

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: September 18, 2017
TO: Honorable Councilmembers Sherman and Gomez
FROM: City Attorney
SUBJECT: Companion Unit Permitting and Impact Fee Information

INTRODUCTION

On August 22, 2017, you submitted a memorandum to the Office of the City Attorney asking several questions related to the potential waiver of permitting and impact fees associated with companion units. In general, any waiver of permitting and impact fees for companion units must meet the rational basis standard to comply with the equal protection clause. In addition, any waiver of enterprise fund fees must identify a funding source, other than the enterprise funds, to make up the difference and must not constitute an impermissible gift of public funds. This memorandum provides an overview of the rational basis standard and then addresses each of the specific fees mentioned in your memorandum.

QUESTIONS PRESENTED

1. Can public utility and sewer capacity fees be waived for companion units?
2. Can San Diego Association of Governments' (SANDAG) Regional Transit Congestion Improvement Program (RTCIP) fees be waived for companion units?
3. Can the City's General Plan Maintenance Fee (GPMF) be waived for companion units?
4. Can development impact fees be waived for companion units?
5. Can companion units pay proportional development fees?

SHORT ANSWERS

1. Yes. Public utility and sewer capacity fees required for companion units can be waived so long as the waiver is rationally related to a legitimate government interest and another funding source to subsidize the enterprise fund is identified. There must be a public purpose established by the San Diego City Council (City Council) to justify the use of public resources to subsidize the enterprise fund, or adequate consideration given for the waiver. The City Council could likely meet this standard if the record was developed appropriately.

2. No. The City Council does not have authority to waive the RTCIP fee for companion units. The RTCIP fee was approved by San Diego County voters in 2004 and requires the City to contribute exactions from the private sector for each newly constructed residential housing unit; there are no applicable exceptions.

3. Yes. The City's GPMF may be waived for companion units if the waiver is rationally related to a legitimate government interest.

4. Yes. Development impact fees can be waived for companion units if the waiver is rationally related to a legitimate government interest.

5. Possibly. While no specific fee is referenced, in general, to the extent any of the fees are based upon a specific metric, such as square footage, the City Council could possibly reduce the fees proportionally for companion units.

ANALYSIS

I. WAIVER OF COMPANION UNIT FEES MUST BE RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST

The development fees identified in your memorandum apply to all residential development in the City. As such, the Equal Protection Clause of the Federal and State constitutions require that governmental decision makers treat parties equally under the law if those parties are alike in all relevant respects. U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7; *Las Lomas Land Co., LLC v. City of L.A.*, 177 Cal. App. 4th 837, 857 (2009). The Fourteenth Amendment Equal Protection Clause of the United States Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The standard of review under the California Constitution’s Equal Protection Clause is the same as that under the United States Constitution’s Equal Protection Clause. *Edelstein v. City & County of San Francisco*, 29 Cal. 4th 164, 168 (2002).

When an action neither targets a suspect class nor impinges on a fundamental right, it is reviewed according to the rational basis standard. *Rui One Corp. v. City of Berkeley*, 371 F.3d 1137, 1156 (9th Cir. 2004). Under the rational basis standard, an action will be upheld on equal protection grounds so long as the action is rationally related to a legitimate government interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993). Legislative acts that are subject to the rational

relationship test are presumed valid, and such a presumption is overcome only by a “clear showing of arbitrariness and irrationality.” *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) (quoting *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981)).

A successful challenge must demonstrate that the legislative body could not have reasonably believed that the classification would attain its aims. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981). “Rational-basis review does not require the government’s action actually advance its stated purposes, but merely that the government could have had a legitimate reason for acting as it did.” *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1008-09 (E.D. Cal 2006) (citing *Currier v. Potter*, 379 F.3d 716, 732 (9th Cir. 2004)). Furthermore, there is no requirement that legislation only serve the goals stated, as the legislature has broad scope to experiment with economic problems. *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 970 (1999).

The state legislature has declared that the development of a sufficient supply of housing to meet the needs of all Californians is a matter of statewide concern. Cal. Gov’t Code § 65913.9. In addition, assisting moderate-income households with their housing needs is recognized in California as a legitimate government purpose. Cal. Gov’t Code § 65583(c)(2); Cal. Gov’t Code § 65580; *see also Santa Monica Beach*, 19 Cal. 4th at 970-971. Your memorandum states that there should be a reduction or elimination of fees to further the facilitation of companion units, which is consistent with our state’s priorities. The City could likely establish a record justifying the waiver as a legitimate government interest.

