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January 21, 2010

Honorable Chair and
Members of the Board of Supervisors
330 Fair Lane
Placerville, CA 95667

Re: Agenda Date: January 26, 2010
Hearing on Serrano Associates, LLC Claim for Refund of Mello-Roos
Taxes under Revenue and Taxation Code Section 5096

Honorable Chairman and Members of the Board:

On August 17, 2009, the Board of Supervisors received a claim for refund of Mello-Roos Taxes pursuant to Revenue and Taxation Code Section 5096 in the form of a letter from counsel for Serrano Associates, LLC dated August 14, 2009 with an attached Affidavit of L. Clark Winn dated August 12, 2009 (hereinafter "Claim"). That Claim is for the tax years 2000/20001 through 2008/2009, and alleges that the taxes have been erroneously overestimated, assessed and paid by Serrano Associates, LLC (hereinafter "Serrano"). Serrano asserts that it is entitled to a refund on the alleged grounds that the yearly calculation of annual costs was overestimated resulting in increased special taxes upon the undeveloped portions of the Serrano project. After requesting prior continuances of the hearing, Serrano has now requested to have the matter heard by the Board on January 26, 2010.

The purpose of this agenda item is to hear the Claim and any testimony and evidence presented by Serrano, to take public comment, and to make a determination to either approve or deny the claim. Attached to this staff report are pertinent excerpts of the Indenture, Rate and Method of Apportionment and other relevant documents cited herein. Full copies of all of the documents listed on Attachment "A" are lodged with the Clerk of the Board for the Board's reference. A declaration from the County's consultant, Danielle Wood of NBS, is also provided.

County Counsel recommends denial of the Claim on all of the following grounds: (1) claim for the tax years 2000/2001 through 2004/2005 are barred by the four-year statute of limitations; (2) for the tax years 2000/2001 through 2008/2009, the calculation of the reserve for delinquencies has been made in accordance with the Indenture By and Between the County of El

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Dorado and BYN Western Trust Company Pertaining to El Dorado Hills Community Facilities District No. 1992-1 (“Indenture”) and the Rate and Method of Apportionment of Special Tax (“RMA”) and is not in error - therefore no grounds under Revenue and Taxation Code section 5096 for relief exist; and (3) the Indenture strictly controls how the special tax moneys are transferred and allocated - the Indenture does not provide for or allow a refund of CFD Fund moneys to Serrano.

1. Claims for the tax years 2000/2001, 2001/2002, 2002/2003, 2003/2004, and 2004/2005 are time-barred by the statute of limitations.

Revenue and Taxation Code section 5097¹ limits the time period for filing a verified claim for refund under Section 5096 to a maximum of four years after making the payment to be refunded. Serrano’s claim includes the tax years 2000/2001 through 2004/2005 which exceed the four year statute of limitations period set forth in Section 5097. Those claims are time barred by the statute of limitations and should be denied without further consideration of the merits. ¹ Serrano has been on notice since 1994 of how annual costs were determined. In addition to the Indenture, Rate and Method of Apportionment of Special Tax, Serrano had access to Board reports, lists of special tax delinquencies, and the Special Tax Levy Report that reflected information such as the debt service, reserve for delinquencies, administrative costs, delinquency rate and fund balances. The Delinquency Summary and Delinquency Detail Reports were and are available as well on the County’s Mello-Roos consultant NBS’ website. Serrano received annual emails from the Auditor’s office providing them with fund balances. The delinquency summary and details report were and are available on the County’s website as well as contained within the annual reports available on the website of the County’s special tax consultant, NBS. In addition, the County’s consultant, NBS, emailed Serrano the special tax calculation worksheets for the fiscal years in question. Serrano has had ample time to appeal any error it deemed appropriate in accordance with the RMA

2. The calculation of annual costs was appropriately made and as a consequence there are no grounds for relief under Revenue and Taxation Code section 5096.

Serrano has alleged that the yearly calculation of “Annual Costs” under the Mello-Roos, and specifically the reserve for delinquencies, was excessive which led to increased special taxes on the undeveloped portions of the Serrano project owned by Serrano. The “Annual Costs” for those tax years were calculated in accordance with the Mello-Roos requirements.

