

MEMORANDUM OF LAW

DATE: October 3, 1991

TO: Jack McGrory, City Manager

FROM: City Attorney

SUBJECT: Emergency Water Conservation Ordinance (Ordinance No. 0-17634)

You have asked this office to respond to an issue regarding the Emergency Water Conservation Ordinance, Ordinance Number O-17634 (New Series) adopted April 29, 1991.

The Emergency Water Conservation Ordinance authorizes the City Manager to "declare that a water shortage emergency exists, . . . to promulgate such regulations, rules, and conditions relative to the time of using water, the purpose or purposes for which it may be used, and other . . . limitations . . . as will . . . relieve the water shortage."

The ordinance is divided into four stages of compliance which are predicated on the severity of the water shortage. Stage 4 is the most restrictive stage within the ordinance. Your question involves the legality of certain activity which may be taken in a declared Stage 4 situation.

Emergency Water Conservation - Stage 4

(e) Stage 4. Mandatory Compliance - Water Emergency. Stage 4 applies when a major failure of any supply or distribution facility, whether temporary or permanent, occurs in the water distribution system of the State Water Project, Metropolitan Water District, San Diego County Water Authority, or City of San Diego water facilities.

Ordinance Number O-17634 (New Series).

Your specific question pertains to the provision in Stage 4 which generally restricts the issuance of new building permits.

(13) Except as to property for which a building permit has been heretofore issued, no new building permit(s) shall be provided, except in the following circumstances:

- (a) For projects necessary to protect the public's health, safety, and welfare;
- (b) When using reclaimed water;
- (c) When the recipient of the building permit

can demonstrate that no net increase in water use will occur; or

(d) Where the recipient of the building permit provides a conservation offset. For purposes of the section, "conservation offset" shall mean the implementation of proven conservation techniques which, when installed, will result in a reduction equal to demand of the proposed use. A conservation offset may be effected by paying a fee established by the City Manager or his designee to the City Treasurer in an amount necessary to cover the cost of implementing such conservation techniques. The fee will be based on the conservation offset required for an equivalent dwelling unit. Such fee shall apply to residential as well as commercial and industrial buildings, and may be adjusted from time to time as determined by the City Manager or his designee.

The question you have raised regarding the permitting restrictions found in Stage 4 is whether it is legal to ask new developers to pay a water conservation offset fee or a partial offset fee in order to reduce the net increase in water demand in new development as is contemplated in 13(d). Your query further assumes that water shortages will be experienced in San Diego as well as throughout the region for the foreseeable future.

Your question will be addressed for a declared emergency situation as well as a non-emergency situation.

Declaring a State of Emergency

The authorization to declare an emergency has been discussed in numerous memoranda of law, the most recent being authored by former Deputy City Attorney Richard L. Pinckard on June 6, 1989. Please refer to Mr. Pinckard's memorandum of law, as Enclosure 1 attached, for a thorough discussion of the power to declare a state of emergency.

In this case, as to what constitutes an emergency is worth revisiting. The San Diego Municipal Code, section 51.0102, defines an emergency as:

Actual or threatened existence of conditions of disaster or of extreme peril to the public peace, health or safety of persons or property within this City caused by, but not limited to, such conditions as air pollution, fire, flood, storm, epidemic, riot, or earthquake, or other conditions, including conditions resulting from war or imminent threat of war.

California Government Code section 8558(c) provides a more exhaustive list of local emergency situation.

"Local emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of

a county, city and county, or city, caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy, which conditions are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission (emphasis added).

It would therefore appear that an enactment, such as Stage 4 of Ordinance Number O-17634, to meet an emergency situation, such as a water shortage, clearly falls within the City's legitimate exercise of its police power.

It has long been settled that the power extends to objectives in furtherance of the public peace, safety, morals, health and welfare and is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life (citations omitted).

Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 160 (1976).

The safeguarding of the public health, safety and welfare -- in this instance addressing problems created by an emergency water shortage -- is the basis which both creates and requires the exertion of the police power with consequent and unavoidable restrictions on individual actions and the use of property. *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 701-703 (1933).

Hence, in a declared water shortage emergency situation, limited in time, the City Council may impose a water conservation offset fee in addition to imposing its one-time charge for connection to the system.

Imposition of Water Conservation

Offset Fee in Non-Emergency Situations

Pursuant to San Diego Municipal Code section 67.72, the Water Utility imposes a one-time capacity charge for a new or larger connection to the system. Section 67.72 reads, in relevant part:

A minimum capacity charge shall be established from time to time by a resolution of the City Council; provided, however, that prior to considering any change in said capacity charge by resolution as aforesaid, a notice of

the proposed change shall be posted by the City Clerk at least ten (10) days prior to consideration of such a resolution by the City Council. Said charge shall be paid when any person, firm, corporation or other entity shall request a new water connection or in any way cause an increase in the water usage by the addition of any type of dwelling, commercial or industrial unit based upon an increase in the water consumption as measured by equivalent family unit or units or portion thereof. Said measurement shall be made by the City Manager or his authorized representative and for the purposes of this section an equivalent family unit shall equal a consumption of 500 gallons of water per day (emphasis added).

The plain language of the section indicates that capacity charges, unlike periodic service charges, deal with expansion - increase in the water usage - of the system.

Similar language restricting the use of capacity fees is found in the California Government Code section 66013.

