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MEMORANDUM

TO: Tahoe Truckee Unified School District, Truckee Tahoe Airport District, Tahoe Forest Hospital District, Truckee Donner Public Utility District

CC: Mike Oliver and Craig Whittom, MRG

FROM: Greg Stepanicich, Inder Khalsa, and Casey Strong

DATE: June 4, 2019

SUBJECT: Formation of JPA for Workforce Housing

This memorandum addresses the legal authority of a proposed Joint Powers Authority (“JPA”), comprised of the Tahoe Truckee Unified School District (“TTUSD”), Truckee Tahoe Airport District (“TTAD”), Tahoe Forest Hospital District (“TFHD”), and Truckee Donner Public Utility District (“TDPUD”) (together, the “Districts”), to support the development of workforce housing.

1. Do the Districts have the authority to form a JPA for the purpose of supporting workforce housing?

Member agencies can delegate to a JPA the powers that they hold in common for the purpose of achieving specific goals.ⁱ Therefore, whether the Districts can form a JPA for the purpose of supporting workforce housing turns on whether the Districts could individually take the contemplated actions. As the goal of supporting workforce housing could involve a range of actions, we have addressed this question in the context of four specific proposals.

A. Could a JPA composed of all four Districts study workforce housing?

Yes. Education Code Section 35172 expressly grants to school districts the authority to conduct studies in conjunction with the present and future management, conditions, needs, and financial support of the schools. Hospital districts, airport districts, and public utility districts (“PUDs”) can study the issue of workforce housing under their general authority to take those actions that are necessary to provide the services for which they were formed, on the

basis that a lack of housing for employees threatens their ability to continue to provide reliable service.

B. Could a JPA composed of all four Districts lease units in a privately-owned development and provide them to workers of the Member Districts?

Yes. All of the Districts are granted by statute the power to lease property for the benefit of the district.ⁱⁱ The Districts are also authorized to hire employees and fix their compensation.ⁱⁱⁱ It is not uncommon for employers, including public agencies, to provide housing assistance as part of an employee benefits package. Relying on this practice and on their express statutory powers to lease property and set employee compensation, each of the Districts has a strong argument that it has the authority to lease units for the purpose of housing their workers, and that the provision of housing (subsidized or unsubsidized) is an employee benefit.

C. Could a JPA composed of all four Districts sell surplus property and impose conditions on the development to offer housing to District workers?

Yes. Each of the Districts is authorized by statute to dispose of surplus property.^{iv} In addition, the Surplus Land Act provides that cities, counties, and districts looking to dispose of surplus property must first offer to sell it to specified public agencies within whose jurisdiction the property is located and to any housing sponsors who have requested notice, for the purpose of developing low- and moderate-income housing.^v The stated goal of the law is to make surplus land available for affordable housing.

Based on these provisions, the JPA could facilitate the sale of one District's property to a developer for the construction of housing. If sold to an affordable housing developer under the Surplus Lands Act, affordability restrictions would apply to a certain percentage of units. Whether sold to an affordable or market-rate housing developer, however, the JPA could require as part of a purchase and sale agreement (or similar agreement) that a certain number of units be reserved or a preference system be established for District workers.

D. Could a JPA composed of all four Districts construct and operate workforce housing on property owned by one District?

Although not as clear as the above examples, it appears that a JPA composed of all four Districts could construct and operate a workforce housing program on property owned by one

of the Districts. This conclusion is based on both the express and the implied powers of the Districts.

A school district is expressly authorized to establish programs to address the housing needs of teachers and other district employees, and to spend money on the construction, reconstruction, or renovation of rental housing facilities for its employees.^{vi} The Teacher Housing Act of 2016 created a state policy in support of school district employee housing, in order to permit districts and developers to obtain tax credits for affordable rental housing and to restrict occupancy to district employees on district-owned land.^{vii} Finally, the governing board of a school district is broadly authorized to initiate any program or activity, or act in any manner, that is not inconsistent with applicable law or the district's purpose.^{viii}

For hospital districts, at least one statutory provision appears to presuppose that they are able to construct workforce housing.^{ix} Additional statutory authorizations provide broad authority with respect to how to use district property and to build and operate hospital facilities and services.^x

Airport districts may lease their property to any party, for any purpose, and may improve, construct, furnish, and maintain the property of the district.^{xi} If an airport district can construct, furnish, and then lease a building on its property to any party, it would seem to be well within its authority to construct and rent housing to its own workers.

