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MEMORANDUM OF LAW

DATE: November 17, 2004

TO: Councilman Brian Maienschein, Chair of PS&NS Committee, and PS&NS Committee Members

FROM: City Attorney

SUBJECT: Development Impact Fees

INTRODUCTION

You have asked our office to analyze whether development impact fees may be used to expand existing public facilities. This question is posed not in relation to a specific project, but rather as a general question, seeking information on the proper use of development impact fees. We caution, however, that application of the general principles set forth below to a specific case or a specific project will require individual analysis.

QUESTION PRESENTED

May development impact fees [DIFs] be used to expand existing public facilities?

SHORT ANSWER

Yes. DIFs may be used to expand public facilities defined in sections 66000(b), 65913.8, and 66002(c) of the California Government Code provided that constitutional and statutory requirements are otherwise met.

ANALYSIS

I. PURPOSE OF DEVELOPMENT IMPACT FEES

A development impact fee is an exaction that is intended to defray all or part of the cost of public facilities related to a development project. Cal. Gov't Code § 66000(b). The rationale supporting DIFs is that all new development affects some or all public facilities provided by local government and increases the demand for those facilities. If the supply is not increased the quality of the service to the existing community will decline. The improvements necessary to mitigate the impact of the new development and to maintain an adequate level of service are those that justify a DIF. For example, a new development may cause increased traffic on roads previously capable of handling traffic. The impact of the new development will be that the existing roads will become insufficient to handle the increased flow. Traffic studies are therefore conducted. The conclusions set forth in the studies may indicate that a wider road will decrease the congestion to previous levels. The City, as a condition of issuing permits to the developer, is justified in imposing a DIF to fund the road widening.

II. PUBLIC FACILITIES FINANCED BY DIF

The term “public facilities” is defined in California Government Code section 66000(d) as “public improvements, public services, and community amenities.” This rather broad language is narrowed by California Government Code section 65913.8: the fee “*may not include an amount for the maintenance or operation of an improvement . . .*” This limitation is based on the rationale that though new development should pay for costs associated with growth, existing residents should bear the burden of existing problems. “Facilities” and “improvements” are further defined in California Government Code section 66002(c). They include such items as storage, treatment, and distribution facilities of non-agricultural water; sewage treatment, collection, reclamation, and disposal facilities; storm water and flood control facilities; facilities for the distribution and generation of gas and electricity; transportation and transit facilities, including streets, roads, overpasses, and bridges; and other capital projects identified in a capital facilities plan adopted pursuant to section 66002. Beyond those definitions provided by sections 66000 *et. seq.*, the term “public facilities” has not been limited by statute or case law.

Though the terms “public facilities” and “public improvements” may fit a wide range of projects, the United States Constitution and other California statutes place limits on the type and size of facilities or improvements that may be financed by a specific DIF. The constitutional limitations are derived from the Takings Clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment, while the statutory limitations arise from Assembly Bill 1600, enacting California Government Code sections 66000 *et. seq.* The California statute, though, is little more than a procedural device intended to protect the same Fifth Amendment concerns of the Takings Clause. An analysis of the imposition and use of a DIF should thus begin with the Fifth Amendment.

III. CONSTITUTIONAL LIMITATIONS

Exactions, such as DIFs, must meet the requirements of a two prong test to avoid straying into the realm of unconstitutional takings. The first prong is generally called the nexus test. Though the nexus test existed in some form or another since 1949, it became part of the modern law of exactions in 1987 when the Supreme Court decided *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). See *Ayers v. City of Los Angeles*, 34 Cal. 2d 31 (1949). The second prong is called the rough proportionality test which first appeared in its current form in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In *Nollan*, a property owner sought to replace a one-story, beachfront bungalow with a two-story house using the same footprint. The California Coastal Commission [CCC] conditioned the permit on the grant by the property owner of a public easement across the beachfront connecting two public beaches. CCC justified the condition by stating that it was necessary to protect the public ability to see the beach. Though the Court assumed, without deciding, that this was a legitimate government interest, it did not see the nexus between this condition and the interest it sought to preserve. 483 U.S. at 835-838. The view of the beach from the street would not be improved by providing an easement across the beach. The easement would only serve those people already on the beach, those who already had an unobstructed view. *Id.* at 838. A height limitation, a width limitation, or a ban on fences would have “substantially advanced” the legitimate government interest offered. *Id.* at 836. The lateral easement did not. *Id.* at 838. The Court thus concluded, “the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an ‘out and out plan of extortion.’” *Id.* at 838, quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A2d 12 14-15 (N.H. 1981).

