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**HARRIS RANCH CID TAXPAYERS' ASSOCIATION**

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September 9, 2021

Members of the Board  
Harris Ranch Community Infrastructure District No. 1 (“HRCID”)  
City of Boise  
150 N. Capitol Blvd.  
Boise, Idaho 83702

Re: Tax-Exempt Status of Harris Ranch CID “General Obligation” Bonds

Members of the HRCID Board:

As you know, the Harris Ranch CID Taxpayers’ Association (“Association”) is in the process of reviewing prior and proposed payments by the HRCID to the Harris Ranch developers (“Developer”). Those payments are intended to reimburse the Developer for certain contributions and expenditures they have made for various supposed public facilities and improvements related to the Harris Ranch development.

While we have not yet received all the documents we’ve requested from the City of Boise (“City”) related to the HRCID’s outstanding “general obligation” bonds (“CID Bonds”), which were issued to finance most of those payments, our review of those payments continues.<sup>1</sup> Based on our review to date, however, we find that the number of issues related to the HRCID is growing and becoming more alarming.

**Discussion**

As you may also know, there is a complex body of Federal tax law governing state and local government obligations the interest on which is intended to be exempt from Federal income tax. That includes provisions of the Internal Revenue Code (“Code”), Regulations adopted pursuant to the Code, and various forms of guidance provided by the Internal Revenue Service (“IRS”). We are not practicing lawyers, let alone tax lawyers, and do not purport to have an in-depth knowledge about such things. But we do have a general understanding of these provisions. So, the following comments are qualified by those representations.

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<sup>1</sup> It is our general understanding that the CID Bonds have been privately placed with one or more financial institutions.

First, we assume that the CID Bonds have been issued as tax-exempt “governmental bonds” under the Code, as proceeds have supposedly been applied, as required by the Idaho Community Infrastructure District Act, to pay the costs of *public* facilities – that is, facilities owned by the City or other local government, and used and available for use by the general public. Issuance of the CID Bonds as “governmental bonds” is preferable, as tax-exempt bonds generally can be issued with lower interest rates than bonds that are not exempt from Federal income taxes.

To qualify as governmental bonds under the Code, at least two of following three conditions must be true for each issue of bonds: (1) no more than 10% of the proceeds of the bonds is used in a private business (“Private Business Use Test”), or (2) no more than 10% of debt service on the bonds is paid from or secured by property used in a private business or by payments in respect of such property (“Private Payments Test”), and (3) less than 5% of the bond proceeds is treated as loaned to someone other than a state or local government (“Private Loan Test”).

The meaning of at least some of that language is rather opaque. So, examples may be helpful to illustrate our understanding of how those tests are applied.

If a city issues bonds to finance an office building which will be leased entirely to private businesses, and the lease payments made by those businesses will be applied to pay and secure the bonds, those bonds exceed both the Private Business Use Test and the Private Payments Test. That’s because 100% of the proceeds of the bonds will be treated as being used by private businesses, and 100% of the bonds will be treated as payable from and secured by payments made by private businesses. Those bonds thus would constitute what are termed “Private Activity Bonds” (which, generally speaking, is a bad thing from a Federal tax law standpoint). The interest paid on those bonds therefore would be *subject to* Federal income taxes even though the office building is owned by the city.

If, however, less than 10% of the office building is leased to private businesses, and the rest is used for local government offices, and/or less than 10% of debt service on the bonds is payable from lease payments made by the private business tenants, either the Private Business Use Test and/or the Private Payments Test would *not* be exceeded, and the bonds thus would constitute “governmental bonds” the interest on which is *exempt from* Federal income taxes.

Similarly, if a city issues bonds and loans the proceeds to a private developer to build an office building for use by private businesses, the bonds would exceed the Private Loan Test, and interest on those bonds would be subject to Federal income taxes.

Special rules, in addition to the above general rules, apply to bonds issued by local governments that are payable from special taxes or assessments levied on a limited group of property owners (such as the CID Bonds). As we understand it, proceeds of such

bonds are treated as being “loaned” to those property owners for purposes of the Private Loan Test. A special provision in the Code, however, permits these “private loans” without jeopardizing the tax-exempt status of the bonds, as long as the bond proceeds finance “essential governmental functions” (generally, publicly-owned improvements that are available for use by the general public).

As the CID Bonds are payable entirely from special taxes imposed on private property owners in the HRCID, the CID Bonds thus by definition are treated as “loaned” to the private property owners in the HRCID. That’s okay, however, so long as the CID Bonds finance publicly-owned improvements that are available for use by the general public. And that is where our new concerns have arisen.

If proceeds of the CID Bonds have been applied to pay or reimburse the Developer for the costs of public roads, parks, water, sewer and storm water facilities, and similar improvements that are (i) owned by the City or other local governments, and (ii) available for use by the general public, then there generally is *not* an issue with the Private Loan Test. But it appears that’s not the case. Rather, it appears, based on our initial review of prior payments by the HRCID to the Developer, that ***more than \$7 million*** of the approximately \$13.6 million paid to the Developer to date from proceeds of the CID Bonds has been for:

- The supposed “value” of land that the Developer was required to dedicate to wetlands and stormwater drainage and retention, ***but which it appears the Developer still owns***<sup>2</sup>;
- At least a portion of the construction costs of such wetlands and storm water drainage and retention facilities; and
- Payments to Idaho Power for undergrounding electric distribution lines and transformers, and other electric service extensions, none of which utility improvements, we expect, are owned by the City or other local government.

