

FILED
OFFICE OF THE CITY CLERK
OAKLAND

CITY OF OAKLAND
AGENDA REPORT

2009 FEB 11 PM 4:17

TO: Office of the City Administrator
ATTN: Dan Lindheim, City Administrator
FROM: Finance and Management Agency
DATE: February 24, 2009

RE: **A Resolution Submitting to the Voters at the June 2, 2009 Special Election a Proposed Ordinance Amending the Real Property Transfer Tax, Chapter 4.20 of the Oakland Municipal Code, to Clarify Application of the Tax to Transfers of Real Estate Resulting from Changes in the Ownership and Control of Corporations and Other Legal Entities Without Increasing the Tax Rate; to Remove the Current Requirement of Conformity to Statewide Rules; to Add a Definition of "Person" to the Tax; Requesting the Services of the Registrar of Voters; and Directing the City Clerk to Take Any and All Actions Necessary Under Law to Prepare for and Conduct the Special Election**

SUMMARY

Staff has prepared a proposed amendment to the Real Property Transfer Tax Ordinance that will amend Chapter 4.20 of the Oakland Municipal Code in order to tax transfers of real estate resulting from corporate mergers, consolidations, and acquisitions without increasing the tax rate. The proposed amendment will ensure fair and equitable treatment of all taxpayers and help raise much needed revenue to support essential public services such as Police, Fire and Public Works.

Staff is recommending that the proposed amendment be scheduled at the next available special election on June 2, 2009. The City Council would need to approve the placement of this item on the ballot by March 6, 2009.

FISCAL IMPACT

The proposed amendment would generate additional General Purpose Fund revenue to support essential City services such as Police, Fire and Public Works. Due to the dramatic change in economic conditions, it is difficult to project how much additional tax revenue would be realized from corporate merger, consolidation, and acquisition activities. It is likely that, as evidenced by recent corporate financial mergers and consolidations, some activity will continue at a reduced level and produce about \$500,000 to \$1,000,000 annually over the next two years. It is important to note that since corporate mergers, consolidation, and acquisitions are difficult to monitor; it will require extraordinary oversight and enforcement efforts to capture this revenue.

Item: _____
Finance and Management Committee
February 24, 2009

BACKGROUND

The Real Property Transfer Tax, Chapter 4.20 of the Oakland Municipal Code was first adopted in 1974 and has been amended twice, once in 1993, and again in 2000. Staff believe it was always the intent of the City Council to apply the Real Property Transfer Tax to all forms of property transfers, including corporate mergers, consolidation, and acquisition.

Over the past few years, staff identified and pursued collection enforcement against a number of large corporate real estate transfers. These transactions had the potential to generate over \$12,000,000 in General Purpose Fund revenue. During the administrative review process, the applicability of the existing Real Property Transfer Tax Ordinance to transfers of real property that occur as a result of changes in corporate mergers, consolidations, and acquisitions has been challenged and called into question.

KEY ISSUES AND IMPACTS

Staff believes it is and was the intent of the City Council to apply the Real Estate Property Transfer Tax to all real estate transfers. This understanding is consistent with the principle of well established taxation policy to apply taxes fairly and equitably. The City relies on this tax as a major revenue source to fund essential City services such as Police, Fire and Public Works.

Staff was unable to pursue enforcement and collection of this tax on specific corporate real property transfers due to potential legal challenges and thus was unable to collect significant tax revenue over recent years. The main legal concern focused on the lack of explicit language in the Real Property Transfer Tax Ordinance indicating that the tax specifically applies to transfers of real property interests resulting from corporate mergers, consolidations, or acquisitions. Also, the current Ordinance contains language referring to conformance with statewide rules related to the documentary transfer tax that has caused ambiguity and opened up potential challenges to the application of the Real Property Transfer Tax. Some of the significant corporate real property transfers that the City was unable to pursue included mergers, consolidations, and acquisitions of major banks, oil companies, manufacturers, utilities and retailers that were all based outside of Oakland.

The City is projecting significant budget deficits for the next two fiscal years. As part of an overall financial recovery strategy, recovering maximum revenue from all existing revenue sources, as well as considering other revenue generating measure to ensure continuation of essential City services, would serve the City's best interests. Ensuring the capture of Real Property Transfer Tax on corporate real estate transfers should be a critical part of this recovery strategy.

