



# CITY COUNCIL AGENDA REPORT

MEETING DATE: MAY 2, 2017

ITEM NUMBER: PH-2

**SUBJECT:** CODE AMENDMENT CO-17-03 AMENDING ARTICLE 4 OF CHAPTER XII OF TITLE 13 OF THE COSTA MESA MUNICIPAL CODE AS ADOPTED BY SECTION 5 OF MEASURE Z, ORDINANCE NO. 2016-07, RELATING TO THE OPEN SPACE AND PUBLIC PARK IMPACT FEES, AND AMENDING THE UNCODIFIED PORTION OF SECTION 5 OF MEASURE Z, ORDINANCE NO. 2016-07, RELATED TO THE CREATION, COMPOSITION AND NAME OF THE OPEN SPACE AND RECREATION ADVISORY COMMITTEE

**DATE:** APRIL 26, 2017

**FROM:** DEVELOPMENT SERVICES DEPARTMENT AND CITY ATTORNEY'S OFFICE

**PRESENTATION BY:** SHERI VANDER DUSSEN, AICP, INTERIM ASSISTANT DIRECTOR

**FOR FURTHER INFORMATION CONTACT:** Sheri Vander Dussen (714) 754-5617  
[Sheri.vanderdussen@costamesaca.gov](mailto:Sheri.vanderdussen@costamesaca.gov)

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## **RECOMMENDATION:**

1. Introduce for first reading Ordinance No. 17-xx adopting Code Amendment CO-17-03 to amend Article 4 of Chapter XII of Title 13 of the Costa Mesa Municipal Code as adopted by Section 5 of Measure Z, Ordinance No. 2016-07, relating to the open space and public park impact fees, and amending the uncodified portion of Section 5 of Measure Z, Ordinance No. 2016-07, related to the creation, composition and name of the Open Space and Recreation Advisory Committee, as presented to the Planning Commission (Attachment 1); or
2. Introduce for first reading Ordinance No. 17-xx adopting Code Amendment CO-17-03 to amend Article 4 of Chapter XII of Title 13 of the Costa Mesa Municipal Code as adopted by Section 5 of Measure Z, Ordinance No. 2016-07, relating to the open space and public park impact fees, and delete the uncodified portion of Section 5 of Measure Z, Ordinance No. 2016-07, in its entirety to remove the Open Space and Recreation Advisory Committee, as recommended by the Planning Commission (Attachment 3) (not recommended by staff); or
3. Transfer the duties of the Open Space and Recreation Advisory Committee to an existing City committee or commission.

## **ANALYSIS:**

The proposed ordinance follows the adoption of Section 5 of Measure Z at the November 8, 2016 election. Measure Z establishes an open space and public park impact fee and revises the name and composition of the Open Space & Recreation Advisory Committee.

### **Background**

Measures Y and Z both received a majority of votes in the November 8, 2016 election. Measure Y received the greatest number of total votes; therefore, the provisions of Measure Y control. Under Measure Y, any provision of Measure Z that does not directly conflict with the provisions of Measure Y is to be adopted – notwithstanding any contrary provisions in Measure Z. The only provision of Measure Z that does not directly conflict with the provisions of Measure Y is Section 5, Establishment of Open Space and Public Park Impact Fee and Open Space & Recreation Advisory Committee. While Measure Y can only be amended by the electorate, the initiative ordinance adopted by Measure Z may be amended or changed by the City Council in the normal manner for adoption of ordinances.

The Planning Commission conducted a public hearing on this code amendment on April 10, 2017. The Planning Commission recommended that the City Council adopt Section 2 of the draft ordinance, which incorporates the parks and open space impact fee into the Zoning Code. However, the Planning Commission expressed reservations about the creation of a new committee to advise the City Council regarding park fees to be collected pursuant to Measure Z. The Commissioners were primarily concerned that the existing Parks and Recreation Commission is to play no role in the allocation of these park fees. The Commissioners also expressed concern regarding the balance of interests represented in the new Youth Sports, Open Space & Recreation Advisory Committee (“YSOSRAC”). Technically, the composition or role of any advisory committee is not within the Planning Commission’s purview. Nevertheless, the Commission recommended that the City Council delete Section 3 from the ordinance. Section 3 addresses the creation of the advisory committee. The draft ordinance recommended by the Planning Commission is included as Attachment 3. An excerpt of the draft minutes from the Commission meeting is included as Attachment 4.

