

LOCAL GOVERNMENT FUNDING OPTIONS
FOR CALIFORNIA'S CHILDREN, YOUTH AND FAMILY SERVICES

(Prepared by Orrick, Herrington & Sutcliffe LLP – September 2013)

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There are many reasons to look to the local level for new, sustainable funding opportunities to provide services to California's children, youth and families. First and foremost, local government funding is needed to complement state and federal resources, which may not be sufficient to address community needs. Moreover, members of the public want local control over their resources, and are more likely to support measures where they can see how funds will be spent. Local funding streams also offer the possibility of greater flexibility, creativity and targeting of priority needs. While the revenues of California's cities and counties are slowly recovering after the impact of the recent recession, funding for new or enhanced children, youth and family services will most likely have to come from new funding sources, instead of existing local government funding sources.

This paper will provide advocates for children and other community leaders with information about the different local government revenue sources that are available for funding children, youth and family services in the State of California, the requirements that must be satisfied in order for the funding source to be implemented, and the limitations on the use of such funding sources.

Note: The following should not be construed or relied on as legal advice. Instead, this information is intended to serve as an introduction to the general subject of local government funding options, from which better informed requests for advice, legal and financial, can be formulated.

SECTION I. TAXES

A. TAXES AS A FUNDING SOURCE

Taxes make up a critical source of funding for local government services and facilities. Because taxes are by their nature imposed to produce revenue, there is no requirement for a direct relationship between the amount of taxes levied by the government and the services and facilities provided by the government.¹ Non-tax payments are typically referred to as charges, assessments and fees. After Proposition 26 amended the California Constitution in 2010 to limit the types of local government funding sources that can be categorized as charges, assessments and fees, imposing taxes is the most viable way to raise funds for children, youth and family services. The restrictions on charges, assessments and fees are discussed in Section II below.

¹ It should be noted that, under Article XIII B of the California Constitution, state and local governmental entities have an annual "appropriations limit" and are not permitted to spend certain moneys which are called "appropriations subject to limitation" (consisting of tax revenues, state subventions and certain other funds) in an amount higher than the "appropriations limit." Accordingly, when seeking approval of a revenue measure, an adjustment to the appropriations limit should be considered.

B. STATE LIMITS ON LOCAL GOVERNMENT'S POWER TO TAX

The California Constitution provides that the State legislature may not impose taxes for local purposes but may authorize local governments to impose them. While the State legislature has authorized local governments to impose taxes, the imposition of any tax by any local government is still subject to the California Constitution and other State laws. The State has given itself exclusive power to tax and regulate certain fields, such as personal and corporate income and the sale and regulation of alcohol and cigarettes, which cannot be taxed by local governments. Local governments, nonetheless, still have options available to generate revenue for local purposes, the most commonly used of which are discussed in Section III below. Readers should note that the California Constitution prohibits the State legislature from delegating to a private person or body the power to levy taxes or assessments. In addition, except in limited circumstances not applicable here, Article XIII A of the California Constitution limits the maximum amount of any *ad valorem* tax on real property to one percent of the full cash value of the property. (The limited exceptions to the one percent limit are for taxes levied to repay voter-approved bonds issued to make capital improvements.) This maximum *ad valorem* tax on real property is already annually levied in each county and the proceeds thereof make up much of the current discretionary revenues of cities and counties. Therefore, increased *ad valorem* real property taxes are not a local government funding option for children, youth and family services in California without a constitutional amendment.

C. SPECIAL RULES FOR CHARTER CITIES

There are two types of cities in California: general law cities and charter cities. General law cities have the powers granted to them by State laws. Each charter city is governed by its own city charter and is empowered to make and enforce all ordinances and regulations relating to "municipal affairs," subject only to the restrictions provided in its charter and the California Constitution. With respect to all other affairs (other than municipal affairs), charter cities are subject to State laws. Therefore, the basis of a charter city's power depends on the California courts' interpretation of "municipal affairs." Although distinguishing between a municipal affair, over which the charter city has power, and a statewide concern (matters other than municipal affairs), over which the State legislature has authority, is not always straightforward, the conduct of municipal elections is a municipal affair that may be governed by a city charter. In addition, the power of a charter city to tax for local purposes is also a municipal affair and is limited only by the city's charter or a State or Federal statute or statutory scheme that has "occupied the field."

There are also two types of counties in California: general law counties and charter counties. Charter counties do not, however, have the same power as charter cities do to make laws with respect to municipal affairs. Instead, charter counties only have extra authority over limited areas, such as the election, compensation, terms, removal and salary of its governing board. Unlike a charter city, a charter county does not have authority over elections generally or revenue-producing activities.

