



To: San Francisco Bay Restoration Authority
Fr: Kenneth Moy, Legal Counsel
Dt: September 15, 2014
Re: Possible Structure for Revenue Measure

Summary: Staff has asked whether the San Francisco Bay Restoration Authority (Authority) has the ability to structure a revenue measure that levies a tax based on a parcel's assessed value. The Authority appears to have the power to do so but will require legislative amendments to the Authority's enabling statute to make such a proposition practical. Bond counsel should be consulted regarding the amendments. Additional information regarding funds available to pursue this option and cost will be presented at the Governing Board meeting on September 24.

Discussion: The Governing Board of the Authority is meeting on September 24. Among the items for discussion are a debriefing on the effort to place a measure on the November 2014 ballot and development of a strategy for placement of a revenue measure on the ballot for 2016. Staff has requested a review of the revenue measure options available to the Authority.

The Authority's enabling legislation grants it the power to levy a special tax, benefit assessment or property-related fee to fund grants for wetland restoration projects. By early 2010¹, the Governing Board concluded that assessments and fees presented a significant hurdle: the legal requirement that the parcels paying the assessment or fee receive a benefit commensurate with the amount paid. Nothing since has altered the legal basis for that conclusion. Therefore, this memorandum focuses on possible variants of the special tax.

Prior to the June 19 meeting, the Governing Board had considered placing a measure on the ballot that levied a fixed Nine Dollar (\$9) per parcel special tax on every nonexempt parcel in the nine (9) county Bay Area for a period of ten (10) years to fund an expenditure plan that described the criteria the Authority would use to select projects for funding. The Governing Board was also considering a provision that would ensure minimum funding for designated subregions and/or a provision that would give priority to project sponsors that provided funds for ballot access costs.

In 2011, the Authority engaged the firm of Jones Hall, a bond counsel firm, to provide advice. The following is excerpted from their June 29, 2011 memorandum:

[In response to a question about exemptions from a special tax for seniors, low income households, etc.] California courts have held that the power to tax includes the power to draw

¹ At its January 27, 2010 meeting, Santa Monica Mountains Conservancy made a presentation to the Governing Board describing their success in levying a benefit assessment. The discussion centered on the differences between the Conservancy's program and circumstances and the Authority's. Ultimately, the Governing Board directed staff to work on a special tax measure.

reasonable distinctions among users and to provide for exemptions, and, on that basis, the SFBRA may consider including a senior exemption or a low-income exemption in its ballot measure and/or establishing different tax rates for different land uses. However, the Election Resolution should include specific findings justifying any such distinction. See *Fox etc. v. City of Bakersfield* (1950) 36 Cal.2d 136 (The power of the states to make classifications of persons or property for the purpose of taxation is very broad. If a classification of persons or occupations made for the purpose of imposing taxes is founded on "natural, intrinsic or fundamental distinctions which are reasonable in their relation to the object of the legislation and otherwise," they will be deemed to be valid and binding.); *Allegheny Pittsburgh Coal v. Webster County* (1989) 488 U.S. 336, 344 (A state may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable. In each case, "if the selection or classification rests upon reasonable consideration of difference or policy," there is no denial of equal protection of the law.); *Nordlinger v. Hahn* (1992) 505 U.S. 1 (Legislature has especially broad latitude in creating classifications and distinctions in tax statutes).

[In response to a question about varying the tax rate depending on parcel size, number of units, etc.]: See previous response and, in particular, *Fox etc. v. City of Bakersfield* (1950) 36 Cal.2d 136, 142 ("It is well settled that occupations and businesses may be classified and subdivided for purposes of taxation, and it is within the discretion of the Legislature to exact different license taxes from different classes or subclasses of businesses, subject only to the limitations of the state and federal Constitutions in regard to equal protection of the laws. No constitutional rights are violated if the burden of the license tax falls equally upon all members of a class, though other classes have lighter burdens or are wholly exempt, provided that the classification is reasonable, based on substantial differences between the pursuits separately grouped, and is not arbitrary.")

Staff has requested a legal analysis of a special tax based on the assessed value of a parcel. In responding to this request, I have consulted with the State Coastal Conservancy's (SCC) senior counsel and the office of the County Counsel for San Mateo County.

First, Articles XIII A, B, C and D of the California Constitution place significant substantive and procedural constraints on the ability of local and regional entities to impose a tax based on the assessed value of a parcel. However, one of the exceptions to these constraints is a statutory authorization for a local or regional entity to incur bond indebtedness for a parcel tax based on the parcel's assessed value. Note that under this exception, the tax and the bond indebtedness are authorized simultaneously. The Midpeninsula Open Space District's June 2014 ballot measure is a recent example of the use of this exception.

The pivotal question is whether the Authority has the requisite statutory authorization to access the bonded indebtedness option. Section 66704 of the Authority's enabling legislation authorizes the Authority to incur bond indebtedness as follows:

(e) Incur bond indebtedness, subject to the following requirements:

(1) The principal and interest of any bond indebtedness incurred pursuant to this subdivision shall be paid and discharged prior to January 1, 2029.

(2) For purposes of incurring bond indebtedness pursuant to this subdivision, the authority shall comply with the requirements of Article 11 (commencing with Section 5790) of Chapter 4 of Division 5 of the Public Resources Code except where those requirements are in conflict with this provision. For purposes of this subdivision, all references in Article 11 (commencing with Section 5790) of Chapter 4 of Division 5 of the Public Resources Code to a board of directors shall mean the board and all references to a district shall mean the authority.

(3) The total amount of indebtedness incurred pursuant to this subdivision outstanding at any one time shall not exceed 10 percent of the authority's total revenues in the preceding fiscal year.

The Governing Board has previously declined this option due to the limitations imposed by subsections (e)(1) and (e)(3). In fact, since the Authority has no revenues until it places a measure on the ballot, subsection (e)(3) appears to act as a 'Catch 22'² since the Authority's revenues prior to the imposition of the tax is zero. Therefore, at the very least, the Authority will need to have the Legislature amend these subsections if it is to levy a special tax based on the assessed value of a parcel.

If the Governing Board wishes to pursue this option, the Authority will need to retain (a) bond counsel to advise it on necessary changes to the Authority's enabling legislation, (b) consultant to determine the potential revenue stream and (c) polling firm to test public support for the measure crafted from the work of (a) and (b). Staff will provide an update on an estimate from bond counsel for the proposed consultation and whether the funds remaining from the FAN grant (which the Authority offered to return to FAN) are available to fund such an effort.

² Acknowledgement to Joseph Heller.