

## LARA WEISIGER

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**From:** TOM ROTH <rothlaw1@comcast.net>  
**Sent:** Tuesday, December 17, 2019 2:55 PM  
**To:** City Clerk  
**Subject:** Comments on DIF Report; City Council Meeting, Dec. 17, 2019, Agenda Item 5-L  
**Attachments:** DIF Staff Report Analysis.pdf; BW 2019 DIF Report Comments.pdf; Alameda DIF Report\_12.16.19 copy.pdf

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Please find the following submissions on behalf of Boatworks LLC for tonight's City Council meeting.

TOM ROTH

**LAW OFFICES OF THOMAS D. ROTH**  
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**By Email**

December 17, 2019

City Council c/o  
Lara Weisiger, City Clerk  
City of Alameda  
2263 Santa Clara Avenue  
Alameda, CA 94501

**Re: Boatworks LLC's Comments and Objections Concerning  
December 17, 2019 City Council Consent Agenda Item 5-L -  
Adoption of Resolution Receiving and Filing the Fiscal  
Year 2018-19 Development Impact Fee (DIF) Report and  
Five-Year Report, Containing Both Development Impact  
Fees and Fees Otherwise Subject to Development  
Agreements, and Making Certain Findings as Required by  
Government Code Sections 66000 et seq. (Finance 2410)**

Dear City Council and City of Alameda Officials:

This firm represents Boatworks, LLC ("Boatworks"), and on Boatworks' behalf files comments and objections on the above-referenced agenda item.

In the staff report for this item, staff asserts "In 2019, staff completed a review of the Ordinance and an update of the parks and recreation facilities portion of the 2014 Nexus Study. As required by Government Code Section 66000 et seq., a nexus study establishes the fair share of the costs to improve public facilities that should be paid by new development. The 2019 review of the Parks portion of the Nexus Study was informed by a court decision, finding that the 2014 Nexus Study miscalculated the total costs to develop additional park lands in the City. Based on that court decision, an internal staff review of the entire Ordinance, and the updated Nexus Study, City Council approved amendments to the Ordinance by reducing the Parks impact fees, establishing Parks fee credit, establishing affordable housing and permitted accessory dwelling unit exemption and establishing transit oriented housing transportation fee reduction." Once again, the City misleads the public and misdescribes the Court action.

Both the trial court and the Court of Appeal **invalidated** the park impact fee. The Courts did not rule that the City “miscalculated” the total costs. The Courts ruled that the City attempted to impose and collect DIF monies for land that it received for free from the Navy. The City had no need for money to buy land that it received for free, but the City attempted to deceive the public. The City’s repeated insistence on trying to “spin” the Court’s ruling to make it seem like it was some innocent mistake is not well taken.

The staff report states “The DIF funds may only be used for new improvements and the City is required to use other funds to pay for any remaining share of the improvement costs attributed to existing development.” Staff further states “. . . as of the close of Fiscal Year 2018-19, the Parks DIF Fund continued to experience a deficit balance of \$2,070,351. The deficit was caused by not meeting revenue projections as a result of developers delaying to pull building permits and refunding fees back to a developer as part of a settlement agreement. Staff anticipates that the deficit will be cured with future Parks DIF revenue as construction begins on future development projects. **The deficit was not incurred to cure existing parks deficiencies.** The deficit resulted from the construction of two eligible parks projects: Estuary Park and Jean Sweeney Open Space Park. Both of these projects will mitigate the impacts of new development on availability of park facilities.” The bolded statement is not supported by substantial evidence. The evidence previously submitted to the City in July 2019 shows that in part both those parks are needed to address pre-existing deficiencies. Boatworks incorporates by reference the documentation previously submitted to the City in July 2019.

I have included with these comments a review of the City’s December 2019 DIF Report by Greg Angelo of Development & Financial Advisory. DFA concludes that the City’s DIF Report fails to comply with the Mitigation Fee Act DIF reporting requirements. Based on the DFA analysis, the City’s December 2019 DIF Report fails to comply with Gov’t Code §§ 66006.

