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LEGAL OPINION

October 8, 2013

FINANCE AND MANAGEMENT COMMITTEE
Oakland City Council
Oakland, California

Subject: Issues Relating to the **Wildfire Prevention District**
(City of Oakland Community Facilities District, No. 2013-1)

Dear Chairperson **Schaaf** and Members of the Finance and Management Committee:

I. Introduction

The City Attorney's Office has been asked to address a number of issues related to the City of Oakland Community Facilities District No. 2013-1 (Wildfire Prevention District) (the "CFD").

II. Question

Can the City of Oakland finance fire protection and prevention services through a special tax under the requirements of the Mello-Roos Community Facilities Act of 1982?

III. Brief Conclusion

As explained in greater detail below, we conclude that the special tax proposed for the CFD is legal and meets the requirements of the Mello-Roos Community Facilities Act of 1982, as amended (the "Mello-Roos Act"), and we can report that other public agencies have used the Mello-Roos Act for a similar purpose.

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IV. Analysis

1. The City may finance fire protection services under the Mello-Roos Community Facilities Act of 1982, as amended.

The City has the authority under the Mello-Roos Act to establish the CFD for the purpose of financing the services (the "Services") listed in Exhibit 1 to City Council Resolution No. 84594 C.M.S., entitled "Resolution of Formation of City of Oakland Community Facilities District No. 2013-1 (Wildfire Prevention District)" (the "Resolution of Formation"). Although the Mello-Roos Act does not expressly authorize the financing of "fire prevention" services, the City is authorized to finance the Services under the Mello-Roos Act. The Mello-Roos Act authorizes the City to levy special taxes to finance "fire protection and suppression services."¹ The Services which, according to the ballot measure, are intended to prevent wildfires and the spread of fire, unquestionably constitute "fire protection and suppression services."

Under basic principles of statutory interpretation, when a court is asked to construe a statute, it will first look to the words of the statute, giving them their plain, usual, ordinary and commonsense meaning. People v. Cheek (2001) 25 Cal.4th 894, 899. A court's inquiry ends if the words of a statute are clear and unambiguous. Wells Fargo Financial Leasing, Inc. v. D&M Cabinets (2009) 177 Cal.App.4th 59, 67 ("If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs" (citation omitted)).

To determine the usual, ordinary and commonsense meaning of "protection" and "suppression", which are the words used in the Mello-Roos Act, and "prevention," which is the word used in the City's formation proceedings, this office turned to two on-line references sources: Merriam-Webster's dictionary and thesaurus.com.

Merriam-Webster's dictionary provides the following relevant definitions of the subject words:

- Protect: "to cover or shield from exposure, injury, damage, or destruction"
- Suppress: "to restrain from a usual course or action ... to inhibit the growth or development of"
- Prevent: "to keep from happening or existing"

¹ Gov. Code 53313: "A community facilities district may be established under this chapter to finance any one or more of the following types of services within an area: ... (b) Fire protection and suppression services...."

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Thesaurus.com lists “prevent” and “suppress” as synonyms for each other; in other words, they are “words or expressions of the same language that have the same or nearly the same meaning in some or all senses” (emphasis added) (Merriam-Webster on-line dictionary).

Based on these definitions, reflecting the clear, unambiguous, usual, ordinary and commonsense meaning of the words, the fire prevention Services authorized in the Resolution of Formation constitute “fire protection and suppression services” (emphasis added) and are authorized by Section 53313 of the Mello-Roos Act.

2. Section 53313(f) of the Mello-Roos Act does not prevent the City from levying the proposed special tax in the CFD.

The City is not prohibited from levying the proposed special taxes in the CFD to finance the Services by the second paragraph of Section 53313(f), which reads as follows:

“A community facilities district tax approved by vote of the landowners of the district may only finance the services authorized in this section to the extent that they are in addition to those provided in the territory of the district before the district was created. The additional services may not supplant services already available within that territory when the district was created.” (emphasis added)

Section 53313(f) only acts as a limit on a community facilities district where the special tax is approved by a vote of the landowners of the district. However, in the case of the CFD, the special tax will be approved by a vote of the registered voters in the CFD.

The levy of a special tax under the Mello-Roos Act requires the two-thirds approving vote of the qualified electors that vote at the election (Gov. Code Section 53328). The Mello-Roos Act (Section 53326(b)) defines “qualified electors” as follows:

“if at least 12 persons, who need not necessarily be the same 12 persons, have been registered to vote within the territory of the proposed community facilities district for each of the 90 days preceding the close of the protest hearing, the vote shall be by the registered voters of the proposed district, with each voter having one vote. Otherwise, the vote shall be by the landowners of the proposed district ...”

