements and costs at the time that they are prepared. Many of the factors that are considered in calculating the amount of FBAs

and DIFs change over time. Where certain assumptions are made, such assumptions may later need to be revised to reflect current realities. These assumptions can include the timing of construction of facilities, the amount of money in the fund balance, development trends, inflation, and interest rates. With annual updates, such realities can be addressed with minor adjustments. However, when many years pass without an update, the Financing Plan reflects current reality less and less. In such situations, legal constraints may limit the City's ability to adequately fund future necessary public facilities. In addition to significant changes in proposed improvements that this Office has previously determined to require "some review," significant changes to the cost of the improvements that occur over time also require some level of review. Moreover, significant changes to the underlying assumptions that form the basis for the calculation of the fees, such as changes in the timing of construction of improvements, the annual interest rate earned on the fund balance, inflationary rates, development trends, construction costs, or amounts actually earning interest in the fund, require at least "some review to maintain valid and equitable assessments" or fees. *See* 1985 City Att'y MOL at 207.

Where the City has chosen not to update a Financing Plan in a community, and various assumptions upon which the current Financing Plan is based are no longer accurate, the current Financing Plan may not adequately account for development's benefits from, or impacts to, public facilities.

**A. DIFs**

The MFA requires that the City establish a reasonable relationship between the DIF and the burden posed by development. The MFA requires an agency to determine "how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed" and "between the need for the public facility and the type of development project on which the fee is imposed." Cal. Gov't Code § 66001(a)(3)-(4); *Garrick*, 3 Cal. App. 4th at 334. While a DIF may be based upon costs "attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan," a DIF may not be based upon "costs attributable to existing deficiencies in public facilities." Cal. Gov't Code § 66001(g). Moreover, a DIF can be found to be invalid if there is no need for additional facilities and the DIF is intended to recover new development's proportionate share of the cost of previously-provided facilities. *Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore*, 185 Cal. App. 4th 554, 571-72 (2010). In addition, as mentioned above, the MFA requires Financing Plans to be updated annually. Cal. Gov't Code § 66001(b).

Therefore, the Financing Plans in DIF communities should be updated annually to comply with the MFA's requirement that capital improvement programs be "annually updated," and to ensure that future DIFs are not based upon costs "costs attributable to existing deficiencies in public facilities." Cal. Gov't Code § 66001(g); Cal. Gov't Code § 66002(b).

### B. FBAs

As discussed above, FBAs are established pursuant to the Municipal Code. Under article I, section 2 of the San Diego Charter and the home rule power conferred by article XI, section 5 of the California Constitution, the City has the power to finance public improvements through assessment procedures enacted by ordinance without regard to the provisions of state law. *J.W. Jones Co. v. City of San Diego*, 157 Cal. App. 3d 745, 756 (1984). However, a crucial feature of a benefit assessment is that it must confer a special benefit upon the property assessed beyond that conferred generally. *Knox v. City of Oakland*, 4 Cal. 4th 132, 142 (1992). The City's FBA has in the past been held to confer special benefits on properties within the FBA area of benefit. *J.W. Jones*, 157 Cal. App. 3d at 756. However, the determination of whether a special benefit exists must be carefully considered in light of the existing circumstances. *See id.* In determining whether properties will receive "special benefits" from the public facilities, a court could look to the California Constitution's definition of a "special benefit," which is "a particular and distinct benefit over and above general benefits conferred on real property located in the [area] or to the public at large." Cal. Const. art. XIIID, § 2(i).

Financing Plans in FBA communities should be updated to ensure fairness and equity in the spread of the FBA; to ensure that sufficient funds are collected to fund all the necessary public facilities in the communities; and to limit the potential future costs to the City's other revenue sources if FBAs collected are insufficient to provide the necessary public facilities.