Under the Indenture, Section 5.3 entitled Levy and Disposition of Special Tax, beginning in 1999 and so long as any Bonds are outstanding, the County shall annually levy the special tax in an amount which will be at least sufficient, after reasonable allowances for contingencies, errors in the levy and anticipated delinquencies, to pay all principal and interest on the Bonds as they become due, to pay all actual and budgeted expenses of administration, to cure any

¹ See also *Hanjin Intern. Corp v. Los Angeles County Metropolitan Transp. Authority* (2003) 110 Cal.App.4th 1109.

delinquencies in the payment of principal and interest on the Bonds which have occurred or will occur in the fiscal year just beginning, and to replenish the Reserve Account to the Reserve Requirement as necessary because of delinquencies that have already taken place. The RMA further defines the appropriate rate or amount of the special tax to be levied. The RMA defines “Annual Costs” as including a reserve for delinquencies determined by adding the prior year delinquencies to an amount for the anticipated delinquencies in the coming year² as follows:

“Annual Costs” means, for any Fiscal Year, the total of (i) Debt Service for the Calendar Year commencing January 1 for such Fiscal Year through December 31 of the following Fiscal Year; (ii) Administrative Expenses for Such Fiscal Year; (iii) any amounts needed to replenish any bond reserve fund for bonds of the District issued for the CFD to the level required under the documents pursuant to which such bonds were issued; (iv) *an amount equal to the amount of delinquencies in payments of Special Taxes levied in the previously Fiscal Year and an amount for anticipated delinquencies for the current Fiscal Year, less any credit from earnings on the bond reserve fund, less credit for applicable development fees, less any reimbursements, and/or less any funds available from prepaid Special Taxes as prescribed in Section 7;* and (v) pay-as-you-go expenditures for authorized facilities to be constructed or acquired by the CFD.(emphasis added)

The Auditor/Controller, and the County’s consultant NBS, have verified that the reserve for delinquencies has been calculated each year according to the Indenture and the RMA formula. In order to state a claim for relief under Section 5096, Serrano must show that the reserve for delinquency was excessive due to clerical error.³ Because the calculation of “Annual Costs” is in accordance with the Indenture and the RMA, and no clerical error or other grounds for relief under Revenue and Taxation Code section 5096 have occurred, the claim should be denied.⁴

² Many of the County’s other Mello-Roos RMAs define the reserve for delinquencies to include both current and anticipated delinquencies. Two others either allow for “and/or” or specifically states “previous Fiscal Year or anticipated for the current Fiscal Year”.

The formula for determining the anticipated delinquency portion of the reserve is in accordance with standard practice in the industry as follows: Reserve for Delinquency = the current year’s actual delinquencies + [delinquency rate (delinquency amount divided by total amount billed) * that tax year’s debt service (principal and interest due for that current year)].

³ “A clerical error exists when without evident intention one word is written for another . . . a mistake in copying or writing . . . a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination”. *Los Angeles Shipbuilding & Dry Dock Corp. v. County of Los Angeles* (1937) 22 Cal. App. 2d 418, 423. In *Kuhlemeier v. County of Los Angeles* (1935) 2 Cal.2d 257, 262, the California Supreme Court likewise distinguished a clerical error, for which relief may be stated under Section 5096, as one as a erroneous numeric entry, as opposed to errors of substance, of judgment, and of law, which are said to affect the merits of the assessment and for which no relief under this section is provided.

⁴ Section 8 of the RMA provides for an appeal of the Special Tax assigned to a parcel prior to September 15 and Serrano has, for the fiscal years 2008/2009 and 2009/2010, taken advantage of that provision and received a refund from the Auditor/Controller for those tax years.

3. The Indenture Prescribes the Allocation of Funds within the CFD Fund Account


Pursuant to the Indenture, Section 3.4 entitled Special Tax Fund, all special tax revenues of CFD1992-1 shall be transmitted by the County to the Fiscal Agent designated in the Indenture (BYN Western Trust Company) for deposit into the Special Tax Fund. The Fiscal Agent shall disburse moneys in the Special Tax Fund first to fully fund all scheduled payments of bond principal and interest, then to replenish the reserve required under the Indenture. Funds not needed for these two purposes shall be disbursed by the Fiscal Agent on September 15 each year to the County for deposit in the CFD Fund.

The CFD Fund is held and maintained by the County and administered by the Auditor/Controller. Section 3.8, entitled CFD Fund, of the Indenture provides for, in specific order, the use of the moneys in that account. This section is mandatory not discretionary. The County *shall* disburse moneys in the CFD fund as follows: to the Expense Account to the extent necessary to replenish it for annual expenses, and then to the Facilities Account only for permitted facilities as listed in the resolution of formation, and then transferred to the Fiscal Agent for deposit within the Optional Redemption Fund for the redemption of Bonds in accordance with Section 3.9, Optional Redemption Funds, of the Indenture.

The Indenture specifies the manner in which the CFD funds can be allocated and does not allow for any portion of the CFD Funds to be refunded to, or paid to, Serrano. As a result for the reasons stated herein County Counsel recommends denial of the claims for each of the tax years sought.

Very truly yours,

LOUIS B. GREEN
COUNTY COUNSEL


By: Patricia Beck, Principal Assistant County Counsel
By: Mike Ciccozzi, Deputy County Counsel

Attachments

cc: Joe Harn, Auditor/Controller