

**PISMO BEACH PARKING DISTRICT STUDY
WORKING PAPER NUMBER THREE
FINANCING OPTIONS FOR
PISMO BEACH DOWNTOWN PARKING**

Prepared For:

**The City of Pismo Beach
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Prepared By:

**P&D Technologies
Orange, California**

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**FINANCING OPTIONS
FOR
PISMO BEACH DOWNTOWN PARKING**

The City of Pismo Beach has several optional methods of financing proposed improvements to downtown parking. The two basic methods of financing are:

- o Pay As You Go (Cash) - This method will be the least expensive approach to finance the parking improvements; however, early commitment of available cash may restrict the City's ability to meet other needs.
- o Pay As You Use (Debt) - This method is more expensive; however, it could provide the City greater flexibility and alternatives to meet other needs and rapidly changing requirements.

There are several optional debt financing techniques available to the City for financing parking improvements. Selection of financing method should follow an initial study of parking facility needs, an estimate of costs, and identification of the properties that will receive direct benefit from the works of improvement. Some of the most commonly used financing techniques include:

General Obligation Bonds

Special Tax (Mello-Roos Community Facilities District). See attached discussion paper prepared by the law offices of Brown & Diven.

Certificates of Participation. Provides long term financing through a lease, installment sale agreement or loan agreement that does not constitute indebtedness.

Special Assessments. Almost all special assessment proceedings are conducted under the Improvement Act of 1911 or the Municipal improvement Act of 1913. The attached discussion paper prepared by the law offices of Brown & Diven describes these two special assessment acts.

The 1911 Act and the 1913 Act are general purpose acts that can be used to construct and/or acquire a great variety of public improvements. All other acts are special purpose acts that are intended to provide a special class or type of public improvement such as parking facilities.

Vehicle Parking District Law of 1943. This law, found in Section 31500 et seq. of the Streets and Highways Code, provides for acquiring and improving parking facilities through the formation of an assessment district. Under this law, the costs of the parking project are assessed against individual properties in proportion to the benefits received. Each assessment represents a fixed lien against the real property benefited.

The assessment procedures formerly contained in the Vehicle Parking District Law of 1943 have been repealed, and the Improvement Act of 1911, the Municipal Improvement Act of 1913 and the Improvement Bond Act of 1915 have been adopted as part of the Vehicle Parking District Law of 1943. This change makes possible the use of the 1911 Act or the 1913 Act for assessment proceedings and the 1911 Act or 1915 Act to issue bonds. All of the preceding discussion about these acts is applicable.

One feature of the 1943 Act is that it specifically permits a public agency to apply surplus parking revenues as a credit toward the unpaid assessments. Proportionate annual refunds may be made by the agency to landowners whose assessments have been paid in cash. When used in parking operations, the 1943 Act allows for greater flexibility than do any other assessment district procedures. The legislative body appoints a Board of Parking Place Commissioners to operate the parking facilities when they are completed. The commission sets the fees and rental rates for the use of the facilities and has the power to operate, manage and control parking places. This includes the power to enter into leases and contracts and to grant franchises to operate the facilities. The legislative body may in kind contribute to the project in the form of administrative services, cash contributions, land contributions or other contributions. Either before or after the formation of the parking district, the legislative body may provide that parking revenues be used to maintain and operate the parking lots, to acquire additional facilities, or to make refunds on the assessment levied.

Parking District Law of 1951. These statutes provide a method of financing facilities in which debt service may be met with revenues from off-street parking facilities, from parking meters in the district and from ad valorem assessments. (See Section 35100 et seq. of the Streets and Highways Code.)

The Parking District Law of 1951 is sometimes classified as an assessment district law. However, it is a revenue bond act with the original issue of bonds secured by estimated meter revenues. The Act provides that property in the district may be assessed ad valorem to meet any deficiency in revenue. The 1951 Act also has provisions for refunding the original issue of revenue bonds by creating a pure assessment lien against each parcel of land in the district.

The proceedings to form the district must be initiated by a petition from the owners of property representing at least 51 percent of the assessed valuation of the land area in the proposed district. Among other general requirements, the property owner petition must describe the boundaries of the proposed district (Property does not need to be contiguous), the parking project, limits as to time and rate of any ad valorem assessments, and the proposed amount, if any, of money that the property owner recommends the city contribute toward the project and/or the issuance of bonds.

If the city council accepts the petition, it causes estimates to be made of the costs of the project, the annual revenues and expenses of the parking spaces in the district, and the assessed valuation of the district.

Following the preparation of the estimates, a hearing is held on the proposed project. At the hearing, the council may modify the project or the district boundaries, in which case new estimates must be made, and new hearings must be called. If owners of property representing over one-half the assessed valuation of the district file protests, the proceeding must be dropped, and no new proceeding for the same project may be started for one year. Once the hearing has been concluded without a majority protest, the council adopts an ordinance declaring the district formed and describing the improvements.

The legislative body may provide for the issuance of bonds when the cost of the project has been determined. The principal amount of bonds may include the costs of acquiring and improving the parking places, incidental expenses, a reserve fund and interest on the bonds during construction and for six months after completion of the facilities.

The bonds must be offered for sale at competitive bidding for not less than eight percent of par value and at an interest rate not to exceed 12 percent. The bonds must mature within 35 years and may be made subject to call for redemption before maturity at whatever price the city determines in the bond resolution. Interest on the bonds must be paid semiannually for the first year.

The resolution of issuance may provide for the bonds to be paid with the revenues from the parking facilities the bonds are used to finance, with the revenues from parking meters along the streets in the district, or with ad valorem assessments on property in the district. However, the maximum annual rate for ad valorem assessments and the maximum period of years during which they may be levied must be set forth in the petition to form the district. In the case of general law cities, these maximums cannot exceed 75 cents per \$100 assessed valuation and 36 years. The assessments need not be levied unless other revenues are insufficient to meet bond service and maintenance and operation costs.

The law permits the bond resolution to include various other provisions normally associated with revenue bond financing. These include establishing various funds to which revenues may be allocated, restricting competing facilities and other covenants for protecting revenues and the rights of the investors.

Note that the power to levy the ad valorem assessments may have been eliminated by the passage of Proposition 13, and the resulting amendment to the California Constitution, Section XIII A does prevent the levying of such an assessment. Thus it would appear that the bonds must be secured solely by parking revenues.

The legislative body may determine the parking district formed under the 1951 Act would be best benefited by being relieved of the obligation to produce parking revenues. A resolution would have to be approved by the legislative body that provides for outstanding bonds to be redeemed by levying assessments. Assessments are to be levied according to the provisions of the Improvement Act of 1911, and the refunding bonds would be issued under the 1911 Act. Therefore, if the original revenue-type bonds are refunded, the parking revenues would be eliminated as a source of security. The new bonds issued would be assessment bonds secured by a direct lien on the property.

Law Offices

BROWN & DIVEN

P. O. BOX 8025

FAIRBANKS RANCH PLAZA

RANCHO SANTA FE, CALIFORNIA 92067

TELEX (619) 756-0412

F. MACKENZIE BROWN*
WARREN B. DIVEN
DANIEL S. HENTSCHKE
*A PROFESSIONAL CORPORATION

SAN DIEGO (619) 456-1915
ORANGE (714) 551-1915
LOS ANGELES (213) 587-1915
VENTURA (805) 853-1915
RIVERSIDE (714) 359-5489

SPECIAL ASSESSMENT DISTRICT FORMATION AND FUNDING

By: F. MACKENZIE BROWN

FIRST OF ALL, WHAT IS AN ASSESSMENT DISTRICT?

An assessment district is not a separate political agency or authority (Redevelopment Agency or Parking Authority), but is a financing tool available to most existing legislative bodies (cities, counties, special districts), that allows that agency to construct desired and authorized public improvements, with the costs and expenses of said project being apportioned and spread against the benefited properties within the boundaries of a designated area (assessment district), with said costs and expenses being directly proportioned in accordance with the special and direct benefits that each parcel receives from the works of improvement. The assessment liens, then, are financed through the issuance of bonds payable over a period of years, thus providing the advantage to the property owners of a loan or deferred funding for the improvements.

WHAT IMPROVEMENTS CAN BE FINANCED UNDER ASSESSMENT DISTRICT PROCEEDINGS?

Section 5101 of the Streets and Highways Code, "Improvement Act of 1911", Division 7 of said Code ("1911 Act"), sets out specifically the kind of work that is authorized for construction under special assessment district proceedings. The "Municipal Improvement Act of 1913", Division 12 of said Code ("1913 Act"), incorporates this Section, and also allows the acquisition of those improvements that can be constructed. The list is extensive, and the Section should be read to clearly understand the kinds of work authorized. A general classification would include the following:

Grading
Sidewalks
Sanitary sewers
Drains
Lighting
Fire protection
Flood protection

Water supply
Gas supply
Bomb or fallout shelters
Retaining walls
Ornamental vegetation
Navigation facilities
Stabilization of land

The general consensus is that improvements authorized to be constructed by a public agency, where special benefits can be established, would normally be a valid subject matter of special assessment district funding.

Although the list of authorized improvements is extensive, a leading decision, Harrison v. Board of Supervisors, 44 Cal.App.3d 852, set forth a basic test that should be used in analyzing the validity of the proceedings in stating that first, one must clearly identify the benefit, and second, determine whether or not the benefit being received is of a specific and direct benefit, or more of a general public benefit. (Sewer, water construction vs. city hall, etc.) The Court stated only a special benefit will justify an assessment, not a general benefit for the public as a whole.

