CITY COUNCIL AGENDA REPORT

Meeting Date: September 7, 2023

From: Legal Counsel and City Manager

Subject: Information Report Concerning Development Impact Fees

RECOMMENDATION

Review the Information Report concerning Development Impact Fees and provide direction concerning such Fees, keeping in mind, as will be explained below, that it is not permissible to adopt one development impact fee that would cover a multitude of improvements.

BACKGROUND

The City of Brisbane imposes a number of "fees". Many of those fees are set forth in the City's Master Fee Schedule. These fees include fees for processing land use applications (Planning), use of City facilities (Parks and Recreation), water services (Finance), copies of police reports (Police), inspections (Fire) and processing grading permits (Public Works). There are also "property related fees", as defined in Proposition 218, such as ordinary water and sewer charges. In addition, there are development impact fees ("DIF") that are fees imposed on new development primarily to alleviate the impact such development has on the community.

Regardless of the type of fee, such fees may not exceed the estimated reasonable cost of providing the service or regulatory act for which the fee is charged. If they do, the fees would be considered a special tax and need voter approval. To adopt or increase such fees, the City must (a) hold at least one public hearing, (b) publish notice of the public hearing, (c) send notice to anyone who requested such notice, and (d) make available to the public data indicating the amount of the estimated cost to provide the service for which the fee is charged and the revenue source anticipated to provide the service.

DISCUSSION

Development Impact Fees and Dedications

Cities and counties throughout California charge development impact fees ("DIF"). These fees, imposed on new development, are charges for service or to alleviate impacts that will result from new development. Cities and counties may establish DIF for a broad range of projects by legislation of general applicability or impose DIF on specific projects on an ad hoc basis. If local agencies did not impose DIF, the cost to provide services or to improve existing infrastructure and facilities would fall on existing taxpayers, notwithstanding that the need for such services and improvements were the result of new development. The types of DIF vary from community to community but most often local agencies impose DIF to mitigate the impacts that new development has on traffic, affordable housing, parks, and capital facilities.

Under State law, DIF may include costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the General Plan.

In addition to imposing a fee, a city may, as mitigation, require a "dedication" in connection with the development of real property whereby a property owner/developer must transfer ownership of the property, whether in fee or an easement, to the city.

The authority to exact fees and dedications stems from the city's police powers under the State Constitution. In addition, several state statutes grant authority to local jurisdictions to impose exactions, for example the Mitigation Fee Act (AB 1600), discussed in more detail below.

There are limits, of course, to imposing DIF and/or dedication. If an exaction "goes too far", it results in a "taking" for which compensation would need to be paid. In order to avoid that, courts have established what is called a "nexus" test to determine whether a DIF or dedication does not constitute an impermissible taking.

To establish nexus, generally three "reasonable relationship" findings must be made: need, benefit and proportionality.

Concerning need, it must be shown that new development will create a need for the item to be funded by the DIF and without this infusion of fees from new development, the availability of, for example, public facilities throughout the community would be negatively impacted. A DIF, of course, may be imposed only to the extent that new development creates the additional need.

Concerning benefit, it must be shown that new development will benefit from the item to be funded by DIF. To accomplish that, the DIF must be used in a timely manner.

Concerning proportionality, it must be shown that the DIF are proportional to the impact created by a particular development. To make that determination, different methodologies are employed to allocate costs and calculate the fees, depending on the type of infrastructure or facilities at issue. For example, a park improvement fee may be used to upgrade the kitchen facilities at Mission Blue, install a new roof at the Community Center, or replace playground equipment at the Community Park, assuming the nexus study, using an appropriate methodology, determines that the fee is necessary in order to maintain a level of service or achieve a level of service consistent with the General Plan.

<u>The Mitigation Fee Act.</u>

State law—the Mitigation Fee Act—often referred to as AB 1600--provides the procedural and substantive provisions that sets forth the requirements for establishing, increasing and imposing many DIF. The Act does not limit the type of infrastructure or facilities

for which DIF may be imposed but broadly defines "public facilities" to include public improvements, public services and community amenities. DIF may not be used, however, for maintenance or operating costs. Moreover, certain fees, such as fees in a development agreement, are not subject to the Act.

For the city to establish, increase or impose DIF under the Act, it must (a) identify the purpose of the fee, (b) identify the use of the fee, and determine issues of reasonable relationship.

As to purpose, imposing DIF is to protect the health, safety and welfare of the community by funding public facilities made necessary by new development and, more specifically, identifying improvements to mitigate the impact of new development.

As to use of the fees, the facilities must be identified in a "capital improvement plan", for example a General Plan or other public documents, which plan must be updated annually.