D. GENERAL TAXES VS. SPECIAL TAXES; VOTER APPROVAL REQUIRED

All taxes imposed by any local government (generally used herein to include general law cities and counties, charter cities and counties and special districts) are categorized as either a general tax or a special tax. A general tax is any tax imposed for general governmental purposes. A local government proposing to impose, increase or extend a general tax must submit a measure to the electorate and receive approval by a majority vote of the voters voting in an election on the measure. A special tax is any tax imposed for specific purposes, even if the revenues from such tax are placed into a general fund. The revenues from any special tax must be used only for the voter-approved purpose or service for which it was imposed, and for no other purpose whatsoever. A local government proposing to impose, increase or extend a special tax must submit a measure to the electorate and receive approval from at least two-thirds of the voters voting in an election on the measure. Special districts, including school districts, can only levy special taxes. See Appendix A for sample general and special tax measures.

E. MEASURE A/B APPROACH

As noted, if revenue to be generated by a particular tax is imposed for a specific purpose, that tax is a special tax and not a general tax. However, courts have upheld taxes as general taxes despite the inclusion of a separate advisory measure to express a preference (but not to impose a legal obligation) regarding the use of tax revenues. In 1998, the California Court of Appeals held that a tax measure (“Measure B”) placed on the ballot by the County of Santa Clara was a general tax notwithstanding the presence of a separate advisory measure (“Measure A”), also placed by the County of Santa Clara on the same ballot, where Measure A provided that it was the intent of the county voters to use any new tax funds authorized by Measure B on a list of certain transportation projects. (This is sometimes referred to as the “Measure A/B approach”). The existence of the advisory measure, which expressed a preference for how new tax revenues should be spent, did not legally obligate the use of the new tax revenues for any specific purpose or project. Future use of the Measure A/B approach may face a similar legal challenge in light of the fact that provisions have been added to the California Constitution (Propositions 218 and 26) since the final adjudication of the lawsuit regarding the County of Santa Clara’s measures. See Appendix A for sample Measure A/B tax measures.

F. WAYS TO PLACE LOCAL TAX MEASURES ON BALLOT

There are two ways a local tax measure can be placed on the ballot for voter approval. The first way is for the legislative body of the local government to adopt an ordinance or resolution. The ordinance or resolution proposing such tax must include the type of tax and rate of tax to be levied, the method of collection, the date upon which an election will be held on the issue and, with respect to a special tax, the purpose or service for which it is to be levied. Generally, the adoption of any ordinance or resolution requires a majority vote of all members of the legislative body of the local government. With respect to charter cities, the city charter may provide for a different approval requirement for the city council’s adoption of such an ordinance or resolution. If such matter is not governed by the city charter, then State law would apply. In the case of a general tax, however, the ordinance or resolution proposing such general tax to the electorate must be approved by a two-thirds vote of all members of the legislative body of the

city or county. An ordinance or resolution proposing an add-on sales tax (discussed in Section III.A.3 below) to the electorate must be approved by a two-thirds vote of all members of the legislative body for both general and special add-on sales taxes.

The second way to place a tax measure on the ballot is by using the initiative power. The same procedures used to place any initiative on the ballot must be followed, the most significant being the collection of signatures from registered voters of the jurisdiction. If the requisite number of signatures is collected, then the legislative body must submit the initiative proposal to the voters. A detailed description of how the initiative process can be used to place a local tax measure on the ballot is beyond the scope of this paper.

In either case, any local special tax measure that would provide for the imposition of a special tax by a local government must provide accountability measures that include, but are not limited to, the following: (a) a statement indicating the specific purposes of the special tax, (b) a requirement that the proceeds be applied only to such specific purpose, (c) the creation of an account into which proceeds will be deposited, and (d) an annual report, which is filed by the chief fiscal officer of the levying local government at least once a year, containing the amounts of funds collected and expended, and the status of any project required or authorized to be funded. Special taxes, unless otherwise permitted by law, should also be applied uniformly to all taxpayers.

G. ELECTION DAY REQUIREMENTS

The legislative body of the local government may provide that the election on any tax be held on any date permitted by law, which includes consolidation with a statewide primary election, a statewide general election or a regularly-scheduled local election at which all of the electors of the local government or district are entitled to vote. With respect to charter cities, the city charter would govern which election dates are permitted or, if such matter is not governed by the city charter, then State law would apply. However, the California Constitution requires that elections for general taxes must be consolidated with a regularly scheduled general election for members of the legislative body of the city or county (e.g., members of a city council or members of a county board of supervisors), except in cases of emergency declared by a unanimous vote of the governing body of the city or county.

