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MEMORANDUM

TO Mayor's Office

FROM Daniel C. Bort, Formation Counsel, Proposed San Diego Convention Center Facilities District

DATE November 11, 2011

RE Questions on the Convention Center Facilities District from the Hotel Community

This memorandum is in response to questions from the hotel community that were provided to me by the City's Debt Management Department.

How does the use of a Mello-Roos-like structure solve the "Prop. 26 issue?"

Prop. 26 was aimed at "fees" or "regulatory fees" that are sought to be imposed on the basis that they are fees for services rather than taxes, and thus do not require a vote. It is much more difficult now, under Prop. 26, to classify such exactions as fees and thus avoid the vote requirement. **But that is irrelevant to the CCFD. The City is not proposing a fee. The City is proposing a tax. The tax does require a vote; and the City will hold an election and have a vote.**

Why can't the industry members put a voluntary assessment on themselves and avoid a lien on their property?

Special assessments that are security for bonds are *also* secured by a foreclosable lien on the real property subject to assessment; but I understand that the question refers to assessments on businesses, not on their real property, such as the TMD. There is nothing wrong with a voluntary business assessment, but I am not aware that the bond market has ever purchased bonds secured by such a revenue stream. It would not be considered secure enough to attract investors. So either the hoteliers can voluntarily assess themselves and save up the money to pay for the project with accumulated cash; or they can provide a secure revenue stream that will enable them to borrow the necessary cash up front. If they do the former, they do not need the CCFD and a mechanism such as the TMD will suffice. If they do the latter then they are going to have to subject their properties to a tax lien and to the ultimate sanction of lien foreclosure if they do not pay the special tax.



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To create such a secure revenue stream, they need a special assessment or something like the CCFD that authorizes a special tax. As I explained to the hotel operators in a conference call, and as I explained to the City Council, the requirements for special assessments – almost certainly before the passage of Prop. 218, but absolutely certainly thereafter – do not permit them to be used for a project such as the convention center. So the CCFD, or something like it, is the only suitable mechanism if it is desired to pay for a portion of the convention center project with borrowed money that would be repaid by the hotel industry.

Virtually every Mello-Roos or assessment district that has ever resulted in the issuance of bonds has had a foreclosure covenant connected with those bonds. I suspect no reason will appear why this bond issue should be different. The market will say: “If you are going to pay your tax, then you will never have to worry about foreclosure, so why would you object to a foreclosure covenant? If you want to NOT have a foreclosure covenant, it must be because you want to be able to not pay your tax. No thanks. There’s a better place for our money.”

It should be clear that foreclosure is a last-resort remedy; and every property owner will have time to pay delinquent special taxes, and even to contest the amount owing if desired, before foreclosure proceedings could be commenced. And no one’s property is endangered because of what some other property owner does or does not do. **If a property owner pays its taxes, it will never be subject to foreclosure.** It is worth noting that the special tax is set at a fixed rate based on actual revenues. In economic downturns, even if the visitor activity shrinks, the property owner will not be required to pay above the percentage of actual revenues.

Why should there be a lien placed on hotel property at all?

This has been covered as to why a special tax is proposed. If a special tax is employed, it is, by law, a property tax and, by law, it is secured by a lien on the real property equal to the lien of the general property taxes on that property.

Can Mello-Roos special taxes support Convention Center Facility construction? Is Mello-Roos not traditionally used for addressing impacts from new development?

Mello-Roos is most frequently used in the development context, but that is not its exclusive application; it has other uses as well. The proposed use of the Convention Center Facilities District is explicitly authorized by the City’s Municipal Code and is a lawful use.

How can a special tax on my property be passed through to the visitors?

That is up to the individual hotel operator. Unlike the City’s Transient Occupancy Tax, the CCFD special tax is not levied on the transient, but on the real property containing the hotel. The City’s Municipal Code neither requires nor prohibits the “passing through” of the special tax



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to the hotel guest. Each hotel operator will have to make its own judgment on how that is to be handled.

Is the weighted vote method appropriate to conduct the election procedure for the district?

This method actually tracks the most recent method of voting power adopted by the people of the State of California (in Prop. 218) in a closely related context – that of special assessments – in that it apportions voting power in proportion to the tax burden sought to be imposed.

Can the City create a citywide district and only have a special tax on the hotel properties?

Yes. The City is free to propose any reasonable special tax it conceives of as being appropriate for a given public purpose. And even in the Mello-Roos Act itself, when a landowner vote is conducted, only the owners of property that would be subject to the special tax if it were adopted are entitled to vote. Owners of property that would not be subjected to the proposed special tax at the time of the election are not entitled to vote, yet they are within the district; and should they subsequently change the use of their land to one subject to the special tax, their property would be required to pay it. That is a case of the tax not coming to the property, but of the property – by the voluntary change in use with full knowledge that it is there – coming to the tax.

cc: Mary Lewis, CFO
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