A 1980 decision, Solvang Municipal Improvement District v. Board of Supervisors, 112 Cal.App.3d 545, again states the generally accepted rule that the construction of facilities to serve the general public, such as fire stations, police stations and schools, may not be transferred to special assessments by a mere change in their name.

A more recent decision, J. W. Jones Companies v. City of San Diego, 157 Cal.App.3d 745, did uphold the validity of a charter city's benefit assessment program for public improvements to serve developing areas, including transportation facilities, libraries, fire station, public buildings, police stations, etc., and indicated that past traditional case law should not act as a barrier to growth, but as a guideline to accomplish the needs of tomorrow. The Court upheld the validity to require the undeveloped land to bear the costs for the needed public facilities necessary to serve the community. Also, in a companion case, City of San Diego v. Holodnak, 157 Cal.App.3d 759, the Court again upheld the validity of the procedure and held that the facilities did confer a direct benefit on the properties within the area of benefit. Even though the community at large might receive some benefit from the facilities, the main and primary beneficiaries would be the residents of the immediately developing facility. Again, certain of the facilities did include the more generalized public improvement, i.e., neighborhood park, library branch, etc. These proceedings were conducted by a charter city, and at this time the general laws of the State have not yet been amended to authorize these types of improvements.

For years there was a question as to whether or not public utility facilities, i.e., underground electrical, telephone, gas line installations, etc., should be installed under assessment district proceedings conducted by a public agency. The issue was the validity of special assessment financing for utility improvements to be owned by a public utility which did not have special assessment powers. In County of Riverside v. Whitlock, 22 Cal.App.3d 863, the question presented to the court related to the validity of the installation of a gas distribution system for domestic service where the proceedings were being conducted by the County of Riverside, and the facilities were to be owned, managed and controlled by the Southern California Gas Company, not the county; not a public agency, but a regulated public utility. The court held that the fact the improvements would be owned and operated by a public utility does not detract from its public character, and the test of the public character of the improvement is the use to which it is put, not necessarily the person by whom it is to be owned or operated, inasmuch as the public utility was obligated by law to manage and operate the system and to provide a valuable service to the residents within the boundaries of the Assessment District.

WHAT ARE THE VARIOUS ASSESSMENT STATUTES USED IN CALIFORNIA?

Initially one must distinguish procedural acts from bond acts. First of all, in California there are two commonly used procedural acts -- "Improvement Act of 1911" [Division 7 of the Streets and Highways Code of the State of California] ("1911 Act"), commencing with Section 5000; and the "Municipal Improvement Act of 1913" [Division 12 of the Code] ("1913 Act"), commencing with Section 10000; and there are two bond acts -- "Improvement Act of 1911" ("1911 Act"), commencing with Section 6400; and "Improvement Bond Act of 1915" [Division 10 of the Code] ("1915 Act"), commencing with Section 8500.

PROCEDURE

UNDER THE "1911 ACT", the normal procedure is, upon the completion of the plans, specifications and cost estimate, a public hearing is noticed on the Resolution of Intention. At that time, construction bids could have been received, so that the property owners would be advised of the bid costs and expenses for accomplishing the works of improvement. Upon the conclusion of this, the first of two public hearings; if the agency decides to proceed, the contract is awarded to the lowest responsible bidder. Inasmuch as there is no procedure for a sale of bonds, the contractors must arrange their own interim financing to pay the costs and expenses necessary to accomplish the improvements, together with the advancement of incidental expenses, as required.

The philosophy of the "1911 Act" is that the contractor, upon completion of the construction, is paid by the agency through the issuance and delivery of bonds. Upon the completion of the construction, the engineer prepares the final assessment roll and diagram, where he shows each parcel and that property owner's individual assessment charge for the completed works of improvement. At that time the second public hearing is noticed, and upon the conclusion of that public hearing, and following a 30-day period where the property owners can discharge their assessments, the bonds are ordered and ultimately delivered to the contractor or his assigns to represent final payment. Because contractors are not in the business of holding bonds, it is necessary for them to arrange for the sale of these bonds, which is done prior to the time that they submit their construction bid to the public agency. Another hurdle to these proceedings is that underwriters are reluctant to make early commitments when they know that the bonds will not be available for distribution for a period of 9 months to 1 year or longer. This fact, and because the contractors must arrange their own interim financing during the course of construction, has caused costs to continually increase on "1911 Act" proceedings.

UNDER THE "1913 ACT", at the time the public hearing is noticed following the preparation of the plans, specifications and cost estimates, the engineer has also prepared the preliminary assessment roll and diagram, so that a single public hearing is now scheduled for all matters. The engineer prepares his Engineer's "Report", based on his estimate of the costs of construction and the incidental expenses. Construction bids and a bond sale can then be authorized prior to the public hearing. At the time of the public hearing, the construction bids would be available, as well as a bid for the sale of bonds; thus all financing is generally known and assured in advance of construction.

Also, under the "1913 Act", any improvement that can be constructed can, in the alternate, be acquired by the public agency from the property owner.

The public agency can proceed to have a public sale of the bonds, or can proceed to negotiate the bonds on a private basis, as it desires. Streets and Highways Code Section 10602 allows the bonds to be sold as the legislative body directs. Inasmuch as the bonds now are sold prior to construction and delivered soon thereafter (1-3 months), the construction contract can be administered as a typical public works contract of a public agency, with normal progress payments being made to the contractor based upon completed portions of the work. This procedure eliminates any need for contractor interim financing, and also shortens the time for bond delivery. One major concern under these proceedings is that since the assessments are confirmed in advance of the construction, the engineers must be careful in the cost estimates to cover in their cost estimate and assessment roll for all contingencies and possible change orders, so as to avoid any cost overrun on the project.

**AFTER ANALYZING THE APPROPRIATE PROCEDURAL STATUTE,
WHAT ARE THE DIFFERENCES IN THE BOND ACTS?**

BONDS

A "1911 Act" bond is basically a property loan or a tax-exempt trust deed. An individual bond is issued to represent each individual assessment, and an individual assessment is levied against each benefited property or parcel of land within the boundaries of the assessment district. That bond can be in any amount in excess of \$150, and is issued to represent that property's proportionate share of the costs and expenses for the improvements being constructed. It can also be analogous to a direct loan to the property owner. In cases of default or delinquency, the bondholders' sole remedy is direct foreclosure against the respective property covered by the bond, and that action can be administered through the public agency Treasurer's department or through the local Superior Court. There is no fiscal impact or obligation on the public agency; there is no limitation to its taxing powers or revenue flows, nor any contingent liability to make up any delinquencies or defaults.

"1915 Act" bonds are issued serially, normally in denominations of \$5,000 or \$10,000, the total of the issue representing the total amount of the levied unpaid assessments. The bondholder no longer has a direct lien relationship against any particular property, inasmuch as the bondholders are holding even denomination bonds, the total of which is secured by the properties within the boundaries of the assessment district. The same parcels are subject to a lien, but now, in cases of default or delinquency, the obligation for foreclosure is shifted to the public agency, as no bondholder has any direct lien right. The public agency can allow the property to be sold under the same rules and procedure for County property taxes (5-year tax sale, then deed to State), or the public agency can immediately initiate a judicial foreclosure in the local Superior Court.

The law also requires the public agency to advance "available funds" to the redemption fund to buy the delinquent property (cure the delinquency). A recent amendment to the law has now allowed inclusion in the bond issue of a special reserve fund, which monies will constitute the available funds to be advanced to that redemption fund, and also these funds will be used to make the final payment on all parcels within the boundaries of the assessment district (Streets and Highways Code (Section 8880, et seq.)). These monies are held in reserve, for the benefit of the bondholders, and can be invested, etc.

WHAT FACTORS MUST BE CONSIDERED WHEN DECIDING WHICH PROCEDURAL OR BOND ACT SHOULD BE USED?

AS TO PROCEDURE, the overwhelming factor today relates to the cost of money, as well as the constant changing cost of money. It is very difficult, expensive, and may be impossible in some cases, to arrange the interim financing necessary for a "1911 Act" procedure, especially one of any size. Investors and underwriters are reluctant to make a firm purchase commitment where bonds would not be available for delivery within a short time. The "1911 Act" procedure could mean a delay in delivery of bonds up to 9 months to 1-1/2 years after a purchase agreement, depending on the time for construction and the time for scheduling and concluding the public hearing, etc. Because of this, the majority of public agencies today utilize the "1913 Act", whereby the bonds can be readily sold and delivered with cash immediately available to pay for the costs and expenses of the project. In today's market place, it appears that approximately 85-90% of all proceedings are conducted under the provisions of the "1913 Act".

AS TO THE BONDS, if the parcels are all subdivided or small parcels, and the resulting assessments not excessive, the decision to use "1911 Act" or "1915 Act" bonds could depend on past practices or preferences of the public agency. If the assessment district is comprised of quite large parcels which ultimately may be subdivided, which means large bonds under the "1911 Act", such bonds are difficult, if not almost impossible, to market. ("1911 Act" bonds in excess of \$50,000 can become difficult to market.) In those cases, therefore, it could be advantageous and may be necessary to use the "1915 Act" bond to gain the advantage of the \$5,000 increment. Also, when those larger parcels are ultimately subdivided, the procedure for the reapportionment of the assessment dollars can more easily be done administratively by the public agency, whereas the "1911 Act" reapportionment and split requires the expressed written consent of the bondholder, which in some cases has been difficult, if not impossible, to obtain, thus forcing the entire discharge of possibly a large assessment. This can cause an extreme hardship to the property owner if he wishes to develop and split part of the property. The use of "1915 Act" bonds today is far more common and widely used than the "1911 Act" bond.