H. APPLICATION TO FUNDING CHILDREN, YOUTH AND FAMILY SERVICES

Taxes can be imposed for the purpose of funding children, youth and family services. The proceeds of the taxes can only be dedicated to this purpose if such taxes are approved as special taxes, which have a two-thirds voter approval requirement. If a general tax is imposed, there is only a majority voter approval requirement, but those proceeds can be used for any lawful purpose of the city or county and therefore can be directed to another purpose as dictated by the governing board of the city or county. If the Measure A/B approach is taken, the tax can be approved at the lower threshold applicable for a general tax, but the advisory vote does not legally obligate the city or county to spend the tax proceeds as described in the companion advisory measure. Accordingly, a city or county may choose to not apply proceeds from the general tax to the specified preferences. As previously noted, this approach has been subject to

legal challenge in the past (on the theory that Measure B effectively converts Measure A into a special tax and that such tax is not properly authorized because the requisite vote threshold is not met), and jurisdictions that take this approach may risk similar legal challenge, especially in light of recent changes to the applicable California laws.

SECTION II. CHARGES, ASSESSMENTS AND FEES

A. IMPACT OF PROPOSITION 26 IN 2010

In addition to the taxes described in Section I above, there is a second group of local government funding sources generally referred to as charges, assessments and fees. Over the years, there have been a number of changes to the California Constitution and State law distinguishing taxes, on the one hand, from charges, assessments and fees, on the other hand. In 2010, the California Constitution was amended by Proposition 26 to establish a clearer standard differentiating between these two groups of funding sources. This has changed the legal landscape to more explicitly limit the practice of raising fees, charges or assessments to produce revenue beyond that needed to fulfill the enforcement, administration or purpose of the fee. Perhaps most relevant to the audience of this paper, so-called “regulatory” fees were significantly limited by Proposition 26 and no longer appear to be an option for funding programs for children, youth and families.²

Under the changes to the California Constitution made by Proposition 26, a tax is broadly defined to be any levy, charge or exaction of any kind imposed by a local government unless the levy, charge or exaction falls within one of the enumerated exceptions. The exceptions include fees for governmental services or products, regulatory and administrative enforcement costs (including those incident to issuing licenses and permits), fees imposed for entrance to or use of local government property, monetary charges such as fines or penalties due to violation of the law, property-related fees and charges and real property assessments, among others.³

² The drafters of Proposition 26 indicated the following as reasons for the need for Proposition 26:

“(e) This escalation in taxation does not account for the recent phenomenon whereby the Legislature and local governments have disguised new taxes as “fees” in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements. Fees couched as “regulatory” but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes.

(f) In order to ensure the effectiveness of these constitutional limitations, this measure also defines a “tax” for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as “fees.”

³ CAL. CONST. ART. XIII C, § 1(e)(1)-(7) (“As used in this article, “tax” means any levy, charge, or exaction of any kind imposed by a local government, except the following: (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege; (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product; (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits,

B. CHARGES, ASSESSMENTS AND FEES NOT TO EXCEED REASONABLE COST

As described in Section I, there need not be a direct relationship between the amount of taxes levied by the government and the services and facilities provided by the government. For instance, a special tax may exceed the reasonable cost of providing the service or regulatory activity for which it is charged. In contrast, a charge, fee or assessment is an allocation of the cost of a government activity to the individual imposing a burden on the government or benefitting from such activity and, in the case of certain of the enumerated categories of fees, cannot generate revenues in excess of such cost. Typically, an individual pays a charge, fee or assessment in exchange for a specific service it receives from the government activity, such as water, sewer and garbage collection services. Or, the charge or fee is imposed because the individual's action imposes a burden on the government, necessitating the government to mitigate the action's effects. In many cases, the amount of a charge, fee or assessment⁴ may not be more than necessary to cover the reasonable costs of the government activity, and may be required to bear a fair or reasonable relationship between how the costs are allocated to the payor and the benefit received by the payor, or burden imposed on, the government. These limitations, which existed in caselaw prior to Proposition 26, were constitutionalized by Proposition 26 and have been strictly construed by California courts ever since. Accordingly, these limitations must be considered if a revenue-generating fee or charge is proposed.