Dolan’s rough proportionality test limits another aspect of exactions. While *Nollan* sought an essential nexus between the state interest and the development condition, *Dolan* seeks to determine whether the degree of the exaction demanded bears the required relationship to the projected impact of the proposed development. In *Dolan*, a store owner applied for a condition to expand her store, expand the parking area, and build an additional structure to accommodate more businesses. The city conditioned the permit on two conditions that the owner dedicate to the city: 1) a portion of her lot in the 100-year floodplain of a creek; and 2) an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The Court found that an essential nexus existed between the legitimate state interests and the conditions; however, the rough proportionality test was not satisfied. 512 U.S. 374 at 387. The city never established why a public as opposed to a private greenway was necessary to protect the floodplain, and the city had not met its burden of showing that additional number of vehicle or bicycle trips generated by the proposed development reasonably related to the pedestrian/bicycle pathway. *Id.* at 394-396. The rough proportionality test does not require the city to make precise mathematical calculations; however, the city must make some sort of individualized determination that the

required exaction is related both in nature and extent to the impact of the proposed development. *Id.* at 391. Further, the city must make some effort to quantify its findings beyond conclusory statements. *Id.* at 395-396.

The reasoning and requirements of *Nollan* and *Dolan* are applicable to non-possessory takings such as DIFs. In *Erlich v. Culver City*, 12 Cal. 4th 854 (1996), a developer owned property with a private recreation facility. The developer requested a permit to demolish the recreation facility and construct condos on the land. The city approved the plans on the condition that the developer pay a \$280,000 fee to be used for public recreation facilities. The court concluded that when “exactions are imposed . . . neither generally or ministerially, but on an individual and discretionary basis, . . . the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered. *Id.* at 876.

IV. STATUTORY LIMITATIONS

The *Nollan/Dolan/Erlich* standards are codified in California in the Mitigation Fee Act, California Government Code sections 66000 *et seq.* [The Act]. The Act allows for the establishment, increase or imposition of a fee as a condition of approval of a development project, provided that the requirements of California Government Code sections 66001 and 66005 are met. In any action establishing, increasing, or imposing a fee, the local agency must: 1) identify the purpose of the fee; 2) identify the use to which the fee will be put; 3) demonstrate how there is a reasonable relationship between the fees use and the type of the type of development project on which the fee is imposed; 4) demonstrate that there is a reasonable relationship between the between the need for the public facility and the type of development project on which the fee is imposed; 5) demonstrate how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed; and 6) fees or exactions shall not exceed the estimated reasonable cost of providing the facility for which the fee or exaction is imposed. A careful examination of these statutory requirements reveals the influence of the constitutional test. Each requirement satisfies an element of either the essential nexus or rough proportionality test, and as such, protects the constitutional concerns of the Takings Clause.

An additional statutory requirement, one implicit in the constitutional analysis, is that of California Government Code section 66008: “A local agency shall expend a fee for public improvements . . . solely and exclusively for the purpose or purposes . . . for which the fee was collected.” To do otherwise would defeat the intent and avoid the purpose of the constitutional essential nexus test.

CONCLUSION

DIF funds may be used to expand existing public facilities; however, the determination of what facilities may be expanded and the extent of the fee imposed must be assessed on a case by case basis. The city must establish an essential nexus between the project and the exaction. The city must also demonstrate a rough proportionality between the fee and the impact of the proposed development. This requires an individualized determination for each project. Though mathematical precision is not required, the city must show that the exaction relates in both nature and extent to the fee imposed. The city must show essential nexus and rough proportionality through the process establish in California Government Code sections 66000 *et seq.* Once these tests are addressed, the type of facility is limited only by sections 66000(b), 66002(c), and 65913.8.

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By

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