



Office of the City Manager

Date: January 28, 2021
To: Budget and Finance Policy Committee
From: Dee Williams-Ridley, City Manager
Submitted by: Henry Oyekanmi, Finance Director
Subject: Administration of Property Tax Special Assessments

Concerns have been raised by some tax payers and members of the public at recent City Council and Council Budget and Policy Committee meetings regarding the administration and applicability of City Property Tax Assessments. Even though some of these concerns have been a subject of litigation, the Courts have consistently ruled that the City was acting in accordance with its laws. It is important to distinguish between the various issues being raised, so as to ensure that the Budget and Finance Policy Committee has context for consideration of any proposed changes on how property tax special assessments are administered going forward. We strongly believe that the City is currently administering these tax assessments correctly per the BMC.

While many issues have been the subject of discussions, the majority fit into these categories:

- (a) a claim that the Finance Department is not administering the tax properly in accordance with the law;
- (b) a claim that the tax itself is not fairly imposed; or
- (c) a claim that the square footage calculations used to administer the taxes differ from other data sources and are, therefore, incorrect.

None of these assertions are valid, and we will address each of these issues separately below.

Finance Department Role in Tax Administration

The Finance Department is responsible for ensuring accurate reporting and timely annual submission of the City's property tax assessments to the County of Alameda. The Finance Department acts as the City's tax administrator and administers tax measures as approved by voters. We are obligated to administer the calculation and assessment of

City property taxes in strict accordance with the language contained in the measures that authorized the imposition of those taxes.

The language of the Code section authorizing each City Property Tax Special Assessment contains the following language:

"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:

1. Areas used for off-street parking spaces or loading berths and driveways and maneuvering aisles relating thereto.
2. Areas which are outdoor or semi-outdoor areas included as part of the building to provide a pleasant and healthful environment for the occupants thereof and the neighborhood in which the building is located. This exempted area is limited to stoops, balconies and to natural ground areas, terraces, pools and patios which are landscaped and developed for active or passive recreational use, and which are accessible for use by occupants of the building.
3. Arcades, porticoes, and similar open areas which are located at or near street level, which are accessible to the general public, and which are not designed or used as sales, display, storage, service or production areas.

These exceptions can mean that it's possible that a property that appears to have a larger building on it may actually have less taxable square footage than a structure that appears smaller from the street. The City has received pictures which show an apparently larger house, claiming errors in square footage calculation. But a house with a large semi-outdoor area would not have that area included in its taxable square footage, while a house with a storage area underneath (but not visible from the street) would have that storage space included in taxable square footage. This has nothing to do with any inconsistency in the methods used to measure or calculate the taxable area, but is due to the fact that these voter-approved tax measures specified certain type of structures to be excluded from taxation. We have always used only these criteria to assess City Property Taxes. We have no authority to grant any additional exceptions to the assessment of the taxes, or to modify them any other way.

We acknowledge the possibility that errors may exist in data that is, in many cases, 50 or even 100 years old. We have procedures in place to allow for disputes by property owners, and any owner who believes their taxes are based on incorrect data can find information on how to submit a dispute at:

<https://www.cityofberkeley.info/propertytaxes/>

It is also the case that some additions to property improvements are built without applying for the appropriate building permits. Without these permits, there is no way for the City to know about additions that need to be made to the square footage in the City property tax database. Errors like this are certainly possible, but what is sometimes being suggested is the misapplication of existing law, not just errors in data. We believe these claims to be incorrect.

We have received additional requests from a concerned property owner, and our preliminary research indicates that most of the 11 properties submitted do not require any adjustment, because the square footages are accurate representations of the usable area of the property improvements.

- In one example, a single house sits on two parcels, one in Berkeley and the other in Oakland. Berkeley special assessments are only applicable to the portion that sits within the City.
- In another example, it was claimed that a basement was excluded from taxable square footage, but it was in fact being used as a garage, and was therefore exempt from taxation.

We continue to research these and other requests, and will respond individually as we complete our analyses.

Fairness of Current Tax

While some have claimed that the voter-approved taxes are regressive, this is a matter to be taken up by policymakers, and is not subject to our discretion as administrators of those taxes. Our obligation is to assess and collect the taxes according to the specific language of the measures authorizing them.

