Alternative Means for Financing Convention Center Expansion
Summary Overview of Legal Issues Presented

General Principles

The below-listed alternatives have been variously described in the Task Force presentations as a tax, a fee or an assessment. Essential to understanding the legal viability of any of these alternatives, is an understanding of the differences between these concepts and the different requirements applicable to each. In general, taxes are imposed for revenue raising purposes, rather than in return for (1) a specific benefit conferred or a privilege granted, or (2) as a means to offset the actual costs of a legitimate regulatory or police power activity. The term "tax," however, has no fixed meaning, and the distinction between taxes and fees is frequently blurred. *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal. 4th 866, 873-874.

Pursuant to California Constitution, Article XIIIC (Proposition 218), any new or increased tax imposed by a local agency, for a particular purpose (as opposed to a tax imposed for general revenue raising purposes) is a special tax, and must be submitted to the electorate and approved by a two-thirds majority of those voting on the tax. Many of the alternatives discussed below would appear to be special taxes requiring a two-thirds voter approval.

Whether a charge is a "fee" or "assessment," as opposed to a special tax requiring a two-thirds vote will depend on whether there is a specific relationship between those who are paying the fee or assessment, and the use of the proceeds. For example, a "fee" is usually intended to pay the cost of regulatory activity, and the difference between a "fee" and a tax has been explained as follows: "where a statute contains no regulatory provisions, but only provides for the subjects and amounts of taxation, it is a tax. *Oakland Raiders v. City of Berkeley* (1976) 65 Cal. App. 3d 623, 627.

Similarly, an assessment generally is imposed upon persons who will in return receive a "special benefit" from the proceeds of the assessment. An assessment must also generally be proportionate to the benefit received – that is, each parcel or business assessed must be assessed in proportion to the extent of the special benefit they receive. See, *Silicon Valley Taxpayers' Ass'n. v. Santa Clara County Open Space Authority* (2008) 44 Cal. 4th 431, 456; see also Sts & Hwys Code section 36536. Both of the assessments discussed below – either a new or a modified TMD assessment -- could qualify as "assessments" rather than special taxes. Although they would not have to be approved by a two-thirds vote of the electorate, they would have to follow established statutory procedures in order to be valid.

1) Citywide increase in the TOT

Increasing the TOT to fund the expansion would be considered a special tax, requiring approval by two-thirds of the electorate of the City voting on the measure.

2) Rental Car surcharge

The validity of this kind of charge, and the applicable legal principles, would depend in part on whether it was structured as a fee or a tax. If it is structured as a fee, it should bear some relation to the impacts of the service being taxed, and not just used as a revenue-generating vehicle. If it is structured as a tax, it likely requires a vote of the electorate, and should be analyzed further with respect to any limitations that may apply under state law (including limitations on local sales and use taxes).

Further, the jurisdiction of the City to impose a fee or a tax on rental car transactions taking place on airport or Port District property must be further researched, with input solicited from the attorneys representing these separate governmental entities. Both the San Diego County Regional Airport Authority and the Unified Port District are separate local agencies with many of the powers otherwise held by the City – thus, the land on which many of the airport-related rental car transactions takes place is subject to potentially overriding jurisdictional powers of those two entities. Further research and consultation with the entities is needed to confirm the extent to which the City would retain the right to impose a fee or a tax for the rental car transactions taking place on their properties.

3) Ticket tax/fee on tourist-related activities (e.g. Sea World, Zoo)

A "fee" on tickets sold to users of Sea World or the Zoo would generally have to be supported by a demonstrable relationship between those users and the use of the revenues generated by the fee. If that relationship is not shown, and if the objective is seen as raising revenue, it will be treated as a tax requiring voter approval. There may also be leasehold or other contractual provisions that affect the rights of the operating parties vis-à-vis fees or taxes (see, e.g. the PETCO agreement, discussed below).

