

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.

Agreement

1. The foregoing recitals are true and correct, and the parties expressly so acknowledge.

2. Forthwith upon approval of this agreement by the City Council and execution hereof by the authorized representatives of the parties, the Proponents will deposit with the City \$1,000.00 into a special fund to be established and maintained by the City and to be known as the "Dudley/Blair/Mountain/Pacific/Hagar and Vicinity Undergrounding Assessment District Preliminary Expense Fund" (the "Preliminary Expense Fund"), which initial deposit shall remain in the Preliminary Expense Fund, unless otherwise needed, until the final invoice from the Engineer of Work has been submitted to the City. The City is authorized to disburse amounts from the Preliminary Expense Fund, from time to time, to pay invoices submitted to the City by I.L. Schwartz Associates, Inc., as Engineer of Work for the Proposed Assessment District proceedings (the "Engineer of Work"), for services provided by the Engineer of Work in connection with the Proposed Assessment District proceedings pursuant to a written agreement between the City and the Engineer of Work pertaining to such services, which written agreement is being approved by resolution of the City Council and executed by the parties.

a. In addition to the foregoing, the Proponents shall deposit with the City sufficient funds to pay the exact amount shown in each separate invoice within ten (10) calendar days after the date of the invoice from the Engineer of Work or of the date of the cover letter sent with the invoice by the Engineer of Work, whichever is later. Any such check or cash deposit shall be made to the attention of the City Clerk, and shall be physically received in the Office of the City Clerk, Piedmont City Hall, 120 Vista Avenue, Piedmont, CA 94611, no later than 5 p.m. on the date due.

b. The maximum aggregate amount that the Proponents shall be required to deposit with the City under this Agreement shall be \$124,900.00, which amount may be reduced if the invoices to the City from the Engineer of Work are less than that maximum amount. Any amount overpaid by the Proponents based on the terms of this Agreement shall be repaid to the Proponents by City within thirty (30) days after the amount of the overpayment has been finally determined based on the final invoice received from the Engineer of Work.

c. The obligations of the Proponents set forth in this Paragraph 2 are joint and several, and shall be fully enforceable in a court of law.

3. The City agrees to proceed with all due diligence in conducting and completing the legal proceedings, leading to recording of the assessments levied upon the various parcels of land within the Proposed Assessment District. The Engineer of Work for said legal proceedings shall be instructed to include in the incidental expenses listed in the cost estimate in the Engineer's Report an amount estimated to be sufficient to reimburse the Proponents for the full amount of the deposit or deposits made by the Proponents pursuant to this agreement, and in addition, for the full amount of reasonable project development costs incurred and paid by the Proponents prior to this Agreement.

4. The City shall proceed with all due diligence to accomplish issuance and sale of the 1915 Act Bonds to accomplish the authorized purposes of the Proposed Assessment

District, including but not limited to reimbursement to the Proponents for their deposit or deposits pursuant to this agreement and to implement the Project. Notwithstanding any other provision hereof, the City shall be under no obligation to reimburse any amounts to the Proponents hereunder except from the proceeds of the 1915 Act Bonds issued for the Proposed Assessment District when, as and if issued. Proponents acknowledge that the City Council retains complete discretion over the issuance of the 1915 Act Bonds and that if for any reason the bonds are not issued, Proponents will have no right to recover any amounts deposited hereunder. If the City Council determines to abandon the proceedings for the Proposed Assessment District and the 1915 Act Bonds, any amounts deposited by the Proponents hereunder which have not been spent and which are not held to cover future payments to the Engineer of Work for which the City is obligated will be returned to the Proponents.

5. It is understood and agreed that nothing in this Agreement requires the City Council or the City to finally approve the Proposed Assessment District, which decision cannot be made by the City Council until due deliberation by the Council after the public hearing and receipt of the report on the results of the assessment ballot procedures.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their authorized representatives as of the effective date stated above.

