

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance •• Administration •• Executive/Legal •• Enforcement
(916) 322-5662 322-5660 322-5901 322-6441

September 19, 1984

Robert W. Gross
Chairman of the Board
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

Re: Your Request for Advice,
Our Advice No. A-84-208

Dear Mr. Gross:

You have written requesting our advice regarding your situation. As I understand them, the material facts are as follows:

FACTS

You are an elected member of the Board of Directors of the Santa Clara Valley Water District. Currently, you serve as Chairman of the Board of the District, which is a public agency. Coincidentally, you and your wife own real property which is appurtenant to the Guadalupe River, within the District's jurisdiction. This property was purchased long before your tenure on the District's Board commenced.

The District is currently developing a flood control project involving the Guadalupe River. This project will necessitate the acquisition, by the District, of a portion of your lands adjacent to the Guadalupe River. You have consistently disqualified yourself from participation in any District decisions involving the stretch of the flood control project which encompasses your lands.

QUESTION

Your question is with regard to your role as a property owner whose land is about to be taken by the District. Specifically, you want to know if you can participate in private negotiations over price and terms of the taking or whether those matters must be settled in court by way of a condemnation proceeding, as has been suggested by the District's General Counsel, Mr. Albert Henley.

CONCLUSION

You may not meet with the District's representatives in private negotiating sessions while you are also serving as a member of the District's Board of Directors. You may discuss your property's acquisition, as may any other member of the public, in an open, noticed hearing of your board. In that instance, having independent appraisals available for purposes of discussion could be of assistance. However, condemnation proceedings would also be an appropriate method for resolving these issues.

ANALYSIS

The Political Reform Act^{1/} (the "Act"), Section 87100, requires that public officials disqualify themselves from making, participating in making, or using their official positions to influence a decision of their agency in which they know or have reason to know that they have a financial interest.

You agree that you have a financial interest in the District's decision to acquire a portion of your property in that you have an interest in the real property and the decision will have a material financial effect upon that real property interest which is distinguishable from the effect upon the public generally. Consequently, you have properly disqualified yourself from any participation in the District's decisions relative to the stretch of the flood control project which includes your property; this includes any negotiations or other preliminary discussions.

Commission regulation 2 California Administrative Code Section 18700 (copy enclosed) discusses what activities constitute "making," "participating in making," and "using his or her official position to influence," within the context of the requirements of Section 87100 discussed above. In particular, subdivisions (d)(2) and (f)(1) of Regulation 18700 exclude:

Appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to his or her personal interests.

^{1/} Government Code Sections 81000-91014. All statutory references are to the Government Code unless otherwise specified. Our advice is limited to issues under the Act and you should consult with the Attorney General's office regarding Section 1090, et seq.

Robert W. Gross
September 19, 1984
Page 3

Consequently, it would be permissible for you to appear before the District's Board at a public hearing to speak on a matter related solely to your personal interest, even though you have been required to disqualify yourself from participation due to a financial interest in the decision about which you are addressing the Board. Thus, the terms of acquisition of your property could be discussed at an open session of the Board at which you appear as any other member of the public (having first placed your disqualification on the record).^{2/}

However, this exemption from the requirement of non-participation does not extend to private communications to the Board, such as lobbying members of the Board or District staff. You are prohibited from conducting private negotiations with District staff over price and other terms of acquisition under Regulation 18700.

Lastly, we wish to point out to you the possible applicability of Section 1090 to your situation. I mentioned this to you in our telephone conversation and suggested that you contact the Attorney General's office for guidance in this regard. It may be that Section 1090 will dictate that a condemnation proceeding is the only method available to the District for acquiring property from one of its directors. This is certainly the case when a redevelopment agency seeks to acquire land from one of its members. See, Health and Safety Code Section 33393. In such court proceedings, you are free to participate fully as a property owner, but must not be involved in the District's actions as a Board member.

Should you have further questions regarding this matter, please do not hesitate to contact me at 916/322-5901.

Sincerely,


Robert E. Leidigh
Counsel, Legal Division

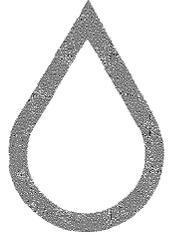
REL:km
Enclosures
cc: Albert Henley, General Counsel
Robin Wakshull, Deputy District Attorney

^{2/} We note that the City of San Jose is utilizing appraisers and then having a hearing involving the landowners in its purchases of land surrounding the San Jose airport. This procedure could be helpful here.

