**Office of**
**The City Attorney**
**City of San Diego**

**MEMORANDUM**
**MS 59**

**(619) 236-6220**

**DATE:** November 22, 2011

**TO:** Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** Letter in Opposition to Proposed Convention Center Facilities District without Public Vote

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## INTRODUCTION

On October 25, 2011, the City Council adopted a procedural ordinance (Ordinance) amending the San Diego Municipal Code (SDMC)[1] to provide for the formation of a Convention Center Facilities District (CCFD) that would levy a special tax on all property within the City operating as hotels. The revenue from such tax would be used to support bonds, the proceeds of which would be used to fund the expansion of the San Diego Convention Center. At the Council meeting, UNITE HERE, a labor organization and their counsel, Mulvaney, Kahan & Barry (the Firm), made a presentation to the City Council challenging the legality of the proposed CCFD. The Firm also provided a letter to the Council, dated October 24, 2011 (Letter), setting forth similar objections.

The Chief Financial Officer has requested that the City Attorney's office review the Letter and respond to the allegations therein. Many of the objections raised by the Firm are based on policy rather than legal considerations. This memorandum addresses only those issues with a legal basis.

## DISCUSSION

The primary legal issues raised in the Letter are that the CCFD is not a proper Community Facilities District under the Mello-Roos Community Facilities Act of 1982 (Mello-Roos Act) and

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[1] The effective date of the Municipal Code amendments is November 25, 2011.

that Proposition 26 requires that taxes levied by the CCFD be approved by two-thirds of City voters. As explained below, these arguments are without merit.

## I. THE CONVENTION CENTER FACILITIES DISTRICT IS NEITHER A MELLO-ROOS DISTRICT NOR A TOURISM MARKETING DISTRICT

Many of the claims in the Letter flow from the argument that the CCFD is inconsistent with the Mello-Roos Act. These claims are irrelevant because the CCFD will not be formed pursuant to the Mello-Roos Act. Rather, the CCFD will be formed pursuant to the City's charter powers and the procedures set forth in the Ordinance.[2] The Ordinance incorporates certain provisions of the Mello-Roos Act that are useful and adopts complementary provisions to allow for a district with the characteristics desired by the City, such as only taxing hotel properties and limiting the qualified electorate to the owners of such properties. If there is any conflict with the Mello-Roos Act, the provisions of the Ordinance would apply. SDMC §§ 61.2706 and 61.2718.

The Letter also claims that the proposed CCFD is the same as the City's Tourism Marketing District (TMD) or a Mello-Roos District. This is not accurate. This Office has provided you with a brief report addressing, in part, the differences between the TMD and the CCFD. A copy of that report dated October 6, 2011, is attached hereto. In sum, the TMD and the CCFD are established pursuant to different laws, they have different purposes and different legal structures.

## II. PURSUANT TO THE CALIFORNIA CONSTITUTION, THE SPECIAL TAX MUST BE APPROVED BY TWO-THIRDS OF THE QUALIFIED ELECTORS SUBJECT TO THE TAX.

The California Constitution requires that special taxes be approved by a two-thirds vote of the qualified electors. Cal. Const. art. XIIIA § 4. The Ordinance defines the qualified electors as "Landowners." SDMC § 61.2710(a). Pursuant to the Ordinance "*Landowner* means the owner of real property upon which a *Hotel* is located" unless the owner of the property is a government entity, in which case the landowner is the possessor of the leasehold interest. SDMC § 61.2705. Moreover, the Ordinance provides that if property in residential use will not be taxed, the vote approving the levy may be approved by a vote of property owners whose property will be taxed.[3] The Ordinance specifically exempts properties other than hotel properties from the special tax. SDMC. § 61.2706(i). Thus, the qualified electors, who must approve the special tax by a two-thirds vote, are the owners (or possessors of leasehold interest) of property operating as hotels in the City.

Proposition 26 was approved by the voters in November 2010. It amended the California Constitution to provide that a levy, charge, or exaction of any kind imposed, increased, or extended by a local government is a tax unless an exception applies. *See,* Cal. Const. art.