These reporting violations portend that the City has been using DIF monies to fund pre-existing deficiencies in park facilities and is seeking to hide this practice from the public. As the City knows, using DIF monies to remedy pre-existing deficiencies violates the Mitigation Fee Act. In addition, the City’s DIF Report fails to contain substantial evidence supporting its assertions that the DIF monies are not being used to fund pre-existing deficiencies in park facilities.

I have also included a matrix showing how even the staff reports produced in response to a PRA request fail to adequately report the information required by the Mitigation Fee Act.

Also, even if the staff reports were complete (which they are not), that method of reporting does not comply with the Mitigation Fee Act. The staff reports fail to adequately notify the public that the reports are attempting to comply with the Mitigation Fee Act reporting requirements, and typically relate

to a specific project, weaning the public would have no way of knowing the Mitigation Fee Act information purports to be in those project specific reports.

The City should reject the staff's DIF Report and require staff to prepare a new report that is fully compliant with the Mitigation Fee Act reporting requirements.

Sincerely,

/s/

Tom Roth

cc: Attachments

DFA December 2019 Analysis and Matrix analyzing information in staff reports produced by the City in response a PRA request

**Summary of Missing Information in Staff Reports Regarding DIF - 2014/15 thru 2017/18**

CA Gov't Code 66006 - Requirement Public Information	City of Alameda DIF Fund 340 Reporting			
	2014/15	2015/16	2016/17	2017/18
(A) A brief description of the type of fee in the account or fund.	X	X	X	X
(B) The amount of the fee.	O	O	O	O
(C) The beginning and ending balance of the account or fund.	X	X	X	X
(D) The amount of the fees collected and the interest earned.	X	X	X	X
(E) An identification of each public improvement on which fees were expended and the amount of the expenditures on each improvement, including the total percentage of the cost of the public improvement that was funded with fees.	O	O	O	O
(F) An identification of an approximate date by which the construction of the public improvement will commence if the local agency determines that sufficient funds have been collected to complete financing on an incomplete public improvement, as identified in paragraph (2) of subdivision (a) of Section 66001, and the public improvement remains incomplete.	O	O	O	O
(G) A description of each interfund transfer or loan made from the account or fund, including the public improvement on which the transferred or loaned fees will be expended, and, in the case of an interfund loan, the date on which the loan will be repaid, and the rate of interest that the account or fund will receive on the loan.	X	X	X	X
(H) The amount of refunds made pursuant to subdivision (e) of Section 66001 and any allocations pursuant to subdivision (f) of Section 66001.	X	X	X	X

"X" indicates information is provided.

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**NOTES**

**2014/15 - Agenda 5-F, Agenda Date 12/1/2015**

Item B: The amount of the fee collected is referenced by Ordinance. The ordinance provides a gross fee and is different than the Nexus (Study), therefore, the fee amount for each type of fee is not provided.

Item E: Agenda Number 5-F and Exhibit 1 only indicate a gross amount spent, omitting identification of each public improvement on which fees were expended and the amount of the expenditures on each improvement, including the total percentage of the cost of the public improvement that was funded with fees.

Item F: Agenda Number 5-F and Exhibit 1 provides no information related to this provision.

Item G: Agenda Number 5-F Exhibit 1, indicates a transfer to Police building debt service; however, the source of these funds is not provided.

***Summary of Missing Information in Staff Reports Regarding DIF - 2014/15 thru 2017/18***

**NOTES**

**2015/16 - Agenda 5-F, Agenda Date 12/6/2016**

Item B: The amount of the fee collected is referenced by Ordinance. The ordinance provides a gross fee and is different than the Nexus (Study), therefore, the fee amount for each type of fee is not provided.

Item C: Included, but the 6/30/2015 fund balance does not match reported fund balance in FY 2014/15.

Item E: Agenda Number 5-F and attachment only indicate a gross amount spent, omitting identification of each public improvement on which fees were expended and the amount of the expenditures on each improvement, including the total percentage of the cost of the public improvement that was funded with fees.

