

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: April 16, 2012

TO: Robert Vacchi, Deputy Director,
Neighborhood Code Compliance Division, Development Services Department

FROM: City Attorney

SUBJECT: Proposition 26 Review of Proposed Neighborhood Code Compliance Division
User Fees for FY 2013

INTRODUCTION

Under Council Policy 100-05, general fund departments are required to conduct comprehensive user fee studies every three years. These fee studies ensure City departments identify and recover all reasonable and allowable costs incurred in providing government services.

Financial Management staff has asked participating departments to obtain an opinion on the legality of their proposed user fee adjustments and additions from the Office of the City Attorney in light of Proposition 26. Approved by the voters in 2010, Proposition 26 amends articles XIII A and XIII C of the California Constitution to provide that a levy, charge, or exaction of any kind imposed, increased, or extended by a local government is a tax unless an exception applies. Exceptions to Proposition 26 include user fees; government service or product fees; regulatory fees; government property entrance fees; fines and penalties imposed by a court or local government; property development impact fees; and assessments and property-related fees governed by Proposition 218.¹

Each Proposition 26 exception involves its own legal standard for determining the amount of a legally permissible fee. Under article XIII C, section 1(e)(1)(2)(3) of the California Constitution, which discusses some of the exceptions to Proposition 26, no fee may exceed the reasonable cost of providing the service. However, such fees should reimburse the government entity for all reasonable direct and indirect expenses incurred. *United Business Commission v. City of*

¹ For a fuller discussion of Proposition 26, see City Att’y MOL No. 11-3 (Mar. 4, 2011), “Proposition 26 and Its Impact on City Fees and Charges.”

San Diego, 91 Cal. App. 3d 156, 166 (1979). As noted in *United Business Commission*, “. . . the municipality need only apply sound judgment and consider ‘probabilities according to the best honest viewpoint of informed officials’ in determining the amount of the fee.” *Id.* This Office has advised City staff to explain the link between the cost and the service provided and justify all fee calculations based on a study of the costs associated with the fee for Council’s consideration and approval. Therefore, depending on the particular type of fee and individual department activities, staff for each City department developed their proposed user fee adjustments using the comprehensive Citywide method developed by Financial Management and Comptroller staff.²

We have reviewed a detailed summary of the Neighborhood Code Compliance Department’s cost recovery calculations as described in Exhibit A and proposed fee adjustments as described in Exhibit B. Our Proposition 26 analysis of each fee is discussed below.

There are four types of user fees proposed for revision by the Neighborhood Code Compliance Division (NCCD), which are as follows:

1. Noise Permit Fee
2. Newsrack Permit Fee
3. Reinspection Fee — Zoning, Housing, and Building
4. Removal of Recorded Notice of Violation Fee — With and Without Appeal

Noise Permit Fee

San Diego Municipal Code section 59.5.0203 authorizes the issuance of a noise permit for activities that exceed the otherwise permissible noise level within the City of San Diego. NCCD currently only issues such permits for construction zones. Noise permits allow contractors to exceed the permissible noise level as it relates to construction-related activities during days and times outside of those set forth in San Diego Municipal Code section 59.5.0404.

NCCD proposes to increase the fee from \$40 per permit to \$167 per permit. The charge for this permit covers the administrative cost of its issuance which is comprised of time spent by staff in reviewing the application and processing the necessary paperwork.

² The method was approved by Financial Management and the Comptroller and provided to the departments by Financial Management. The number (budget item) used to apportion rates (overhead and load) against direct cost is the responsibility of each department based on the contents and knowledge of their individual department activities. This Office did not independently verify or recalculate the numbers provided or the validity of the methodology.

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Based on the foregoing facts, the noise permit fee would not likely constitute a tax under Proposition 26 because two exceptions would likely apply: the “user fee” exception and the “regulatory fee” exception.

The user fee exception relates to a charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the benefit or granting the privilege. Cal. Const. art. XIII C, § 1(e)(1). This exception is hereinafter referred to as the User Fee Exception.

The regulatory fee exception exempts charges imposed for regulatory purposes such as “costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits . . . and the administrative enforcement and adjudication thereof.” Cal. Const. art. XIII C, § 1(e)(3). This exception is hereinafter referred to as the Regulatory Fee Exception.

The user fee exception applies because those who obtain a noise permit obtain a specific benefit; they are permitted to exceed the noise decibel levels set forth in the San Diego Municipal Code and to engage in construction-related activities on days and times not otherwise allowed pursuant to the San Diego Municipal Code. And, the increased fee would not exceed the cost of providing the service to the public.