C. SPECIAL TREATMENT IF FEE PAID TO NON-GOVERNMENTAL ENTITY

Taxes must be payable to, or for the benefit of, the government. Certain payments that, at first blush, do not meet the criteria for fees, charges or assessments described above, would still be legal if they are required to be paid to an entity or person other than the local government when such entity or person incurs reasonable costs. Specifically, a California Court of Appeals in February 2013 has determined that a paper bag charge enacted by the Los Angeles County Board of Supervisors is not a tax because the charge is retained by the stores incurring the cost and collecting such fee, and raises no revenue for the local government. The ordinance requires retail stores to charge customers 10 cents for each recyclable paper carryout bag provided and states that such money received must be retained by the store and used only for the costs of compliance with the ordinance, providing the paper bags, or the costs of educational materials or other efforts to promote the use of reusable bags.

performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof; (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property; (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law; (6) A charge imposed as a condition of property development; (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.”)

⁴ An “assessment” is a “charge upon real property for a special benefit conferred on the real property.” CAL. CONST. ART. XIII D, § 2(b).

D. VOTER APPROVAL ONLY REQUIRED FOR ASSESSMENTS, FEES AND CHARGES THAT ARE PROPERTY-RELATED

The distinction between taxes and other non-taxes is significant because there are different approval requirements for each. As discussed in Section I above, imposing, increasing or extending taxes requires voter approval. Local governments, however, have the authority to create or increase a fee or charge without voter approval, including charges that are paid to or benefit entities other than the local governments, such as the paper bag charge described in the preceding paragraph. Generally, the approval of a majority of the governing body is the only requirement. One exception, which was constitutionalized by Proposition 218 approved by the voters in 1996, is the category of property-related assessments, fees or charges. Property assessments cannot be levied if certain procedures are not followed or if there is a majority protest by the owners of the affected parcels of property. And, except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge can be imposed or increased without approval of a majority vote of the property owners or by a two-thirds vote of the electorate residing in the affected area. Note that fees or charges for gas or electric services are not considered property-related. Further, to increase or impose new charges for sewer, water and refuse collection services, the local government providing such services has to follow certain procedures. A full description of these procedures is beyond the scope of this paper.

E. APPLICATION TO FUNDING CHILDREN, YOUTH AND FAMILY SERVICES

Although local governments in the past may have raised revenue for programs through fees, charges or assessments, and may have preferred or found it expedient to do so because they did not need to seek voter approval, Proposition 26 and the way courts have recently interpreted Proposition 26 severely limit such an option. It is important to note in this connection that existing local government-imposed fees that predate the effectiveness of Proposition 26 are not required to be re-established, but Proposition 26's requirements would apply to any new, extended or increased fees. Because Proposition 26 significantly limits the types of and purposes for local government-imposed fees, such fees likely cannot produce excess revenue to pay for programs that address health, environmental, societal or other general public concerns. Therefore, depending on the precise circumstances, if the proposed fee or charge does not fit within one of the enumerated exceptions under Proposition 26, voter approval of taxes will be the only way cities or counties can raise revenue for children, youth and family programs.

SECTION III. TYPES OF LOCAL GOVERNMENT FUNDING SOURCES

A. COMMON TYPES OF GENERAL OR SPECIAL TAXES

1. Utility User Taxes

General law cities and charter cities (so long as not prohibited in the applicable city charter) may levy taxes upon the use of utilities, including, but not limited to, electricity, gas, water, sewer, telephone and cable television services. Such tax is commonly referred to as a utility user tax ("UUT"). Cities may levy a UUT solely for revenue purposes and are not preempted by the State's regulation of public utilities. Counties may also levy a UUT on the

consumption of certain utilities in the unincorporated area of the county: electricity, gas, water, sewer, telephone, telegraph and cable television services. A UUT can be either a general tax or a special tax, and there is no limit on the UUT rates that can be set by cities and counties.

Generally, a UUT is collected by the public utility or service supplier from their customers as part of the standard billing process and remitted to the city or county. When a city or county receives voter approval for a new UUT, it must submit, on and after the effective date of the new UUT, written notification to the public utility or service supplier requesting that the tax be collected.⁵ The State legislature enacted statutes to limit the responsibility of a public utility or service supplier with respect to its collection of UUTs.

2. Transient Occupancy (Hotel) Taxes

Transient occupancy taxes (“TOT”) are taxes levied by cities or counties on persons staying 30 days or fewer in hotels, motels or other lodging facilities. TOT can be either a general or special tax and there is no limit on the TOT tax rate that can be set by cities and counties. TOT is collected by the hotel operator from the guest and remitted to the city or county.

