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MEMORANDUM

December 14, 2011

TO: Arthur L. Dao and Tess Lengyel, Alameda CTC

FROM: Neal A. Parish and R. Zachary Wasserman

RE: Limitations on Allowing Sales Tax Revenues to Replace Local Revenues

The Alameda County Technical Advisory Committee (“ACTAC”) has asked for guidance regarding certain language in the draft Master Programs Funding Agreement (“MPFA”) form currently under review. The language in question is part of Article 3, Policies on Use of Funds, and provides as follows:

“2. Non-Substitution of Funds: RECIPIENT shall use Measure B, pursuant to PUC 180000 *et seq.*, and VRF funds to supplement and not replace existing local revenues used for transportation purposes.”

This language is intended to carry out a policy considered and adopted by the Alameda CTC Board at its meeting of September 22, 2011.¹ ACTAC would like to know how this language will be applied by Alameda CTC in the future.

It is our understanding that the language in question was originally proposed by the Citizens Watchdog Committee, and is essentially based on Public Utilities Code (“PUC”) Sections 180001(e) (“It is the intent of the Legislature that funds generated pursuant to this division be used to supplement and not replace existing local revenues used for transportation purposes”) and 180200 (“The Legislature, by the enactment of this division, intends that the additional funds provided governmental agencies by this chapter shall supplement existing local revenues being used for public transportation purposes and that local governments maintain their existing commitment of local funds for transportation purposes”). These statutory provisions are part of the “Local Transportation Authority and Improvement Act” (Public Utilities Code §§180000 *et seq.*), the legislative act which allowed the enactment of the current Measure B sales tax.

A similar requirement was applicable to the 1986 Measure B funds administered by ACTA. As noted in Footnote 9 to the 1986 Expenditure Plan, each local government was required to certify to ACTA that Measure B funds would “not be substituted for property tax

¹ The staff report for the Board meeting used the phrase “property or gas tax subventions for transportation purposes” rather than the phrase “general funds for transportation purposes” as used in the draft agreement form.

funds which are currently utilized to fund existing local transportation programs.” It appears that this certification requirement was included as part of the 1986 Expenditure Plan to ensure that Measure B was not subjected to the two-thirds vote requirement which applied to new property taxes (but not sales taxes) at the time.² In order to enforce this requirement, the funding agreements between ACTA and each local jurisdiction contained an explicit provision pursuant to which Measure B funds could not replace property tax funds, and each jurisdiction was required to submit an annual independent audit to ACTA in which the jurisdiction’s auditor was required to confirm that Measure B funds have been spent in accordance with this and other applicable requirements.

By 2000, when the Expenditure Plan governing the current Measure B was drafted, sales taxes were no longer considered to be exempt from the two-thirds vote requirement, and the certification language was accordingly not included as part of the ACTIA Expenditure Plan. Similarly, the funding agreements between ACTIA and the jurisdictions for local streets and roads funds required that the jurisdiction comply with “applicable provisions of Public Utilities Code Section 180000 et seq.,” but without any explicit statement as to whether or not Measure B funds could substitute for property tax revenues or other local funds.

Given that PUC Sections 180001(e) and 180200 express the “intent” of the Legislature, but do not contain any directive language (e.g., stating that a jurisdiction “shall” take certain actions or refrain from certain actions), neither the statutes governing ACTIA nor the existing funding agreements require local jurisdictions or their auditors to confirm that Measure B funds did not replace property taxes. Additionally, given that each jurisdiction has been receiving Measure B funds from ACTA and ACTIA for nearly 25 years, it may be difficult to determine what constitutes “existing” general funds or property tax revenues for the purpose of determining whether local jurisdictions are maintaining their pre-existing level of support for transportation purposes.

Based on the above history, in order to carry out the intent of the Legislature, with respect to the original adoption of PUC Sections 180000 *et seq.*, and the intent of the Alameda CTC Board, with respect to the policy adopted at the September Board meeting, we would recommend that the MPFA form should be revised to refer to “property taxes” rather than “local funds.” Given the past history of both ACTA and ACTIA with respect to this and similar matters, we do not believe it is either appropriate or required to include an explicit statement as to what actions Alameda CTC would take in the event of a violation of this requirement – it should instead be left up to the Alameda CTC Board to take whatever actions they deem appropriate at the time.

² The certification requirement was taken from statutory language (PUC §142257) authorizing Fresno County to enact a transportation sales tax revenue, and was not contained within the statutory language actually governing the original Measure B, but was still considered to be appropriate for ACTA’s 1986 Expenditure Plan. PUC §131100, which was applicable to the original Measure B, stated the Legislature’s intent that newly generated sales taxes should “not replace funds previously provided by property tax revenues for public transportation purposes.”