HOW ARE ASSESSMENT DISTRICT PROCEEDINGS INITIATED?

A general belief is that assessment district proceedings must be initiated by a petition of the property owners within the boundaries of the designated assessment district. Such is not necessarily the case. Although proceedings can be initiated by a petition, most proceedings for improvements can be initiated by direct action of the legislative body without the necessity of any filed petition. From a legal standpoint it is necessary to comply with the steps and provisions of the "Special Assessment Investigation, Limitation and Majority Protest Act of 1931" [Division 4 of the Streets and Highways Code of the State of California] ("Debt Limit Act" or "1931 Act") before any assessment district proceedings work can be ordered. These proceedings can be undertaken by a legislative body to initiate the proceedings without the necessity of a petition. The "1931 Act" also contains certain provisions and procedures for waiving the necessity of its steps, and they are generally as follows:

- A. A petition signed by 60% of the property owners within the boundaries of the assessment district;
- B. For sanitary sewers or storm water drains, where a Health Officer's letter has been obtained, recommending that the proceedings be instituted as a health measure;
- C. Charter agencies, upon establishing a procedure for holding a public hearing on the public convenience and necessity for the improvements;
- D. Sidewalks for the safety and benefit of children attending school (Streets and Highways Code Sections 2804, 2808, 2810).

The procedure for complying with the "1931 Act" requires the preparation of what is commonly known as the "Debt Limit Report", which is an engineering document setting forth a cost estimate and each property owner's individual assessment, as well as certain information regarding the assessed value of land, true value of land, improvements, etc. This Report and contents is then scheduled for a public hearing, and the purpose of this Report is to provide value/lien information to public agencies prior to the time that they consider ordering any public improvements.

WHICH IS THE BEST WAY TO INITIATE THE PROCEEDINGS, BY PETITION OR DIRECT LEGISLATIVE ACTION?

Although there is great political advantage to the filing of a property owner executed petition, many times property owners will be reluctant to sign any petition until all cost figures and final design alignments are known. This may prove difficult to ascertain to their satisfaction, therefore executed petitions are unable to be obtained. If the project is initiated directly by the legislative body [Streets and Highways Section 2820] ("Debt Limit Act" proceedings), upon an estimate being prepared and a map showing the improvements and the boundaries, a public hearing can then be scheduled where all property owners would be noticed as to the time and place for a public hearing, and the legislative agency would be formally considering the project. What this means is that the momentum for initiating the proceedings has been shifted from the property owners to the public agency, thus allowing the matter to move forward to a noticed public hearing. Different considerations and facts in different projects could warrant different conclusions.

WHO ARE THE PEOPLE INVOLVED IN AN ASSESSMENT DISTRICT PROJECT?

Generally there could be 5 roles to be filled in one form or another in order to have a successful project. The Design Engineer, obviously, is the person needed to prepare the required plans and specifications showing the works of improvement. Next, the Assessment Engineer is the person with the responsibility of apportioning the costs against the properties in proportion to the special benefits each parcel receives from the works of improvement. This person can be the key to the success of the project, as it is his responsibility to determine each individual charge and the method of assessment allocation. The Bond Counsel has the responsibility of preparing the necessary resolutions and support documentation and issuing, at the completion of the proceedings, the approving legal opinion attesting to the validity

of the proceedings and the enforceability of the lien. The Financial Consultant is a person specialized in obtaining proposals for the sale of bonds, and for a successful issue he must keep abreast of changing market conditions and make recommendations as to the time, terms and conditions for the sale. Lastly, then, the Underwriter is the person who purchases the bonds and makes the bond proceeds money available to the public agency to accomplish the works of improvement. Certain of these functions can be consolidated with others, depending on the needs or desires of the agency and/or the project.

WHAT INCIDENTAL EXPENSES ARE ALLOWABLE TO BE INCLUDED IN THE PROCEEDINGS?

Again the initial reference should be to the statutory enactment as set forth in the "Improvement Act of 1911", Section 5024. That Section generally mentions the following:

1. Engineering and legal fees;
2. Printing and advertising;
3. Bond servicing and collection;
4. Compensation for Superintendent of Streets;
5. Expense of making the assessment;
6. Soils tests;
7. Debt Limit Report;
8. Title searching;
9. Relocation of public utility facilities;
10. Costs of acquisition. Note that the acquisition by gift, purchase or eminent domain is not limited to land, rights-of-way easements, but the following items are subject to acquisition:
 - a. Sewage disposal facilities or the capacity in or right to use sewage disposal facilities;
 - b. Drainage systems or facilities or capacity in or right to use;
 - c. The payment in full of all amounts necessary to eliminate previously imposed special assessment liens.

One question for consideration is whether or not it is advisable in all cases to require as an acquisition, so as to eliminate any second lien, the purchase of previously imposed special assessment liens. The facts might be that a prior assessment lien is unpaid and outstanding at a low interest e.g., 6%. The Agency, by forcing the discharge, requires the property owner to incur an increase in his interest rate from 6% to 12%, as well as possible 5% redemption premium, plus discount charges that are now added to his previously levied special assessment. This Section, for that reason, should be watched carefully before usage.

11. In the event the construction of sewers shall have been ordered, service connection and capacity charges established as a condition to providing sewer service for the benefit of properties within the district and required for the completion of the improvements constructed;
12. In the event the proceedings are for water improvement construction, the same basic condition that charges for connection or capacity, when they have been established as a condition to providing the service strictly for the benefit of properties within the district and required for their completion and utilization.

One should read the Supreme Court decision, City of Los Angeles v. Offner, 55 Cal. 2d 103, where the Supreme Court disallowed the inclusion within the incidental expenses of a connection charge for sewer outlet facilities. The court there stated the rule that any substantial excess of the assessment over the direct cost would be a general taxation of that particular district, and the court stated that the collectible incidental connection charge was not fixed with specific reference to the costs of providing sewer connections to the properties within the particular assessment district and the amount was a basic, general, city-wide charge. It held that inasmuch as the charge could be used to construct sewers which were not a part of the subject improvement, that it was not an allowable incidental expense.

CAN THE PROCEEDINGS INCLUDE NECESSARY LAND ACQUISITION COSTS?

The "1911 Act" and "1913 Act" expressly provide for the proceedings to include the acquisition of land or interest in real property and easements (Streets and Highways Code Sections 5023.1, 10010). Both statutes provide that in making the benefit assessment, credits may be given for dedications of land (Streets and Highways Code Sections 5360.3, 10209). The assessment engineer, however, must be careful in making a spread of land acquisition costs, inasmuch as the courts have held that an assessment spread will be arbitrary under certain circumstances where the agency has adopted a fixed policy of assessment back to the landowner of land costs without any consideration of benefits on an individual basis (Spring Street Company v. City of Los Angeles, 170 Cal.24). A more recent decision, Cogan v. City of Los Angeles, 34 Cal.App.3d 516, involved facts where the city was proposing a project which included land acquisition, together with grading and paving. It was necessary to acquire an easement over a strip of land owned by the plaintiff. All other easements necessary for the project had previously been acquired by the city through dedications. Almost the entire cost of acquisition was then assessed against the plaintiff's property. The challenge made was that the city was taking the property for a public use, and pretending to pay just compensation with one hand, while deliberately planning to take that payment back with a direct assessment against that property for the same amount. The question then before the court was whether or not this assessment back of the land costs was a constitutionally permissible procedure, or based on a predetermined bad faith policy. The plaintiff argued that under the assessment method, the cost for land acquisition was basically all spread against his property, thus constituting a taking without due process. The court relied on Section 5360.3 of the Streets and Highways Code, allowing for adjustments to be made because of contributions or donations by other property owners along the block, the theory being that the burden of acquisition costs should not necessarily be cast upon those who have previously donated land. The city exempted from assessments those landowners who had already borne costs of acquisition by dedicating and improving their land, thus the remaining unpaid costs of land acquisition were apportioned among those properties which had not previously dedicated or donated. A contrary result would have meant that the neighbors would be paying twice, and to avoid that situation, the court upheld the validity of that assessment. Also, see White v. County of San Diego, 26 Cal.3d 897. In that case the court again held that it was proper to exclude from the assessments, lands over which rights-of-way already had been dedicated.

ARE THERE RULES AS TO THE METHOD AND FORMULA FOR THE APPORTIONMENT
OF THE ASSESSMENT SPREAD BY THE ASSESSMENT ENGINEER?