CITY OF PIEDMONT

By _____
City Administrator

Attest:

By _____
City Clerk

PROPONENTS

By _____
WENDY WILLRICH

By _____
MASON WILLRICH

PRELIMINARY EXPENSE AGREEMENT**City of Piedmont
Piedmont Hills Underground Assessment District****Recitals**

- A. The parties to this Preliminary Expense Agreement ("this Agreement") are the City of Piedmont, a California charter city (the "City"), and the undersigned Proponents of the Piedmont Hills Underground Assessment District ("the Proponents") who are residents of the proposed district, working with other residents of the streets to be undergrounded in connection with the Piedmont Hills Underground Assessment District.
- B. The Piedmont City Council has or is expected to approve a resolution of intent to form the Proposed District.
- C. Certain of the residents of the Proposed District have executed written commitments to deposit funds or have already contributed funds toward the Preliminary Expenses for the Proposed District, which Preliminary Expenses include the preliminary engineering work to be performed by the Engineer of Work, Harris and Associates, in the amount of \$226,165; engineering fees by SBC in the amount of \$16,876; and one-half (1/2) of the estimated \$5,000 cost of an arborist to evaluate potential tree damage caused by trenching work on the Proposed District as required by city code or \$2,500; and a 5% contingency in the amount of \$4,867. It is agreed that the total estimated Preliminary Expenses for the Proposed District will be \$250,408.
- D. Various residents owning parcels within the Proposed District have advanced, or will advance, the total sum of \$250,408, to fund the Preliminary Expenses incurred prior to the issuance of bonds to provide funding for the Proposed District. The total of \$250,408 shall be deposited into a special fund established and maintained by the City known as the Central Piedmont Underground Assessment District Preliminary Expense Fund ("the Preliminary Expense Fund"). If and when the sum of \$250,408 is fully deposited into the Preliminary Expense Fund by the residents, the City shall then commit the amount of \$25,000.00 from its allocated 20A funds to apply to the engineering expenses of Pacific Gas & Electric for the Proposed District. These funds are to be used by the City to pay the duly submitted invoices of the Engineer of Work, Harris and Associates, Inc., and SBC, for engineering work that must be undertaken prior to the formation and funding of the Proposed District, as well as one-half (1/2) of the cost of an arborist.
- E. Harris and Associates has notified the City that its engineering fees that will be invoiced to the City prior to balloting shall not exceed \$123,480 and that total costs prior to the formation and funding of the Proposed District will not exceed the sum of \$102,685.

Report Exhibit B

- F. Pacific Gas & Electric has notified the City that its engineering fees for the Proposed District will be \$25,000.00 and SBC has notified the City that its engineering fees for the Proposed District will be \$16,876.00.
- G. 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.

In consideration of the mutual undertakings stated herein, the parties agree as follows:

Agreement


1. The foregoing recitals are true and correct, and the parties expressly so acknowledge.
2. The Proponents shall deposit into the Preliminary Expense Fund with the City for any expenses that are necessarily incurred and paid by the City prior to the formation and funding of the Proposed District the sum of \$250,408, which is agreed between the Proponents and the City to be an amount reasonably expected to cover the anticipated Preliminary Expenses, except for the engineering fees of Pacific Gas & Electric.
3. At such time as the full amount of \$250,408 has been deposited in the Preliminary Expense Fund by the Proponents, the City shall commit the amount of \$25,000.00 from its allocated 20A funds to apply to the engineering expenses of Pacific Gas & Electric for the Proposed District.
4. City shall be responsible for making payment of the Preliminary Expenses based on reasonably detailed bills submitted to the City out of the Preliminary Expense Fund, provided that such bills shall be approved by the City Clerk, Public Works Director and two or more representatives appointed by the Steering Committee of the district.
5. If for any reason all of the monies in the Preliminary Expense Fund are expended, and there are still additional Preliminary Expenses anticipated ("the Anticipated Overage") that are necessary to proceed further prior to the funding of the Proposed District by a bond issue, the Proponents and the City shall meet, review all of the facts then available, determine exactly how much shall be reasonably required to cover the Anticipated Overage, and Proponents shall be required to raise the additional monies necessary to cover the Anticipated Overage before any further work proceeds or any further monetary obligations are incurred relating to the Proposed District, which additional monies shall be deposited in the Preliminary Expense Fund.
6. If Proponents are unsuccessful in raising sufficient funds to cover the Anticipated Overage, all actions relating to the Proposed District shall cease.