## III. APPLICATION OF PROPOSITION 218 AND THE MFA TO FBAS AND DIFS

As discussed above, FBAs date back to 1980 when they were used as a mechanism to ensure the provision of adequate public facilities in planned urbanizing areas. The planned urbanizing areas were newly developed communities. However, as explained in the City's 2008 General Plan, the planned urbanizing areas have been "largely completed." General Plan at PF-4. In response, in addition to designating an FBA area of benefit in FBA communities, the City has undertaken a practice of adopting DIFs (equal in amount to the adopted FBA) to apply to undeveloped or underdeveloped lands that have not been assessed FBAs.

In addition, since the FBA Ordinance was adopted, constitutional and statutory requirements have been enacted that affect the FBAs. While the FBA Ordinance has been upheld in court as a valid exercise of the City's police power to finance public improvements through assessment procedures, those cases were decided prior to the passage of Proposition 218 and the MFA. *See generally J.W. Jones*, 157 Cal. App. 3d 745. There are no cases that uphold the FBA Ordinance against a Proposition 218 or MFA challenge.[1]

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[1] A California Fourth District Court of Appeal case related to the applicability of Proposition 218 to the FBA Ordinance; however, the court found that the challenge was barred by the applicable statute of limitations and specifically declined to "reach the question whether the benefit assessment violates Proposition 218, or whether it is a fee or charge imposed as a condition of property development." *Barratt American, Inc. v. City of San Diego*, 117 Cal. App. 4th 809, 815, 820 (2004).

**A. Proposition 218**

Proposition 218 was enacted by the California electorate at the November 1996 general election. Proposition 218 amended the California Constitution by adding Articles XIIIC and XIIID, which restrict local agencies' ability to impose or increase special fees, charges, assessments, and taxes without voter approval. Article XIIID defines an assessment as:

> [a] levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment," and "special assessment tax."

Cal. Const. art. XIIID, § 2(b).

An agency levying an assessment must identify the parcels that will receive a "special benefit" and those parcels will then be subject to an assessment. Cal. Const. art. XIIID, § 2(i). Assessments may not exceed "the reasonable cost of the proportional special benefit conferred on [a particular] parcel." Cal. Const. art. XIIID, § 4(a). Specific procedures and requirements for the assessments are required, including notice to affected property owners including a ballot for the property owner to indicate its support or opposition, and a public hearing. Cal. Const. art. XIIID, § 4(c)-(d). A majority protest bars imposition of the assessment. Cal. Const. art. XIIID, § 4(e). In addition, a local agency must show that an assessment is proportional to the benefit conferred on the property assessed. Cal. Const. art. XIIID, § 4(f). While the FBA Ordinance requires notice and a public hearing, it does not require the provision of ballots to affected property owners, nor does it specifically require that the City show an assessment is proportional to the benefit conferred on the property assessed. SDMC §§ 61.2206-61.2207.

Proposition 218 does not "[a]ffect existing laws relating to the imposition of fees or charges as a condition of property development." Cal. Const. art. XIIID, § 1(b). Accordingly, in a City Attorney Report, this Office previously advised that FBAs are expressly exempt from Proposition 218 because they are "'imposed as an incident of the voluntary act of development'" and because they are not imposed "'simply by virtue of property ownership.'" 1997 City Att'y Report 535, 540 (97-7; Apr. 29, 1997). This Report supersedes the 1997 City Attorney Report to the extent it is intended to convey that FBAs are not subject to Proposition 218. The existing FBA Ordinance requires the payment of FBAs "upon the issuance of building permit(s) for development *or at such time as the Capital Improvement Program for the Area of Benefit in which the assessed land is located calls for the commencement of construction of the Public Facilities Project.*" SDMC § 61.2210(a) (emphasis added). By the plain language in the existing FBA Ordinance, while FBAs may be payable as a condition of development (at the time of building permit issuance), they may also become payable "simply by virtue of property ownership." Therefore, FBAs, as currently provided for in the FBA Ordinance are not exempt from Proposition 218 as a "condition of property development."

However, to be consistent with the City's current practice, the Proposed Ordinance would, among other things, only require FBA payment at the time of building permit issuance. Specifically, the requirement that an FBA be paid "at such time as the Capital Improvement Program for the Area of Benefit in which the assessed land is located calls for the

commencement of construction of the Public Facilities Project" would be stricken. If the Proposed Ordinance is adopted with that deletion, then the FBA would only be charged as a condition of property development, and would therefore, not be subject to Proposition 218.

