



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: April 18, 2012 REPORT NO: 12-047

ATTENTION: Budget and Finance Committee
Agenda of April 25, 2012

SUBJECT: FY 2013 Recommended Development Services Department User Fee
Adjustments

REFERENCE: None

REQUESTED ACTION:
Approve proposed user fees for Fiscal Year 2013.

STAFF RECOMMENDATION:
Approve proposed user fees for Fiscal Year 2013.

SUMMARY:

BACKGROUND

The City's User Fee Policy 100-05, which was adopted by the City Council on March 10, 2009, provides guidelines for establishing a comprehensive user fee schedule and requires that the full cost of services be identified and all fees be categorized according to the level of cost recovery. The Policy requires all existing fee levels be in line with service costs to ensure that all reasonable costs incurred in the provision of services are being recovered. Per the User Fee Policy, a comprehensive user fee study shall be conducted every three years. The last comprehensive user fee study was conducted in Fiscal Year 2009.

The User Fee Policy stipulates three categories of cost recovery: user fees with 100% cost recovery (Category I), user fees with less than 100% cost recovery (Category II), and penalties and fines (Category III). This report groups the recommended user fee adjustments into these three categories.

The cost recovery calculations are based on direct and indirect costs for all fees in order to accurately calculate the cost of providing services. Direct costs are those that can be fully attributed to providing a specific service. An example of a direct cost is the staff time spent performing tasks related to a specific service and includes employee salary and benefits. Indirect costs include allocated central support service costs (IT, risk management, fleet assignment and usage fees, etc.), departmental support costs, and the full cost associated with staff providing the service.

Since the Fiscal Year 2009 comprehensive user fee study was completed, voters approved Proposition 26, the Supermajority Vote to Pass New Taxes and Fees Act, as part of the November 2, 2010 ballot. Proposition 26 places limitations on the ability of local governments to impose and adjust fees. All user fee adjustments recommended in this report have been reviewed by the City Attorney's Office for compliance with Proposition 26.

FEE ADJUSTMENTS

The Development Services Department has two General Fund divisions. The Neighborhood Code Compliance Division (NCCD) has seven fees subject to the User Fee Policy. They include fees associated with the administrative cost of issuing noise and newsrack permits. Three fees are related to the time and costs involved with reinspecting property to ensure building, housing or zoning compliance. Removal of Recorded Notice fees are tied to the time spent closing a case when a Notice of Violation has been recorded with the County of San Diego. In the event of an appeal by the property owner, the fee covers staff time spent representing the City of San Diego at an appeals hearing. The majority of these fees have not been reviewed and adjusted per updated cost factors since 2004. Over the years, the staff time involved, position costs, and indirect recovery cost (IRC) rates have changed significantly. The proposed fee adjustments are consistent with the User Fee Policy and the cost recovery guidelines previously described.

The City Planning Division is proposing adjustments to four fees subject to the policy. These include revisions to Mills Act fees for requesting a Mills Act Program Agreement following historic designation, and for monitoring the terms of an approved agreement. While still unused, there is a proposed adjustment to the as-needed Mills Act fee for enforcing the terms of an adopted agreement should enforcement be required. Similar to NCCD's fees and consistent with the policy, these fees are accounting for updated staff time, position costs, and IRC rates. Three of the fees are related to the Mills Act and have not been adjusted since their adoption in 2008.

General Plan Maintenance Fee

The General Plan Maintenance Fee (GPMF) was last adjusted for inflation as part of the Fiscal Year 2011 budget process per the User Fee Policy. The GPMF is paid by applicants of development projects and charged for projects with plans and documents to be reviewed for compliance with the General Plan or Land Development code provisions. As part of the Fiscal Year 1991 Budget Review Process, the Planning Department was directed to develop a Long Range Planning cost recovery program. The GPMF was developed to recover a pro rata share of the costs associated with maintaining the General Plan, Community Plans, and Zoning Maps, among others. The original \$80 GPMF was adopted on June 24, 1991 by Resolution Number R-278187. In August 2003, the City Council approved an increase to \$84 effective May 2004 and scheduled another automatic increase to \$88 in 2005. Revenue from the current \$108 fee per permit application is used to justify General Fund expenditure appropriations to support ongoing plan update and maintenance efforts.

Despite the \$28 total increase since the fee was adopted nearly 21 years ago, a complete cost analysis of the targeted maintenance efforts had not been conducted. Per the fee policy, a complete cost assessment was performed to calculate the proposed fee adjustment for the Fiscal Year 2013 budget. City Planning General Fund expenditures on community plan updates,

General Plan maintenance, the Housing Element Update, planning grant match requirements, and other special projects were added to calculate an average annual cost. Due to the number of variables in plan update and maintenance efforts that can affect actual costs in a given year, the fee adjustment was based on a three year average. Included in the comprehensive assessment were updated position costs, staff time, applicable IRC rates, and other direct non-personnel expenditures (e.g. contractual services costs).