Report Exhibit B

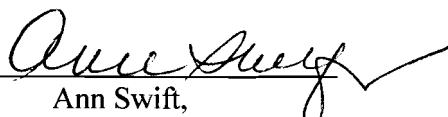
7. If the Proposed District fails for any reason to be approved by the Piedmont City Council, any monies remaining in the Preliminary Expense Fund shall first be repaid to the City of Piedmont for preliminary engineering costs by P.G. & E. in the amount of \$25,000, then be refunded by City to the Proponents, and Proponents will reimburse those persons who originally contributed such monies pro rata based on the following: (a) First each person whose contribution exceeded \$2,000 shall be repaid such excess amount; and (b) any remaining reimbursement funds shall be allocated to persons based on the percentage of their contribution to the total amount collected excluding the excess contributions in (a) above.

8. If the Proposed District proceeds successfully to the issuance of bonds to finance such Proposed District, the Proponents and residents making contributions shall be reimbursed for their contributions out of the bond proceeds.

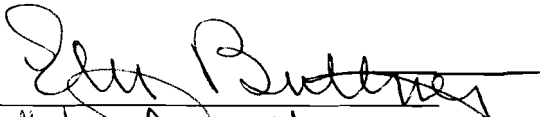


CITY OF PIEDMONT

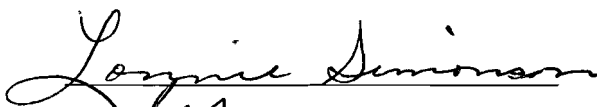


By 
Michael Bruck
Mayor

Attest:

By 
Ann Swift,
City Clerk

PROPONENTS:

5/2/05

Sample Reimbursement Agreement

PRELIMINARY EXPENSE DEPOSIT AND INDIVIDUAL REIMBURSEMENT AGREEMENT

Recitals

- A. The parties to this agreement are the City of Piedmont, a California charter city (the “City”), and (the “Proponents”).
- B. The effective date of this agreement shall be _____, 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 _____ 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.

Agreement

1. The foregoing recitals are true and correct, and the parties expressly so acknowledge.

2. Forthwith upon approval of this agreement by the City Council and execution hereof by the authorized representatives of the parties, the Proponents will deposit with the City \$_____ into a special fund to be established and maintained by the City and to be known as the “_____ Preliminary Expense Fund” (the “Preliminary Expense Fund”), which initial deposit shall remain in the Preliminary Expense Fund, unless otherwise needed, until the final invoice from the Engineer of Work has been submitted to the City. The City is authorized to disburse amounts from the Preliminary Expense Fund, from time to time, to pay invoices submitted to the City by _____, as Engineer of Work for the Proposed Assessment District proceedings (the “Engineer of Work”), for services provided by the Engineer of Work in connection with the Proposed Assessment District proceedings pursuant to a written agreement between the City and the Engineer of Work pertaining to such services, which written agreement is being approved by resolution of the City Council and executed by the parties.

a. In addition to the foregoing, the Proponents shall deposit with the City sufficient funds to pay the exact amount shown in each separate invoice within ten (10) calendar days after the date of the invoice from the Engineer of Work or of the date of the cover letter sent with the invoice by the Engineer of Work, whichever is later. Any such check or cash deposit shall be made to the attention of the City Clerk, and shall be physically received in the Office of the City Clerk, Piedmont City Hall, 120 Vista Avenue, Piedmont, CA 94611, no later than 5 p.m. on the date due.

b. The maximum aggregate amount that the Proponents shall be required to deposit with the City under this Agreement shall be \$_____ which amount may be reduced if the invoices to the City from the Engineer of Work are less than that maximum amount. Any amount overpaid by the Proponents based on the terms of this Agreement shall be repaid to the Proponents by City within thirty (30) days after the amount of the overpayment has been finally determined based on the final invoice received from the Engineer of Work.

c. The obligations of the Proponents set forth in this Paragraph 2 are joint and several, and shall be fully enforceable in a court of law.

3. The City agrees to proceed with all due diligence in conducting and completing the legal proceedings, leading to recording of the assessments levied upon the various parcels of land within the Proposed Assessment District. The Engineer of Work for said legal proceedings shall be instructed to include in the incidental expenses listed in the cost estimate in the Engineer’s Report an amount estimated to be sufficient to reimburse the Proponents for the full amount of the deposit or deposits made by the Proponents pursuant to this agreement, and in addition, for the full amount of reasonable project development costs incurred and paid by the Proponents prior to this Agreement.

