




OFFICE OF COUNTY COUNSEL  
INTER-DEPARTMENT MEMORANDUM

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**TO:** Board of Supervisors  
**FROM:** David A. Livingston, County Counsel   
Daniel S. Vandekoolwyk, Deputy County Counsel  
**DATE:** June 2, 2020  
**RE:** MC&FP Bonds

During the February 22, 2020 discussion about the Missouri Flat Master Circulation and Financing Plan (“MC&FP”), Supervisor Frentzen inquired whether bonds could be issued to “pay back” the County for County discretionary funds (e.g., general fund and tribe funds) used toward previously constructed improvements in the MC&FP area. Following that discussion, on March 10, 2020 (Legistar File #20-0321), the Board of Supervisors formalized Supervisor Frentzen’s prior inquiry and directed County Counsel to “provide the Board with a legal analysis of whether MC&FP funds can reimburse Tribe Funds and the General Fund if the MC&FP projects can be funded by other revenue sources.” The memorandum is provided in response to that direction.

**ISSUE**

In 2002, the qualified electors within the Missouri Flat Community Facilities District (“CFD”) authorized bonded indebtedness in an amount not to exceed \$35,000,000 and the levying of a special tax to finance the public facilities described in Exhibit B of the Resolution of Formation of the district. However, no bonds were issued under this authority. Instead, the County financed the construction of those facilities using a combination of state grant funds, the 85% tax increment set aside within the MC&FP area, and other discretionary funding (e.g., general fund and tribe funds). Can the CFD now issue bonds to “pay back” the County for County discretionary funds that were contributed by the County toward previously constructed improvements in the MC&FP area?

**SHORT ANSWER**

No, reimbursement of prior County contributions from a current bond issuance is inconsistent with both the Mello-Roos Act and the intent of the qualified electors who approved the issuance of bonds in 2002. Moreover, even if the proceeds of the bonds

could be used to repay the County in this manner, it is unlikely that any bonds issued for these purposes would qualify for tax exempt status, and would therefore cost substantially more for the County to issue.

## ANALYSIS

### Summary of the Formation of Missouri Flat CFD

On January 31, 2002, a group of landowners petitioned the Board to create a Community Facilities District in accordance with the Mello-Roos Community Facilities Act of 1982 (Gov. Code, § 53311 et seq.) (hereafter “Mello-Roos Act”). The Board held a hearing on February 12, 2002, and adopted two related resolutions of intention to establish the district, levy a special tax, and incur bonded indebtedness.

The Board held a final hearing on the proposal on March 19, 2002. At the end of that hearing, the Board adopted two related resolutions establishing the district, setting its appropriation limit, and calling an election for the levy of a special tax and bonded indebtedness to finance the public facilities described in Exhibit B of the Resolution of Formation.

In 2002, the qualified electors<sup>1</sup> within the Missouri Flat Community Facilities District authorized bonded indebtedness in an amount not to exceed \$35,000,000 and the levying of a special tax to finance various public facilities described in Exhibit B of the Resolution of Formation of the District. The election was unanimous and Community Facilities District (Community Facilities District No. 2002-01) (hereafter Missouri Flat CFD) was formed in 2002. The Board adopted one ordinance to levy the special tax and another to memorialize the 85% tax increment set aside, which was also a contractual obligation of the County pursuant to various development agreements. However, no bonds were issued under this authority. Instead, the County financed the construction of the authorized facilities using a combination of state grant funds, the 85% tax increment set aside, and other discretionary funds (e.g., the general fund and tribe funds).

### The Mello-Roos Act

The Mello-Roos Act authorizes the legislative body of a Community Facilities District to accept advances of funds or work in-kind and to enter into an agreement, by resolution, with the person or entity advancing those funds to repay the funds advanced. However, the proposal to repay the funds or the value or cost of the work in-kind, whichever is less, must be included both in the resolution of intention to establish the district and in the resolution of formation to establish the district. (Gov. Code, § 53314.9, subd. (a)(1).)

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<sup>1</sup> The election used a weighted ballot system so that each property owner vote was valued depending on the relative amount of property that they held in the proposed district. Wal-Mart had 20 votes, Safeway had 16, and WRI Golden State LLC had 21 votes.

In our case, the Resolution of Formation included a provision authorizing the CFD to accept advances of funds, but it was not clear as to the types of expenses for which the CFD would enter into a repayment agreement with the County:

“(h) Pursuant to Section 53314.9 of the Act, this Board may accept advances of funds or work-in-kind from any source, including, but not limited to, private persons or private entities, and may provide, by resolution, for the use of those funds or that work-in-kind for any authorized purpose, including, but not limited to, paying any cost incurred by the County in creating the District.” (Res. 074-2002, p. 4, (h).)

Although this provision clearly contemplates that the County would be repaid for costs incurred to “create” the District, it does not clearly indicate that the County would be repaid for other costs to finance the public facilities. Moreover, section 53314.9 requires that the CFD enter into an agreement, by resolution, agreeing to repay the advanced funds. No such agreement was entered into at the time the County chose to contribute its discretionary funds toward certain MC&FP improvements. Accordingly, it does not appear that the requirements of Government Code section 53314.9 have been satisfied to repay the County for funds contributed by the County toward MC&FP improvements.

