MEMORANDUM OF LAW

DATE: January 29, 1993

TO: Dennis H. Kahlie, Rate Analyst, Water Utilities

FROM: City Attorney

SUBJECT: Expenditure of Pre-AB 1600 Water Expansion Balances

By memorandum of December 9, 1992, you have requested our opinion on the feasibility of expending pre-Assembly Bill ("AB") 1600 water expansion balances to offset or defer the need to debt finance water replacement capital projects. Specifically, you have posed two questions. First, can water capacity charge revenues collected from new development prior to the effective dates of AB 1600 and Senate Bill ("SB") 372 (January 1, 1989 and January 1, 1988, respectively) be utilized to offset or defer the need to debt-finance water side replacement capital projects as a means of minimizing the requirement for water rate increases? Second, if such expenditures are permissible, what actions must the City take to insure compliance?

ANALYSIS

Article XI, section 7, of the California Constitution grants cities and counties the authority to enact all local police power ordinances which are not in conflict with general state law. Thus, the enactment of a general statute effectively serves not as an enabling act, but rather as a limitation or the power and authority of the local government. Pursuant to the Subdivision Map Act, the state legislature has enacted legislation governing the imposition of certain regulatory fees. See, e.g., Cal. Gov't Code Sections 66483, 66477, and 66484. In those areas of the Map Act where there is a matter of statewide concern, cities and counties must observe the limitations imposed by these regulations when collecting and expending fees which are used to finance capital improvements.

In 1987, the state legislature enacted statutes which imposed procedural and substantive requirements relating to the calculation, adoption, administration and enforcement of impact fee systems. Under the provisions of AB 1600, whenever a local agency imposes a fee or other monetary exaction as a condition to the approval of a development project for payment of the costs of

public facilities related to the project, the agency must identify the purpose of the fee and the public facilities to be financed. Additionally, there must be a reasonable relationship between the use of the fee and the development project, and the need for the facilities and the project. The agency also must establish a reasonable relationship between the amount of the fee and the costs of the facilities, or the portion of the facilities attributable to the development. Any fee collected must be placed into a separate account, and each fiscal year the agency must (1) render findings regarding any portion of the fee which remains unexpended or uncommitted for five (5) years after it was deposited; (2) identify the purpose for the balance of the fee on hand; and, (3) demonstrate a reasonable relationship between the fee and the purpose for which it was charged. Finally, if the need cannot be established, the fee, plus accrued interest, must be refunded on a prorated basis after five (5) years. Cal. Gov't Code Section 66001.

The statutory regulations established by AB 1600 codified many of the constitutional tests which previously had been applied to development exactions by the California courts. For example, Gov't Code Section 66005 expressly states that it was the "intent of the Legislature in adding this section to codify existing constitutional and decisional law with respect to the imposition of development fees and monetary exactions on developments by local agencies." While it can be argued the fees contemplated by AB 1600 do not involve capacity charges (both Sections 66001 and 66005 deal with fees "as a condition of approval" and capacity fees are established on a uniform basis and are collected on all building permits), we need not resolve that conundrum. Rather statutes must be construed consistent with their legislative purpose with a view towards context, problems addressed and legislation on the same subject. Cossack v. City of Los Angeles, 11 Cal. 3d 726 (1974).

Therefore, construing AB 1600 as a whole and Section 66013 in particular, we believe the statutory purpose was to restrict designated fees to the purpose for which they were collected. Hence, Section 66013 restricts capacity fees to "the service for which the fee or charge is imposed . . . ." Combining this language with the accounting provisions of Section 66001 presents a statutory scheme of restrictive use such that capacity charges should not be used for replacement projects. Moveover, given the declaration of Section 66005 that the statutory scheme was intended to codify existing constitutional and decisional law, we conclude that pre-AB 1600 deposits should observe the same restrictions.

While you note that former Gov't Code Section 53077 presented a window of time for use of interest on certain fees, that exception by its terms dealt only with interest on park fees and the entire section was amended and renumbered in 1988 to delete the noted exception. See, Gov't Code Section 66006. Consequently, neither existing Section 66006 nor former Section 53077 provides any exception for diversion of interest payments on capacity fees to replacement costs.

CONCLUSION

In reviewing the entire statutory scheme of AB 1600 and the declaration of legislative intent, we conclude that both pre- and post-AB 1600 capacity charge fees are restricted to the provision of service for which the fee was collected and should not be diverted to defer the need to debt-finance with replacement projects.

JOHN W. WITT, City Attorney
By
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