



CITY OF EMERYVILLE

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To: Mayor Atkin and City Council

From: Michael G. Biddle, City Attorney

Date: March 17, 2015

Subject: **AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF EMERYVILLE ADDING CHAPTER 9 TO TITLE 3 OF THE EMERYVILLE MUNICIPAL CODE ESTABLISHING PROCEDURES RELATING TO THE FORMATION OF ASSESSMENT DISTRICTS**

INTRODUCTION

In accordance with the exercise of constitutional powers conferred on cities under Article XI sections 7 and 5 of the California Constitution, a charter city may establish procedures relating to the formation of assessment districts, such as property and business improvement assessment districts. On November 4, 2014, the Emeryville City Charter was ratified by the voters of the City of Emeryville. Section 200 of Article II of the Emeryville City Charter provides as follows:

The City of Emeryville adopts this Charter to exercise all constitutional powers conferred on cities under Article XI sections 7 and 5 of the California Constitution solely with respect to the powers over municipal affairs in relation to municipal revenues including taxation and assessment, and a system for the imposition, levy and collection of a tax on the conveyance of real property based on the value of the real property in addition to the amount authorized by California Revenue and Taxation Code section 11911.

Accordingly, the proposed ordinance establishes procedures for the formation of property and business improvement assessment districts which would supplement, not supplant, state law.

DISCUSSION

State law provides procedures to form property and business improvement districts (California Streets & Highway Code Section 36600 *et seq.*). This proposed ordinance would establish authority for the City to invoke those state procedures and in addition to apply those procedures to residential property that would otherwise not be covered were the City to follow the state law exclusively. By proceeding to form a property and business improvement district under the provisions of the proposed ordinance, Article 1 of Chapter 9 of Title 3 of the Emeryville Municipal Code incorporates the state law and then specifies how the City Council may choose to augment the state law provisions.

In forming assessment districts that will fund improvements and services that confer special benefit on businesses, or residential, commercial or residential and commercial property, the City Council may elect to use the procedures set forth in California Streets & Highways Code Sections 36600 et seq. or may elect to use those procedures as modified by the proposed ordinance. The City Council will still be bound by, and must comply with, the applicable state law governing the formation of property and business improvement and maintenance districts in all other respects when forming an assessment district to fund improvements and services that provide special benefits to businesses, commercial and/or residential property.

The following describes the manner in which the assessment district formation would differ from existing state law in the event the proposed ordinance is adopted and the City Council thereafter elects to proceed under the authority conferred by this ordinance in the formation of a property and business improvement district.

Initiation of District Formation (Section 3-9.02(b))

Streets & Highways Code Section 36621(a) requires the submission of a written petition signed by property owners, business owners, or a combination of property owners and business owners in the proposed district who will pay at least 50 percent of the assessments proposed to be levied to merely initiate the assessment district proceeding. The proposed ordinance would allow the City Council to initiate the assessment district proceeding by adoption of a resolution on its own motion. Further, the City Council could initiate the assessment district proceeding if a written petition is submitted by property owners, business owners, or a combination of property owners and business owners in the proposed district who will pay at least 30 percent of the assessments proposed to be levied, as opposed to 50 percent.

Where the City Council initiates assessment district proceedings pursuant to the provisions of the proposed ordinance, as required by existing law, the City Council must still conduct a protest ballot proceeding in accordance with Article XIII D of the California Constitution.

Duration/Term of Assessment District (Section 3-9.02(c))

Streets & Highways Code Section 36622(h) authorizes the City Council to form a district authorized to levy assessments for a maximum term of up to 10 years. The proposed ordinance would allow the City Council to form a district authorized to levy assessments for up to 15 years, except where a longer term is authorized by state law.

Assessment of Residential Property (Section 3-9.02(d))

Streets & Highways Code Section 36632(c) provides that property zoned solely for residential use may not be assessed. Notwithstanding this provision, some practitioners believe that the constitutional requirements of Proposition 218 effectively trump the statutory prohibition of Section 36632(c) and thus mandate that property zoned for residential use must be assessed in the formation of a property and business improvement district if the residential property receives a special benefit. However, a recent trial court decision that analyzed the interplay of Proposition 218 and an assessment district formed under the State Water Code for a reclamation district, which exempted property owned by school districts, held that Proposition 218 did not confer

new authority to assess fees. Thus, the trial court held that since the exemption for school districts under the Water Code predated the passage of Proposition 218, the school district remained exempt from the assessment under the provisions of the Water Code. Similarly, the PBID law predates the passage of Proposition 218 and thus it can be argued that the passage of Proposition 218 has no effect on the exemption provided by the PBID law for property zoned solely for residential use. Note that the case referred to is only a trial court decision and thus has no precedential value. Nevertheless, it raises an issue as to whether Proposition 218 does indeed trump the exemption from assessment under the PBID law for residential property.

