



California Fair Political Practices Commission

September 18, 1987

Robert L. Pleines
Assistant County Counsel
County of Sacramento
700 H Street, Suite 2650
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-87-220

Dear Mr. Pleines:

You have requested advice on behalf of the board of directors of the Sacramento Regional County Sanitation District, regarding their duties under the Political Reform Act (the "Act").^{1/} Some of your questions relate to past actions taken by the directors. We make no comment as to whether any past conduct of the directors was or was not in violation of the Act. (See Regulation 18329(b)(8).)

QUESTIONS

The Sacramento Regional County Sanitation District is considering adoption of an ordinance to impose a surcharge to the sewer connection fee for developers of property in the North Natomas area of Sacramento County. The funds collected pursuant to the ordinance would be used only for the purpose of repaying federal and state grant moneys, reimbursing the district for such a repayment, or for reimbursing a private party for advancing the funds for such a repayment, provided the private party has entered into an agreement with the district providing for the reimbursement. You have asked the following questions:

1. Is the proposed ordinance a proceeding involving a license, permit or other entitlement for use, which subjects

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

the District board to the contribution limitation and disqualification requirements of Section 84308?

2. Is an agreement between the District and a private party a proceeding subject to Section 84308 if the agreement provides the private party will indemnify the District against liability for repayment of approximately \$6.6 million in grant funds upon issuance of a sewer permit?

CONCLUSIONS

1. The proposed ordinance is not a proceeding involving a license, permit or other entitlement for use. Therefore, the District board is not subject to the contribution limitation and disqualification requirements of Section 84308 with respect to decisions on the proposed ordinance.

2. The agreement in question is a contract. Thus, it involves a license, permit or other entitlement for use and is subject to Section 84308.

FACTS

The Sacramento Regional County Sanitation District (the "District") is a special district formed under Health and Safety Code Section 4700 et seq. The District is situated wholly within Sacramento County. It includes unincorporated territory of the county and incorporated territory of the cities of Sacramento and Folsom. The District is responsible for transportation and disposal of sewage on a district-wide basis. The primary source of income for maintenance and operation of its facilities consists of sewer service fees levied by ordinance on an annual basis on all properties served by the District. The District also levies sewer hookup charges by ordinance to finance plant and line expansion.

The District is governed by a board of directors consisting of seven members. All five members of the Sacramento County Board of Supervisors serve on the District board, as does one member of the Sacramento City Council and one member of the Folsom City Council.

The District's regional wastewater treatment system cost approximately \$460 million, 80 percent of which was paid by federal and state grant funds. One of the projects financed with these grant funds is the Natomas Interceptor System, which serves the northwestern portion of the county, commonly referred to as the Natomas area.

In order to obtain federal grant funds for construction of the Natomas Interceptor System, the District agreed to a requirement imposed by the Environmental Protection Agency ("EPA") which prohibits sewer connections within 19,000 acres of the northern portion of the Natomas area (North Natomas) for a period of 20 years. The purpose of this agreement was to comply with EPA's policy concerning preservation of agriculturally significant lands. The agreement affects property located in the unincorporated area of Sacramento County and property located within the boundaries of the City of Sacramento. Both the city and the county acquiesced to the conditions of the agreement.

The agreement was executed in March 1979. It provides that the federal or state government may demand repayment of approximately \$4.8 million in grant funds, plus interest, if the District allows sewer connections in the North Natomas area prior to the expiration of the 20-year period. Consequently, if the District now issues a sewer permit within the prohibited area, the District may be compelled to repay approximately \$6.6 million to the state or federal government.

In May 1986, the City of Sacramento amended its general plan to provide for urban development in the portion of North Natomas that is within the city's boundaries. At about the same time, the city provided appropriate zoning and a special use permit for a parcel of land in the North Natomas area to the Sacramento Sports Association for development of a sports stadium. A condition of the zoning is that the developer make arrangements satisfactory to the District with respect to potential violation of the District's agreement with EPA. Sacramento County also is considering approval of development of 153 acres in North Natomas owned by a developer, RJB Company. Thus, it appears that development within the North Natomas area is imminent.

Because of impending development, the District now is considering adoption of two proposed ordinances which would address the problem of the District's potential liability for the \$6.6 million repayment to the federal government. One of the proposed ordinances applies to the portion of North Natomas within the Sacramento city limits, the other applies to the portion of North Natomas within the unincorporated area of Sacramento County. The property subject to the proposed ordinances is coterminous with the property which is the subject of the agreement between the District and EPA.

The ordinances would require that upon issuance of a building permit, the property owner will pay to the District a

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sewer connection surcharge of \$338 per residential unit, in addition to all other connection and service charges otherwise payable by any other developer within the District. A commensurate surcharge is required for industrial and commercial development based upon comparable flows. The ordinances would apply only to the first 18,803 residential units, or commensurate amount of commercial or industrial development. Only those property owners who elect to develop would be required to pay the sewer connection surcharge fee. The ordinances would terminate in March 1999, the date of expiration of the agreement between the District and EPA. The funds collected would be used only to repay the grant funds to the state or federal government, to reimburse the District for such a repayment, or to reimburse a private party which has advanced the funds for such a repayment pursuant to an agreement with the District.

In conjunction with the proposed ordinances, the District has developed a reimbursement agreement which will require the first developer of property in the North Natomas area to indemnify the District against any loss the District may suffer by reason of demand by the federal or state government for repayment of grant funds. The District already has approved such an agreement with the Sacramento Sports Association, whose sports stadium is likely to be the first facility to develop in North Natomas. That agreement requires the developer to post security for the repayment. It also provides that the District, at its option, may enact the sewer connection surcharge ordinances, described above, to reimburse the developer for its costs of repayment of the \$6.6 million in grant funds. If it appears likely that another parcel will be the first in the area to develop, the District probably will require, as a condition of approving development plans, that the owner of the parcel enter into a similar indemnification agreement with the District.