Likewise, the Regulatory Fee Exception applies because a noise permit is issued as part of a regulatory scheme involving compliance with acceptable time of day noise decibel levels within different land use zones.

Newsrack Permit Fee

San Diego Municipal Code section 62.1002(e) requires that all newsracks located in or upon any portion of the public right-of-way require an annual newsrack permit. The imposition of an annual fee for such a permit is authorized by San Diego Municipal Code section 62.1014. The fee covers the administrative cost, or a portion thereof, to issue the newsrack permit.

NCCD proposes to increase this annual fee from \$15 per newsrack to \$20 per newsrack. Based on the calculations set forth in Exhibit A, the requested fee increase would result in a 43 percent cost recovery.

Based on the foregoing facts, the newsrack permit fee would not likely constitute a tax under Proposition 26 because two exceptions would likely apply: the User Fee Exception and the Regulatory Fee Exception.

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The User Fee Exception applies because those who pay the fee for a newsrack permit obtain a specific benefit that others who do not pay the fee do not receive; the fee payors are authorized to place their newsrack on the public right-of-way, unlike those who do not pay the fee.

Furthermore, the Regulatory Fee Exception applies because it covers the cost of regulating the placement of newsracks within the public right-of-way. The failure to obtain such a permit before placing a newsrack in the public right-of-way constitutes a violation of the law under San Diego Municipal Code section 62.1003.

Reinspection Fee — Zoning, Housing and Building

San Diego Municipal Code section 13.0103 authorizes the City to assess a fee for reinspections of property to determine compliance with provisions of the San Diego Municipal Code and applicable state codes which were listed in a Notice of Violation. Pursuant to San Diego Municipal Code section 13.0104, such a fee shall reflect current costs.

NCCD proposes that the reinspection fee for zoning violations be increased from \$98 per reinspection to \$269 per reinspection. NCCD also proposes that the reinspection fee for housing code violations and building code violations each be increased from \$105 to \$288 per reinspection. Based on the calculations set forth in Exhibit A, the requested increases in these fees will result in 100 percent cost recovery.

Based on the foregoing facts, the increased reinspection fees would not likely constitute a tax under Proposition 26 because the Regulatory Fee Exception would likely apply. And since the increased reinspection fees are meant only to cover the cost of performing investigations or inspections, the fees would not be a tax under the Regulatory Fee Exception.

Removal of Recorded Notice of Violation Fee — With and Without Appeal

Whenever there is a Notice of Violation (NOV) issued by NCCD to a property owner and the property remains in violation after the deadline established in the NOV, NCCD may record the NOV with the San Diego County Recorder's Office. SDMC § 12.1003(a). Before actual recordation, NCCD must provide the property owner with a written notice of intent to record the NOV and provide a right to appeal. SDMC § 12.1003(b).

If NCCD does not receive a timely written request to appeal, NCCD has the right to record the NOV if the violations remain. SDMC § 12.1003(c). There is a fee charged by NCCD for recordation of the NOV where the property owner has not requested an appeal set forth in the Exhibit A as the "Removal of Recorded Notice of Violation Fee — No Appeal" (No Appeal Recordation Fee).

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In the event that NCCD receives a timely written appeal, the City is required to schedule an administrative hearing before an enforcement hearing officer to allow the property owner to state any reasons why the NOV should not be recorded. SDMC §§ 12.1005-12.1006. If the enforcement hearing officer affirms NCCD's decision, NCCD may record the NOV. SDMC § 12.1006(c). The fee charged by NCCD for the recordation of the NOV with an appeal hearing is set forth in the Exhibit A as "Removal of Recorded Notice of Violation Fee — Appeal" (Appeal Recordation Fee).

Pursuant to San Diego Municipal Code section 12.1007(d), NCCD is entitled to recover the administrative costs incurred in the "investigation, inspection, reinspection, title search, appeal hearing, and any other processing costs associated with the violations specified on the Notice of Violation."

NCCD is proposing that the No Appeal Recordation Fee be decreased from \$766 per NOV to \$625 and that the Appeal Recordation Fee be decreased from \$976 per NOV to \$967 per NOV. Based on the calculations set forth in Exhibit A, both of the decreased fees would result in a 100 percent cost recovery.

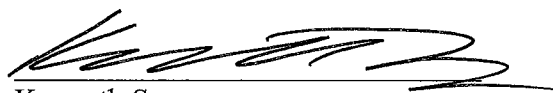
Based on the foregoing facts, the requested fees would likely not constitute a tax under Proposition 26 because the performance of investigations and inspections as well as administrative enforcement and adjudication associated with such actions trigger the application of the Regulatory Fee Exception.

