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## MEMORANDUM

RECEIVED AT  
COUNCIL MEETING OF:

To: Matt Nichols

JUL 11 2006

From: Adam Millard-Ball, Principal

OFFICE OF THE CITY CLERK  
CITY OF BERKELEY

Date: July 10, 2006

Subject: **Claimed Legal Issues in the Proposed Transportation Services Fees**

This memorandum provides a response to the July 6, 2006 letter to the Mayor and Councilmembers from R. Clark Morrison, regarding purported "Legal Defects in Proposed Transportation Services Fee." In summary, we believe that the issues raised in Mr. Morrison's letter are either spurious or reflect an incomplete understanding of California statutes and case law. At best, the letter writer does not appear to have fully read or understood the Nexus Study. The only exception relates to a minor point regarding the timing of fee payments for residential development.

A point-by-point analysis is detailed below. For reasons of conciseness, the original points are not repeated; however, responses are in the same order as the bullet points in the letter.

Please note that no statement in this memorandum is meant to express a legal opinion of any kind. Any explicit or implicit interpretation of law or court precedence in this memorandum is based solely on our experience as non-legal professional practitioners using development impact fees in California. We advise consulting with an expert attorney in this field prior to making any final recommendations based on the content of this memorandum.

### 1. Requirements of Nexus and Rough Proportionality

- Pass-by and linked trips will be taken into account in the traffic study, which in turn will determine the actual fee. Even if they were not, the TSF would satisfy the requirements of "rough proportionality." In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court decision explicitly stated that "no precise mathematical calculation is required" when determining rough proportionality. Note also that the Mitigation Fee Act (Gov't Code § 66001) requires the less rigorous "reasonable relationship" test.
- The Nexus Study does identify how the anticipated new trips will affect the environment (see pp 3-5). As noted above, no precise mathematical calculation is required to satisfy the rough proportionality test. The letter's statement that 2,000 new trips do not require a \$50

million expenditure plan is the same opinion, speculation and unsupported factual assertion that Mr. Morrison argues against earlier in the letter. In contrast, the basis for the expenditure plan, and how it will only mitigate the impacts of new development rather than address existing deficiencies, is fully documented in Appendix A of the nexus study.

- The trip generation calculations are derived from an updated model, and thus more recent and accurate than those in the Berkeley General Plan. They are taken directly from the Metropolitan Transportation Commission's forecast, which is the standard reference for all transportation planning in the region. Note that since the fee is calculated on a per-trip basis, the number of trips actually does not affect the fee level. Rather, a smaller number of trips would simply require a smaller expenditure plan to be divided among proportionately fewer trips, resulting in the same per-trip fee.
- A six percent increase will have a major impact on congestion and pollution in Berkeley, given that many intersections are already at capacity. Other jurisdictions may choose not to mitigate these trips; this does not preclude Berkeley from doing so.
- The goal of the fee is not to increase bicycle commute mode share to 10 percent (which in any case is not a policy goal). It is to reduce the number of trips generated by new development. The Nexus Study seeks to use existing data (such as that contained in the Bicycle Plan) to ensure that new development does not pay more than its fair share, and that is the reason for referencing these calculations.
- Any transportation impact fee must be "solely directed at new trips." If it were directed at trips from existing land uses, the fee would be illegal as it would be remedying existing deficiencies. The fee does not transfer any benefit to existing uses; it merely makes them whole by mitigating the impacts of new development.
- PM peak hour motor vehicle trips generated is an accepted proxy for transportation impacts and is standard practice in the transportation planning and traffic engineering professions. Existing City of Berkeley practice uses this measure. We would be happy to provide further references on request.
- Traffic conditions are irrelevant, and the author's use of the term "potentially significant impact" appears to confuse CEQA law with the Mitigation Fee Act. The City is entitled to require new uses to mitigate 100 percent of their impacts under the Mitigation Fee Act. There are numerous other reasons why the City may wish to make this policy choice, which are not limited to traffic.
- The logic behind the author's point is unclear and appears to be self-contradictory. The City wishes to encourage new uses to mitigate their impacts through their own self-funded transportation demand management programs. While fee revenue would decrease, the number of trips to be mitigated would also decrease. Fees collected under the TSF program would not be used for non-transportation municipal obligations, as this would be illegal. Any fees not spent according to their intended purpose would be refunded pursuant to § 66001(e).
- As specified in the Nexus Study, site-specific impacts (i.e., intersection level of service) are different to those mitigated under the TSF. In any case, any objection should be made at