Santa Clara Valley Water District

ROBERT W. GROSS
CHAIRMAN OF THE BOARD

5750 ALMADEN EXPRESSWAY
SAN JOSE, CALIFORNIA 95118
TELEPHONE (408) 265-2600



August 13, 1984

Ms. Janis McLean, Legal Counsel
F.P.P. Commission
P.O. BOX 807 - 1100 K Street
Sacramento, CA 95804

SUBJECT: Follow-up of phone conversation 8/13/84 and a
clarification of conflict of interest questions

Dear Janis:

Thank you very much for your time today in reference to the above
subject.

Under Government Code Section 83114, I would like to make a formal
request and opinion per our conversation by telephone.

1. In late 1970, my wife and I purchased the property that is
under question, the escrow closed in January 1971.
2. In 1980, I was elected to a four year term to the Board of
Directors, and re-elected again for another four year term which
will start in January 1985.
3. The Gaudalupe River has been studied by the County Flood Control
and the U.S. Corps of Engineers for over 40 years, and it was only
in the late 70's, the decision was to proceed with design and cons-
truction to follow. The project was broken down into stretches, with
separate contracts for each one.
4. When the stretch (copy attached) was started, that would have a
direct impact upon our lands, I made formal notice in the Board meeting
that I will not be a participant in the discussions, debates or will
I be voting on this.
5. The District real estate department had one meeting with my wife
and myself to describe various proposals and value. At that meeting,
I expressed that I may be a Director, but I am a property owner and
wish to be treated in that manner.
6. Somewhere in time, the General Counsel for the District (copy of
the letter attached), advised me as to the above, including the fact
that I should not become involved in the valuation, and the decision
shall be made by a court rather than upon negotiation, I personally
find this somewhat confusing as to my role as a property owner.

REC'D
022 AM
1984

7. Last week, the District real estate department contacted me and asked if my wife and I would like to meet and discuss the taking of our lands for flood control? They stated that a formal appraisal had been made, and I was told that an outside attorney will be there to discuss the taking of subject property. I agreed to meet with them this Tuesday, August 16, 1984.

I begin to think this over and discussing it with my wife, I became very uncomfortable, that the District was to hire outside legal counsel because of my position as a Director, and I repeated my position again, I am a property owner with my wife and wished to be treated so.

After considerable thought, a question that came to mind, the District is protected, but am I? Also, how could an employee, which the attorney will be in this specific case be neutral when he is being paid by the District represent me?

I recalled the General Counsel's letter to me and questioned the facts that were before me and made the decision to contact the District Attorney's office in Santa Clara County for an opinion.

On Friday, last week, I spoke to Ms. Robin Wakshull, attorney for the D.A.'s office in Palo Alto (415)328-1173, and explained my role and how I was not comfortable with this taking of our lands. She advised me to contact your office for a clarification to this matter.

Somewhere, in a conversation with someone, I was advised that I do have rights and not to meet with the District and their counsel until I have a ruling from you.

I also was advise, that I do have the right of freedom of speech to express my opinion on this take, if I do, do not do it in a private meeting, it should be open and in public.

I will be notifying the District, that I will not be meeting with them, until I hear from your office as to the procedures I should take to avoid as Mr. Henley stated, "speaking not of evil so much as the appearance of it."

Very truly yours,



ROBERT W. GROSS
1035 Vista Del Mar
San Jose, CA 95132
408-263-4170

ENCL

cc: Mr. Albert Henley, General Counsel, SCVWD
Ms. Robin Wakshull, Attorney, SCC D.A.'s Office



TO: Albert T. Henley, General Counsel, SCVWD
SUBJECT: Fair Political Practices Commission

FROM: Robert W. Gros
DATE: August 14, 198

I have been advised by the Fair Political Practices Commission to hold off with any direct meetings with the District or their agent until they review my letter (copy attached) in reference to the taking of our land. I shall keep you informed as soon as possible.