ANALYSIS

Section 84308 imposes contribution limitation, disclosure and disqualification requirements on members of appointed boards and commissions who make decisions involving licenses, permits or other entitlements for use. You have asked whether the directors of the Sacramento Regional County Sanitation District are subject to Section 84308 when considering the proposed sewer connection surcharge ordinances or the proposed indemnification agreement. This question requires analysis of two questions: (1) Is the District an agency subject to the restrictions of Section 84308? and (2) Do the proposed ordinances or the proposed indemnification agreement involve a license, permit or other entitlement for use?

Application of Section 84308 to the District

Section 84308(a)(3) specifies the type of agencies to which the restrictions of Section 84308 apply. Section 84308(a)(3) provides:

(3) "Agency" means an agency as defined in Section 82003 except that it does not include the courts or any agency in the judicial branch of government, local governmental agencies whose members are directly elected by the voters, the Legislature, the Board of Equalization, or constitutional officers. However, this section applies to any person who is a member of an exempted agency but is acting as a voting member of another agency.

Thus, Section 84308(a)(3) provides that city councilmembers and county supervisors are exempt from Section 84308 when acting as members of the agency to which they are directly elected. However, when a city councilmember or county supervisor acts as a voting member of another agency whose members are not directly elected to serve on that agency, Section 84308 applies. (Regulation 18438.1(b), copy enclosed.)

The District's board consists of elected officials; however, those officials are not directly elected to serve as officers of the District. Therefore, the board members are officers of an agency subject to the prohibitions and requirements of Section 84308.

Application of Section 84308 to Sewer Connection Surcharge Ordinances and Indemnification Agreement

The restrictions and requirements of Section 84308 apply only to proceedings involving a license, permit or other entitlement for use. Decisions of general application are not covered by Section 84308. The law is intended to apply to decisions which have a direct and significant effect upon specific parties. These types of decisions seem particularly susceptible to the influence of large campaign contributions. (See Woodland Hills Residents Assn., Inc. v. City Council (1980) 26 Cal. 3d 938, 953 (Tobriner, J., concurring.) Thus, Section 84308 imposes contribution limitations, as well as disclosure and disqualification requirements, to limit the actual and apparent corrupting influence of large campaign contributions in these proceedings.

Section 84308(a)(5) defines "license, permit, or other entitlement for use" as follows:

(5) "License, permit, or other entitlement for use" means all business, professional, trade and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises.

Thus, Section 84308 clearly applies to sewer permit proceedings pending before the District. Section 84308 also applies to contracts considered by the District, other than competitively bid, labor, or personal employment contracts. Accordingly, contracts such as an indemnification agreement between the District and the Sports Association or another developer are entitlement-for-use proceedings for purposes of Section 84308. However, the proposed ordinances clearly are not licenses or permits, nor are they contracts. We next consider whether the proposed ordinances are another type of "entitlement for use."

The proposed ordinances would levy a surcharge on developers within a 19,000-acre area. There are approximately 433 different property owners in this area, some who own only one- or two-acre parcels, and others who own several hundred acres. The proposed ordinances impose conditions on development in the North Natomas area, but do not entitle any property owners in that area to develop their property. This distinction is a significant one, because the ordinances must involve an entitlement for use to be covered by Section 84308.

The California courts have examined the term "entitlement for use" in other contexts. These decisions provide useful guidance; however, interpretation of the Act is not necessarily limited by interpretation of other laws. (See Section 81013.) In Friends of Lake Arrowhead v. Board of Supervisors (1974) 38 Cal. App. 3d 497, 509, and People v. County of Kern (1974) 39 Cal. App. 3d 830, 837-840, the final discretionary acts of a public agency regarding the development of property were considered "entitlements for use" for purposes of the California Environmental Quality Act ("CEQA").^{2/} Similarly, in Bozung v. Local Agency Formation Com. (1975) 13 Cal. 3d 263, 278-279, the California Supreme Court held that a local agency formation commission's approval of annexation of territory to a city was an "irrevocable step" as far as that particular public agency was concerned, and thus involved the issuance of an entitlement for use for purposes of CEQA.

^{2/} Public Resources Code Section 21000 et seq.

The proposed ordinances before the District are not the final acts of that agency regarding development of specific property. Instead, the ordinances are preliminary decisions which establish one of the conditions with which developers of property in a certain area must comply to obtain a sewer permit from the District. Based on the precedent previously cited, these ordinances are not entitlements for use.^{3/}

There is another aspect of the proposed ordinances which might be considered an entitlement for use. The proposed ordinances authorize use of the surcharge fees only for specific purposes, including reimbursing a private party who has advanced funds for repayment of federal and state grants on behalf of the District. Unlike the proceedings which the courts have labeled entitlements for use, this aspect of the proposed ordinances does not involve any entitlement for land use. However, Section 84308(a)(5) does not limit the definition of "entitlement for use" to land use entitlements. For example, it states that contract and franchise proceedings are "entitlements for use." Yet, unlike the indemnification agreement, the proposed ordinances are not contract or franchise proceedings.

The reimbursement provisions of proposed ordinances present a close question, but we conclude they are not "entitlements for use" for purposes of Section 84308. Our conclusion is based on the judicial precedents cited above and also on the fact that another related decision pending before the District clearly is an entitlement for use pursuant to Section 84308(a)(5). Accordingly, under these unique facts, we conclude the proposed ordinances are not covered by Section 84308.^{4/}

^{3/} This conclusion also is based on the fact that the \$338 fee per parcel is not so burdensome that it essentially would prevent development of the property in question. If this decision concerned a condition on development which was so burdensome that it was tantamount to a prohibition on development, our conclusion probably would differ.

^{4/} Because we have concluded that the proposed ordinances are not covered by Section 84308, it is unnecessary to address questions 5 through 9 in your letter. Those questions concern the application of Section 84308 to specific persons interested in the proposed ordinances. In the remainder of this letter we provide general advice about application of Section 84308 to the indemnification agreement proceeding.

