

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: October 8, 2010

TO: The Honorable Mayor and City Council

FROM: Adam R. Wander, Deputy City Attorney

SUBJECT: Use of Downtown PBID Assessment Funds for Maintenance of Public Restrooms

INTRODUCTION

This memorandum is in response to a request by Council President Pro Tem Faulconer to provide a legal analysis of the issues raised in a letter from the Downtown San Diego Partnership, Inc., in which the Partnership expressed concerns regarding the actions taken by the City Council on Item 332 of the July 20, 2010 City Council meeting. At that meeting, the City Council decided to use Downtown Property and Business Improvement District (PBID) assessment funds for maintenance of downtown public restrooms known as the "Portland Loos." Specifically, the Partnership is concerned with whether the law allows for PBID assessment funds to be used for maintenance of public restrooms; whether the use of such funds for maintenance of public restrooms requires an amendment to the engineer's report and management plan; and whether it would require an amendment to the current operating agreement with the Downtown San Diego Partnership.

DISCUSSION

I. MAINTENANCE OF PUBLIC RESTROOMS IS AN ALLOWABLE EXPENSE UNDER THE CALIFORNIA STREETS AND HIGHWAYS CODE.

The PBID is governed by the Property and Business Improvement District Law of 1994, California Streets and Highways Code sections 36600-36671 (PBID Law). Under the PBID Law, liability for the assessment may either be premised upon a person's property ownership or upon a person's operation of a business within the district. In the City's PBID, the requirement to pay the assessment is premised upon a person's property ownership. Because the responsibility to pay the assessment is connected to property ownership, the PBID is also governed by Proposition 218 (Prop 218). Cal. Const. art. XIII D, § 2(b).

The PBID law authorize cities to levy assessments within a defined area for the purpose of providing improvements and promoting activities that benefit the real property or businesses located in the district. Cal. Sts. & High. Code §§ 36601(d), 36602. California Streets and Highways Code section 36610 defines "Improvement" as "the acquisition, construction, installation, or maintenance of any tangible property with an estimated useful life of five years or more including, but not limited to . . . (c) Trash receptacles and public restrooms." Clearly, the maintenance of public restrooms is something that the legislature has found to be an improvement which may be undertaken with PBID funds.

The amount of money which may be assessed within the PBID is wholly dependent on the reasonable cost of the proportional special benefit conferred on those parcels. Cal. Const. art. XIII D, §§ 2(b), 4(a). The downtown public restrooms, like all public restrooms, will be used by the public at large to some extent. This raises the question of whether there is a general benefit to the maintenance of the restrooms, and if so, the City is required to fund the general benefit from non-assessment sources. However, a special assessment for improvements or activities within a district can be defended on the basis of non-assessment revenue contributions to other aspects of an overall program within that district, and the City need not show that each element of the program is jointly funded by assessment and non-assessment revenues. *Beutz v. County of Riverside*, 184 Cal. App. 4th 1516, 1531 (2010). In other words, it is not necessary to show that each PBID improvement that provides a general benefit is funded by both assessment and non-assessment revenue, so long as there is enough non-assessment contribution to the PBID to cover the general benefits provided by the PBID program as a whole. City staff should consult with their assessment engineer to quantify the special and general benefits of the restroom maintenance, and determine whether there is currently an appropriate amount of general benefit contribution by non-assessment funds being provided within the PBID that would allow for the maintenance of public restrooms.

II. USING PBID ASSESSMENT FUNDS TO MAINTAIN PUBLIC RESTROOMS WOULD NOT REQUIRE AN AMENDMENT TO THE ENGINEER'S REPORT AND MANAGEMENT PLAN.

Under the PBID Law, the City may initiate proceedings to form a PBID "[u]pon the submission of a written petition, signed by the property or business owners in the proposed district who will pay more than 50 percent of the assessments proposed to be levied." Cal. Sts. & High. Code § 36621(a). The petition must be accompanied by a summary of the management plan for the proposed operations of the district. Cal. Sts. & High. Code § 36621(b). The management plan includes a description of the boundaries of the district, a list of each business or property to be assessed, the improvements and activities to be funded, sources of financing, a schedule for implementation of the improvements, and rules and regulations for the district. Cal. Sts. & High. Code § 36622. In addition, Prop 218 requires that all assessments must be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California. Cal. Const. art. XIII D, § 4(b).

The engineer's report and management plan adopted in connection with the PBID's renewal in 2005, and every annual engineer's report since, has included maintenance of public restrooms as a type of "improvement" that may be undertaken by the PBID. Pursuant to the engineer's report and management plan and every annual update, "[i]mprovement' means the . . . maintenance of any tangible property with an estimated useful life of five years or more including, but not limited to . . . public restrooms." See Shilts Consultants, Inc., *City of San Diego Downtown Property and Business Improvement District Engineer's Report and Management Plan, Fiscal Year 2005-06*, at 7; Koppel & Gruber Public Finance, *City of San Diego Downtown Property & Business Improvement District Annual Update Engineer's Report*, June 2010, at 5. Additionally, each engineer's report has included "Amenity Maintenance" as an as-needed service in the service frequency breakdown table. See Shilts Consultants, Inc., *City of San Diego Downtown Property and Business Improvement District Engineer's Report and Management Plan, Fiscal Year 2005-06*, at 8; Koppel & Gruber Public Finance, *City of San Diego Downtown Property & Business Improvement District Annual Update Engineer's Report*, June 2010, at 6. Therefore, public restroom maintenance is an allowable expenditure under the engineer's report and management plan.

III. USING PBID ASSESSMENT FUNDS TO MAINTAIN PUBLIC RESTROOMS WOULD REQUIRE AN AMENDMENT TO THE OPERATING AGREEMENT WITH THE DOWNTOWN SAN DIEGO PARTNERSHIP.

Beginning in Fiscal Year 2006, the PBID was renewed for a term of ten years in accordance with California Streets and Highways Code section 36622(h). Correspondingly, the City entered into a ten year agreement with Downtown San Diego Partnership, Inc. for administration of contracts for goods and services for the PBID.

Exhibit "A" to the agreement between the City and the Downtown San Diego Partnership (Document No. OO-19365), which is attached to this memorandum, lists cleaning and maintenance of all downtown public restrooms as a baseline service to be provided by the City. Exhibit "A" also states that "[t]he parties to the Agreement understand that the City baseline services, including but not limited to the level and frequency of the services, may change, at the sole discretion of the City Council and as allowed by law." *Operating and Management Agreement Between The City of San Diego and Downtown San Diego Partnership, Inc.*, Exhibit "A," effective July 1, 2005. The baseline services listed represent only the services provided by the City as of the drafting of the agreement in February 2005. However, a reduction in City baseline services does not require the Downtown San Diego Partnership to correspondingly increase the services provided by the PBID. Therefore, the agreement should be amended prior to a decision to use PBID assessment funds for maintenance of any public restrooms.

CONCLUSION

Maintenance of public restrooms is an allowable expense under the PBID Law, as well as the engineer's report and management plan. However, the use of PBID assessment funds to maintain downtown public restrooms requires an amendment to the current agreement between

Council President Pro Tem Faulconer

October 8, 2010

Page 4

the City and the Downtown San Diego Partnership. In addition, this Office recommends that City staff consult the City's assessment engineer to quantify the special and general benefits and ensure that there is an appropriate amount of non-assessment contribution to the PBID to support the use of assessment funds for maintenance of the public restrooms prior to using PBID funds for such purposes.

JAN I. GOLDSMITH, CITY ATTORNEY

BY

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Attachment

cc: Beth Murray, Deputy Director, City Planning & Community Investment