### **Proposed Ordinance**

The proposed ordinance codifies and amends provisions of Title 13, Chapter XII, Article 4, of the Costa Mesa Municipal Code relating to the establishment of an open space and public park impact fee. Article 4 was adopted by the voters; however, it has not yet been codified, and as drafted Article 4 is not suitable to codification in the Zoning Code. Accordingly, staff have proposed non-substantive revisions that divide Article 4 into three separate sections. Staff are also proposing one substantive revision to make the open space and public park impact fee due upon issuance of building permits, rather than a certificate of occupancy. Second, the ordinance revises the title and composition of the seven-member Open Space & Recreation Advisory Committee (“OSRAC”) by combining it

with the Youth Sports Advisory Committee to adopt by ordinance the new seventeen-member committee called the Youth Sports, Open Space & Recreation Advisory Committee (“YSOSRAC”) that has already been established by the City Council. The role of the YSOSRAC is to advise the Council on expenditures of the Open Space and Public Park Impact Fee, as well as to advise the City Council on capital improvement projects, facility status and policy review, as related to youth sports, open space and recreation, as needed. This latter revision is required to allow the entire YSOSRAC to take action on Public Park Impact Fee matters. Because the Open Space and Public Park Impact Fee itself is subject to the Mitigation Fee Act, the City must conduct a study to determine the fees to be imposed.

### **Adoption of the Non-Conflicting Provisions of Measure Z.**

As a general rule of statutory construction, two initiatives relating to the same subject matter must be read together and reconciled whenever possible. See *Ctr. for Public Interest Law v. Fair Political Practices Com* (1989) 210 Cal.App.3d 1476, 1480; *Estate of Gibson* (1983) 139 Cal.App.3d 733. The California Supreme Court has stated that “[w]hen practicable, a court should construe two or more initiative measures as complementary or supplementary rather than as competing or conflicting, so that the expressed will of the voters is given the greatest possible deference.” *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 988–989.

Here, Measure Z presents itself as conflicting with Measure Y, because it contains the following conflict language:

*This Measure is intended to comprehensively regulate the same subject as the Initiative – the General Plan, Specific Plan(s), Overlay Plan(s) and applicable provisions of the Municipal Code. If a majority of voters approve both the Initiative and the Costa Mesa Measure for Sensible Community Development and Development-Funded Open Space and Recreation, the ballot measure with the higher percentage of the vote will control. Therefore, if both measures are approved and the Costa Mesa Measure for Sensible Community Development and Development-Funded Open Space and Recreation receives a higher percentage of the vote than the Initiative, none of the changes or additions proposed by the Initiative will be implemented.* (Emphasis added.)

However, while Z presents itself as directly conflicting, the language of Y is different, and requires that the specific provisions of other measures that are not in direct conflict with Y to be put into effect – notwithstanding the conflict language of Z.

Measure Y, Sec.\_\_\_\_ 12. *Consistency with Other Ballot Measures*, states:

*If another ballot measure is placed on the same ballot as this measure and deals with the same subject matter, and if both measures pass, the voters intend that both measures shall be put into effect, except to the extent that specific provisions of the measures are in direct conflict. In the event of a direct conflict, the measure which obtained more votes will control as to the directly conflicting provisions only. The voters expressly declare this to be*

their intent, regardless of any contrary language in any other ballot measure. (Emphasis added.)

The net effect of the controlling language of Measure Y when compared to Measure Z is that any provision of Z that does not directly conflict with Y is to be adopted. However, this does not mean that non-conflicting provisions of Measure Z get adopted into Measure Y and added to the Municipal Code as a part of Y. Rather, any non-conflicting provision of Z would be controlled by the provisions of Z and would be adopted into a separate portion of the Municipal Code. While Measure Y requires that any amendments to Measure Y be approved by the voters, Measure Z allows the City Council to amend the provisions of Z in the normal manner for City ordinances.

