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November 1, 2021

Dr. Ayindé Rudolph, Superintendent
Members of the Board of Trustees
Mountain View Whisman School District
1400 Montecito Ave.
Mountain View, CA 94043

TRANSMITTED VIA EMAIL

RE: Mountain View Whisman School District Proposed 2-Tier Mello Roos Tax

Dear Dr. Rudolph and Board of Trustees,

The Building Industry Association of the Bay Area (BIA) submits the following comments in objection to the Mountain View Whisman School District (District)'s actions regarding a proposed onerous 2-Tier Community Facility District (CFD) or Mello-Roos tax. BIA requests that the District cease and end all analysis, study, investigation, strategizing, polling or other activities in furtherance of this divisive measure.

Along with the proposed 2-Tier Mello-Roos tax's conflict with State of California tax and school facilities funding laws (discussed later this letter), the special tax would irreparably impair and undermine years' long efforts to provide for housing growth in the predominately jobs rich areas of North Bay Shore, East Whisman, and Terra Bella by cost burdening all new housing in areas that the City of Mountain View (City) and the Greater Mountain View Community have painstakingly planned and supported as the next new growth areas of Silicon Valley. The District's proposed tax would be also be an impediment to the development of deed restricted affordable housing, further hampering geographic equity aspirations of socioeconomically disadvantaged Mountain View households and aggravating demographic imbalance in the District and the City.

Background: City of Mountain View "Citywide School Strategy" Abandoned

In 2019, at the District's behest, the City attempted to circumvent controlling State Law by proposing to exact additional, unlawful funding from new housing units under the guise of a "Citywide School Strategy." At that time, BIA strongly objected to these efforts and eventually the City concurred with BIA and abandoned the Strategy, acknowledging it was preempted by the School Facilities Act of 1998 also known as "S.B. 50."

As BIA noted at the October 15, 2019 City Council Study Session and again on May 20, 2020, controlling state law has preempted the field of school facilities adequacy and mitigation measures (Gov. Code Section 65995 et seq.):

> *65595 (g)(3) For purposes of subdivisions (f), (h), and (i), and this subdivision, "school facilities" means any school-related consideration relating to a school district's ability to accommodate enrollment.*
>
> *(h) The payment or satisfaction of a fee, charge, or other requirement levied or imposed pursuant to Section 17620 of the Education Code in the amount specified in Section 65995 and, if applicable, any amounts specified in Section 65995.5 or 65995.7 are hereby deemed to be full and complete mitigation of the impacts of any legislative or adjudicative act, or both, involving, but not limited to, the planning, use, or development of real property, or any change in governmental organization or reorganization as defined in Section 56021 or 56073, on the provision of adequate school facilities.*

The contemplated 2-Tier Mello-Roos tax is clearly a continuation of the District's effort to circumvent SB 50.

The CFD Would Render Housing Infeasible and Exacerbate the Housing Crisis

Incumbering new housing and new households with thousands of dollars each year in additional special tax bills is a potential disaster for Mountain View because it will most certainly render economically infeasible thousands of planned units on which the City and the greater Silicon Valley Region depend to help meet our crushing housing shortage. The City has already analyzed the feasibility of residential construction and found a very troubling underlying economic predicament with new housing development in the North Bayshore and East Whisman areas even without the additional burden of the 2-Tier CFD.

In 2019 the City commissioned the *Mountain View East Whisman Residential Development Financial Feasibility Analysis* to analyze to District's funding demands within the now discarded "Citywide School Strategy". The Analysis, conducted by Seifel Consulting, reports that the City's efforts to add housing are even now at significant risk from the lower economic feasibility of these projects. According the City's October 19, 2019 Staff Report:

> *Despite high sales prices and rents, high-density residential projects may be economically infeasible by $100,000 or more per unit. Residential projects are challenging to pencil out due to the factors summarized below.*
>
> - *Construction costs are significantly higher in these areas, based on a local labor shortage and more complicated and expensive high-rise methods;*
> - *City fees, such as the Park Land Dedication Fee, which can be well over $100,000 per unit;*
> - *Environmental and site issues, based on redevelopment of industrial land;*
> - *Escalating land prices; and*
> - *Rents and sales prices that are not increasing as fast as the cost factors above.*

The City has Evaluated the CFD as a Likely Significant Constraint to Housing in the Housing Element

In the upcoming Housing Element, the State of California Department of Housing and Community Development (HCD) has determined that the City must build over 11,000 new residential units between 2023 and 2031 with over half of those below market rate affordable units. Mountain View will desperately need every single planned housing unit in North Bay Shore, East Whisman, Moffett Field, and Terra Bella areas to meet this ambitious goal. If the District's 2-Tier Mello-Roos tax were adopted, it would mean that the economic feasibility of much new housing within the District would likely be entirely destabilized.