The statutes all generally provide that the cost and expenses of the proposed improvement shall be spread and apportioned against the properties in direct proportion to the estimated benefits received by said parcels from the improvements. Property owners then have the right to protest the method and formula of the assessment engineer, with the legislative body then having the ability to make certain modifications or amendments to the assessment at the public hearing. Although the statutes do not set forth specific rules or guidelines for the spread of the assessments, the courts, in reviewing factual situations through their decisions, will indicate what has been an improper assessment. In a leading California decision, Harrison v. Board of Supervisors, *supra*, the court set forth a basic three-prong test that should be used in analyzing the validity of any assessment district or the spread. First of all, it is necessary to identify the benefit to be received from the public improvement. Secondly, a determination must be made if the benefit being received is a specific and direct benefit or a general benefit. Special assessments will be upheld on the theory of a special and direct benefit being received from the works of improvement. Thirdly, one must ascertain if the formula is truly one based upon the individual benefits received. In the Harrison decision, a special assessment was levied for the construction of certain storm sewers, and in the testimony relating to benefit, it was stated that one of the benefits would be the prevention of street flooding which occurred during the rainy season. The court held that this facilitation of traffic is of a general benefit to the community, and not of a direct benefit to the property owners, inasmuch as there was no testimony relating to the flooding on the private properties themselves. The testimony reflected that the amount of the assessment was calculated upon a rainfall runoff coefficient based upon zoning of the lands within the assessment district. The court pointed out that one must consider that possibly there would be different benefit between higher land which may not be flooded (or at least to a lesser degree), than lower land. The rule is that only a special benefit to properties assessed will justify the assessment, not the general benefit of the public as a whole. The testimony did not relate to any direct benefit to the private property or protection from inundation. Obviously from this decision, it is clear that a careful and detailed analysis must be made of the direct and special benefit being received.

Another case, Costello v. City of Los Angeles, 54 Cal.App.3d 28, supports the rule that the assessment spread should not be an arbitrary spread without any basis for its foundation. The improvement in this case consisted of the widening of a public street, and the assessment engineer, in spreading the assessments over the lots on either side of the street, determined that no benefit would accrue to any lot beyond 135 feet from the street. The court found nothing in the record to support the method used by the assessment engineer in support of the arbitrary 135 foot basis. The record indicated that the assessment engineer stated that it was based on their experience and best judgment, and it followed a procedure previously used by the city. The court then concluded that nothing could be more arbitrary, and accordingly invalidated the assessment. Again, the rule to be learned is that there must be a foundation or basis for the spread of the assessments, and it should not be an arbitrary decision.

An additional decision, Howard Park Company v. City of Los Angeles, 119 Cal.App.2d 515, upheld a general principle that a voluntary special use to which the property is put should not be considered as affecting the amount of benefits to be received by the property. In this case, the court was presented with a factual situation where sanitary sewer improvements were being assessed to land zoned for and being used for oil production purposes. The challenge was that the assessments could not possibly be made against the land of the petitioners in proportion to the benefits received, inasmuch as the land was currently being used for oil production and there was no early prospect of it being converted to residential use. The court, in upholding the assessment, indicated that it would be inequitable and unfair to exempt particular property from an assessment just because of a special use voluntarily being made by the owner, and which he could change at any time so as to then reap the benefits of an improvement that does not, at the time the assessment is made, directly benefit him because of the voluntary special use. The court continued and stated that the question of benefit is also a matter of forecast and estimate, and thus one must also consider probable use. The court also indicated that one of the major tests, being the increase in market value before and after the improvements, is a fair test, but not necessarily the exclusive test in arriving at the question of benefit.

The courts thus continually state that the basis in determining benefits to the property may be done by a variety of methods, so long as it is reasonable, and it even may be determined by using an ad valorem basis, under certain circumstances. Solvang Municipal Improvement District v. Board of Supervisors, supra.

WHAT ABOUT ASSESSMENTS TO BE LEVIED ON PUBLICLY OWNED PROPERTY WHICH BENEFIT FROM THE IMPROVEMENTS?

The "1911 Act" and "1913 Act" set forth specific procedures for the issuance of bonds or public property certificates against publicly owned property included within the boundaries of an assessment district, with the key Section being Section 5302.5, which sets forth the procedures and steps for the levy of assessments against publicly owned property, including school districts. The Section basically provides that in the event the legislative body of the entity whose property is assessed decides that the assessment shall be payable in installments, then that agency shall include in the next tax levy an amount sufficient to pay the annual debt service, and that they shall include in each succeeding year a tax levy sufficient to pay the principal and interest. The question, since the passage of Proposition 13 (California Constitution Article XIII A) is whether or not public agencies still have the legal ability to levy this special ad valorem tax to pay their special assessments. There has been a very limited market for the saleability of public property bonds or certificates since the passage of Proposition 13 because of this restraint. Although the lower Court in San Diego County did uphold the Constitutionality and validity of Section 5302.5, thus authorizing a special tax levy, the higher Courts indicated that the special tax override was not allowed under Proposition 13, and thus could not be imposed without the approval of a two-thirds vote. This case now tends to disallow the levy of assessments on publicly owned property, inasmuch as the assessed public agency no longer may levy the special tax override to pay on that assessment. City of San Marcos v. Board of Supervisors of San Diego County, 159 Cal.App.3d 355.

ARE THERE OTHER PROBLEMS WITH SPECIAL ASSESSMENTS AND CONSTITUTIONAL AMENDMENTS XIII A AND XIII B?

These issues have both been heard by the courts, and in the leading case, County of Fresno v. Malmstrom, 94 Cal.App.3d 974, the court clearly indicated that capital improvement special benefit assessments do not fall within the purview of the 1% limitation of Article XIII A, nor do they constitute a special tax. The court then in County of Placer v. F. Earl Corin, 113 Cal.App.3d 443, also ruled that capital improvement special benefit assessments were not subject to the appropriation limits of Article XIII B.

Under the "Improvement Bond Act of 1915", Section 8809 provides in cases of delinquencies that if the agency has no available funds to advance to buy the delinquent property, then the legislative body shall, at the time of fixing the annual tax rate and levying taxes, levy a special tax upon the taxable property in the city for the purpose of paying for the lands to be purchased at any delinquent tax sale, and also for the purpose of paying installments of the assessment or interest thereon; said special tax not to exceed for each local improvement, 10¢ on each \$100 of assessable property in any one year. The Code then continues that this special tax is in addition to all other taxes levied. This Section has not expressly been amended or repealed, but it is the general concensus that the passage of Proposition 13 has eliminated this previously mandatory duty on the part of any agency to levy and collect this special tax. No cases are pending to test the validity of the special tax levy.

CAN THE PUBLIC AGENCY MAKE A CONTRIBUTION AND THUS REDUCE THE BALANCE TO ASSESSMENT?

The answer is "yes"; the statutes all allow for cash contributions from lawful sources to be made prior to the confirmation of the assessments, thus reducing the balance to assessment. The assessment statutes now also provide that the legislative body may provide, by ordinance, for a term not exceeding the term of the bonds, for a contribution from any source of revenue not otherwise prohibited by law. This money can be applied as a credit upon the levied assessments. This contribution may be made from any source of revenue not otherwise prohibited by law; provided, however, that any contribution authorized after the levy of the assessments shall be from sources other than ad valorem taxes (Streets and Highways Code Sections 10205, 5125, et seq.).

The introduction of this legislation has allowed innovative new methods of financing by allowing monies to be allocated over a period of years and applied against the assessments, thus reducing the property owners' annual debt service responsibility. This is extremely viable in cases where immediate cash monies may not be available for a contribution, but monies would be available on an annual basis and thus could be applied then against the annual debt service. One example of this is an agency that was constructing and expanding a sewage treatment plant facility which was proposed to be financed by connection fees. Because there is no certainty as to the payment of connection fees, it was determined that revenue bonds could not be successfully sold, inasmuch as no revenue flow could be guaranteed. It was projected, however, that the payment of connection fees could possibly cover a

substantial majority of the debt service on a bond obligation. The city formed an assessment district and levied the lien on the benefited, undeveloped properties, and pledged connection fees based upon dwelling units to be applied against all assessment debt service. The initial connection fees were used to discharge a property owner's assessment, and the surplus was then applied as a credit to assist the debt service of all other parcels within the boundaries of the assessment district. In this case, to make it more attractive, the city had accumulated a substantial amount of fees to be applied toward the costs and expenses, which monies were made available on a loan basis, to be applied as a credit on an annual basis against debt service. What this generally accomplished was the city being able to obtain the money up front for the expansion, and still continue with its program of collecting connection fees, with the majority of the debt service being paid by connection fees; however, the bond issue was secured by the assessment lien.

Another example of this philosophy has been the combined use of special assessment and tax increment financing. In certain cases, a Redevelopment Agency and project area have been formed for the purposes of financing certain public improvements. Tax allocation bonds could have been considered; however, the development projections would not warrant the immediate sale of any tax allocation bonds, as the increase in valuation of the properties would not occur until the public improvements had been installed and private development was initiated to cause the increases in the valuation, thus resulting in the increase in the tax increment. A program was developed that would allow the city to proceed, but instead of issuing tax allocation bonds, the city would issue assessment bonds for the public improvements and then, by a cooperative arrangement between the city and the Redevelopment Agency, tax increment monies would be pledged when they were available to act as a credit against the assessment bond service debt. The advantage was that the improvements were installed at an earlier date, and when the tax increment monies were available, they were used at that time to "finance" the improvements.

HOW DOES THE PROPERTY OWNER FILE HIS PROTEST?