The City should act immediately to amend the City's Real Property Transfer Tax Ordinance to clarify the ordinance and explicitly include taxation of real estate transfers resulting from corporate mergers, consolidations, and acquisitions. Staff is recommending that the City Council

approve a resolution placing such an amendment on the next special election likely to be scheduled for June 2, 2009.

Voter Approval

Under Proposition 218, any change to a tax ordinance that could result in a tax increase for any taxpayer within the taxing jurisdiction must be approved by the voters. "The election required by this subdivision shall be consolidated with a regularly scheduled special election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body." The next scheduled Oakland special election is likely to occur on June 2, 2009. Accordingly, the proposed amendment to Chapter 4.20 seeking voter approval for taxation of real estate transfers resulting from corporate mergers, consolidations, and acquisitions may be placed on the ballot by resolution of the Council.

POLICY DESCRIPTION

Amending the language in the Real Property Transfer Tax Ordinance to clarify the City's intent and ensure the right to collect Real Property Transfer Tax on all real estate transfers, including corporate mergers, consolidations, and acquisitions, is vital to the City's ability to provide essential services such as Police, Fire, and Public Works.

Gaining voter approval for ensuring fair and equitable treatment and application of the Real Property Transfer Tax as it applies to corporate mergers, consolidations, and acquisitions will address potential legal challenges that could threaten the viability of an essential revenue source.

SUSTAINABLE OPPORTUNITIES

Economic: Action on this item clarifies the intent of the City Council in applying the tax and collecting general purpose fund revenue to support essential municipal services such as Police, Fire, and Public Works.

Environmental: There are no environmental opportunities resulting from the recommended changes to the Ordinance.

Social Equity: The Ordinance amendment will promote the fair and equitable treatment of all taxpayers.

DISABILITY AND SENIOR CITIZEN ACCESS

There are no impacts on disability and senior access from the recommended changes to the Ordinance.

Item: _____
Finance and Management Committee
February 24, 2009

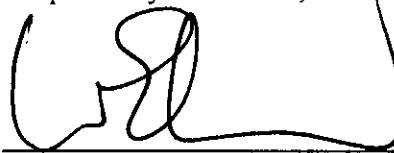
RECOMMENDATION AND RATIONALE

Staff recommends the City Council approve the proposed resolution placing the proposed ordinance amending Chapter 4.20 of the Oakland Municipal Code before the voters at a June 2, 2009 special election. This action is necessary to eliminate potential legal issues and to ensure collection of tax revenue that is necessary for the City to continue to provide vital public services.

ACTION REQUESTED OF THE CITY COUNCIL

Staff recommends the City Council approve the proposed resolution placing the proposed ordinance amending Chapter 4.20 of the Oakland Municipal Code before the voters at a June 2, 2009 special election.

Respectfully submitted,



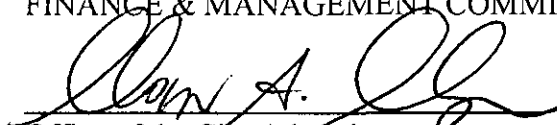
WILLIAM E. NOLAND

Director, Finance and Management Agency

Prepared by:

Terry Adelman, Revenue Manager
Revenue Division

APPROVED AND FORWARDED TO THE
FINANCE & MANAGEMENT COMMITTEE:


Office of the City Administrator

FILED
OFFICE OF THE CITY CLERK
OAKLAND
INTRODUCED BY COUNCIL MEMBER _____
2009 FEB 11 PM 4:11

APPROVED AS TO FORM AND LEGALITY

Kevin A. Kelly
CITY ATTORNEY

OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

A RESOLUTION SUBMITTING TO THE VOTERS AT THE JUNE 2, 2009 SPECIAL ELECTION A PROPOSED ORDINANCE AMENDING THE REAL PROPERTY TRANSFER TAX, CHAPTER 4.20 OF THE OAKLAND MUNICIPAL CODE, TO CLARIFY APPLICATION OF THE TAX TO TRANSFERS OF REAL ESTATE RESULTING FROM CHANGES IN THE OWNERSHIP AND CONTROL OF CORPORATIONS AND OTHER LEGAL ENTITIES WITHOUT INCREASING THE TAX RATE; TO REMOVE THE CURRENT REQUIREMENT OF CONFORMITY TO STATEWIDE RULES; TO ADD A DEFINITION OF "PERSON" TO THE TAX; REQUESTING THE SERVICES OF THE REGISTRAR OF VOTERS; AND DIRECTING THE CITY CLERK TO TAKE ANY AND ALL ACTIONS NECESSARY UNDER LAW TO PREPARE FOR AND CONDUCT THE SPECIAL ELECTION.

