Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

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DATE: July 11, 2011 (updated/posted online on April 15, 2019)

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Options Available to the City Council at the North Park Overlay Maintenance Assessment District Public Hearing

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INTRODUCTION

On July 12, 2011, City Council will conduct a public hearing and consider protests on the formation of the North Park Clean & Safe Overlay Maintenance Assessment District (North Park Overlay MAD). Four residential property owners located within the proposed North Park Overlay MAD, claiming to represent a larger group of property owners, have contacted City staff with two main areas of contention regarding the proposed district.

The first issue raised by the four residential property owners was with respect to the methodology employed to apportion the special benefits and costs. It is their belief that residential properties located along primary service corridors (30th Street, North Park Way, University Avenue, etc.) would be over-assessed using the assessment methodology presented in the current engineer's report. While the City's assessment engineer is confident in the assessment methodology as it is currently written, at City staff's request the assessment engineer also provided an alternative methodology, which has residential property owners along the primary service corridors paying less than they would under the current methodology.

The assessment methodology as currently written takes the total cost of providing the proposed improvements and services and assesses the parcels proportionally to the benefit they receive based on parcel land use (Land Use Assessment) and frontage along the service corridor (Frontage Assessment). The Frontage Assessment is divided into Primary Linear Front Footage and Secondary Linear Front Footage, depending on whether the parcel fronts a primary service corridor or not. The total assessment for a given parcel is equal to the sum of the parcel's Land Use Assessment and Frontage Assessment.

The alternative methodology eliminates the Primary Linear Front Footage factor as applied to residential properties so that all residential properties pay the same linear rate, regardless of their location in the district. In other words, under the alternative methodology, the Primary Linear Front Footage factor would only be applied to commercial properties within the North Park Overlay MAD.

The second issue raised by the four residential property owners was with respect to the factor by which the maximum authorized assessments may increase to account for inflation. Those property owners are concerned that the inflation factor in the assessment engineer's report could result in large increases in assessments during times of high inflation and have proposed lowering the inflation factor. The assessment engineer's report calls for a maximum inflation factor of the San Diego Consumer Price Index (CPI) plus three percent. So if the CPI increases two percent, then the maximum assessment increase for the North Park Overlay MAD for that year would be five percent. The four residential property owners are proposing that the maximum inflation factor applied to any given year be either CPI or three percent, whichever is lower.

QUESTIONS PRESENTED

1. What options are available to the City Council during the public hearing to address the assessment methodology issue and the inflation factor issue raised by the four residential property owners?

2. Are there risks and/or costs associated with any of the options available to the City Council?

SHORT ANSWER

1. The City Council may: (1) accept the assessment engineer's report as-is and authorize the City Clerk to open and tabulate the ballots; (2) modify the assessment engineer's report and authorize the City Clerk to open and tabulate ballots; (3) modify the assessment engineer's report and order a re-ballot of the property owners and a new public hearing based on the modified assessment engineer's report; or (4) abandon the formation proceedings entirely and decline to open and tabulate the ballots.

2. Of the four options available to the City Council, the Office of the City Attorney would recommend City Council refrain from using Option No. 2, in light of the requirements of Proposition 218. This is particularly true in the case of modifications to the assessment methodology.

BACKGROUND

A Maintenance Assessment District (MAD) is a mechanism by which property owners can elect to assess themselves in order to pay for and receive services beyond what the City normally provides. MADs are governed by the Landscaping and Lighting Act of 1972 (Cal. Sts. & High. Code §§ 22500-22679), the San Diego Maintenance Assessment Districts Ordinance (Chapter 6, Article 5, Division 2, sections 65.0201-65.0234 of the San Diego Municipal Code), and Proposition 218 (Cal. Const. art. XIIID; Cal. Gov't Code § 53750).

In the formation of a MAD, community members advocating for the MAD usually meet frequently with City staff and the City's assessment engineer to identify a scope of services and improvements for the proposed MAD. City staff and the assessment engineer finalize the scope, plans, and specifications for the MAD, taking into consideration any comments received from the community members and, if applicable, the relevant Community Planning Group. City staff orders the preparation of an engineer's report, pursuant to Proposition 218 (Cal. Const. art. XIIID, § 4(b)), and dockets for City Council review the engineer's report and a resolution of intention to levy the assessments for the proposed MAD. The resolution of intention, among other things, notices the public hearing on the formation of the proposed MAD.