Between Fiscal Years 2008 and 2011 there has been a 80% increase in active grants administered for plan update and maintenance activities. Nearly \$800,000 in General Fund expenditures have been leveraged successfully to secure approximately \$5.15 million in grant awards. During the same timeframe the General Fund has also appropriated \$4.1 million for community plan updates, and dedicated an average of 8.05 FTE for plan update and maintenance efforts. Collectively these investments represent commitments to continue implementing the vision and goals set forth by the city's General Plan. Redevelopment funding has also been used to fund a portion of the planning work program between 2008 and 2011.

The city's General Plan is its constitution for development, the foundation upon which all land use decisions are based. California Government Code §66014(b) specifically authorizes a city to include in development fees the "costs reasonably necessary to prepare and revise the plans and policies that a local agency is required to adopt before it can make any necessary findings and determinations" in land use decisions. The fundamental basis for plan update and maintenance cost recovery through various development fees is the fact that none of the actions paid for by these fees are legally possible without an adopted and current General Plan.

Many other jurisdictions in California assess a development-related fee to help fund the update and maintenance of their General Plan. Attachment 1 lists some of the fees collected by other cities. However, the different fee methodologies and lack of actual revenue information makes a comparison to San Diego difficult. The City of Antioch is one of the few cities currently assessing a flat fee like San Diego but at a rate of \$157 per residential permit.

FISCAL CONSIDERATIONS:

The proposed fee adjustments for NCCD are estimated to result in a revenue variation of \$12,000. The proposed City Planning fees are estimated to increase revenue by a net of \$942,000. All fees are classified as Category I fees as defined by the User Fee Policy. The General Plan Maintenance Fee and the News Rack Permit Fee are the exceptions. These are considered Category II fees. The following table displays the proposed user fee adjustments for the Development Services Department.

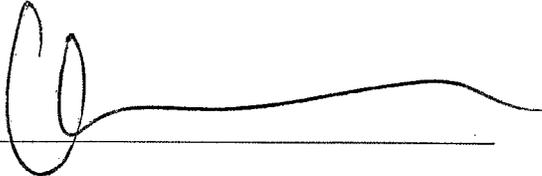
Development Services Department – Proposed FY 2013 User Fee Adjustments				
Fee Title	DIVISION	Unit of Measurement	Current Fee	Proposed Fee
General Plan Maintenance Fee	CP	Per Permit Application	\$108	\$275
Mills Act Application Fee	CP	Per Item	\$890	\$456
Mills Act Enforcement Fee	CP	Per Item	\$949	\$750
Mills Act Monitoring Fee	CP	Per Item	\$492	\$232
News Rack Permit Fee	NCC	Per Permit	\$15	\$20
Noise Permit Fee	NCC	Per Permit	\$40	\$167

Reinspection Fees - Building	NCC	Per Reinspection	\$105	\$288
Reinspection Fees - Housing	NCC	Per Reinspection	\$105	\$288
Reinspection Fees - Zoning	NCC	Per Reinspection	\$98	\$269
Removal of Recorded Notice of Violation Fee - No Appeal	NCC	Per Notice	\$766	\$625
Removal of Recorded Notice of Violation Fee - With Appeal	NCC	Per Notice	\$976	\$967

PREVIOUS COUNCIL and/or COMMITTEE ACTION: None

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

The Development Services Department presented the proposed Mills Act fee adjustments to the Historic Resources Board on March 22, 2012. The GPMF adjustments were presented to members of the Building Industry Association at a special meeting on April 4, 2012 and to the Technical Advisory Committee (TAC) on April 11, 2012. An additional presentation to the San Diego Regional Chamber of Commerce's Housing Committee is scheduled for April 18, 2012.



Kelly Broughton
Development Services Department Director

Attachment:

- Attachment I - General Plan Maintenance Fee by California Jurisdiction

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: April 16, 2012

TO: Kelly Broughton, Director, Development Services Department

FROM: City Attorney

SUBJECT: Proposition 26 Review of Proposed Development Services Department User Fees for FY 2013

INTRODUCTION

Under Council Policy 100-05, general fund departments are required to conduct comprehensive user fee studies every three years. These fee studies ensure City departments identify and recover all reasonable and allowable costs incurred in providing government services.