### B. Mitigation Fee Act

The MFA was adopted in 1989 to standardize the procedures for imposition of development fees, to clarify the required showing for demonstrating the constitutionally mandated "reasonable relationship" between the impact of development projects and fees, and to protect developers from disproportionate and excessive fees. Adam U. Lindgren et al., California Land Use Practice § 18.49 (CEB July 2010). As discussed above in Section II.A, the MFA requires that the City establish a reasonable relationship between a development fee and the burden posed by development and sets forth procedures for the collection, accounting, and expenditure of development fees. Cal. Gov't Code §§ 66001, 66006-66007. The MFA applies to fees, which are defined as a "monetary exaction other than a tax or special assessment . . . that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project." Cal. Gov't Code § 66000(b). While amending the FBA Ordinance to only require payment of FBAs as a condition of property development would result in the inapplicability of Proposition 218, it is this Office's opinion that the MFA would apply to FBAs because the FBAs would be fees charged by a local agency in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to a development project. However, if the FBA Ordinance continues to provide for the collection of FBAs prior to property development through an assessment, then the MFA would not apply because the MFA does not apply to special assessments. However, in such a case, the FBAs would be subject to Proposition 218.

## IV. AS CURRENTLY IMPLEMENTED, FBAS ARE MOST LIKELY DIFS

Practically, as the City currently implements FBAs, the difference between an FBA and a DIF is a matter of semantics. Regardless of their name or title, if the Proposed Ordinance is adopted to provide for the collection of FBAs as only a condition of property development, a court would most likely find FBAs subject to the MFA. As discussed in the Background Section, the FBA Ordinance was originally intended to establish procedures for the implementation of a policy that certain public facilities should be financed at least in part by special assessment proceedings by providing "for the designation of lands within the Planned Urbanizing Area which will receive special benefits from the acquisition, construction and improvement of certain public facilities . . . and the imposition of special assessments on land related to benefits received." O-15381.

However, as also discussed, the City's 2008 General Plan explains that planned urbanizing areas have been "largely completed." General Plan at PF-4. As such, the need to have separate procedures for financing public facilities in planned urbanizing areas may have become obsolete. Moreover, the City already adopts DIFs in its FBA communities, and the amount of the DIF is equal to the amount of the FBA. Although not collected as an FBA through the FBA Ordinance, DIFs could still be collected to ensure the provision of adequate public facilities

needed as a result of new development. Although DIFs must comply with the requirements of the MFA, elimination of the FBA proceedings would eliminate time-consuming and costly procedures such as the need for two public hearings, and the recordation and release of FBA liens on affected parcels in the Office of the County Recorder. *See* SDMC §§ 61.2203, 61.2207, 61.2209. Furthermore, if the FBA Ordinance's provision for the collection of FBAs prior to property development is not deleted, then the even more onerous requirements of Proposition 218 would apply.

With fewer procedural requirements, collecting FBAs as DIFs would not affect the City's ability to collect fees for the financing of public facilities attributable to new development. However, it is possible that it could affect the methodologies that could be employed to calculate the fees for the financing of public facilities. Whereas under the MFA, the City must show a reasonable relationship between the DIF and the burden posed by development, under Proposition 218, the City would need to show that the assessment does not exceed the reasonable cost of the proportional special benefit conferred on a particular parcel. Cal. Const. art. XIIID, § 4(a); Cal. Gov't Code § 66001(a)(3)-(4). Both the MFA and Proposition 218 set forth different limitations on how the City may calculate the ultimate fee or assessment. Notwithstanding the different methodology, it should be noted that it has been the City's practice to adopt a separate DIF in an amount equal to the FBA in an FBA community. If requested by the Mayor or the Council, this Office can provide additional legal guidance with respect to compliance with the MFA or Proposition 218 as well as the benefits and limitations of each. However, it is important to understand that if the Proposed Ordinance is adopted as currently drafted, City staff should conform with the requirements under the MFA. However, if the Proposed Ordinance is changed to allow for the collection of FBAs prior to property development through an assessment, then Proposition 218 would apply.

