Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: May 8, 2012

TO: Chairperson Zapf and Members of the Land Use and Housing Committee

FROM: City Attorney

SUBJECT: Preliminary Analysis of the Potential Impacts of Proposition 26 on the Proposed Property Value Protection Ordinance

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The members of the Land Use and Housing Committee have asked the Office of the City Attorney to provide a preliminary analysis of Proposition 26 impacts on the fee requirements in the proposed Property Value Protection Ordinance (PVPO) presented by the Center on Policy Initiatives and the Alliance of Californians for Community Empowerment.[1] This memorandum will briefly highlight two exceptions to Proposition 26 that may apply to the fees and penalties in the proposed PVPO. This memorandum should not be relied upon as a legal opinion or advice from this Office, but is provided as preliminary legal guidance only. Upon direction from the City Council or a Council Committee, this Office will provide the necessary in-depth legal review and analysis.

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.[2]

Each Proposition 26 exception involves its own legal standard for determining the amount of a legally permissible fee. Under article XIII C, sections 1(e)(1),(2) and (3) of the California Constitution, which discuss some of the exceptions to Proposition 26, no fee may exceed the

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[1] A copy of the proposed Property Value Protection Ordinance is attached to this memorandum.
[2] 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."

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.* (quoting *Watson v. County of Merced*, 274 Cal. App 2d 263, 268 (1969)).

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). As mentioned above, regulatory fees "must not exceed the reasonable cost of the services necessary for the activity for which the fee is charged and for carrying out the purpose of the regulation; they may not be levied for unrelated purposes." *Isaac v. City of Los Angeles,* 66 Cal. App. 4th 586, 596 (1998).

Section 3, Registry, subsection (5) and section 5, Public Nuisances, subsection (3) of the proposed PVPO contain language addressing fees pursuant to the registry requirement and pursuant to notices of violations and demands to abate. Proposed section 3, subsection (5) provides, generally, for a fee to cover the costs of the creation and maintenance of the registry and the costs of the inspection by City staff of the registered properties. Proposed section 5, subsection (3) provides, generally, for a fee to cover the cost of creating a notice of violation and the cost of the inspection and investigation by City staff of properties potentially subject to a notice of violation. These fees may fall into the regulatory fee exception to Proposition 26. This Office recommends that, before establishing any fee, staff perform a study of the costs associated with the proposed regulation to establish a link between the actual cost and the matter to be regulated. Further, the City Council's approval of any proposed fee should be based on the facts presented by staff and the basis for the decision should be documented.

Section 3, subsection (5) of the proposed PVPO includes, as part of the fees to cover the cost of the registry, "the administrative costs incurred in determining the appropriate fee." This Office cautions that this portion of the proposed fee likely does not fall under the regulatory fee exception to Proposition 26.

The exception for fines and penalties concerns "[a] fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law." Cal. Const. art. XIII C, § 1(e)(5).Unlike the regulatory fee exception, the City is not required to limit its fines and penalties to a reasonable cost. Fines and penalties for violations of law, whether categorized as criminal punishment or civil penalty, are punitive in character and are imposed as a means of securing obedience to statutes and regulations validly adopted under the police power. *People v. Union Pacific Railroad Company,* 141 Cal. App. 4th 1228, 1257-58 (2006). Thus, fines and penalties may be imposed without regard to the actual damage that may have been sustained.

Section 3, subsection (6) and section 5, subsection (4) of the proposed PVPO contain language addressing fees and penalties. Proposed section 3, subsection (6) provides, generally, for a penalty for failure to comply with the registration requirements. Proposed section 5, subsection (4) provides, generally, for a penalty for non-compliance with a notice of violation. It appears that the penalties in the proposed PVPO fall under the fines and penalties exception to Proposition 26.

As noted previously, this Office will provide more in-depth analysis upon specific direction from the Council or a Council Committee.

JAN I. GOLDSMITH, City Attorney

By Elisa A. Cusato
Elisa A. Cusato
Deputy City Attorney

EAC:mm:nja
Attachment

September 8, 2011

TO: City of San Diego, Land Use and Housing Committee
FR: Alliance of Californians for Community Empowerment and the Center on Policy Initiatives
RE: Information Item Regarding the Property Values Protection Ordinance

Our neighborhoods are suffering. The foreclosure crisis hurts not just the families foreclosed on but their neighbors and communities. Foreclosures impact the values of properties in the entire neighborhood. Moreover, vacant foreclosed properties are at significant risk of becoming nuisances in their communities, threatening neighborhood health and safety.