Proposition 218 has very specific procedures for property owner approval of assessments and specifies that the notice, protest, and public hearing requirements imposed therein supersede existing statutory requirements. Cal. Gov't Code § 53753.

Proposition 218 requires 45-day mailed notice to the record owner of each parcel. Cal. Gov't Code § 53753(b). The notice must contain: the total assessment for the entire assessment district; the assessment chargeable on the owner's parcel; the duration of the proposed assessment; the reason for the assessment; the basis on which the amount of the proposed assessment was calculated; the date, time, and place of a public hearing on the assessment; and a summary of voting procedures and effect of majority protest. *Id*. The information contained in the notice is based upon and supported by the engineer's report.

Property owners may express their support or opposition to a proposed assessment by ballot, which must accompany the notice. The ballots must be returned before the conclusion of the public hearing, at which time the ballots are then tabulated. No assessment may be imposed if a "majority protest" exists. Cal. Gov't Code § 53753(e)(5). A majority protest exists if ballots submitted in opposition exceed ballots submitted in favor of the assessment, with the vote weighted according to the proportional financial obligation of affected property. Cal. Gov't Code § 53753(e)(4).

Proposition 218 restricts government's ability to impose assessments by requiring findings of both a special benefit and proportionality to support an assessment. An assessment can be imposed *only* for a special benefit conferred on a particular property. Cal. Const. art. XIIID, §§ 2(b), 4(a). A special benefit is "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large." Cal. Const. art. XIIID, § 2(i). In addition, an assessment on any given parcel must be in proportion to the special benefit conferred on that parcel: "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel." Cal. Const. art. XIIID, § 4(a). "The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided." *Id*. The engineer's report must contain the evidence justifying the apportionment based on special benefit and proportionality.

However, the Landscaping and Lighting Act of 1972 contains language suggesting that the City Council may modify the engineer's report at the public hearing:

> During the course or upon the conclusion of the hearing, the legislative body may order changes in any of the matters provided in the [engineer's] report, including changes in the improvements, the boundaries of the proposed assessment district and any zones therein, and the proposed diagram or the proposed assessment. The legislative body may, without further notice, order the exclusion of territory from the proposed district, but shall not order the inclusion of additional territory within the district except upon written request by a property owner for the inclusion of his property or upon the giving of mailed notice of hearing to property owners upon the question of the inclusion of their property in the district.

Cal. Sts. & High. Code § 22591.

ANALYSIS

I. OPTIONS AVAILABLE TO THE CITY COUNCIL DURING THE PUBLIC HEARING TO ADDRESS THE ISSUES RAISED BY THE FOUR RESIDENTIAL PROPERTY OWNERS.

Based on current law, the following options are available to the City Council at the July 12, 2011 public hearing: (1) accept the engineer's report as-is and authorize the City Clerk to open and tabulate the ballots; (2) modify the engineer's report and authorize the City Clerk to open and tabulate ballots; (3) modify the engineer's report and order a re-ballot of the property owners and a new public hearing based on the modified engineer's report; or (4) abandon the formation proceedings entirely and decline to open and tabulate the ballots.

II. RISKS AND COSTS ASSOCIATED WITH THE FOUR OPTIONS AS THEY RELATE TO THE ASSESSMENT METHODOLOGY.

A. Accept the Engineer's Report As-Is and Authorize the City Clerk to Open and Tabulate the Ballots.

The City has hired a State-licensed assessment engineer and relies upon his expertise in apportioning the special benefits to the various properties within the MAD in conformance with the requirements of Proposition 218. The City's assessment engineer has stated that he is confident in the assessment methodology as it is currently written. He has determined that the current methodology is a fair and reasonable apportionment, and the assessment amounts are proportional to the special benefit each parcel receives. Therefore, the only risks associated with accepting the engineer's report with no change in the assessment methodology and authorizing the City Clerk to open and tabulate the ballots, would be those risks associated with *any*

Proposition 218 public hearing and ballot procedure. That is, there may be enough property owners who submit ballots in opposition to constitute a majority protest, or, if the North Park Overlay MAD is successfully formed, disgruntled property owners may attempt to challenge the formation in court. Such risks are not unique to the North Park Overlay MAD and are present any time the City forms a MAD or similar assessment district, so there are no additional risks or costs associated with this option.