If policy decision is to collect FBAs as DIFs, then the FBA Ordinance could be deleted in its entirety as it applies going forward. The financing of public facilities for future development would then be addressed exclusively in Chapter 14, Article 2, Division 6 of the Municipal Code and through resolutions adopting applicable DIFs. However, if a distinction between FBAs and DIFs continues, in adopting and imposing FBAs, the City should nonetheless ensure that it complies with either the MFA (if the Proposed Ordinance is adopted and FBAs may only be collected as a condition of property development), or Proposition 218 (if FBAs may continue to be collected prior to property development). If the latter, the Municipal Code should be amended to incorporate the requirements of Proposition 218.

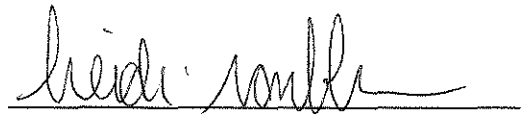
## CONCLUSION

The decision to defer fees and delay updates to Financing Plans remains a policy decision squarely with the Mayor and Council. However, this Office provides this Report to describe the legal implications of such policy decisions.

If the Proposed Ordinance is adopted and FBAs are collected only as a condition of property development, there is likely no longer a meaningful distinction between FBAs and DIFs, and FBAs should be converted to, or at a minimum, collected as DIFs, subject to the requirements of the MFA. Alternatively, if the FBA Ordinance continues to allow for the collection of FBAs prior to property development through an assessment, then the FBAs are

subject to Proposition 218. Both the MFA and Proposition 218 set forth different limitations on how the City may calculate the ultimate fee or assessment. If requested by the Mayor or the Council, this Office can provide additional legal guidance with respect to compliance with the MFA or Proposition 218. Once this Office is provided with the policy direction, we can draft an additional amendment to the FBA Ordinance that reflects compliance with either the MFA or Proposition 218 for FBAs or DIFs.

JAN I. GOLDSMITH, CITY ATTORNEY

By 
Heidi K. Vonblum
Deputy City Attorney

HKV:hm
RC-2011-28
Attachment A

# ATTACHMENT A

**STRIKEOUT ORDINANCE**

**OLD LANGUAGE: ~~Struck Out~~**
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ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 6, ARTICLE 1, DIVISION 22 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 61.2200, 61.2202, AND 61.2210; AND AMENDING CHAPTER 14, ARTICLE 2, DIVISION 6 BY AMENDING SECTION 142.0640; ALL PERTAINING TO PUBLIC FACILITIES FEES AND ASSESSMENTS.

**§61.2200 Purpose**

(a) through (b) [No change in text.]

(c) The purpose of this ordinance is to implement, in part, the City's General Plan ~~adopted by Resolution No. 303473 on March 10, 2008~~, which establish~~ed~~s guidelines for future urban development in the City, including the financing of public facilities. ~~These guidelines include the division of the City into two planning designations, Proposition A Lands and Urbanized Lands.~~

(d) The communities ~~subject to Facilities Benefit Assessments (previously designated Planned Urbanizing Areas) are designated Urbanized Areas~~ identified as Facilities Benefit Assessment Planning Areas, and Future Urbanizing Areas Planning Areas that are phase shifted, in the City's General Plan are subject to this Division, until such time as all FBA funds are collected and expended in each individual community.

(e) The City's General Plan ~~referred to in this Division expresses a~~ contains policy~~ies concerning~~ to maintain an effective facilities financing program to ensure the impact of new development is mitigated through appropriate fees and to address current and future public facility needs through a diverse funding and management strategy ~~the acquisition, construction and improvement of public facilities which states that certain public facilities may be financed by special assessment proceedings, consideration from developers, the City's General Fund~~, including ~~some combination thereof, as well as other appropriate funding mechanisms~~ special assessment proceedings for local facilities. This Division is intended to establish procedures ~~for the implementation~~ in furtherance of ~~that policy~~ the City's General Plan policies by ~~providing for the designation of~~ designating lands ~~within the Urbanized Lands~~ which will receive special benefits from the acquisition, construction and improvement of certain public facilities ~~set forth in this Division,~~ and ~~the imposition of special~~ imposing assessments on land related to the special benefits received.