the time any project-specific improvements are required, rather than at present when these improvements are hypothetical.

- The City may by policy choice exempt certain land uses, such as government agencies. This is standard practice in California cities. This exemption does not increase the fee for other uses, which will continue to be required to mitigate their own impacts only.
- The impacts of a project, according to standard professional practice, are assessed according to trip ends (usually referred to simply as “trips”). See, for example, Institute of Transportation Engineers, *Trip Generation Handbook. An ITE Recommended Practice*. Whether the other trip end is in Berkeley, Oakland or New York City is immaterial, as a single project would only pay a fee for one “trip end” (otherwise, the trip would be counted as an “internal trip” and discounted from the analysis).
- There is no evidence provided in the letter to substantiate the point. The Nexus Study identifies increased transit service as one means to mitigate the impacts of new motor vehicle trips. The letter is correct that “better access to public transit could reduce automobile trips” – this is the basis for this nexus as detailed in Appendices A and B of the Nexus Study.
- The impacts are quantified in terms of new vehicle trips, which is a proxy for other impacts. Emissions, for example, are proportional to the number of trips, as detailed on pp 4-5 of the Nexus Study. Neither case law nor the Mitigation Fee Act requires the actual impacts to be quantified, merely to show a “reasonable relationship” or “rough proportionality.”
- The fee is roughly proportional because the average cost of all mitigation measures is used. (The TSF would *not* charge \$1.46 to one land use and \$69.80 to another.)
- Citywide transit improvements are proposed – they are not limited to West Berkeley. See Appendix B of the Nexus Study. Moreover, there is no requirement for fee revenue to be spent in the same area of the city as the fee-paying use.
- A three-hour PM peak period is a conservative assumption. It assumes that all return commute trips are made between 4 PM and 7 PM. A less generous assumption could be used (i.e., that some commute trips take place outside of this window) – this would serve only to reduce the estimated number of trips mitigated and thus increase the fee.
- There is no requirement to identify the balance of the source of funds. Essentially, the City is making a policy choice not to require new uses to mitigate their full impacts. There is no break in the link between the fee and the impacts of the projects, as fee revenue will not be spent on projects not contained in the Expenditure Plan.
- The comparison is with development impact fees, not with planning, zoning and sewer fees nor inclusionary housing requirements. In any case, the letter fails to point out the legal issue that is addressed here – fees levied by other jurisdictions are immaterial for purposes of determining a nexus.
- See above – the City may set a lower fee or exempt some land uses by policy choice. Information on the trip generation and vehicle ownership characteristics of affordable

housing is well documented – see, for example, Transportation and Land Use Coalition (2002), *Housing Shortage/Parking Surplus*.

## 2. Funding Services and Long-Term Operations

There is no prohibition in the Mitigation Fee Act or other legislation regarding use of impact fee revenue to fund services and operations. Such practice has been upheld by California courts, for example in the context of San Francisco's Transit Impact Development Fee which uses fee revenue to fund transit operating costs. *Russ Building Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496.

