



Finance Department
Office of the Director

January 14, 2020

To: Berkeley Neighborhoods Council Executive Committee
Jesse Arreguin, Mayor
Rashi Kesarwani, Council Member, District 1
Cheryl Davila, Council Member, District 2
Ben Bartlett, Council Member, District 3
Kate Harrison, Council Member, District 4
Sophie Hahn, Council Member, District 5
Susan Wengraf, Council Member, District 6
Rigel Robinson, Council Member, District 7
Lori Droste, Council Member, District 8

From: Henry Oyekanmi, Finance Director

Subject: Billing of City of Berkeley Square Footage Based Special Taxes

The Finance Department received correspondence from the BNC Executive Committee dated December 2, 2019 and would like to address some of the issues raised. In order to comprehensively respond to the questions, Finance would like to provide a timeline of events that has led to the misconception that the City database used to calculate special taxes is not accurate.

How did we get here?

For several years, there have been no major issues or questions about tax calculations. The City updates its database on a regular basis to account for changes based on building permits. In July 2008, Lilana Spindler and her husband, Doug Spindler, residents of Orinda, purchased a four-unit income property at 2215/2217 Stuart Street. The property has four units split among two duplex buildings. Per the Berkeley Rent Board, all four units are rented. The City continued to assess the Spindler' property for special taxes just as it had the prior owners; no changes were made.

Nearly ten years later, on January 16, 2018, Mrs. Spindler emailed the City requesting that it update her taxable square footage as she believed that her basement was not subject to taxation and should be removed. The City responded the next day and provided her with a breakdown of her taxable area and informed her that a correction was not warranted.

In July 2018, Mrs. Spindler wrote again and cited a definition for "basement" from the City's Zoning Code, BMC Chapter 23. In November 2018, after much discourse, the City informed Mrs. Spindler that the definitions she cited in the City's Zoning Code, as well as other real estate and construction terminology,

were not applicable to calculation of City special taxes. The City further informed Mrs. Spindler that, per the City's Taxation Code, BMC Chapter 7, the definition of total square footage is very broad and, in addition to "usable" basements includes "cellars" which are generally understood and defined as used for storage (as opposed to living space). The City explained that if the basement can be used for storage, as was clearly indicated by the pictures Mrs. Spindler provided, her basement was subject to taxation. No change to taxable square footage was made; the Spindlers were charged for the same square footage as the previous owners.

In March 2019, Mrs. Spindler sued the City in the Small Claims division of the Alameda County Superior Court and a hearing was set for May 2019. Neither party could be represented by attorneys in Small Claims court. Mrs. Spindler contended that Berkeley had overbilled her for special taxes since she purchased the property in 2008. The City explained that it followed the voter-approved definitions of taxable square footage in the City's municipal code, and further explained a four-year statute of limitations applied in any case. The Superior Court ruled in favor of the City and entered judgment in favor of the City.

Mrs. Spindler filed a Notice to Vacate (Cancel) Judgment on June 6, 2019. Mrs. Spindler renewed her argument that the definition of "usable space" in the City's Zoning Ordinance should apply to the special tax measures. On July 9, 2019, the Superior Court sided with the plaintiff, vacating the earlier judgment, and filed judgment in favor of plaintiff, ordering the City to refund four-years' worth of alleged overpayments.

On August 5, 2019, the City appealed and received a September 4 hearing date.

Two weeks before the appeal date, on Monday, August 19, Carolyn Copeland, producer of the Pat Thurston Show on KGO Radio, informed the City that Mr. Spindler would appear on the Wednesday, August 21 program. Ms. Copeland invited the City to send representation. The City declined, noting that the City had appealed the ruling and following the City's usual practice of not commenting on pending litigation.

On the radio program titled "[The City of Berkeley Has Been Shady When Charging Some People With Property Taxes](#)," Mr. Spindler explained how he and his wife sued the City and won. His lawyer, Kirk Boyd, encouraged property owners to file a refund claim for money he claimed had been erroneously and illegally taken.

Mr. Spindler, his lawyer, and Pat Thurston made many inciting statements: the City is cheating homeowners; tell the City that you want your information or you're going to sue them; we are talking about what may be an enormous issue with the City of Berkeley; look at your tax bill – it could be happening someplace else. Mr. Spindler also made various misrepresentations during the radio program, including that his Berkeley property was a single-family home and that he was a "Berkeley" resident. The statements were unsubstantiated and demonstrated that none of the program guests or host were aware of City of Berkeley's taxation code, which will be described in more detail below.