The "1911 Act", "1913 Act" and the "1931 Act" all basically provide that any property owner wishing to protest must submit a written protest, generally containing a description of the property in which the signer is interested, sufficient to identify the same (Streets and Highways Code Sections 2856, 5220, 10310). These written protests should be presented to the legislative body prior to the time of the public hearing, and in determining whether or not a majority protest exists, the determination is based on whether or not protests have been signed by the owners of more than 1/2 of the area of land included within the assessment district. The count is based upon assessable acreage, and not the number of landowners, assessed value, or aggregate assessments. The protest count procedure has been challenged in the proceedings as not being totally equitable; however, the courts have determined that the majority protest scheme is not an election in fact, and therefore does not violate the one-man, one-vote equal protection standard. County of Riverside v. Whitlock, 22 Cal.App.3d 863.

WHEN MUST A PROPERTY OWNER FILE A COURT ACTION IF HE WISHES TO TEST IN THE COURTS THE VALIDITY OF THE PROCEEDINGS OR HIS OWN SPECIAL ASSESSMENT?

Both the "1911 Act" and the "1913 Act" have in common a 30-day challenge period. It should be noted that under the "1911 Act" (Streets and Highways Code Section 5660), the law provides that the action must be commenced within thirty (30) days after the recording of the warrant, diagram and assessment; however, under the "1913 Act", the challenge must be made within thirty (30) days after the assessment is levied. These dates are not the same, as the levy is accomplished when the legislative body acts on the assessment, and recordation could be several days to possibly a week following the levy. The most recent decision upholding this challenge period is Allis-Chalmers v. City of Oxnard, 105 Cal.App.3d 876.

IN CASE OF A LEGAL CHALLENGE, WILL THE ASSESSMENT ENGINEER AGAIN HAVE TO MAKE HIS PRESENTATION TO THE COURT?

The establishment of a special assessment district takes place as the result of a detailed legislative process, concluding with a due process public hearing before the legislative body. Because of that, the scope of the judicial review is accordingly quite narrow, inasmuch as the legislative body is the ultimate authority empowered to finally determine which lands are benefited and the extent of the benefits following the public hearing. Therefore, in such a case, the court will not declare the assessments void unless it can plainly see from the face of the record or from facts judicially known, that the assessments, as finally confirmed, were not in proportion to the benefits received. Based on this, it is necessary that the record of the local agency must be sufficiently organized and detailed so that the legislative body had all matters clearly presented to them before any final action was taken. Dawson v. Town of Los Altos, 16 Cal.3d 676.

WHAT AFFECTS THE MARKET PRICE OF BONDS?

Inasmuch as the security for the bonds is based upon the security of the land being assessed, the price or value of the bonds will somewhat vary according to the extent of the security. Underwriters generally will take into consideration the following items in determining their pricing:

1. Improved versus unimproved parcels.
2. Second home and resort home versus primary residence.
3. Growth pattern of area.
4. Size of parcels and number of property owners: Single ownership parcels and a delinquency means 100% delinquency versus a very small default situation if there are several parcels and a diversity of ownership.
5. Term of bonds: The bonds to date are normally 10-15 years with a slight increase in the yield or discount being received for a bond that is extending over a 15-year term. In today's market it may be difficult to sell a 20-year term bond. Although the law allows a much longer term, the market conditions dictate what the actual term should be.

6. Zoning, land use and governmental restrictions: Obviously, if the land is not capable of receiving permits or is under a moratorium, this will have a bearing on any pricing by the underwriters. In many cases, if there are severe governmental limitations and prohibitions on development, it is quite possible there will not be any bidding activity for the sale of bonds.
7. Terrain and topography: If there is a substantial amount of grading work necessary to make the property subject to development, the underwriters may need assurances that all the work on the private property would be accomplished in an orderly sequence together with the public improvements.
8. Land-locked parcels: A large number of land-locked parcels will cause concern, inasmuch as access problem parcels may be difficult to explain to prospective bond purchasers, thus make marketing these bonds questionable.
9. Slide protection improvements: Obviously the question here is what guarantee is there that the land will not again slide.

WHAT ABOUT MAINTAINING THE IMPROVEMENTS?

Since the passage of Proposition 13, the interest in finding vehicles or tools that will allow the maintenance of public improvements through the use of special assessment has greatly expanded. The "Improvement Act of 1911", commencing with Section 5820, has a built-in maintenance district, which Act generally allows the formation of a maintenance district for purposes of maintaining and operating any of the improvements that are permitted to be constructed therein, including the costs of necessary repairs, replacements, fuel, power, electrical current, etc. The problem with these provisions is that the law provides that the legislative body, for each year, estimate the cost of maintaining and operating the improvements, and then in addition to all other taxes, they should fix a special tax rate for the real property within the maintenance district. The ability to levy this special tax has been questioned because of the passage of Proposition 13.

There have been attempts to amend the "1911 Act" law to provide for not only a special tax, but also a benefit assessment; however, the only enactment to date allows the benefit assessment strictly for lighting purposes. An election now is also required for the lighting maintenance benefit assessment prior to the time that any assessment can be levied (Streets and Highways Code Sections 5830, 5830.2).

Another commonly used maintenance district is the "Landscaping and Lighting Act of 1972" (commencing with Streets and Highways Code Section 22500). This Act is limited in its scope to the maintenance and limited improvements of landscaping, lighting and park facilities. This law requires the preparation of a Report, setting forth individual assessments, and then a public hearing prior to the time that the assessments are levied. There is no requirement of an election, and the assessments are then collected on an annual basis, along with the County property taxes. Again, attempts have been made to cause amendments to this statute to provide a broader base of the types of improvements that could be maintained, but to date these bills are still pending in the legislature.

For flood control districts and their maintenance and services, Government Code Sections 60400, et seq., have been enacted, which provide for the levy of a benefit assessment for flood control services on properties within the boundaries of any benefit district. This levy can be made according to benefits received, based on the storm water rainfall runoff coefficient.

It should be noted that in California, until August of 1983, there were actually no direct cases on point dealing with validity of special benefit capital improvement assessments. In the case City Council of the City of San Jose v. South (1983), 146 Cal.App.3d 320, the court was confronted with a charter city procedural ordinance dealing with landscaping maintenance costs distributed on a benefit basis. The court indicated that the city was empowered to enact its own procedural ordinance, and further that the decision would have the same impact on a general law city for benefit maintenance assessments. The court concluded that inasmuch as the assessments were levied for special benefits received over and above that of the general public, that the special assessment benefit maintenance assessments were not subject to the limitations and restrictions of Proposition 13 and/or Proposition 4. This case does tend to validate the ability of cities to levy benefit assessments where special benefits can be shown for the maintenance of authorized improvements.

Also, January 1, 1985, amendments to the "1913 Act" do expressly authorize the legislative body, following the levy of any assessment, to approve an additional estimate of the expenditures required during the next ensuing year for maintenance, repair and improvement for any of the authorized and constructed public works, systems of facilities. The legislative body may, by Resolution adopted at a public hearing, determine to levy and collect in any year against the land within the district, a special assessment sufficient to raise money in order to pay the costs for certain maintenance and operations (see Streets and Highways Code Section 10110.8).

**ARE THERE SPECIAL CONCERNS WHEN INVOLVED IN A SUBDIVISION
OR LAND DEVELOPMENT SPECIAL ASSESSMENT PROCEEDING?**

Section 66462 of the Government Code of the State of California ("Subdivision Map Act") expressly authorizes financing and completion of public improvements under an appropriate special assessment act, and Section 10102 of the Streets and Highways Code ("Municipal Improvement Act of 1913") expressly authorizes the acquisition of any improvements authorized to be constructed under said law.

One of the major concerns or questions relating to land development or subdivision proceedings relates to the question as to the "pass-through" of the assessment, or when should the assessment be discharged. Different policies are in force in different public agencies as to whether or not special assessments should be used strictly for interim financing, and thus discharged at the time of any subdivision final map or a building permit, or whether or not the financing should be allowed to stay in effect until the property is in escrow. A more recent approach is one that would allow the ultimate homeowner to make the decision as to whether or not he desires to see the special assessment remain on the land, or to have that dollar amount discharged and included in any final trust deed financing for that property.

Another question relates to the timing of any final subdivision map and the confirmation of the assessment. If the subdivision is recorded prior to the final confirmation of the assessments, it would normally be required that the subdivider post the appropriate subdivision security, as well as the required surety bonds to guarantee the construction. The "Subdivision Map Act", however, does allow the release of a developer's improvement security upon contracts being awarded and the appropriate bonds being posted by the assessment district contractor. If the subdivision map recordation procedure follows the confirmation, then the assessment district contractor would have posted the required subdivision security, and thus the same security would not be required from the developer.

As to the apportionment of any assessment when a final subdivision map is recorded, Government Code Section 66493(c) sets forth a procedure for the posting of security or the payment in full of a special assessment bond, although that Section is expressly not applicable for bonds issued under the provisions of the "Improvement Bond Act of 1915".

Where assessment proceedings are to be initiated by a petition and the proceedings are for the financing and improvement of subdivision improvements, property owners should also be aware of the provisions and requirements of Sections 2804.1 and 2804.2 of the Streets and Highways Code of the State of California. Those Sections provide that written evidence must be submitted clearly showing that the total estimated amount of any proposed assessment will not exceed 75% of the estimated fair market value of the land proposed to be assessed. Also, when determining the adequacy of any petition, that petition for subdivision improvements would also require the signature of any mortgagee or beneficiary under any existing mortgage or deed of trust.

