

DATE: September 26, 1989

TO: Councilman Ron Roberts

FROM: City Attorney

SUBJECT: Proposition C - Open Space Bonds - Proposal to
Obtain Voter Authorization for Additional Bonds

By memorandum dated August 24, 1989, you asked a number of questions all relating to the potential issuance by the City of additional open space bonds. Your memorandum referred to our memorandum of law dated July 5, 1989, on the subject of Proposition C, the 1978 authorization to sell \$65 million in bonds to fund acquisition of open space.

While we have prepared this memorandum of law in response to your questions, we also referred your questions to the City's bond counsel for the proposed new open space bond issuance. That bond counsel, Jones Hall Hill & White, also provided answers to the various questions which are attached hereto as Attachment 1.

The questions in your August 24 memorandum are as follows:

1. Some believe the voters did not approve an increase in ad valorem tax when they passed Proposition C in 1978. Rather, they agreed to pledge an existing revenue source (i.e., the Environmental Growth Fund). Is this not in conflict with the "prior voter approved debt" clause contained in Proposition 13?

2. Even if the \$65 million in bonds is debt, "prior voter approved debt," hasn't the city reached its voter approved limit?

3. The San Diego Unified School District last November exercised its authority under Proposition 13 but it had not reached its limit. What are the similarities and differences between what the city is proposing and what the school district has done?

4. Are the explicit promises made in sample ballot language for the 1978 bond act enforceable?

5. How can this be termed a "reauthorization" of a tax rate, when no specific tax rate was ever established in the initial act; and in fact, it was promised to never establish one?

6. Will a specific tax rate be established high enough to pay for both the new bonds and to accommodate the existing bonds?

7. Although authorized as collateral for a specific series of bonds if needed, is it not true that

this vote will establish a new tax never before used and therefore subject to Proposition 13 vote requirements?

8. There are four potential ways in which the city could impose a new levy for open space acquisition and avoid Proposition 13 restrictions. These four options are outlined below. Please comment on the viability of each option.

A. Pre-existing Indebtedness -- Proposition 13 permits ad valorem property taxes to exceed 1 percent of the market value in order to retire indebtedness authorized before the enactment of the proposition. In the case of Proposition C (1978), if the voters approved a rate of indebtedness not to exceed \$65 million, and the entire amount has been issued and properties purchased, the debt retired, and the debt serviced through the franchise fee, hasn't the full amount of voter approved debt been incurred, and thus no residual authority to issue new or added debt exists?

B. A General Tax -- The California Supreme Court has ruled that taxes which accrue to a jurisdiction's general fund, and are not earmarked for special purposes, are not "special taxes," and thus not subject to the 2/3 vote requirement. Is it possible to frame a new levy for open space acquisition as a general tax (assuming the levy is not an ad valorem tax) to flow into the Open Space District's General Fund and not be earmarked for a "special purpose?"

C. A Special District -- There is some authority to suggest that in some instances the 2/3 vote requirement of Proposition 13 does not apply to some special districts. Can the open space district be defined as a "special district?"

D. An Assessment -- Proposition 13 does not govern assessments. An assessment would require demonstrating that the acquired open space would specifically benefit the assessed properties. Your July 5 memo suggests this but does not draw any definitive conclusions. What is the feasibility of using an assessment as a method to securing additional funds for open space acquisition?

In answer to your first question, I have attached as Attachment 2 the notice of hearing together with questions and answers which was mailed to all the property owners in the City

in connection with the formation of the San Diego Open Space Park Facilities District No. 1. You will note that, while the notice itself does not refer to the Environmental Growth Fund, the questions and answers did refer to the Environmental Growth Fund and its capability of financing potential future bonds of the open space park facilities district. You will also note that the questions and answers merely indicated that the Environmental Growth Fund is one of the potential sources of funds for servicing open space bonds and that property taxes would "not necessarily" be increased.

Subsequent to the Council's hearing and formation of the district, the City Council placed Proposition C on the ballot. A copy of Proposition C together with its "tax rate statement" and arguments for and against is attached as Attachment 3. The "tax rate statement" clearly reflects the City's intention to utilize two-thirds of the Environmental Growth Fund for the payment of principal and interest on the proposed bonds. Likewise, the argument in favor of Proposition C reflected the proponents position that the Environmental Growth Fund would be used for debt service on the bonds.

The bonds themselves were sold in accordance with the San Diego Park Facilities Procedural Ordinance (Municipal Code Section 61.2000 et seq.) with security for payment being all of the property within the park district together with the City's ability to levy an ad valorem assessment, if necessary, against all the property in the district to pay principal and interest on the bonds.

As a result of the substantial security afforded by the City's ability to levy an ad valorem assessment against all the property in the district, the bonds were highly rated and achieved low comparative interest rates.

