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**OBJECTIONS TO PROPOSED
ASSESSMENTS FOR
FINANCING OF UNDERGROUNDING
OF UTILITIES
(PROPOSED DISTRICT 08-01)**

Presented to Long Beach City Council

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Legal and Equitable Issues

Proposed Assessment District 08-01

- The formation of the proposed district has not complied with California law, both statutes and California Constitution
- Council must therefore reject the formation of the proposed district regardless of the outcome of the ballot procedure

Legal Issues regarding Proposed Assessment Dist. 08-01 [The Toledo – Naples Island]

- Summary of Certain Major Issues (detailed letter submitted to Council on Nov. 10, 2008):
 - * Violation of Streets & Highways Code Section 5896.6
 - * Failure to Identify General Benefits
 - * Failure to Separate General Benefits from Special Benefits
 - * Failure to Proportionally Allocate Special Benefits

Streets & Highways Code Section 5896.6

- Expressly applies to undergrounding of utilities – Section 5896.4 – a proceeding for conversion to underground system “shall” be conducted and completed in accordance with that division of the Streets and Highways Code.
- Section 5896.6 requires a petition for underground conversion proceedings to be signed by not less than 5 landowners “owning lands constituting **more than one-half of the area** of all assessable lands within the proposed assessment district.”

Streets & Highways Code Section 5896.6

- Initial petition (Feb. 2008) to form this district failed because it did not meet the 1/2 of area requirement.
- Earlier this year, the Council approved an amendment to the Municipal Code, amending Section 3.52.415 to require a petition to form an assessment district be signed by owners of land within the proposed district on which more than **one-half of the proposed assessments** are to be levied.

Streets & Highways Code Section 5896.6

- The petition that the Council certified at its September 23, 2008 by adoption of Resolution No. RES-08-0116 violates Streets and Highways Code Section 5896.6 because it did not include the signatures of property owners constituting at least **one-half** of the **land area** of the proposed assessment district.

Article 13D, § 4(a) of Cal. Constitution

Failure to Identify Any General Benefits

- “Only special benefits are assessable, and an agency **shall** separate the general benefits from the special benefits conferred on a parcel.”
- Engineer’s Report fails to separate any general benefits.
- Engineer’s Report ambiguous as to whether any general benefits exist – see, p. 10: “All general benefits, if any, . . .”
- Council Resolution No. RES-08-0116 acknowledges that the proposed district would “enhance public safety” – clearly a General Benefit

Article 13D, § 4(a) of Cal. Constitution Failure to Identify Any General Benefits [continued]

- The Constitution expressly states that enhancement of property values is **not** a special benefit (Art. 13D, §2(a)).
- However, the Engineer's Report states that the proposed improvements **will enhance the property values** within the proposed district, and therefore 100% of the improvements are of direct and special benefit to the properties within the district. See Engineer's Report, pgs. 10-11.
- Express contradiction of the California Constitution.

Article 13D, § 4(a) of Cal. Constitution

No Proportionality of Special Benefits

- Article 13D, Section 4(a) requires that the agency determine the proportionate special benefit derived by each parcel to be assessed.
- Assessments are limited to the reasonable cost of the proportional special benefit conferred on the parcel being assessed.
- The special benefits were not proportionately allocated – examples follow.

Failure to Proportionately Allocate Special Benefits [continued]

- Examples:
 - Failure to consider property sizes
 - Aesthetics – no consideration of bay view vs. non-bay view; failure to consider possible future development of school as highest and best use
 - Public Safety - no consideration of effect of remaining poles as to some parcels
 - Reliability – no consideration of reliability benefit to school with respect to telephone and cable television utility lines; no consideration of effect of private generators; no analysis of possible impact of high water table on reliability of undergrounded facilities
 - Size of Naples Elementary School and amount of assessment not proportionate – almost 1/2 of area, but assessment of less than 10% of total assessments

Burden of Proof – Art. 13D, §4(f)

- “In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.”

Burden of Proof – Art. 13D, §4(f)

- Despite that express constitutional language, prior appellate decisions had utilized a more deferential burden of proof
- Recent California Supreme Court decision – ***Silicon Valley Taxpayers Assn. v. Santa Clara County Open Space Authority*** (2008) 44 Cal.4th 431 clarified that an agency must determine whether the substantive requirements of Article 13D, Section 4 have been met regardless of the voters' decision, and that the agency's determination is entitled to no judicial deference.

Other General Issues

- Unreasonable costs – compare to costs of proposed Peninsula project, which are estimated to be approximately 50% less per parcel;
- Failure to analyze the proposed project for compliance with Local Coastal Plan;
- Failure of ballot materials to disclose total amount to be paid over time or duration of payments (violates Article 13D, §4(c));
- Failure of ballot materials to disclose additional connection costs – which may be significant; and
- Failure to tabulate ballots during Nov. 10 public hearing (violates Article 13D, §4(e)).

CONCLUSION

- Under Streets & Highways Code § 5896.6, the required threshold for formation (50% of land area) not met
- Complete failure to identify any General Benefits, and to separate Special Benefits from General Benefits
- Failure to comply with ballot requirements (e.g., no statement of total amounts to be paid if financed or duration of payments)
- Willing to meet with City Attorney and City Engineer to discuss issues in effort to avoid litigation