Procedural Aspects of Section 84308

Our conclusion that the indemnification agreement is a proceeding covered by Section 84308 requires discussion of the procedural aspects of Section 84308. We previously stated that we make no comment concerning the District's past actions, such as its approval on July 28, 1987, of the indemnification agreement with the Sacramento Sports Association. Your letter indicates that it is possible that future decisions on one or more similar agreements may occur. Therefore, we will summarize the procedural aspects of Section 84308 regarding those future decisions.

Contribution Limitations

The \$250 contribution limitation of Section 84308 applies while a decision on an indemnification agreement is pending before the District and for three months after the District makes its final decision on that matter. (Section 84308(b).) It is during this period that the solicitation, offer or receipt of large campaign contributions most clearly appears to interfere with impartial decisionmaking. Regulation 18438.2(b) (copy enclosed) provides that a proceeding involving a license, permit or other entitlement for use is "pending before" an agency if all of the following conditions are met:

- (1) When the application has been filed, the proceeding has been commenced, or the issue has otherwise been submitted to the jurisdiction of an agency for its determination or other action;
- (2) It is the type of proceeding where the officers of the agency are required by law to make a decision, or the matter has been otherwise submitted to the officers of the agency for their decision; and
- (3) The decision of the officer or officers with respect to the proceeding will not be purely ministerial.

While the proceeding is pending, and for three months after the final decision in the matter, the District's directors are prohibited from accepting, soliciting or directing a contribution of \$250 from a "party" or a "participant." A "party" is any person who files an application for or is the subject of the indemnification agreement. (Section 84308(a)(1).) Therefore, the private party who agrees to indemnify the District is considered a "party" for purposes of Section 84308. In contrast, the other

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property owners in the North Natomas area would not be considered "parties" under Section 84308. However, as discussed below, some of those property owners may be "participants" in the proceeding.

A "participant" in the proceeding concerning the indemnification agreement is any person, other than a party, who (1) actively supports or opposes a particular decision concerning the agreement and (2) has a financial interest in the decision, as described in Article 1 (commencing with Section 87100) of Chapter 7 of the Act. A person actively supports or opposes a particular decision if he or she lobbies in person the directors or employees of the District, testifies in person before the District, or otherwise acts to influence the directors of the District. (Section 84308(a)(2).) Regulation 18438.4 (copy enclosed) further defines when a person "lobbies in person," "testifies in person," or "otherwise acts to influence."

Section 87103 provides that a person has a "financial interest" in a decision if it is reasonably foreseeable that the decision will materially affect the person, or the person's investment, business or real property interests, or sources of income or gifts, in a manner distinguishable from the effect on the public generally. Regulations 18702, 18702.1, 18702.2 and 18703 (copies enclosed) provide additional guidance on whether a decision's effect is considered material and distinguishable from the effect on the public generally.

You have asked specifically whether any property owners in North Natomas who are not parties to the indemnification agreement have a financial interest in that proceeding. Based on the information you provided, it appears that the agreement will foreseeably affect those property owners insofar as it essentially will remove restrictions on their ability to develop their property. The ability to develop property affects the property's value. The foreseeable effect on the value of the property is considered material if it meets the standards in Regulation 18702(b)(2) (for property owned by individuals) or Regulation 18702.2 (for property owned by business entities).

Assuming the decision foreseeably and materially affects the property owners, it also is necessary to determine whether the effect is distinguishable from the effect on the public generally. A decision which primarily affects 433 property owners in the District usually would be considered to affect the property owners in a manner distinguishable from the public

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generally. (See Regulation 18703 and In re Legan (1985) 9 FPPC Ops. 1, copies enclosed.)

In summary, whether the 433 property owners in North Natomas have a financial interest in the indemnification agreement depends on whether that agreement is likely to have a material effect on their property. If the agreement is likely to have such an effect, any property owner who "actively supports or opposes" a particular decision on the agreement would be considered a "participant" for purposes of Section 84308. (Section 84308(a)(2).) If you need assistance in applying the materiality standard to specific owners, please feel free to contact us again.

Disqualification

If a director has received a contribution totaling \$250 or more from a party or participant in the indemnification agreement proceeding during the preceding 12 months, the director is disqualified from participating in the decision on the indemnification agreement. However, the director may return that portion of the contribution over \$249 and participate in the proceeding. This option is available to the director only for 30 days after he or she has knowledge of both the pending proceeding and the contribution. (Section 84308(c).)

Regulation 18438.7(b) specifies when a director knows or should know about a pending proceeding. Regulation 18438.7(b) provides:

(b) An officer knows, or should have known, about a proceeding pending before the agency if either:

(1) The officer has received notice of the license, permit or other entitlement proceeding. Notice includes receipt of an agenda or docket identifying the proceeding and the party or other persons affected by name; or

(2) The officer has actual knowledge of the proceeding.

Regulation 18438.7(c) specifies when a director knows or should know about his or her receipt of a contribution. Regulation 18438.7(c) provides:

(c) An officer knows, or should have known about a contribution if:

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- (1) The contribution has been disclosed by the party pursuant to Section 84308(d); or
- (2) The officer has actual knowledge of the contribution.

If a director learns of the contribution at the time of the decision on the indemnification agreement, he or she may participate in the decision if he or she publicly discloses the contribution, states his or her intent to return or pay down the contribution within 30 days, and actually returns or pays down the contribution within the 30-day period.

Legally Required Participation


You indicated in your letter that it is possible that the board of directors may be unable to achieve a quorum because of disqualification of several directors. In that case, the rule of legally required participation in Section 87101 would apply to allow one or more otherwise disqualified directors to participate in the decision. (Andrus Advice Letter, No. A-85-079, copy enclosed.)

The Commission has interpreted Section 87101 to permit a disqualified official to participate in a decision only if his or her participation is necessary to constitute a quorum. (In re Hudson (1978) 4 FPPC Ops. 13; In re Brown (1978) 4 FPPC Ops. 19.). In the Hudson and Brown opinions, the Commission specifically rejected the common law "rule of necessity," which permits all the disqualified officials to participate in the decision. Instead, the Commission ruled that the officials should draw lots or use a similar impartial method of selection to determine which among them would be permitted to participate in the decision pursuant to Section 87101. (In re Hudson, supra at pp. 17-18.)

