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Attachment 1



County of Santa Cruz

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January 24, 2000

Linda Wilshusen, Executive Director
Santa Cruz County Regional Transportation Commission
1523 Pacific Avenue,
Santa Cruz, CA 95060-3911



Re: Rail Lead Agency Options and Associated Liability

Dear Linda:

This is in response to your memorandum dated December 15, 1999, conveying the following questions for which the Commission has requested an opinion of this office:

Question No. 1

What is the difference in liability and risk to both lead agency assets and, if applicable, member agency assets if the lead agency for the acquisition is:

- A. A new Joint Powers Authority consisting of the County of Santa Cruz and the Cities of Capitola, Santa Cruz, and Watsonville;
- B. The SCCRTC as currently composed;
- C. A new JPA with a composition identical to the SCCRTC; or
- D. The County of other local jurisdiction.

Response:

The California Joint Powers Act contained in Government Code Sections 6500 et seq authorizes various public entities, including counties, cities, districts, and regional transportation commissions, to enter into joint powers agreements, and the joint powers agency is declared to be a public entity separate from the parties to the agreement for purposes of the Act (Gov. Code Section 6507). However, this limited separate status of a JPA does not necessarily insulate the public entities which created the JPA from liability

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and risk because of the provisions of Government Code Section 895.2 which state in relevant part the following:

“Whenever any public entities enter into an agreement, they are jointly and severally liable upon any liability which is imposed by any law other than this chapter upon any one of the entities or upon any entity created by the agreement for injury caused by a negligent or wrongful act or omission occurring in the performance of such agreement.” (Section 895.4 authorizes the contracting agencies to provide for contribution or indemnification by one or more of the agencies as to the other contracting agencies with regard to claims by third parties.)

The case of Ross v. Campbell Union School District (1977) 70 Cal. App. 3d 113 has stated in dicta that the wording of section 895 makes clear that a joint powers agreement under Chapter 5 (commencing with Section 6500) is but one of the many agreements covered by the joint and several liability provisions of Section 895.2. The Court did not distinguish between joint powers agreements which designate one of the contracting parties to be the administering agency from those joint powers agreements which establish a new joint powers authority (Government Code Section 6508).

Accordingly, the creation of a JPA does not provide any assurance that member agency assets will be insulated from third party claims. With or without the creation of a JPA, the interested public entities could by agreement specify the ultimate responsibility among themselves for third party claims relating to ownership and/or development of the Santa Cruz branch rail line. However, any such agreement would not appear to affect the right of third parties to collect legitimate claims from any agency member to the JPA agreement providing for the ownership/operation of the branch rail line. The agreement provisions would determine the extent to which any such member paying a third party claim could then be reimbursed in whole or in part by the JPA or by the other members to the agreement.

Insurance can provide substantial protection against third party claims, but may not be adequate to completely protect member agency assets due to the potential for catastrophic accidents which may exceed liability insurance limits or to the extent of any exposure for inverse condemnation or other types of claims for which insurance cannot be obtained. (Additional review and research would be required to appraise the extent of exposure for inverse condemnation based on the proposed use of the railroad right-of-way.) It was because of considerations such as these that Sonoma County Counsel has previously recommended that Sonoma County seek special legislation establishing a separate rail authority by statute before participating in a rail project.

Question No. 2

“Is there a way to protect an existing agency, e.g. the SCCRTC or the County, from undue liability so that its risk would either be the same or less than that of a newly established agency?”

Response:

Insurance combined with an agreement allocating any uninsured risk among the participating public entities would appear to provide similar protection as can be obtained through a newly established agency. (See discussion above.) However, an advantage of a JPA is that its authority can be as broad as that of any one agency member of the agreement (Government Code Section 6509; Cooper v. Mountains Recreation & Conservation Authority [1998] 61 Cal. App. 4th 1115). The independent authority of the SCCRTC as a regional transportation agency would not appear to be as extensive as that of cities and the County (cf. Government Code Sections 67940 and 29535). Accordingly, the JPA could resolve any uncertainty regarding the authority of the SCCRTC with regard to acquisition or operation of the rail line as opposed to planning activities.

Question No. 3.

“In the case of a new JPA, would any of the following affect the assignment of potential liability and risk:

- A. Nature of member representation (i.e. number of representatives per member agency);
- B. Staffing arrangement (i.e. internal agency staff vs. contracted staff provided by the SCCRTC, County, or cities); or
- C. Cost sharing arrangement among member agencies?”

Response:

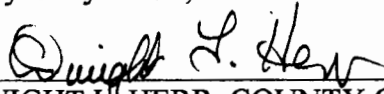
If a new JPA is created, it is advisable for the agreement to specify the obligation of the JPA to defend and indemnify the member agencies and any contribution or indemnification obligation of the member agencies among themselves. As discussed above, any such agreement would not affect any right of third parties to proceed against the member agencies on a joint and several liability basis. The nature of member representation, staffing arrangements, or cost sharing arrangements would not by themselves have any effect on liability for third party claims.

You have also advised that the Commission is also interested in any legal issues associated with a JPA provision allowing the addition of members in the future. Please

be advised that it is not uncommon for a joint powers agreement to provide for the addition of future members. The terms and conditions for such an addition can be determined in advance in the joint powers agreement or subject to negotiation at the time of consideration of a new member. As indicated, it is recommended that the allocation of liability and risk be one of the provisions addressed in the agreement with regard to all members.

Please advise if you have further questions.

Very Truly Yours,



DWIGHT L. HERR, COUNTY COUNSEL