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[2] The City has a right to make and enforce laws and regulations respecting the municipal affairs of the City. Charter § 2.

[3] The Ordinance incorporates California Government Code section 53326(c).

XIIC, § 2. Proposition 26 has limited relevance to the CCFD because the proposed levy clearly is a special tax and must be approved by a two-thirds vote of the qualified electors.

## III. THE PROPOSED SPECIAL TAX WILL BE APPORTIONED ON A REASONABLE BASIS

The Letter contends that the allocation of the tax will be on an arbitrary basis. This also is not true. Pursuant to the Ordinance, special taxes need not be apportioned on the basis of benefit but must be reasonable.[4] Cal. Gov't. Code §53325.3. This issue was discussed in our September 22, 2011 memorandum but it bears repeating here. Under the current proposal, the apportionment of the special tax for the CCFD is generally based on the benefit to the properties to be taxed; those closer to the Convention Center receive a greater benefit than those farther away from the Convention Center and pay a higher rate. The apportionment will not be established until the Rate and Method of Apportionment (RMA) is adopted by the City Council and the reasonableness of the RMA is determined by the City Council, at the City Council's sole discretion. *Id.*

## IV. THE FUNDS OF THE CCFD MAY ONLY BE USED TO FUND THE EXPANSION OF THE CONVENTION CENTER

Among the allegations related to the TMD is the claim that the funds of the CCFD "would be controlled by a select group of hotel owners without voter approval." This claim is inaccurate. The CCFD is a legally separate government entity governed by the City Council under authority conferred upon it by the CCFD and its governmental powers are limited to financing certain facilities.[5] *See* Cal. Gov't Code §§ 53317, 53311.5. Specifically, the CCFD is only authorized to finance facilities related to the expansion of the Convention Center.[6] Cal. Gov't Code §§ 53330, 53343, SDMC §§61.2701, 61.2707. Once formed, the CCFD would be governed by the City Council, subject to the limitations specified in the organizational documents of the CCFD, including the RMA, resolution of intent, resolution to incur bonded indebtedness, resolution of formation and the resolution deeming it necessary to incur bonded indebtedness (District Documents). Accordingly, the funds of the CCFD are entirely within the control of the City Council and cannot be diverted for any purpose not expressly authorized in the District Documents.

## V. JUDICIAL VALIDATION WILL PROVIDE CERTAINTY REGARDING FINANCING STRUCTURE

The City, at the advice of this Office and the City's outside formation counsel, intends to seek judicial validation of the CCFD. Judicial validation is a process under the California Code of Civil Procedure whereby a public agency can obtain a judicial determination that certain actions are allowable under existing laws and, thus, valid. Cal. Civ. Proc. Code § 860. The CCFD may

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[4] The Ordinance incorporates California Government Code section 53325.3.
[5] The Ordinance incorporates California Government Code sections 53317 and 53311.5.
[6] The Ordinance incorporates California Government Code sections 53330 and 53343.

be so validated.[7] Cal. Gov't Code § 53359. The judgment in a judicial validation is binding and conclusive against all persons and institutions and all are permanently enjoined from challenging the validated actions in the future. Cal. Civ. Proc. Code § 870(a). Because the formation of the CCFD will proceed under new legislation it is entirely appropriate and prudent to establish, in a binding and conclusive way, that the formation is valid.

## CONCLUSION

In general, the arguments advanced in the Firm's October 24, 2011 letter to the City Council are based on a misunderstanding of the legal basis for the formation of the CCFD and factual inaccuracies about the CCFD and its purpose. We believe that the legal arguments offered are inapplicable or have been addressed within the Ordinance.

As a new legal structure, the CCFD presents certain legal challenges and, consequently, the City will seek judicial validation of the Ordinance and the CCFD. As this Office advised in our September 22, 2011 memorandum regarding the Ordinance (attached hereto), no assurance can be given that the CCFD will, in fact, be validated by a court of law. However, the City's outside counsel with respect to the formation of the CCFD has advised this Office that the superior court should properly be able to uphold the validity of both the Ordinance and the CCFD.