**§61.2202 Definitions**

~~Unless the context requires otherwise,~~ tThe definitions set forth in this section apply to the following terms as used in this Division:

(a) through (b) [No change in text.]

(c) "~~Building~~ Construction Permit" ~~means the permit issued or required for the construction of any structure in connection with the development of land pursuant to and as defined by the California Building Code, as~~

~~adopted in Chapter IX of the Municipal Code~~ has the same meaning as stated in Section 113.0103;

(d) through (j) [No change in text.]

**§61.2210 Payment of Facilities Benefits Assessments**

(a) ~~Regular~~ Payment

After the adoption by the City Council of ~~its~~ a Resolution of Designation, ~~no building permits shall be issued for development on any land included within the Area of Benefit unless and until the Facilities Benefit Assessments established by the Resolution of Designation for such lands have been paid. The~~ the Facilities Benefit Assessment for the Area of Benefit shall be paid by the Construction Permit applicant or landowner ~~upon~~ prior to the issuance of any ~~building permits(s)~~ Construction Permit issued or required for development that would benefit from the Public Facilities Projects ~~for development or at such time as the Capital Improvement Program for the Area of Benefit in which the assessed land is located calls for the commencement of construction of the Public Facilities Project. In the event that a landowner desires to proceed with development of a portion of the landowner's property, based on a phased development program, which is subject to a lien for the total amount of Facilities Benefit Assessments as provided in this Division, the landowner may obtain building permits for the development phase after paying a portion of the Facilities Benefit Assessments and making provision for payment of the remainder of the Facilities Benefit Assessments to the~~

~~satisfaction of the City Manager. The Facilities Benefit Assessment due shall be the amount in effect upon the issuance of building permit(s) for development or the amount in effect at such time as the Capital Improvement Program for the Area of Benefit in which the assessed land is located calls for the commencement of construction of the Public Facilities Project. Money received by the City as payment of the Facilities Benefit Assessments shall be deposited in an interest earning special fund established for the Area of Benefit and shall thereafter be expended solely for the purposes for which it was assessed and levied.~~

~~Upon payment of the Facilities Benefit Assessments as provided in this Division, the lien which attaches pursuant to Section 61.2209 shall be discharged. In the event partial payment is made based on a phased construction program, the City shall only release *lots* (as defined in San Diego Municipal Code section 113.0103) on which all building permits have been issued for that development from the lien of the Facilities Benefit Assessment~~.

(b) Partial Payment for Phased Development

In the event that a Construction Permit applicant or landowner desires to proceed with development of a portion of the property, based on a phased development program, which is subject to a lien for the total amount of Facilities Benefit Assessments as provided in this Division, the Construction Permit applicant or landowner may obtain Construction Permits for a particular development phase after paying a partial Facilities

Benefit Assessment payment in an amount proportional to the amount of development occurring under that particular development phase to the satisfaction of the City Manager, plus the administrative processing fee, as set forth in the Comprehensive Fee Schedule on file in the Office of the City Clerk. After a partial payment is made, the City Manager will release the existing Facilities Benefit Assessment lien in accordance with Section 61.2210(d), and shall record a new Facilities Benefit Assessment lien against the property with the revised Facilities Benefit Assessment amount.

(c) Payment Amount

The amount of Facilities Benefit Assessment due shall be determined by the City Manager by the actual type and size of the development permitted by the applicable Construction Permit, and by the applicable Facilities Benefit Assessment schedule in effect and on file in the Office of the City Clerk upon the issuance of Construction Permit(s).

(d) Use of Facilities Benefit Assessments

Money received by the City as payment of the Facilities Benefit Assessments shall be deposited in an interest earning special fund established for the Area of Benefit and shall thereafter be expended solely for the purposes for which it was assessed and levied.