Moreover, the Government Code provisions that the letter cites are incomplete and misleading. For example:

- The letter states: "Government Code section 65913.8 provides that an impact fee 'may not include an amount for the maintenance or operation of an improvement.'" A more complete citation reads: "A fee, charge, or other form of payment imposed by a governing body of a local agency for a public capital facility improvement related to a development project may not include an amount for the maintenance or operation of an improvement..." (emphasis added). Therefore, this provision (which in any case is not part of the Mitigation Fee Act) does not apply to improvements other than public capital facilities. TDM programs, Bike Station operations, shuttles and transit incentives clearly fall outside of this category.
- The letter omits to mention that §65913 only applies in the context of residential development.
- The letter cites §66008, which bears no relevance to this issue. (This section requires the fee to be expended solely for the purposes for which it was collected.)
- The fee does achieve the objectives of the General Plan, insofar as it requires new uses to mitigate their impacts. Attainment of a policy goal is incidental.
- Specific infrastructure improvements are identified in Appendix B of the Nexus Study, and linked to the impacts of new uses in Appendix A.
- Soft costs are an integral part of the improvements – the improvement would not be possible without design, project management and contingency costs. This is standard engineering practice in determining costs.

## 3. Technical and Procedural Requirements of the Mitigation Fee Act

- The public facilities to be constructed or improved with the fee revenues are identified in Appendix B, and in other City plans by reference.
- The development of a Pedestrian Plan is adopted City policy (General Plan Policy T-48). In any case, all of the specific potential improvements for which fee revenue will be used have already been adopted in General Plan Policies T-24, T-28, T-29, T-30, T-51, T-52, T-53, T-54 and T-55. This satisfies Mitigation Fee Act requirements.

- The projects adopted as part of the Bicycle Plan are specifically detailed in the Bicycle Plan itself. The letter's statement that they are to "be defined later and could take any form" is inaccurate – they could only take the form as specified in the Bicycle Plan. In addition, the Mitigation Fee Act has no requirement for specificity.
- Government Code §66006 does not require specific measures for accounting and spending TSF revenues to be proposed prior to establishing the fee. However, the City will need to follow the requirements specified in §66006 once fee revenue is collected.
- The City will need to comply with the provisions of §66007 regarding the collection of fees for residential development. Note that there are some exceptions for when fees may be collected prior to the date of final inspection or certificate of occupancy.
- The Construction Cost Index is the best available index for transportation projects, regardless of whether they are capital or operating in nature. There is no index for TDM program or transit costs, but the CCI can be expected to have a reasonable relationship to cost increases in these areas.
- There is no requirement for the City to identify the balance of funding. If this is not procured, the only result is that new uses mitigate less than their full impacts.
- The letter fails to specify the "old and unreliable data" that is being used. The bicycle data is the most recent available from the adopted Berkeley Bicycle Plan.

#### **4. General Plan Consistency**

- The TSF differs from a zoning ordinance in that it is not an action directly affecting land use. The case law cited therefore does not apply. The General Plan specifically calls for the adoption of a TSF (Policy T-6).

#### **5. California Environmental Quality Act**

- Mr. Morrison appears to be unaware of the Guidelines for the Implementation of the California Environmental Quality Act (CEQA). These specify that a "project" for CEQA purposes does *not* include: "The creation of government funding mechanisms or other government fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment." §15378(b)(4). However, any specific projects funded by the fee would need to satisfy CEQA requirements.

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July 6, 2006

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RECEIVED  
JUL -7 2006  
CITY ATTORNEY

**Re: Legal Defects in Proposed Transportation Services Fee**

Dear Mayor Bates and Councilmembers:

The proposed Transportation Services Fee ("TSF" or "Fee") violates state and federal law in a number of respects. Accordingly, the City must revise the proposed TSF substantially before adopting it, or abandon it altogether.

The proposed Fee's legal deficiencies fall into five main categories:

- (1) a failure to satisfy the federal and state requirements of "nexus" and "rough proportionality;"
- (2) violations of the California Government Code prohibitions on using impact fees for long-term operation and maintenance of improvements or for services (or alternatively the adoption of a special tax without adhering to the public vote requirements of the California Constitution);
- (3) violations of the technical and procedural requirements of the Mitigation Fee Act (California Government Code sections 66000, *et seq.*);<sup>1</sup>
- (4) failure of legal consistency with the Berkeley General Plan and other adopted plans and regulations; and
- (5) failure to comply with the California Environmental Quality Act.