In many cases a developer/property owner may feel that it is more desirable that he install the public improvements rather than having those same public improvements installed through the public agency bidding an administrative procedure. The "1913 Act" does allow the acquisition of any improvements that can be constructed. Some assessment projects have been structured so that the developer has been allowed to install the required public improvements, and then upon their installation, proceedings are initiated by the public agency for the acquisition, financing and purchase of those facilities. Upon all improvements being installed in place, the assessment district hearing process is initiated, and bonds are then sold and delivered to represent those purchased improvements. In these cases, an agreement setting forth the terms and conditions for the purchase should be approved and executed prior to the time that any developer commences any construction.

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Law Offices

BROWN & DIVEN

P. O. BOX 8025

FAIRBANKS RANCH PLAZA

RANCHO SANTA FE, CALIFORNIA 92067

TELEX (610) 756-0412

F. MACKENZIE BROWN*
WARREN B. DIVEN
DANIEL S. HENTSCHKE

*A PROFESSIONAL CORPORATION

SAN DIEGO (619) 456-1915
ORANGE (714) 551-1915
LOS ANGELES (213) 587-1915
VENTURA (805) 653-1915
RIVERSIDE (714) 359-5489

"MELLO-ROOS COMMUNITY FACILITIES ACT OF 1982"

INTRODUCTION

The "Mello-Roos Community Facilities Act of 1982" (effective January, 1983), is a relatively new and quite interesting piece of legislation now available to local agencies which provides an alternate method for financing a broad range of public capital facilities, as well as certain additional public services. With the passage of Proposition 13 (California Constitution Article XIII A), local agencies have experienced severe restrictions on the use of property tax revenues, especially where those revenues previously were used for financing public capital facilities and infrastructure improvements. Proposition 13 effectively repealed the use of general obligation bond financing by local public agencies. Special assessment financing is still available; however, the historical concept for the utilization of assessment districts has been limited to financing the traditional local improvements, i.e., sanitary sewer, water, streets and drainage, where it can clearly demonstrate that the property receives a special, local and direct benefit from the works of improvement. Because of the above restrictions and/or prohibitions, the Mello-Roos Community Facilities Act was created.

Article XIII A does allow the imposition of special taxes following a favorable two-thirds vote of the qualified electors. Section 4 expressly states that "cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such city, county or special district".

FIRST, WHAT IS A COMMUNITY FACILITIES DISTRICT?

A Community Facilities District is a governmental entity to be formed by local agencies for the purpose of providing certain designated additional public services and empowered to finance a broad range of public capital facilities through the levy of special taxes against the area where said services and/or facilities are being provided (Community Facilities District). Bond authorization is available for assisting in the financing of the public capital facilities, but is not available for financing any of the public services. Any authorization relating to the levy of the special tax and/or the bond authorization is subject to a favorable two-thirds vote of the qualified electors of the Community Facilities District.

"Local agency" is defined as any city, county, special district, school district or joint powers entity [Government Code §53317(f)]. This law provides an alternate method of financing and is generally applicable for assistance in developing areas or areas undergoing rehabilitation.

The District may include areas that are non-contiguous.

WHAT SERVICES AND FACILITIES ARE AUTHORIZED?

A. SERVICES

The Code authorizes four classes or categories of additional services that can be provided, and they are as follows:

1. Police protection services, including criminal justice
2. Fire protection, suppression, ambulance and paramedic
3. Recreation program services, library services, and the operation and maintenance of parks, parkways, open spaces and museums and cultural facilities
4. Flood and storm protection services, including all costs and expenses relating to operation and maintenance

However, the above services can only be provided to the extent that they are in addition to those provided in the District before the District was created, and the Act may not be used to replace existing services.

The Code defines "service" to include the performance by employees of functions, operations, maintenance and repair activities.

B. PUBLIC CAPITAL FACILITIES

The law authorizes the purchase, construction, expansion, improvement or rehabilitation of any real or other tangible property with an estimated useful life of 5 years or longer, which is necessary to meet increased demands placed upon local agencies as a result of development or rehabilitation occurring within the District. The law then continues and sets forth a listing of specific, although not exclusive authorizations, and they are the following:

1. Local park, recreation or parkway facilities
2. Elementary and secondary school sites and structures, provided the facilities meet the area and cost standards as established by the State Allocation Board
3. Libraries

4. Construction or underground of natural gas, telephone, electrical and cable television facilities to provide new service to mitigate existing visual blight, even though facilities remain under the ownership and control of a regulated public utility, and any reimbursements for line extensions, etc., would be utilized and applied as a credit against any special tax levy
5. Any other governmental facilities which the legislative body is authorized by law to construct, own or operate

The District is authorized to contract with the regulated public utility to provide these services, and any reimbursement would be utilized as a credit against any special tax levied.

From the first three examples authorized, i.e., parks, schools and libraries, it was clear that a major intent of the legislative was to provide a vehicle for financing public benefit facilities that are people-related rather than property-related. The additional authorizations, i.e., gas, telephone and electrical thus provide the expressed authorization for the financing of utility facilities owned by regulated public utilities, not governmental entities. The final authorization allows any other governmental facility which the legislative body has jurisdiction by law to construct, thus showing the broad intent to allow the financing of all types of public facilities, those conferring a broad general public benefit, as well as more localized improvements, including both those facilities which are property and/or people-related.

HOW ARE THE PROCEEDINGS INITIATED?

Proceedings for the establishment of a District may be instituted at any time by motion of the legislative body, and the proceedings shall be initiated when any one of the following occurs:

- A. A written request for the establishment of a District signed by two members of the legislative body
- B. A petition requesting the initiation of the proceedings signed by:
 1. Not less than 10% of the registered voters residing within the proposed District, or
 2. By owners of not less than 10% of the area proposed to be included within the District

Any petition submitted should generally:

- A. Describe the boundaries of the territory proposed to be included
- B. State the type of facilities and/or services to be provided

The Local Agency Formation Commission has no power or duty for purposes of reviewing, approving or disapproving any proposal to create a Community Facilities District or proceedings relating to annexation, detachment, etc.

**WHAT ARE THE REQUIREMENTS
OF A COMMUNITY FACILITIES DISTRICT?**

A general narrative of the steps and procedures would be as follows:

Within ninety (90) days following a written request by two members of the legislative body or a petition being submitted, the legislative body shall adopt a RESOLUTION OF INTENTION TO ESTABLISH A DISTRICT. The Resolution of Intention will generally describe the boundaries of the territory proposed, set forth the types of facilities and services to be provided, and specify the rate and method of apportionment of the special tax in sufficient detail to allow each landowner or resident within the District to estimate the annual amount that he or she will have to pay. Other statutory requirements are set forth in §53321, and the Resolution will also fix and time and place for the public hearing on the District, which shall be not less than thirty (30) nor more than sixty (60) days following adoption. The hearing can be continued for a period not in excess of six (6) months.

NOTICE of the public hearing shall be given by publication one time, completed at least seven (7) days prior to the hearing, and notice by mail is discretionary. This office has been recommending that the mailed notices be given so that all owners or residents within the boundaries of the District will have a clear understanding of what is to be considered at the public hearing.

At the same time as the adoption of the Resolution of Intention, the legislative body shall direct the preparation of a REPORT, which Report shall contain a brief description of the public facilities and services, as well as a cost estimate. I would recommend that the Report of the Engineer be quite detailed, setting forth an analysis and explanation of the rate, method and procedure for apportionment of any proposed special tax. The REPORT shall be part of the record of the hearing on the RESOLUTION OF INTENTION.

