

MEMORANDUM OF LAW

DATE: July 20, 1994

TO: Steve Castaneda, Transportation and Land Use
Committee Legislative Specialist

FROM: City Attorney

SUBJECT: Referral From Committee - Development Fees

In response to your attached memorandum, you state in part that the Transportation and Land Use Committee is "interested in learning more about the legality of deferring fees and the methods of securing payment."

Facilities Benefit Assessments (FBAs) are based upon the concept of each developer paying an equitable and proportional share of the cost of permanent public facilities needed to serve the community in which the development occurs. The fees are in the nature of assessments and are imposed based upon a determination that a special benefit accrues to all the real property to be developed as a result of construction of the various public facilities.

Development Impact Fees (DIFs) are calculated in the same manner but are based upon the impact of new development on existing infrastructures. FBAs are created under our authority as a charter city. DIFs are imposed under a state procedural statute.

There is no legal problem with "deferring" impact or FBA fees so long as the deferred process does not result in other property owners in the area picking up a portion of the costs which were to have been paid by the property owner with the deferred fees.

An ordinance may be needed to allow for such fee deferral but such an ordinance can be drafted by this office. When fees are deferred, however, provision should be made for reasonable interest to be paid on such deferred fees in order to, in effect, "make the public trust fund whole."

An alternative would be to provide that, when fees are deferred, the fees which will ultimately be collected are the fees in effect at the time of ultimate payment. This alternative to interest payments would probably be simpler to administer.

With regard to the "methods of securing payment," if a developer signs a written recordable agreement to the effect that no certificates of occupancy can be issued prior to payment of the deferred fees, or if the agreement provides that no water hookups will be allowed without payment of such fees, such agreement, when recorded, will be enforceable equally against the property owner or his or her successor in interest. (Lenders must agree to subordinate any preexisting loans to the agreement.)

Since impact fees are generally based upon the effects of occupied units, such required payment prior to occupancy appears legally adequate and, in the event a project for some reason goes into bankruptcy or for other reasons is not built to the point of being occupied, the impact fees could logically be deferred until the project is ultimately completed and ready for occupancy.

JOHN W. WITT, City Attorney

By

Harold O. Valderhaug

Chief Deputy City Attorney

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Attachment

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