




Office of the City Manager

action calendar
April 22, 2008

To:  Honorable Mayor and Members of the City Council

From: Phil Kamlarz, City Manager

Submitted by: Christine Daniel, Deputy City Manager

Subject: Addition of Chapter 7.98 to the Berkeley Municipal Code - Special Tax Financing Law - Sustainable Energy Financing District

RECOMMENDATION:

Adopt first reading of an Ordinance to amend the Berkeley Municipal Code by adding Chapter 7.98 providing for special tax financing for the installation of energy efficiency improvements, including solar.

BACKGROUND:

On November 6, 2007 the City Council approved the concept of the “Sustainable Energy Financing District” by which the City would help property owners to finance solar installations and energy efficiency improvements by creating a voluntary assessment that is paid through their individual property tax bills. The item also directed staff to continue to develop the program. This program is consistent with the goals embodied in Measure G, adopted by the voters in 2006, to reduce the City’s greenhouse gas emissions.

Since November, staff, in collaboration with the City’s financial and legal consultants and members of UC Berkeley’s Renewable and Appropriate Energy Laboratory (REAL), have been developing a program that would provide special tax financing to Berkeley property owners who wish to install solar facilities on their property and to pay for those improvements as a special tax assessment on their property tax bills over a twenty year period.

With the current state and federal subsidies, installation of solar electric and solar thermal systems are now cost effective for many residential and commercial property owners. However, disincentives to installation remain, particularly the high upfront cost and other financial hurdles. The “Sustainable Energy Financing District” is being developed to address those disincentives.

The new special tax district would be city-wide, but would result in a tax **only** on those property owners who voluntarily chose to “opt-in” in order to use it as a financing mechanism for installation of these energy systems. It would allow property owners to

install solar systems and make energy efficiency improvements to their buildings and pay for the cost as a 20-year special tax assessment on their property tax bills. No property owner would pay a special tax assessment unless they chose to opt-in to the tax district and to use the funding available through the tax district to have work done on their property. Those who opt-in to the district would pay only for the cost of their own project and any fees necessary to administer the program.

The financing mechanism is based on similar tax financing authorized under the Mello-Roos Community Facilities Act of 1982 and, functionally, is no different than the assessment districts previously formed by the City to finance utility undergrounding. The special tax districts created under the Mello-Roos Act are called Community Facilities Districts and work as follows:

- Property owners vote to create a Community Facilities District comprised of their properties and to impose a special tax on their property.
- The city within which the Community Facilities District is created issues bonds based on the agreement by the property owners to tax themselves to pay back the bonds. (General Funds are not pledged as security for these bonds.)
- The bond proceeds are used to build public facilities such as streets, traffic signals, storm drains, sewers, landscaping, school buildings, etc.
- The special taxes paid by the property owners are used to pay the debt service on the bonds.
- If a property owner defaults on the payment of taxes such that the bondholders do not receive their payment, the city is obligated to foreclose on the property to cure that default.

Community Facilities Districts are used state-wide to build a host of necessary public improvements and have become an important component of local government finance. The Sustainable Energy Finance District proposed here is a new approach to that type of financing and essentially allows private property owners to access their property tax bills as a financing tool in order to install energy efficient improvements on their own property.

CURRENT SITUATION AND ITS EFFECTS

The Special Tax Financing Law proposed by this item would be created under the City's Charter authority and would incorporate by reference the provisions of the Mello-Roos Act, but will add the legal authority to finance solar and energy efficiency improvements for private property, which is not currently allowed under the Mello-Roos Act. The Special Tax Financing Law is the implementing legislation which will then allow for the creation of the Sustainable Energy Financing District discussed above. The boundaries of the district would be City-wide, however, no property owner would be taxed unless and until that property owner consented to impose the special tax on their property. At the time the property owner granted their consent, they would also agree that bonds could be issued which would be secured by the tax on their property, they would agree to the rate of the tax and to pay the tax as part of their annual property tax bill.