While the City, therefore, has at all times had the ability to levy an ad valorem assessment if necessary, the City Council's plan, as implemented by City staff, has always been to sell the \$65 million bonds in increments in order to attempt to assure that two-thirds of the Environmental Growth Fund would be able to fully service the bond debt.

The above circumstances did result in "prior voter approved debt," even though no ad valorem assessments have been levied or are planned. There does not appear to be any legal conflict in the above fact situation with the "prior voter approved debt" clause contained in the Jarvis Gann initiative of 1978, commonly known as Proposition 13.

In answer to your second question, since the City has, in fact, sold the \$65 million in bonds authorized by Proposition C,

additional voter approval would be necessary under the City's procedural ordinance prior to the Open Space Park Facilities District being able to sell additional bonds.

In answer to your third question, the rules and regulations applicable to the San Diego Unified School District as contained in the State Education Code, and as have resulted from various past ballot measures, are so dissimilar to the rules and regulations applicable to the City and to the open space park facilities district that comparison would be relatively unproductive. Substantial research and time would be required to answer the broad questions, as posed. If you have any specific questions on this issue we would be pleased to address them.

With regard to your fourth question, there is no certainty as to whether the statements by the City Manager and the proponents and/or opponents of Proposition C regarding the Environmental Growth Fund are "enforceable." Ballot arguments are generally known to be less than totally objective and would perhaps not be treated by the courts as creating enforceable obligations. However, as was pointed out in our July 5 memorandum of law, Charter Section 103.1a, which creates and describes the Environmental Growth Fund, does specify "that two-thirds of the money paid into the Environmental Growth Fund shall be used exclusively as debt service for bonds of any nature issued for the acquisition, improvement and maintenance of open space to be used for park or recreational purposes." Therefore, as a

practical matter, the City must use two-thirds of the Environmental Growth Fund to service the \$65 million in open space bonds.

This office is not aware of any proposal by anyone to deviate from the plan created in 1978 to service the \$65 million open space bond issue with two-thirds of the Environmental Growth Fund.

The fifth question involves the word "reauthorization." We are not aware of the genesis of that term. We are, however, attempting to work out a proposed process with bond counsel for submittal to the City Council and, if approved, for submittal for a majority vote of the electorate, which would allow the San Diego Open Space Park Facilities District No. 1 to issue additional open space bonds.

Issuance of such additional open space bonds would, of course, result in a requirement for additional funds for debt service on the bonds. An assessment or levy against all of the property in the district which, as you know, has boundaries contiguous to the City's boundaries, is a potential source of such funds. The voters would, of course, have to, in effect,

approve such funding plan, if it is ultimately proposed, as part of the approval of the bond issuance itself. It is our understanding, for example, that if the voters, by majority vote, approved the issuance of an additional \$100 million in open space bonds to be financed through the levying of an ad valorem assessment, the estimated annual cost per \$100,000 property value in the City upon sale of the total \$100 million would be approximately \$23, based on a 30-year amortization of the bonds. The \$23 per \$100,000 of assessed value would decrease over the term of the bonds as the total value of property in the City increases.

In response to your sixth question, there is no proposal to our knowledge, under any scenario, to discontinue servicing the existing \$65 million open space bonds with two-thirds of the Environmental Growth Fund.

Your seventh question involves the basic issue of whether or not the potential ad valorem assessment, which would seem to be the most obvious source of funds to pay for any new authorized open space bond issue, would require a two-thirds vote of approval by the electorate pursuant to the requirements of Proposition 13. Our discussions with representatives of Jones Hall Hill & White, the recently approved bond counsel for any proposed new open space bond issue, indicates that the existing

district could, in fact, sell such bonds on the basis of a majority vote of the electorate. However, certain modifications to the existing procedural ordinance may be necessary to clarify the method of assessing various properties to reflect their actual values rather than the conditionally "frozen" values of properties which resulted from the passage of Proposition 13.

Your final question described four potential ways in which you have concluded "the city could impose a new levy for open space acquisition and avoid Proposition 13 restrictions."

We agree it does not appear that the "pre-existing indebtedness" provision of Proposition 13 would be available for any ad valorem property tax levy for open space bonds.

Your second potential funding source "a general tax," is perhaps a possible source of funds for the City which could perhaps result in freeing up other funds to support open space acquisition. However, please see the attached discussion of this issue prepared by bond counsel, Jones Hall Hill & White.

Your third and fourth sources of funds involve special districts and assessments. Please see the response of Jones Hall Hill & White (Attachment 1) which explains that the "assessment" approach is precisely the process proposed for the potential new bond issuance.

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By

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Deputy City Attorney

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Attachments 3

cc Ken Jones, Esq.

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