If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel


By: Kathryn E. Donovan
Counsel, Legal Division

DMG:KED:plh
Enclosures



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August 7, 1987

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State of California
Fair Political Practices Commission
428 J Street
Sacramento, California 95814

Re: Sacramento Regional County Sanitation District
Request for Opinion Regarding Interpretation of
Government Code Section 84308

Ladies and Gentlemen:

We are counsel for the Sacramento Regional County Sanitation District, and as such request your opinion on the following questions:

1. Is the proceeding in which the proposed District surcharge ordinances are to be considered by the Board of Directors an "entitlement for use" proceeding within the meaning of Government Code Section 84308? If so, when did the proceeding commence?

2. If it is such a proceeding, is either of the following a party to the proceeding: (i) the Sacramento Sports Association and other owners and interests in the land and project to build a sports stadium within the North Natomas Area; or (ii) the RJB Company as owner of the 153 acres of North Natomas unincorporated area land within North Natomas whose zoning application is pending before the Board of Supervisors?

3. If it is such a proceeding, are the 433 owners of property who would be subject to the ordinance fees if they develop, considered to be parties to the proceeding?

4. Do the 433 owners of the property who would be subject to the ordinance fees if they develop, have a financial interest, within the meaning of Government Code Section 84308, in the decision on the ordinances.

5. Does either the RJB Company or the Sacramento Sports Association and associated interests have a financial interest in the decision on the ordinances?

6. Have either the RJB Company or the Sacramento Sports Association and related interests become "participants" in the proceeding on the ordinance by virtue of their representation in public hearings before the Board of Supervisors (in behalf of RJB) and the Sacramento City Council (in behalf of the Sports Association, et al) in relation to zoning and other land use applications on the subject properties, where members of the Board of Supervisors and City Council are also members of the Board of Directors of the District?

7. Have either the RJB Company or the Sacramento Sports Association and associated interests become "participants" in the proceeding on the ordinance where members of the Board of Directors have had prior discussions with such persons but cannot recall whether any such discussions have involved the issue of connection to the District's sewer system or other District issues related to violation of the EPA prohibition condition and the monetary repayment?

8. Have either the RJB Company or the Sacramento Sports Association and related interests become "participants" in the proceeding on the ordinance for any other reason?

9. Since there are no applicants in the proceedings on the ordinance, there are no disclosures by campaign contributors made on the record. What is the extent of the obligation of the Directors to affirmatively ascertain who are officers, employees, owners and agents of parties to a proceeding?

10. The same questions are asked as numbers 1, 3, and 4 in relation to the potential agreements between the District and the owner of the first property to require a sewer connection within the North Natomas Area for indemnification of the District against liability for the \$6.6 million grant repayment.

11. If more than two (three in the case of the reimbursement agreement proceedings) of the seven members of the Board of Directors are required to disqualify themselves from the proceedings wherein the proposed ordinances or reimbursement agreements are considered, how many Directors will be entitled to vote, and by what process, if any, are disqualified Directors to be selected to vote?

12. If Section 84308 is applicable to one or more of the decisions discussed herein, with respect to each decision:

a. During what period of time will or has the official been prohibited from receiving campaign contributions of \$250 or more from parties or participants under paragraph (b) of Section 84308;

b. Will the officials be deemed in violation of that provision if he or she did not know Section 84308 was applicable at the time the contribution was received;

c. Would return of the contribution following knowledge of the applicability of Section 84308 affect whether there has been or will be a violation of paragraph (b) of Section 84308;

d. May an official vote on a decision under paragraph (c) of Section 84308 if he or she returns the contribution within 30 days following knowledge that Section 84308 applies to the proceeding and that as a matter of law a particular act or circumstance caused the proceeding to be commenced and pending, even though factual knowledge of the event or circumstance was acquired more than 30 days preceding the date of return.

BACKGROUND FACTS

A. General Regional Facts

The Sacramento Regional County Sanitation District is a special district formed under Section 4700 et seq. of the Health and Safety Code. The District is situated wholly within Sacramento County. It includes unincorporated territory of the County and incorporated territory of the Cities of Sacramento and Folsom. The District is responsible for the transportation and disposal of sewage on a District-wide basis. The District owns and maintains hundreds of miles of trunk and interceptor sewers, and a 136 million gallon per day sewage treatment plant into which all sewage transported by the District is delivered. The primary source of District income for maintenance and operation consists of sewer service fees levied by ordinance on an annual basis on all properties served by the District. The District also levies sewer hookup charges by ordinance to finance plant and line expansion.

The District is governed by a Board of Directors consisting of seven members -- the five County Supervisors, a single member of the Sacramento City Council, and a single member of the Folsom City Council. All operational, maintenance, engineering, administrative and legal services to the District are performed

by County officers and employees whose costs are charged to the District. The County Director of Public Works is ex-officio District Engineer. The background of formation of the District is as follows.

In October 1972, the Federal Water Pollution Control Act was extensively modified by Public Law 92-500 and added to Title 33 of the United States Code as Sections 1251 and following. As modified by Public Law 92-500, the Act made a large quantity of money available to state and local agencies for construction of local sanitation projects. At that time, both the City of Sacramento and the County of Sacramento were under pressure from the State Water Resources Control Board to upgrade essentially all of their treatment facilities and to eliminate all discharges to the American River. Both the City and the County were early recipients of various grants under PL 92-500 for the purpose of planning new or modified facilities. The Sacramento Regional County Sanitation District (hereinafter called the District) was formed in 1973.

In 1974, the District entered into a Master Interagency Agreement with the County of Sacramento, the Cities of Sacramento and Folsom and ten other local sewerage agencies for the purpose of constructing a regional wastewater treatment and disposal system. The essence of the agreement was that the Cities and the underlying sewerage agencies would provide and maintain the local sewage collection systems and the District would provide and maintain sewer interceptors, sewage treatment plants and disposal facilities. At that time, the planning grants previously obtained by the City and the County were transferred to the District.