Individual property owners would contract directly with qualified private solar installers and contractors for energy efficiency and solar projects on their building. In order to take advantage of the special tax financing authorized by the Sustainable Energy Financing District, property owners and their contractors would be required to agree to certain terms and conditions mandating energy efficiency steps, appropriate warranties, and other performance. The City would provide the funding for the project from a bond or loan fund that is then repaid through the special tax assessments on participating property owners' property.

The Financing District should solve many of the financial hurdles facing property owners. First, there would be relatively little upfront cost to the property owner. Second, the cost of the solar system and energy improvements will be repaid through a voluntary tax on the property over time. Third, the total cost to finance the solar system and energy improvements through the Financing District is intended to be comparable to or better than the cost to finance the improvements through a traditional equity line or mortgage refinancing because a well-secured bond should provide lower interest rates than are commercially available. Fourth, the special tax assessment is transferable between owners; if an owner sells his or her property prior to the end of the 20-year repayment period, the next owner takes over the special tax assessment as part of his or her property tax bill.

The Sustainable Energy Financing District is consistent with the goals of Measure G, approved by the voters in 2006.

Next Steps:

Legislative: The creation of the Special Tax Financing Law is the first step in a series of legislative actions that will need to occur to form the Sustainable Energy Financing District, set the rate and method of apportionment of the special tax and authorize the issuance of bonds. The following legislative steps are required:

- First reading of ordinance adding Chapter 7.98 to the BMC, Special Tax Financing Law
- Second reading of Special Tax Financing Law ordinance
- 30 day referendum period before next action
- Adoption of Resolution of Intention to form Sustainable Energy Financing District
- Adoption of Resolution of Intention to incur bonded indebtedness
- Adoption of Local Goals and Policies for Sustainable Energy Financing District
- 30 day waiting period before next action
- Noticed Public Hearing on formation of Sustainable Energy Financing District and issuance of bonds
- Adoption of Resolution of Necessity to incur bond indebtedness
- Adoption of Resolution of Formation of Sustainable Energy Financing District

- First reading of Ordinance to levy special taxes
- Legislative authorization of bond issuance
- Second reading of Ordinance to levy special taxes
- 30 day referendum period
- Program clear to begin

Administrative: Once the program has received all of its legislative approvals, the next step is to implement a pilot project with approximately 25 properties which can move through the entire process as soon as possible. Staff and the project team would then evaluate the program and determine whether it needs any modifications prior to bringing it to the community on a larger scale. In order to move into this pilot project as expeditiously as possible, staff will be working over the next several weeks on various issues such as how the 25 pilot properties will be chosen, what is the application process, what qualifications are required in order to participate, how the funds are drawn down, and when the installer gets paid.

Financing: Finally, the key to this entire program is to find a bank that is willing to provide the financing anticipated by the program. Over the last few months, staff and consultants have met with several banks that have expressed interest in the program. One of the challenges has been to create a financing structure that yields sufficient revenue to fund the installations as well as the necessary administrative costs of the program, while at the same time remaining competitive with other available funding mechanisms for solar installation, such as an equity line of credit. As of the date of this report, staff is still working with several institutions to try to reach acceptable terms that meet all of these interests. Staff remains confident that we will identify and reach tentative agreement with a lender (subject to the approval of the City Council), especially because the special tax lien that is created by the Sustainable Energy Financing District -- like the lien of the 1% ad valorem property tax -- is superior to private liens on property, including mortgages; in other words, it is a "super-lien" that should be extremely attractive to most investors.

FISCAL IMPACTS:

Staff and Consultant Costs: In a separate item on this same Agenda, the Council is being asked to approve two grants, one from the federal EPA for \$115,000 over two years, and one from the Bay Area Air Quality Management District for \$75,000. Both of these grants can be used to pay for staff and consultant time to develop and implement the program.