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**2016/17 - Agenda 5-F, Agenda Date 12/19/2017.**

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***Summary of Missing Information in Staff Reports Regarding DIF - 2014/15 thru 2017/18***

**NOTES**

**2017/18 - Agenda 5-F, Agenda Date 11/27/2018**

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## REVIEW OF CITY OF ALAMEDA DEVELOPMENT IMPACT FEE REPORT

To: Boatworks, LLC  
From: Greg Angelo, Development & Financial Advisory  
Date: December 16, 2019  
Re: Review of City of Alameda Development Impact Fee Report, dated December 2, 2019

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On December 2, 2019, the City of Alameda (“City”) released to the public a City Development Impact Fee Report (“DIF Report”). Development & Financial Advisory (“DFA”) reviewed the report, focusing on the parks fee component. In reviewing the DIF Report and relevant City Capital Budgets, including Capital Improvement Programs (“CIP”), DFA concluded that the DIF Report cannot be reconciled with other publicly available financial reports issued by the City. There are significant inconsistencies among the DIF Report, City Capital Budgets and CIP. Thus, the DIF Report is not supported by substantial evidence, and is contradicted by other City financial data.

### EVALUATION & RESPONSE TO DIF REPORT:

#### DIF Report: Legal Requirements for Development Impact Fee Reporting

##### ***Section A. California Government Code Section 66006 (b)***

The DIF Report identifies the reporting requirements the City must produce each year and make available to the public to satisfy development impact fee reporting requirements under the Mitigation Fee Act.

I have concluded that the City failed to comply with Government Code Section 66006 (b).

- 1. Government Code Requirement: “An identification of each public improvement on which fees were expended and the amount of the expenditures on each improvement, including the total percentage of the cost of the public improvement that was funded with fees.”***



The DIF Report fails to comply with this element because:

- The DIF Report and CIP identify different park facilities and different sources of funding for the respective park facilities
- The DIF Report provides no substantiating documentation to support the purported Development Impact Fee (“DIF”) funded park facilities identified on page 14 of the DIF Report
- The DIF Report is inconsistent with the adopted 2019-2024 CIP as well as the previous 2017-2019 Capital Budget
- The DIF Report fails to explain the inconsistencies with the adopted CIP

**2. Government Code Requirement: “An identification of an approximate date by which the construction of the public improvement will commence, if the local agency determines that sufficient funds have been collected to complete financing on an incomplete public improvement.”**

The DIF Report fails to comply with this element because:

- The DIF Report fails to identify the date of park construction commencement and fails to provide detail regarding the source and sufficiency of funds, which is required by the Mitigation Fee Act
- The City is required to spend DIF funds within 5 years of collection or those funds shall be subject to refund

**3. Government Code Requirement: “A description of each interfund transfer or loan made from the account of fund, including the public improvement on which the transferred or loaned fees will be expended, and, in the case of an interfund loan, the date on which the loan will be repaid, and the rate of interest that the account or fund will receive on the loan.”**

The DIF Report fails to comply with this element because:

- The DIF Report fails to fully disclose the source of funds, including the public improvement on which the funds were expended, to cover the reported annual deficits (page 7), other than the interfund loan amount of \$900,000 to fund construction of the Cross Alameda Trail.

**DIF Report: Legal Requirements for Development Impact Fee Reporting**

***Section D. Establishing a Reasonable Relationship Between the Fee and the Purpose for Which It Is Charged***

The DIF Report purports to base its “reasonable relationship” finding on the July 1, 2014 DIF, which was invalidated by the Court. The referenced nexus study does not meet these requirements, as determined by the court.

## **DIF Report: Legal Requirements for Development Impact Fee Reporting**

### ***Section E. Funding of Infrastructure***

The City is required to identify a percentage of any project funded with DIF monies. The DIF Report purports to explain how the City derived that percentage. The City uses a “percentage of use” approach, which estimates the percentage of the facility attributable to existing residents vs. new development. This directly contradicts the City’s nexus methodology used in deriving the park impact fees. The nexus study used the inventory method. The Mitigation Fee Act prohibits funding existing deficiencies. The City doesn’t explain how they determined the percentage of use that they believe can be attributed to new development. The City also doesn’t explain how specific facilities are being expanded to accommodate new development and maintain the existing level of service, as opposed to simply fixing existing deficiencies.