JAN I. GOLDSMITH, City Attorney

By
Brant C. Will
Deputy City Attorney

BCW:jdf
Attachment

[7] The Ordinance incorporates California Government Code section 53359.

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ASSISTANT CITY ATTORNEY

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DEPUTY CITY ATTORNEY

OFFICE OF
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CITY OF SAN DIEGO

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October 6, 2011

**REPORT TO MAYOR AND CITY COUNCIL**

**LEGAL STRUCTURE OF CONVENTION CENTER FACILITIES DISTRICT**

## INTRODUCTION

On September 21, 2011, the Budget and Finance Committee considered the proposed Procedural Ordinance for the Convention Center Facilities District (CCFD Ordinance). During the discussion, questions were posed to the City Attorney's office regarding the legal structure of the Convention Center Facilities District (CCFD) and whether the funds of the CCFD would be "state funds" or "local funds." This report addresses those questions.

## QUESTIONS PRESENTED

1. Why is staff recommending forming the CCFD as a special tax district modeled on the Mello Roos Community Facilities Act of 1982 (Mello Roos Act) and not as an assessment district similar to the Tourism Marketing District (TMD)?

2. Would the funds of the CCFD be considered "state funds" or "local funds?"

## SHORT ANSWERS

1. City staff recommends the formation of a special tax district rather than an assessment district for two principal reasons. First, special taxes, provided they are approved by a two-thirds vote of the taxpayers, need only be reasonable while assessments must confer a "specific benefit" on all businesses to be assessed (and not provide such benefit to unassessed businesses). Second, bonds issued by a special tax district and secured by a lien on real property will be more marketable than bonds issued by a business assessment district.

2. Because the funds of the CCFD may only be used to finance the renovation and expansion of the San Diego Convention Center, such funds would likely be considered "local funds," however, without knowing the context in which such a determination might be made, it is not possible to answer this question definitively.

## ANALYSIS

### I. Special Tax Need Only Be Reasonable

Mello-Roos districts and the proposed CCFD, which is based on the Mello-Roos Act, impose a special tax and not an assessment. A special tax must be approved by a two-thirds vote of the taxpayers and there is no requirement that a special tax be apportioned on the basis of benefit to the property. Cal. Gov. Code §53323.3. Rather, there must be a reasonable basis for the levy, as determined by the legislative body, in this case, the City Council. *Id.*

Assessment districts, such as the TMD, impose assessments, which must provide a "specific benefit" or privilege conveyed directly to the payor of the assessment that is not provided to those not charged. Cal. Const. art. XIIIC §(e)(1). Proposition 26 was added to the California Constitution by voter approval on November 2, 2010 and as yet there are no reported cases that have interpreted the provision. However, the "specific benefit" language in Proposition 26 is similar to the "special benefit" language in Proposition 218, which governs property-based assessments. The California Supreme Court has strictly construed "special benefit" in Proposition 218. An assessment is illegal if a property is being assessed for any portion of the general benefit received by all properties or if certain properties not subject to the assessment would receive an element of special benefit. *See generally, Silicon Valley Taxpayers' Association v. Santa Clara County Open Space Authority*, 44 Cal.4th 431 (2008). If the same analysis were applied to "specific benefit" under Proposition 26 it may be difficult to argue that hotels receive a specific benefit from the expansion of the Convention Center that is not enjoyed by any other businesses, and that all businesses receiving a specific benefit are being assessed.

### II. Marketability of Special Tax Bonds

The Mello-Roos Act provides for a lien to be recorded against all real property within a district that is subject to the special tax and allows for foreclosure on delinquent properties in the event of non-payment. Cal. Gov. Code §53325.1. Further, local agencies that issue Mellos-Roos bonds typically include a covenant in the bond documents requiring the district to foreclosure on properties with delinquent special taxes under specified circumstances. These two features, the lien on property and the covenant to foreclose, are essential to the marketability of the Convention Center bonds and will be included in any CCFD bond issuance.