The City of San Diego has the ability to help protect property values, protect the health and safety of our communities, and regain some of the revenue lost by the large numbers of nuisance properties.

We ask the Land Use and Housing Committee to direct the City Attorney's office to work with our community coalition to determine how to legislatively address these problems. Sample language follows.

Property Value Protection Ordinance, Sample Language

Sec. 1. Findings and Purpose

The City Council finds, determines and declares that:

(1) Buildings that remain vacant and unoccupied for any appreciable period of time become an attractive nuisance to children, a harborage for rodents, an increased fire hazard, and an invitation to derelicts, vagrants and criminals as a temporary residence and as a place to engage in illegal conduct, frequently including illegal drug-related activity; that unkempt and unsecured grounds surrounding such buildings invite the dumping of garbage and trash thereon and the congregation of unauthorized persons who use the property for illegal activity; that such buildings contribute to the growth of blight within the City of San Diego, necessitate additional governmental services and costs, significantly interfere with the use and enjoyment of neighboring properties, and depress market values of surrounding properties, thereby reducing tax revenues; and that such buildings accordingly create an unhealthy and unsafe condition affecting the public and constitute an unreasonable use of property and a public nuisance.

(2) Protection of the public health, safety and welfare requires the establishment and enforcement of the means by which such nuisance conditions may be prevented and abated.

(3) Vacant properties that are going through or have been through the foreclosure process are frequently the responsibility of banks, lenders, and/or servicers.

(4) Properties in default and Real-Estate Owned ("REO") properties are at a greater risk of becoming unmaintained vacant properties than other properties.

(5) Even one vacant property that is not actively and well maintained, monitored and managed can cause blight and crime.

(6) It is in the interest of the welfare of neighborhoods in the City of San Diego that banks, lenders, and/or servicers which fail to maintain vacant properties that they own or have an interest in be subject to the imposition of fines.

Sec. 2. Definitions

For the purposes of this chapter:

(1) "Beneficiary" means the current beneficiary (either the original beneficiary or the assignee(s)), including, but not limited to, a lender, under a note secured by a deed of trust.

(2) "Beneficiary's Designated Agent" means an entity, including, but not limited to, a servicing company, that has contracted with the Beneficiary to perform duties related to the note secured by a deed of trust, including, but not limited to, the collection of installment payments on the note and administration of any default and foreclosure process.

(3) "Days" means calendar days.

(4) "Evidence of Vacancy" means any condition visible from the exterior of the property that alone or in combination with other existing conditions would lead a reasonable person to believe that the property is vacant. Such conditions include, but are not limited to, overgrown and/or dead vegetation; unmaintained pools or spas; an accumulation of newspapers, circulars, flyers and/or mail; past due utility notices and/or disconnected utilities; an accumulation of trash, junk and/or debris; the absence of window coverings such as curtains, blinds and/or shutters; the absence of furnishings and/or personal items consistent with residential habitation; statements by neighbors, passersby, delivery agents, and/or government employees that the property is vacant.

(5) "Legal Owner" means the person or entity having record title to the property as shown in the county recorder's office.

(6) "Legal Owner's Designated Agent" means an entity, including, but not limited to, a servicing company, that has contracted with the Legal Owner to perform duties related to the property.

(7) "Neighborhood Standard" means those conditions that are present on a simple majority of properties within a 300 foot radius of the relevant property. A Property in Default or a REO Property that is Vacant or shows Evidence of Vacancy within a 300 foot radius of the relevant property shall not be counted toward the simple majority.

(8) "Property in Default" means a residential property within the City of San Diego that is subject to a current Notice of Default and/or Notice of Trustee's Sale.

(9) "REO Property" ("Real-Estate Owned" Property) means a residential property within the City of San Diego for which title has transferred to the Beneficiary or Beneficiary's Designated Agent, including, but not limited to, a lender or servicing company, as the result of a foreclosure sale or deed in lieu of foreclosure.

