MEMORANDUM OF LAW

DATE: October 2, 1995

TO: Jeff Washington, Deputy Director, Planning Department

FROM: City Attorney

SUBJECT: Park and Recreation Development Impact Fees for the Stonecrest Project

Issue

You have asked our office to comment on the legality of granting a credit against park and recreation related Development Impact Fees ("DIF") when a residential developer incorporates private park and recreational facilities into a proposed subdivision. This issue was recently raised by Craig Beam who represents California Pacific Homes ("CalPac"), the developer of the Stonecrest Project. The Stonecrest Project is scheduled for hearing before the Planning Commission in October 1995 and I understand Mr. Beam has asserted that the City is required to grant such a credit against park and recreation DIF fees pursuant to Government Code section 66477(i) for the value of the private park and recreational facilities incorporated into the project.

Short Answer

To offset the impacts of new residential development, the City routinely assesses developers with two separate fees for development of community park and recreation facilities: Quimby Act fees are assessed pursuant to the Subdivision Map Act, and DIF fees are assessed pursuant to Government Code section 66000 et seq. CalPac is statutorily entitled to a credit against payment of Quimby Act fees for the value of private recreational improvements incorporated into the Stonecrest Project in accordance with Government Code section 66477(i). Additionally, as recommended by the League of California Cities and otherwise dictated by prudent legal considerations, CalPac should be given the opportunity to seek a credit against payment of DIF fees. However, in order for the City Council to grant any credit to CalPac against DIF fees targeted for new park and recreation facilities, CalPac must demonstrate the lack of a reasonable relationship between the need for the park facilities which have been identified for funding and the type of development CalPac is proposing. Ideally, uniform standards for granting DIF fee credits should be set forth in an ordinance or City Council Policy. However, it is legally possible to grant a credit against DIF fees on an ad-hoc basis, provided that proper findings are made by the City Council at a

public hearing.

Discussion

A. State Statutory Authority for Funding Park Facilities

It is important to recognize at the outset that the Legislature has statutorily authorized charter cities to assess development fees for park and recreation facilities in two mutually exclusive statutory schemes. There are critical differences between these alternative methods of collecting fees.

1. The Quimby Act: Parkland dedications or fees in lieu thereof can be imposed by a charter city pursuant to Government Code section 66477 ("the Quimby Act"). The Quimby Act is part of the Subdivision Map Act. In order to utilize this authority the following conditions must be met: 1) the city's general plan or community plan must contain policies and standards for park and recreation facilities; 2) the requirement for dedication or fees in lieu must be imposed on new residential subdivisions by ordinance; and 3) the dedication or fees in lieu must be imposed as a condition to the approval of a tentative map.

There are a number of other mandated standards of review contained in the Quimby Act, including a provision in Government Code section 66477(i) which requires the approving agency to grant a credit against the dedication and/or fee requirements for the value of private facilities installed by the developer on dedicated land. Additionally, pursuant to this same subsection, a developer "shall be eligible" to receive a credit, as determined by the legislative body, for the value of private open space within the development which is usable for active recreational uses.

In 1990, the Attorney General was asked to render an opinion on the narrow issue of whether a city or county, as a condition of approving a subdivision map, could lawfully require the dedication of land improved for park and recreation purposes without giving the subdivider credit for the value of the private recreational improvements. See, 73 Op. Cal. Att'y Gen. 152 (1990). In the course of opining that certain language in Government Code section 66477(i) mandated the granting of a credit in that circumstance, the Attorney General made the important observation that "the type of private recreational improvements furnished would be the subject of negotiation with and approval by the city or county. Section 66477 does not give subdividers the authority to determine unilaterally the extent of the facilities for which credit must be given." Id. at 155 n.3.

2. DIF Fees: After the passage of Proposition 13, it became common for cities and counties to charge fees on new development to fund construction of capital facilities, including park facilities, that serve the new development. These DIF fees are outside the parameters of the Subdivision Map Act and

authorized as a legitimate exercise of the police powers vested with local governments.

In 1987 the Legislature enacted Government Code section 66000 et seq. in response to concerns raised by developers that local agencies were imposing development fees for purposes unrelated to development projects. Section 66000 et seq. sets forth uniform procedures for imposing development fees that require local agencies to identify the purpose of the fee, identify the use to which the fee is to be put, and then demonstrate a reasonable relationship between the fee imposed and the proposed project's burden on the community. The last requirement for demonstrating a "reasonable relationship" is commonly referred to as a "nexus" requirement.

The "nexus" requirement can be further broken down into two separate components, related to specific provisions in the DIF fee statute. Government Code section 66001(a)(3) dictates that local agencies establishing or imposing DIF fees must determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed. This is sometimes referred to as a "type nexus." Additionally, Government Code section 66001(a)(4) provides that local agencies must determine how there is a reasonable relationship between the need for the public facility which has been identified by the local agency and the type of development project on which the fee is imposed. This requirement is sometimes referred to as a "burden nexus."