CONCLUSION

This Office concludes that the fees set forth above are compliant with Proposition 26 because they fall under one or more exceptions to Proposition 26.

JAN I. GOLDSMITH, City Attorney

By



Kenneth So
Deputy City Attorney

KS:mm:amt
Attachments: Exhibits A and B
cc: Mark Leonard, Director, Financial Management
MS-2012-15

Exhibit A
Fiscal Year 2013 Proposed User Fee Adjustments
Cost Recovery Calculations

User Fee Departmental Cost Recovery Calculations

Department: DSD/NCC **Dept No:** 161114 **Fee Title:** Newsrack Permit Fee **Load Rate:** 21.0%
Preparer/Contact: Linda Martinez **Date:** 10/21/11 **Fee Legal Authority:** SDMC, Section 62.1014 **Overhead Rate:** 127.0%

Fee Description: Fee established to cover the administrative cost to issue a newsrack permit.

JOB CLASS and CLASS CODE	A		B		C		D		E		F		G		H		I		J	
	HOURLY SALARY RATE	LABOR HOURS PER SERVICE OCCURRENCE	LABOR COST (HOURLY RATE x HOURS)	ESTIMATED HOURLY FRINGE	FRINGE COST (EST HOURLY FRINGE x HOURS)	DIRECT COSTS (LABOR COST + FRINGE)	LABOR LOAD (LABOR COST x LOAD RATE)	DEPT CITY OVERHEAD (LABOR COST + DEPT CITY OVERHEAD)	LABOR LOAD (LABOR COST x DEPT CITY OVERHEAD)	FRINGE LOAD (FRINGE x LOAD RATE)	INDIRECT COSTS ((C + G) x OH %)	FRINGE LOAD (FRINGE x LOAD RATE)	DEPT CITY OVERHEAD (LABOR COST + DEPT CITY OVERHEAD)	LABOR LOAD (LABOR COST x DEPT CITY OVERHEAD)	FRINGE LOAD (FRINGE x LOAD RATE)	INDIRECT COSTS ((C + G) x OH %)	FRINGE LOAD (FRINGE x LOAD RATE)	TOTAL COSTS (DIRECT COSTS + LABOR LOAD + OVERHEAD + FRINGE LOAD)	(F + G + H + I)	
Code Compliance Officer - 1356	\$ 20.71	0.25	\$ 5.18	\$ 17.05	\$ 4.26	\$ 9.44	\$ 1.09	\$ 7.96	\$ 0.89	\$ 7.96	\$ 0.89	\$ 7.96	\$ 0.89	\$ 0.89	\$ 7.96	\$ 0.89	\$ 19.38	\$ 19.38		
Senior Zoning Investigator - 1880	\$ 29.75	0.05	\$ 1.49	\$ 21.02	\$ 1.05	\$ 2.54	\$ 0.31	\$ 2.29	\$ 0.22	\$ 2.29	\$ 0.22	\$ 2.29	\$ 0.22	\$ 0.22	\$ 2.29	\$ 0.22	\$ 5.36	\$ 5.36		
Account Clerk - 1104	\$ 17.45	0.10	\$ 1.75	\$ 14.99	\$ 1.50	\$ 3.25	\$ 0.37	\$ 2.69	\$ 0.32	\$ 2.69	\$ 0.32	\$ 2.69	\$ 0.32	\$ 0.32	\$ 2.69	\$ 0.32	\$ 6.62	\$ 6.62		
Senior Civil Engineer - 1855	\$ 43.05	0.10	\$ 4.31	\$ 30.60	\$ 3.06	\$ 7.37	\$ 0.91	\$ 6.62	\$ 0.64	\$ 6.62	\$ 0.64	\$ 6.62	\$ 0.64	\$ 0.64	\$ 6.62	\$ 0.64	\$ 15.54	\$ 15.54		
		0.50	\$ 12.73	\$ 83.66	\$ 9.87	\$ 22.60	\$ 2.67	\$ 19.56	\$ 2.07	\$ 19.56	\$ 2.07	\$ 19.56	\$ 2.07	\$ 2.07	\$ 19.56	\$ 2.07	\$ 46.91	\$ 46.91		

Revenue Code: 416172

Notes: FY 2013 fee will increase the current fee by \$5.00 per newsrack user. Although the fee is being increased, the recovery is not at 100%. There has been a decrease in the number of newsrack businesses as a result of computer online technology.