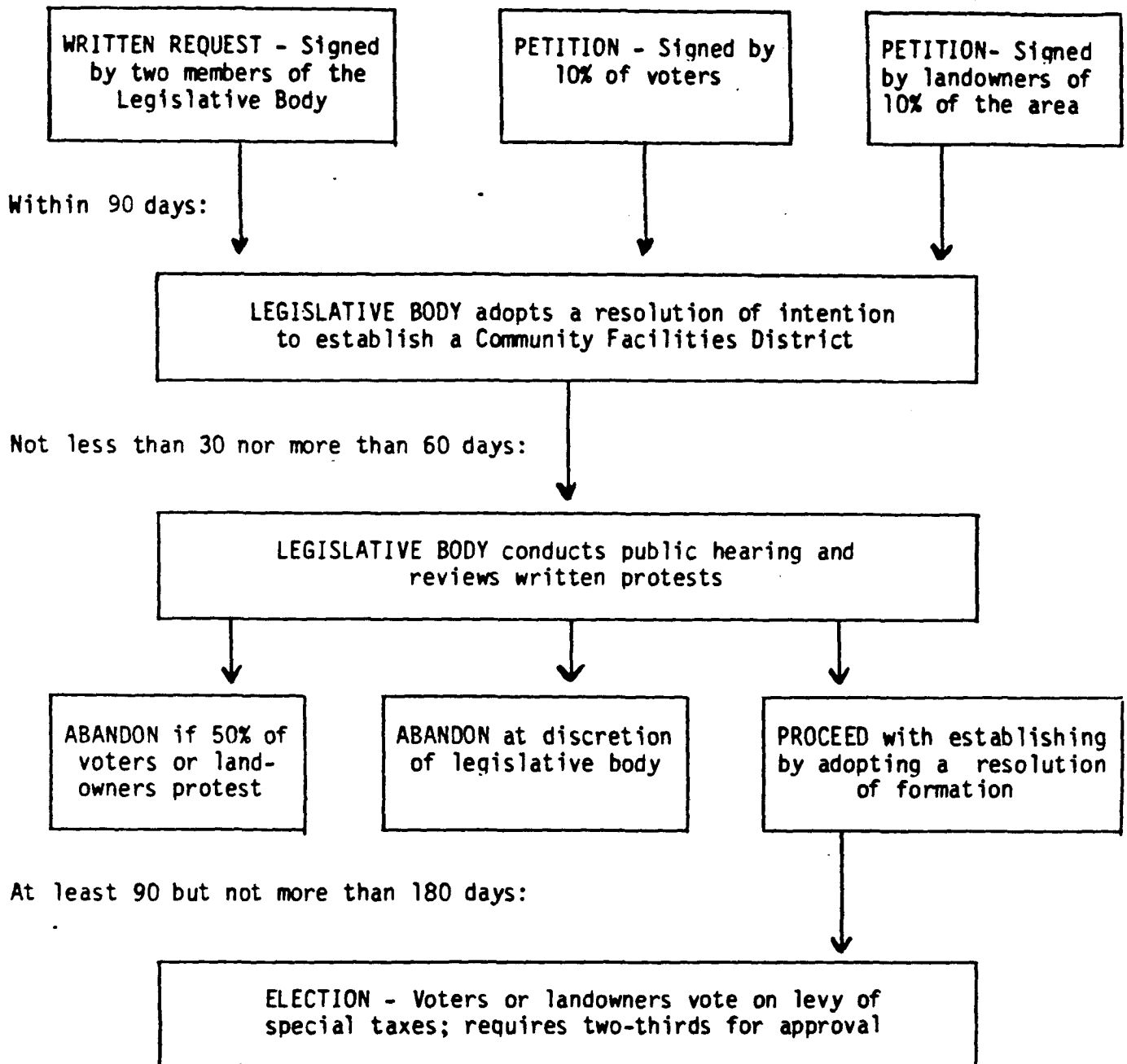
At the PUBLIC HEARING, protests may be made orally and in writing against the establishment of the District, the extent of the District, or the furnishing of the specified type of facilities and/or services. Written protests pertaining to the regularity of the proceedings shall be filed with the Clerk before the time fixed for the hearing, and the legislative body has the right to waive irregularities in the form or content of any written protests, with written protests being allowed to be withdrawn prior to the conclusion of the public hearing. The hearing may be continued, but shall be completed within six (6) months, and upon the conclusion of the public hearing, if a majority protest does not exist, the legislative body acquires jurisdiction to proceed. A majority protest is determined as follows:

If 50% or more of the registered voters, or six (6) registered voters, whichever is more, residing within the territory, or the owners of one-half (1/2) or more of the area of land proposed to be included within the District file written protests, a majority protest exists and the legislative body shall abandon the proceedings. If the majority protest is against a specified type of facility or services or a specific tax, that protest item shall be eliminated from the final Resolution establishing the District.

Upon the conclusion of the public hearing, the legislative body may amend the RESOLUTION OF INTENTION by (a) altering the boundaries to include less territory; (b) eliminating one or more of the facilities and services; or (c) changing the rate or method of apportionment of the proposed special tax so as to reduce the maximum special tax for all or a portion of the District.

FORMING A COMMUNITY FACILITIES DISTRICT

Initiated by:



ELECTION

Following the conclusion of the public hearing, and if the legislative body decides to proceed with the establishment of the District, the legislative body shall then submit the levy of any special tax to the qualified electors of the proposed District at the next general election or in a special election. Said election shall be held not less than ninety (90) and not more than one hundred eighty (180) days following the date of adoption of the Resolution of Formation. In certain cases where the landowners within the District are the electors and there is only a single or limited number of landowners within a proposed District, it may be possible to shorten the time for the election by having all interested property owners waive their rights to the ninety (90) day time period. Note, however, that the official conducting the election must consent to any election proposed to be held within 125 days from the date of adoption of the Resolution of Formation.

Following the election, the legislative body may levy the special tax as previously specified if two-thirds of the voters voting upon the question vote in favor of levying that tax. The vote shall be by registered voters of the proposed District, with each voter having one vote. However, if there are less than twelve (12) registered voters residing within the District for each of the ninety (90) days preceding the close of the protest hearing, the vote shall be by the landowners of the District, each landowner having one (1) vote per acre or portion thereof. Additionally, the legislative body may provide for an election only by landowners whose property would be subject to the special tax in any case where the proposed special tax would not be apportioned on any portion of property in residential use at the time of the election. In these cases of a landowner ballot, the election may be distributed to the electors by mail.

To date, the majority of the proceedings that have been completed and/or attempted have been where the District was comprised of less than 12 registered voters; thus the vote was by landowners.

If the issue does not receive the required approval of two-thirds of the voters voting upon the question, the legislative body shall take no further action with respect to levying any specified special tax for one (1) year from the date of the election.

CAN CHANGES OR ADDITIONS BE MADE TO THE FACILITIES, SERVICES AND SPECIAL TAX SUBSEQUENT TO THE ESTAB- LISHMENT OF A COMMUNITY FACILITIES DISTRICT?

The Code (Article 3, Section 22, commencing with Section 53330) sets forth the specific procedure and regulations relating to the ordering of any changes or modifications to the proceedings following the establishment of the District. Unless those certain changes and modifications have been specifically authorized, only those facilities and services as originally authorized and the special tax as

originally approved by the voters may be levied, except the legislative body may levy the special tax at a lower rate than specified in the Resolution of Intention, and the special tax may be levied only so long as it is needed to accomplish one of the following:

- A. Pay principal and interest on debt incurred to construct facilities;
- B. Pay for construction of facilities.
- C. Pay for needed services;

Changes and modifications to the facilities and services can be initiated generally by one of the following methods:

- A. Motion of legislative body;
- B. Petition signed by 25% or more of registered voters residing in the District;
- C. Petition signed by owners of 25% or more of the territory.

Again, within 90 days after receiving any petition, the legislative body shall adopt a RESOLUTION OF CONSIDERATION, setting forth those changes as proposed. No changes can be made that would reduce or eliminate an existing special tax being used to pay off any bonded indebtedness relating to the construction or acquisition of capital facilities.

The RESOLUTION OF CONSIDERATION shall generally describe the territory within the District, specify the proposed changes in the facilities and services, and specify modifications or amendments to the levy of the special tax. The RESOLUTION OF CONSIDERATION shall then fix a time and place for the public hearing not less than thirty (30) nor more than sixty (60) days following the adoption of the RESOLUTION OF CONSIDERATION.

NOTICE of any changes shall be given in the same manner provided for in the original Resolution of Intention, i.e., publication, with mailing being discretionary. Again I would recommend that notice be given by mail. The changes and public hearing are again subject to the rules of a majority protest, i.e., if 50% or more of the registered voters, or six (6) registered voters, whichever is more, or if owners of one-half (1/2) or more of the area of land within the territory protest the changes, those proposed changes shall be eliminated from any further action by the legislative body. For particulars, reference is made to §53337. This hearing can also be continued, but must be completed within thirty (30) days, and upon the conclusion of the hearing the legislative body may abandon the change proceedings, or may, after passing upon the protests, submit the question of levying the new tax or of changing the rate or method of apportionment of the existing tax to the qualified electors of the District. The election shall be conducted and held in the same manner as that set forth previously.

**CAN PROPERTIES BE SUBSEQUENTLY ANNEXED TO
AN EXISTING COMMUNITY FACILITIES DISTRICT?**

The Act, commencing with §53339, sets forth the steps and procedures relating to the annexation of territory to an existing Community Facilities District, and any territory proposed for annexation need not be contiguous to the existing District.

The Code generally states that the legislative body, on its own motion, or by a petition by voters or owners of the area proposed to be annexed, may request and initiate proceedings for annexation. Again a RESOLUTION OF INTENTION TO ANNEX would be adopted, with the Resolution generally describing the territory proposed to be annexed and specifying the type of facilities and/or services to be provided. This Resolution should further include a plan for sharing facilities and providing services that will be provided in common with the existing District. In order to accomplish equity, the Resolution should specify the special taxes which would be levied within the territory proposed for annexation to pay for the facilities and services. The special tax proposed to pay for services shall be equal to any special tax levied for the same services in the existing District; however, a higher or lower tax may be levied within the proposed area to the extent that the actual cost of providing the services is higher and/or lower than the cost for the existing District. A special tax to pay for special facilities financed with bonds shall also be the same as the tax levied in the existing District, except again, a higher tax may be levied for that purpose within the territory proposed for annexation to compensate for previously paid principal and interest, less any depreciation, etc. The maximum tax rate in the existing District may not be increased as a result of annexation proceedings. The Resolution shall set a time and place for the hearing, not less than thirty (30) nor more than sixty (60) days following its adoption.

NOTICE shall be given by publication, and mailed notice is required to be made to registered voters and landowners within the proposed annexed territory. The public hearing and protest procedures are substantially the same in that the hearing and actions are subject to majority protest of registered voters or landowners not only of the existing District, but also of the territory proposed for annexation. The hearing must be concluded within thirty (30) days and at that time the question of levying the special tax within the area proposed for annexation shall be submitted to the qualified electors of the area proposed for annexation. Upon receipt of a successful two-thirds vote of the voters voting, the legislative body acquires jurisdiction to levy the special tax within the annexed territory.

WHAT ARE THE RULES ON THE LEVY OF THE SPECIAL TAX?