(10) "Responsible Party" means, for a Property in Default, the Beneficiary and/or the Beneficiary's Designated Agent; and for a REO Property, the Legal Owner and/or the Legal Owner's Designated

Agent. In the event that there is more than one Responsible Party for a single property, each Responsible Party shall be jointly and severally liable for compliance with the provisions of this ordinance.

(10) "Vacant" means property that is unoccupied by the Legal Owner or by persons with the consent of the Legal Owner for a period of more than 30 days.

Sec. 3. Registry

The City of San Diego shall maintain a registry of the properties described in subsection (1) in order to permit the City to determine which properties are at risk of becoming subject to and/or in violation of Section 4 of this ordinance, and to inspect such properties for compliance with Section 4 of this ordinance and any other applicable requirements. The City of San Diego shall regularly inspect registered properties, at times and in a manner to be determined by Neighborhood Code Compliance Division. Neighborhood Code Compliance Division may, within its discretion, inspect all registered properties or a sample of such properties selected randomly or by criteria determined by Neighborhood Code Compliance Division.

(1) Application.

The registration requirements contained in this section shall apply to:
(a) All Properties in Default.
(b) All REO Properties.

(2) Registration.

The Responsible Party for a Property in Default, including, but not limited to, a lender or servicing company, shall register the property with the Neighborhood Code Compliance Division within 30 days of the recording of the notice of default or, if the notice of default was issued prior to the effective date of this ordinance, within 30 days of the effective date of this ordinance.

The Responsible Party for a REO Property, including, but not limited to, a lender or servicing company, shall register the property with the Neighborhood Code Compliance Division within 30 days of the transfer of title or, if the title was transferred prior to the effective date of this ordinance, within 30 days of the effective date of this ordinance.

Registration shall be filed on City of San Diego approved forms which shall require the following information, as well as any additional information deemed necessary by the Neighborhood Code Compliance Division:

(a) The name and mailing address of the Responsible Party, and whether the party is the Beneficiary, Beneficiary's Designated Agent, Legal Owner, or Legal Owner's Designated Agent.
(b) A direct contact name and phone number for the Responsible Party.
(c) Whether the property is Vacant or shows Evidence of Vacancy.
(d) If the property is Vacant or shows Evidence of Vacancy: a statement describing the expected period of vacancy, a detailed plan for the regular maintenance of the property during the period of vacancy, and a timeline for the lawful re-occupancy of the property or for the rehabilitation or demolition of the property.

(e) If the property is Vacant or shows Evidence of Vacancy and the Responsible Party is located more than 30 miles outside of the City of San Diego limits: the name, street address, telephone and facsimile number of a local property management or property preservation company responsible for the maintenance and security of the property.

(3) Updating the registry.

Any change in the information provided to the registry including, but not limited to, a change in the identity of the Responsible Party, a change in the vacancy status of the property, and any change in contact information, shall be provided to the registry within 10 days of the date of the change.

(4) Annual renewal.

The initial registration shall be effective for the duration of the calendar year in which it is made. For any registered property that is still subject to the registration requirements of this section on January 1 of each year, the Responsible Party must submit a renewed registration by no later than January 31 of that year.

(5) Fees.

The Responsible Party shall pay a fee set by action of the City Council to cover the costs of the registry including, but not limited to, initial creation of the registry; ongoing maintenance of the registry; inspection and investigation of registered properties to ensure that the information recorded in the registry is current and accurate; inspection and investigation of registered properties conducted by Neighborhood Code Compliance Division to ensure that they have not fallen into disrepair or are otherwise not in compliance with the requirements of Section 4 and/or any other applicable requirements; and the administrative costs incurred in determining the appropriate fee. These costs shall be determined annually by the City of San Diego.

This fee shall be paid with the initial registration and with each annual renewal.

(6) Penalties.

Any Responsible Party that fails to comply with the registration requirements of this section shall become personally responsible for a penalty of $100 per day for each day of non-compliance; except that commencing 10 calendar days after the date of the Neighborhood Code Compliance Division's notification of failure to comply, the penalty shall be $500 per day for each day or non-compliance; with a maximum total penalty of $100,000.

If the Neighborhood Code Compliance Division determines that a Responsible Party has failed to comply with the registration requirements of this section, the Neighborhood Code Compliance Division shall notify such party within 10 days of this determination at the last known address of the failure to comply with this section, the penalties currently due, and the daily accrual of penalties.