In 1975, the District processed and had approved a state environmental impact report and a federal environmental impact statement providing for the destruction of some existing 22 sewage treatment plants, the construction of several miles of sewer interceptors to transport the sewage which otherwise would have been treated by those plants to a regional treatment plant south of the City of Sacramento, and the construction of that regional treatment plant. One of the elements of the approved EIR and EIS was that the then existing Natomas Wastewater Treatment Plant would be demolished and the effluent being treated at that plant would be transported via a Natomas interceptor line to the regional wastewater treatment plant.

In 1975, the District received the first of many design and construction grants for the design and construction of the regional wastewater treatment system, which system ultimately cost approximately \$460 million, 80% of which was paid by federal

and state grant funds. Construction commenced in 1975 and continued through the early 1980s. As provided in the Master Interagency Agreement, it continues to be the responsibility of the District to receive and treat all of the sewage originating within the Cities of Sacramento and Folsom and the metropolitan portion of the unincorporated area of the County. These territories contain about 95% of the population of the County.

B. Natomas Facts

The portion of Sacramento County commonly referred to as the Natomas area is that northwestern part of the County bounded by the American River on the south, the Natomas East Main Drain Canal on the east, the Sacramento-Sutter County Line on the north, and the Sacramento River (Sacramento-Yolo County Line) on the west. That portion thereof lying south of Interstate 80 is commonly referred to as South Natomas, and the balance, comprising the far greater portion, lying north of Interstate 80, is commonly referred to as North Natomas. The great bulk of South Natomas is within the boundaries of the City of Sacramento, and a significant portion of North Natomas (approximately 7,000 acres) is also within the boundaries of the City of Sacramento. The balance of the territory is unincorporated.

In the early 1960s, the boundaries of the City of Sacramento did not extend into the Natomas area. At that time, an assessment district was formed for the purpose of constructing the Natomas Sewage Treatment Plant, a relatively small plant, and several trunk sewer lines serving several scattered parcels of land within both the South Natomas and North Natomas areas. That construction was completed in about 1965. Some time prior to the completion thereof, a significant portion of both North and South Natomas was annexed to the City of Sacramento. Although the trunk sewer lines had been constructed to serve numerous parcels, it was several years before any of those parcels developed. Those of such parcels in North Natomas have never developed and have never received service from the trunk sewers or the sewage treatment plant. In the 1960s, a few of the South Natomas parcels began developing and were served by the Natomas Sewage Treatment Plant.

Prior to 1973, the land in South Natomas and a major portion of the land in North Natomas (especially including the City portion) was designated on the General Plans for urban development. In 1973, pursuant to newly enacted state legislation, the City of Sacramento and the County of Sacramento both designated essentially all of the territory in North Natomas as agricultural. No territory was rezoned, rather the designation was merely changed on the General Plans. A few

parcels of land had been developed, and those parcels continued to be designated as urban. Although the territory in South Natomas continued to be designated for urban purposes, it was still not fully developed. In fact, a significant portion was still zoned agricultural and development maps had not been filed thereon.

In 1978, the District was ready to commence design of the Natomas Interceptor System. The District applied for a grant therefor but was required to prepare an EIR prior to receiving a grant offer. This was true even though the original EIS was probably broad enough to cover the Natomas Interceptor sewer service area. In September 1978, the Environmental Protection Agency adopted a new policy concerning the preservation of environmentally significant agricultural lands. At that time, approximately 1,400 acres of land in South Natomas were still zoned for agricultural purposes and were without filed development maps. The Natomas Interceptor sewer service area was planned to include essentially all of South Natomas and none of North Natomas with the exception of a very few parcels in the southeastern corner of North Natomas which were already developed or zoned for urban development. South Natomas constitutes a relatively small portion of the Natomas Interceptor sewer service area. The entire Natomas Interceptor sewer service area include a large amount of territory east of the Natomas East Main Drain Canal and outside of the North Natomas area. The roughly estimated construction cost of the entire Natomas Interceptor sewer system was approximately \$48 million. Of that amount, only approximately \$5 million was the estimated cost of the facilities designed to serve the South Natomas area.

The EIR was not scheduled for completion until about December 1978. Since South Natomas included 1,400 acres of agricultural land, and in view of EPA's newly enacted agricultural lands policy, EPA would not agree to the Natomas Interceptor system grant until such time as the District agreed to prohibit for a period of 20 years sewer connections within some 19,000 acres of the North Natomas area. That agreement was executed in March 1979, and a copy thereof is attached hereto for your review. That agreement was also incorporated into the final EIR and appears to have been in part the basis for a finding of no significant impact by EPA. Since the Natomas Interceptor system was not designed to incorporate flows from North Natomas, and since it was not anticipated at that time that North Natomas would develop in the near future, the District, with the acquiescence of the City and the County, agreed to the prohibition condition.

As you will note from the agreement, the condition provides for a remedy in the event that connections are allowed by the District. That remedy is that the federal or state government may demand repayment of the portion of grant funds used for the construction of facilities serving South Natomas. The estimated grant funded portion of the cost of those facilities is \$4.8 million which, with interest added, now amounts to some \$6.6 million. Consequently, if the District is to now allow a sewer connection within the prohibited area, the District may be compelled to repay to the federal and state governments approximately \$6.6 million.

ORDINANCES

As South Natomas developed in the early 1980s, considerable interest mounted for development in North Natomas. A number of developers made proposals to the City of Sacramento for development of the North Natomas territory within the City. The City commissioned a study to determine if and how North Natomas should develop. In 1983, an application for zoning to develop 153 unincorporated area acres within North Natomas was filed with the County.

In light of these developments, in December, 1983, the Director of Public Works acting as District Engineer recommended to the Board of Directors of the District that it seek a waiver of the EPA prohibition condition. On January 24, 1984, the Board of Directors adopted that recommendation. This request was made pursuant to the terms of the grant agreement allowing for periodic review of the propriety of the prohibition condition.

During the ensuing two years correspondence was exchanged between the District and the EPA concerning the requested waiver. However, the EPA had not acted on the request.

