

MEMORANDUM

To: Audit Subcommittee

From: George Peyton, City Attorney

Re: Question on Preliminary Expense Agreement for Piedmont Hills District

Dated: July 7, 2010

Question: “Ascertain from the City Attorney why the Preliminary Expense Agreement for the Hills District did not reflect the position reflected in the FAQ regarding reimbursement agreements (Exhibit 1-B(1)), page 7 that : “The reimbursement may be reduced if the actual costs for construction exceed the budget...””

Response: After review of various documents that relate to your question, and realizing that the FAQ Sheet was presented to the Council over 7 years ago, here is my response:

1. Starting with the Preliminary Expense Deposit and Reimbursement Agreement for the Dudley/Blair/Mountain/Pacific/Hagar and Vicinity Undergrounding Assessment District back in 2000, copy attached hereto and marked Exhibit A, the underlying purpose of such an Agreement was to provide funds to cover the preliminary expenses of setting up an Undergrounding Assessment District. There are substantial initial expenses that must be paid, particularly to the Engineer of Work, prior to the Assessment District being placed before the homeowners in the District as part of the assessment ballot procedure or to be placed before the City Council to consider approval of the District. The City Council has not wanted to advance general fund monies to pay these preliminary expenses, so that in order to have a process for raising these monies through the efforts of the Proponents of a new District, the Preliminary Expense Agreement was an important component.

2. The Preliminary Expense Agreement for the Piedmont Hills District (copy attached and marked Exhibit B) executed in 2005 makes clear its purpose in G. of the Recitals on page 2 of the Agreements: “The purpose of this Agreement is to provide for payment of any expenses that are incurred prior to the formation and funding of the Proposed District by creation of the Preliminary Expense Fund.”

3. The FAQs About Underground Utility Districts referred to in your question to me was attached to a Council Agenda Report dated February 3, 2003, to which was also attached a Sample Reimbursement Agreement, all as part of a series of documents that “...will give the public adequate information regarding the undergrounding process...”

4. The Sample Reimbursement Agreement (copy attached and marked Exhibit C) follows the same basic language of the Preliminary Expense Deposit and Reimbursement

Agreement executed in 2000 for the Dudley/Blair/Mountain District, and indicates no obligation to cover cost overruns or any expenses other than preliminary expenses.

5. While I do not recall being involved in drafting the FAQs About Underground Utility Districts, it was part of a Council Agenda Report to which my name was attached.

6. It appears to me that the FAQ in question which states that, "The reimbursement may be reduced if the actual costs for construction exceed the budget..." was simply an inaccurate statement, particularly relating to the Preliminary Expense Agreement, attached to the same Agenda Report, which neither I nor other City Staff apparently recognized.

7. To further understand how the wording of the final signed Preliminary Expense Agreement covering the Piedmont Hills District was arrived at, I have checked back in the City's records. On May 19, 2003, I prepared a Council Agenda Report (copy attached and marked Exhibit D) entitled "Preliminary Expense Agreement for Undergrounding District," which was prepared based on Council direction after discussion at the May 5, 2003 Council Meeting. A review of this Council Agenda Report shows that the Council was rethinking the idea that all liability related to the Undergrounding Assessment District would be placed on the Proponents of the District, particularly in light of the concern that this might effectively kill the possibility that any future Districts would be formed.

8. Attached to my May 19, 2003 Council Agenda Report is a new form of Preliminary Expense Agreement, which I indicate at the top of page 3 of the Report was prepared at the Council's instruction along the lines suggested by Denny McLeod.

9. Further attached and marked Exhibit E is a copy of the pertinent part of the Minutes of the May 19, 2003 Council Meeting. You will find on pages 6 and 7 the Council discussion and action taken relating to the wording of the Preliminary Expense Agreement.

10. If you compare the specific instructions in the attached City Council Minutes with the final signed Preliminary Expense Agreement for the Piedmont Hills District, you will see that all of the language changes requested by the Council were incorporated in the final Piedmont Hills Preliminary Expense Agreement.

11. Attached you will also find copies of pages 2 and 3 of the City Council Minutes for its June 2, 2003 Meeting, marked Exhibit F. If you look at Resolution 55-03 in the middle of page 3, you will see that the Council approved the form of Preliminary Expense Agreement which I presented, which was the format used for the Piedmont Hills District, and also was the form used for the Wildwood/Crocker Undergrounding Assessment District.

12. In summary, after reviewing the record, it appears that after carefully considering various alternatives at their meetings on May 5 and 19, 2003, the Piedmont City Council made a deliberate decision at its June 2, 2003 meeting relating to the wording of a Preliminary Expense Agreement, which was followed in the final wording of the Piedmont Hills Preliminary Expense Agreement.

I hope that the foregoing information is of assistance.

**PRELIMINARY EXPENSE DEPOSIT
AND REIMBURSEMENT AGREEMENT**

**City of Piedmont
Dudley/Blair/Mountain/Pacific/Hagar and Vicinity
Undergrounding Assessment District**

Recitals

A. The parties to this agreement are the City of Piedmont, a California charter city (the "City"), and Wendy Willrich and Mason Willrich (the "Proponents").

B. The effective date of this agreement shall be July 17, 2000, or on approval by the City Council of the City (the "City Council") of the Petition referred to in Paragraph C hereafter, whichever occurs later.

C. The Proponents have coordinated the effort which has led to obtaining signatures on a petition (the "Petition"), counterparts of which have been filed with the City Clerk of the City, requesting that the City undertake special assessment proceedings to provide for the undergrounding of certain existing overhead utility facilities and the related relocation of street lights located on utility poles which will be removed as part of the undergrounding project (the "Project").

D. The Petition requests the City to implement land-secured financing proceedings under the Municipal Improvement Act of 1913 (the "1913 Act"), and to issue and sell limited obligation bonds of the City under the Improvement Bond Act of 1915 (the "1915 Act Bonds") upon the security of the unpaid assessments levied and recorded against certain residential real property located within the boundary of an area to be known as the proposed Dudley/Blair/Mountain/Pacific/Hagar and Vicinity Undergrounding Assessment District (the "Proposed Assessment District").

E. In the event the City is able to complete the 1913 Act assessment proceedings and to thereafter accomplish sale and delivery of the 1915 Act Bonds, the City intends to utilize a prescribed portion of the proceeds of sale thereof, pursuant to the 1913 Act in general and the Engineer's Report (the "Engineer's Report") approved by the City Council of the City as a part of the 1913 Act proceedings and pursuant to the terms and conditions of this agreement to (1) reimburse the Proponents for the deposit or deposits made pursuant to this agreement and (2) finance the implementation of the Project, all in accordance with and subject to the terms and conditions of the 1913 Act, the Engineer's Report and this agreement.

F. In consideration for the mutual undertakings of the parties stated herein, the parties agree as follows.