A Responsible Party shall be liable for interest on any unpaid penalties accrued at the same annual rate as civil judgments.

Any penalty proceeds collected by the City of San Diego shall be deposited in the General Fund.

(7) Terminating registration.

If a registered property becomes no longer subject to the registration requirements of this section, the Responsible Party shall report this information to the registry within 10 days.

Sec. 4. Inspection, Maintenance, Security, and Posting Requirements

(1) Application.

This section shall apply to all properties that are both:
(a) A Property in Default or a REO Property; and
(b) Vacant or showing Evidence of Vacancy

A Responsible Party that presents the Neighborhood Code Compliance Division with documentary evidence that it does not have the legal right to inspect, maintain, secure, and/or post on the property, where such evidence is accepted as adequate by the Neighborhood Code Compliance Division, shall be exempt from the requirements of this section.

(2) Inspections.

The Responsible Party for a property subject to this section shall perform an inspection of the property no less than once every 7 days to ensure the property is in compliance with this section.

(3) Maintenance.

Properties subject to this section shall be, in comparison to the Neighborhood Standard, kept free of weeds, dry brush, dead vegetation, trash, junk, debris, building materials, any accumulation of newspapers, circulars, flyers, notices (except those required by federal, state, or local law), discarded personal items including but not limited to furniture, clothing, large and small appliances, printed material or any other items that give the appearance that the property is Vacant.

The property shall be maintained free of graffiti, tagging or similar markings by removal or painting over with an exterior grade paint that matches the color of the exterior of the structure.

Visible front and side yards shall be landscaped and maintained to the Neighborhood Standard. Landscape includes, but is not limited to, grass, ground covers, bushes, shrubs, hedges or similar plantings; and decorative rock, bark or artificial turf/sod designed specifically for residential installation. Landscape does not include weeds, gravel, broken concrete, asphalt, decomposed granite, plastic sheeting, mulch, indoor-outdoor carpet or any similar material. Maintenance of yards includes, but is not limited to, regular watering, irrigation, cutting, pruning, mowing and removal of all trimmings.

Pools and spas shall be kept in working order so the water remains clear or free of pollutants and debris or drained and kept dry. In either case properties with pools and/or spas must comply with the minimum security fencing requirements of the State of the California.

(4) Security.

Properties subject to this section shall be maintained in a secure manner so as to not be accessible to unauthorized persons.

Secure manner includes, but is not limited to, the closure and locking of windows, doors (walk-through, sliding, and garage), gates and any other opening of such size that it may allow a child to access the interior of the property and or structures(s). In the case of the broken windows securing means the reglazing or boarding of the window.

(5) Posting.

Properties subject to this section shall be posted with a contact number individuals can call to report blighted properties to the Neighborhood Code Compliance Division .The posting shall be no less than 18" X 24", shall be of a font that is legible from a distance of 45 feet, and shall contain, along with the contact number of the Neighborhood Code Compliance Division the words "TO REPORT PROBLEMS OR CONCERNS CALL". The posting shall also contain the name and contact information of the Responsible Party, along with the words "IS RESPONSIBLE FOR THE MAINTENANCE OF THIS PROPERTY." The posting shall be placed on the interior of a window facing the street to the front of the property so it is visible from the street, or secured to the exterior of the building/structure facing the street to the front of the property so it is visible from the street or if no such area exists, on a stake of sufficient size to support the posting in a location that is visual from the street to the front of the property but not readily accessible to vandals. Exterior posting must be constructed of and printed with weather resistant materials.

(6) Additional Authority.

In addition to the requirements of this section, the Neighborhood Code Compliance Division shall have the authority to require the Responsible Party for any property subject to the requirements of this section to implement additional maintenance and/or security measures including, but not limited to, securing any door, window or other openings; installing additional security lighting; increasing on site inspection frequency; employment of an on-site security guard; or other measures as may be reasonably required to arrest the decline of the property.

Sec. 5. Public Nuisances

(1) Public nuisance.

It shall be a public nuisance for any property subject to the requirements of section 4 of this ordinance to fail to comply with any of those requirements.

(2) Notice of violation/demand to abate.

Whenever Neighborhood Code Compliance Division determines that a property is a public nuisance pursuant to subsection (1), Neighborhood Code Compliance Division shall issue a notice of violation and demand to abate directed to the Responsible Party and to the Legal Owner, if the Legal Owner is different than the Responsible Party.