On January 14, 1986, the Director, acting as District Engineer, recommended (copy attached) to the Board of Directors of the District that the Board: (i) adopt a resolution renewing its request to the EPA for waiver of the prohibition condition; and (ii) approve a development agreement by which owners within North Natomas would pay a pro rata surcharge to defray the cost of the \$6.6 million repayment as properties develop. The latter recommendation was based upon the assumption that EPA would permit the \$6.6 million to be repaid on an installment basis as properties develop.

On January 14, 1986, the Board of Directors adopted the first recommendation. It deferred until February 11, action on the second recommendation. The EPA had expressed reluctance to permit an installment payment program.

On January 28, 1986, the Director, acting as District Engineer, recommended (copy attached) to the Board of Directors of the District that the Board: (i) provide for repayment of the \$6.6 million grant by the first property to develop; (ii) conceptually approve establishment of a surcharge upon all properties within North Natomas as they develop in order to reimburse the initial developer; and (iii) request the Board of Supervisors and Sacramento City Council to condition any zoning approval for the first property to develop in North Natomas by requiring repayment of the \$6.6 million grant.

On February 11, 1986, these recommendations were approved by the Board of Directors of the District.

During 1983, an application by the RJB Company for rezoning from agricultural to industrial had been made to the County on a 153 acre parcel of land in the unincorporated area within North Natomas. The application was heard by the Board of Supervisors in November, 1983, and has been continued from time-to-time to the present. One of the primary reasons for part of the delay has been the uncertainty of whether the EPA will waive the prohibition condition. At various times the developer proposed an agreement by which the developer would contract to repay the grant funds should demand be made by EPA in response to development approval. In each instance the Board of Supervisors rejected the proposal on the basis of a recommendation by this Office that the financial security for such an agreement was insufficient. On April 9, 1986, the Board of Supervisors approved industrial zoning for the project upon condition, among others, that the developer indemnify the District in a manner satisfactory to this Office for liability for the EPA grant fund repayment. The formal ordinance and contract to implement the zoning approval and conditions have not been adopted. Rather, the matter has been continued from time-to-time at the developer's request.

In May 1986, the City of Sacramento amended its General Plan to provide for urban development in the entire City portion of North Natomas. At or about that time, appropriate zoning and a special use permit were provided for a parcel of land within the prohibition area for the development by the Sacramento Sports Association of a sports stadium. A condition of the zoning is that the developer make arrangements satisfactory to the District with respect to potential violation of the EPA prohibition condition. Some time thereafter the City issued a foundation permit to the Sacramento Sports Association. That permit does not authorize the construction of the stadium, but does authorize the preliminary work leading thereto. At such time as a full

building permit is issued, it will be necessary that the developer provide for sewer service to the facility. On July 28, 1987, the District approved a reimbursement agreement (described below) pursuant to which the District will issue a connection permit and allow connection of the facility to the District's sewer system. This allowance will give rise to probable demand by the state and federal governments for repayment of the \$6.6 million grant funds.

The District is not a planning agency and has no powers to engage in land use regulation nor to permit or deny development. The powers of the District relate only to the providing of a utility service. The District was organized to provide a sewer utility service to the City, the County and several other utility districts for the reason that it could provide that service more efficiently and economically than could the other agencies. It is among the functions of the City and County to regulate land use and allow or disallow development. Only after the City or County has acted to provide for development through appropriate general plan designation and zoning is the District involved. If the District should refuse to provide the utility service, that service could legally be provided by the City or County itself or by a newly created agency.

In the Spring of 1986, informal exploratory discussions were initiated with this Office by legal counsel for the Sports Association. The purpose of the discussions was to identify how the Sports Association might repay the \$6.6 million EPA grant funds for the privilege of connecting the new North Natomas Stadium to the District's sewers. The discussions focused on a contract between the Sports Association and the District under which the Sports Association would pay the \$6.6 million to the District, and the District would agree to reimburse the Association on a pro rata basis as other North Natomas properties develop in the future. This Office objected to that form of agreement, because it would place the District at risk for breach of contract should it fail to establish a cost recovery mechanism after execution of the contract. On February 11, 1986, the Board of Directors of the District had already directed staff to develop a cost recovery mechanism for North Natomas which would be generally applicable. Other properties within North Natomas could actually commence development before construction of the Stadium commenced.

This Office developed and presented four alternative cost recovery or cost spreading mechanisms. These alternatives were presented to the Board of Directors on November 21, 1986, as set forth in the memorandum from County Counsel, a copy of which is attached hereto. On November 25, 1986, the Board set the matter

for public hearing on December 16, 1986, in order to provide notice to all of the property owners within the subject area. As of November 25, 1986, the ordinances were not yet drafted and were not before the Board for consideration.

At the public hearing on the cost spreading mechanisms on December 16, 1986, various persons addressed the Board. Following the public testimony, the Board closed the hearing and directed that an ordinance be drafted establishing a surcharge to the sewer connection fee. Such surcharge would be collected at such time as any of the parcels within the area in question are developed and connected to the District's sewer system.

The District is currently considering the adoption of the two proposed ordinances enclosed herewith. Those ordinances cover the territory shown in the annexed diagram. The ordinance marked in the upper right-hand corner "City Portion" pertains to the area shaded in yellow, and the ordinance marked in the upper right-hand corner "County Portion" pertains to the area shaded in gray. All of the property is in the North Natomas area and is coterminous with the property which is the subject of the EPA prohibition condition.

Both ordinances provide that upon issuance of a building permit, the property owner will pay to the District, in addition to all other connection and service charges otherwise payable by any other developer within the District, an additional surcharge of \$338.00 per residential unit (a commensurate surcharge is provided for industrial and commercial development based upon comparable flows). The ordinances apply only to the first 18,803 residential units within the area (this number of units would be reduced commensurately for each area of commercial or industrial development), and the ordinances terminate in March 1999, the date of expiration of the EPA prohibition condition.