4. The City shall proceed with all due diligence to accomplish issuance and sale of the 1915 Act Bonds to accomplish the authorized purposes of the Proposed Assessment District, including but not limited to reimbursement to the Proponents for their deposit or deposits pursuant to this agreement and to implement the Project. Notwithstanding any other

provision hereof, the City shall be under no obligation to reimburse any amounts to the Proponents hereunder except from the proceeds of the 1915 Act Bonds issued for the Proposed Assessment District when, as and if issued. Proponents acknowledge that the City Council retains complete discretion over the issuance of the 1915 Act Bonds and that if for any reason the bonds are not issued, Proponents will have no right to recover any amounts deposited hereunder. If the City Council determines to abandon the proceedings for the Proposed Assessment District and the 1915 Act Bonds, any amounts deposited by the Proponents hereunder which have not been spent and which are not held to cover future payments to the Engineer of Work for which the City is obligated will be returned to the Proponents.

5. It is understood and agreed that nothing in this Agreement requires the City Council or the City to finally approve the Proposed Assessment District, which decision cannot be made by the City Council until due deliberation by the Council after the public hearing and receipt of the report on the results of the assessment ballot procedures.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their authorized representatives as of the effective date stated above.

CITY OF PIEDMONT

By _____
City Administrator

Attest:

By _____
City Clerk

PROPONENTS

City of Piedmont
COUNCIL AGENDA REPORT

MEETING DATE: May 19, 2003
FROM: George Peyton, City Attorney
SUBJECT: Preliminary Expense Agreement for Undergrounding Districts

RECOMMENDATION :

Review the proposed format of a Preliminary Expense Agreement for Undergrounding Districts and advise the City Attorney and other City staff of any changes desired by the City Council in the proposed Agreement, as well as how the City Council would like to generally proceed relating to the requirement of such a Preliminary Expense Agreement as compared to the Reimbursement Agreement previously being required by the City.

BACKGROUND:

At the time of the formation of the Dudley/Blair Undergrounding District, the City Council made a policy decision that the Proponents of Undergrounding Districts, including the Dudley/Blair Undergrounding District, must be fully responsible for any expenditures whatsoever relating to that District, and that the City's General Fund financed by tax revenues should not be used to pay any of these expenses. As a result, a Reimbursement Agreement was agreed to and executed by the Proponents of the Dudley/Blair Undergrounding District in which they took full responsibility for an amount exceeding \$185,000.00, which funds were at their personal risk if certain aspects of the Undergrounding District did not prove out as expected.

WILDWOOD DISTRICT:

In all of the discussions with the Wildwood Undergrounding District (now retitled the "Wildwood/Crocker Undergrounding District") City staff and previously the City Council had made clear to the Proponents of that District that a similar Reimbursement Agreement which would place the Proponents at risk, and would not place any City funds at risk, was consistently required. That requirement continued through the initial approval of that District back in September, 2002, and has been the basis of the continuing discussions of City staff with the key Proponents of that District, namely Dan Christopoulos and Craig Casebeer. The initial approval of the Wildwood Undergrounding District in September, 2002, was specifically conditioned upon a Reimbursement Agreement being executed that was acceptable to the City Attorney, which would protect the City against any possible risk of expenditure relating to the District.

While discussions have been continuing with the Proponents of the Wildwood/Crocker Undergrounding District, and various formats of a Reimbursement Agreement have been reviewed, to date no specific Agreement has been finalized or signed. However, the basic strategy indicated by Dan Christopoulos and Craig Casebeer has been to raise a sufficient amount of funds that would finance at least most of the anticipated expenses of such a District before any Reimbursement Agreement was executed by them. By doing this, they were cutting their risk down to a very minor potential amount. In fact, in recent indications to the City, it is possible that contributions to the Wildwood/Crocker Undergrounding District will actually exceed the anticipated expenses.