As a result of the radio program, the City received inquiries from many news publications including the Wall Street Journal, Berkeleyside, and others, and received numerous inquiries from property owners.

The Finance Department worked with the City's Public Information Officer to respond to all press requests. The City responded to all inquiries and notified inquirers that the County's building square footage was calculated differently than square footage for Berkeley's special taxes.

On September 4, 2019, the Court ruled in favor of the City, stating, "The court concludes that Berkeley correctly included plaintiff's basement in its calculations for purposes of special taxes and assessments."

But the court's ruling came after the airing of the radio broadcast, and unfortunately, Mrs. Spindler and many other property owners essentially ignored the ruling and continued to argue that they were being unfairly taxed.

BNC's assertion that all cities, excluding Berkeley, use Alameda County data to determine taxable square footage

Your December 2, 2019 memo asserts that "[a]ll cities in Alameda County, with the sole exception of Berkeley, use data maintained by the Alameda County Assessor's Office, as adjusted from time to time by improvements to a parcel as indicated by City building permits to determine taxable square footage."

That is factually untrue. There are three categories of property taxes:

1. Ad Valorem Tax: This 1% tax is based on the County-assessed value of property as established each year on January 1 by the County of Alameda's Assessor's Office (County Assessor), less exemptions. The County Assessor also validates tax exemptions, most commonly for homeowners, veterans, and non-profit organizations. This tax is calculated by the County.
2. Government Obligation (GO) Bonds: a type of municipal government bond which is a government debt issued to raise money to finance public improvements, including but not limited to infrastructure and facilities, fire safety, downtown revitalization programs, and funding for a new animal shelter. The City determines that bond rates and provides them to the County. The County calculates the bond amount by multiplying the rate against the property's County-assessed value.
3. Special taxes, assessments, and fees are determined by the City of Berkeley which are direct charges against a property that are included on the tax bill; many are based on building and lot square footage as opposed to the property's valuation. The City imposes a series of charges on properties based on taxable building square footage (BSFT) and lot square footage (LSFT). Both taxable BSFT and LSFT are maintained in the City's Land Management System.

The first two categories (ad valorem taxes and general obligation bonds) are wholly dependent on the County's assessed values. The City of Berkeley and other cities are dependent on the County to calculate these amounts.

The BNC and other members of the public are concerned with the third category. More specifically, they are concerned that some Berkeley property owners are either overbilled or under-billed on the special taxes that are based on square footage.

Special taxes based on square footage

At issue are seven (7) voter-approved taxes that help fund municipal services for street lighting, landscaping, libraries, paramedics, fire protection, and emergency services. It should be noted that the BNC provided an inaccurate list of special taxes that are based on building square footage.

When voters approved each of these taxes based on square footage, the ballot language included the definition of “square footage.” Each tax measure uses an essentially identical definition of square footage. The below chart lists each of the taxes at issue and where it appears in the Berkeley Municipal Code (BMC) or in publicly available City Council resolutions:

Voter-approved Measure	BMC § or Resolution #
Parks, Trees and Landscaping Maintenance Tax (operative as of July 1, 2015)	BMC Chapter 7.10.020
Library Relief Act of 1980 (operative as of July 1, 1980)	BMC Chapter 7.56.020 (G)
Special Tax to Fund Fire Protection and Emergency Response Preparedness (operative January 1, 2009)	BMC Chapter 7.81.030 (G)
Fire Safety Services Tax (Mello Roos) (effective July 1, 2001)	BMC Chapter 7.82
Emergency Services for Severely Disabled Persons Tax (operative January 1, 1999)	BMC Chapter 7.88040
Emergency Medical Services Tax	BMC Chapter 7.90.030 (D)
Levy and Collection of Street Lighting Assessment (operative 1982)	Resolution No. 68,453-N.S.

Each of the special taxes at issue is based on a calculation of the specific tax rate multiplied by the square footage of a property. For instance, the Parks, Trees and Landscaping Maintenance Tax found in Chapter 7.10 of the BMC taxes “square footage of all improvements in the City of Berkeley, as defined herein.” “Improvements” is defined as “all buildings or structures erected or affixed to the land.” And “square footage” is defined as follows:

"Square footage" shall mean the total gross horizontal areas of all floors, including usable basement and cellars, below the roof and within the outer surface of the main walls of buildings (or the center lines of party walls separating such buildings or portions thereof) or within lines drawn parallel to and two feet within the roof line of any building or portion thereof without walls (which includes, notwithstanding paragraph c. below, the square footage of all porches), and including pedestrian access walkways or corridors, but excluding the following:"

Notably, the definition of square footage is very broad. Each tax measure also excludes certain improvements from the definition of “square footage.” Expressly excluded are garages and off-street parking structures, pools and patios, and publicly accessible arcades and porticoes.

