

K E R R
 &
 W A G S T A F F E
 LLP

22

100 SPEAR STREET, SUITE 1800
 SAN FRANCISCO, CALIFORNIA 94105

ATTORNEYS

TELEPHONE (415) 371-8500
 FACSIMILE (415) 371-0500
 www.kerrwagstaffe.com

July 9, 2004

KEITH K. FONG
 DIRECT DIAL: (415) 357-8910
 E-MAIL: fong@kerrwagstaffe.com

VIA CERTIFIED MAIL

Mayor Tom Bates
 City Council of Berkeley
 City of Berkeley
 2180 Milvia St.
 Berkeley, CA 94704

Re: *Thousand Oaks Applicant Funded Utility Underground District No. 1*

Dear Mayor Bates and Members of the City Council:

We are writing on behalf of Ms. Ruth King, a homeowner in the Thousand Oaks Heights neighborhood, regarding the recent actions of the City Council ("Council" or "City") in connection with the proposed Thousand Oaks Heights project to place existing utilities underground.

For the last several years, the City has required that at least 70 percent of neighborhood residents agree to the imposition of a special assessment for the undergrounding of utilities. That rule makes sense. The burden and cost of a project to move utilities underground is significant and is borne directly by each property owner. Thus, before undertaking such a burden, it is critical that a significant majority of the affected residents agree to the project.

We recently have learned of the Council's recent, decision to reduce the 70 percent requirement to 60 percent. That decision is indeed troubling. It is our understanding that the Council unilaterally changed the long-standing approval threshold on eve of the vote on whether to approve the Thousand Oaks Heights project, ostensibly to ensure voter approval of the project. It is improper for the City to unilaterally change a critical voting rule on which the public has long relied. *See Hock Investment Co. v. City and County of San Francisco*, 215 Cal. App. 3d 438, 449 (1989) (trial court abused its discretion in sustaining a demurrer where it appeared the plaintiff could state a cause of action based on estoppel if the plaintiff reasonably relied on that promise).

Moreover, we have serious concerns regarding the sufficiency of the information supplied on the ballot. Article VIII D § 4, subs. (c) and (d) of the California Constitution requires, *inter alia*, the notice and ballot set forth "the basis upon which the

Mayor Tom Bates and the City Council
July 9, 2004
Page 2

amount of the proposed assessment was calculated....” Though the amount due for each parcel is identified, no information is provided regarding how that figure was calculated. Each property owner has a right to know precisely how the City arrived at the assessment, particularly given that the assessment could be tens of thousands of dollars over the course of thirty years.

The burden imposed by the proposed assessment should not be underestimated. As you know, the cost of living in the Bay Area is among the highest in the nation. It already is difficult for Ms. King—and a number of other homeowners in the area—to stay current with their existing financial obligations. Thus, to impose a yearly assessment in excess of \$2,000 simply is too much for her to bear. Sadly, the anticipated annual assessment means that Ms. King very likely will have to sell the home in which she has lived for close to a decade because she cannot afford to pay yet another tax bill. It simply is unfair and unjust for Ms. King and others to be forced from their homes so that other residents will be able to enjoy unobstructed views.

We urge the City to reconsider Resolution No. 62,504 and reinstate the 70 percent voter approval requirement. In addition, given the defect in the ballot, we request that the City vacate the forthcoming election until such time as the defects articulated above are rectified. We also urge you to develop alternatives to the existing method of imposing the proposed assessment that will address the legitimate financial concerns of residents like Ms. King—who have just as much right to stay in their homes as those who are more financially advantaged.

If you have any questions or comments regarding the above, please feel free to contact me at 415-371-8500. Thank you in advance for your anticipated courtesy and attention to this matter.

Very truly yours,



KEITH K. FONG

KKF | ah | 16928.2

cc: Ruth King