WHEREAS, pursuant to Chapter 4.20 of the Oakland Municipal Code, the City of Oakland imposes a real property transfer tax on transfers of real property located in Oakland; and

WHEREAS, the Council determines that although not expressly stated in the language of the ordinance, it was the intent of the Council to impose the tax on all transfers of real property unless expressly excepted from taxation; and

WHEREAS, transfers of real property occurring as a result of changes in the ownership of corporations, and other legal entities, through mergers, consolidations, and acquisitions escape taxation, while Oakland homeowners and small businesses pay the real estate transfer tax; and

WHEREAS, the Council determines that it is in the best interest of the City of Oakland to submit an amended real property transfer tax to the voters that will clarify the intent of the ordinance to fairly and equally tax all transfers of real property, including transfers of real property that result from changes in ownership and control of corporations and other legal entities; and

WHEREAS, the Council determines that statewide rules sometimes conflict with Oakland's interests as an independent charter city and that the current requirement of conformity with statewide rules should be removed; and

WHEREAS, accordingly, without increasing the tax rate, the City Council of the City of Oakland desires to amend Chapter 4.20, sections 4.20.020 and 4.20.021 of the Oakland Municipal; and

WHEREAS, all revenues received from the tax will be deposited in the general fund of the City to be expended for general fund purposes; now, therefore, be it

RESOLVED: That the City Council of the City of Oakland does hereby request that the Board of Supervisors of Alameda County order the Special Municipal election on June 2, 2009, consistent with the provisions of state law; and, be it

FURTHER RESOLVED: That the City Council of the City of Oakland does hereby submit to the voters at the June 2, 2009 special election the text of the proposed ordinance, which shall be as follows:

AN ORDINANCE AMENDING THE REAL PROPERTY TRANSFER TAX, CHAPTER 4.20 OF THE OAKLAND MUNICIPAL CODE, TO CLARIFY APPLICATION OF THE TAX TRANSFERS OF REAL ESTATE RESULTING FROM CHANGES OWNERSHIP AND CONTROL OF CORPORATIONS AND OTHER LEGAL ENTITIES.

Be it ordained by the People of the City of Oakland:

Section 1. The Municipal Code is hereby amended to add, delete, or modify sections as set forth below (section numbers and titles are indicated in **bold type**; additions are indicated by underscoring and deletions are indicated by strike-through type; portions of the regulations not cited or not shown in underscoring or strike-through type are not changed).

Section 2. Code Amendment. Section 4.20.020 of the Oakland Municipal Code is hereby amended to read as follows:

4.20.020 Imposition of tax.

There is imposed a tax on all transfers by deeds, instruments, writings, or any other document, or changes in control and ownership of legal entities, by which any lands, tenements or other interests in real property located in the city, are or is granted, assigned, transferred, or otherwise conveyed to or invested in a transferee, or transferees thereof, which shall be levied at the rate of one and one-half (1.50) percent of the value of consideration.

~~There is imposed a tax on all transfers by deeds, instruments, writings, or any other document by which any lands, tenements or other interests in real property located in the city, are or is granted, assigned, transferred, or otherwise conveyed to or invested in a transferee, or transferees thereof, which shall be levied at the rate of one and one-half (1.50) percent of the value of consideration. Such tax shall be administered to conform to the statewide rules governing the documentary transfer tax as stated in California Revenue and Taxation Code~~

~~Sections 11911 through 11930, as codified on the date of passage of the ordinance codified in this section, including the exemptions from tax that are itemized therein, except where the exemptions appearing within this Chapter 4.20, provide greater protection to the taxpayer.~~

Section 3. Code Amendment. Section 4.20.021 of the Oakland Municipal Code is hereby amended to read as follows:

4.20.030 Definitions.

As used in this chapter:

"Changes in control and ownership of legal entities" means any direct or indirect acquisition or transfer of ownership interest or control in a legal entity that constitutes a change in ownership or transfer of the real property of the entity under California Revenue and Taxation Code section 64, as such statute reads and is interpreted by the California Board of Equalization on June 3, 2009.