The proposed ordinance would cut through this legal uncertainty and clearly provide that to the extent an assessment district is formed in accordance with the proposed ordinance, the City Council may establish an assessment district that encompasses, and levies assessments upon, and funds improvements and services that specially benefit, properties zoned for residential use. Note that the City of San Francisco, a charter city, has adopted legislation similar to the proposed ordinance in order to assess property zoned for residential use as part of a property and business improvement district.

Activities Include Shuttle Bus Services (3-9.02(e))

Streets & Highways Code Section 36606 identifies a list of “activities” that may be provided and funded pursuant to a property and business improvement district. Indeed, Section 36606 (f) provides very broad language that such activities include “other services provided for the purpose of conferring special benefit upon assessed businesses and real property located in the district”. While it would be indefensible for anyone to argue that the Emery Go Round shuttle does not provide special benefit upon assessed property in the district, the proposed ordinance would make it explicitly clear that activities that may benefit businesses or real property in a district include the provision of shuttle bus services, such as the Emery Go Round.

Recovery of Costs of District Formation (3-9.02(f))

The proposed ordinance would specifically provide that the assessment district could recover through assessments the costs incurred in forming the district. Those costs would include the costs of preparation of the management plan and engineer's report, circulating and submitting the petition to the City Council seeking establishment of the district, printing, advertising and the giving of published, posted or mailed notices, compensation of any engineer or attorney employed to render services, and costs associated with any ballot proceedings required for approval of a new or increased assessment.

If the district will be authorized to recover these costs, the management plan shall specify the formation costs eligible for recovery through assessments, the schedule for recovery of those costs, and the basis for determining the amount of the additional assessment for recovery of costs, including the maximum amount of the additional assessment, expressed either as a dollar amount, or as a percentage of the underlying assessment.

Disestablishment of District (3-9.02(g))

Under Streets & Highways Code Section 36670 the City Council may only disestablish a district due to malfeasance, misappropriation of funds, or other violation of law. The proposed ordinance would authorize the City Council, by a supermajority vote of four or more members, to notice a hearing and initiate proceedings to disestablish a district for any reason. Where the City Council seeks to disestablish a district in circumstances not authorized under Streets & Highways Code Section 36670, both the resolution of intention to disestablish the district and any final resolution to disestablish the district shall be subject to a supermajority vote of four or more members. This proceeding would not be applicable where the district has outstanding bonded indebtedness.

NEXT STEPS

If the City Council adopts the proposed ordinance with a first reading on March 17, 2015 and a second reading on April 7, 2015, the ordinance would become effective May 7, 2015. Thereafter, staff would bring forth an item at the City Council's regular meeting of June 2, 2015 to adopt a resolution electing to proceed with formation of a property and business improvement district in accordance with California Streets & Highway Code Section 36600 *et seq.* as supplemented by the proposed ordinance with respect to the provision of shuttle bus services. In addition the Council would adopt a resolution to initiate the proceedings to form a district and thereby review and consider the Management District Plan and Engineer's Report. The City Council would also set a time and place for the Public Hearing at which assessment ballots are tabulated, and if there is no majority protest, the City Council may consider the adoption of a resolution to form the district. The public hearing may not be held sooner than 45 days after notice of the public hearing and assessment ballots are mailed to property owners. Thus, it is anticipated this public hearing would be held at the City Council's regular meeting of July 21, 2015, which is 49 days after the City Council's regular meeting of June 2, 2015.

RECOMMENDATION

It is recommended that the City Council take the following actions:

1. The Ordinance be introduced after a motion to read by title only;
2. Public testimony be taken regarding the Ordinance; and
3. The City Council adopt the first reading of the Ordinance.

Respectfully submitted,



Michael G. Biddle, City Attorney

Attachments:

1. Ordinance Establishing Procedures Relating To Formation Of Assessment Districts – Property and Business Improvement Districts