PIEDMONT HILLS/CENTRAL PIEDMONT UNDERGROUNDING DISTRICTS:

In recent discussions between City staff and the Proponents of the Piedmont Hills and Central Piedmont Undergrounding Districts, concern was increasingly raised by the Proponents that it would be very difficult, and possibly impossible, to find anyone who would be willing to take the personal risk of signing a Reimbursement Agreement with the City, particularly one involving joint and several liability of the Proponents. At your last City Council Meeting on May 5, there was a very lengthy discussion of this matter both by members of the audience and the City Council. Certain Proponents of the Piedmont Hills and Central Piedmont Undergrounding Districts, including Denny McLeod and Carl Anderson, indicated that they personally felt that a requirement by the City of a Reimbursement Agreement that would put the Proponents at personal risk, and most specifically a Joint and Several Liability Reimbursement Agreement, would very likely sink both of these Districts, since they felt it would be extremely difficult to find anyone willing to sign such an Agreement. As an alternative, Denny McLeod proposed to the City Council that a different type of Agreement be arrived at, which would involve raising all of the anticipated funds needed to pay for the Preliminary Expenses, specifically including the engineering fees for the Engineer at Work, as well as the engineering fees for Pacific Gas & Electric and SBC, and that once that amount was agreed to, raised and deposited with the City, that no further financial requirements would be made of the Proponents of the Districts, including the execution of any Reimbursement Agreement that would subject them to any possible liability, even if it was not based on a Joint and Several Liability Agreement. This proposal was tied in with the idea that there would be definite commitments from Pacific Gas & Electric and SBC as to their engineering fees, which could not be exceeded, and that the Engineer at Work would sign a "Not to Exceed" Contract that would place a maximum cap on the expenses of the Engineer at Work. A further part of this proposal was to provide for full consultation if for any reason the expenses were anticipated to exceed the amount of funds that had been raised, and if the Proponents of the District felt these expenses were justified, before any additional actual costs were incurred, the Proponents would need to raise additional funds to cover those additional anticipated costs, and deposit those funds into the Preliminary Expense Fund with the City.

PRELIMINARY EXPENSE AGREEMENT:

At the May 5 City Council Meeting for the first time a member of the Council indicated the possibility that the City Council may wish to change its policy relating to the funding of the Preliminary Expenses of all Undergrounding Districts, and be willing to accept at least a small amount of risk. I was instructed to prepare a Preliminary Expense Agreement along the general lines suggested by Denny McLeod, and attached you will find a draft of such an Agreement that could be adapted to any Undergrounding District, as well as a separate draft specifically adapted to the Combined Piedmont Hills/Central Piedmont Undergrounding Districts. All of the blanks have not been completed, even in the proposed Preliminary Expense Agreement for the Combined Piedmont Hills/Central Piedmont Undergrounding Districts, and obviously one of the key issues is the amount of funds that will be required to be raised by the Proponents and deposited into the Preliminary Expense Fund.

RISK TO CITY:

What the City Council needs to concentrate on is the underlying policy issue involved, namely, how much risk, if any, the City Council feels is appropriate to subject the City and its General Fund to relating to any specific Undergrounding District. Past policy had clearly been to subject the City General Fund to no risk, and to place this risk entirely on the shoulders of the Proponents of the Underground District. The proposal made by Denny McLeod, which is the basis of the attached Preliminary Expense Agreement, is meant to cut down within reason the amount of any risk of expenses not covered by funds actually raised. However, based on past experience, City staff has some question as to whether such risk can be entirely removed, or even kept to an extremely small amount, unless a fairly high Contingency Fund is incorporated as part of the total amount that the City Council requires to be raised in the Preliminary Expense Fund. Obviously, proponents of any Undergrounding District would prefer not to have any contingency amount included, and to the extent that there is any contingency amount, they would prefer to keep it as low as possible. On the other hand, if the City Council wishes to protect the City's General Fund from such expenditures, the City will wish to have the Contingency Fund higher rather than lower. Therefore, the underlying policy question is whether the City Council feels it is appropriate to change its current policy, so that it accepts some risk, and if so, just how much risk the City Council feels is appropriate.