3. Add-on Sales Taxes

Sales and use taxes are based on gross receipts from the sale of tangible personal property. Sales taxes are imposed on retail sales of tangible personal property and are collected by the retailer in California. Use taxes are imposed upon the storage, use and consumption of tangible personal property and are owed by the purchaser if an out-of-state or online retailer does not collect the tax for an item delivered to California. The sales and use tax rate generally has three components. The first is a base standard state sales and use tax at a rate of 7.5%. The second is authorized by what is known as the “Bradley-Burns Uniform Local Sales and Use Tax Law” (the “Bradley-Burns Law”) which comprises the sales and use tax of up to 1.25% that a county may impose on a purchaser. Under the Bradley-Burns Law, cities may also impose a sales and use tax of up to 1%. However, because payment of the city sales and use tax is credited against payment of the county sales and use tax, a purchaser does not pay twice for the local portion of taxes. Cities keep all the local sales tax collected within the city, and counties keep the local sales tax collected outside city boundaries.

The third component is the add-on sales and use tax rate, which is in addition to the statewide rate and the countywide rate. Local governments wishing to raise additional revenue through sales and use taxes should consider this component if the county or city has already imposed the Bradley-Burns Law sales and use tax at the maximum rates of 1.25% or 1%, respectively. Every city or county or any other governmental entity that is authorized to impose add-on taxes and that wishes to raise such a tax must seek voter approval of these add-on sales taxes. Under the Bradley-Burns Law, county and city sales and use taxes, including add-on taxes, are collected and distributed by the California State Board of Equalization.

⁵ There are also separate notice requirements and timing provisions when an existing UUT is extended or amended.

The same rules that govern sales and use taxes govern add-on taxes. For example, add-on taxes cannot be imposed on certain items, such as certain groceries or medicine.⁶ Add-on taxes are based on the gross receipts from the sale of all tangible property, which means that such add-on taxes cannot be selectively imposed on some items. (See Section III.A.5. below regarding soda taxes for a description of how a business license tax can be used selectively.) Add-on taxes are to be imposed at a rate of one-eighth of one percent (1/8 %) or its multiple. Add-on taxes can be either general or special taxes. The State legislature has placed a limit on the amount of add-on taxes: the combined rate of these add-on taxes in a county cannot exceed 2%.

4. Business License Taxes

The board of supervisors of any county may license and tax, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the unincorporated portion of the county. Additionally, the legislative body of a general law city may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city, including shows, exhibitions and games. Such license tax upon a business operating both within and outside the legislative body's taxing jurisdiction must be levied so that the measure of tax fairly reflects that proportion of the taxed activity actually conducted within the taxing jurisdiction. Charter cities have direct constitutional power to impose license taxes for revenue so long as that power is not specifically withheld by the city charter. Counties and cities may levy business license taxes as a general tax or a special tax.

Business license taxes are most commonly based on gross receipts or levied at a flat rate. Certain business license taxes are based on square footage of a business, the number of employees or a combination of factors. Some business license taxes apply to the majority of the business in the city or county. Other business license taxes apply to a single industry, such as soda taxes (see next section) and rental car taxes.

5. Soda Taxes (Example of Business License Tax)

Although two local soda tax measures failed in 2012, the imposition of a tax upon soda (or other sugary, high-caloric beverages, or both) has been the subject of recent discussion in the State as a means to generate revenue while regulating the consumption of sugary, high-caloric beverages. Because of the restriction contained in the California Constitution on the taxing of the sale of, or the storage, use or other consumption of food products, the imposition of a business license tax on soda distributors or retailers doing business within a city or county is generally the only viable option. As discussed above, counties and cities may license, for revenue and regulation, and fix a business license tax upon, every kind of lawful business transacted within their boundaries. Such business license tax upon soda distributors or retailers

⁶ The exemptions include those applicable to sales and use taxes, such as services, certain items like food for home consumption, natural gas, electricity and water delivered through pipes, agricultural feeds, seeds and fertilizers, medicine or certain items sold through a vending machine for \$0.25 or less. Other exemptions include fuel or petroleum products to operators of common carrier aircraft to be used or consumed outside the county, property that is shipped to and used outside the city or county or the storage, use or consumption of tangible personal property other than fuel or petroleum products, purchased by and used or consumed by operators of common carrier aircraft.

(or distributors or retailers of other sugary, high-caloric beverages, or both) can be levied as a general tax or a special tax.