By contrast, the TMD ordinance does not specify a method for collecting delinquent assessments. S.D.M.C. § 61.2518. Rather, penalties and the collection of delinquent assessments are established in the City Council's resolution of formation, which sets forth a hearing procedure to be undertaken by the City Treasurer. Resolution No. R-303226. This unfamiliar and relatively weak process provides less security for bondholders and would therefore impair the marketability of any bonds secured by such assessments.

### III. Local Funds or State Funds

The Committee asked whether the funds of the CCFD would be considered "local funds" or "state funds." In order to fully address this question this office requires additional facts and context, however, we offer the following observations as a preliminary response. The purpose of

the Mello-Roos Act is expressly for local governments to create special tax districts to finance local public capital facilities. Cal. Gov. Code § 53311.5. Moreover, while the CCFD ordinance incorporates many of the provisions of the Mello-Roos Act, it is a separate and distinct municipal law unique to the City and expressly states that the creation of special tax districts is entirely within the City's municipal affairs.

It is also worth reiterating that the funds of the CCFD are special taxes. By statute, all taxes are either general taxes (taxes imposed for general governmental purposes) or special taxes (taxes imposed for specific purposes). Cal. Gov. Code §53721. Special taxes may only be used to fund the purpose for which the tax was imposed. A Mello-Roos district can finance only certain types of public projects and services. Cal. Gov. Code §53313. The CCFD ordinance is even more restrictive and the proceeds of any special tax under the CCFD may only be used for the renovation and expansion of the San Diego Convention Center. Due to these restrictions, it is unlikely that the State would be able to take CCFD funds for state purposes. This does not mean that the State cannot impose requirements regarding the expenditure of CCFD funds on matters of statewide concern.

## CONCLUSION

Staff is recommending the formation of the CCFD as a special tax district rather than an assessment district because a special tax district is less vulnerable to challenge and provides better security for district bondholders. The funds of the CCFD would likely be considered to be "local funds" but without a specific context, it is not possible to answer this question definitely.

JAN I. GOLDSMITH, City Attorney

By _____
Brant C. Will
Deputy City Attorney

BCW:jdf
RC-2011-39

Office of
The City Attorney
City of San Diego

**MEMORANDUM**
**MS 59**

(619) 236-6220

**DATE:** September 22, 2011

**TO:** City Council

**FROM:** City Attorney

**SUBJECT:** Convention Center Facilities District Procedural Ordinance

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This memorandum is to inform the City Council that the proposed Convention Center Facilities District Procedural Ordinance (CCFD Ordinance) represents an unusual procedure for the formation of a special tax district and no assurance can be given that the CCFD Ordinance or the Convention Center Facilities District (CCFD) formed pursuant thereto will be validated by a court of law.

Due to the novel nature of the CCFD, the City Attorney, on the recommendation of outside counsel, will file a judicial validation action once the CCFD has been formed. While the City's outside counsel, Orrick, Herrington & Sutcliffe LLP, has not provided a formal legal opinion to the City regarding this matter, they have indicated to the City Attorney their belief that a court should be able to properly issue a validation judgment upholding both the CCFD Ordinance and the CCFD (see attached).

JAN I. GOLDSMITH, City Attorney

By

Brant C. Will
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September 22, 2011

Jan Goldsmith
City Attorney
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Re: Proposed Convention Center Facilities District Enabling Ordinance

Dear Mr. Goldsmith:

This firm will not be providing an opinion to the City of San Diego on the legality of the City's proposed Convention Center Facilities District enabling ordinance. This letter is expressly not such an opinion.

We participated in the drafting of the enabling ordinance and believe it addresses the City of San Diego's municipal affairs under its charter powers.

The terms of the enabling ordinance will be the subject of a validation action that will be filed on behalf of the City in San Diego County Superior Court. We believe the San Diego Superior Court should properly be able to issue its validation judgment upholding the enabling ordinance and the Convention Center Facilities District.

Very truly yours,

Daniel C. Bort