The only provision of Measure Z that does not directly conflict with the provisions of Measure Y is Section 5, Establishment of Open Space and Public Park Impact Fee and Open Space & Recreation Advisory Committee. Section 5 adds a new Article 4 to Chapter XII, Special Fee Assessments. It also creates a new Open Space & Recreation Advisory Committee as an advisory body of limited duration to the City Council whose purpose is to advise the Council on the expenditure of the fees collected by this new Article 4. Section 5, Establishment of Open Space and Public Park Impact Fee and Open Space & Recreation Advisory Committee, provides:

*By this Measure, the People of the City of Costa Mesa hereby add Article 4, to Chapter XII of Title 13 to the City's Municipal Code for the purpose of establishing a new open space and public park impact fee (the "Open Space and Public Park Impact Fee" or "Fee"). The Fee shall be applicable to all new development located both north of the 405 freeway and west of Fairview Drive. The Open Space and Public Park Impact Fee shall be due upon issuance of a certificate of occupancy. The Open Space and Public Park Impact Fee is established to offset the impact of development upon recreational opportunities and shall be used by the City for the purpose of increasing active recreation, open space and public park facilities within the City, which uses may include, but would not be limited to, the maintenance and development of Fairview Developmental Center upon its anticipated closure.*

*The amount of the Open Space and Public Park Impact Fee shall be the maximum amount permissible pursuant to the Mitigation Fee Act, and shall be established pursuant thereto; provided, however, in no event shall the Fee exceed \$1.50/square foot of new development.*

*A citizen committee is hereby created, and shall be known as the open space & recreation advisory committee (the "Open Space & Recreation Advisory Committee" or "Committee"), whose role shall be to advise the City Council on expenditures of the Open Space and Public Park Impact Fee. The Open Space and Public Park Impact Fee shall be only spent after receiving the advice and recommendation of the Committee.*

*The Open Space & Recreation Advisory Committee shall consist of seven (7) members of the public who are appointed by the City Council. The seven (7) members shall consist of:*

*the Mayor, one (1) City Councilmember chosen by a majority of the City Council, one (1) representative of a Costa Mesa youth football organization chosen by a majority of the City Council, one (1) representative of a Costa Mesa youth baseball organization chosen by a majority of the City Council, one (1) representative of a Costa Mesa youth soccer organization chosen by a majority of the City Council, one (1) representative of the Newport Mesa Unified School District ("NMUSD") chosen by a majority vote of the NMUSD trustees, and one (1) member from a properly formed and actively operating California corporation whose primary focus is issues of environmental concern chosen by a majority of the City Council. The members shall be appointed at a time and place pursuant to Council policy. The Committee shall comply with the Brown Act and the Fair Political Practices Act, including but not limited to all disclosures required therein. City Staff shall provide the necessary support for the Committee's meetings and other official business. The City Council shall budget an appropriate amount of funds collected from the Open Space & Public Park Impact Fee for the Committee's activities, recognizing that interfund transfers may be necessary at the beginning of the Committee's formation before sufficient Open Space and Public Park Impact Fees have been collected. The Open Space & Recreation Advisory Committee shall sunset, and unless renewed by the City Council cease to exist, upon making its final recommendations to the City Council for active and passive recreational uses at Fairview Developmental Center, or 5 years after the effective date of this Measure, whichever shall first occur.*

Based on the above analysis, Section 5 of Measure Z was enacted by the voters at the November 8, 2016 election.

### **The City Council May Amend or Change Section 5 of Measure Z.**

Elections Code section 9217 provides in relevant part:

No ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city without submission to the voters, or adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance. Elections Code § 9217.

By its terms, Measure Y can only be amended or repealed by a vote of the electorate. However, Section 7 of Measure Z provides:

*Except as otherwise provided herein, any future changes or amendments to this ordinance, if approved, including any future changes or amendments to the General Plan, Specific Plan(s), Overlay Plan(s), or Municipal Code provisions affected by the Measure, may occur in the manner set forth in State law and the City's Municipal Code, and shall not require a vote of the people. (Emphasis added.)*

An amendment is any change of the scope or effect of an existing statute or ordinance, whether by addition, omission, or substitution of provisions, that does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form. See *Mobilepark West Homeowners Assn. v.*

*Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 40, 41; *Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 776–777; Cal. Forms of Pleading and Practice, § 302.29. “A provision which operates to repeal by implication a portion of a prior statute is not, properly speaking, an amendment.” *Assets Reconstruction Corp. v. Munson* (1947) 81 Cal.App.2d 363, 368 (emphasis added).