We do this based solely on information we have regarding the improvements made to each property within the City. We do not have or use any data about the age, race, income level, or any other biographical information of a property owner, unless that owner has provided such information in an application for a low-income tax exemption. The exact same criteria, authorized by Council and approved by Berkeley voters, are applied to every property in the City, as fairness dictates and demands.

Difference in Square Footage Calculations

The total square footage of property improvements may be recorded differently in the City's Taxation database and in other City and County records. It is true that the City has different definitions of what constitutes usable space, as different departments use different parameters. Similarly, the County has its own definitions and parameters, because they only use square footage data for non-taxation related purposes, such as comparative value analysis (see attached letter from Alameda County Assessor Phong La).

Examples:

- County data does not include basements or cellars, while City taxable square footage includes usable basements and cellars. This means that all properties in the City of Berkeley database having a usable basement or cellar will have a different square footage than the County shows. This difference alone affects approximately 40% of the City of Berkeley's properties.
- County data sometimes includes garages, but the City property tax data does not include them, because the City tax language exempts garages. Consequently, all garage square footages that are included in the County data will cause differences from City data.
- In defining usable space, the Planning department is mainly concerned with floor areas and measurements of **habitable** space, while City taxable square footage includes space usable for other purposes.

We understand how aligning the Finance taxable square footage database with the Planning definition would make things easier to understand, however, the two are intended for completely different purposes. While the Zoning Code may limit the area measurements of a dwelling unit to habitable space within that unit, the Taxation Code does not. Arbitrarily aligning taxable square footages with zoning measurements may violate the tax measures that expressly defined square footage and have been codified in the City's Taxation Code.

The three exceptions listed in the Taxation Code are the only ones that can be used to determine taxable square footage. While measurements of square footage associated with the Zoning Code are limited to habitable space, the Taxation Code mandates the measurement of the **total gross area**, including all **usable** basements and cellars, whether that usage is for human habitation, or for other purposes, such as storage.

B.A.T.E claimed in July 2020 that the tax code allows Finance to impose the Library and Schools taxes only on habitable dwelling unit square feet. This is not accurate. While certain Tax Measures do distinguish between residential property improvements and other types of improvements, they impose the taxes on the square footage of all improvements, dwelling and non-dwelling units alike. For example, BMC 7.56.020C does define dwellings as "designed for human occupancy," but it does not limit the taxable area of that dwelling to the habitable portions. The only difference is that there is one rate for dwelling units and another for all industrial, commercial, and institutional buildings. The distinction made by the law is not between habitable and non-habitable space within the same unit, but between dwelling improvements and those used for other purposes.

Dwelling units may contain usable space that is not habitable per the Zoning Code, and that space is nonetheless subject to taxation under the sections of the Taxation Code authorizing the assessments of the taxes. This was confirmed in 2019 when a property owner sued the City in the Small Claims Division of the Alameda County Superior Court. The owner contended that they were overbilled by the City for special taxes on the property they purchased in 2008. Specifically, they asserted that the basement of their

four-unit rental property was not subject to taxation because it did not meet the definition of “usable space” per the City’s Zoning Code. After three separate court hearings, the Superior Court’s final ruling was in favor of the City. The fact that the basement was usable, whether used or not, made it subject to taxation. The court determined that the taxation of the property was accurate, no refund was due, and the City complied with its taxation code.

The differences between the uses of the Zoning Code and the Taxation Code are why the definitions from one cannot be applied to the other. While the various measures of property improvement square footage may seem confusing to some, it must be understood that they vary because they use different calculations mandated by the various laws which they support. Berkeley citizens have authorized the way that Berkeley’s City Property Taxes are imposed, and we implement their decisions.

To further confuse the issue, there are also many privately maintained, publicly accessible databases claiming to have accurate data on building square footages. These services, such as Zillow, have square footage numbers that might not be accurate and may use any combination of official or unofficial sources of property data.

