MEMORANDUM OF LAW

DATE: February 18, 1994

TO: Allen Holden, Jr., Deputy Director, Transportation Planning Division, Engineering and Development Department

FROM: City Attorney

SUBJECT: Holds Placed on Development Company Maps

The Baldwin Company ("Baldwin") owes the City over $3,000,000 for its share of the construction of State Route 56 West. Baldwin has not paid this money despite repeated requests for the money. The Transportation Planning Division of the Engineering and Development Department is considering imposing a hold on any maps which Baldwin is processing through Development Services Division. You have asked if this is appropriate under California law.

SHORT ANSWER

It may be appropriate to stop processing any maps involving land in North City West, as the financing for State Route 56 is intertwined with Baldwin's development in that area. However, it is not appropriate to hold up maps in other geographical areas or related to other developments. If you wish to collect the money, we could file a lawsuit on your behalf.

ANALYSIS

There is little guidance in the area of collecting money due from developers by the use of placing "holds" on land use maps being processed through City departments. But the background and legal footing for development fees in general provide a framework for analysis.

Legal Basis for Fees

Cities have the constitutional power to regulate land use and development to promote the public convenience or the general prosperity, public health, public morals or the public safety. Cal. Const. article XI, section 7; Matter of Stoltenberg, 165 Cal. 789, 791 (1913); Candid Enterprises, Inc. v. Grossmont Union High School District, 39 Cal. 3d 878 (1985).

This power, commonly referred to as the cities' "police power," includes the power to impose fees and dedications upon developers, as long as the exactions are substantially connected

to the impact of the development or the problem to be corrected. Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317 (1981); Surfside Colony v. Coastal Commission, 226 Cal. App. 3d 1260 (1991); Rohn v. City of Visalia, 214 Cal. App. 3d 1463 (1989); Commercial Builders of Northern California v. City of San Francisco, 941 F.2d 872 (9th Cir. 1991), cert. denied, U.S. , 112 S. Ct. 1997 (1992).

Fees can be imposed to pay for public facilities which must be constructed or expanded to meet increased usage. For example, fees can be imposed to cover the additional burden on schools, or the costs of increased traffic. Rules governing the imposition of development fees have been codified in California Government Code sections 66000 et seq. The City must identify the purpose of the fee and how it will be used. Government Code section 66001. The City must determine a reasonable relationship between the fee and the development, and between the need for the public facility and the development on which it is imposed. Government Code section 66001. Fees must not exceed the estimated reasonable cost of providing the service for which the fee was collected. Government Code section 66005(a).

In addition to developer fees, the Legislature has authorized the imposition of fees to support the work of a planning agency, Government Code section 65104; fees to administer specific plans, Government Code section 65456; and a general statute permitting local agencies to perform all acts which are necessary or proper to carry out governmental duties, Government Code section 37112.

Constitutional Limits on Fees

There have been two lines of constitutional attack on these fees by developers: either as a "taking" of private property without compensation, or else as a tax which has been imposed without the necessary approval of two-thirds of the voting public.

A fee or other exaction could be found to be a "taking" of private property if it is so restrictive or burdensome that it deprived the property owner of the use of his land. A fee will be upheld, however, if there is a substantial connection between the fee and the impact caused by the development.

In Commercial Builders of Northern California v. Sacramento, 941 F.2d 872 (9th Cir. 1991), the City of Sacramento commissioned a study to determine the effect of nonresidential development in creating a need for low-income housing and the propriety of charging fees to nonresidential developers to provide such housing. Based on the results of the study, the City passed an ordinance imposing fees on developers of

nonresidential developments which created jobs in the City to help finance low-income housing. Developers objected to the fee as an unlawful taking of property, arguing that the fee exceeded the need for low-income housing created by their developments. The court upheld the fee, however, ruling that the City of Sacramento had amply demonstrated that the fee was reasonably related to the burdens imposed by the developments. Therefore, the fee was justified and did not constitute an unlawful taking.

When a fee exceeds the reasonable cost of providing the service or regulatory activity for which it is charged, or if the funds go to general revenue purposes, the fee may be deemed a special tax, requiring an affirmative vote of two-thirds of the populace. The question, to be determined by a court as a matter of law, is whether the fee exceeds the reasonable cost of providing the service, and whether the fee allocated to the developer bears a fair and reasonable relation to the developer's benefit from the fee.

For example, in Russ Building Association v. San Francisco, 199 Cal. App. 3d 1496, 1505-06 (1987), a transit fee on new office buildings for increased costs of municipal railways was held not to be a special tax, as the fee was reasonable in relation to the increased traffic generated by the use of the building. However, a fire hydrant fee was ruled invalid as a special tax in Bixel Associates v. City of Los Angeles, 216 Cal. App. 3d 1208, 1218 (1989). That fee was calculated by dividing the total fire systems needs in the City by the number of permits issued. This resulted in a fee of $135,500, when the development only required two fire hydrants which cost $16,800. The court also ruled that the developer could not be charged any part of the cost to replace a ninety (90) year old water main which should have been replaced years earlier.

CONCLUSION

These cases all focus on the question of whether money is validly due from a developer instead of the problem here, how to extract money which is admittedly due. However, the common theme of these cases is that fees must be substantially related to the particular development to be valid.

Here, the department has proposed holding up unrelated projects until the fees relating to State Route 56 are paid. This is contrary to the guiding legal principles expressed in the major cases discussing legal fees, and we recommend that this practice be discontinued.

The proper approach to collect the fees due would be to file a lawsuit in Superior Court against Baldwin. We would be happy to file such a lawsuit at your request.

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