B. Modify the Engineer's Report and Authorize the City Clerk to Open and Tabulate Ballots.

While the City's assessment engineer is confident in the assessment methodology as it is currently written, he has also developed an alternative methodology which results in a decrease of assessment on residential properties along primary service corridors. It may seem unusual that the assessment engineer would be confident in more than one approach to apportioning the special benefits but, practically speaking, there is no one right methodology for any MAD. In *Town of Tiburon v. Bonander*, the court acknowledged that "no special assessment district could survive scrutiny if courts expected rigorous mathematical precision in the calculation and apportionment of assessments" and stated "[a]ny attempt to classify special benefits conferred on particular properties and to assign relative weights to those benefits will necessarily involve some degree of imprecision." *Town of Tiburon v. Bonander*, 180 Cal. App. 4th 1057, 1088 (2009). The court went on to explain that a legally justifiable formula to measuring and apportioning special benefits need not be the only valid approach. *Id*. The court stated, "[w]hichever approach is taken to measuring and apportioning special benefits, however, it must be both defensible and consistently applied." *Id.*

In every circumstance, an assessment engineer's report for a MAD must contain, among other things, the assessment methodology and evidence justifying the methodology as a fair and reasonable apportionment according to special benefit and proportionality received by the parcels. The City's assessment engineer crafted the current methodology and determined that the current methodology is a fair and reasonable apportionment. He then included the methodology and necessary supporting evidence in the North Park Overlay MAD engineer's report. Ballots reflecting the current assessment methodology and inflation factor contained in the engineer's report were then mailed to the property owners within the proposed North Park Overlay MAD.

The alternative assessment methodology now being suggested is a significant change to the assessment methodology sent out with the ballots. Because of this, modifying the assessment methodology in the assessment engineer's report at the public hearing and then tabulating the ballots submitted in response to the original assessment methodology causes concern, primarily because it may provide additional avenues for legal challenges against the City's formation of the North Park Overlay MAD. A challenger could reasonably argue that the ballots received by the property owners did not reflect the MAD that was ultimately formed, and therefore, did not give the property owners a meaningful opportunity to cast their ballot in support or opposition.

Additionally, while the Landscaping and Lighting Act of 1972 appears to provide City Council the authority to modify nearly any matter in the engineer's report at the public hearing (Cal. Sts. & High. Code § 22591), after exhaustive legal research and reaching out to other jurisdictions in the State, this Office has found no examples of any other legislative body attempting to utilize such authority post-Proposition 218. In fact, the other public agencies' attorneys who were contacted shared this Office's concerns in light of Proposition 218. Accordingly, it is entirely possible that California Streets and Highways Code section 22591 is merely a relic from the pre-Proposition 218 days. Accordingly, utilizing the apparent authority provided by the Landscaping and Lighting Act of 1972 to change the assessment methodology poses a significant risk that such action will be in violation of Proposition 218.

C. Modify the Engineer's Report and Order a Re-Ballot of the Property Owners and a New Public Hearing Based On the Modified Engineer's Report.

If the City Council agrees with the property owners' contention that the current assessment methodology is not a fair apportionment of the costs and reflective of the proportional special benefit received by each parcel, City Council may order the assessment engineer to incorporate the alternative assessment methodology into the engineer's report and direct City staff to re-ballot all property owners within the MAD. This would be accomplished through the adoption of a new resolution of intention proposing to levy and collect assessments on parcels within the North Park Overlay MAD as described in the modified engineer's report, and setting the new public hearing date. This approach does not appear to pose any additional legal risks beyond the risks associated with any Proposition 218 public hearing and ballot procedure discussed in section II.A. of this memorandum. However, City staff has advised that modifying the engineer's report and re-balloting would cost approximately $5,000 to $10,000, and there is currently no identified funding source.

D. Abandoning the Formation Proceedings Entirely and Decline to Open and Tabulate the Ballots.

The City Council retains the authority to not go forward with the North Park Overlay MAD formation and decline to tabulate the ballots. While, from a policy perspective, this option may not be the preferred scenario, it is, in fact, the option that poses the least amount of risk because it would not open the door for any legal challenge. Similarly, there would be no additional costs associated with this option.

