

City of Piedmont
COUNCIL AGENDA REPORT

DATE: April 4, 2007

FROM: Ann Swift, City Clerk

SUBJECT: **Consideration of a Resolution Abandoning Proceedings and Voiding Assessment in the Central Piedmont Undergrounding Assessment District**

RECOMMENDATION

Consider the attached resolution which will abandon proceedings and void assessments which have been levied for the Central Piedmont Undergrounding Assessment District.

BACKGROUND

On March 5, ballots were opened for the Central Piedmont Undergrounding District. As indicated the following extract from the meeting minutes, the council appeared to be split 3-1 against approving the revised engineer's report and levying increased assessments.

“Councilmember Barbieri supported Council approval of district formation, supporting majority rule in this type of matter. He noted that the 70% threshold referenced by opponents pertained to the level of support desired at the preliminary stage of consideration to assess whether there is sufficient support to initiate district formation proceedings, and even then it is a non-binding policy established by a previous Council. The remaining Councilmembers opposed district formation based upon a 53% level of support. Councilmember Chiang noted his desire for around a 60% support level to authorize district formation and was disappointed that the vote did not even reach 55%, the minimum level required for certain School bond measures. The Mayor reiterated her preference for a two-thirds support level for assessment levy and Councilmember Keating voiced support for adhering to past Council practice of requiring an approximately 70% support level, especially since this standard was originally set for the Central Piedmont District in 2005.”

Council then unanimously passed a resolution directing that a Resolution Abandoning Proceedings be prepared which terminate the district and remove the existing property liens for all homeowners.

On March 19, council considered a resolution abandoning proceedings and, upon request of the Central Piedmont proponents, tabled the matter for two weeks. The council also asked a series of questions which have been addressed in a separate portion of this report by City Attorney George Peyton and Special Attorney Sam Sperry.

In order for the liens on property in the Central Piedmont Undergrounding District to be removed, the council must pass the attached resolution. Three votes of council are required for passage. A vote of either 4-0 or 3-1 would pass the resolution and remove the liens. A vote of 2-2 would mean that the motion failed and the liens on property remain.

As explained in the attached supplementary report by George Peyton, the council may take other actions should they so desire.

RESOLUTION NO. _____

RESOLUTION ABANDONING PROCEEDINGS

CITY OF PIEDMONT
CENTRAL PIEDMONT UNDERGROUND ASSESSMENT DISTRICT

WHEREAS, at the close of the public hearing conducted on November 7, 2005, this City Council (this "City Council") of the City of Piedmont (the "City") levied assessments (the "Original Assessments") upon the benefited parcels within the Central Piedmont Underground Assessment District (the "Assessment District"), based upon the estimated cost (the "2005 Estimated Cost") for the authorized utility undergrounding project (the "Project"), with a 74% margin of support from the affected property owners as indicated by the assessment ballots submitted prior to the close of the public hearing; and

WHEREAS, following the levy and recording of the Original Assessments as liens on the parcels of land assessed, final engineering design was completed and sealed bids for the Project were solicited and received, and the best bid received was for a bid price substantially in excess of the 2005 Estimated Cost, with the result that proceeding with the Project required a substantial increase in the amount of the assessments (the "Proposed Increased Assessments"); and

WHEREAS, for the purpose of determining whether sufficient support remained among the affected property owners to proceed with the Project based on the Proposed Increased Assessments, this City Council directed the preparation of an amended engineer's report (the "Amended Report"), showing the increased total costs to be assessed and the Proposed Increased Assessments and, upon receiving the Amended Report, by resolution adopted on January 16, 2007, scheduled a public hearing for March 5, 2007, to consider the Amended Report and the Proposed Increased Assessments and to hear and consider expressions of support and opposition from the affected owners and any interested persons; and

WHEREAS, notices of hearing and assessment ballots were mailed to the affected owners as required by law, and this City Council opened, conducted and closed the public hearing as scheduled, and at the close of the public hearing, directed the City Clerk (the "City Clerk") to open and tally the assessment ballots received; and

WHEREAS, upon completion of the task of opening and tallying the assessment ballots, the City Clerk reported the results to this City Council, namely that of the assessment ballots received, when weighted in accordance with the amount of the Proposed Increased Assessments as directed by law, the margin of support was 53%; and

WHEREAS, there is insufficient support among the affected property owners and because it is now in the best interest of the City in general and the property owners within the Assessment District to terminate any further consideration of the Proposed Increased Assessments or the Project, this City Council has resolved to and by this resolution wishes to abandon the proceedings for the Assessment District and to provide for the recordation of a certified copy of this resolution with the Alameda County Recorder in accordance with Section 3117 of the California Streets and Highways Code;

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

1. The proceedings for the Assessment District are hereby abandoned.
2. Pursuant to Section 3117 of the California Streets and Highways Code, the City Clerk is hereby authorized and directed to record a certified copy of this Resolution Abandoning Proceedings with the Alameda County Recorder. As further specified by Section 3117, the following information pertains to the Assessment District proceedings:

- (a) The date of adoption of the resolution of intention was October 7, 2003.
- (b) The boundary map for the Central Piedmont Underground Assessment District was filed for record in the office of the County Recorder of Alameda County on September 19, 2005, in Book 16 of Maps of Assessment and Community Facilities Districts, at page 25.
- (c) The assessment diagram for the Central Piedmont Underground Assessment District was filed for record in the office of the County Recorder of Alameda County on February 15, 2006, in Book 16 of Maps of Assessment and Community Facilities Districts, at pages 30 through 38 inclusive.
- (d) The Notice of Assessment for the Central Piedmont Underground Assessment District was recorded March 15, 2007 as Document No. 2007105573, in the official records of the County Recorder of Alameda County.
- (e) The date of adoption of this Resolution Abandoning Proceedings is March 19, 2007.

PASSED AND ADOPTED at a regular meeting of the Piedmont City Council on March 19, 2007 by the following vote:

AYES:
NOES:
ABSENT:

Attest: _____
Ann Swift, City Clerk

City of Piedmont
Supplemental Council Agenda Report

DATE: April 4, 2007

FROM: George Peyton, City Attorney

SUBJECT: Legal Questions Relating to Central Piedmont Underground Assessment District

RECOMMENDATION:

Consider the following responses to legal questions in determining the next steps to take in connection with the Central Piedmont Underground Assessment District.

BACKGROUND:

At your March 5, 2007 Meeting after balloting by property owners on a revised Engineer's Report involving higher assessments, with 53% of the ballots cast in favor of formation of the District, the Council directed staff to prepare a Resolution Abandoning Proceedings related to the District. At your March 19 Meeting a request was made by Denny McLeod for a 90 day extension on taking action on the Resolution, and the Council instead agreed to continue the matter to tonight's meeting. A Notice of this continuance dated March 21, 2007, a copy of which is attached, was mailed out to affected property owners.

LEGAL QUESTIONS:

The City Council and others wanted certain legal questions to be clarified in connection with your further consideration of issues involving the Central Piedmont District. In response to that Ann Swift emailed Sam Sperry, the City's Bond Counsel with five questions on March 23, and Mr. Sperry responded to those questions on that same date, copies both such emails being attached. Subsequent to that time Geoffrey Grote and I had a long discussion with Sam Sperry to clarify certain of his responses and to review various related legal questions.

In an effort to put matters in perspective to allow you to more easily proceed tonight, here are some legal points to consider:

1. Freedom of Action. Sam Sperry and I agree that as a general matter you have substantial freedom of action in what you may do in connection with the 53% approval by ballots cast as determined at the March 5 City Council Meeting. From a legal perspective the only action the Council took on March 5 was to instruct the staff to

prepare a Resolution Abandoning Proceedings. You did not legally vote to either approve or disapprove the revised Engineer's Report and to act on the increased assessments set forth as part of that Report.

2. Action at Tonight's Meeting. While you have general freedom of action, at tonight's meeting you are restricted to dealing with the Resolution Abandoning Proceedings on the District because that was the only matter set forth in the Notice of March 21 sent to the homeowners, and pursuant to the Brown Act you must generally restrict discussions and any legal action to what was set forth in that Notice. However, you can take other action relating to the District, such as actually voting to approve or disapprove the revised Engineer's Report, at a later meeting by instructing staff to put the subject matter on another later Council Agenda.

3. Action on Abandoning Proceedings. The question has been raised as to whether the Council vote on March 5 instructing staff to prepare a Resolution Abandoning Proceedings somehow binds the Council to vote in favor of such a Resolution. Sam Sperry has stated that he is not aware of anything in state law that requires you to vote for such a Resolution, and I am not aware of anything in City law that would require you to do so. In fact, the City follows The Standard Code of Parliamentary Procedure by Alice Sturgis and indicates that the City Council has the power to rescind past actions, including Resolutions, i.e., resolutions instructing staff to do something.

4. Indefinite Hold. The question has been raised as to whether you can legally leave the Central Piedmont District on "indefinite hold", i.e., not vote for a Resolution Abandoning Proceedings and also not voting to approve the revised Engineer's Report with the higher assessments. Mr. Sperry has indicated that he is unaware of anything in State law that would prevent the City from taking no action, and I am unaware of anything in City law that requires action to be taken. Obviously, since any action to legally pass a resolution will require three affirmative votes, and one Council Member being recused, if the remaining four Council Members split their votes evenly, then there is no way to pass the Resolution approving the revised Engineer's Report.

a. Practical Considerations. There is, of course, the practical consideration of how long the contractor will hold its bid to do the undergrounding work on the Central Piedmont District. Also you will see in Mr. Sperry's response to Question 2 that he points out accurately that there are now assessment liens against all of the properties in the District, and unless it appears that there is some reasonable chance that the Council will act before too much time has passed to approve proceeding with undergrounding in the District, it may be considered unfair to maintain those assessment liens against each property for an indefinite time.

5. Moratorium. A question was raised as to whether the passage of a Resolution abandoning proceedings would automatically institute a year-long moratorium on any further Underground District being created in the area now covered by the Central Piedmont District. Sam Sperry addresses that issue in his response to Question 5, and indicates that no such moratorium is part of the current law that applies.