4) Ticket tax/fee on sports venues (e.g. PETCO Park, Cricket Amphitheater, Cox Arena)

Each of these particular venues presents its own legal issues. PETCO Park, for example, is governed by a series of agreements between the City of San Diego and the Padres. These agreements are very specific as to the powers and duties of each entity. Specifically with respect to a ticket tax, fee or assessment, section 28.7 of the PETCO Park Joint Use and Management Agreement between the City and the Padres expressly provides that if the City imposes any new or increased admission, ticket or entertainment taxes or fees against the Padres, the Padres will get full credit for the amount of such tax or fee paid, against other sums the Padres may owe the City under the Agreement -- essentially negating the benefit of such new taxes or fees from the Padres for Ballpark Events. There are exceptions to this repayment right, (1) for assessments levied pursuant to the establishment of a property-based assessment district in which the Padres had an opportunity to participate as a voter; and (2) where the tax, fee or assessment is "generally applicable" (note that, in the JUMA, an admission, ticket or entertainment charge is by definition *never* going to qualify as "generally applicable").

Cricket Amphitheater is located within the boundaries of the City of Chula Vista; as such the City of San Diego would appear to have no jurisdictional basis for imposing a tax or a fee at that venue.

Cox Arena is located on the grounds held by the California State University system; the City would not appear to have the power to regulate the use or management of the property (following case law presenting similar facts, the imposition of a fee is probably not viable). The City may be able to impose a tax on the business conducted within the Arena; however, the tax must be imposed on the Cox Arena businesses on the same basis as it is imposed on other entities who are engaged in similar businesses. That is, if the City imposes a tax on entertainment events held at Cox Arena pursuant to a contract or lease agreement between the entertainer and the CSU system, then the same tax should be applied to any similar entertainment events taking place at other venues within the City. As a tax, any such measure would be subject to a vote of the electorate.

5) Charge on taxicab airport pick-ups and drop-offs

The same concerns that apply to any imposition of a rental car transaction fee or tax, would apply to taxicab transactions occurring on airport property – that is, the Airport Authority may have exclusive jurisdiction over the charges that can be added to a taxicab transaction taking place on airport property.

6) Extension or increase of existing TMD

The existing Tourism Marketing District was created by assessing lodging businesses located with the defined District, for the purpose of funding marketing efforts to increase tourism and promote the City as a tourist, meeting, convention and special event destination. As currently structured, the funds from the TMD would not be authorized to fund the construction of the expansion. Further, if the construction of the expansion were added as a "program" to be funded from the assessments, then the Management District Plan would have to be amended to show how the proposed increase in assessments would confer a fair and proportional special benefit on the assessees. An argument could be made that an even percentage distribution of increased assessment (for example, all businesses going from 2% to 3%) would *not* correlate into a proportionate benefit to the assessed businesses, because some businesses will benefit more directly from the expansion than would others. As such, a more detailed assessment engineering effort would be required, to develop an assessment formula that meets the constitutional and other legal requirements for such assessment districts.

7) New TMD-type assessment district

A new type of assessment district could be formed, assuming it did not duplicate the boundaries or functions of the existing TMD and otherwise met the structural criteria in state statutes and City ordinances. Regardless of the basis for the assessment (property or business, or both as is allowed under the 1994 Act, an assessment engineer would have to

determine (1) the "special benefit" of the expansion to the proposed assessees, and (2) the legally proportionate allocation of the cost of that special benefit among the assessees. The City already has in place a TMD ordinance that could be used or amended to allow the implementation of this kind of assessment district.

8) Assessment or tax on food/beverage sales in vicinity of Convention Center

The California Constitution grants the state the exclusive power to tax alcoholic beverage sales; a local tax on alcoholic beverage sales is thus preempted by state law. *City of Oakland v. Superior Court* (19996) 45 Cal. App. 4th 740, 760-761. Any permissible sales tax imposed on the sale of food would be a special tax, subject to the two-thirds voter approval requirement of Proposition 218.