III. RISKS AND COSTS ASSOCIATED WITH THE FOUR OPTIONS AS THEY RELATE TO THE INFLATION FACTOR.

The same four options discussed above with respect to the assessment methodology would apply to the inflation factor as well. Generally speaking, the same analysis regarding the risks and costs associated with those options may also be applied to the modification of the inflation factor. The engineer's report included the inflation factor and the ballots mailed to the property owners reflected that inflation factor, just as they reflected the assessment methodology. Likewise, changing the inflation factor without re-balloting would mean that the ballots did not fully reflect

the MAD that was ultimately formed. However, this Office is less concerned legally with the City Council modifying the inflation factor at the public hearing, primarily because the modification is one that affects all property owners equally. Unlike the modification to the assessment methodology, in which only residential properties located on primary corridors have lower assessments, a reduction in the inflation factor is applied equally across the entire North Park Overlay MAD. Furthermore, it is harder to imagine that someone would challenge the formation of the North Park Overlay MAD on the basis of having a lower inflation factor than originally presented.

The assessment engineer's report, as currently written, calls for an inflation factor of CPI plus three percent. City staff typically recommends this approach when forming a new MAD because it allows for the most flexibility and allows for cost increases that are not always captured by the CPI. The CPI inflationary factor typically falls within the range between zero and five percent each year. However, San Diego has seen a series of cost increases in the early- to mid-2000s associated with items that exceeded this inflationary range. Examples include the implementation of the Living Wage Ordinance, gasoline price increases, water rate increases, and energy costs. Due to the manner in which the CPI is calculated, it did not keep pace with these costs. However, these are major expenditure areas in typical MADs. Therefore, several MADs have needed to shift funding to these areas to maintain levels of service or curtail services. Those MADs with higher inflationary thresholds, beyond just the CPI, fared better.

Even if the inflation factor is left as proposed by the assessment engineer, City staff works with the property owners to set the annual budget and assessment rate, so the assessment would not have to go up by the full CPI plus three percent every year. The current inflationary factor merely adds flexibility to ensure services are rendered at the intended level of service as costs unexpectedly increase. In addition, the Landscaping and Lighting Act of 1972 limits the size of MAD fund balances; the maximum MAD reserve allowable is approximately six months of operating budget or fifty percent of the annual operating budget. Cal. Sts. & High. Code § 22569(a). Therefore, any increases in assessments must be matched with either increases in services or increases in costs associate with providing the services.

CONCLUSION

There are four options available to the City Council at the July 12, 2011, public hearing on the formation of the North Park Overlay MAD: (1) accept the assessment engineer's report as-is and authorize the City Clerk to open and tabulate the ballots; (2) modify the assessment engineer's report and authorize the City Clerk to open and tabulate ballots; (3) modify the assessment engineer's report and order a re-ballot of the property owners and a new public hearing based on the modified engineer's report; or (4) abandon the formation proceedings entirely and decline to open and tabulate the ballots.

Of the four options, this Office recommends that the City Council refrain from utilizing option No. 2 in light of Proposition 218's very specific notice, protest, and public hearing requirements for property owner approval of MAD assessments, as well as Proposition 218's requirements for apportioning the costs of services and improvements within a MAD. Cal. Gov't Code § 53753.

Proposition 218 requires that the assessment engineer's report contain, among other things, the assessment methodology and evidence justifying the methodology as a fair and reasonable apportionment according to special benefit and proportionality received by the parcels. The assessment engineer's report must also include any applicable inflation factor that may be applied in future years. The City hired a State-licensed assessment engineer to rely upon his expertise in these areas. The City's assessment engineer crafted the current methodology and determined that the current methodology is a fair and reasonable apportionment. He then included the methodology and supporting evidence, along with the inflation factor, in the North Park Overlay MAD engineer's report. Ballots were mailed to the property owners within the proposed North Park Overlay MAD reflecting the current assessment methodology and inflation factor contained in the engineer's report. However, pursuant to City staff's request, the assessment engineer has come up with an alternative methodology, which he also feels is a fair and reasonable apportionment. It is not uncommon that there may be multiple justifiable methodologies for any given MAD; nevertheless, modifying the engineer's report without re-balloting the property owners to reflect those changes leaves the City open to additional legal challenges.

The only risks associated with option Nos. 1 and 3 would be those same risks associated with *any* Proposition 218 public hearing and ballot procedure; however, option No. 3 would add an additional $5,000 to $10,000 for the costs of re-balloting, and there is currently no identified funding source. Option No. 4 poses the least amount of risk because it would not open the door for any legal challenge and would not result in any additional costs.

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