<sup>1</sup> Statutory references are to the California Government Code, unless otherwise noted.

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We will take each of these in turn.

**The TSF Fails to Satisfy the Requirements of Nexus and Rough Proportionality.**

A fee must bear a rational nexus and be roughly proportional to the impact(s) that it is proposed to mitigate. § 66005; *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The burden is on the City to prove that any fee meets these two tests, and such proof must be by substantial record evidence. Opinion, speculation or unsupported factual assertions do not constitute substantial evidence. For the following reasons, the TSF and its nexus study fail to satisfy the constitutional, case law or statutory requirements for supporting the adoption or imposition of an impact fee.

- The TSF does not appear to be roughly proportional to a project's impacts because it ignores pass-by and linked trips, or counts those trips against more than one land use, when those are actually not equal to a single-purpose trip in terms of potential impact. The City must quantify the impacts the Fee is proposed to mitigate before it can support findings that there is a nexus between the Fee and the impacts, or that the Fee is roughly proportional to impacts.
- The City has not specifically identified how anticipated new trips will affect the environment, which is necessary to understand the actual impacts of projects, and therefore the need to mitigate those impacts and the cost of doing so. Rather, the City is using existing deficiencies, *e.g.*, un-implemented plans or un-achieved goals as a proxy for impacts. For example, the staff report discusses a \$50,000,000, 20-year expenditure plan to offset the impacts of an estimated 2,000 new automobile trips. Two thousand new trips does not require a \$50,000,000 expenditure plan. Accordingly, it is obvious the City will use Fee revenues primarily to remedy existing deficiencies. Using a legislatively-adopted impact fee to remedy existing deficiencies is illegal. §§ 65913.8, 66008 (prohibiting impact fees to be collected for general revenue purposes); *Bixel v. City of Los Angeles* (1989) 216 Cal.App.3d 1208. A fee used to remedy existing deficiencies is a special tax, which is subject to the voter approval requirements of Proposition 218.
- The trip generation calculations provided to support the TSF are inconsistent with trip generation calculations in the Berkeley General Plan, which the City purports to be the basis of the Fee in the first instance. Indeed, the General Plan anticipates a lower automobile mode share than the TSF study. In other words, the TSF study anticipates greater impacts, which are in turn proffered to justify a higher fee.
- Put another way, the TSF is proposed to reduce a projected six percent increase in P.M. peak period vehicle trips over the next 20 years. A six percent increase in peak hour trips is considered negligible or *de minimis* in many jurisdictions. It certainly does not justify

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a \$50,000,000 mitigation program, or the collection of \$10,000,000 in fees from development projects. Again, the TSF plainly will be used to remedy existing deficiencies in the City's transportation system and to fund broad policy goals that exist regardless of the projected six percent increase. This is illegal. *See, e.g.*, §§ 65913.8, 66006 and 66008.