(e) Release of Facilities Benefit Assessment Lien

Upon payment of Facilities Benefit Assessments as provided in this Division, the City Manager will release the lien which was attached to the land pursuant to Section 61.2209.

(~~b~~f) Deferral of Facilities Benefit Assessment Payment in Certain Circumstances

Notwithstanding Section 61.2210(a), Construction Permits may be issued if the City Manager defers payment of the Facilities Benefit Assessments in accordance with this Section.

(1) Payment of Facilities Benefit Assessments may be deferred in the following circumstances:

(~~1~~A) ~~Payment on assessments may be deferred for~~ Where a developments is located in a Facility~~ies~~ Benefit Assessment areas that has~~ve~~ a sufficient cash balances to fund existing programmed facilities for the next two fiscal years~~.~~;

(~~2~~B) ~~Payment on assessments may be deferred for~~ Development of affordable housing ~~units~~projects. For purposes of this ~~s~~Subsection, an affordable housing ~~units~~ project means ~~all units that meet the affordability requirements of the Inclusionary Ordinance codified in San Diego Municipal Code section 142.1309 by providing on-site units and moderate units consistent with the California Health and Safety Code section 50093~~ a project that consists entirely (with the exception of a manager's unit) of residential

housing units reserved for extremely low, very-low, low, or moderate income households as defined in California Health and Safety Code Sections 50105, 50106, 50079.5 and 50093, as evidenced through a recorded agreement with the San Diego Housing Commission and/or the Redevelopment Agency of the City of San Diego.; and

(3C) ~~Until November 10, 2011 the City Manager is authorized to enter into agreements to defer the collection of Facilities Benefit Assessments for a maximum deferral period of two years or until request for Final Inspection, whichever is shorter, provided the City's Fee Deferral Agreement is properly executed and duly recorded, and the applicable administrative fee is paid.~~ Until December 31, 2014, all other development that is otherwise subject to this Division.

(2) Payment of Facilities Benefit Assessments may be deferred for a maximum period of two years from the effective date of a Fee Deferral Agreement, or until a final inspection is requested, whichever occurs earlier. A final inspection shall not occur, and where applicable no certificate of occupancy shall be issued, until the applicable Facilities Benefit Assessments are paid.

(3) Payment of Facilities Benefit Assessments may only be deferred if the applicable administrative processing fee, as set forth in the

Comprehensive Fee Schedule on file in the Office of the City Clerk, is paid by the Construction Permit applicant or landowner.

(4) Payment of Facilities Benefits Assessments may not be deferred unless and until a Fee Deferral Agreement is entered into with the Construction Permit applicant or landowner to the satisfaction of the City Manager. The Fee Deferral Agreement shall be recorded against the applicable property in the Office of the San Diego County Recorder and shall constitute a lien for the payment of the Facilities Benefit Assessment. The Fee Deferral Agreement shall be binding upon, and the benefits of the agreement shall inure to, the parties, and all successors in interest, to the Fee Deferral Agreement.

(5) At the end of the Facilities Benefit Assessment deferral period set forth in Section 61.2210(f)(2), ~~T~~the deferred Facilities Benefit Assessments~~, including all annual inflationary rate increases,~~ due ~~under this subsection~~ shall be determined in accordance with Section 61.2210(c), except that the Facilities Benefit Assessment shall be determined by the Facilities Benefit Assessment rate for the year in which the Facilities Benefit Assessment is actually paid as set forth in the Facilities Benefit Assessment fee schedule in effect when the Fee Deferral Agreement ~~is~~ was executed by the City, or the Facilities Benefit Assessment fees schedule approved by the City Council for a subsequent update or amendment of the

applicable public facilities financing plan, whichever ~~fee schedule~~ is lower. ~~The Final Inspection shall not be scheduled until the applicable Facilities Benefit Assessments are paid.~~