As to reasonable relationship, as discussed previously, the use of the DIF and the type of development must be reasonably related; the need for the public facility and the type of development must be reasonably related; and the amount of the DIF and the cost of the public facility attributable to the development must be reasonably related.

Because each type of DIF has its own peculiarities as to purpose, use, reasonable relationship and proportionality, it is not permissible to adopt a one size fits all DIF. Each category of public facilities—park land, park facilities, affordable housing, traffic impacts, etc.—must be evaluated separately in determining what impact new development has on such facilities. Then, as discussed in the next section, the totality of the DIF must be considered in context of how "feasible" such fees are.

Feasibility Studies

In addition to undertaking a nexus study to support imposing DIF, many communities also will undertake a DIF feasibility study to determine whether a DIF, either by itself or in conjunction with other DIF's, render development within a community "infeasible" for all practical purposes. In other words, even if a nexus study or studies show that a city could impose certain amount of DIF's, if such DIF's were imposed, developers would be unlikely to pay such DIF's. Under those circumstances, a city may want to consider reducing the amount of permissible DIF in order to encourage development in the community.

Current DIF Within Brisbane

Currently the only DIF that Brisbane imposes on development is the parkland dedication fee on residential development. See Sections 16.24.020 and 16.24.030, Brisbane Municipal Code.

Where the residential development is for more than 50 lots and where land within the proposed subdivision will properly accommodate public recreational facilities, the subdivider must dedicate an area for such purposes on the basis of three acres for each 1000 population within the subdivision, assuming 2.35 persons per household. For example if there were a 100 lot subdivision and the property to be subdivided could accommodate a neighborhood park, the subdivider would be required to dedicate .71 acres (100 x 2.35 = 235/1000 = .235 x 3 - .71)

Where the residential development is for 50 lots or fewer, the subdivider is to pay a fee based on the following formula: the number of proposed units times 2.35 persons per household, divided by 1000 times three acres times the fair market value of one acre of the subject property as determined by the planning director. For example, if there were a 10 lot subdivision and the fair market value of the land to be divided was $1,000,000 per acre, the fee would be $90,000 (10 x 2.35 = 23.5/1000 = .03 x 3,000,000 = $90,000.

Although not necessarily a DIF, developers of certain residential and commercial property must also contribute to the City's Public Art Fund. See Section 15.85.050, Brisbane Municipal Code.

For commercial projects that have building development costs between $1 M and $5 M, the developer must contribute one percent of such costs to the public art fund. For commercial projects that have development costs above $5 M, the developer must either contribute one percent of such costs or devote a comparable amount for the acquisition and installation of publicly accessible art.

For residential projects with ten to 20 units, the developer must contribute one half of one percent of building development costs to the fund. For residential projects with more than 20 units, the developer must contribute one percent of the building development costs to the fund. Moreover, regardless of the number of units, if the development costs are above $10 M, the developer must contribute one percent of the development costs or devote a comparable amount for the acquisition and installation of publicly available art. Building developments designated as low or moderate income housing are exempt from these provisions.

DIF in the "Pipeline"

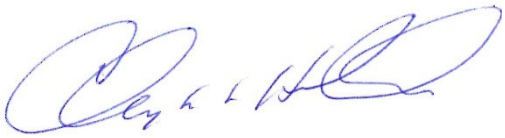
There are currently two DIF in the pipeline: a fee for parks, recreation facilities, open space and trails and an affordable housing fee. The DIF for parks, recreational activities, open space and trails would be applicable to residential and non-residential projects and because it includes a component for parkland, presumably the current provisions in the Municipal Code concerning the dedication of land for parks or payment of an in lieu fee for residential projects would be deleted. The affordable housing fee would be applicable only to non-residential projects in that the City's existing inclusionary housing ordinance requires including affordable housing in certain residential projects.

Also forthcoming will be a Traffic Demand Management Ordinance. That Ordinance, if adopted, may well lead to consideration of a Traffic DIF that could be used, for example, for

intersection improvements, traffic signals, traffic calming devices, etc. Preparation of the study for a Traffic DIF would likely not occur until late this or early next year.

Next steps

As stated above, because the need, benefit and proportionality of any particular DIF must be considered on its own terms, it is not feasible to have an overall DIF that covers a host of public facilities. Accordingly, Staff seeks direction from City Council how it wishes to proceed with DIF in general and, in particular, with the two DIF that are in the pipeline. Concerning the two that are in the pipeline, a feasibility study is underway and staff is prepared to the nexus studies, the feasibility study and proposed DIF to the Council before the end of the year. Unless directed otherwise by Council, staff anticipates preparing additional nexus/feasibility studies for other DIF, such as traffic and capital facilities.



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