- Page 16 of the nexus study confirms that the TSF is proposed to remedy existing deficiencies. Page 16 includes calculations of trip reductions that the City claims Fee revenues will achieve. For example, for "Bicycle Improvements," the goal of the Berkeley Bicycle Plan is a 10 percent commute mode split for bicycles. The existing split (as of 1999) was 4.9 percent. It follows that the goal of programs implemented with TSF revenues is to remedy the existing 5.1 percent gap. This figure is used to calculate the proposed effects of the Fee. In other words, the proposed effects of the Fee are quantified as resolving the unmet goals of the City's current Bicycle Plan. That gap between the City's mode split targets and the current actual mode splits cannot be attributed to new uses, because it exists today, in the complete absence of those new uses.
- The Fee is solely directed at new trips, which unfairly burdens new uses and transfers the benefit of that burden to existing uses. Again, a fee may not remedy existing deficiencies at the expense of new land uses, but that is precisely what the TSF is attempting to do.
- The City has not provided substantial record evidence to support its statement that "the actual transportation impacts of a development . . . tend to be proportional to the number of PM peak hour motor vehicle trips generated." This assumption, however, forms the fundamental basis of the entire nexus study.
- Requiring new uses to "eliminate" all of their car trips (or mitigate for 100 percent of them), when traffic conditions are not such that any single new car trip can be identified as a potentially significant impact, exceeds any possible nexus theory. Requiring mitigation of 100 percent of impacts again demonstrates that the purpose of the TSF is actually to remedy existing deficiencies.
- The TSF is partially self-defeating, meaning that, over time, it will not continue to result in the proposed mitigation, and therefore again, that it lacks a sufficient nexus. Specifically, one of the proposed set of programs to be funded is trip reduction or transportation demand management ("TDM"). Because the Fee is charged on a per-trip basis, however, as the mitigation succeeds, Fee revenues will decrease, which in turn may result in the TDM programs no longer being funded. Accordingly, the mitigation will evaporate, and the Fee revenues originally collected will not have resulted in mitigation. This further raises the specter that fees collected under the TSF program may actually end up being used for non-transportation municipal obligations, particularly if

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fees collected to address a planned deficiency can no longer be spent to address that need. Again, a fee structured in this fashion is illegal under sections 65913.8, 66006 and 66008.

- The City proposes to continue mitigating “site-specific” impacts through site-specific exactions, in addition to the proposed TSF. This double charging causes the proposed TSF to exceed rough proportionality requirements. It also demonstrates that the TSF is being used to fund improvements that may be completely unrelated to a given project’s impacts, since those project-specific improvements apparently may need to be separately financed through additional exactions.
- The nexus study states that government agencies are exempt from the TSF. Regardless, those land uses also contribute to traffic impacts and the need for improvements to mitigate those impacts. Because those land uses will not pay into the Fee, revenues may be too low to complete the necessary improvements, in which case the impacts will not be mitigated, despite the fact that all other land uses have paid the Fee. Conversely, private uses may be required to mitigate their impacts plus the impacts of government uses, which would violate nexus and rough proportionality requirements.
- Footnote 1 on page 1 of the nexus study provides that “the figures here refer to ‘trip ends.’” This footnote explains further that a trip that begins and ends in Berkeley has two trip ends for TSF purposes, whereas a trip that begins in Berkeley and ends in Oakland, for example, has only one trip end. However, the trip to Oakland could have equal or greater impacts on Berkeley streets and transit. Nonetheless, it appears that the intra-Berkeley trip would be charged twice as much under the TSF as the trip from Berkeley to Oakland. (*See* Nexus Study at Fig. 1 (calculating the 2,153 denominator number as “trip ends”).) This is an obvious disconnect between the TSF and the actual impacts of the project against which it is being assessed.
- The study claims that there is a nexus between impacts from additional automobile traffic and the need for more transit facilities, and therefore that it is appropriate to charge a fee based on automobile trips to pay for transit improvements and operations. This nexus is tenuous, since additional automobile trips mean people are driving and are not riding transit. Indeed, the correlation may in fact be negative, because better access to public transit could reduce automobile trips. In any case, there is no data and little analysis to support this assumption that is so fundamental to the City’s justification of the TSF.
- The impacts that the TSF is purported to address are not quantified. Thus, the City has completely failed to support its finding that there is a nexus between motor vehicle trip ends (the basis for the Fee) and these impacts.
- The various programs to be funded by TSF revenues have been calculated to reduce trips at costs varying from \$1.46 per trip to \$69.80 per trip. The more expensive mitigation is

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not necessarily more effective, however. Accordingly, the Fee and the impacts it is purported to mitigate are not roughly proportional.