The Code does not set forth specific rules or regulations as to the standards or guidelines for establishment of any special tax, although the Resolution of Intention must specify the rate and method of apportionment of the special tax in sufficient detail to allow each landowner or resident within the proposed District to estimate the maximum amount that he or she will have to pay. I recommend that the mandated REPORT that becomes a part of the public record at the public hearing contain a detailed and careful analysis of the formula and method for apportionment and/or establishment of any special tax. The intent of the statute is to allow flexibility in establishing or setting the rate and formula for any special tax; however, any tax should not be arbitrary or discretionary, and the tax should be equally and uniformly applied to all properties or classes of persons proposed to be taxed. Properties of entities of the State, Federal or other local governments, however, shall be exempt from any special tax.

Despite the above, Proposition XIII A, Section 4, in authorizing special taxes, excludes ad valorem taxes on real property, or a transaction tax or sales tax on the sale of property. Based upon this Constitutional restriction, the authorized special tax should not be based upon the ad valorem or value of the real property within the boundaries of the proposed District.

The proceeds of any special tax may be used to pay, in whole or part, the cost of providing the public facilities and services as authorized by the electorate. The special tax may be collected in the same manner as ordinary ad valorem taxes are collected, and thus be subject to the same penalties and procedure and sale in cases of delinquency. The Code also allows the legislative body to adopt an alternate procedure, if it so desires.

Any action or proceedings to attack or set aside the levy of the special tax, and/or an increase in a special tax, shall be commenced within thirty (30) days after any special tax is approved by the voters.

In structuring the special tax, the following are some of the factors that have been considered:

1. Drainage improvements with a special tax based upon the area of property within the boundaries of the Community Facilities District;
2. Street improvement expansion improvements based upon occupancy of residential units or equivalent dwelling units;
3. School facilities based upon the size of residential dwelling units, etc.
4. Different tax rates for different uses, i.e., different tax rate for residential distinguished from commercial versus industrial, etc.

Special taxes may be considered to be based upon a measure of usage or of service provided by the facilities to be funded, such as trip generation, water volume, etc.

Certain measures would more likely be related to people-related factors, such as pupils, employees, etc. This would also be applicable for public recreation programs, schools, administration facilities, etc.

If different tax rates are considered for different types and/or uses of property, it allows a readjustment each year of the special tax to reflect the development within the area. An example would be where property subsequently subdivides, the property then would be transferred from a vacant land and/or agricultural category into a residential unit class.

Certain services, such as police and fire, may be interpreted to relate to both persons and property; thus, a special tax selection should truly represent the combination components. Again, any levy should not be arbitrary or discriminatory, but should be equally and fairly applied.

Although the discretion in structuring the special tax is left to the local agency, it is my recommendation to keep the tax as clear and straightforward as possible, so that it can be easily understood by future residents, homeowners or landowners who will be subject to any tax, and the tax should obviously bear some reasonable relationship to the facility or service to be funded. Note that in certain cases and certain Districts there possibly will be three (3) levels of special tax levied to accomplish any combination of the following:

- A. Pay the principal and interest on any approved bonded indebtedness;
- B. Pay for certain public capital facilities on an annual basis, "pay-as-you-go";
- C. Pay for authorized services for operation and maintenance, "pay-as-you-go".

WHAT ARE THE PROCEDURES FOR LONG-TERM BOND AUTHORIZATION?

Bonds may be authorized whenever the legislative body deems it necessary for the Community Facilities District to incur a bonded indebtedness; however, bonds can only be issued to pay the principal and interest costs for funding public capital facilities and no bond issue can relate to the providing of any services for operation and maintenance. Before any bonds can actually be authorized and sold, the Code requires a public hearing procedure, with notice given by publication. The public hearing relates to the necessity, purpose and amount of any proposed debt. For convenience, and if desired, the legislative body may designate only a portion of the District as an improvement area that would be subject to any special tax or bonded indebtedness.

Following the conclusion of the public hearing, if the legislative body makes its determination to proceed and authorize the bonded indebtedness, it shall generally do the following by Resolution:

- A. Declare the necessity to incur the debt;
- B. Set forth the specific purpose for the bonded indebtedness;
- C. Indicate whether the whole or only a portion of the District will be subject to the bonded indebtedness;
- D. Indicate the amount of the debt to be incurred;
- E. Set forth the maximum term of the bonds to issue;
- F. Indicate the maximum annual rate of interest to be paid;
- G. Specify that the proposition will be submitted to the voters;
- H. Set forth the date of any election, the hours the polls will be open for registered voter elections and/or the hour when mailed ballots must be received.

Any proposition relating to the levy of a special tax, the incurring of the bonded indebtedness, or the establishing or any changes and modifications, may all be combined into a single ballot proposition as determined by the legislative body. This procedure obviously would be recommended, so that at the election the voters would be voting on all issues relating to the proceedings, i.e., formation of the proposed District and authorization to levy a tax, as well as the necessity to incur the bonded indebtedness to finance authorized public capital facilities. A successful two-thirds vote is required for the issuance of any Community Facilities District bonds. Upon the receipt of two-thirds of the voters voting, the legislative body may provide and set forth the terms and conditions relating to the issuance of any bonds.

Once bonds are authorized, each year the legislative body shall fix and levy taxes and charges sufficient to pay principal and interest on any outstanding bonded indebtedness, including any necessary replenishment of bond reserve funds. Some concern is expressed to this provision to authorize the replenishment of the reserve fund in certain cases where the District is comprised of very few landowners, which could possibly result in a very few property owners being required to incur an

excessive debt to pay for the delinquency of others. It is possible that this replenishment requirement would be limited by any maximum tax amount; however, in those cases, the owner could be paying for replenishment costs rather than being able to fund authorized and voted facilities or services.

The bonds of any Community Facilities District may be sold publicly or at private sale, if it is determined that the private sale would result in a lower interest cost on the bonds. The bonds may bear a variable interest rate, if desired. These bonds would be exempt from both Federal and State of California taxation, are given the same force value as other bonds issued by any municipality, and are legal investments for trust funds of insurance companies, State school funds, etc.

CAN THESE BONDS BE REFUNDED?

The legislative body may issue refunding bonds without repeating any of the procedures required for the approval of the original issue if the legislative body determines that it would be prudent to issue the refunding bonds. Refunding bonds, however, shall not be issued if the total net interest cost to maturity on said refunding bonds plus the principal amount of said refunding bonds exceeds the total net interest cost to be refunded. The principal, however, can be more or less than the principal amount being refunded. A Resolution is required for refunding, and the Resolution would generally set forth the terms and conditions of the refunding, setting the maturity date, place of payment, etc. These refunding bonds may be exchanged for bonds to be refunded, or, as an alternate, they can be sold at public or private sale. Any savings achieved through the issuance of refunding bonds shall be used to reduce any special tax obligation.

WHAT ARE SOME OF THE ADVANTAGES OF MELLO-ROOS COMMUNITY FACILITIES DISTRICT FUNDING?

Certain advantages to the use of these proceedings appear to be the following:

- A. Considerable flexibility is available in the establishment of any special tax formula.
- B. The property is not subject to a specific lien as it would be with assessment proceedings, inasmuch as following the election there is merely the special tax authorization.
- C. Special taxes can be structured so that their payment accrues only upon development, i.e., tax based upon occupancy of a dwelling unit. In these cases, if the development does not occur, there would not be any reason for the public capital facilities, and thus no tax would be imposed. This could tend to control and disallow over-taxation or premature debt.
- D. The special tax levy can be used for pay for facilities on a pay-as-you-go basis, as well as be used to pay the principal and interest on a bonded indebtedness. This would allow a public agency to finance a portion of its facilities on a pay-as-you-go basis, with other facilities being paid through the bonded debt. The advantage here is that a special tax formula would allow monies to be accumulated and invested prior to the time that a bond sale might be proposed. This could result in a possible lower eventual cost, inasmuch as the money

accumulated in advance could be invested, and secondly this would mean that there would be no necessity for a subsequent increase in the special tax levy once it was initially levied. Under assessment district proceedings, if a second assessment district is required or if a second series of bonds is ultimately needed to finance the balance of the improvements, it will mean an increase in the property owner obligation.

- E. The structuring of the tax is not limited to benefits to land, but can be more closely related to use and service. This would allow the special taxes to be structured specifically to relate to a residential dwelling unit, equivalent dwelling unit, commercial building space, etc. As development occurs within the area, the special tax would then be adjusted to reflect the current land development plans within the area, thus assuring that land and/or properties are paying for the services and facilities actually being provided.

**ARE THERE CERTAIN CAUTIONS AS TO THE USE OF
THE MELLO-ROOS COMMUNITY FACILITIES DISTRICT?**

A few early concerns as it relates to the use of the Community Facilities District method of financing would be the following:

1. There is now express procedure in the Code requiring the recordation in the Office of the County Recorder of a notice of special tax, thus making similar notice provisions as that for special assessments. The only concern here is that the notice is only as adequate and clear as the special tax rate formula as set forth in the proceedings. If the tax rate formula is complicated, ambiguous and difficult to understand, the notice given can be no better. For this reason I recommend a simple, easy to understand and concise taxing formula.
2. The requirement of the replenishment of the reserve could create an inequity where a few property owners are possibly paying for the delinquency of others, and the Code does not set forth a procedure for credits for any excess payments.
3. The special tax structure, if not carefully analyzed and straightforward, could lead to future confusion as subsequent homeowners and/or residents move into the territory.

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