The DIF Report includes “playground annual replacement” as a park facility line item. First, the DIF should specify which facilities are funded via the DIF, so that it is clear that the City is not funding pre-existing deficiencies. Second, the DIF Report does not indicate the commencement dates of the respective facilities. Third, replacement of existing playgrounds is not an obligation of new development and is a violation of the Mitigation Fee Act.

## **DIF Report: Parks Development Impact Fee Fund**

### ***Page 7: Financial Summary Report***

The financial summary report table does not explain or provide detail associating the identified annual expenditures and the associated DIF facility. In conjunction with a review of the DIF Report, page 14, Development Impact Fee Projects Identification, correlating costs, construction commencement dates, and actual source of funds cannot be determined. As a result, the DIF Report does not meet the Mitigation Fee Act reporting requirements for development impact fee funding. It also does not explain the source of funds.

## **DIF Report: Notes to the Development Impact Fee Report**

### ***Page 12: Interfund Loan***

As noted in sections above, the DIF Report fails to explain the source of funds to cover the reported annual deficits (page 7), other than the interfund loan amount of \$900,000 to fund construction of the Cross Alameda Trail.

**DIF Report: Development Impact Fee Project Identification****Page 14:**

According to the DIF Report, the following park improvements and respective % of DIF funding has incurred since 2016. However, there are problems with this explanation.

Improvement	Estimated Completion Date	Estimated Cost	Budget to 6/30/2019	Funding to 6/30/2019	Estimated % Funded with Fees
Encinal / Alameda High School Swim Renovation	2016	750,000	228,000	228,000	30.4%
Estuary Park - Phase 1	2019	5,576,000	2,062,000	2,062,000	37.0%
Jean Sweeney Open Space Park, Cross Alameda Trail, and Phase 1	2020	11,613,438	1,536,438	1,536,438	13.2%
Playground Annual Replacement	2017	530,000	400,000	355,039	75.5%

- Encinal Alameda High School Swim – This facility is located on property owned by Alameda Unified School District. The Joint Use Operating Agreement between the City and AUSD limits public use of the facility. For these reasons, the City’s park nexus study does not include this facility in its inventory. Yet, for reporting purposes, the City shows DIF funding being used for this facility. The Park DIF should not be used to fund this facility, and to do so is inconsistent with the Mitigation Fee Act.
- Playground Annual Replacement: The CIP program reports these facilities were funded by “Miscellaneous Revenue,” “Bayport Assessment District,” “Grants” and “General Fund.” Annual replacement of existing deficient playgrounds that are not being expanded is not a lawful use of DIF monies. Furthermore, other revenue sources, such as assessments, should offset DIF revenue obligations. Measure F funds are also available to fund park playgrounds. As stated in the 2019-21 Capital Budget (pp. 55-56), “the project replaces one playground each year with the oldest playgrounds to be replaced first.” The need to replace playgrounds is an existing deficiency, and thus, the Mitigation Fee Act prohibits funding those facilities.

**DIF Report: Summary**

This memo has identified numerous errors, inconsistencies and problems with the DIF Report. The result is that the City has failed to comply with the Mitigation Fee Act reporting requirements.

With respect to the City’s historical reporting (prior to the DIF Report), the City produced certain staff reports in response to Public Records Act requests; however, those staff reports do not contain all of the required information, lack the appropriate level of detail and fail to meet the legal requirements established by the Mitigation Fee Act for development impact fee reporting.

The attached “City DIF Reporting Summary, Years 2014/15 – 2017/18” catalogs the insufficient information.

*Attachments: “City DIF Reporting Summary, Years 2014/15 – 2017/18”*

**City DIF Reporting Summary, Years 2014/15 – 2017/18**

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*City DIF Reporting Summary, Years 2014/15 – 2017/18*

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*City DIF Reporting Summary, Years 2014/15 – 2017/18*

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**2017/18 - Agenda 5-F, Agenda Date 11/27/2018**

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