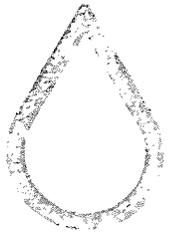
Chairman of the Board of Directors

Attachment

Santa Clara Valley Water District

ALBERT THOMAS HENLEY
GENERAL COUNSEL

5750 ALMADEN EXPRESSWAY
SAN JOSE, CALIFORNIA 95118
TELEPHONE (408) 265-2600



November 22, 1982

Robert W. Gross
Director, District 3
Santa Clara Valley Water District
906 Elizabeth Street, Second Floor
Alviso, California 95002

Dear Bob:

As you are an owner of improved properties in the Alviso area which will be affected by flood control work now in contemplation by the District, it will be proper for you to make sure that your actions as a Board member do not bring you into a conflict of interest.

I refer to two properties specifically: one is your headquarters or office, the other is a brick structure located very close to the stream. As to the former, the effect of flood protection will be the same for you as for all the other owners there. In these circumstances, assuming no other interest, you would have no obligation to abstain from debate and vote when the issue of undertaking the project comes before the Board.

However, the brick building is in quite another category. This structure may have to be acquired by us. If that becomes a possibility, you would be obliged to declare your interest and take no part in debate or vote. Further, the valuation of the take should, in such a circumstance, be made by a court rather than upon negotiation.

During the period of public discussion of the kind of flood protective structure best adapted to the area, you will wish to avoid any suggestion to the other residents favoring a choice which will dictate whether condemning your building will be necessary or not. I do not consider such an action by you to be something you would consider. I am speaking not of evil so much as the appearance of it.

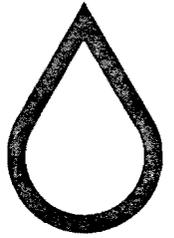
Faithfully,

Albert Thomas Henley
General Counsel

bc: J. O'Halloran; R. Esau; G. Korby

ATH:scs

Santa Clara Valley Water District



ALBERT THOMAS HENLEY
GENERAL COUNSEL
5750 ALMADEN EXPRESSWAY
SAN JOSE, CALIFORNIA 95118
TELEPHONE (408) 265-2600

AUG 16

8:02 AM '84

August 14, 1984

Robert W. Gross
1035 Vista Del Mar
San Jose, California 95132

Dear Bob:

Allow me to comment on the problem of District acquisition of property you and Mrs. Gross own in the Alviso area as outlined in the letter to Attorney McLean you have shown me. It is possible I have been misunderstood.

My advice to you, which was to take no part in District Board discussion and decisions affecting your personal financial interests in Alviso (or anywhere), does not have an effect of hindering your vigorous pursuit of those interests. Your freedom to protect yourself as a landowner is unimpaired. You can say and do anything at all that you might have said and done if you were not on the Board except use your position to influence a Board decision in the matter.

Thus, the question of your rights as a landowner, including the level of your compensation on a take in eminent domain, will be decided by a court, where you and the District are equal as litigants. I have insisted on this because it protects your right to be fully heard AND it protects you and your colleagues from accusations of improper influence and conflict of interest.

It must be understood that our special condemnation Counsel is not intended to be neutral, he works for the District, the public. It is for you either in pro. per. or through your own counsel to present your position and to defend your determinations of what is owed you.

The reason that I will not appear in the matter and that no District employee will be appraising or negotiating is simply that, again, there must be no appearance of influence by a Board member upon a Board employee to make a determination in your favor.

The idea of getting specific written direction from the FPPC is good insurance. You cannot, as a public official, have too much documented protection from the kind of accusations people find so easy to make. At your suggestion I am enclosing a copy of this letter for you to send along to Ms. McLean.

Faithfully,

Albert Thomas Henley
General Counsel

cc: Janis McLean, Legal Counsel,
FPPC, P. O. Box 807, Sacramento, CA 95804

State of California



Fair Political Practices Commission

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August 17, 1984

Robert W. Gross
Chairman of the Board
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

Re: A-84-208

Dear Mr. Gross:

Your letter requesting advice under the Political Reform Act has been referred to Robert E. Leidigh, an attorney in the Legal Division of the Fair Political Practices Commission. If you have any questions about your advice request, you may contact this attorney directly at (916) 322-5901.