As voter-approved taxes, voters ratified a specific definition of “square footage” and granted the City the right to use its own calculations rather than relying on data maintained by the Alameda County Assessor’s Office. The BNC is correct that the “City of Berkeley uses its own unique methodology” for these taxes, because that is what the voters approved and therefore what is required.

The County Assessor publicly stated that the County’s records are “designed for our purposes and not to be used for other purposes. They’re designed for comparable value, not for taxation.” Further, he stated that the County Assessor does not play a role in how local jurisdictions, like Berkeley, calculate square footages for their own purposes. The County has no authority or input regarding how local jurisdictions calculate square footages for their own purposes.

Are there significant differences between County and City data?

The BNC claims that “significant differences have been found to exist between the data maintained by the County and that used by the City for such taxes.” We agree. The City and County have different parameters and criteria for determining square footage. As such, there will be differences between City and County data; there is nothing improper about this.

Does the existence of different definitions of building square footage lead to complexity?

Other members of the public have claimed that definitions from the City’s Zoning Code, BMC Chapter 23 should be imported into the tax definitions of BMC Chapter 7. However, the City’s Zoning Ordinance governs land use, not taxation. The Zoning Ordinance states that its “purposes” are to regulate the *uses* of land and buildings, provide the appropriate intensity and density of development, and to generally implement the policies of the City’s General Plan. Zoning and taxation are two separate areas of municipal power.

In September 2019, the Small Claims division of the Superior Court affirmed the City’s standards and stated that there “does not appear to be a legal basis for importing the definition... as developed for and applicable to zoning purposes, into a separate ordinance and regulatory scheme...that governs imposition of taxes.”

While the different definitions in the Taxation and Zoning codes may arguably create complexity, that differentiation is needed to address the unique purposes for each municipal function. The City has implemented a number of operational changes to improve and ensure that special City taxes are assessed correctly and that the City’s square footage data is provided to property owners.

Has the City been responsive to property owners’ inquiries?

A number of Berkeley property owners have been contacting the Finance, Planning, and Information Technology Departments, including 311. Their issues have been looked into and the City has taken appropriate action as needed.

When one property owner questioned the City’s “underassessment” of recently sold properties, the City found that the majority of properties provided were not located in Berkeley but rather in Oakland. In another instance, the City provided a complete listing of Berkeley properties’ taxable square footage with by Assessor’s Parcel Number (APN). Upon providing the list, the customer questioned two

“underassessments.” Shortly after, he asked the City to disregard one of his claims because he realized it was not subject to tax. The other property presented to the City was a boundary property in which the building was in Oakland, and not subject to Berkeley taxation.

Is the City improperly taxing “crawlspaces”?

BNC has questioned whether the City includes crawlspaces when measuring taxable square footage; it does not. Usable basements and cellars, on the other hand, are subject to taxation.

The City’s taxable square footage database

The Finance Department maintains a database of taxable property square footage. It is updated on a regular basis based on building inspections, building plans, and use permits submitted by property owners and tenants at various stages throughout the process.

In 2019, the City received a noticeable increase in public inquiries regarding property tax calculations, specifically those surrounding taxable square footage. Property owners have requested taxable square footage information, and staff has responded. Staff has given them multiple avenues to obtain the requested data. If property owners believe there is an error in square footage, staff has directed them to write to the Finance Department directly and include building plans, scaled drawings with dimensions, and their calculations to augment their assertion that the City’s record is not accurate.

In an effort to increase transparency into the City’s database, multiple departments are working together to publicly post taxable square footage data on the City’s parcel conditions website.

Conclusion

While we understand concerns have arisen about the City’s calculation methodology, due in large part to misinformation that has been disseminated, and the special taxes in question were voter approved with a specific definition of what constitutes taxable square footage. All taxed parties are treated equitably and are taxed based on those definitions. The BNC is correct that the City uses its own unique methodology for calculating these taxes, because that is what voters approved and has been codified in the Berkeley Municipal Code.