"Person" and "persons" mean any natural person, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, co-partnership, joint venture, club, company, joint stock company, business trust, limited liability company, municipal corporation, political subdivision of the state of California, domestic or foreign corporation, association, syndicate, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise, and the United States or any instrumentality thereof, and any natural person, who as an individual or with a spouse, owns fifty-one (51%) percent or more of the capital stock of a corporation obligated to file a declaration and pay tax pursuant to this chapter; and in addition, is a person with the power to control the fiscal decision-making process by which the corporation allocates funds to creditors in preference to its tax obligations under the provisions of this chapter. A person as defined herein, who is also an officer or director of a corporation obligated to file declarations and pay tax pursuant to this chapter, shall be presumed to be a person with the power to control the fiscal decision-making process. Whenever the term "person" is used in any clause prescribing and imposing a penalty, the term as applied to association shall mean the owners or part owners thereof, and as applied to corporation, the officers thereof.

"Real property" and "realty" mean real property as defined by and under the laws of the state of California.

"Value of consideration" means the total consideration, valued in money of the United States, paid or delivered, or contracted to be paid or delivered in return for the transfer of real property, including the amount of any indebtedness existing immediately prior to the transfer which is secured by a lien, deed of trust or other encumbrance on the property conveyed and which continues to be secured by such lien, deed of trust or encumbrances after such transfer, and also including the amount of any indebtedness which is secured by a lien, deed of trust or encumbrance given or placed upon the property in connection with the transfer to secure the payment of the purchase price or any part thereof which remains

unpaid at the time of transfer.

"Value of the consideration" also includes the amount of any special assessment levied or imposed upon the property by a public body, district or agency, where such special assessment is a lien or encumbrance on the property and the purchaser or transferee agrees to pay such special assessment or takes the property subject to the lien of such special assessment. The value of any lien or encumbrance of a type other than those which are hereinabove specifically included, existing immediately prior to the transfer and remaining after such transfer, shall not be included in determining the value of the consideration. If the "value of the consideration" cannot be definitely determined, or is left open to be fixed by future contingencies, "value of the consideration" shall be deemed to mean the fair market value of the property at the time of transfer, after deducting the amount of any lien or encumbrance, if any, of a type which would be excluded in determining the "value of the consideration" pursuant to the above provisions of this section.

Unless a transfer is a "gift", i.e., "free and clear" of liens or encumbrances, it is presumed that the value of consideration of a given property being transferred is the fair market value of that property, unless circumstances supporting a departure therefrom can be furnished to the sole satisfaction of the Director or his or her designee(s).

Section 4. Severability. Should any provision of this Ordinance, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions hereof are severable.

Section 5. Majority Approval; Effective Date. This Ordinance shall be effective only if approved by a majority of the voters voting thereon and shall go into effect ten (10) days after the vote is declared by the City Council.

Section 6. Council Amendments. The City Council of the City of Oakland is hereby authorized to amend Sections 4.20.020 and 4.20.021 of the Oakland Municipal Code as adopted by this Ordinance in any manner that does not increase the rate of the real estate transfer tax, otherwise constitute a tax increase for which voter approval is required by Article XIII C of the California Constitution or entirely dispense with the requirement for independent audits stated in Section 4.28.190.

; and be it

FURTHER RESOLVED: That in accordance with the Elections Code and Chapter 3 of the Oakland Municipal Code, the City Clerk shall fix and determine a date for submission of arguments for or against said proposed ordinance, and said date shall be posted in the Office of the City Clerk; and be it

FURTHER RESOLVED: That in accordance with the Elections Code and Chapter 3 of the Oakland Municipal Code, the City Clerk shall provide for notice and publication as to said proposed ordinance in the manner provided for by law; and be it

FURTHER RESOLVED: That the City Council does hereby request that the Registrar of Voters of the County of Alameda perform necessary services in connection with said election; and be it

FURTHER RESOLVED: That the City Clerk is hereby directed to obtain printing, supplies and services as required; and be it

FURTHER RESOLVED: That the City Clerk is hereby authorized to provide such other services and supplies in connection with said election as may be required by the Statutes of the State of California and the Charter of the City of Oakland; and be it

FURTHER RESOLVED: That the City Clerk and City Administrator are hereby authorized and directed to take any and all actions necessary under law to prepare for and conduct the special election and appropriate all monies necessary for the City Administrator and City Clerk to prepare and conduct the June 2, 2009 special election, consistent with law.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2009

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, QUAN, REID, AND
PRESIDENT BRUNNER

NOES-

ABSENT-

ABSTENTION

Attest: _____
LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California