6. Documentary (Property) Transfer Taxes

The documentary transfer tax is a tax on the transfer of title to property. When the federal tax (the Federal Stamp Act) on documentary transfers expired in 1968, the gap was filled by the enactment of a similar local tax (the Transfer Tax Act), which is operative so long as U.S. Congress does not reenact a federal tax. Counties may impose a tax on instruments transferring real property (exceeding \$100 in value), with certain exemptions, at the rate of 55 cents for each \$500 of the value of the property transferred (exclusive of the amount of any lien or encumbrances remaining on the property at the time of transfer). Cities may also impose a tax at one-half the rate, with a credit against the county tax. The documentary transfer tax may be imposed or increased as a general tax or special tax only with the requisite voter approval.

7. Admission Taxes

Admission taxes are taxes imposed by cities on receipts from sales and charged for admission or entrance. These can include admission costs to sporting events, movie theaters, golf courses, amusement parks and other recreational activities and parking lots, all of which are not subject to the sales tax. As an example, the City of Santa Cruz imposes an admission tax at the rate of 5% of the price of admission charges to certain events including, but not limited to, circuses, motion picture shows, all sporting contests and athletic events, concerts, theatrical and musical performances, bowling, lectures, golf and amusement parks. Admission taxes can be either a general or special tax.

B. COMMON TYPES OF SPECIAL TAXES

1. Parcel Taxes

A parcel tax is a special tax imposed by a local government designated for a specific purpose. As a special tax, parcel taxes require approval by a two-thirds vote. A parcel tax is generally levied at a fixed amount per parcel, per room or per square foot of parcel, or based on property usage or some other measure (except property value). Because parcel taxes are special taxes, the proceeds from a parcel tax must be applied to the public programs, services or projects that voters approved when approving the parcel tax and must include the accountability measures discussed in Section I and be applied uniformly except as otherwise permitted by law.

2. Mello-Roos Taxes for Services

The Mello-Roos Community Facilities Act of 1982 (the “Mello-Roos Act”) allows a broad list of public entities⁷ to finance needed community facilities and services through the levy of voter-approved special taxes (“Mello-Roos Taxes”). Mello-Roos Taxes are special taxes levied on real property within a defined area called a “community facilities district,” and

⁷ Any city, county, special district, school district, joint powers entity or any other municipal corporation, district or political subdivision of the State of California.

therefore require a two-thirds vote (of the applicable landowners or registered voters). The Mello-Roos Act does not authorize the levying of a general tax.

The Mello-Roos Act does not direct how the special tax is to be applied. In fact, there is nearly unlimited flexibility in designing the rate and method of apportionment of the tax (the “rate and method”). The tax must, in every case, have a stated maximum; but it can reflect virtually any reasonable public policy consideration or development consideration in terms of how and when the taxes are to be levied. The only real legal constraints are that the rate and method must have a reasonable basis and the tax cannot be an *ad valorem* tax; that is, it cannot be based on the value of the property taxed.

The types of services that may be financed, however, are limited, and are even more limited for landowner vote districts. Of such services, those that might be pertinent to children, youth and family services include recreation program and library services, maintenance of parks, operation and maintenance of museums and cultural facilities, juvenile hall services, and maintenance services for elementary and secondary schoolsites and structures. Amendments to the Mello-Roos Act to include more children, youth and family services could be considered.

The first group of services may be authorized by either a registered voter or a landowner election:

- Police protection services
- Jail, detention facility and juvenile hall services
- Fire protection and suppression services
- Ambulance and paramedic services
- Maintenance of parks, parkways and open space
- Flood and storm protection services, including, but not limited to, the operation and maintenance of storm drainage systems, plowing and removal of snow and sandstorm protection services
- Environmental cleanup and remediation services

A second classification of services may not be authorized by a landowner election, but only by a registered voter election (unless the proposed tax will not be apportioned in any tax year on any portion of property in residential use in the tax year):

- Recreation program services
- Library services
- Operation and maintenance of museums and cultural facilities
- Maintenance services for elementary and secondary schoolsites and structures

In addition, by statute, a Mello-Roos tax approved by vote of the landowners may only finance services “to the extent they are in addition to those provided within the area of the district before the district was created,” and the “additional services may not supplant services already available within the territory when the district was created.” The Mello-Roos Act sets forth the specific procedures for establishing a community facilities district, specifying the authorized services and approving the Mello-Roos Taxes. Mello-Roos Taxes may be commenced by petition.

3. Public Library Special Taxes

Any city, county or library district may impose special taxes for the purpose of providing public library facilities and services. The public library special tax is subject to the two-thirds vote requirement of California Constitution, and must apply uniformly to all taxpayers or all real property within the city, county or library district. There is no requirement that the public library special tax be apportioned on the basis of benefit to any property; however, it may be based on benefit to any property or other reasonable basis (e.g., based on cost of making the authorized services available) as determined by the city, county or library district.