The City of Mountain View has recently expressed considerable concern that the CFD will undermine the City's effort to complete and certify the Housing Element. At the October 20, 2021 meeting of the City's Environmental Planning Commission (EPC), City Staff conducted a Study Session of the 2023-2031 Housing Element.[1] As the Staff Report for the EPC notes:

> *Housing sites identified in the Housing Element must meet the criterion that they are likely to be redeveloped within the eight-year planning period specified by State law. In order to meet that criterion, every site must be analyzed for constraints on housing development, such as site conditions, City development standards, and fees and special taxes imposed by governments which serve the area.*

After describing MVWSD Board actions to date regarding the CFD, the City Staff Report goes on to state:

> *If a CFD parcel tax as presented to the School District Board of Trustees in August were in place, it would likely reduce housing production, especially affordable housing production, in the City since it would raise the cost of home ownership or depress developers' incentive to build for-sale housing and apartments and other rental housing.*
>
> *As a result, it would be considered a constraint on housing development, which would preclude the City's use of those areas for the site inventory used to satisfy the City's obligation under RHNA. If the City cannot include the area north of Central Expressway in the site inventory, more areas south of Central Expressway would need to be rezoned to comply with RHNA, bearing more of the community's obligation to site new housing at densities which promote affordability.*

The CFD Would Worsen Economic Unfairness in the District & Most Likely Doom Future Funding Measures

[1] The Housing Element is one of seven State-mandated General Plan elements and is the only General Plan element subject to mandatory review by a State agency (HCD). The purpose of the Housing Element is to analyze the housing needs of a community's current and future residents across various income categories; create, update, and guide housing policy in the City; and identify locations to accommodate the City's Regional Housing Need Allocation (RHNA).

This ill-conceived, unjust CFD tax would also add to the Region and City's severe housing discrimination crisis. Under the District's proposed 2-Tier Mello-Roos, two classes of residents would be created in the City. One class, primarily existing property owners and tenants, would be subject to a relatively low annual CFD tax of between $49 and $99 annually. A second class of new residents would be saddled with up to $5,795 in taxes—***each year***-- in addition to property taxes, parcel taxes, bonds and other special assessments. The District has already acknowledged that lopsided enrollment has skewed demographics at choice schools, prompting the District to reconsider how it enrolls students. This tax would likely exacerbate this imbalance of socioeconomically disadvantaged student enrollment.

What's more, by saddling a large number of future households with a monumental and potentially crippling increase in annual property tax payments, the CFD tax would create a permanent bloc of voters unwilling and unable to afford to vote for future local tax measures necessary to maintain essential quality-of-life services. Since these measures typically require 2/3 voter approval, this permanent bloc of "no" voters could make it impossible for the City of Mountain View and special districts, including the District itself, to pass future local tax measures or other assessments.

The 2-Tier Mello-Roos Scheme is Illegal

The 2-Tier Mello-Roos scheme runs directly afoul of the California Constitution. Art. 13A, § 4 (enacted as part of Proposition 13), limits the ability of local entities—including school districts—to impose special taxes. Under Section 4:

> Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes ***on such district***…. (emphasis added)

The Court of Appeal applied Art. 13A, § 4 in *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 Cal.App.3d 212 to invalidate a similar tax scheme attempted by several Los Angeles school districts to impose a special tax on new housing units to fund school facilities. The Court held the tax unlawful. It ruled that the phrase "on such district" does not merely refer to the geographical area encompassed by the special district in which the tax was to apply. Rather, it means that a special tax must fall directly or indirectly on the voters who approved it:

> *The Exactions Here At Issue Were Not Imposed "On The District" Within the Meaning of Article XIII A, Section 4*. Section 4 provides that the special taxes imposed by cities, counties and special districts must be imposed "on such district." For the reasons discussed below, we interpret this directive language to preclude taxes which the electorate impose on others and not directly or indirectly on themselves[2]….
>
> As already noted, the [California Supreme] Court observed in *Candid Enterprises, Inc. v. Grossmont Union High School Dist., supra,* 39 Cal.3d 878, 882, 218 Cal.Rptr. 303, 705 P.2d 876, that article XIII A special taxes have rarely been imposed because of the need for a two-thirds vote of the electorate. The implication in this observation is that the two-thirds vote would have to be achieved through voters ***who will pay the tax themselves.*** *California Bldg. Industry Assn. v. Governing Bd.*, *supra*, at 238 (original emphasis)….

[2] The Court of Appeal's reliance on the California Constitution is important because it means that even if the Legislature had purported to grant school districts statutory authorization to place a 2-tier Mello-Roos special tax on the ballot with exponentially differential tax rates, such legislation would be invalid.

> To adopt the school districts' interpretation of the phrase "on such district" would allow the absurd consequence effected by the voters in the instant case—overwhelming passage of a "tax" which they themselves do not have to pay, either directly or indirectly. The constitutionally imposed difficulty of a two-thirds vote would be rendered meaningless. In contrast, requiring the tax to be imposed directly or indirectly on the electorate to whom the tax was submitted will give effect to the limitation on new taxes which the supermajority requirement seeks to insure. *Id.* at 238-239 [3]

The District's 2-tier Mello-Roos tax scheme violates Section 4's prohibition against using the artifice of establishing a nominal special tax rate for a supermajority of qualified voters and an exponentially higher rate for a discrete minority of taxpayers in the district.