II. PUBLIC UTILITY AND SEWER CAPACITY FEES FOR COMPANION UNITS MAY BE WAIVED IF THE WAIVER MEETS THE RATIONAL BASIS STANDARD AND DOES NOT CONSTITUTE A GIFT OF PUBLIC FUNDS

It is this Office’s understanding from the Public Utilities Department that companion units may not trigger additional water or sewer capacity fees because existing service connections are sufficient to serve them. If larger service connections are necessary; however, the City can not waive or discount capacity fees unless a funding source other than the enterprise funds makes up the difference. 2010 City Att’y MOL 323(2010-13; June 15, 2010); 1993 City Att’y MOL 835 (93-29; Mar. 12, 1993).

To the extent larger connections are necessary and fees would be triggered, any waiver of public utility and sewer fees would need to be rationally related to a legitimate government interest. In addition, since another funding source would need to subsidize the enterprise fund, there must be a public purpose established by the legislative body to justify the use of public resources or adequate consideration given in exchange for the waiver.

Use of another City funding source, such as the General Fund, cannot constitute a gift of public funds. The San Diego Charter (Charter) prohibits the giving of “credit . . . to or in the aid of any individual, association or corporation.” San Diego Charter § 93. This provision is consistent with the prohibition in article XVI, section 6 of the California Constitution on the gift of public funds. Cal. Const. art. XVI, § 6; *County of Alameda v. Janssen*, 16 Cal. 2d 276, 281 (1940). There must

be a public purpose established by the legislative body to justify the use of public resources in a specified manner. *See Tevis v. City & County of San Francisco*, 43 Cal. 2d 190, 197 (1954) (charter provision defining gift of public funds prevails over constitutional provision); *City & County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 103-04 (1988).

An expenditure of public funds that benefits a private party constitutes an impermissible gift if the public agency does not receive adequate consideration¹ in exchange or if the expenditure does not serve a public purpose. *People v. City of Long Beach*, 51 Cal. 2d 875, 881-83 (1959). However, the prohibition does not preclude expenditures and disbursements for public purposes, even if a private person incidentally benefits. *Redevelopment Agency of the City of San Pablo v. Shepard*, 75 Cal. App. 3d 453, 457 (1977); *Schettler v. County of Santa Clara*, 74 Cal. App. 3d 990, 1003 (1977). The determination of a public purpose lies with the legislative body and is liberally construed. *Mannheim v. Superior Court*, 3 Cal. 3d 678, 691 (1970); *Cnty. Mem'l Hosp. v. County of Ventura*, 50 Cal. App. 4th 199, 207 (1996). The legislative action will be upheld unless it is totally arbitrary. *Id.*

As discussed above, the stated purpose of the waiver is to increase housing. The facilitation of companion unit development to create more housing supply would likely constitute a public purpose, as state law provides that “[l]ocal . . . governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.” Cal. Gov’t Code § 65580(d).

In addition, the result of increasing the housing supply and providing below market housing would most likely be adequate consideration in exchange for the waiver of fees.² In order to create a legally defensible position for the City with respect to any claim that the waiver constitutes a gift of public funds, facts supporting the adequacy of consideration and the achievement of a public purpose should be part of the administrative record.

III. THE CITY DOES NOT HAVE THE AUTHORITY TO WAIVE SANDAG’S RTCIP FEE FOR COMPANION UNITS

In November 2004, San Diego County voters approved Proposition A, also known as the TransNet Extension Ordinance, which extended the TransNet half-cent sales tax for transportation projects through 2048, and also included a requirement that each affected city and county collect a fee for newly constructed residential housing units in that jurisdiction. Section 9.A., “New *Development* Exactions,” of the TransNet Extension Ordinance states “[s]tarting on

¹ Consideration is “simply the conferring of a benefit upon the promisor or some other person or the suffering of a detriment by the promisee or some other person. Consideration, if it consists of a benefit, must have some value.” *Cal. Sch. Emps. Ass’n v. Sunnyside Elementary Sch. Dist.*, 36 Cal. App. 3d 46, 59 (1973) (citation omitted).

² The companion unit regulations do not require the units be provided to lower or middle-income earners. However, the intent of Companion Unit Ordinance was to provide affordable and below market housing throughout the City. In addition, state law intended for the units to provide housing for family members, students, the elderly, in-home health care providers, the disabled, and others, at below market prices within existing neighborhoods. Cal. Gov’t Code § 65852.150.