The "type nexus" and the "burden nexus" need not necessarily be established on a project specific basis. A legally justifiable general scheme for establishing and applying fees in a ministerial manner may be created by a local agency, provided that proper nexus findings are made by the legislative body at the time the fee schedule is established. See, e.g., Garrick Development Co. v. Hayward Unified School Dist., 3 Cal. App. 4th 320, 334 (1992).

It is well settled that charter cities and local agencies may impose DIF fees or Quimby Act fees for park and recreation facilities. Park and recreation facilities are specifically referenced in the legislation for imposing DIF fees in Government Code section 66002(c)(7). The mutual exclusivity of the DIF fee statute to the Quimby Act is set forth in Government Code section 66005(b), and further demonstrates the clear intention of the Legislature that the DIF fee legislation was not intended to supersede or preempt the Quimby Act.

In summary, DIF fees for park and recreation facilities are distinguishable from Quimby Act fees as follows: Quimby Act fees must be imposed as a condition of approving a tentative map but DIF fees can be imposed in connection with approving any discretionary permit issued by a local agency; Quimby Act fees are imposed under authority granted

by the Subdivision Map Act but DIF fees are imposed pursuant to general police powers; Quimby Act fees may only be imposed pursuant a regulatory scheme adopted by local ordinance, DIF fees may be imposed pursuant to an adopted regulatory scheme or on an ad hoc basis; the Quimby Act contains an express provision addressing developer credit against private improvements and the DIF fee legislation does not.

B. City Framework for Funding Park Facilities

The City of San Diego has a framework in place for imposing Quimby Act dedications or fees in lieu and DIF fees for park and recreation facilities.

1. Quimby Act Implementation: San Diego Municipal Code ("SDMC") section 102.0406.0601 provides that as a condition of approving a subdivision map, every subdivider who subdivides lands must contribute lands or pay a fee for the purpose of developing new parks or rehabilitating existing park and recreational facilities to serve residents of such subdivisions. This requirement has been in the SDMC since 1977, seven years before the Quimby Act amended the Subdivision Map Act to expressly authorize the imposition of park and recreation fees in connection with subdivision map approvals.

SDMC section 102.0406.0601 requires a subdivider to be assessed a fee of $100 per dwelling unit for R-1 development. Entirely consistent with the mandated developer credit provisions of the Quimby Act, SDMC section 102.0406.0801 states that:

> Where private usable land is provided for park and recreational purposes, such areas may be credited against the requirement for the payment of fees for park and recreation purposes or contribution of land and payment of fees as provided in Section 102.0406.0601 hereof, provided that City Council, applying such criteria as usability, public access, proposed improvements and permanency, finds it is in the public interest to do so.

2. DIF Fee Implementation: Although the issue has been brought forward for action in the past, I understand that the City Council has declined as a matter of policy to adopt a formal procedure via resolution or ordinance for the imposition of DIF fees. However, implicitly or perhaps even expressly, they have established and approved a general scheme for assessing DIF fees through adoption of the Facility Financing Plans for various communities throughout the City. With the one exception of lack of a procedure for granting waivers, reductions or adjustments, it appears that the City assesses DIF fees in a manner which is generally consistent with recommended practice. I have reached

this conclusion after comparing our implementation process with a DIF Fee Implementation Guide published by the League of California Cities.

In 1987 the League of California Cities coordinated the formation of a blue ribbon committee of city officials ("The Committee") to study AB 1600.F

AB 1600 was the Assembly Bill which was codified after enactment as Government Code section 66000 et seq.

The charge of The Committee was to create a DIF Fee Implementation Guide to assist members of the League of California Cities. Mr. Witt served as a member of The Committee. (See attached copy of the Implementation Guide in its entirety.)

One of the issues acknowledged and addressed in the Implementation Guide by The Committee involved occasions when a generally adopted fee or fee schedule (as is imposed by The City of San Diego) is inappropriate for a particular development. The recommendation of The Committee was for cities to establish a procedure for a developer to request an exception as a means to get the fee reduced or credited, with the developer having the burden to show the city why the general "type nexus" or "burden nexus" findings adopted with establishment of the fee schedule is legally deficient for the particular development. In the model ordinance attached to the Implementation Guide, The Committee recommends language to implement a process for granting these fee adjustments.

It does not appear that the City has established any process for considering adjustments to DIF fees as recommended by The Committee.

C. Park and Recreation Facility Fees for the Stonecrest Project

Without getting into specifics regarding project design issues or policy considerations, I offer the following observations and conclusions with regard to the imposition of park and recreation fees for the Stonecrest Project:

1. Since the Stonecrest Project involves a subdivision of property, Quimby Act fees should be assessed pursuant to SDMC section 102.0406.0601 at the rate of $100 per dwelling unit and CalPac should be provided the opportunity to request a credit against those fees for the private recreational improvements incorporated into the subdivision, as required by Government Code section 66477(i) and provided for in SDMC section 102.0406.0801. The Planning Commission should make a recommendation to the City Council with the City Council making the final decision on the issue of a credit.

2. Park and recreation related DIF fees should be calculated in such a way that they are reduced by the amount of any

Quimby Act fees collected for the same purpose.