POSSIBLE COURSE OF ACTION:

In light of the foregoing legal points, a possible course of action would be as follows:

1. Tonight. Have a further discussion on the Resolution Abandoning Proceedings and take an actual vote on that Resolution. If the Resolution does not pass because of inability to obtain 3 affirmative votes, direct staff to schedule the matter for your April 16 or another specific meeting, with a broadly worded Notice to homeowners allowing you to take a vote on approving or disapproving the revised Engineer's Report.

2. Later Meeting. At your April 16 Meeting or whenever this matter is scheduled for a later hearing, have a discussion and then vote on the revised Engineer's Report. If the vote does not approve the revised Engineer's Report, then seriously consider passing the Resolution Abandoning Proceedings to among other things remove the current assessment liens from the real properties in the Central Piedmont District.

Sam,

Just to put in writing the questions on which the city would like a written opinion:

1. Having passed a resolution asking that the clerk prepare a resolution abandoning the Central Piedmont District, does state law preclude the council rescinding their motion and taking up again the formation of the district?
2. Is there a time limit during which the council must act to abandon the district?
3. If the council rescinds its previous motion and takes up the issue of formation of the district, is there a noticing requirement?
4. Is there a conflict between the 1913 Act and Prop 218? Does Prop 218 change the balloting percentage requirements for undergrounding?
5. Is there a requirement that district's which have been abandoned wait 12 months before submitting new petitions?

Thanks for your help.

Ann

Ann, Responding to your 5 questions in this morning's e-mail as follows:

1. While I can't speak to the entirety of "state law," there is nothing in the 1913 Act (under which the Central Piedmont assessment district proceedings have been conducted) and nothing in Section 4 of Article XIID of the California Constitution (the part of Prop. 218 pertaining to assessment district proceedings) which precludes the Council from rescinding their March 5 action which directed staff to bring back an appropriate resolution abandoning proceedings. Since there was not a majority protest, the decision of the Council on March 5 was discretionary, and I personally know of nothing that precludes the Council from changing its mind with respect to a decision on a matter over which the Council has discretion.

However, the question you ask has a more general application which needs to be addressed to George, as City Attorney, because it has implications way beyond this specific situation - namely, having taken an action which indicates an intention to exercise its discretion in a particular manner, can the City Council later rescind that action and exercise its discretion differently. That is an issue which could arise in a whole range of situations, and the City Attorney needs to be the source of guidance on that issue for that reason.

Your statement of Question 1 includes reference to "taking up again the formation of the district." Please bear in mind that the assessment district formation was completed in November, 2005. By its resolution adopted on November 7, 2005, the Council completed the formation process. The action under consideration at the March 5 hearing was not formation but an increase in the assessments previously levied.

2. There are no provision in either the 1913 Act or the Proposition 218 Omnibus Implementation Act which specifies any deadline following the close of the public hearing within which the Council must act either one way or the other (i.e., to proceed or to abandon). I know of no other legal provision specifying a deadline. As best I know, the primary reason to proceed with reasonable diligence to resolve the matter one way or the other is the fact that each of the properties assessed now has a lien to secure payment of the assessment, and considerations of fairness to the affected property owners dictate that the continued existence of or the removal of the lien be resolved within a reasonable period of time.

3. I know of no noticing requirement applicable to any reconsideration of the assessment district by the Council. However, in my view, this question is similar to Question 1 in that it has applications to a broad array of situations beyond this specific situation, and for that reason needs to be addressed by the City Attorney.

Aside from pure legal considerations, I strongly recommend that any such reconsideration of the assessment district be made the subject of a mailed notice to the affected property owners, whether or not the reconsideration would be considered a public hearing.

4. I'm unclear about what you are asking in Question 4 when you ask, "Is there a conflict between the 1913 Act and Prop 218?" My response is that there are no conflicts of which I am aware. Following the approval of Prop 218 in November, 1996, there were a number of provisions of the 1913 Act, especially those pertaining to notice and majority protest, which were in conflict with Prop 218, but insofar as I know those have all now been resolved by subsequent clean-up legislation.

The second part of Question 4 asks, "Does Prop 218 change the balloting percentage requirements for undergrounding?" Again, I'm unclear about the question - does Prop 218 change the balloting percentage requirements from what other legal provisions? Please keep in mind that there was no balloting procedure until the adoption of Prop 218, so there was nothing in existence with which the Prop 218 provisions could conflict.

Perhaps it's useful to confirm that the assessment ballot provisions of Prop 218 apply in the same manner to all assessment districts, irrespective of what's being financed. So, the definition of "majority protest" is the same irrespective of what is being financed.

5. There used to be a provision in the 1913 Act which precluded renewed consideration of a 1913 Act assessment district for one year following a majority protest, but that provision has been repealed as part of the Prop 218 clean-up

legislation. Even if it were still in effect, it wouldn't apply since there was not a majority protest. I know of no other provision touching on this topic.

Regards, Sam