Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: October 22, 2009

TO: Bennur Koksuz, Deputy Director, City Planning and Community Investment

FROM: City Attorney

SUBJECT: Maintenance of Park Amenities by Developers or with Developer Impact Fees

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You have asked the following questions: 1) Can maintenance of a negotiated park amenity be credited towards satisfying population based-park requirements? 2) Can an ad hoc fee assessed in-lieu of the park portion of a development impact fee [DIF] be used for maintenance of a park amenity provided to satisfy population-based park requirements?

BACKGROUND

The request for legal services did not contain any facts regarding the basis for or the process by which Park Planning negotiates park amenities. Therefore, this analysis is based on the following understanding of the facts involved and the process followed.

The population-based park requirements are set forth in the Recreation Element of the City's General Plan. The General Plan is adopted pursuant to California Government Code section 65300 et. seq. The City is required to adopt a General Plan that addresses the distribution, general location, and extent of uses of the land for, among other things, recreation. Cal. Gov't Code § 65302(a). The Recreation Element contains "minimum standards and strategies for development of population-based park and recreational facilities." City of San Diego Recreation Element, pg. RE-10. Table RE-2 contains Parks Guidelines for the population-based parks: the acreage, uses, and typical components of the City of San Diego population-based parks. These are the recreational standards that new development is requested to contribute toward when residential units are added to a community.

Park Planning reviews discretionary land use development projects and proposes conditions to be placed on the development approval that will satisfy the population-based park requirements. To conduct this review, staff first determines what, if any, new population the proposed development adds to the Community Plan. Next, staff calculates the corresponding park amenities needed for that population, as set forth in the Recreation Element. This analysis may result in a proposed condition that the developer pays a fee, which is then used towards satisfying the development's proportionate need for those recreational facilities set forth in the Recreation Element. The negotiated park amenity appears to be a mutually acceptable alternative to the payment of the recreational facility impact fees. This memorandum assumes that the purpose of the park amenity is to reduce the new development's impact on the current public facilities.[1] The question is whether the developer can also be asked to contribute toward maintenance of that amenity, to the credit of his or her population-based park impacts.

1. Can maintenance of a negotiated park amenity be credited toward satisfying population based park requirements?

A. The Law Clearly Prohibits Collection Of A Fee For The Purpose Of Operation And Maintenance Of A Public Facility As A Condition Of Approval Of A Development.

California Government Code section 65913.8 prohibits a local agency that charges a fee, charge, or other form of payment for a public capital facility improvement as a condition of approval of a development project from including an amount for the operation and maintenance of the improvement. An exception from this prohibition exists but is not applicable to charter cities.[2]

The City's ability to regulate land use, including the ability to charge fees for the impacts of new development is based on its police powers set forth in the article XI, section 7 of

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[1] While the Subdivision Map Act allows a city or county to enact an ordinance *requiring* the dedication of land for recreational purposes, or the payment of fees in-lieu of that land (commonly referred to as a "Quimby Ordinance"), the City of San Diego does not currently have such an ordinance and therefore cannot require the dedication of this land or the fees in-lieu of the land. Cal. Gov't Code § 66477. Also as part of a Quimby Ordinance, common interest developments shall be eligible to receive credit, as determined by the legislative body, against the amount of land to be dedicated or the amount of the fee to be imposed for the value of private open space within the development which is usable for active recreational uses. Cal. Gov't Code § 66477(e). The re-enactment of City of San Diego Quimby Ordinance is goal RE-A.16 of the recently adopted Recreation Element. See, City of San Diego Recreation Element, pg. RE-19. This memorandum does not reach the question of how credit for private open space should be calculated, should a Quimby Ordinance be adopted.