Besides violating Section 4 of the California Constitution, the District's CFD tax would be invalid as a *de factor* development mitigation measure. The District's financial and other materials leave no doubt that as a legal and factual matter the CFD is intended to be a method for mitigating the impact of new residential development on the need for school facilities. However, state law expressly preempts the field of school mitigation measures connected to residential development. While SB 50 allows formation and imposition of a landowner-approved CFD special tax to finance school facilities in connection with residential development so long as there is a dollar-for-dollar credit against any other school mitigation measure, registered-voter special taxes that purport to impose a nominal special tax on existing voters to induce approval of a massive school mitigation special tax on new units represent an invalid end-run around the State's comprehensive school mitigation regime. *See California Bldg. Industry Assn. v. Governing Bd.* , *supra*, at 233:

> This case presents a novel but transparent attempt by the school districts to circumvent the dollar limitations found in section 65995. Although authorized by section 53080 'to levy a fee, charge, dedication, or other form of requirement against' development projects for the purpose of funding construction of school facilities, section 65995 limits the amount of those fees. School districts were apparently concerned that the amount which section 53080 allows them to impose would not be sufficient to meet the reasonable costs of providing school facilities for the anticipated increase in the school population which would be generated by new housing.
>
> It is clear to this court that as a means of avoiding the section 65995 limitations, school districts decided to adopt the subject exactions. Under the guise of the term "special tax," school districts sent to their voters a measure which would impose what are, in actuality, development fees….

<u>This Tax Scheme Failed Miserably the Last Time Attempted</u>

2021 is the 10-year anniversary of the last time financial consultants and political pollsters persuaded a Bay Area school district they had devised a clever way to circumvent SB 50. In March 2011, the Santa Clara Unified School District dismissed the concerns of the local business community, city leaders, and housing advocates and followed its hired "experts" who confidently predicted they could secure 2/3

[3] While the Court of Appeal suggested that Art. 13A, § 4 might countenance "reasonable" exemptions from the tax and a "reasonable" tax rate differential between classes of taxpayer within the district, the enormous disparity in the District's scheme between the existing residents who would approve the tax and the occupants of future housing units is patently unreasonable in light of Art. 13A, § 4's purpose .

voter approval of a measure to impose a similar 2-tier Mello-Roos special tax. As the ballotpedia[4] election site shows, despite seeking only $19.00 per year from existing residents, the CFD tax was opposed by a broad coalition and overwhelming rejected:

Santa Clara Unified School District parcel tax and bond, Measure A (March 2011)

A **Santa Clara Unified School District CFD No. 2011-1, Measure A** ballot question was on the March 8, 2011 ballot for voters in the Santa Clara Unified School District in Santa Clara County, where it was **defeated.**

Measure A required a two-thirds (66.67 percent) supermajority vote to pass. It would have:

- Authorized the levy of an annual tax of $19.00 on existing residential units
- Authorized both a one-time tax and an annual tax on new residential units.
- Authorized $788,000,000 in bonds for Community Facilities District (CFD) No. 2011-1.

Community Facilities District (CFD) No. 2011-1 was formed by the Santa Clara Unified School District to fund land acquisition and development of school facilities to serve 10,000 anticipated new residential units.

Election results

Measure A		
Result	**Votes**	**Percentage**
No	**595**	**59.03%**
Yes	413	40.97%

[4] https://ballotpedia.org/Santa_Clara_Unified_School_District_parcel_tax_and_bond,_Measure_A_(March_2011)

Support

Supporters

Arguments in favor of Measure A in the official voter pamphlet were signed by:

- Andrew Ratermann, School Board President
- Jim Canova, School Board Trustee, Area 2
- Jim Foran, Director, Santa Clara County Open Space Authority
- MaryAnne Velard
- Erik D. Kaeding

Opposition

Opponents

The arguments/rebuttal arguments in the official voter pamphlet from Measure A's opposition were signed by:

- Shilpa Patel, Resident of Millbrook, Santa Clara USD Parent
- Thomas E. Doherty, Santa Clara USD Parent, Tech Consultant, Homeowner
- Deborah Hill, Resident of Villagio Condo @ River Oaks
- Pamela Sell, 12 year Resident of California Renaissance
- Carl Guardino, President & CEO, Silicon Valley Leadership Group
- Kimberly J. Lain, SCUSD Parent
- Kansen Chu, San Jose City Council Member
- Patricia M. Dando, President/CEO San Jose Silicon Valley Chamber of Commerce

BIA urges the District Board of Trustees to stop wasteful spending of District funds on financial consultants and political pollsters concocting this ill conceived and desperate tax scheme that would likely have the effect of putting a halt to all housing production in the North Bayshore and East Whisman

areas, likely forcing more housing production into other areas of the City. The Board should immediately cease its consideration of this 2-tier Mello-Roos tax on new residents and seek other fair, balanced and reasonable means of meeting the needs of new students that may be generated in the District.

Very truly yours,

Dennis Martin

BIA Bay Area Government Affairs

Encl: Mountain View East Whisman Residential Development Financial Feasibility Analysis
For City of Mountain View by Seifel Consulting, Inc. October 4, 2019
City of Mountain View Environmental Planning Commission Staff Report October 20, 2021