Tax District Costs: With respect to the tax district itself, the costs of administering the special tax assessment will be built into the costs of the bonds or other financing mechanism. However, similar to the utility undergrounding districts mentioned above,

staff has included in the Special Tax Financing Law legal authority for the City to use "available surplus funds" during each fiscal year to pay delinquent special taxes. The City would cover these delinquent special tax payments during the period (5 years) before which the County would foreclose on a property in default for failure to pay property taxes. After the County's foreclosure, the City would be repaid any amounts it distributed to cover that debt service. This provision avoids the requirement that the City foreclose on a property simply to collect the relatively modest special tax amount due for the solar financing and, for that reason, staff recommends the City adopt this approach.

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Attachments:

1. Draft ordinance adding BMC Chapter 7.98, Special Tax Financing Law

ORDINANCE NO. -N.S.

AMENDING THE BERKELEY MUNICIPAL CODE BY ADDING CHAPTER 7.98 THEREOF PROVIDING FOR THE CITY OF BERKELEY SPECIAL TAX FINANCING LAW FOR THE PURPOSE OF PROVIDING FINANCING FOR SPECIFIED PURPOSES

BE IT ORDAINED by the City Council of the City of Berkeley as follows:

Section 1. The Berkeley Municipal Code is hereby amended by adding Chapter 7.98, to read as follows:

**Chapter 7.98
SPECIAL TAX FINANCING LAW**

Sections:

Section 7.98.010	Title.
Section 7.98.020	Purpose; Special Tax.
Section 7.98.030	Full Authority.
Section 7.98.040	Additional Authority.
Section 7.98.050	Actions and Determinations -- Proceedings.
Section 7.98.060	Compliance with Chapter.
Section 7.98.070	Nonexclusiveness of Remedies.
Section 7.98.080	Incorporation of the Mello-Roos Community Facilities Act of 1982.
Section 7.98.090	Administrative Appeals Procedures.
Section 7.98.100	Limitation of Actions.
Section 7.98.110	Definitions.
Section 7.98.120	Name and Nature of Districts.
Section 7.98.130	Elections.
Section 7.98.140	Authorized Facilities.
Section 7.98.150	Authorized Services.
Section 7.98.160	Alternate Procedure for Forming Special Tax Districts.
Section 7.98.170	Alternate Procedure for Approving Issuance of Bonds.
Section 7.98.180	Refunding Bonds -- Use of Savings.
Section 7.98.190	Authority to Advance Funds.
Section 7.98.200	Liberal Construction.
Section 7.98.210	Chapter Controlling.
Section 7.98.220	Savings Clause.

Section 7.98.010 **Title.**
This Chapter may be cited as the "Special Tax Financing Law."

Section 7.98.020 **Purpose -- Special Tax.**

A. This Chapter provides an alternative method of financing certain public and private capital facilities and municipal services.

B. Section 4 of Article XIII A of the California Constitution (Proposition 13) allows two-thirds of the qualified electors of the City to impose a special tax within the City, provided the special tax is not an *ad valorem* tax on real property or a transaction tax or a sales tax on the sale of real property within the City. The tax imposed by this chapter is a special tax which is authorized for elector approval by Section 4 of Article XIII A of the California Constitution.

C. The City of Berkeley (the "City") is a municipal corporation and chartered city duly organized and existing under a charter pursuant to which the City has the right and power to make and enforce all laws and regulations in respect to municipal affairs and certain other matters in accordance with and as more particularly provided in Sections 3, 5 and 7 of Article XI of the Constitution of the State of California and Section 115 of the Charter of the City (the "Charter"); and

D. The City Council of the City acting under and pursuant to the powers reserved to the City under Sections 3, 5 and 7 of Article XI of the Constitution of the State of California and Section 115 of the Charter, finds that the public interest and necessity require the establishment by this Chapter of a law for financing certain public and private capital facilities and services.

Section 7.98.030 Full Authority.

This Chapter is full authority for the City to undertake the matters specified herein.

Section 7.98.040 Additional Authority.

