

CITY ATTORNEY UPDATE

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TESTING THE BOUNDARIES OF LAW

By Jan Goldsmith

Last week, the City Council approved creation of a Convention Center Facilities District (CCFD), an entity that would levy a tax on most hotel properties in the City. The revenue from the tax (about \$30 million annually) would be used to fund expansion of the San Diego Convention Center.

The California Constitution requires that taxes be approved by a two-thirds vote of the qualified electorate. To be clear, this IS a tax. But, this tax would not be submitted to all voters in the City. Instead, it would only be submitted to hotel property owners within the City. If two-thirds of that electorate approves the tax, the tax would be imposed.

The CCFD borrows, in part, from a similar structure used by the City of San Jose in 2010 to finance its convention center project. San Diego's convention center advocates brought in Daniel Bort, the attorney who handled the San Jose plan, to help put together San Diego's plan.

It is important to emphasize that neither our office nor Mr. Bort have opined that this plan is a legal means of imposing taxes. This does not mean the plan is illegal. Rather, it is not clear because it is largely untested. Accordingly, the City will file a lawsuit called a "validation action," a legal process that asks the court to review the plan and decide whether it is legal. In other words, we will test the boundaries of the law. Mr. Bort used this process in San Jose and obtained a court decision validating the San Jose plan. The [complaint](#), [legal brief](#) and [court decision](#) are available for viewing on our website.

It could bode well for San Diego's plan that a Superior Court judge approved the San Jose plan. Mr. Bort has stated that a San Diego court "should properly be able to issue its validation," although stopping short of opining that the San Diego plan would be validated.

There are no guarantees. The San Jose plan is similar – but not identical – to San Diego's plan. In addition, the San Jose judge's decision is not legally binding on a San Diego judge and there was no opposition filed with the San Jose court. In San Diego, lawyers have already come forward indicating they will challenge this plan.

Here are a few questions worth asking:

1. **Is the plan legal or illegal?** That is not clear. It tests the boundaries of the law and there are legitimate arguments on both sides. Lawyers within our office have differing opinions. Mr. Bort would not issue an opinion on legality. Nor, will we. That's why a validation lawsuit will be filed.
2. **Why would the City Attorney's Office allow the City to go forward with a plan that is legally unclear?** There is nothing wrong with testing the boundaries of the law if that is what the client wants to do. After all, a similar – but not identical – plan was approved

by a Superior Court judge in San Jose. If we believed that the plan is illegal, we would not sign off. There is a big difference between illegality and lack of clarity.

3. **Should the City go forward with the financing plan?** That is the policymakers' call. Legally, there is nothing wrong with going forward as long as a validation lawsuit is filed. But, we should do so with our eyes open. Expectations should be tempered. We do not know if this is a reliable plan to finance the convention center expansion. In addition, a validation action is litigation and it may not be quick, particularly if there are appeals; and, it could be expensive.
4. **Is there a potentially quicker and more legally reliable means of increasing taxes?** Yes, a financing plan could be presented to the general electorate for a vote, not just to hotel property owners.

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