Financial Management staff has asked participating departments to obtain an opinion on the legality of their proposed user fee adjustments and additions from the Office of the City Attorney in light of Proposition 26. Approved by the voters in 2010, Proposition 26 amends articles XIII A and XIII C of the California Constitution to provide that a levy, charge, or exaction of any kind imposed, increased, or extended by a local government is a tax unless an exception applies. Exceptions to Proposition 26 include user fees; government service or product fees; regulatory fees; government property entrance fees; fines and penalties imposed by a court or local government; property development impact fees; and assessments and property-related fees governed by Proposition 218.¹

Each Proposition 26 exception involves its own legal standard for determining the amount of a legally permissible fee. Under article XIII C, section 1(e)(1)(2)(3) of the California Constitution, which discusses some of the exceptions to Proposition 26, no fee may exceed the reasonable cost of providing the service. However, such fees should reimburse the government entity for all reasonable direct and indirect expenses incurred. *United Business Commission v. City of San Diego*, 91 Cal. App. 3d 156, 166 (1979). As noted in *United Business Commission*, “. . . the municipality need only apply sound judgment and consider ‘probabilities according to the best honest viewpoint of informed officials’ in determining the amount of the fee.” *Id.* This Office

¹ For a fuller discussion of Proposition 26, see City Att’y MOL No. 11-3 (Mar. 4, 2011), “Proposition 26 and Its Impact on City Fees and Charges.”

has advised City staff to explain the link between the cost and the service provided and justify all fee calculations based on a study of the costs associated with the fee for Council's consideration and approval. Therefore, depending on the particular type of fee and individual department activities, staff for each City department developed their proposed user fee adjustments using the comprehensive Citywide method developed by Financial Management and Comptroller staff.²

We have reviewed a detailed summary of the Development Service Department's cost recovery calculations as described in Exhibit A and proposed fee adjustments as described in Exhibit B. Our Proposition 26 analysis of each fee is discussed below.

General Plan Maintenance Fee

California Government Code section 65104 provides that a legislative body, including that of a charter city, may establish fees to support the work of its planning agency provided the fees not exceed the reasonable cost of providing the service for which the fee is charged and that the fees be imposed pursuant to Government Code section 66016.

The City currently charges a General Plan Maintenance Fee (GPMF) in the amount of \$108.00 for development projects that must be reviewed for consistency with the City's General Plan. *See* Exhibit B. City staff's comprehensive user fee study concludes that the total costs associated with a General Plan consistency review for a development permit is \$491.38. *See* Exhibit A. City staff proposes to raise the GPMF to \$275.00, which is estimated to recoup approximately 56% of costs associated with such reviews. *See* Exhibit B.

The amended GPMF would not be a "tax" under Proposition 26 because two exceptions apply: the "government service or product" exception and the "fee imposed as a condition of property development" exception.

Article XIII C, section 1(e)(2) exempts from Proposition 26's definition of "tax": "A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." This exception would cover the GPMF because those who apply for development permits are paying for a government service (a General Plan consistency review necessary to the issuance of a permit) received directly by the applicants that is not provided to those not charged.

Article XIII C, section 1(e)(6) excludes from the Proposition's definition of "tax": "A charge imposed as a condition of property development." This exception would likewise cover the

² The method was approved by Financial Management and the Comptroller and provided to the departments by Financial Management. The number (budget item) used to apportion rates (overhead and load) against direct cost is the responsibility of each department based on the contents and knowledge of their individual department activities. This Office did not independently verify or recalculate the numbers provided or the validity of the methodology.

GPMF because the fee is charged as part of obtaining development permits necessary for the development of property.

Mills Act Application Fee

California Government Code sections 50280 through 50290, known as the Mills Act, provide that a local government may enter into contracts with homeowners whereby homeowners receive property tax benefits if they rehabilitate and maintain the historical and architectural character of designated historical resources.

The San Diego City Council approved the collection of a Mills Act Application Fee (MAAF) that is charged to homeowners seeking to enter into a Mills Act Agreement with the City of San Diego. San Diego Resolution R-304533 (Dec. 15, 2008). The MAAF pays for staff costs to receive and log applications, review applications for completeness, conduct site visits, prepare documents, including the development of a tailored agreement for the specific properties, correspondence and meetings with property owners, signing and recording of Mills Act Program Agreements, and updating of the historic designation file and database. The City currently charges a MAAF in the amount of \$590.00. *See* Exhibit B. City staff's user fee study concludes that the total costs associated with a Mills Act application are \$456.22. *See* Exhibit A. City staff therefore proposes to reduce the MAAF to \$456.00. *See* Exhibit B.

The amended MAAF would not be a "tax" under Proposition 26 because two exceptions apply: the exception for a "charge imposed for a specific benefit conferred or privilege granted" and the "government service or product" exception.

Article XIII C, section 1(e)(1) exempts from Proposition 26's definition of "tax": "A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." This exception would cover the MAAF because property owners seeking to enter into Mills Act Agreements are applying for a specific property tax benefit that will be conferred directly to them as payors that is not provided to those not charged.

Article XIII C, section 1(e)(2) exempts from Proposition 26's definition of "tax": "A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." This exception would also cover the MAAF because property owners seeking to enter into Mills Act Agreements are paying for a government service (staff's review of the application, preparation of a Mills Act Agreement, and other tasks described more fully above) received directly by the property owner that is not provided to those not charged.