July 1, 2008, each local agency in the San Diego region shall contribute \$2,000 in exactions from the private sector, for each newly constructed residential housing unit in that jurisdiction to the RTCIP.” TransNet Extension Ordinance 04-01, Section 9.A. The purpose of the exaction is to “ensure future development contributes its proportional share of the funding needed to pay for the Regional Arterial System and related regional transportation facility improvements.” *Id.* Each local agency is required to establish an impact fee or other funding program to collect and fund its contribution to the RTCIP, and the fee is increased annually. *Id.*

While the TransNet Extension Ordinance does not define “residential housing unit,” the recently adopted Companion Unit Ordinance specifically intends for the companion units to be used for residential housing. The TransNet Extension Ordinance provides a list of developments that are exempt from the RTCIP; however, companion units, also known as accessory dwelling units under state law, are not one of the listed developments. As such, companion units are subject to the RTCIP fee and the City does not have the authority to waive or reduce it.³

IV. THE CITY’S GPMF FOR COMPANION UNITS MAY BE WAIVED IF THE WAIVER MEETS THE RATIONAL BASIS STANDARD

The GPMF is a flat fee applied to certain permits. As part of the Fiscal Year 2018 budget, the GPMF revenue was removed from the General Fund and placed into a special fund. The GPMF fund is a singular purpose fund that was established to partially fund the Planning Department’s work in updating and maintaining the General Plan, as well as other long range planning efforts that support or further the General Plan. Since the GPMF fund is not an enterprise fund requiring full cost recovery, the fees can be waived for companion units if the waiver is rationally related to a legitimate governmental interest.⁴

V. DEVELOPMENT IMPACT FEES FOR COMPANION UNITS MAY BE WAIVED IF THE WAIVER MEETS THE RATIONAL BASIS STANDARD

The Municipal Code provides for the assessment and administration of development impact fees. SDMC § 142.0640. These fees are established by City Council resolution in accordance with the Mitigation Fee Act, at California Government Code sections 66000 through 66025 (MFA). SDMC § 142.0640(b). The MFA requires that an agency legislating development fees determine that there is a reasonable relationship between: (1) the fee’s use and the type of development project on which the fee is imposed; and (2) the need for the public facility funded by the fee and the type of development project on which the fee is imposed. Cal. Gov’t Code § 66001(a); *Garrick Dev. Co. v. Hayward Unified Sch. Dist.*, 3 Cal. App. 4th 320, 336 (1992).

Development impact fees can be waived for companion units so long as it does not result in other developments paying a higher fee to cover the portion of the costs that were to have been paid by the property owner for whom the fees were waived. SDMC § 142.0640(d); *see also* 1994 City

³ *See also* San Diego Municipal Code (Municipal Code or SDMC) § 142.0640(d), (“Development Impact Fees due pursuant to the City’s Regional Transportation Congestion Improvement Program shall not be deferred under any circumstance.”).

⁴ If the rational basis standard can be met, such a waiver can be done by resolution.

Att'y MOL 551, 551(94-62; July 20, 1994). To the extent that the waiver of fees results in a deficiency in public facilities, it is legally impossible to recover from future developers. *See* Cal. Gov't Code § 66001(g); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 867 (1996). In addition, a waiver of development impact fees would need to be rationally related to a legitimate governmental interest.

VI. LEGAL REQUIREMENTS TO ALLOW FOR COMPANION UNITS TO QUALIFY FOR PROPORTIONAL FEES

While no specific fee is referenced, in general, to the extent any of the fees are based upon a specific metric, such as square footage, the City Council could possibly reduce the fees proportionally for companion units. However, additional analysis may be needed depending on which fee the City Council would like to waive.

CONCLUSION

The City Council may waive development impact fees, the GPMF, and any public utilities and sewer fees for companion units so long as the waiver meets the rational basis standard to comply with the equal protection clause. In addition, a waiver of public utilities and sewer capacity fees must be subsidized by another funding source, other than the enterprise funds, and must not constitute an impermissible gift of public funds. The City Council does not have the authority to waive the RTCIP fee for companion units as that fee was approved by San Diego County voters and requires the City to contribute exactions from the private sector. Proportional fee reductions are possible, but require further analysis.

For those fees the City Council has the authority to waive, this Office is available to assist with identifying the actions necessary to waive those fees.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Corrine L. Neuffer

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