User Fee Departmental Cost Recovery Calculations

Department: DSD/NCC Dept No: 161114 Fee Title: Removal of Recorded Notice of Violation/No Appeal Load Rate: 21.0%
 Preparer/Contact: Linda Martinez Date: 10/21/11 Fee Legal Authority: SDMC 12.1001 Overhead Rate: 127.0%

Fee Description: Covers the cost of closing a case after a Notice of Violation is recorded with the County of San Diego.

JOB CLASS and CLASS CODE	A		B		C		D		E		F		G		H		I		J	
	HOURLY SALARY RATE	LABOR HOURS PER SERVICE OCCURRENCE	LABOR COST (HOURLY RATE X HOURS)	ESTIMATED HOURLY FRINGE	FRINGE COST (EST HOURLY FRINGE X HOURS)	DIRECT COSTS (LABOR COST + FRINGE)	LABOR LOAD (LABOR COST X LOAD RATE)	DEPT/CITY OVERHEAD (LABOR LOAD) X DEPT/CITY OVERHEAD	INDIRECT COSTS ((C + G) x OH %)	LABOR LOAD (LABOR COST X LOAD RATE)	FRINGE LOAD (FRINGE X LOAD RATE)	TOTAL COSTS (DIRECT COSTS + LABOR LOAD + OVERHEAD + FRINGE LOAD)	(C + E)	(C x load rate %)	(C + G) x OH %	(E x load rate %)	(F + G + H + I)			
Senior Planner - 1872	\$ 36.45	2.00	\$ 72.90	\$ 24.18	\$ 48.36	\$ 121.26	\$ 15.31	\$ 112.03	\$ 10.16	\$ 258.75	\$ 121.26	\$ 15.31	\$ 112.03	\$ 10.16	\$ 258.75					
Zoning Investigator 2 - 1998	\$ 28.00	1.00	\$ 28.00	\$ 20.35	\$ 20.35	\$ 48.35	\$ 5.88	\$ 43.03	\$ 4.27	\$ 101.53	\$ 48.35	\$ 5.88	\$ 43.03	\$ 4.27	\$ 101.53					
Combination Inspector 2 - 1277	\$ 30.69	1.00	\$ 30.69	\$ 22.21	\$ 22.21	\$ 52.90	\$ 6.44	\$ 47.16	\$ 4.66	\$ 111.17	\$ 52.90	\$ 6.44	\$ 47.16	\$ 4.66	\$ 111.17					
Code Compliance Officer - 1356	\$ 20.71	1.00	\$ 20.71	\$ 17.05	\$ 17.05	\$ 37.76	\$ 4.35	\$ 31.83	\$ 3.58	\$ 77.51	\$ 37.76	\$ 4.35	\$ 31.83	\$ 3.58	\$ 77.51					
Administrative Aide I - 1105	\$ 20.49	1.00	\$ 20.49	\$ 16.80	\$ 16.80	\$ 37.29	\$ 4.30	\$ 31.49	\$ 3.53	\$ 76.61	\$ 37.29	\$ 4.30	\$ 31.49	\$ 3.53	\$ 76.61					
		6.00	\$ 172.79	\$ 100.59	\$ 124.77	\$ 297.56	\$ 36.29	\$ 265.53	\$ 26.20	\$ 625.57	\$ 297.56	\$ 36.29	\$ 265.53	\$ 26.20	\$ 625.57					

Revenue Code: 417052

Exhibit B
Fiscal Year 2013 Proposed User Fee Adjustments
Department Summary

FY 2013 User Fee Analysis - Proposed Fee Adjustments

Department	Fee Title	Unit of Measurement	Current Fee	Current Cost Recovery %	Proposed Fee	Proposed Cost Recovery %
Development Services - Neighborhood Code Compliance						
	News Rack Permit Fee	Per Permit	\$ 15.00	32%	\$ 20.00	43%
	Noise Permit Fee	Per Permit	\$ 40.00	24%	\$ 167.00	100%
	Reinspection Fees-Building	Per Reinspection	\$ 105.00	36%	\$ 288.00	100%
	Reinspection Fees-Housing	Per Reinspection	\$ 105.00	36%	\$ 288.00	100%
	Reinspection Fees-Zoning	Per Reinspection	\$ 98.00	36%	\$ 269.00	100%
	Removal of Recorded Notice of Violation Fee - No Appeal	Per Notice	\$ 766.00	122%	\$ 625.00	100%
	Removal of Recorded Notice of Violation Fee - With Appeal	Per Notice	\$ 976.00	101%	\$ 967.00	100%

Development Services - Neighborhood Code Compliance - Estimated Revenue Variation of Proposed Fee Adjustments: \$ 11,707