

MEMORANDUM OF LAW

DATE: June 30, 1986

TO: Bill Schempers, Engineering and Development
Department
FROM: City Attorney
SUBJECT: Facilities Benefit Assessment "Cash-Outs"

QUESTION PRESENTED

The Facilities Financing Division of the Engineering and Development Department and Pardee Construction Company ("Pardee") have asked whether they can agree to "cash-out" a public facilities park project in lieu of the usual consideration of credits for future building permits due to Pardee's inability to effectively use the credits as a result of unmet phasing thresholds that are beyond Pardee's control.

CONCLUSION

Section 61.2215 of the San Diego Municipal Code ("Code") authorizes the City Council to reimburse developers for the value the City Council finds is greater than the developer's usable facilities benefit assessment ("FBA"). The City Council is free to determine if the reimbursement is to be in cash. This power does not conflict with applicable California law.

BACKGROUND

The North City West FBA District was created to fairly charge the land in that district for the cost of the public facilities projects needed as a result of the development of that land. Before building permits are issued for construction on any land in the FBA district, special assessments to pay that land's share of the scheduled public improvements must be paid.

When the contractors who build those public improvements are also owners of land in that FBA district they may be paid to build the improvements with building permit credits on their FBA land. These credits reduce the amount due on their assessed land by the value of their contribution to the construction. The policy inferred in the FBA Procedural Ordinance directs the

Facilities Financing Division to use this building permit credit procedure over cash payment of contractors. Code Sections 61.2213 and 61.2215. The building permit credit payment policy stabilizes public facilities development progress and reserves cash raised by assessments for use on public facilities projects built by contractors who are not FBA landowners.

Although Pardee is a contractor/landowner, giving building permit credits now may not be valuable enough to compensate for,

or motivate construction of, the proposed public park. Building permit credits alone will not allow construction on some of Pardee's land. Some of their land is surrounded by undeveloped land, where phasing thresholds have not been satisfied, in effect landlocking their land in an unimproved area. Another contractor is responsible for the development of this surrounding land. The land may not be developed for some time. Pardee's inability to use the FBA credits and develop their land until the phasing thresholds are met is in no way due to actions within Pardee's control. Pardee has met any responsibilities it had in meeting those thresholds.

This situation leaves the building permit credit method of compensation for the construction of public facilities projects without the present value necessary to motivate the construction. In order to adequately compensate Pardee in this situation, alternate payment methods need to be used. Cash payment for the improvement has been considered (cash-out) and the authority for such a payment is set forth in this memorandum of law.

ANALYSIS

Neither Division 22 of the Code nor the Improvement Acts relied on in its drafting provide specific terms or types of compensation allowable. State law speaks only in terms of "credit" for improvements while Division 22 of the Code provides for "reimbursement." This lack of specific allowable methods of payment leaves sufficient flexibility to support the proposed "cash-out."

California law in three code sections addresses consideration for landowners who contribute to public improvements. The sections are identical:

Assessment of land: Credit for dedications and improvements.

In assessing land, credit may be given for dedications and for improvements constructed at private expense. Streets and Highways Code Sections 5360.3, 5890.5 and 10209.

Because we are dealing with improvements constructed at private expense in our FBA situation, these sections seem applicable. They do not say only credit may be given and to so interpret would preclude paying cash for any public improvement. A less strained interpretation would be that these sections are meant to allow for credit, not restrict payment of consideration to only credits. This interpretation allows local law to further specify consideration methods with lessened chance of conflict with state law.

Division 22 of the Code, provides more detailed methods of

payment. Sections 61.2213 and 61.2215 of the Code deal with payment for public facility improvements. Section 61.2213 of the Code is entitled "Consideration In Lieu of Assessment." Section 61.2215 of the Code is entitled "Reimbursement and Refund."

Section 61.2213 of the Code allows for the City to accept payment of FBA's with land, items, or services "in lieu of" money. This section is limited by the use of the "in lieu of" phrase. It allows only substitution. If the substitute for money is equal to, or more than, the value of the FBA, it can be accepted. If less, the cost difference must be made up and paid to the FBA district. In this section there is no indication of authority allowing payment back to the landowner to equalize an acceptance of a value greater than the FBA. Payment back for the value given in excess of the FBA could not be inferred because it would result in an interpretation that does not always favor the city; as occurs without the inference.

This lack of authority for reimbursement of value received in excess of the FBA is addressed by Section 61.2215(b) of the Code. It allows the City Council to enter into an agreement to reimburse a developer for a value the City Council finds is greater than the "otherwise applicable" FBA credits it gives as payment. These "otherwise applicable" FBA credits must be interpreted as usable credits in order to promote the policy of stabilizing development progress. This section does not define how the reimbursement must occur, but gives the City Council latitude in this determination. Thus, Section 61.2215 of the Code gives the City Council the authority to agree to a "cash-out" agreement.

JOHN W. WITT, City Attorney

By

Janis Sammartino Gardner

Deputy City Attorney

JSG:PS:ta:600.2(x043.2)

ML-86-75