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Because more than 12 persons have been registered to vote in the territory of the CFD for each of the 90 days preceding the close of the protest hearing on August 2, 2013, the qualified electors of the CFD are the registered voters in the CFD. Consequently, the second paragraph of Section 53313(f), which expressly applies only to special taxes approved by landowner elections, does not apply to this CFD.

However, even if the second paragraph of Section 53313(f) were to apply to this CFD (which it does not), the CFD would meet the policy goal underlying the second paragraph of Section 53313(f) because the City will stop levying assessments in the existing Wildfire Prevention Assessment District after fiscal year 2013-14 and the City will not levy the proposed special tax in the CFD until fiscal year 2014-15. The City is forming the CFD now because the CFD must be formed by August 1, 2014 in order for the special taxes to be included on the County property tax bills beginning in fiscal year 2014-15 and the City believes that it is important to provide the financed Services on a continuous basis. In other words, consistent with the policy underlying Section 53313(f), the CFD would begin financing the Services in fiscal year 2014-15, and the Services otherwise would not be available in that fiscal year unless the special tax passes.

3. The Services financed by the CFD can provide “general benefit” as well as “special benefit” to the taxable parcels.

The special tax can be levied to finance the Services to the extent they provide “general benefit” as well as “special benefit” to the taxable parcels. The limitations on the financing of general benefit in Article XIID of the California Constitution are applicable to special assessments only, not special taxes. In fact, one of the reasons that the City decided to finance the Services under the Mello-Roos Act is that special taxes are expressly permitted by California law to finance services that provide general benefit as well as special benefit (Gov. Code Section 53325.3):

“A tax imposed pursuant to this chapter is a special tax and not a special assessment, and there is no requirement that the tax be apportioned on the basis of benefit to any property. However, a special tax levied pursuant to this chapter may be on or based on a benefit received by parcels of real property, the cost of making facilities or authorized services available to each parcel, or some other reasonable basis as determined by the legislative body.”

Therefore, the CFD may legally finance the Services even though they may provide general benefit as well as special benefit to the taxable parcels.

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4. The City can commit to pay for some of the Services and levy special taxes to pay for the remainder.

The following statement from the City Administrator's August 2, 2013, Agenda Report does not prevent the City from levying the special tax in the CFD:

"Though entities of the state, federal and local governments would be exempt from Special Tax [Government Code Section 53340(c)], the City understands and accepts its obligations to properly maintain the City owned parks, medians, and open spaces residing within the proposed CFD. Therefore, per Government Code Section 53314.8, prior to the November 13, 2013 special district election, the City Council will adopt an ordinance encumbering monies in the City's biennial General Purpose Fund budget to cover the City's share of the Special Tax for its properties lying within the CFD No. 2013-1."

Staff proposed that the City pay the same amount for the Services that it would have paid if the parcels that it owns in the CFD were not exempt from the special tax. Nothing in California law precludes the City from contributing to the cost of the Services financed by the CFD. In fact, Section 53314.8 of the Mello-Roos Act expressly authorizes the course of action proposed by staff:

Gov. Code 53314.8. At any time either before or after the formation of the district, the legislative body may provide, by ordinance, that for a period specified in the ordinance, the local agency may contribute, from any source of revenue not otherwise prohibited by law, any specified amount, portion, or percentage of the revenues for the purposes set forth in the ordinance, limited to the following: the provision of authorized services, and the payment of expenses incidental thereto. The contribution shall not constitute an indebtedness or liability of the local agency."

5. It is common for California local agencies to use the Mello-Roos Act to finance fire protection and prevention services.

Other California local agencies have used the Mello-Roos Act to finance fire protection and suppression services as expressly permitted by Section 53313(b). A Google search performed on August 12, 2013, produced a partial list of California public agencies that have formed community facilities districts to finance fire protection and suppression services: City of Fresno, City of Lathrop, City of Merced, City of Rancho Cucamonga, City of Rocklin, City of Roseville, City of San Jacinto, City of San

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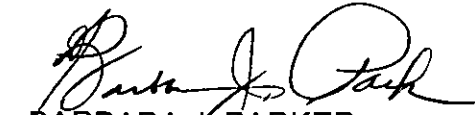
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Marcos, City of Santa Fe Springs, Northstar Community Services District and San Marcos Fire Protection District.

V. Conclusion

For the reasons above, we believe that the proposed special tax is legal and meets the requirements of the Mello-Roos Act, and can report that other public agencies have used the Mello-Roos Act for similar purpose.

Respectfully submitted,



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