3. CalPac should be given the opportunity to seek a credit of park and recreation DIF fees. The Planning Commission should make a recommendation to the City Council on this issue with the City Council making the final decision. To justify the granting of any credit of DIF fees to CalPac, the burden should be on CalPac to demonstrate that there is not a "burden nexus" between the project proposed and the need for the park and recreation facilities targeted in Serra Mesa for development with the DIF fees to be collected from CalPac. Of course, as observed by the Attorney General in analyzing a collateral concept in the Subdivision Map Act, the recreational improvements proposed by CalPac for the Stonecrest Development should be the subject of negotiation with and approval by the City. CalPac cannot unilaterally determine the extent of private recreational facilities for the project.

The role of City staff in this process should be to provide the Planning Commission and the City Council with needed advice on the planning requirements of the City's General Plan and the Serra Mesa Community Plan with respect to community standards for public park facilities. Obviously, the granting of a credit (depending on the amount of the credit) and the construction of private facilities by CalPac may affect the scope, size, and funding of public park facilities currently planned for the community. In order for the Council to grant any fee credit, the supporting documentation from the applicant and City staff must be prepared in advance. This can be reviewed and presented to the decisionmakers at the hearing where the discretionary decision will be made.

By offering CalPac an opportunity to request a credit of park and recreation DIF fees, the City would be implementing a process consistent with the recommendation of the League of California Cities. Beyond that, however, I would also note that in my review of the current state of the law it appears that this approach is the most prudent course of action in light the recent intensified scrutiny which courts are focusing upon local governments in the imposition of development exactions.

In Dolan v. City of Tigard, 512 U.S. , 114 S. Ct. 2309 (1994), the United States Supreme Court recently articulated a new standard of review in connection with developer exactions for land dedications, placing the burden squarely on local governments to justify such exactions with findings of "nexus" and "rough proportionality." Although, a good legal argument can be made that the holding of Dolan should be limited to exactions involving dedications and not applied to exactions involving fees, the issue remains an open question. On June 27, 1994 the United States Supreme Court granted a writ of certiorari in Ehrlich v. Culver

City, 15 Cal. App. 4th 1737 (1993), vacated, 114 S. Ct. 2731 (1994), vacated the judgment, and remanded the case back to the California courts for further consideration in light of Dolan.

The City of San Diego recently joined with more than 100 other California cities and counties in an amicus brief filed by the City and County of San Francisco with the California Supreme Court in the Ehrlich case. In that brief, the amici cities are taking the position that the holding of Dolan is limited to exactions involving direct physical invasion of private property, and is not applicable to fee exactions such as those imposed pursuant to Government Code section 66000 et seq.

The amici cities and counties do not oppose the "reasonable relationship" test as applied to developer fee exactions and set forth in the Government Code, however, it is the Dolan mandated shifting of the burden to local governments to make project-by-project individualized "rough proportionality" findings which the amici cities assert is unworkable for financing large scale community infrastructure and facilities improvements. If the City gives CalPac the opportunity to seek a credit of park and recreation DIF fees, this allowance would in no way concede the Ehrlich issue because the City would still place the burden on CalPac to demonstrate the lack of a "burden nexus" as applied to their particular project.

4. If a credit of park and recreation DIF fees is granted to CalPac, specific findings should be adopted by the City Council via resolution referencing the unique community circumstances and attributes of the Stonecrest Project which justify the granting of the credit. The adoption of such findings is critical to protect against potential allegations by citizens in the community or developers of future projects that the City Council acted in an arbitrary and capricious manner in granting the credit, or otherwise violated principles of equal protection.

It is not uncommon for developers to claim a violation of equal protection in connection with the imposition of DIF fees. In fact, although the issue will not be the focus of review by the California Supreme Court, the developer in the Ehrlich case made such a claim with respect to the ad-hoc determination by the City of Culver City to impose a $280,000 mitigation fee for the community loss of private recreation facilities. The appellate court in Ehrlich and in other recent cases, such as Garrick Development Co. v. Hayward Unified School Dist., 3 Cal. App. 4th 320 (1992), has given little credence to equal protection claims in the face of properly adopted findings authorizing the imposition of development fees. In constitutional jurisprudence, the imposition of fee exactions is considered an economic regulation subject only to rationale basis review and not accorded the more strict scrutiny

applied to regulations affecting "suspect classifications" or "fundamental rights." Id. at 338.

Conclusion

The City is legally precluded from granting a credit pursuant to Government Code section 66477(i) for park and recreation DIF fees imposed pursuant to Government Code section 66000 et seq. However, as recommended in the DIF Fee Implementation Guide published by the League of California Cities and dictated by the state of the case law related to fee exactions, CalPac should be afforded the opportunity to request a credit of park and recreation DIF fees, subject to the limitations and procedures specified above in the body of this memorandum.

JOHN W. WITT, City Attorney
By
Richard A. Duvernay
Deputy City Attorney

RAD:lc:600.2(x043.2)
Attachment
ML-95-69