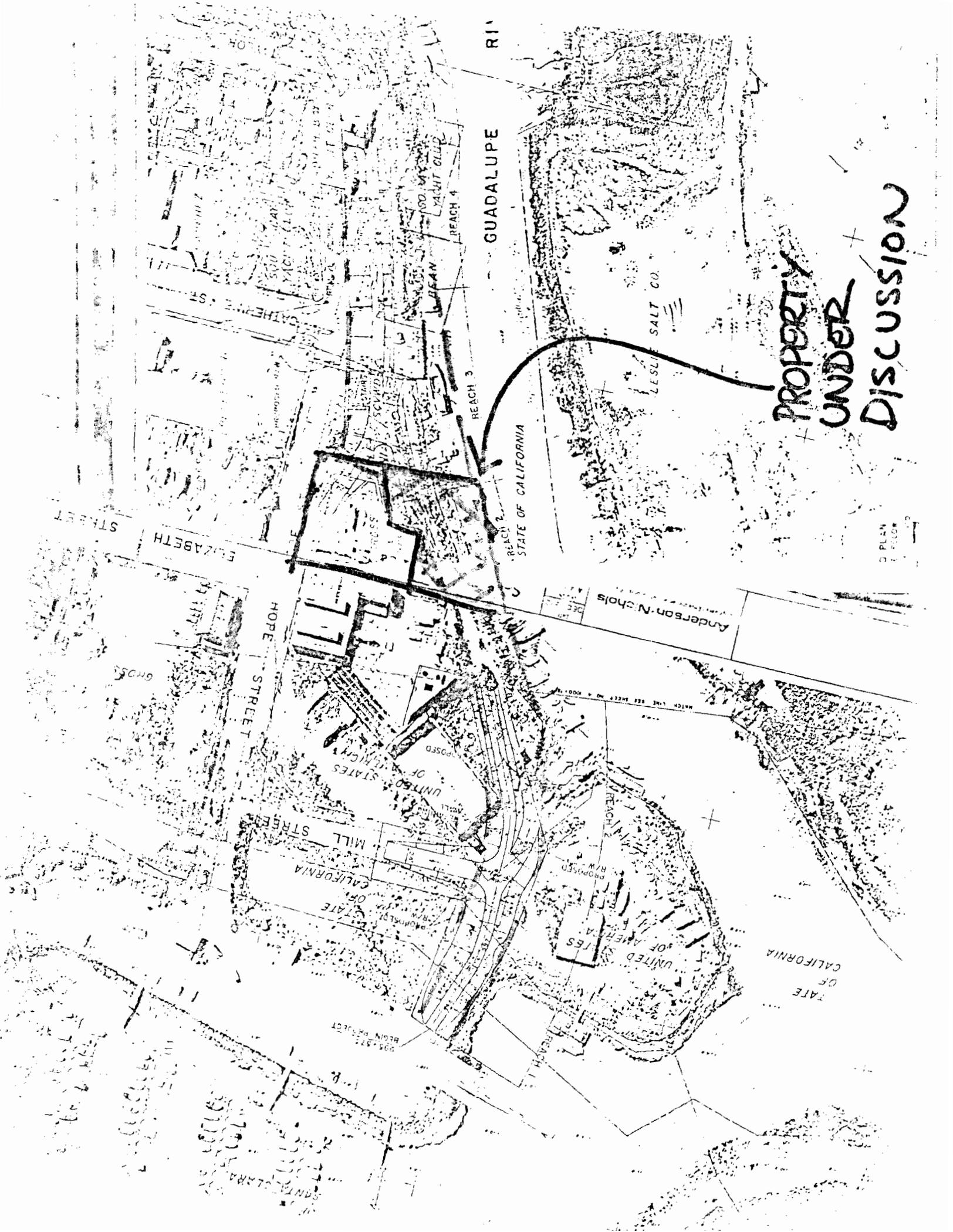
We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or unless more information is needed to answer your request, you should expect a response within 21 working days.

Very truly yours,

A handwritten signature in cursive script that reads "Barbara A. Milman".

Barbara A. Milman
General Counsel

BAM:plh



PROPERTY
UNDER
DISCUSSION

GUADALUPE RIVER

STATE OF CALIFORNIA

LESLIE SALT CO.

