June 25, 1990

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
TRAFFIC CONTROL AND COMPREHENSIVE
GROWTH MANAGEMENT INITIATIVE (SD 2000)

At the City Council meeting on Tuesday, June 12, 1990, the Council requested that the City Attorney's office prepare a written analysis of issues raised by the Traffic Control and Comprehensive Growth Management Initiative (SD 2000). The Council's action at the June 12th meeting caused SD 2000 to be placed on the ballot for the November 1990 general election.

In light of the Council's current consideration of the Growth Management concepts embodied in the proposed Transportation Congestion Management and Phasing Ordinance, Capital Facilities Plan Ordinance and City-wide Impact Fee Program, councilmembers expressed interest in the City Attorney's analysis of the SD 2000 proposal.

If SD 2000 prevails in the November election, the City Attorney will be charged by law with enforcing and defending SD 2000 to the fullest extent possible. Because of the City Attorney's potential legal obligation in that regard as weighed against my present obligation to advise this City Council on legal issues before it, I believe this report must be general in nature, outlining and discussing only the main issues and potential obligations which SD 2000 would appear to create for the City.

At the heart of SD 2000 is a "benefit assessment fee." The Initiative would require the City pass an ordinance providing that new development pay a "benefit assessment fee" before being issued a building permit. (Section IV.A.1.) This fee would have a maximum Spending Cap of $200 per Average Daily Trip. (Section IV.A.5.b.)

The amount of the fee could be adjusted annually according to the Engineering News Record cost of construction index. This $200 fee would be the maximum amount the City could impose and collect to finance the Initiative's Transportation and Transit Corridor Projects. The limitation would not apply to fees charged for "local-serving facilities" or improvements which are imposed as a condition of development approvals. (Section

IV.A.5.b.)

The revenue raised would be used primarily to construct, expand, or accelerate the completion of the Transportation and Transit Corridor Projects. These priority projects are listed in Section IV.A.4. of the Initiative.

SD 2000 would require the City to prepare a plan which identifies "regionally significant" transportation facilities which are located in urban areas and which need upkeep due to the demands caused by new development. Up to 10 percent of the annual revenue raised by the fees would be annually allocated by the Council to pay for construction, expansion, or rehabilitation of these facilities. (Section IV.A.4.e.) Although most of the revenue from the fees would be spent on transportation improvements, Section IV.A.5.d. permits up to 1 percent of the revenue to be spent on "administer┌ingσ implementation of this measure."

The City would prepare a capital improvement plan (Section X.B.1.) as well as facility financing plans for each community within the City. (Section X.B.1.a.) Further, the City would take specific steps to bring about timely construction of community facilities (Section X.B.1.c.) and would require applicants for Discretionary Projects to submit a detailed fiscal impact analysis. (Section X.C.)

A Discretionary Project is defined by the Initiative as any real estate development application which requires a tentative map, parcel map, reclassification, general plan amendment, development agreement, planned development permit, or similar discretionary approval intended to comprehensively review a particular project or land use. Applications requiring single purpose permits designed to accomplish a narrow public purpose, such as a hillside or design review permit, would not be Discretionary Projects.

If the Initiative is enacted, the City Council could modify it with a two-thirds vote. Any modification would have to be either consistent with the Initiative's purpose or necessary to respond to changing circumstances. (Section XV.)

The Initiative would require all plans, policies, programs, procedures and regulations which are "necessary to implement" the Initiative's provisions to be adopted within 180 days of its enactment by the voters. (Section XVIII.)

Finally, SD 2000 would require the City to enact and undertake several other obligations such as a Traffic Demand Management Program, Habitat Conservation Districts, Child Day Care Site Program and Water and Air Quality Assurance Plans.

I have some general concerns regarding the SD 2000 proposal. Many of these are discussed in greater detail by the City's Growth Management consultant, Robert H. Freilich, in the attached letter dated January 5, 1990.

An important issue is whether new development is paying its "fair share." Generally, new development may be required to pay impact fees only to the extent that these fees are necessary to mitigate the impacts of new development. New development may not be required to pay fees in order to correct existing deficiencies or for improvements unrelated to the demands caused by new development.

Specifically, then, new development may not be required to pay more than its "fair share" of the costs associated with those transportation facilities which are needed because of new growth and which will benefit new growth. In each case, before new development may be charged for improvements to existing facilities, the City must find a relationship between the need to improve the facility and the demands caused by new development. For example, regarding Section IV.A.4.d. of SD 2000, new development may legally be charged for trolley improvements only if the City finds a relationship between the need to improve the trolleys and the demands caused by new development.

Another concern raised by the proposal is that arbitrary allocations of percentage of revenue may be inconsistent with state and federal law concerning impact fees. For example, Section IV.A.4.e. makes no attempt to justify the figure of 10 percent of the revenue being spent on the upkeep of urban transportation facilities.

Also, if fees are incurred by new development ostensibly to pay for transportation facilities, these fees should not be used to implement other parts of the growth management program unrelated to transportation. Thus, instead of permitting 1 percent of the fee revenue to be spent on "administer┌ingσ implementation" of the measure (Section IV.A.5.d.), might it not be wiser to limit the use of the revenue to paying the costs for capital expenditures?

Remaining issues identified by the City's Growth Management consultant will be more fully addressed by this office if SD 2000 becomes law. These issues include consistency of a growth management plan with the City's Progress Guide and General Plan, treatment of development applications before a plan's provisions are implemented, requirement of a comprehensive traffic analysis, feasibility of provisions for acquiring child day care sites, desirability of establishing "level of service" standards for

public facilities, and adequacy of definitions.

Finally, I want to emphasize to you that this Report is not intended to be any expression of my conclusions on the legal issues involved in this matter. To the extent that Mr. Freilich's observations in his January 5, 1990 letter or his remarks in public session indicate concern over the legal issues raised by this proposal, they are to be construed as just that, expressions of concern, and are not to be construed as indicating my legal conclusions on the merits.

Respectfully submitted,
JOHN W. WITT
City Attorney

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