Mills Act Maintenance Fee

California Government Code sections 50280 through 50290, known as the Mills Act, provide that a local government may enter into contracts with homeowners whereby homeowners receive property tax benefits if they rehabilitate and maintain the historical and architectural character of designated historical resources. The Mills Act requires that local governments inspect a property that is the subject of a Mills Act Agreement prior to a new agreement and every five years thereafter. Cal. Gov't Code § 50281(b)(2).

The San Diego City Council approved the collection of a Mills Act Monitoring Fee (MAMF) that is charged to homeowners who have entered into a Mills Act Agreement with the City of San Diego. San Diego Resolution R-304533 (Dec. 15, 2008). The MAMF pays for staff to review historic designation files and Mills Act Agreements, conduct field checks of properties, prepare conditions assessments with photos of properties, review previous permits if applicable, correspond with property owners, and update designation files and database with monitoring information. The City currently charges a MAMF in the amount of \$492.00. *See Exhibit B.* City staff's user fee study concludes that the total costs associated with the monitoring of a Mills Act Agreement are \$232.87. *See Exhibit A.* City staff therefore proposes to reduce the MAMF to \$232.00. *See Exhibit B.*

The amended MAAF would not be a "tax" under Proposition 26 because three exceptions apply: the exception for a "charge imposed for a specific benefit conferred or privilege granted," the "government service or product" exception, and the "investigations, inspections and audits" exception.

Article XIII C, section 1(e)(1) exempts from Proposition 26's definition of "tax": "A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." This exception would cover the MAMF because property owners in Mills Act Agreements with the City are receiving a specific property tax benefit that is conferred directly to them as payors that is not provided to those not charged, the expenses covered by the MAMF are necessary to the maintenance of those Mills Act Agreements, and Exhibit A demonstrates that the MAMF does not exceed the reasonable costs to the City of maintaining Mills Act Agreements.

Article XIII C, section 1(e)(2) exempts from Proposition 26's definition of "tax": "A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." This exception would also cover the MAMF because property owners seeking to enter into Mills Act Agreements are paying for a government service (the inspection of property subject to a Mills Act Agreement) received directly by the property owner that is not provided to those not charged.

Article XIII C section 1(e)(3) exempts from Proposition 26's definition of "tax": "A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof." This exception may also cover the MAMF because the fee pays for the inspections required by state law for Mills Act Agreements.

Mills Act Enforcement Fee

California Government Code sections 50280 through 50290, known as the Mills Act, provide that a local government may enter into contracts with homeowners whereby homeowners receive property tax benefits if they rehabilitate and maintain the historical and architectural character of designated historical resources. The Mills Act provides if a local government determines that the owner of a property subject to a Mills Act Agreement has breached any of that Agreement's conditions or allowed the property to deteriorate to the point it no longer meets the standards for a qualified historical property, the local government must either cancel the Agreement or bring an action in court to enforce the Agreement. Cal. Gov't Code § 50284.

The San Diego City Council approved the collection of a Mills Act Enforcement Fee (MAEF) that is charged to homeowners who have entered into a Mills Act Agreement with the City of San Diego. San Diego Resolution R-304533 (Dec. 15, 2008). The MAEF pays expenses that would be incurred by the City in the event of a violation of a Mills Act Program Agreement. The fee would cover expenses for staff to pursue compliance or process a revocation action, including staff time to identify the violation, prepare a restoration plan, conduct meetings and correspondence with the property owner, do a field review with photos, update the designation file and data base, and follow up on implementation of a restoration plan. If the owner did not agree to restore the property, the fee would cover expenses for staff time to prepare for and attend a hearing to revoke the Mills Act Agreement at issue. The City currently charges a MAEF in the amount of \$949.00. *See* Exhibit B. City staff's user fee study concludes that the total costs associated with the enforcement of a Mills Act Agreement would be \$750.37. *See* Exhibit A. City staff therefore proposes to reduce the MAEF to \$750.00. *See* Exhibit B.

The amended MAEF would not be a "tax" under Proposition 26 because two exceptions apply: the exception for a "charge imposed for a specific benefit conferred or privilege granted" and the "investigations, inspections and audits" exception.

Article XIII C, section 1(e)(1) exempts from Proposition 26's definition of "tax": "A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." This exception would cover the MAMF because property owners in Mills Act Agreements with the City are receiving a specific property tax benefit that is conferred directly to them as payors that is not provided to those not charged, and the expenses covered by the MAEF are necessary to the maintenance of the City's Mills Act Program that provides the payors those benefits.

Article XIII C section 1(e)(3) exempts from Proposition 26's definition of "tax": "A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof." This exception may also cover the MAEF because the fee pays for "investigations, inspections, and audits" and resulting "administrative enforcement and adjudication" that may be necessary to enforce the terms of Mills Act Agreements.