A. This Chapter is adopted pursuant to Section 115 of the Charter of the City. In proceedings had pursuant to this Chapter, which are a municipal affair, any general laws referred to in this Chapter are deemed a part of this Chapter.

B. The provisions of this Chapter shall not affect or limit any other provisions of law authorizing or providing for the furnishing of public and private capital facilities or services, or the raising of revenue for these purposes. The City may use the provisions of this Chapter instead of or in conjunction with any other method of financing a part or all of the cost of providing the authorized kinds of public and private capital facilities and municipal services.

Section 7.98.050 Actions and Determinations -- Proceedings.

The City Council may take any actions or make any determinations which it determines are necessary or convenient to carry out the purposes of this Chapter and which are not otherwise prohibited by law. Any procedure not expressly set forth in this Chapter, but deemed necessary or convenient to carry out any of its purposes, is authorized.

Section 7.98.060 Compliance with Chapter.

Any proceedings taken or special taxes levied pursuant to this Chapter shall not be

held invalid for failure to comply with the provisions of this Chapter provided such failure is not a constitutional defect.

Section 7.98.070 Nonexclusiveness of Remedies.

The remedies provided in this Chapter for the enforcement of any levy pursuant to this Chapter are not exclusive, and additional remedies may be provided at any time.

Section 7.98.080 Incorporation of the Mello-Roos Community Facilities Act of 1982.

The Mello-Roos Community Facilities Act of 1982 (Chapter 2.5, commencing with Section 53311 of Part 1, Division 2, Title 5 of the California Government Code) (the "Act"), as amended from time to time, is incorporated in and made a part of this Chapter. Except as otherwise provided by this Chapter, the purposes, mode and manner of levying and collecting special taxes shall be as prescribed in the Act.

Section 7.98.090 Administrative Appeals Procedures.

The City Council may provide by separate resolution for such appeals procedures as it may deem appropriate to facilitate the levy and enforcement of the special taxes. Such procedures may provide for the appeal of confirmed special taxes to the Finance Director or other official of the City responsible for the collection of the special taxes and grounds upon and times within which such appeals must be made. There shall be no appeal to the City Council from the decision of the appointed official or other official of the City. The taking of an administrative appeal under this Chapter shall be a precondition to bringing any action under Section 7.98.100 of this Chapter.

Section 7.98.100 Limitation of Actions.

A. The validity of any special tax levied under this Chapter shall not be contested in any action or proceeding unless the action or proceeding is commenced within 30 days after the effective date of any ordinance or resolution providing for the levy of such special tax. Thereafter, a special tax may be contested only for the purpose of challenging the accuracy of computation of the special tax. Any appeal from a final judgment in the action or proceeding shall be perfected within 30 days after the entry of judgment.

B. The validity of any bonds issued under this Chapter shall not be contested in any action or proceeding unless the action or proceeding is commenced within 30 days after the effective date of any ordinance or resolution authorizing the issuance of such bonds. Any appeal from a final judgment in the action or proceeding shall be perfected within 30 days after the entry of judgment.

Section 7.98.110 Definitions.

Unless the context otherwise requires, the terms defined in this Chapter shall have the following meanings. Terms defined in the Act but not defined in this Chapter have the meaning given them in the Act.

A. "Act" means the Mello-Roos Community Facilities Act of 1982 (Chapter 2.5,

commencing with Section 53311 of Part 1, Division 2, Title 5 of the California Government Code), as amended from time to time,

B. "City Council" means the City Council of the City of Berkeley.

C. "City" means the City of Berkeley.

D. "Services" means, in addition to the "Services" defined in Section 53317 of the Act, operation and maintenance of any improvements that may be financed under this Chapter or the Act, and any related studies, testing or monitoring.

Section 7.98.120 Name and Nature of Districts.

The name of any district created under this Chapter shall be substantially as follows: "City of Berkeley Special Tax District No. ____ (____)."

Section 7.98.130 Elections.