If adopted, the ordinances would cover a territory of some 19,000 acres in the City and County which is comprised of properties owned by approximately 433 different property owners. Some of these property owners hold one or two acre parcels while others own several hundred acres. Only those property owners who elect to develop will be required to pay the sewer connection surcharge fee. Under the Ordinances, the District could elect to repay the entire \$6.6 million itself without surcharging theoretically the first developers. In such event, fees recovered from owners of developing properties through March, 1999 would be retained by the District as reimbursement. However, the reimbursement agreement requires the first developer to bear the entire initial costs of repayment of the grant; thus, the fees collected pursuant to the ordinance will be used to

reimburse the first developer pursuant to the terms of the reimbursement agreement. In either event, there is no guarantee that the ordinance would yield full reimbursement. If fewer than 18,803 units are built before March, 1999, the reimbursement would be deficient. If 18,803 units are constructed by March, 1999, the full \$6.6 million plus 6% interest would be reimbursed. The fee would not be applicable to more than 18,803 units.

The adoption of the ordinances in question will require five votes since this is a seven-member Board of Directors and Section 5474 of the Health and Safety Code requires a two-thirds vote of the members of the legislative body of the District. Consequently, if more than two Directors are disqualified, the District Board would be short of the requisite number of votes to enact any connection fee ordinance.

REIMBURSEMENT AGREEMENT

That portion of North Natomas within the City boundaries has already been approved for development by the City of Sacramento. Only the 153-acre RJB Company parcel outside the City limits has been approved for development by the County Board of Supervisors, and that approval is not final. It is quite likely that the District will issue connection permits to developers within North Natomas as those developers receive building permits from the City of Sacramento. Moreover, once developmental approval has been given by the County, it is likely that the District will issue connection permits to developers within the County portion of North Natomas.

Unless certain lawsuits attempting to halt the development of North Natomas are successful, it is evident that the area will develop in the very near future. Although the Sacramento Sports Association facility will not necessarily be the first facility to develop in North Natomas, it is quite likely that it will be the first such facility. Presently, it is anticipated that the first building permit will be issued by the City to the Sacramento Sports Association sometime in the summer of 1987.

The Board of Directors of the District has approved a reimbursement agreement with the Sacramento Sports Association which will require the developer to indemnify the District against any loss the District may suffer by reason of demand by the federal or state government for the aforesaid grant funds. The developer will be required to post security therefor, which security may be drawn by the District to make such repayment. The agreement provides that the District may, at its option, enact the ordinances described above thereby providing for reimbursement to the developer.

Once the reimbursement agreement has been executed and the security posted, it is expected that the District Engineer will approve the development plans, thereby permitting a sewer connection to the District's sewer facilities and giving rise to a probable demand for the grant fund repayment. However, it is yet possible that a connection may be approved and physically made for the above discussed 153 acre parcel in the unincorporated area before physical connection and actual use of the Sports Association property. In that case, that first physical connection and use may be the event which will trigger a repayment demand. Consequently the District will probably require, as a condition of approving any development plans for the 153 acre parcel, that the owners of the parcel enter into a similar reimbursement agreement with the District providing for posting of security before physical connection to the District's sewer facilities if repayment has not already been made on account of the Sports Association permit.

APPLICABILITY OF SECTION 84308

If Section 84308 of the Government Code is applicable to either enactment of the above-described ordinances or approval of any agreement by which the developer indemnifies the District against the \$6.6 million repayment, a variety of practical issues are presented. These issues relate in part to what the criteria for disqualification are; the degree of knowledge of individual elected officials of the factual foundation for the criteria; and, assuming disqualification of so many Directors that a passing vote is impossible, in what manner and to what extent disqualified Directors may be deemed entitled to vote.

The tenure of current Directors of the District is varied. One Director (Sandra Smoley) has been a member of the Board of Directors of the District and a County Supervisor continuously since the District's formation. One Director (Rod Carmody) has been a member of the Board of Directors of the District and a Folsom City Councilman continuously since January, 1978. Two Directors (Illa Collin and Toby Johnson) have been members of the Board of Directors and County Supervisors continuously since January, 1979. One Director (Jim Streng) has been a member of the Board of Directors and a County Supervisor continuously since July, 1986. One Director (Grantland Johnson) has been a member of the Board of Directors and a County Supervisor continuously since January 4, 1987, and served as a Sacramento City Councilman during the period January, 1983 through December, 1986. One Director (Ann Rudin) has been a member of the Board of Directors of the District continuously since January 27, 1987, and has been a member of the Sacramento City Council continuously since before 1978.

The tax assessment rolls of the County show that the 19,000 acres within the North Natomas Area are owned by 433 separate parties. Since business firms hold record title to some of the acreage, the actual number of persons with a financial interest in the land is far greater.

Written notice of the December 16, 1986 public hearing concerning alternative methods of assessing the EPA grant repayment costs was mailed to owners of all 19,000 acres within North Natomas. Eleven persons addressed the Board of Directors of the District during the December 16, 1986 hearing. Eight of those persons were owners of acreage within North Natomas. One of the eleven (an owner) had made a campaign contribution to Director Streng of \$250 or more within the twelve-month period preceding the December 16 hearing. No other speaker during the hearing contributed as much as \$250 to a particular Director during the twelve-month preceding period.

The following individuals and firms possess a financial interest in the North Natomas Sport Stadium Project or the land on which it will be situated:

The Sacramento Sports Association, a general partnership composed of:

JB Company, a sole proprietorship owned by Joseph Benvenuti;

B&B and Sons Enterprises, a corporation all of the shares of which are owned by Joseph Benvenuti and Nancy Benvenuti; and

C, C, M & L, a general partnership owned by Robert Cook, Steven Cippa, Frank McCormack and Lukenbill Enterprises, a general partnership owned by Gregg P. Lukenbill and Frank Lukenbill.

During the twelve-month period preceding December 16, 1986, Directors Collin, Streng, Smoley and Grantland Johnson received campaign contributions from the above persons which individually exceeded \$250. During the twelve-month period preceding December 16, 1986, Directors Carmody, Rudin and Toby Johnson, did not receive individual or cumulative campaign contributions from the above parties which equalled or were greater than \$250.