CONCLUSION

The fees that the Development Services Department proposes to change fall within a number of exceptions to Proposition 26. The General Plan Maintenance Fee falls under the "government service or product" and the "fee imposed as a condition of property development" exceptions to Proposition 26. The Mills Act Application Fee falls within both the "charge imposed for a specific benefit conferred or privilege granted" and the "government service or product" exceptions to Proposition 26. The Mills Act Maintenance Fee falls within the "charge imposed for a specific benefit conferred or privilege granted," the "government service or product," and the "investigations, inspections, and audits" exceptions to Proposition 26. Last, the Mills Act Enforcement Fee falls within both the "charge imposed for a specific benefit conferred or privilege granted" and the "investigations, inspections, and audits" exceptions to Proposition 26. Accordingly, this Office concludes the fees listed in Exhibit "A" would be exempt from the definition of "tax" contained in Proposition 26.

JAN I. GOLDSMITH, CITY ATTORNEY

By



Keith Bauerle
Deputy City Attorney

KB:hm:amt

Attachments: Exhibits A and B

cc: Marco Camacho, Supervising Management Analyst, Development Services Department
Mark Leonard, Department Director, Financial Management

MS-2012-17

Exhibit A

Fiscal Year 2013 Proposed User Fee Adjustments

Cost Recovery Calculations

Exhibit B

Fiscal Year 2013 Proposed User Fee Adjustments

Department Summary

User Fee Departmental Cost Recovery Calculations

Department: DSD-City PlanninDept No: 161115Fee Title: Mills Act Monitoring Fee Load Rate: 21.0%
 Preparer/Contact: Marco Cam Date: 9/29/11 Fee Legal Authority: CA GC §50280-50290; R-30Overhead Rate: 127.0%
 Fee Description: Mills Act Monitoring Fee to be paid upon submittal of a signed and notarized Mills Act Program Agreement.

PE Costs	A	B			C			D			E			F			G			H			I			J					
		LABOR-HOURS PER-SERVICE OCCURRENCE	LABOR COST (HOURLY RATE X HOURS)	ESTIMATE DI HOURLY FRINGE	FRINGE COST (EST HOURLY FRINGE X HOURS)	DIRECT COSTS (LABOR COST + FRINGE)	(C + E)	(C x load rate %)	LABOR LOAD (LABOR COST + FRINGE)	DEPT/CITY OVERHEAD (LABOR LOAD X DEPT/CITY OVERHEAD)	(C + G) x OH %	INDIRECT COSTS	FRINGE LOAD (FRINGE X LOAD RATE)	(Ex)load rate%	FRINGE LOAD (FRINGE X LOAD RATE)	DEPT/CITY OVERHEAD (LABOR LOAD X DEPT/CITY OVERHEAD)	(C + G) x OH %	INDIRECT COSTS	FRINGE LOAD (FRINGE X LOAD RATE)	(Ex)load rate%	FRINGE LOAD (FRINGE X LOAD RATE)	DEPT/CITY OVERHEAD (LABOR LOAD X DEPT/CITY OVERHEAD)	(C + G) x OH %	INDIRECT COSTS	FRINGE LOAD (FRINGE X LOAD RATE)	(Ex)load rate%	FRINGE LOAD (FRINGE X LOAD RATE)	DEPT/CITY OVERHEAD (LABOR LOAD X DEPT/CITY OVERHEAD)	(C + G) x OH %	INDIRECT COSTS	TOTAL COSTS (DIRECT COSTS + LABOR LOAD + OVERHEAD + FRINGE LOAD)
Senior Planner - 1872	\$ 36.45	1.80	\$ 65.61	\$ 24.18	\$ 43.52	\$ 109.13	\$ 13.78	\$ 100.82	\$ 13.78	100.82 %	\$ 100.82	9.14	9.14 %	\$ 100.82	\$ 13.78	100.82 %	\$ 100.82	9.14	9.14 %	\$ 100.82	\$ 13.78	100.82 %	\$ 100.82	9.14	9.14 %	\$ 100.82	\$ 13.78	100.82 %	\$ 100.82	\$ 232.87	232.87

Notes:

FY11 actual personnel expenditures for this service were roughly \$31,544 with CPCI's FY11 load and overhead rates. This tab reflects the revised fee calculation per service. This fee update is based on staff hours from the last 2.75 years of actual time spent on these tasks by Historical Resources' staff. The initial fees were based on an estimate of hours that would be required and appear to have been higher than the actual number of hours spent on these tasks. Additionally, we anticipated hours for staff positions that ultimately did not participate in the task, those hours have been removed from the new estimate. The revised Mills Act Monitoring Fee is \$253.09 per service proposed for FY13 as calculated using FY12 average salary and fringe rates provided by FM, and DSD FY11 load and overhead rates. The "Projected Annual Revenue" is based on FY11 activity at the revised fee rate.