The notice shall contain:

(a) The street address and such other description as is required to identify the property.

(b) A statement that specifies the conditions that constitute the violation.

(c) A description of the measures necessary to correct the violation.

(d) An order that the Responsible Party take the necessary measures to correct the violation and abate the nuisance within 10 days from the date of the notice; unless the violation constitutes a violation of any provision of the California Building Standards Code, in which case the notice shall order the Responsible Party to take the necessary measures to correct the violation and abate the nuisance within 30 days from the date of the notice.

(e) A statement that if the Responsible Party fails to take the necessary measures to abate the nuisance within the specified time period, the Responsible Party will be subject to penalties pursuant to subsection (4), and City of San Diego may take all necessary legal or administrative action, including performing the necessary measures, with the cost of such performance to be assessed against the Responsible Party.

(f) A statement that the Responsible Party may, during the specified time period in which it is ordered to correct and abate, request in writing a hearing before the Neighborhood Code Compliance Division regarding the conditions that constitute the violation and the measures necessary to correct the violation.

(g) A notice of the fee due, as provided in subsection (3).

The written notice shall be served on the Responsible Party and Legal Owner either by personal delivery or by first class mail.

(3) Fees.

A Responsible Party to whom the Neighborhood Code Compliance Division has sent a notice of violation and demand to abate pursuant to subsection (2) shall pay a fee set by action of the City Council to cover the costs of the notice of violation and demand to abate including, but not limited to, administrative costs related to the notice; inspection and investigation of properties to determine whether they are public nuisances (other than inspections or investigations conducted pursuant to Section 3 of this ordinance); inspection and investigation of properties subject to a notice of violation and demand to abate to determine whether they have complied with such demand; increased inspection and investigation of properties formerly subject to a notice of violation and demand to abate to ensure that such properties remain in compliance; and the administrative costs incurred in determining the appropriate fee. These costs shall be determined annually by the City of San Diego.

(4) Penalty for failure to abate.

Any Responsible Party served with a notice of violation that fails to take the necessary measures set forth in the notice shall become personally responsible for an administrative penalty in an amount up to $1,000 per day for each day of non-compliance after the specified time period set forth in the notice has passed, with a maximum total penalty of $500,000, unless the Responsible Party provides documentary evidence to the Neighborhood Code Compliance Division that the structure is the subject of an active building permit for repair, rehabilitation or demolition and the Responsible Party is proceeding diligently in good faith to complete the repair, rehabilitation or demolition, where such evidence is accepted as adequate by the Neighborhood Code Compliance Division.

A Responsible Party shall be liable for interest on any unpaid penalties accrued at the same annual rate as civil judgments.

Any penalty proceeds collected by the City of San Diego shall be deposited in the General Fund.

(5) Abatement by City

In the event the violation is not abated within the time specified in the notice, the City may take all necessary actions to abate such violation, and the Responsible Party shall become personally indebted to the City of San Diego for the actual and reasonable costs of abatement as adopted by the City Council at a public hearing.

After the City has taken abatement actions, Neighborhood Code Compliance Division shall send a notice to the Responsible Party by first class mail advising the Responsible Party of the abatement action by the City The notice shall also inform the Responsible Party that he/she is responsible for the actual and reasonable costs of abatement and notify the Responsible Party of the date and location of the public hearing at which the costs will be determined.

(6) Summary Abatement.

If, in the opinion of the Neighborhood Code Compliance Division, there exists a specific condition on any property subject to the requirements of this section which is of such a nature as to be an imminent threat to the public health, safety or welfare, the same may be abated by the City forthwith without compliance with the provisions of subsection (2). The actual and reasonable costs of any abatement measures taken by the City pursuant to this subsection shall be the responsibility of the Responsible Party as provided in subsection (5).

(7) Appeals.

Any person aggrieved by any of the requirements of this section may appeal as provided under (relevant sections of municipal code).

Sec. 6. Severability

Should any provision, section, paragraph, sentence or word of this chapter be determined or declared invalid by any final court action in a court of competent jurisdiction or by reason of any preemptive legislation, the remaining provisions, sections, paragraphs, sentences or words of this chapter shall remain in full force and effect.