TDPUD has the most limited powers of the Districts. The Public Utility District Act makes no mention of housing, and does not extend to PUDs the same flexibility that airport districts enjoy with respect to leasing property. Further, while airport districts are authorized to exercise those powers "expressly granted or necessarily implied," the Public Utility District Act states only that PUDs may exercise expressly-granted powers, calling into question the extent of implied powers.^{xii} Still, PUDs may hold, enjoy, and lease real property "of every kind" when in the best interests of the district to do so, and may do "all things necessary or convenient to the full exercise of powers" granted for the construction, operation, and control of utility works and services.^{xiii} Therefore, the TDPUD board could adopt findings as to how the construction and operation of workforce housing is necessary and convenient to the continued provision of reliable water and electric services.^{xiv} Further, TDPUD has the same power as the other Districts to fix the compensation and benefits of its employees. Providing housing as an employee benefit seems to be a common power shared by all four Districts.

Finally, to the extent that the ability to build and operate workforce housing is not an express power of any one of the Districts, it may well be an implied power. Implied powers

include those that can be reasonably be inferred from the powers expressly granted by the Legislature. The Court of Appeal has called this criteria “uncommonly flexible,” and observed that what powers are necessary for a district to fulfill its purpose might change over time.^{xv} To determine what is an implied power, one test is whether the Legislature has expressed support for the exercise of the power in question. In this instance, the Legislature’s recent enactments to facilitate housing suggest that it would be supportive of the Districts’ efforts to construct and operate workforce housing.^{xvi}

E. Could a JPA composed of all four Districts construct and operate housing on property owned by one of the Districts, and rent units to the general public?

Probably not. Apart from TTAD, which may lease property to any party, for any purpose, operating housing for the general public appears to exceed the express and implied powers of the other Districts. In contrast to the provision of workforce housing, it would be substantially more difficult for the Districts to argue that providing housing to the public is necessary to fulfill their purposes. We do believe, however, that a JPA composed of all four of the Districts could offer vacant units not required for its own workforce housing to employees of other public agencies.

That said, we understand that limiting housing to the member agencies’ employees may have implications for the financing of a project. If additional market-rate units are required in order to make a project financially viable, selling surplus property to a private developer for a mix of market rate and affordable units under the scenario described in Section 1(C) above may be the JPA’s preferred option.

2. What is the recommended legal structure for the collaboration between the Districts?

A JPA appears to be the most appropriate legal structure for the type of collaboration contemplated by the Districts. As discussed above, a JPA composed of all four of the Districts would have the authority to support workforce housing through a variety of different projects. A JPA requires at least two members. In the event that a District decides to not become a member of the JPA, it could work with the JPA as a separate contracting entity, and enter into contracts to secure housing for its employees on a project-by-project basis.

Regardless of how many Districts participate in the JPA, each project should be evaluated on an individual basis to ensure it is within the authority of the JPA to carry out. While we believe that that the member Districts have the common power to pursue workforce housing generally, as described above, additional analysis will be required to ensure that the

approval and implementation of specific projects do not exceed the common powers of the members.

3. Would separate agreements be necessary for District participation in the development or acquisition of workforce housing on a project-by-project basis, and what would those agreements look like?

The JPA Agreement will create and provide the structure for the legal entity that would enter into contracts for the development or acquisition of workforce housing. We would expect the JPA to enter into consulting, real estate, and construction agreements with private parties in order to implement specific projects. There also may be a need for separate stand-alone agreements on a project-by-project basis among the member agencies and the JPA. These could take various forms, but one example would be a funding agreement between the JPA and member Districts with regard to a specific project, describing the contributions of the individual members, such as land for a project or direct funding. The JPA may also choose to enter into cooperative agreements with one or more member Districts to provide staffing or operational support to the JPA on an ongoing or project by project basis.

4. Will the general funds of the member Districts in the JPA be protected from the contractual debts, liabilities and obligations of the JPA.