Attachment I: Proposed FY 2013 User Fee Adjustments Summary

Department	Fee Title	Unit of Measurement	Current Fee	Proposed Fee	Proposed Cost Recovery %
Development Services - City Planning					
	General Plan Maintenance Fee	Per Item	\$ 108.00	\$ 275.00	56%
	Mills Act Application Fee	Per Item	\$ 590.00	\$ 456.00	100%
	Mills Act Enforcement Fee	Per Item	\$ 949.00	\$ 750.00	100%
	Mills Act Monitoring Fee	Per Item	\$ 492.00	\$ 232.00	100%

DSD - City Planning - Estimated Revenue Variation of Proposed Fee Adjustments (Rounded to the Thousand): **\$ 942,000**

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: April 16, 2012

TO: Robert Vacchi, Deputy Director,
Neighborhood Code Compliance Division, Development Services Department

FROM: City Attorney

SUBJECT: Proposition 26 Review of Proposed Neighborhood Code Compliance Division
User Fees for FY 2013

INTRODUCTION

Under Council Policy 100-05, general fund departments are required to conduct comprehensive user fee studies every three years. These fee studies ensure City departments identify and recover all reasonable and allowable costs incurred in providing government services.

Financial Management staff has asked participating departments to obtain an opinion on the legality of their proposed user fee adjustments and additions from the Office of the City Attorney in light of Proposition 26. Approved by the voters in 2010, Proposition 26 amends articles XIII A and XIII C of the California Constitution to provide that a levy, charge, or exaction of any kind imposed, increased, or extended by a local government is a tax unless an exception applies. Exceptions to Proposition 26 include user fees; government service or product fees; regulatory fees; government property entrance fees; fines and penalties imposed by a court or local government; property development impact fees; and assessments and property-related fees governed by Proposition 218.¹

Each Proposition 26 exception involves its own legal standard for determining the amount of a legally permissible fee. Under article XIII C, section 1(e)(1)(2)(3) of the California Constitution, which discusses some of the exceptions to Proposition 26, no fee may exceed the reasonable cost of providing the service. However, such fees should reimburse the government entity for all reasonable direct and indirect expenses incurred. *United Business Commission v. City of*

¹ For a fuller discussion of Proposition 26, see City Att’y MOL No. 11-3 (Mar. 4, 2011), “Proposition 26 and Its Impact on City Fees and Charges.”

San Diego, 91 Cal. App. 3d 156, 166 (1979). As noted in *United Business Commission*, “. . . the municipality need only apply sound judgment and consider ‘probabilities according to the best honest viewpoint of informed officials’ in determining the amount of the fee.” *Id.* This Office has advised City staff to explain the link between the cost and the service provided and justify all fee calculations based on a study of the costs associated with the fee for Council’s consideration and approval. Therefore, depending on the particular type of fee and individual department activities, staff for each City department developed their proposed user fee adjustments using the comprehensive Citywide method developed by Financial Management and Comptroller staff.²

We have reviewed a detailed summary of the Neighborhood Code Compliance Department’s cost recovery calculations as described in Exhibit A and proposed fee adjustments as described in Exhibit B. Our Proposition 26 analysis of each fee is discussed below.

There are four types of user fees proposed for revision by the Neighborhood Code Compliance Division (NCCD), which are as follows:

1. Noise Permit Fee
2. Newsrack Permit Fee
3. Reinspection Fee — Zoning, Housing, and Building
4. Removal of Recorded Notice of Violation Fee — With and Without Appeal

Noise Permit Fee

San Diego Municipal Code section 59.5.0203 authorizes the issuance of a noise permit for activities that exceed the otherwise permissible noise level within the City of San Diego. NCCD currently only issues such permits for construction zones. Noise permits allow contractors to exceed the permissible noise level as it relates to construction-related activities during days and times outside of those set forth in San Diego Municipal Code section 59.5.0404.

NCCD proposes to increase the fee from \$40 per permit to \$167 per permit. The charge for this permit covers the administrative cost of its issuance which is comprised of time spent by staff in reviewing the application and processing the necessary paperwork.

² The method was approved by Financial Management and the Comptroller and provided to the departments by Financial Management. The number (budget item) used to apportion rates (overhead and load) against direct cost is the responsibility of each department based on the contents and knowledge of their individual department activities. This Office did not independently verify or recalculate the numbers provided or the validity of the methodology.

Robert Vacchi, Deputy Director
Neighborhood Code Compliance Division
Development Services Department
April 16, 2012
Page 3

Based on the foregoing facts, the noise permit fee would not likely constitute a tax under Proposition 26 because two exceptions would likely apply: the “user fee” exception and the “regulatory fee” exception.

The user fee exception relates to a charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the benefit or granting the privilege. Cal. Const. art. XIII C, § 1(e)(1). This exception is hereinafter referred to as the User Fee Exception.

The regulatory fee exception exempts charges imposed for regulatory purposes such as “costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits . . . and the administrative enforcement and adjudication thereof.” Cal. Const. art. XIII C, § 1(e)(3). This exception is hereinafter referred to as the Regulatory Fee Exception.