### **Codification of and Revisions to Article 4, Chapter XII of the Zoning Code.**

Staff is proposing that Article 4 as written be separated into three sections, without substantive revision, for ease of codification. However, staff recommends one substantive revision to specify that the Open Space and Public Park Impact Fee shall be due upon issuance of a building permit rather than a certificate of occupancy. This change will make the due date for fee provisions of Article 4 consistent with other provisions of Chapter XII, and will enhance the City’s ability to actually collect the impact fee prior to completion and entitlement of a project. Under the Mitigation Fee Act, fees or charges generally may not be imposed on residential development until the final inspection or issuance of the certificate of occupancy. See Government Code § 66007. However, these restrictions are not applicable to non-residential development that would be allowed north of the I-405 and west of Fairview Drive.

### **Revisions to the Name and Composition of the Open Space & Recreation Advisory Committee**

Measure Z, by the un-codified provisions of Section 5, created the seven-member OSRAC, whose sole role is to advise the City Council on expenditures of the Open Space and Public Park Impact Fee. On February 7, 2017, the City Council created a combined committee of 17 members called the YSOSRAC, whose role is to advise the City Council on expenditures of the Open Space and Public Park Impact Fee, as well as to advise the City Council on capital improvement projects, facility status and policy review, as related to youth sports, open space and recreation, as needed. Because composition and duties of the OSRAC was established by initiative ordinance, the members of the combined committee that constitute the OSRAC must act separately from the rest of the members of the YSOSRAC when it comes to taking action on the Impact Fee matters, until the ordinance is amended. The proposed revisions will remain un-codified, and will allow the entire YSOSRAC to take action on all matters before it.

### **Deleting the Open Space & Recreation Advisory Committee as Recommended by the Planning Commission**

Staff recommends against deleting the uncodified provisions of Section 5 in its entirety as recommended by the Planning Commission. This is because a repeal of this specific, severable portion of the ordinance is not properly considered an amendment, and is thus arguably beyond the authority conferred on the City by Measure Z. See *Assets Reconstruction Corp.*, supra, 81 Cal.App.2d at 368.

## **Transferring the Duties of the Open Space & Recreation Advisory Committee to an Existing Committee or Commission**

The City Council retains the authority to revise the uncodified portion of Measure Z to transfer the duties of the Committee to an existing City committee or commission. For example, the City Council could transfer these duties to the Parks and Recreation Commission. This Commission seems to be the most appropriate to assume these duties. Section 12-71 of Chapter III of the Municipal Code– Parks & Recreation, states that the Parks & Recreation Commission shall:

(a)

*Consider matters that may be referred to it by the city council, the city manager, the director of administrative services, or the director of public services, and render such counsel and advice in regard thereto as may be requested by the referring authorities;*

(b)

*By its own motion, make such studies, investigations and hold public hearings as it may deem necessary for the formulation of parks, recreation, recreation facilities and parkways policies, or to determine the wisdom and efficacy of the policies, plans and procedures dealing with parks, recreation, recreation facilities and parkways matters, or to determine an action program to pursue in implementing the city open space plan and report its findings and recommendations to the city council, the city manager, the director of administrative services, or the director of public services;*

(c)

*Recommend to the city council approval of concept plans for development and/or modification of parks, recreation, and open space facilities*

### **ENVIRONMENTAL DETERMINATION:**

The ordinance has been reviewed for compliance with the California Environmental Quality Act (CEQA), the CEQA guidelines, and the City's environmental procedures, and has been found to be exempt pursuant to Section 15061(b)(3) (General Rule) of CEQA because there is no possibility that the proposed amendment to the Zoning Code will have a significant effect on the environment.

### **LEGAL REVIEW:**

The draft ordinance has been reviewed and approved as to form by the City Attorney's Office.

**CONCLUSION:**

Staff recommends that the City Council introduce for first reading Code Amendment CO-17-03, given that the provisions have been approved by the voters of Costa Mesa.

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SHERI VANDER DUSSEN, AICP  
Interim Assistant Director

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JAY TREVINO, AICP  
Development Services Department  
Consultant

**ATTACHMENTS:**

1. [Draft Ordinance amending Title 13 and uncodified portions of Measure Z – Clean Version](#)
2. [Draft Ordinance amending Title 13 – Revisions Depicted](#)
3. [Draft Ordinance as recommended by the Planning Commission](#)
4. [Excerpt of Minutes of the Planning Commission meeting of April 10, 2017](#)
5. [Staff Report and Attachments prepared for Planning Commission Meeting of April 10, 2017](#)