- The Fee appears to be proposed to provide transit improvements in west Berkeley only. There may be no nexus between a project in north Berkeley and transit impacts in west Berkeley, for example. In any case, again, the City certainly has not adequately justified the proposed TSF.
- By using a factor of 33 percent based on an assumed three-hour peak period, the nexus study is significantly overstating the number of trips that will actually be reduced by the proposed mitigation measures. There is no support for a three-hour peak period.
- Similarly, the City claims that TSF revenues will only constitute 20 percent of the funds required for all of the proposed improvements. There is no guarantee that the other 80 percent will be available. Accordingly, the nexus study again significantly overstates the mitigation that will actually be achieved. Further, because a source for the balance of the improvement funds has not been identified, it seems likely that the proposed improvements will not occur. In that case, the funds raised through the TSF will not be spent on the transit enhancements envisioned at the outset. Again, this breaks the required link between the Fee and the impacts of the projects on which it is imposed.
- The estimate of current City fees is inaccurate and incomplete. By narrowly drawing the comparison between Berkeley and nearby municipalities, the analysis excludes Berkeley's comparatively very high planning and zoning and sewer fees, and ignores the affordable housing requirement (which is, in effect, a substantial fee).
- The City proposes that the TSF be reduced for certain preferred land uses such as affordable housing. The City has failed to provide evidence demonstrating that below-market rate housing units generate fewer trips than market rate housing units. Therefore, again, the City has failed to adequately justify the fee's nexus and rough proportionality. Furthermore, the City would not provide the same fee reduction for affordable units constructed in conjunction with a density bonus. There is no evidentiary basis for making this distinction (even if there were an evidentiary basis for the reduction for affordable housing generally). Under the Mitigation Fee Act and the nexus and rough proportionality requirements, a fee cannot be used as a "stick" to obtain preferred land uses, unless the distinctions among land uses and impacts can be, and are, justified by substantial record evidence.

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**The TSF Violates the California Government Code Because it is Proposed to Fund Services, and Long-Term Operations and Maintenance of Public Facilities.**

Government Code section 65913.8 provides that an impact fee “may not include an amount for the maintenance or operation of an improvement.” Fee revenues also may not be used to fund ongoing services (as opposed to depreciable capital improvements or assets). § 66008.

- The nexus study states that TSF revenues will be used for transit operations and TDM programs and incentives, among other things. These expenditures violate sections 65913.8 and 66008 because they are for ongoing operations and services. Because these services are of general benefit, the supporting revenue sources are subject to the voter approval requirements of Proposition 218.
- Proposed inappropriate expenditures for maintenance, operations or services include Citywide TDM Marketing and Incentive Programs (\$6,763,200), Downtown Berkeley BART Bike Station Operations (\$800,000), Shuttle Services (transit operations) (\$6,120,000), and Citywide TransLink and EcoPass Incentives for Employers (\$17,710,504). Together, these constitute more than 60 percent of the proposed expenditure of TSF revenues.
- Similarly, page 3 of the nexus study states that the Fee is proposed to achieve the objectives of the City’s General Plan. A fee may not be charged to fund attainment of a broad policy goal. Specific infrastructure improvements must be identified and linked to the fee and the impacts it is purported to mitigate. § 66008. The nexus study fails to make these connections.
- The Fee includes 30 percent for “soft costs.” Since, as pointed out above, many of the proposed expenditures are not capital improvements that may be funded with TSF revenues, they must be eliminated, and in turn, the estimate of soft costs must be reduced proportionately.

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**The TSF Violates the Technical and Procedural Requirements of the Mitigation Fee Act.**

The Mitigation Fee Act governs the adoption and implementation of impact fees and exactions in California. §§ 66000 – 66025. The statute sets forth specific requirements and limitations for the adoption of an impact fee, the maintenance of fee revenues, and the expenditure of fee revenues. The proposed TSF violates a number of these requirements, as follows.