Section 66013. Local agency fees for water or sewer connections; Limits

(a) Notwithstanding any other provision of law, when a local agency imposes fees for water connections or sewer connections, or imposes capacity charges, those fees or charges shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed, unless a question regarding the amount of the fee or charge imposed in excess of the estimated reasonable cost of providing the services or materials in submitted to, and approved by, a popular vote of two-thirds of those electors voting on the issue.

(b) As used in this section:

(1) "Sewer connection" means the connection of a building to a public sewer system.

(2) "Water connection" means the connection of a building to a public water system, as defined in subdivision (e) of Section 4010.1 of the Health and Safety Code.

(3) "Capacity charges" means charges for facilities in existence at the time the charge is imposed or charges for new facilities to be constructed in the future which are of benefit to the person or property being charged.

California Government Code section 66013.

A capacity charge, as imposed by San Diego Municipal Code section 67.72, cannot, therefore, exceed the cost of providing for the expansion of the system.

Agencies imposing capacity charges are required to demonstrate that

the capacity or connection charge is related both to the costs of the facilities to be constructed and the burden the development of property places on the water system, and to keep such funds separate from their general funds. *Beaumont Investors v. Beaumont-Cherry Valley Water District*, 165 Cal. App. 3d 227, 234 (1985). Imposition of an additional charge, such as a water conservation offset fee, as a condition of receiving a building permit would require the same sort of nexus found in capacity charges, that is that the fee be rationally related to the use and benefit extended. And, because capacity charges have already occupied the expansion aspect of water services, any additional water-related fee must be reasonably related to a benefit/burden not associated with expansion.

The type of fee or exaction contemplated in the present situation would be termed a development fee. "Typically, a development fee is an exaction imposed as a precondition for the privilege of developing the land. Such fees are commonly imposed on developers by local government in order to lessen the adverse impact of increased population generated by the development." *California Building Industry Association v. Governing Board of the Newhall School District of Los Angeles County*, 206 Cal. App. 3d 212, 235 (1988) (citation omitted). Courts have distinguished development fees from taxes in finding taxes to be compulsory in nature while development fees are imposed only if the developer chooses to develop. *Id.* at 236. "While decisions invalidating the exaction rely upon theories of constitutional invasion, their springboard is the lack of relationship between the exaction and the proposed use." *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 422 (1969).

Here, the legislative body may desire imposition of a water-conservation offset fee as a condition for obtaining a building permit in a non-emergency situation. How close a 'fit' or reasonable relationship between the condition imposed and the original purpose of the restriction is required? The essential nexus between the condition and purpose is achieved if the condition "substantially advances legitimate state interest." *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (citation omitted).

The Construction Industry Federation (CIF) recently attacked an ordinance drafted by the Vista Irrigation District which would have required applicants applying for a new water meter to pay an "offset fee." The CIF characterized the offset fee as "double dipping" new customers. (See Enclosure 2, as attached.) This characterization may be due to a failure within the Vista Irrigation District Ordinance to establish the appropriate nexus between the fee imposed and the related benefit/burden.

Recently, the United States Court of Appeals for the Ninth Circuit upheld an ordinance adopted by the City of Sacramento which conditioned certain types of nonresidential building permits upon the payment of a

fee intended to offset the burden on the City caused by low-income workers draw to Sacramento to fill jobs created by nonresidential development. The court found that the "nexus between the fee provision . . . designed to further the City's legitimate interest in housing, and the burdens caused by commercial development was sufficient to pass constitutional muster."F

The dissent warned that "we can be expected next to uphold exactions imposed or developers to subsidize small business retailers, child-care programs, food services and health-care delivery systems." *Commercial Builders of Northern California v. City of Sacramento*, 91 Daily Journal D.A.R. 9609, 9612 (August 8, 1991).

Commercial Builders of Northern California v. City of Sacramento, 91 Daily Journal D.A.R. 9609, 9611 (August 8, 1991).

The relationship or nexus between the condition imposed and the purpose it is designed to serve is of principal importance if the fee is to survive a constitutional challenge. While a nexus as tenuous as that articulated in *Commercial Builders of Northern California v. City of Sacramento* is not suggested here, it is our opinion that an ordinance which clearly articulates the nexus between the water conservation fee imposed and the purpose or service it is designed to accomplish would be sufficient to pass constitutional muster. We would caution that such a water conservation fee must be unrelated to the expansion of the water supply system or to any increase in water usage caused by the development since capacity fees have been imposed to address those areas.

Conclusion

An enactment such as Stage 4 section 67.38.5(e)(13)(d) of the San Diego Municipal Code, which provides for the payment of a water conservation offset fee as a condition of receiving a building permit in a declared water shortage emergency, is within the City's legitimate exercise of its police power to safeguard public health, safety, and welfare. The emergency cannot be of an indeterminate length and should have a sunset provision as does Stage 4 in San Diego Municipal Code section 67.38.5(e)(14).

The legality of the imposition of a water conservation offset fee in a non-emergency water shortage situation is a more difficult issue. The nexus between the condition and the purpose it is designed to serve must substantially advance a legitimate state interest. To properly frame such a nexus, an area which staff might wish to explore in developing a water conservation fee would be that of a reliable water supply as opposed to an expanded water supply. An ordinance establishing a water conservation fee could address the need for a dependable water supply, one which is no less secure than prior to new development, and how the fee imposed would further that end.

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By
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Attachment
ML-91-75