For purposes of any election herein, unless otherwise waived by unanimous action of all qualified electors, the time for the conduct of the election shall be not less than 30 nor more than 120 days from the adoption of the Resolution of Formation or other resolution ordering such election. For purposes of any such election, the City Clerk shall be the election official responsible for conducting and canvassing such election.

Section 7.98.140 Authorized Facilities.

In addition to the facilities that may be financed under the Act, special taxes may be levied and bonds may be issued to finance and refinance the acquisition, installation and improvement of energy efficiency and renewable energy improvements to or on real property and in buildings, whether such real property or buildings are privately or publicly owned. Work on privately owned buildings and on privately owned real property may only be financed by a special tax levy if all of the votes cast on the question of levying the special tax are in favor of levying the special tax, or with the prior written consent to the special tax of all of the owners of each property that may be subject to the special tax, in which case the prior written consent shall be deemed to constitute a unanimous vote in favor of the special tax and any associated bonded indebtedness.

Section 7.98.150 Authorized Services.

It is hereby specifically provided that in proceedings under this Chapter to finance Services, the limitations set forth in the penultimate paragraph of Section 53313 of the Act shall not apply.

Section 7.98.160 Alternate Procedure for Forming Special Tax Districts.

A. As an alternate and independent procedure for forming a special tax district, the City Council may form a special tax district that initially consists solely of territory proposed for annexation to the special tax district in the future, with the condition that a parcel or parcels within that territory may be annexed to the special tax district and subjected to the special tax only with the unanimous approval of the owner or owners of such parcel or parcels at the time that such parcel or those parcels are annexed. In such case, the City Council shall follow the procedures set forth in the Act for the

formation of a community facilities district, with the following exceptions:

1. The City Council shall not be obligated to specify the rate or rates of special tax in the resolution of intention or the resolution of formation, provided that the rate of special tax applicable to a parcel or parcels shall be specified in the unanimous approval described in this Section relating to such parcel or parcels.

2. In lieu of approval pursuant to an election held in accordance with the procedures set forth in this Chapter and in Sections 53326, 53327, 53327.5 and 53328 of the Act, the appropriations limit for the special tax district, the applicable rate, method of apportionment and manner of collection of special tax and the authorization to incur bonded indebtedness for the special tax district shall be specified and approved by the unanimous approval of the owner or owners of each parcel or parcels at the time that such parcel or parcels are annexed to the special tax district. No additional hearings or procedures are required, and such unanimous approval shall be deemed to constitute a unanimous vote in favor of the appropriations limit for the special tax district, the authorization to levy the special tax on such parcel or parcels and the authorization to incur bonded indebtedness for the special tax district.

3. This subsection establishes the applicable protest provisions in the event the City forms a special tax district pursuant to the procedures set forth in this Section. If 50 percent or more of the registered voters, or six registered voters, whichever is more, residing within the territory proposed to be annexed to the special tax district in the future, or if the owners of one-half or more of the area of land proposed to be annexed in the future and not exempt from the special tax, file written protests against establishment of the special tax district, and protests are not withdrawn so as to reduce the protests to less than a majority, no further proceedings to form the special tax district shall be undertaken for a period of one year from the date of decision of the City Council on the issues discussed at the hearing. If the majority protests of the registered voters or of the landowners are only against the furnishing of a specified type or types of facilities or services within the district, or against levying a specified special tax, those types of facilities or services or the specified special tax shall be eliminated from the resolution of formation.

4. The City Council shall not record a notice of special tax lien against any parcel or parcels in the special tax district until such time as the owner or owners of such parcel or parcels have given their unanimous approval of such parcel or parcels' annexation to the special tax district, at which time the notice of special tax lien shall be recorded against such parcel or parcels as set forth in Section 53328.3 of the Act.