The user fee exception applies because those who obtain a noise permit obtain a specific benefit; they are permitted to exceed the noise decibel levels set forth in the San Diego Municipal Code and to engage in construction-related activities on days and times not otherwise allowed pursuant to the San Diego Municipal Code. And, the increased fee would not exceed the cost of providing the service to the public.

Likewise, the Regulatory Fee Exception applies because a noise permit is issued as part of a regulatory scheme involving compliance with acceptable time of day noise decibel levels within different land use zones.

Newsrack Permit Fee

San Diego Municipal Code section 62.1002(e) requires that all newsracks located in or upon any portion of the public right-of-way require an annual newsrack permit. The imposition of an annual fee for such a permit is authorized by San Diego Municipal Code section 62.1014. The fee covers the administrative cost, or a portion thereof, to issue the newsrack permit.

NCCD proposes to increase this annual fee from \$15 per newsrack to \$20 per newsrack. Based on the calculations set forth in Exhibit A, the requested fee increase would result in a 43 percent cost recovery.

Based on the foregoing facts, the newsrack permit fee would not likely constitute a tax under Proposition 26 because two exceptions would likely apply: the User Fee Exception and the Regulatory Fee Exception.

Robert Vacchi, Deputy Director
Neighborhood Code Compliance Division
Development Services Department
April 16, 2012
Page 4

The User Fee Exception applies because those who pay the fee for a newsrack permit obtain a specific benefit that others who do not pay the fee do not receive; the fee payors are authorized to place their newsrack on the public right-of-way, unlike those who do not pay the fee.

Furthermore, the Regulatory Fee Exception applies because it covers the cost of regulating the placement of newsracks within the public right-of-way. The failure to obtain such a permit before placing a newsrack in the public right-of-way constitutes a violation of the law under San Diego Municipal Code section 62.1003.

Reinspection Fee — Zoning, Housing and Building

San Diego Municipal Code section 13.0103 authorizes the City to assess a fee for reinspections of property to determine compliance with provisions of the San Diego Municipal Code and applicable state codes which were listed in a Notice of Violation. Pursuant to San Diego Municipal Code section 13.0104, such a fee shall reflect current costs.

NCCD proposes that the reinspection fee for zoning violations be increased from \$98 per reinspection to \$269 per reinspection. NCCD also proposes that the reinspection fee for housing code violations and building code violations each be increased from \$105 to \$288 per reinspection. Based on the calculations set forth in Exhibit A, the requested increases in these fees will result in 100 percent cost recovery.

Based on the foregoing facts, the increased reinspection fees would not likely constitute a tax under Proposition 26 because the Regulatory Fee Exception would likely apply. And since the increased reinspection fees are meant only to cover the cost of performing investigations or inspections, the fees would not be a tax under the Regulatory Fee Exception.

Removal of Recorded Notice of Violation Fee — With and Without Appeal

Whenever there is a Notice of Violation (NOV) issued by NCCD to a property owner and the property remains in violation after the deadline established in the NOV, NCCD may record the NOV with the San Diego County Recorder's Office. SDMC § 12.1003(a). Before actual recordation, NCCD must provide the property owner with a written notice of intent to record the NOV and provide a right to appeal. SDMC § 12.1003(b).

If NCCD does not receive a timely written request to appeal, NCCD has the right to record the NOV if the violations remain. SDMC § 12.1003(c). There is a fee charged by NCCD for recordation of the NOV where the property owner has not requested an appeal set forth in the Exhibit A as the "Removal of Recorded Notice of Violation Fee — No Appeal" (No Appeal Recordation Fee).

Robert Vacchi, Deputy Director
Neighborhood Code Compliance Division
Development Services Department
April 16, 2012
Page 5

In the event that NCCD receives a timely written appeal, the City is required to schedule an administrative hearing before an enforcement hearing officer to allow the property owner to state any reasons why the NOV should not be recorded. SDMC §§ 12.1005-12.1006. If the enforcement hearing officer affirms NCCD's decision, NCCD may record the NOV. SDMC § 12.1006(c). The fee charged by NCCD for the recordation of the NOV with an appeal hearing is set forth in the Exhibit A as "Removal of Recorded Notice of Violation Fee — Appeal" (Appeal Recordation Fee).

Pursuant to San Diego Municipal Code section 12.1007(d), NCCD is entitled to recover the administrative costs incurred in the "investigation, inspection, reinspection, title search, appeal hearing, and any other processing costs associated with the violations specified on the Notice of Violation."

NCCD is proposing that the No Appeal Recordation Fee be decreased from \$766 per NOV to \$625 and that the Appeal Recordation Fee be decreased from \$976 per NOV to \$967 per NOV. Based on the calculations set forth in Exhibit A, both of the decreased fees would result in a 100 percent cost recovery.

Based on the foregoing facts, the requested fees would likely not constitute a tax under Proposition 26 because the performance of investigations and inspections as well as administrative enforcement and adjudication associated with such actions trigger the application of the Regulatory Fee Exception.