[2] (a) The improvement is designed and installed to serve only the specific development project on which the fee is imposed, the improvement serves 19 or fewer lots or units, and the local agency makes a finding, based on substantial evidence, that it is infeasible or impractical to form a public entity for maintenance of the improvement or to annex the property served by the improvement to an entity described in subdivision (b); (b) The improvement is within a water, sewer, street lighting, or draining district; specific limits are set forth regarding the length of time the fees may be collected. Cal. Gov't Code § 65913.8(a) & (b). This section is applicable to charter cities. Cal. Gov't Code § 65913.9.

the California Constitution: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." The Mitigation Fee Act, California Government Code section 66000 et. seq., sets forth the procedures for local agencies, including charter cities, to impose a fee "in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . . . " Cal. Gov't Code § 66000(b). The fee must be expended solely for the purpose it was collected, and cannot be used for general revenue purposes. Cal. Gov't Code § 66008. Whether a fee is a development fee or special tax is a question of law, and the burden is on the public agency to prove the fee is not a special tax. 9 Miller & Starr, Cal. Real Estate, (3rd Ed.) § 25:45. A special tax does not include a fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and is not levied for general revenue purposes. Cal. Gov't Code § 50076. The establishment of special taxes requires an ordinance or resolution by the legislative body and approval of two-thirds of the votes cast on the proposition. Cal. Gov't Code § 50077.

Therefore, a requirement that a developer directly pay a fee for the operation or maintenance of a public facility as a condition of development approval is generally prohibited by law. In addition, a fee for the purpose of maintenance would likely be viewed as a special tax because it is for general revenue purposes. The City would need to follow the procedures required to establish special taxes.

B. State Law Preempts Any Local Requirement For The Developer To Maintain The Park Amenity As A Condition Of Approval.

As stated above, the city obtains its power to regulate land use through the California Constitution. However, the grant of power also contains a limitation: the local regulations may not conflict with general laws. Cal. Const. art. XI, § 7.

Recently, in *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895 (2009), the court summarized the factors to be considered in making a preemption determination. Whether the city's development condition is preempted by state law depends on whether it conflicts with state law. A conflict exists when the local act duplicates, contradicts, or enters into an area fully occupied by general law, either expressly or by legislative implication. The court further expanded on each of these factors:

i. Duplication exists when the proposed local rule is coextensive with state law.

ii. Contradiction exists when the proposed local rule is inimical to, or cannot be reconciled with, state law.

iii. A local rule enters a field fully occupied by state law when the Legislature has expressly intended to occupy the legal area or when it has impliedly occupied the area. Implied occupation occurs when 1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become a matter of state concern; 2) the subject matter has been partially covered by general law in terms clearly indicating that a paramount matter of state concern is at issue, and no local regulation will be tolerated; or 3) the subject matter has been partially covered by general law, and the nature of the subject is such that the adverse effects on transient citizens of the state outweighs possible benefits to the locality.

Fiscal v. City and County of San Francisco, 158 Cal. App. 4th 895, 904 (2009).

In addition, because the City of San Diego is a charter city, it may act in conflict with state law if the matter is a municipal affair and not a matter of statewide concern. *Id.*

The requirement that a developer maintain a park amenity does not meet the first test; it does not duplicate state law. However, such a requirement does seem to meet the second test in that it is contrary to the clear state law prohibition against the requirement of a fee for operations and maintenance. If the negotiated park amenity is a substitute for the payment of development impact fees as set forth in the Mitigation Fee Act, then the prohibition against requiring fees for operation and maintenance of that amenity would likely apply. Additionally, the Legislature has evidenced an intent that these state statutes apply to charter cities, therefore the "municipal affairs" doctrine is inapplicable. Cal. Gov't Code §§ 65913.9; 66000(b).

Finally, it is unclear how maintenance of an amenity could equate with satisfying a population-based need. For example, a development's population may dictate a large playground, but the developer instead constructs a small playground as part of its population-based requirements, and then maintains the small playground in satisfaction of the remainder of its population-based requirements. The maintenance does not mitigate the impact of the new development on the recreational needs of the community. It seems as though the population-based needs would in fact, be worse than before the development was approved because any existing recreational deficits would be increased.

2. Can an ad hoc fee assessed in lieu of the park portion of a DIF be used for maintenance of a park amenity provided to satisfy population-based park requirements?

No. While the Mitigation Fee Act allows for the assessment of impact fees established either by legislation of general applicability or imposed on a specific project on an ad hoc basis, section 65913.8 does not differentiate legislatively enacted fees of general applicability from ad hoc fees in its general prohibition on the collection of such fees for operations and maintenance of the capital public facility.

CONCLUSION

A development condition that requires the maintenance of a park amenity may not be credited toward satisfying a population-based impact of that development. Further, development impact fees, whether legislatively adopted or imposed on a project-specific ad hoc basis, may not be used for operations or maintenance.

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