Anderson Nichols
DEC 1911
PLAN 1

REACH 1

REACH 2

REACH 3

REACH 4

HOPE STREET

ELIZABETH STREET

UNITED STATES OF AMERICA

MILL STREET

CALIFORNIA

STATE

OF

AMERICA

REACH 1

REACH 2

REACH 3

REACH 4

STATE OF CALIFORNIA

UNITED STATES OF AMERICA

REACH 1

REACH 2

REACH 3

REACH 4

REACH 5

REACH 6

REACH 7

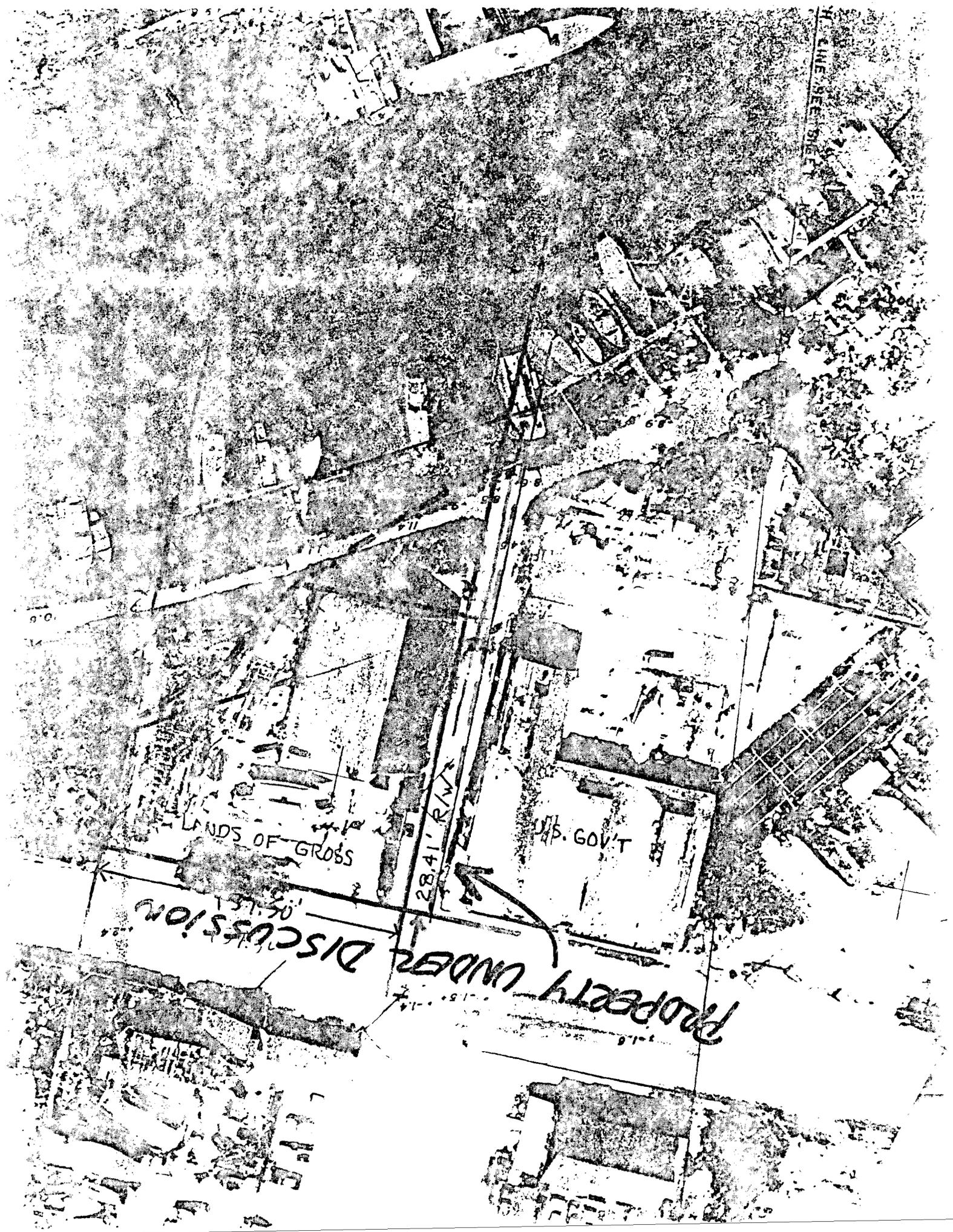
REACH 8

REACH 9

REACH 10

PLAN 1

H. LINE RE-SUBJECT



LANDS OF GROSS

28.41' R/W

U.S. GOV'T

PROPERTY UNDER DISCUSSION