- The City has failed to specifically identify the public facilities to be constructed or improved with the fee revenues, in violation of sections 66001(a)(2), 66006(f), and 66008.
- One glaring example is that over \$8,000,000 is proposed to be collected to fund the implementation of a yet-to-be adopted Pedestrian Plan. If the plan is not yet adopted, the public facilities to be constructed or improved obviously cannot be specifically identified.
- The nexus study claims that \$3,340,000 is required to implement “projects adopted as part of the Bicycle Plan.” This is insufficient definition of the public facilities to be constructed or improved with TSF revenues because these projects to be defined later could take any form. It seems likely that if a narrowly-drawn fee dedicated to capital improvements is left open-ended in this way, future legislators may deliberately or inadvertently elect to spend fee revenues in ways that violate the Mitigation Fee Act.
- The City must propose specific measures for accounting and spending TSF revenues. § 66006. It has failed to do so.
- Fees charged against residential development may not be collected until the date of final inspection or the date of the certificate of occupancy, unless certain findings are made. § 66007(a). The nexus study does not include those findings, but it provides that the TSF would be collected in conjunction with the issuance of a use permit, for example. That would violate section 66007(a).
- The nexus study states that the City will adjust TSF levels annually in accordance with the Construction Cost Index. Not all the expenditures the TSF is proposed to fund are capital facilities construction or improvements. Notwithstanding the fact that it is inappropriate to fund services or operations with a mitigation fee in the first instance, increasing the TSF level for services based on the Construction Cost Index is not justified or proper under the Mitigation Fee Act.

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- The City purports to fund, outside of the TSF, a portion of the projects vaguely specified as being the target of TSF revenues, yet there is no plan or proposal for that additional funding. Accordingly, the City again appears to be collecting a fee for which there is an insufficiently defined connection to mitigation projects. This is illegal under the Mitigation Fee Act and particularly section 66001(b).
- With respect to bicycle improvements, the nexus study uses old and unreliable data. Accordingly, once again, the nexus study fails to sufficiently demonstrate that a nexus exists between impacts and those improvements, or that the TSF charge against a project would be roughly proportional to the cost of providing those improvements.

**The City's Own Documents Find the TSF Inconsistent with the Berkeley General Plan and Other Adopted Plans and Regulations.**

Actions affecting land use must be consistent with a city's general plan. *See, e.g., Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582; § 65850 (zoning ordinance must be consistent with a general plan). A January 25, 2006 document prepared by City staff and titled "Attachment 1: Plan Conformance Review, Proposed Transportation Services Fee," concludes that the proposed TSF is of "uncertain" consistency with a large number of General Plan policies. Before it can adopt the TSF, the City must either amend its General Plan, or revise the TSF to make it legally consistent with the existing General Plan.

**The City Must Comply with the California Environmental Quality Act Before Adopting the TSF.**

A discretionary action that may have an effect on the environment is subject to the California Environmental Quality Act ("CEQA") (Public Resources Code §§ 21000 - 21178). The adoption of the TSF is such an action because it proposes numerous facilities construction and other programs that may have significant, unavoidable impacts on the environment. CEQA requires these impacts to be analyzed, disclosed and mitigated before the City may adopt the TSF. *See, e.g., Pub. Res. Code §§ 21002, 21005, 21080.* Given the magnitude and number of potential impacts from the wide variety of programs and construction projects proposed by the TSF, a full Environmental Impact Report is required.

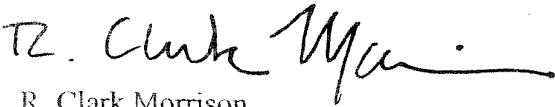
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We appreciate the opportunity to provide this information and trust that you will consider it carefully before proceeding with the current proposal.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Clark Morrison". The signature is fluid and cursive, with a long horizontal stroke at the end.

R. Clark Morrison

cc: Manuela Albuquerque, Esq.  
Berkeley Builders Group