#### Voter Intent

Even if it can be established that Section 53314.9 has been met, there is an additional issue concerning whether repaying the County from bond proceeds would be consistent with the intent of the voters who approved the issuance of bonds. A local agency cannot use bond proceeds in a manner inconsistent with the intent of the voters. (*Peery v. City of Los Angeles* (1922) 187 Cal. 753, 767.) To determine whether the voters intended the proceeds of any bonds issued by the Missouri Flat CFD can be used to reimburse the County for contributions towards MC&FP improvements, a court would begin by looking at the language of the proposal submitted to the voters, including any ballot materials. (*See Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 633 [principles of statutory construction apply to ordinance or resolution adopted by local electorate].)

The resolution submitting the bonds to the voters (Res. 075-2002) requires the proceeds of the bonds to be used to finance the facilities described in the Resolution of Formation to establish the District (Res. 074-2002). The Resolution of Formation in turn requires the district to finance public facilities with an expected useful life of five years or longer that are set out in Exhibit B of Res. 074-2002. (*See* 5th Resolved Clause of Res. 074-2002.) The Resolution of Formation also authorizes the bonds to be used for incidental expenses connected to those facilities. (Res. 074-2002, Exhibit B-2; *see also* Gov. Code § 53345.3 [describing incidental expenses].) The Ballot Pamphlet for the election incorporated the Resolution of Formation by reference and asked the voters whether the Missouri Flat CFD should be formed to “finance, in whole or in part, certain public facilities...as set forth in EXHIBIT B to the Resolution of Formation” and whether

the voters wanted to incur “bonded indebtedness in the amount of not to exceed \$35,000,000 be incurred within the District in order to finance such Facilities....”

The ballot materials presented to the voters asked the voters to approve the issuance of debt, and the levying of a special tax, in order to finance the specific public facilities listed in Exhibit B of the Resolution of Formation. Those materials did not indicate to the voters that any of the proceeds of any bonds issued under that authority, or the special tax authorized, would be used to repay the County for contributions from discretionary funds to finance those facilities.

Accordingly, it would be inconsistent with the intent of the voters to issue bonds in 2020 for the purpose of reimbursing the County for contributions from discretionary funds the County made to finance the public facilities described in the Resolution of Formation. As such, based on the current Resolution of Formation, the CFD does not have authority to utilize bond proceeds to reimburse the County for any advanced funds.<sup>2</sup>

#### Tax-Exempt Status

The Board may also want to consider whether issuing bonds to repay the County for contributions from discretionary funds to finance the public facilities described in Exhibit B of the Resolution of Formation would be tax-exempt under federal law. Under federal law, bonds issued by local agency for a governmental purpose are generally tax-exempt bonds, which means that the interest earned by the bondholders on those bonds are excluded from gross-income for federal income tax purposes. (26 U.S.C. § 103 & 26 C.F.R. 1.150-1.) This is significant because tax-exempt bonds generally can be sold at a lower interest rate than they would be if they were taxable debt, and therefore cost less to the issuer. (See California Debt Financing Guide, § i.4.2.6, i.29 (<https://www.treasurer.ca.gov/cdiac/debtpubs/financing-guide.pdf>).

A local agency may use the proceeds of a governmental bond toward reimbursement of an expense made before those bonds were issued by meeting detailed requirements set out in Treasury Regulation, Section 1.150-2. Those requirements include that no later than 60 days after paying the original expenditure, the agency adopted an official intent for that expenditure stating that the agency intended to use bond proceeds to reimburse that expenditure, and that reimbursement occurs no later than 3 years after the original expenditure. (26 C.F.R. § 1.150-2(d).)

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<sup>2</sup> Government Code § 53314.9 does allow for a Community Facilities District, after formation of the district, to obtain authorization to repay advanced funds, but the process is extremely cumbersome and requires that the CFD adopt a resolution of consideration to alter the types of public facilities and services provided within the district. To do so, the CFD would first need to hold a noticed hearing to determine if there is a majority protest against adopting the resolution and making the proposed changes. (Gov. Code, § 53337.) If there is a majority protest – defined as a protest by 50% or more of the registered voters in the district or the owners of one-half or more of the land in the district subject to the special tax – then the resolution fails. (*Ibid.*) If there is not a majority protest, then the resolution can be submitted to qualified electors in the district for a vote, where it will require approval of two-thirds of the votes cast. (Gov. Code, § 53338(b).)

In this instance, the County has financed the public facilities described in the Resolution of Formation over multiple years starting in 2002 from a combination of County discretionary funds and state grants. When the County made payments towards those public facilities, neither the CFD nor the County adopted an official intent to seek reimbursement because the County did not, at the time, contemplate that those payments would be reimbursed by a later bond issuance. Accordingly, if the CFD issued bonds to reimburse the County for those prior contributions from discretionary funds, those bonds would not qualify as tax-exempt bonds under federal law. Therefore, the CFD would likely have to sell those bonds at a higher interest rate.

### **CONCLUSION**

As currently structured, the CFD is not authorized to issue bonds for the purpose of repaying the County for prior contributions toward improvements within the Missouri Flat area. Additionally, even if the CFD possessed that authority, the bonds issued would not qualify as tax-exempt, thereby increasing the cost of the issuance and likely negating any benefit provided to the County.

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