

MEMORANDUM OF LAW

DATE: March 1, 1996

TO: Leonard L. Wilson, Senior Civil Engineer, Water Utilities
Section, Development Services Department

FROM: City Attorney

SUBJECT: Expiration of Reimbursement Agreements

This replies to your memorandum of December 8, 1995 to Chief Deputy City Attorney Ted Bromfield regarding the closure of sewer and water facility reimbursement agreements. Your memorandum identifies several factual instances where it is your understanding that reimbursement agreements are subject to closure. These situations are as follows:

1. Where all funds subject to the agreement have been collected and reimbursed to the developer who advanced them

to construct the facilities.

2. Where the expiration date of the agreement has passed.
3. Where facilities constructed under the terms of the agreement are no longer in use.
4. Where the agreement has been superseded by a new agreement.

You have asked this office to confirm your understanding in reference to these circumstances or to provide an explanation if necessary.

Your understanding with respect to the first two situations is accurate. Clearly, reimbursement agreements terminate pursuant to their express terms. No explanation is necessary to confirm that the agreements terminate when reimbursement is full and complete, or when an expressly agreed-upon reimbursement cut-off date passes. However, situations 3 and 4, as described above, require some explanation.

Situation 3: May the reimbursement agreement be terminated on the sole basis that the facilities which are its subject are no longer in use?

Short answer: No.

Discussion

Analysis of this situation should begin with a reference to the Subdivision Map Act provisions which allow the City to require an initial subdivider to oversize public facilities as a condition of subdivision approval. Relevant parts of pertinent Government Code sections provide as follows:

Section 66485. Improvements for property not within subdivision

There may be imposed by local ordinance a requirement that improvements installed by the subdivider for the benefit of the subdivision shall contain supplemental size, capacity, number, or length for the benefit of property not within the subdivision, and that those improvements be dedicated to the public. . . .

Section 66486. Local agency to reimburse subdivider for portion of cost of improvements

In the event of the installation of improvements required by an ordinance adopted pursuant to Section 66485, the local agency shall enter into an agreement with the subdivider to reimburse the subdivider for that portion of the cost of those improvements, including an amount attributable to interest, in excess of the construction required for the subdivision.

Consistent with these statutes, the San Diego City Council has adopted the Cost Reimbursement District Procedural Ordinance, San Diego Municipal Code section 62.0208. Without quoting in full, the ordinance in essence provides the method by which reimbursement districts are formed and reimbursement agreements entered.

With respect to reimbursement district formation, the ordinance requires City staff to prepare a plat map showing the area to be benefitted by the initial developer's facilities construction and to provide notice to all benefitted property owners that a proposed district is being formed. A public hearing before the City Council is scheduled and all owners of property to be benefitted may attend to express their views on any matter relevant to the proposal, including matters such as the boundaries of the district, the type and configuration of the facilities, the cost of those facilities, the apportionment of those costs, etc. Once the hearing is held and due process accorded, the City Council may in its discretion adopt a resolution establishing the reimbursement district, which is to include a listing of benefitted properties and an apportionment of excess costs. Each benefitted property is apportioned its share of the excess costs, and this apportionment constitutes a lien against the benefitted property which may be removed only when the reimbursement fee is paid or

when the reimbursement district and agreement expire. Relevant parts of the ordinance provide that:

The term of any reimbursement agreement shall be established by the City Council and shall be based upon the reasonable expectations of the development of benefitted properties or use of the Public Improvement by the benefitted properties; provided, however, that the maximum term of any reimbursement agreement shall be for a period of twenty (20) years.

If, during the period following the formation of the Reimbursement District, any person records a final map (subdivision, parcel, consolidation or financial map) or applies for a building permit on a lot for which a lien for Public Improvements has been established in accordance with this Ordinance, and such person or his predecessor in

interest has not paid the lien to the City, the established lien shall be paid prior to the filing of the final map or the issuance of the building permit. Payment shall not be required, however, in connection with building permits having a total improvement value of twenty thousand dollars (\$20,000) or less, unless the building permit is for improvements which will ultimately use the Reimbursement District's improvements. . . .

San Diego Municipal Code section 62.0208(k) (Emphasis added.)

As indicated by the emphasized language, in general a lien on benefitted property can be removed only when the obligation is paid or when the reimbursement agreement term expires without substantial development of benefitted property. Significantly, the ordinance requires prior notice of the above provisions to the owners of reimbursement district property. The ordinance requires advance notice to all property owners in the improvement benefit area that:

If, within a 20-year period from the date of forming this district, you either file a final map, are issued a building

permit for improvements which will ultimately utilize the cost reimbursement improvements, or are issued a building permit for improvements valued in excess of \$20,000, the fee would become due and payable.

San Diego Municipal Code section 62.0208(b)(2)

This clearly puts all owners of benefitted property on notice that the fee is payable in the event final maps are filed during the reimbursement term or in the event that permits are issued for improvements costing more than \$20,000, regardless whether their subdivisions or improvements will actually benefit from the cost reimbursement facilities. The only exception to this would be an instance where improvements of the later developers 1) do not utilize the cost reimbursement improvements, and 2) cost less than \$20,000. Obviously, this is a very narrow exception for de minimis development in the cost reimbursement district. Thus, for all material purposes, the liens remain recorded and subject to foreclosure in the event that the fees are not paid at the time final maps are recorded or permits obtained for improvements to reimbursement district property during the life of the reimbursement agreement.

To summarize the analysis of this question, reimbursement agreements are generally not terminated merely because the subject facilities are not used by later developers. The obligation of later developers to pay reimbursement fees arises at the time the

reimbursement district is created, this obligation is secured by a lien on their property, and the only circumstance where the lien may be extinguished without paying the fee is where the benefitted land is not significantly improved or "final mapped" during the term of the reimbursement district. This is consistent with the spirit and intent of the provision of the Subdivision Map Act (Government Code section 66486) which states that "the local agency shall enter into an agreement with the subdivider to reimburse the subdivider. . . ."

If the oversize facilities are deemed to be of public necessity and of ultimate benefit to other property owners within a specified area at the

time they are required to be constructed, it is at that same time that the obligation of reimbursement arises for those other benefitted owners. It is of no consequence that in developing their properties they may never actually use the facilities (unless their improvements do not exceed a cost of \$20,000).

Situation 4: May reimbursement agreements be terminated where they are superseded by a new agreement?

Short Answer: Yes, provided that there is identity of the parties to the two agreements.

Discussion

Any contract may be modified or terminated by the mutual assent of all parties. However, this answer must be qualified to take crucial note of the fact that we assume you mean that the developer who is a party to the original reimbursement agreement is likewise a party to the "new agreement." If this assumption is mistaken, then the answer would be different and opposite to that stated above. This is for the simple reason that an agreement with one party cannot be modified by a separate and collateral agreement with an unrelated third party.

Hopefully this will amount to a satisfactory response to your inquiry.

JOHN W. WITT, City Attorney

By
Frederick M. Ortlieb
Deputy City Attorney

FMO:mb:825(x043.2)

ML-96-17