C. COMMON TYPES OF FEES

1. Nuisance Abatement and Mitigation Fees

By ordinance, the legislative body of a city may declare what constitutes a nuisance. A city may also enact a local ordinance to control and abate nuisance activities. Whether codified by statute, abating nuisances is a proper exercise of a city’s police powers. A county may also abate nuisances as a proper exercise of its police powers. Such regulation may take the form of a fee or a tax. For more information regarding the difference between fees and taxes, see Section II above.

Nuisance abatement and mitigation fees may be permissible in certain cases when taxes are not permissible. For example, the State of California has exclusive power to license, regulate and tax the manufacture, sale, possession and transportation of liquor, subject to the internal revenue laws of the United States. A local tax measure in a particular field enacted for revenue purposes is invalid if a statewide tax has been imposed with intent to preempt such field. Accordingly, a local “tipplers’ tax” on liquor purchase (i.e., the sale of liquor) was invalid as the taxation of such field was preempted by State sales tax laws. However, with respect to nuisance abatement, the City of Oakland has enacted an ordinance where the sale of alcoholic beverages in the city is deemed to be an approved commercial activity as long as the merchant complies with the city’s standards (e.g., standards relating to disturbance of the peace, drinking in public and public intoxication) and, in cases where a merchant fails to comply with city standards, the ordinance sets forth an administrative process that could result in the city’s seeking to have the activity abated as a nuisance and the merchant’s liquor license revoked by the Department of Alcoholic Beverage Control. The city assessed a fee upon merchants to support this nuisance regulation program. Certain interested parties alleged that such ordinance, among other things, was preempted by State law and the exclusive power of the State to collect license fees or occupation taxes related to alcoholic beverages. The California Court of Appeals differentiated between fees and taxes and concluded that the ordinance in question was not a tax imposed to

generate general revenues but a regulatory fee intended to defray the cost of providing and administering the hearing process set out in the ordinance, stating, “That the fee will probably be paid from revenue derived at least in part from the sale of alcoholic beverages creates only an indirect burden on alcoholic beverage retailer –one that is insufficient to nullify the otherwise proper imposition of a regulatory fee.” Accordingly, the Court held that the ordinance in question was a proper exercise of the city’s powers to control and abate nuisances and did not conflict with the State’s authority to regulate alcoholic beverage sales. However, local governments wishing to impose a fee for nuisance abatement and mitigation should analyze it carefully and be advised that a legal challenge to the fee may be filed.

2. Other Common Types of Fees

Cities and counties may also enact other types of fees, provided the fees meet the criteria for fees discussed in Section II above. These include business license fees (fees for the privilege of doing business in the jurisdiction) and admission fees (fees for admission to local property or events held on local property), among others. Generally, such fees are limited in amount by current law so that they likely cannot produce excess revenue for new services for children, youth and families. However, to the extent such fees offset costs that would otherwise be borne by the general fund of a local agency, such fees could be used, together with a budget appropriation or set-aside, to result indirectly in the availability of funding for such services.

SECTION IV. MEASURES FOR MULTIPLE JURISDICTIONS; USE OF JOINT EXERCISE OF POWERS AUTHORITY

Under the Joint Exercise of Powers Act, if authorized by their legislative or other governing bodies, two or more public agencies⁸ by agreement may jointly exercise any power common to the contracting parties. These common powers may include the power to authorize, levy, collect and spend the various revenues discussed in this paper. For instance, two or more cities may enter into an agreement to establish a community facilities district overlapping all or a portion of each city’s boundaries and seek voter approval of Mello-Roos Taxes within the territory of such community facilities district. Similar agreements may be entered into for authorizing and implementing parcel taxes and other revenue measures.

SECTION V. CONCLUSION

This paper sets forth certain legal parameters for various strategies for creating a new revenue stream to support new or enhanced services for children, youth and families. There are a number of other factors that should be considered in determining whether to pursue such a new revenue stream, which to pursue and how best to pursue it – factors including what program to

⁸ Under the Joint Exercise of Powers Act, “public agency” includes, but is not limited to, the federal government or any federal department or agency, the State of California, another state or any state department or agency, a county, county board of education, county superintendent of schools, city, public corporation, public district, regional transportation commission of the State of California or another state, a federally recognized Indian tribe, or any joint powers authority formed pursuant to the Joint Exercise of Powers Act by any of these agencies.

fund, the level of funding needed, the level of government at which to pursue the new revenue stream (city, county, special district, or some other), which election to target if a voter approval is needed, whether to pursue the new revenue via voter initiative or through a local agency-initiated ballot measure, the rate at which the tax or fee should be imposed, and many others.

