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August 22, 2018

Board of Directors  
Newberry Community Services District  
30884 Newberry Road  
Newberry Springs, CA 92365

Dear Members of the Board of Directors,

You have asked me to analyze and address the nature and extent of permissible expenditures that your community services district may make of revenues received by your District from Kiewit Pacific Co. ("Kiewit") arising out of the settlement of a conditional use permit dispute between Kiewit, the District, an organization known as CEQA-NOW, and several other individuals.

The Settlement Agreement dated November 5, 2004, is signed by all of the parties mentioned above. The Agreement specifically provides that the District and all other parties appealing the issuance of a Conditional Use Permit to Kiewit for the Fort Cady Road Quarry will withdraw all appeals and cease all opposition to the Permit in exchange for payment by Kiewit to the District of the sum of \$350,000. The Agreement specifically provides that such amounts shall be distributed by the District in the sum of \$20,000 for emergency services and \$330,000 "to be used at the discretion of the CSD for the benefit of the community."

The District is a community services district formed and operating pursuant to the provisions of the Community Services District Law at Government Code Section 61000 et seq. (the "CSD Law"). The provisions of that law define the powers of your District, and the purposes, services and facilities it is authorized to provide. Government Code

Section 61000 specifically defines those services and facilities which a community services district is authorized to provide. A community services district may not provide any services or facilities that are not expressly enumerated in Section 61100. Of the numerous services and facilities described in that section, your District has been authorized by its formation documents and San Bernadino County LAFCO to provide the following services and facilities: water for District and fire protection purposes; fire protection; streetlighting; park and recreation; and sewer services. Should your District wish to exercise the power to provide additional services and facilities described in Section 61100, your District would have to petition for and receive LAFCO approval to exercise those powers pursuant to Section 61106. Community services districts are not authorized to provide electricity, except in very limited circumstances which are not applicable to your District pursuant to the provisions of Section 61102.

Your first question asks whether the District can spend funds it receives from non-tax revenues such as donations, contributions, or the Kiewit settlement funds for any purposes other than those services and facilities that your District has been specifically authorized to provide pursuant to the CSD law. The answer to that question is "No". The source of revenues to your District is irrelevant with respect to the authorized purposes, services and facilities for which such revenues can be expended by the District. Your District is limited to expending all of its revenues, whether from taxes or other sources, to accomplish its authorized purposes and provide its authorized services and facilities as specified above. For example, Section 61116 authorizes your District to accept any revenue, money, grants, goods, or services from any other person, but only for any lawful purpose of the District as described in the CSD Law.

My understanding is that the District has been asked by one or more local residents to expend proceeds of the Kiewit settlement to take legal and other action to oppose county approval of two solar projects to be located in or near the District. You have asked whether such an expenditure of the Kiewit settlement funds by the District is permissible under the provisions of the CSD Law. The answer to that question is also "No". Such an expenditure of public funds by the District to oppose a solar electrical project is not specifically authorized by any provisions of the CSD Law. Section 61102 provides that the provision of electricity, and any issues surrounding electricity services, are not within the express powers of your District. The District has no power to expend any of its public funds, regardless of the source of such funds, for any purpose other than providing those services and facilities which it has been specifically authorized to provide, and performing those administrative functions such as budget preparation and approval, holding of public meetings, compliance with the Public Records Act, and the other administrative and operational functions described in the CSD Law.

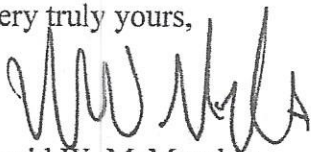
Any expenditure of District funds for any purpose, service or facility which the District does **not** have the express power to provide in the CSD Law is arguably an unconstitutional gift of public funds. Any expenditure of public funds by a public agency for a purpose, service or facility that it is not authorized by law to provide is considered by the law to be a gift, since no authorized public purpose of the public agency is being served in making the payment.



Finally, I understand that a contention is being made that the Kiewit settlement proceeds are actually trust funds, held in trust by the District as the trustee, for distribution as the other parties to the settlement see fit. The Kiewit Settlement Agreement is clear that the settlement funds are to be paid to the District, to be distributed **at the discretion** of the District for the benefit of the **community**, not just the parties to the settlement agreement. The settlement agreement contains no language regarding the establishment of a trust, the naming of and appointment process for a trustee, a listing of beneficiaries of the trust funds, or authorized purposes of distribution of the trust funds. The lack of any written evidence that the settling parties intended the settlement proceeds to be governed by the provisions of a trust will make it very difficult to prove that such a trust actually exists and was intended by all of the parties executing the settlement agreement. The express language of the settlement agreement specified above supports the conclusion that the settlement funds were to be paid to the District, as its property, for distribution for the benefit of the entire community in the discretion of the District. Since the express language of the settlement agreement is clear, a court will likely not permit parol, or oral, evidence regarding an allegation that a trust was intended to be formed by that settlement agreement. Even if such a trust agreement can be legally proved, the District has no legislatively granted authority to act as the trustee of such a trust, or to disburse trust funds, as the trustee, for purposes other than those specifically granted to the District by the CSD Law as discussed above.

Should you have any questions regarding the foregoing, please don't hesitate to contact me.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'David W. McMurchie', with a stylized, flowing script.

David W. McMurchie  
MCMURCHIE LAW