Discussion of Specific Recommendations Included in Agenda Item #2

1. Taxable space must have manufactured flooring. If the understory has dirt base, it shall not be taxed (Uniform Building Code R502 – floor material requirement). (Acceptable proof: photo)
2. Taxable basement space must be of required height clearance. If understory has proper flooring and is of limited height, 6’ 8” or less, with 6’4” allowance for ducting, then it shall not be taxed (Uniform Building Code R305 – basement height requirement) (Acceptable proof: photo with measuring tape)
3. Taxable attic space must have required height clearance. If finished attic, only areas of 6’4” height or more is taxed for city assessments (Acceptable proof: photo with measuring tape)

For recommendations 1-3, the Municipal Code does not currently contain any description of whether the area is manufactured or dirt, or define any height requirements. It only refers to usable space.

4. City of Berkeley shall post the property’s taxable square footage in at least 12 point font on the City’s Parcel Viewer page. City of Berkeley shall disclose the potential increase to taxable square footage liability for the taxpayer when application for building addition is made.
5. City of Berkeley shall make public the taxable square footage liability of the proposed finished building to the community when a Zoning Adjustments Board application is made.

6. City of Berkeley shall disclose a property's taxable square footage in writing to a property owner or interested buyer, upon request.

For recommendations 4-6, the taxable square footage information is already available on the City Open Data Portal. It can be accessed at:

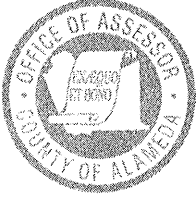
<https://data.cityofberkeley.info/City-Government/Taxable-Square-Footage/9a47-nj4i>

7. If the taxpayer requests a correction on the square footage assessments, and the space in question does not align with the above taxability requirements, the taxpayer shall be entitled to a refund on all 9 city and schools assessments for the previous four full years of taxes (Civil Code 5097). Requests for correction shall be allowed at any time.

We need further clarification on what is being requested. The timing of the change to assessment criteria and any request for review by a taxpayer will affect whether any refund is due.

Conclusion

The City has and continues to administer the property tax special assessments correctly. The criteria used by City staff to calculate the square footage of usable space in City properties has been consistently applied for decades, and has been affirmed by the State Court as a proper application of the law. We determine a basement or cellar to be usable if it is an area with sufficient space to allow for storage of goods, the placement of appliances, or other activities associated with possession of a domicile. We continue to believe that this aligns with the most common sense definition of *usability*. However, should the City Council wish to reassess the methodology by which usable space will be calculated in future assessments, we, of course, defer to its policy-making authority. An examination of all the potential impacts and legal implications should be studied in order to make an informed decision.



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March 13, 2020

Ms. Lilana Spindler
101 Laura Way,
Orinda, CA 94563-3645

Dear Ms. Spindler,

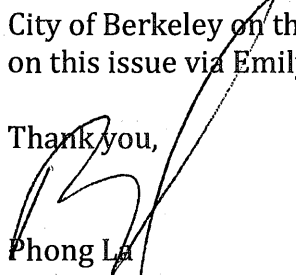
Thank you for contacting the Alameda County Assessor's Office regarding the square footage of properties in Berkeley. I understand you have been in contact with multiple staff members in the Assessor's Office and I hope this letter can serve as some guidance about what services the Assessor's Office is able to provide.

As you may know, Alameda County has 14 cities, and six unincorporated communities. The Assessor's Office does not regulate or have any authority on how these local jurisdictions choose to calculate square footage for their special assessments. The Assessor's Office designs and uses our records for our purposes only, which includes comparable value, not taxation. Property taxes are ad valorem, or calculated based on the value of a house, not its size. Value is determined in a number of ways, including comparable selling prices of like properties, and supply and demand. The City of Berkeley is not using Alameda County Assessor records to determine City of Berkeley taxes and is not legally obligated to do so. The City of Berkeley voters approved seven special assessment taxes in which the ballot language included the definition of "square footage", and therefore what is required to be used.

Regarding your requests for records on properties you do not own or are not the authorized agent, the Assessor's Office normally only discusses the assessment in detail with the property owner or authorized agent. The records the Assessor's Office has are not used for special assessment taxation such as the City of Berkeley's parcel tax.

I hope this letter has provided some clarity on the role of the Assessor's Office and the information we can provide. I understand you have pursued legal action and your case was heard in Alameda County Superior Court in September 2019 where the findings were for the City of Berkeley on this matter. I encourage you to continue to work with the City of Berkeley on this issue via Emily Teruya, Revenue Collection Manager.

Thank you,


Phong La
Assessor, Alameda County
CC: City of Berkeley Department of Finance