It is unclear to us whether these payments will be treated for Federal tax law purposes as being made to finance privately-owned improvements, or perhaps as grants (or, one might say, gifts) to the Developer, as a private business, for use as they see fit. In either

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<sup>2</sup> It appears that the Developer has provided the City with supposed “easements of access” with respect to the land in question, but solely for the purpose of maintaining the privately-owned storm water system facilities and only upon any failure of the private nonprofit Harris Ranch homeowners’ association to do so. An “easement of access” for that very limited purpose does not, by any stretch of the imagination, convert private property into a publicly-owned infrastructure improvement. The supposed “easements of access” appear to be nothing more than a fig leaf to cover what may constitute a gift of public moneys by the HRCID to the Developer (at the direct expense of the homeowners and property taxpayers in the HRCID).

case, it seems to us, they cannot be treated as having financed *publicly*-owned improvements that are available for use by the general public.

It thus appears to us, again based on our preliminary review, that *all* of the proceeds of the CID Bonds will be treated as “loaned” to the private property owners in the HRCID, and that substantially more than 5% of the proceeds of the CID Bonds have been applied to finance facilities which are privately owned, rather than “essential governmental functions”, and that interest on the CID Bonds thus may be subject to Federal income tax.<sup>3</sup> If that is the case, we expect that the financial institution(s) which hold the CID Bonds may understandably be *very* surprised and concerned.<sup>4</sup>

### **Potential Consequences of Taxability of CID Bonds**

It is our understanding that an outside law firm specializing in municipal bond law (“Bond Counsel”) would typically have provided a legal opinion to the HRCID to the effect that interest on the CID Bonds is tax-exempt. In doing so, as we understand it, they typically would have relied on certifications and undertakings provided by one or more officials of the HRCID, and possibly by the Developer, that proceeds of the CID Bonds were being spent for purposes appropriate to their Federal income tax tax-exempt status. It would then be up to the HRCID, and the Developer if they provided such certifications, to make sure that the expenditures of proceeds of the CID Bonds complied with their respective certifications and undertakings. In the event of any uncertainty, of course, they may have consulted with Bond Counsel regarding specific expenditures the treatment of which may have been unclear.

The consequences of the CID Bonds being taxable rather than tax-exempt, if that were the case, could be quite serious for Bond Counsel to the HRCID, the HRCID, the City, the officials who signed the tax certifications and undertakings, and/or the Developer, if they did as well. Those consequences could include the payment of significant penalties and interest to the IRS, the payment of more serious Section 6700 penalties to the IRS, and the need to refinance the debt at taxable rather than tax-exempt rates. In addition, we understand that the Securities and Exchange Commission has taken the position that false tax-related certifications made in connection with the sale of tax-exempt bonds can

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<sup>3</sup> In addition, it appears that the CID Bonds will also exceed the Private Business Use Test, as perhaps 50% or more of the net proceeds may be treated as having financed payments for privately-owned facilities. A significant portion of the planned development within the HRCID, as we understand it, is expected to consist of apartment buildings, retail space and other commercial establishments. We are unable to determine at this point whether payments by the owners of such commercial properties, including by the Developer in the interim, will exceed the Private Payments Test, and thus that the CID Bonds may also constitute Private Activity Bonds the interest on which is subject to Federal income tax. We note that it is our understanding that the Federal tax law analysis applies to each “issue” of CID Bonds. We don’t yet know whether the CID Bonds constitute one or more “issues” for these purposes.

<sup>4</sup> We are very disappointed that these issues are having to be brought to your attention by homeowners in the HRCID, rather than being identified in advance and thus avoided by the City, acting through the HRCID.

constitute a violation of Federal securities laws by the bond issuer and/or by the individuals who made the certifications. And, of course, there likely would be significant reputational damage for all involved.

It appears to the Association that this presents a serious conundrum. Any failures to comply with Federal tax law in connection with the CID Bonds and any penalties that might be applied because of such failures are certainly *not* the responsibility of the homeowners in the HRCID. And, as we've noted before separately, the HRCID is simply an extension of the City, as it was created by the City and is now overseen, controlled and staffed entirely by the City.

### **Requested Actions**

We therefore request the following:

- That the HRCID's Bond Counsel provide a detailed Federal tax law analysis to the Association, at no expense to the Association or the homeowners in Harris Ranch, as to the compliance with Federal tax law of each prior expenditure or reimbursement made to the Developer from the proceeds of the CID Bonds;
- That the City (as they are the party ultimately responsible for all this) indemnify and hold harmless the homeowners in the HRCID from and against any liability which may arise to the HRCID from any failure by the HRCID, the City or the Developer to comply with Federal tax law with respect to the CID Bonds; and
- That the City (again, as they are the party ultimately responsible for all this) agree to pay the costs of independent Bond Counsel, reasonably selected by the Association, to undertake its own review of these matters.

If the HRCID and the City are not amenable or responsive to the above requests, another option would be for the Association to approach the IRS' Tax-Exempt Bonds office (TEB) directly to seek their guidance and views regarding these matters. We hope, however, that such action on the part of the Association won't be necessary.

We look forward to your timely response.

Sincerely,

*pp Bill Doyle*

Executive Committee,  
Harris Ranch CID Taxpayers' Association

Cc: The Honorable Lauren McLean, Mayor, the City of Boise  
Council Member Liza Sanchez, Council Pro Tem  
Council Member Patrick Bageant  
Council Member Jimmy Hallyburton  
David Hasegawa, City of Boise  
Jaymie Sullivan, City of Boise  
Rob Lockward, City of Boise  
Amanda Brown, City of Boise