Richard Benvenuti is one of the owners of the RJB Company. RJB is the developer of the 153-acre parcel within North Natomas upon which the rezoning application is currently pending before the Board of Supervisors.

During the twelve-month period preceding December 16, 1986, Directors Rudin, Collin, Smoley and Grantland Johnson received campaign contributions from either Richard Benvenuti or RJB which individually and cumulatively exceeded \$250. During the same period, Directors Carmody, Streng, and Toby Johnson did not receive campaign contributions from either Richard Benvenuti or RJB which individually or collectively exceeded \$250.

All of the Directors have discussed on innumerable occasions the North Natomas development, the North Natomas Stadium proposal, and the EPA grant prohibition condition and associated monetary repayment. These discussions have transpired over a period of three years or more. They have occurred in public meetings, at social events, and in private conversations. The private conversations have been so numerous and with so many different persons that no individual Director is able to recall a particular conversation with any of the persons who have made campaign contributions. Nor is any Director able to state that a conversation about any of these topics has occurred with any of the contributors. In effect, should a charge be made that a particular Director discussed any of these topics with named campaign contributors, the Director could neither admit nor deny the charge, unless he or she had never met the person or a time, or date circumstance would negate the possibility of the conversation having occurred. The North Natomas Stadium interests have been represented in proceedings before the Sacramento City Council in connection with land use development applications. These interests have not appeared before the Board of Directors of the District in connection with the project discussed herein.

Directors Collin, Smoley and Toby Johnson have on innumerable occasions discussed the rezoning of the 153-acre parcel of North Natomas land pending before the Board of Supervisors. These discussions have also transpired over a period of more than three years, and have occurred in public meetings, socially and privately. These Directors similarly, however, are unable to recall any particular private conversation with any individual concerning the topic, and cannot state that such conversation has occurred with a financially interested campaign contributor. RJB and Richard Benvenuti have been represented in hearings before the Board of Supervisors in connection with the rezoning proceedings on the 153 acres. Neither of these interests have appeared nor been represented before the Board of Directors of the District in connection with the projects discussed herein.

VOTE PASSAGE ISSUES

As discussed above, five affirmative votes are required for the Board of Directors of the District to enact the surcharge ordinances which would provide for recovery of the \$6.6 million repayment throughout the North Natomas Area. Four affirmative votes are required to approve any contract providing for indemnification of the District. The policy posture of the District has been such that the Director of Public Works will not authorize a sewer connection for a North Natomas property which would trigger liability for the EPA grant repayment without express approval by the Board of Directors. Four votes would be required for such hookup approval.

This Office commonly advises elected officials who it represents to disqualify themselves from voting upon a particular matter on the basis of an appearance of conflict of interest, even if each and every technical requisite for existence of such a conflict is not established. Here, however, several individual directors, including Grantland Johnson, Jim Streng, Ann Rudin, Illa Collin and Sandra Smoley, desire to disqualify themselves from any decision concerning the matters discussed in this letter, in the absence of an opinion from the Fair Political Practices Commission sustaining the legality of their votes.

Such voluntary disqualifications would render the Board of Directors powerless to act. Reconstitution of a quorum of less than a full Board through some random process could potentially impact the outcome of particular votes. This Office believes such a process to be fundamentally inappropriate and illegal absent a legally technical disqualification of each of the Directors which necessitates reconstitution of a lack of a quorum.

This Office understands that the FPPC has concluded that when the number of elected officials disqualified in relation to a particular covered proceeding is so numerous that there would be insufficient remaining votes for passage of a measure, particular disqualified officials are to be permitted to vote only in such number as minimally necessary to pass the measure. For example, if five members of a seven-member board must pass a measure, and three are disqualified, only one disqualified member is entitled to vote. Identification of the disqualified official permitted to vote is to be made, according to our understanding, through some random selection process.

This Office registers its disagreement with that position for the following reasons.

The central purposes of conflict of interest laws are to promote honesty in government and instill public confidence in the integrity of the public decision making process. These objectives are generally thought to be achieved by denying officials who have received money under specified circumstances the right to vote. Such a denial suffers from the counterbalancing handicap that the constituency represented by the disqualified official is denied a voice with respect to a particular decision. However, the benefits derived from the disqualification are considered sufficient to outweigh the limited disenfranchisement of the electorate.

When so many officials are disqualified that too few remain to take action, the policies inherent in political reform become subordinate to the need for public action to be taken. The question is whether under such circumstances all disqualified officials are to be permitted to vote, or only a number sufficient to permit action to be taken. It is our view that when such a contingency occurs disqualification of any official achieves such limited political reform objectives, that such benefits are overshadowed by the disenfranchisement detriment.

Since at least one disqualified official must be entitled to vote, it is impossible to derive a pristine decision. It cannot be convincingly argued that a particular decision is any more or less pristine depending upon the number of disqualified officials who vote, if any do. Public confidence will not be materially impacted by the number of disqualified officials who vote, since at least one will. Yet, one or more voting constituencies are denied representation by the refusal to permit all disqualified officials from voting.

Perhaps the most disturbing feature of a rule which prohibits reconstitution of the entire governing body is the fact there must be some process for selecting the official who will be allowed to vote. The only rational process related to the purposes of political reform which might be chosen is one which selects the official whose vote is deemed to be the least contaminated. Obviously, such a selection process could not be practically implemented. The random process for selection, on the other hand, bears no rational relationship to objectives to be achieved, while subjecting voting constituencies to representation by "chance". For all these reasons, it is requested that the FPCC reconsider its prior ruling and adopt the common law view that all disqualified officials are permitted to vote when so many are disqualified that the governing body is

Fair Political Practices
Commission

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August 7, 1987

legally incapable of taking action.

Very truly yours,

L. B. ELAM
County Counsel



By

ROBERT L. PLEINES
Assistant County Counsel

RLP:bjh
Enclosures

cc: Members, Board of Directors
Clerk, Board of Directors
John McLean
Douglas M. Fraleigh

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