Although local revenue-generation options have become more limited since the enactment of Propositions 218 and 26 in recent years, there are still many ways for local governments to raise revenue for services for children, youth and families in California. Each jurisdiction will have different needs, different potential revenue sources and different levels and types of local support for each tax, fee, charge or assessment being considered. Advocates and local government officials should consider carefully the applicable legal and political constraints and consult with their own legal advisors in deciding which funding source to pursue and the level, if any, of voter approval that it requires. Ultimately, as noted above, the hope is that local voters will continue to support locally-controlled and locally-provided revenue streams for services to local children, youth and families.

EXHIBIT A
SAMPLE TAX MEASURES

Sample General Tax Measures:

City of Chico UUT measure: “Shall an ordinance be adopted to amend the City's Telephone User's Tax in order to: 1) reduce the tax rate from 5% to 4.5%; 2) modernize the definition of telephone communication services subject to the tax to include new technologies such as wireless and voice over internet services; 3) apply the tax to all telephone communications services regardless of the type of technology used; and 4) reflect changes to federal and state law?” [November 2012 election]

City of El Monte Soda Tax measure: “To offset state cuts and maintain police, fire, 9-1-1 emergency services, gang prevention, graffiti removal, youth after school/nutritional/fitness/health programs, senior services; pothole repair; and other general fund services shall an ordinance be adopted implementing a business license fee of one (1) cent per fluid ounce of sugar sweetened beverage served/ provided/traded by businesses in the City requiring annual audits and all funds used locally?” [November 2012 election]

City of San Mateo TOT measure: “To maintain and protect City services and facilities, such as street and sidewalk maintenance and repair, fire protection and emergency medical services, police protection, neighborhood watch and crime prevention programs, libraries, community centers, recreation programs, and parks, shall the City of San Mateo be authorized to increase the Hotel Transient Occupancy Tax (the "hotel tax") by 2% with all proceeds placed in the City's General Fund?” [November 2009 election]

Sample Special Tax Measures:

City of Oakland Parcel Tax measure: “To maintain/upgrade humane animal care and basic needs (food, medical, heating, cooling, safe enclosures); retain veterinarians/animal specialists; care for wounded/endangered animals; support wildlife conservation; maintain children's educational, nature/science programs, field trips; and keep entrance fees affordable; shall Alameda County levy a tax of \$12/parcel annually for residential parcels and comparable commercial/industrial rates, with low-income senior exemptions, mandatory audits, and citizens' oversight?” [November 2012 election]

County of Los Angeles Add-on Sales Tax measure: “To advance Los Angeles County's traffic relief, economic growth/ job creation, by accelerating construction of light rail/ subway/ airport connections within five years not twenty; funding countywide freeway traffic flow/ safety /bridge improvements, pothole repair; keeping senior/ student/ disabled fares low; Shall Los Angeles County's voter-approved one-half cent traffic relief sales tax continue, without tax rate increase, for another 30 years or until voters decide to end it, with audits/ keeping funds local?” [November 2012 election]

Sample Measure A/B Tax Measures:

City of Richmond Soda Tax measure: “Shall an ordinance be adopted to impose a business license fee of one (1) cent per ounce of sugar-sweetened beverage served, provided, or traded by businesses in the City?” [November 2012 election]

City of Richmond advisory measure: “Should the proceeds of any business license fee measured by the serving, providing, or trading of sugar-sweetened beverages be used to: have more after school sports programs, make them less expensive and provide adequate sports fields; allow healthier school meals, nutrition classes and cooking classes; provide medical care for children with diabetes who can't afford care; and support other worthy projects to prevent and treat diabetes and childhood obesity?” [November 2012 election]

City of Sierra Madre UTT measure: Measure 12-1: “Shall an Ordinance be adopted amending the City's existing Utility Users' Tax to continue the existing 10% tax, subject to a potential increase of 12% on July 1, 2013, in order to maintain general City services such as public safety services, including paramedic programs, and to reflect technological advances in communications, continue existing exemptions to low and very low income households, establish new sunset dates and continue a citizen's oversight committee?” [November 2012 election]

City of Sierra Madre advisory measure: Measure 12-2: “If Measure 12-1, to continue the exiting Utility Users' tax of 10%, subject to a potential increase to 12% in July 1, 2013 and establishing new sunset dates, is approved by the voters, should the additional revenue generated by that tax be used to fund public safety services, including paramedic programs?” [November 2012 election]