ALTERNATIVES:

The Proponents of the Piedmont Hills/Central Piedmont Undergrounding Districts strongly emphasized that they felt a City requirement of a "Joint and Several Liability" Reimbursement Agreement was totally unfair, and would clearly discourage almost anyone from signing such an Agreement, since the City would be able to go against any single signatory to the Agreement, rather than going against each individual on a prorata basis. They have further indicated that the fact that Mr. and Mrs. Mason Willrich executed such an Agreement in connection with the Dudley/Blair Undergrounding District was a very unique situation. Assuming that the City Council agrees with this assertion by the Proponents, there are still other alternatives to covering Preliminary Expenses beyond that proposed by Mr. McLeod as incorporated in the Preliminary

Expense Agreement. One of those alternatives is what is actually being carried out by the Proponents of the Wildwood Undergrounding District, namely trying to raise all of the funds, and likely even more, than the anticipated expenses, and once that has actually been done, and the monies are in hand, to sign a Reimbursement Agreement. In addition, there has been a proposal from the Proponents of the Wildwood Undergrounding District to remove the requirement of Joint and Several Liability, and simply place maximum caps on the liability of each individual, so at least they can understand what their potential exposure is. City staff has already indicated to Dan Christopoulos and Craig Casebeer that the City is willing to consider such a proposal, although the caps have to be large enough so that they will more than cover any possible additional expenses. While there would be some small risk in this approach, it could possibly give the City more protection than that provided by the Preliminary Expense Agreement as proposed by Denny McLeod.

SUMMARY:

The requirements established by the City Council on raising funds for Undergrounding Districts and who will take the risks for unanticipated expenses is obviously a difficult, but crucial policy matter. A series of alternatives have been set forth in this Report ranging from the current policy that the Proponents will take all of the risk, to the proposal by Denny McLeod as set forth in the Preliminary Expense Agreement that is attached. The City Council needs to give guidance to the City staff and the Proponents as to which approach it feels is appropriate for the City of Piedmont.

PRELIMINARY EXPENSE AGREEMENT

City of Piedmont For the Combined Piedmont Hills and Central Piedmont Undergrounding Assessment Districts

Recitals

- A. The parties to this Preliminary Expense Agreement (“this Agreement”) are the City of Piedmont, a California charter city (the “City”), and the undersigned Proponents of the Combined Piedmont Hills and Central Piedmont Undergrounding Assessment Districts (“the Proponents”) who are residents of Piedmont, California, working with other residents of the streets to be undergrounded in connection with _____ Undergrounding Assessment District.
- B. On _____, 2003, the Piedmont City Council approved a resolution of intent to form the Proposed Districts.
- C. Certain of the residents of the Proposed Districts have executed written commitments to deposit funds or have already contributed funds toward the Preliminary Expenses for the Proposed Districts, which Preliminary Expenses include the preliminary engineering work to be performed by the Engineer of Work, Harris and Associates, as well as the engineering fees charged by Pacific Gas & Electric and by SBC.
- D. Various residents owning parcels within the Proposed Districts have advanced, or will advance, the total sum of \$_____, to fund the Preliminary Expenses incurred prior to the issuance of bonds to provide funding for the Proposed Districts. The total of \$_____ shall be deposited into a special fund established and maintained by the City known as the _____ Undergrounding Assessment District Preliminary Expense Fund (“the Preliminary Expense Fund”). These funds are to be used by the City to pay the duly submitted invoices of the Engineer of Work, Harris and Associates, Inc., Pacific Gas & Electric Corp., and SBC, for engineering work that must be undertaken prior to the formation and funding of the Proposed Districts.
- E. Harris and Associates has notified the City that its engineering fees that will be invoiced to the City prior to the formation and funding of the Proposed District will not exceed the sum of \$_____.
- F. Pacific Gas & Electric has notified the City that its engineering fees for the Proposed Districts will be \$50,000.00 and SBC has notified the City that its engineering fees for the Proposed Districts will be \$30,000.00.
- G. The purpose of this Agreement is to provide for payment of any legitimate expenses that are incurred prior to the formation and funding of the Proposed Districts by creation of the Preliminary Expense Fund.