B. Notwithstanding the provisions of Section 53340 of the Act, after adoption of the resolution of formation for a special tax district described in subdivision (a) hereof, the City Council may, by ordinance, provide for the levy of the special taxes on parcels that will annex to the special tax district at the rate or rates to be approved by unanimous approval of the owner or owners of each parcel or parcels to be annexed to the special tax district and for apportionment and collection of the special taxes in the manner specified in the resolution of formation. No further ordinance shall be required even

though no parcels may then have annexed to the special tax district.

C. Notwithstanding the provisions of Section 7.98.100, an action to determine the validity of any special taxes levied pursuant to this Chapter and authorized pursuant to the procedures set forth in this Section shall be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure but shall, notwithstanding the time limits specified in Section 860 of the Code of Civil Procedure, be commenced within 30 days after the adoption of the resolution of formation if the action is brought by an interested person pursuant to Section 863 of the Code of Civil Procedure. Any appeal from a judgment in that action or proceeding shall be commenced within 30 days after entry of judgment.

Section 7.98.170 Alternate Procedure for Approving Issuance of Bonds.

A. As an alternate and independent procedure for conducting an election on the proposition to authorize bonded indebtedness for a special tax district formed pursuant to Section 7.98.160, and in lieu of the procedure set forth in this Chapter and in Sections 53353.5, 53354 and 53355 of the Act, the proposition to authorize bonded indebtedness may be approved by the owner or owners of a parcel or parcels of property at the time that the parcel or parcels are annexed to the special tax district pursuant to the unanimous approval described in 7.98.160. No additional hearings or procedures are required, and such unanimous approval shall be deemed to constitute a unanimous vote in favor of such proposition.

B. Notwithstanding the provisions of Section 7.98.100, an action to determine the validity of any bonds issued pursuant to this Chapter and authorized pursuant to the procedures set forth in this Section 7.98.170 shall be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure but shall, notwithstanding the time limits specified in Section 860 of the Code of Civil Procedure, be commenced within 30 days after the effective date of the resolution described in Section 53351 of the Act if the action is brought by an interested person pursuant to Section 863 of the Code of Civil Procedure. Any appeal from a judgment in that action or proceeding shall be commenced within 30 days after entry of judgment.

Section 7.98.180 Refunding Bonds -- Use of Savings.

Bonds may be issued under this Chapter to refund any outstanding special tax bonds, whether fixed lien bonds or any other improvement or special tax bonds, including *ad valorem* assessment or revenue bonds. Any savings achieved through the issuance of refunding bonds may be used by the City in any manner that it determines to be in the best financial interests of the City.

Section 7.98.190. Authority to Advance Funds.

In connection with the issuance of bonds pursuant to this Chapter, the City Council may determine and may declare in the resolution authorizing the issuance of the bonds that it will obligate itself to advance available surplus funds in the amount of any delinquent special taxes as an advance recoverable upon payment of delinquent special taxes. For purposes of this section, "available surplus funds" shall mean any surplus moneys held by the City at the end of each fiscal year in excess of the amounts required

to pay lawful municipal obligations of the City for that fiscal year, all as determined by the City Council in its sole discretion, whose determination shall be final and binding.

Section 7.98.200 Liberal Construction.

This Chapter is to be liberally construed.

Section 7.98.210 Chapter Controlling.

To the extent that the provisions of this Chapter are inconsistent with the provisions of any general statute or special act or parts thereof the provisions of this Chapter shall be deemed controlling.

Section 7.98.220 Savings Clause.

The provisions of this Chapter shall not apply to any person, association, corporation or to any property as to whom or which it is beyond the power of the City Council to impose the tax herein provided. If any sentence, clause, section or part of this Chapter, or any tax against any individual or any of the several groups specified herein is found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality, or invalidity shall affect only such clause, sentence, section or part of this Chapter and shall not affect or impair any of the remaining provisions, sentences, clauses, sections or other parts of this chapter. It is hereby declared to be the intention of the City Council of the City of Berkeley that this Chapter would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included herein.

Section 2. Posting.

Copies of this Bill shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.