**§142.0640 Payment of ~~Facilities Benefit Assessments and~~ Development Impact Fees**

~~(a) The payment of Facilities Benefit Assessments (as defined in paragraph (i) of Municipal Code Section 61.2202) shall be required before the issuance of any Building Permit in accordance with Municipal Code Section 61.2210.~~

(~~b~~a) The payment of Development Impact Fees (as defined in ~~paragraph (b) of~~ California Government Code Section 66000) shall be required before the issuance of any Building Permit in areas where Development Impact Fees have been established by ~~the~~ Resolution of the City Council. The Development Impact Fee due shall be determined in accordance with ~~as set forth in~~ the fee schedule approved by the ~~most recent~~ applicable Resolution of the City Council ~~and in the amount~~ in effect upon the issuance of a Building Permit, ~~plus~~ and may include an automatic increase consistent with ~~subsection (c)~~Section 142.0640(b) below.

(e~~b~~) Unless otherwise specified in the applicable Resolution(s) establishing the Development Impact Fees, the amount of the Development Impact Fee shall be increased, starting on July 1, 2010, and on each July 1st thereafter, based on the one-year change (from March to March) in the ~~Los Angeles~~ Construction Cost Index for Los Angeles as published monthly in the Engineering News-Record. ~~For reference purposes, this update is based on~~

~~the March 2009, Los Angeles Construction Cost Index of 9799.19.~~

Increases to Development Impact Fees consistent with the Construction Cost Index in Los Angeles shall be automatic and shall not require further action of the City Council. This Subsection shall not be applicable to Development Impact Fees in communities that are also subject to Chapter 6, Article 1, Division 22.

(~~d~~c) Notwithstanding ~~the above~~ Section 142.0640(a) ~~the City Manager is authorized to defer the collection of Development Impact Fees (except those Development Impact Fees due pursuant to the City's Regional Transportation Congestion Improvement Program) for a maximum period of two years or until request for Final Inspection, whichever is shorter, provided the City's Fee Deferral Agreement is properly executed and duly recorded and the applicable administrative fee is paid.~~, Building Permits may be issued if the City Manager defers payment of the Development Impact Fees in accordance with this Subsection. Development Impact Fees due pursuant to the City's Regional Transportation Congestion Improvement Program shall not be deferred under any circumstance.

(1) Payment of Development Impact Fees may be deferred for a maximum period of two years from the effective date of a Fee Deferral Agreement, or until a final inspection is requested, whichever occurs earlier. A final inspection shall not occur until the applicable Development Impact Fees are paid.

(2) Payment of Development Impact Fees shall not be deferred unless and until a Fee Deferral Agreement is entered into to the satisfaction of the City Manager. The Fee Deferral Agreement shall be recorded against the applicable property in the Office of the San Diego County Recorder. The Fee Deferral Agreement shall be binding upon, and the benefits of the agreement shall inure, to the parties and all successors in interest to the parties to the Fee Deferral Agreement.

(3) Payment of Development Impact Fees shall only be deferred if the applicable administrative processing fee, as set forth in the Comprehensive Fee Schedule on file in the Office of the City Clerk, is paid by the applicant or landowner.

(4) At the end of the Development Impact Fee deferral period as set forth in Section 142.0640(c)(1), ~~T~~the deferred Development Impact Fees ~~due under this subsection~~ shall be determined ~~the amount in effect when~~ in accordance with Section 142.0640(a), except that the Development Impact Fee shall be determined by the Development Impact Fee rate for the year in which the Development Impact Fee is actually paid as set forth in the Development Impact Fee schedule in effect when the Fee Deferral Agreement ~~is~~ was executed by the City, plus an automatic increase consistent with ~~subsection (c) above~~ Section 142.0640(b), or the fee schedule approved by the City Council for a subsequent update

or amendment of the applicable public facilities financing plan, whichever fee schedule is lower. ~~The Final Inspection shall not be scheduled until the applicable Development Impact Fees are paid.~~

(~~e~~d) ~~Notwithstanding paragraphs (a) and (b) above,~~ Any party on whom Development Impact Fees are imposed, may file an application for a waiver, adjustment, or reduction of the Development Impact Fees ~~due may be requested and decided in accordance with Process Five and shall require the findings in paragraph (f) be made.~~ with the City Manager in accordance with this Subsection. Nothing in this Subsection shall affect the requirements set forth in Section 142.0640(a). The procedures provided in this Subsection are additional to any other procedure authorized by law for protesting or challenging Development Impact Fees.