CONCLUSION

This Office concludes that the fees set forth above are compliant with Proposition 26 because they fall under one or more exceptions to Proposition 26.

JAN I. GOLDSMITH, City Attorney

By



Kenneth So
Deputy City Attorney

KS:mm:amt
Attachments: Exhibits A and B
cc: Mark Leonard, Director, Financial Management
MS-2012-15

Exhibit A

Fiscal Year 2013 Proposed User Fee Adjustments

Cost Recovery Calculations

User Fee Departmental Cost Recovery Calculations

Department: DSD/NCC **Dept No:** 161114 **Fee Title:** Removal of Recorded Notice of Violation with Appeal **Load Rate:** 21.0%
Preparer/Contact: Linda Martinez **Date:** 10/21/11 **Fee Legal Authority:** SDMC 12.1001 **Overhead Rate:** 127.0%

Fee Description: Covers the cost of NCC staff representing the City at an appeals hearing brought forward by the owner due to the Notice of Violation against the property plus the costs of closing a case after a Notice of Violation is recorded with the County of San Diego.

JOB CLASS and CLASS CODE	A		B		C		D		E		F		G		H		I		J	
	HOURLY SALARY RATE	LABOR HOURS PER SERVICE OCCURRENCE	LABOR COST (HOURLY RATE X HOURS)	ESTIMATED HOURLY FRINGE	FRINGE COST (EST HOURLY FRINGE X HOURS)	DIRECT COSTS (LABOR COST + COST + FRINGE)	LABOR LOAD (LABOR COST X LOAD RATE)	FRINGE LOAD (FRINGE X LOAD RATE)	DEPT/CITY OVERHEAD (LABOR LOAD X DEPT/CITY OVERHEAD)	FRINGE LOAD (FRINGE X LOAD RATE)	TOTAL COSTS (DIRECT COSTS + LABOR LOAD + OVERHEAD + FRINGE LOAD)	DEPT/CITY OVERHEAD ((C + G) X OH %)	FRINGE LOAD ((E x load rate %)	LABOR LOAD ((C x load rate %)	DEPT/CITY OVERHEAD ((C + G) X OH %)	FRINGE LOAD ((E x load rate %)	TOTAL COSTS (F + G + H + I)			
Senior Planner - 1872	\$ 36.45	2.00	\$ 72.90	\$ 24.18	\$ 48.36	\$ 121.26	\$ 15.31	\$ 112.03	\$ 10.16	\$ 258.75						\$				
Combination Inspector 2 - 1277	\$ 30.69	2.00	\$ 61.38	\$ 22.21	\$ 44.42	\$ 105.80	\$ 12.89	\$ 94.32	\$ 9.33	\$ 222.34						\$				
Code Compliance Officer - 1356	\$ 20.71	2.00	\$ 41.42	\$ 17.05	\$ 34.10	\$ 75.52	\$ 8.70	\$ 63.65	\$ 7.16	\$ 155.03						\$				
Administrative Aide I - 1105	\$ 20.49	1.00	\$ 20.49	\$ 16.80	\$ 16.80	\$ 37.29	\$ 4.30	\$ 31.49	\$ 3.53	\$ 76.61						\$				
Senior Combination Inspector - 1849	\$ 35.87	2.00	\$ 71.74	\$ 23.65	\$ 47.30	\$ 119.04	\$ 15.07	\$ 110.24	\$ 9.93	\$ 254.28						\$				
		9.00	\$ 267.93	\$ 103.89	\$ 190.98	\$ 458.91	\$ 56.27	\$ 411.73	\$ 40.11	\$ 967.01						\$				

Revenue Code: 417052

Exhibit B

Fiscal Year 2013 Proposed User Fee Adjustments

Department Summary

Attachment I: Proposed FY 2013 User Fee Adjustments Summary

Department	Fee Title	Unit of Measurement	Current Fee	Proposed Fee	Proposed Cost Recovery %
Development Services - Neighborhood Code Compliance					
	News Rack Permit Fee	Per Permit	\$ 15.00	\$ 20.00	43%
	Noise Permit Fee	Per Permit	\$ 40.00	\$ 167.00	100%
	Reinspection Fees-Building	Per Reinspection	\$ 105.00	\$ 288.00	100%
	Reinspection Fees-Housing	Per Reinspection	\$ 105.00	\$ 288.00	100%
	Reinspection Fees-Zoning	Per Reinspection	\$ 98.00	\$ 269.00	100%
	Removal of Recorded Notice of Violation Fee - No Appeal	Per Notice	\$ 766.00	\$ 625.00	100%
	Removal of Recorded Notice of Violation Fee - With Appeal	Per Notice	\$ 976.00	\$ 967.00	100%
			\$	\$ 12,000	

DSD - Neighborhood Code Compliance - Estimated Revenue Variation of Proposed Fee Adjustments (Rounded to the Thousand): \$ 12,000