In consideration of the mutual undertakings stated herein, the parties agree as follows:

Agreement

1. The foregoing recitals are true and correct, and the parties expressly so acknowledge.
2. The Proponents shall deposit with the City for any expenses that are necessarily incurred and paid by the City prior to the formation and funding of the Proposed Districts the sum of \$_____, which is agreed between the Proponents and the City to be an amount reasonably expected to cover the anticipated Preliminary Expenses.
3. City shall be responsible for making payment of the Preliminary Expenses based on reasonably detailed bills submitted to the City out of the Preliminary Expense Fund.
4. If for any reason all of the monies in the Preliminary Expense Fund are expended, and there are still additional Preliminary Expenses anticipated (“the Anticipated Overage”) that are necessary to proceed further prior to the funding of the Proposed Districts by bond issues, the Proponents and the City shall meet, review all of the facts then available, determine exactly how much shall be reasonably required to cover the Anticipated Overage, and Proponents shall be required to raise the additional monies necessary to cover the Anticipated Overage before any further work proceeds or any further monetary obligations are incurred relating to the Proposed Districts, which additional monies shall be deposited in the Preliminary Expense Fund.
5. If Proponents are unsuccessful in raising sufficient funds to cover the Anticipated Average, all actions relating to the Proposed Districts shall cease.
6. If either of the Proposed Districts fails for any reason to be approved by the Piedmont City Council, any monies remaining in the Preliminary Expense Fund shall be refunded by City to the Proponents, and Proponents will reimburse those persons from the Proposed District who originally contributed such monies prorata based on the ratio of their percentage contributions to the total monies contributed.

7. If either of the Proposed Districts proceeds successfully to the issuance of bonds to finance such Proposed District, the Proponents and residents from the Proposed District making contributions shall be reimbursed for their contributions out of the bond proceeds.

CITY OF PIEDMONT

By _____
Geoffrey L. Grote,
City Administrator

Attest:

By _____
Ann Swift,
City Clerk

PROPONENTS:

Craig Casebeer, Wildwood/Crocker Utility Undergrounding proponent felt that Option 1 may be too expensive for district property owners but noted his willingness to submit this option to district members at a May 29 neighborhood meeting. He felt that Option 2 would be acceptable to district members provided (1) the criteria used to determine whether a tree should be removed would be the same criteria the City currently uses and (2) if after two years from the completion date of the undergrounding project, any portion of the \$7,500 reserve not expended for tree removal would be returned to the district to be used to pay off bond related expenses. These conditions were acceptable to the Council.

The Council stated that either Option was acceptable to the City and therefore, the district has the authority to choose which option it prefers.

Resolution 52-03

RESOLVED, that the City Council accepts either Option 1 or 2 set forth above regarding the removal of Wildwood Avenue street trees and grants the Wildwood/Crocker Utility Undergrounding District the privilege of choosing which tree removal option it prefers, with the understanding that the City will apply its existing tree removal criteria to Option 2.

Moved by Bruck, Seconded by Wieler

Ayes: Matzger, Bruck, McEnroe, Wieler

Noes: None

Recused: Friedman

(1075)

**Utility
Undergrounding
Reimbursement
Agreements**

The City Attorney submitted a proposed format of a Preliminary Expense Agreement for Undergrounding Districts for use in connection with the proposed Piedmont Hills and Central Piedmont Assessment Districts.

Craig Casebeer of the proposed Wildwood/Crocker Utility Undergrounding District requested that a similar agreement be prepared for his district, noting that the district has sufficient funds to cover all of the preliminary engineering costs associated with its proposal. The City Attorney stated that a specific Expense Agreement for the Wildwood/Crocker District will be prepared.

Judge Carl Anderson of the proposed Piedmont Hills Utility Undergrounding District supported Council approval of the proposed Expense Agreement, acknowledging that the agreement mitigates all of the district's concerns.

The Council reviewed the proposed Expense Agreement, requesting the following changes:

1. A separate agreement be prepared for Piedmont Hills and Central Piedmont
2. Recital "C" be amended to provide for the cost of an arborist to be split 50/50 between the City and the district as well as indicate that the cost of PG&E preliminary design and

engineering work can be covered by Rule 20A funds as set forth in Resolution 51-03 adopted tonight

3. Agreement Paragraph 5 substitute the word Overage for "Average"

The City Attorney agreed to revise the Agreement as requested and submit revised drafts for Council review and approval at the next meeting.

ANNOUNCEMENTS

Earthquake Preparedness Seminar – Councilmember McEnroe reported on last week's *Earthquake Preparedness Seminar* sponsored by the Piedmont Asian American Club and thanked Club President Stan Moy for arranging such an important and informative community event.