An advantage of local public agencies conducting regional programs pursuant to a Joint Powers Agreement is that they can form a legally separate public agency to conduct the program. Under Government Code Section 6508.1, the Joint Powers Agreement may provide that the debts, liabilities and obligations of the Joint Powers Authority or Agency shall **not** be the debts, liabilities or obligations of the member agencies. Last year, the State Legislature created an exception to this rule related to the retirement obligations of a joint powers authority that contracts with a public retirement system. This change in the law is a disincentive for any new JPA contracting with PERS or another public retirement system for retirement benefits.

ENDNOTES

ⁱ GC § 6502.

ⁱⁱ See HSC § 32121(c); EC §§ 35160, 35162; PUC § 16431; PUC § 22553(d).

ⁱⁱⁱ See HSC § 32121(g), (h); EC §§ 45022, 45160; PUC §§ 16191 *et seq.*; PUC § 22439(b).

^{iv} See HSC § 32121.2 (hospital district may dispose of surplus property at fair market value); EC § 17455 (school district may sell or lease real property not needed for classroom facilities); PUC § 16341 (PUD may dispose of real property when in the best interests of the PUD); PUC § 22553.5 (airport district may sell surplus property).

^v GC § 54222. School district property is subject to other requirements under Education Code §§ 17455-17484; however, AB 1157 (2017) waived the requirements that (1) school districts appoint an advisory committee prior to selling surplus property, if the sale is to be used for teacher or school district employee housing; and (2) property be first offered to specified entities (such as park or rec districts, childcare centers, affordable housing developers, etc.), if the proceeds from the sale are to be used for the construction, reconstruction, and renovation of rental facilities for school district employees.

^{vi} EC § 17456 provides that the construction, reconstruction, or renovation of rental housing facilities for school district employees is a permissible capital outlay expenditure of financing proceeds obtained by a school district.

^{vii} HSC §§ 53570.

^{viii} EC §§ 35160, 35160.1.

^{ix} HSC § 32132.96 places affordability requirements on hospital districts that elect to construct housing using the design-build process set out in the Public Contract Code. Those affordability requirements do not apply where design-build is used to construct workforce housing.

^x A hospital district may “use and enjoy property of every kind and description,” and control, encumber, and create a leasehold interest in its property for the benefit of the district. It may also “do any and all things that an individual might do that are necessary for, and to the advantage of, a health care facility...”; “do any and all other acts and things necessary to carry out this division”; and “purchase such real property, and erect or rent and equip such buildings or building, room or rooms as may be necessary for the hospital.” HSC §§ 32121, 32123.

^{xi} An airport district may “[i]mprove, construct or reconstruct, lease, furnish or refurbish, use, repair, maintain, control, sell, or dispose of the property of the district,” and leases may be “for any purpose and to any party,” provided that they do not interfere with the purpose or operations of the district. An airport district can also “[m]ake contracts, employ labor, and do all acts necessary or convenient for the full exercise of any of the powers of the district.” PUC §§ 22553(e), 22553.5(c), 22554.

^{xii} Compare PUC § 22004 and PUC § 15701. See also *Cequel III Commc'ns I, LLC v. Local Agency Formation Comm'n of Nevada Cnty.*, 149 Cal.App.4th 310 (2007).

^{xiii} PUC §§ 16431, 16461. See also PCC § 20202.2

^{xiv} A 2016 study estimated that 58.6% of workers in Truckee-North Tahoe commute from outside the area. If a majority of employees are forced to commute from Reno or elsewhere in Placer County, providing reliable utility services during adverse weather becomes a serious challenge. Tahoe Truckee Community Foundation, *Truckee North Tahoe Regional Workforce Housing Needs Assessment* (2016).

^{xv} *Zack v. Marin Emergency Radio Authority*, 118 Cal.App.4th 617, 633-34 (2004).

^{xvi} See, e.g., the legislative findings in SB 1413 (2016) and SB 2 (2017) (discussing employee recruitment and retention problems presented by the lack of affordable housing); GC § 50470(b)(2)(A) (allocating money to affordable workforce housing); GC § 65589.5(a) (making findings and declarations regarding the impacts of the lack of housing); GC § 65621 (authorizing local governments to establish Workforce Housing Opportunity Zones).