

MEMORANDUM OF LAW

DATE: October 23, 1991

TO: Evan Becker, Executive Director, Housing Authority

FROM: City Attorney

SUBJECT: Housing Trust Fund Fees - Application to Property Owned by
the San Diego Unified Port District

This office recently received the attached letter from the law firm of McDonald, Hecht & Solberg. Mr. Charles Gill of that firm takes the position in the letter that the Housing Trust Fund fee cannot be collected from a hotel developer in connection with a project being constructed on land leased from the Port District. It is intended that this memorandum shall serve as a response to Mr. Gill.

The San Diego Housing Trust Fund was established by ordinance of the City Council in 1990 and has been codified as sections 98.0501 et seq. of the City's Municipal Code. Housing impact fees are created by the ordinance. The fees are payable with regard to any "new office, retail, research and development, manufacturing, warehouse, and hotel development" in the City. The fees are paid at the time of acquiring building permits. The purpose and intent of the fee is to require all such developments to "pay a fair share of the costs of subsidy necessary to house the low and very low income employees who will occupy the jobs new to the region related to such development." Section 98.0601. The proceeds from the impact fees are utilized to provide affordable housing within the boundaries of the City of San Diego.

Section 98.0608 contains specific exemptions for certain types of projects. Section 98.0608(4) provides an exemption for "that portion of any development project located on property owned by the State of California, the United States of America or any of its agencies, with the exception of such property not used exclusively for state governmental or state educational purposes; . . ." The subject Port District lands are not owned by the state or the federal government or its agencies. They are owned in fee by the Port District having been conveyed to them by the City of San Diego following creation of the District in 1962. In the absence of any other facts it would appear, therefore, that a hotel built anywhere within the San Diego city limits would be subject to housing impact fees.

Mr. Gill's letter contains a number of arguments in support of his theory that, because the hotel in question is being constructed on Port District property, it is exempt from the housing impact fees. In order

to address Mr. Gill's arguments, it is necessary to first review the creation and purpose of the San Diego Unified Port District.

Prior to 1962, the various tidelands, filled and unfilled, within the San Diego Bay area were owned in fee by the cities of San Diego, Chula Vista, Coronado, National City and Imperial Beach. The concept behind the Unified Port District and the purpose for which it was created was specifically to allow for the coordinated development of operation and maintenance of the various filled and unfilled tidelands in and adjacent to San Diego Bay. Rather than having five different cities planning and developing the tidelands it was considered beneficial to place all the tidelands in one entity, i.e., the Port District. The voters in the five cities, therefore, voted to create the Port District in accordance with the Port District Act which is codified as Appendix I to the State Harbors and Navigation Code.

It is clear from the Port District Act, read as a whole, that the Port District is vested with the ownership of the tidelands and has the right to control development on the tidelands and enact regulations with regard to use of and activities on the tidelands. (See for example sections 55, 56 and 60 Port District Act.)

The arguments in Mr. Gill's letter relate basically to the contention that the San Diego Unified Port District is not a "local agency" and is therefore not subject to the provisions of sections 53090 et seq. of the State Government Code. Sections 53090 et seq. basically require that "each local agency shall comply with all applicable building ordinances of the city in which the territory of the local agency is situated" Section 53091.

We do not agree that the Port District is exempt from the Government Code sections and have concluded that the Port District falls squarely within the definitions of "local agency" as contained in said sections.

The fact is that private developers within the Port District area have paid various fees in connection with development of the tidelands before the District was formed and at all times since the District was formed.

We feel, however, that the Housing Trust Fund fees are payable in connection with private development on Port District land even without the provisions of sections 53090 et seq. of the State Government Code. Our reasoning is that impact fees are simply not regulatory measures and are valid throughout the City limits as a pure and simple development impact fee. The validity of such City-wide impact fees has been upheld in *Russ Building Partnership v. City and County of San Francisco*, 199 Cal.App.3d 1496, 246 Cal.Rptr.21 (1987), *City of Los Angeles v. A.E.C. Los Angeles*, 33 Cal.App.3d 933 (1973) and the recent United States Court of Appeals case of *Commercial Builders of Northern California v. City of Sacramento*, 91 Daily Journal D.A.R. 9609.

In summary, our conclusion is that the City's housing impact fees are applicable to private developments on Port District lands within the City of San Diego.

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By

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Attachment

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