Concert-in-the-Park Series – Vice Mayor Bruck announced that the City's annual summer *concert in the park* series will begin Sunday, June 1 and he encouraged residents to attend this enjoyable series.

ADJOURNMENT

There being no further agenda business, Mayor Matzger adjourned the Council to Closed Session at 10:15 p.m. for the purposes of discussing City Administrator performance review pursuant to Government Code Section 54957.6

REGULAR CALENDAR

**Wildwood/Crocker
Undergrounding**

The Council considered the following items of regular business:

Councilmember Friedman recused himself from discussion and action on this and the remaining two other utility undergrounding agenda items and left the chambers.

The city clerk gave a brief report asking for council actions to move the district forward to a vote on August 18, 2003.

Public testimony was received from:

Denny McLeod thanked the council and staff on their work to develop a Preliminary Expense Agreement for use with underground assessment districts. He also thanked the council for their decision to use the city's Rule 20A funds for engineering costs in Rule 20B projects.

Resolution 54-03

**Resolution Preliminarily Approving Engineer's Report,
Setting Date, Time and Place for Public Hearing of
Protests**

WHEREAS, at the direction of this City Council by resolution adopted on September 3, 2002, I. L. Schwartz Associates, Inc., as Assessment Engineer for improvement proceedings in the Wildwood/Crocker Avenues Undergrounding Assessment District, City of Piedmont, County of Alameda, State of California (the "Assessment District"), has filed with the City Clerk the report described in Section 10204 of the Streets and Highways Code (Municipal Improvement Act of 1913, hereafter in this resolution referred to as "the Act"), and containing the matters required by Article XIII D of the California Constitution ("Article XIII D"), and it is appropriate for this Council to preliminarily approve said report and to schedule the public hearing of protests respecting said report.

NOW, THEREFORE, THE CITY COUNCIL HEREBY FINDS, DETERMINES AND RESOLVES as follows:

1. This Council preliminarily approves the report without modification, for the purpose of conducting a public hearing of protests as provided in the Act, Article XIII D, and Section 53753 of the California Government Code. Said report shall stand as the report for the purpose of all subsequent proceedings under the Act and Section 53753, except that it may be confirmed, modified, or corrected as provided in the Act.

2. This Council hereby sets 7:30 o'clock P.M. or as soon thereafter as the matter may be heard, on August 18,

2002, in the Council Chambers at 120 Vista Avenue, Piedmont, California, as the date, time and place for a public hearing of protests to the proposed public improvements, the proposed levy of assessments, the amounts of individual assessments, and related matters as set forth in said report, and any interested person may appear and object to said public improvements, or to the extent of said assessment district or to said proposed assessment.

3. The City Clerk is hereby directed to cause a notice of said public hearing to be given by mailing notices thereof, together with assessment ballots, in the time, form and manner provided by Section 53753, and upon the completion of the mailing of said notices and assessment ballots, the City Clerk is hereby directed to file with the Council an affidavit setting forth the time and manner of the compliance with the requirements of law for mailing said notices and assessment ballots.

4. I.L. Schwartz Associates, Inc., telephone (415) 883-9200, is hereby designated to answer inquiries regarding the report and related assessment district proceedings.

Moved by Bruck, Seconded by McEnroe
Ayes: Matzger, Bruck, McEnroe, Wieler
Noes: None
Absent: Friedman

Resolution 55-03

RESOLVED, that the city council approves the form of the Preliminary Expense Agreement which is attached hereto and incorporated herein by reference and authorizes the City Administrator to execute a final agreement with the Wildwood/Crocker Undergrounding Assessment District on behalf of the city as may be amended.

Moved by Bruck, Seconded by McEnroe.
Ayes: Matzger, Bruck, McEnroe, Wieler
Noes: None
Absent: Friedman

Resolution 56-03

RESOLVED, that the city council ratifies the January 14, 2000 agreement for bond counsel services related to the Wildwood/Crocker Avenues Undergrounding Assessment District with Orrick, Herrington & Sutcliffe as previously approved by the City Administrator.

Moved by Bruck, Seconded by McEnroe
Ayes: Matzger, Bruck, McEnroe, Wieler
Noes: None
Absent: Friedman