(1) An application for a waiver, adjustment, or reduction of Development Impact Fees ~~shall be filed in accordance with Section 112.0102 and~~ shall set forth the factual and legal basis to support the application ~~include financial and other information the City Manager determines necessary to perform an independent evaluation of the *applicant's* rationale for the~~ a waiver, adjustment, or reduction ~~and shall be a matter of public record~~ of Development Impact Fees.

(2) An application for a waiver, adjustment, or reduction of Development Impact Fees shall only be processed after the applicable fee or amount of deposit, as set forth in the

Comprehensive Fee Schedule on file in the Office of the City Clerk, has been paid in full. If a deposit is required, and the deposit as shown in the Comprehensive Fee Schedule is insufficient to cover the actual cost to the City to process the application, an additional deposit, in an amount determined by the City Manager, shall be required. Any unused portion of a deposit shall be returned. If the City Council grants the application for a waiver of the Development Impact Fees, then the fee or the amount of the deposit expended shall be returned, minus a processing fee equal to 10 percent of the refund amount up to a maximum of five hundred dollars. If the City Council grants the application for an adjustment or reduction of the Development Impact Fees, then a portion of the fee or amount of the deposit expended, determined by the percentage reduction in the Development Impact Fee imposed, shall be returned, minus a processing fee equal to 10 percent of the refund amount up to a maximum of five hundred dollars.

(3) An application for a waiver, adjustment, or reduction of Development Impact Fees shall be filed no later than ten (10) calendar days after the Development Impact Fees are imposed or ten (10) calendar days after the Development Impact Fees are paid, whichever occurs earlier.

(4) The decision on an application for a waiver, adjustment, or reduction of Development Impact Fees shall be decided by the City

Council within sixty (60) calendar days of the date that the application is received by the City Manager. The *applicant* shall bear the burden of presenting evidence to support the application for a waiver, adjustment, or reduction of Development Impact Fees.

(5) Notice of the time and place of the City Council hearing, including a general explanation of the matter to be considered shall be mailed at least 14 days prior to the hearing to the *applicant*, and any interested party who files a written request with the City Manager requesting mailed notice of all applications for a Development Impact Fee waiver, adjustment, or reduction. Written requests for such notice shall be valid for one year from the date on which it is filed unless a renewal request is filed prior to the end of the one-year term. If established by resolution of the City Council, an annual charge for sending notices based on the estimated cost of providing the service, shall be required prior to the requestor's name being placed on a notice list.

(~~f~~6) ~~No~~ An application for a waiver, adjustment, or reduction of ~~the~~ Development Impact Fees may only be granted if:

(A) The City Council makes the following *finding*: ~~due shall be issued unless the City Council finds~~ there is no reasonable relationship ~~or nexus~~ between the ~~impact of the~~ *development* ~~and the~~ amount of the Development Impact

Fee and the cost of the public facilities attributable to the *development* on which the fee is imposed.

(B) The landowner enters into an agreement with the City providing that an intensification of use of the *development* shall subject the *applicant* or landowner to full payment of the Development Impact Fee to the satisfaction of the City Manager. The agreement shall be recorded with the Office of the San Diego County Recorder and shall constitute a lien against the applicable property for the payment of the Development Impact Fee. The agreement shall be binding upon, and the benefits of the agreement shall inure, to the parties and all successors in interest to the parties to the agreement.

(7) If an application for a waiver, adjustment, or reduction of Development Impact Fees is granted, any Development Impact Fees previously paid with respect to the application at issue shall be refunded in accordance with the resolution adopted by the City Council granting the application, plus any interest earned by the City on the fee, as applicable.

HKV: cw
06/01/11
Or.Dept: Facilities Financing