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March 17, 1978

Memo To: District Board of Directors

From: Legal Counsel

Re: 1) Board Member Residency, 2) Board Alternates,
3) Appointment and Removal and 4) Board Compensation

As you will recall, at the last Board of Directors meeting I was asked to look into and present my legal opinion as to the provisions of the Health and Safety Code relating to the above-mentioned topics. My interpretations of these subjects and the code sections relating to same basically involved one or more of three approaches or thought processes: common sense, literal interpretation of the statutory language involved to determine its apparent meaning; attempted discovery of the intent of the legislature in using certain language; and comparison to other legislation. Legislative intent is seldom very apparent, so it was not of much assistance; although I did have to resort to certain legal presumptions of legislative intent. As a practical counter-check of my thoughts on these matters, I confirmed my opinion with three other local city attorneys.

1. Residency of Board Members. Health and Safety Code §4179, relating to the composition and appointment of members to the governing board of this district, concludes with the requirement that: "The person appointed shall reside within the area he represents." I can find nothing in this language or any other provisions of the code to conclude other than that a board member appointed by a city council must reside within the city he represents, and a member appointed by the board of supervisors must reside within the county unincorporated area. If such is the case, there is no alternative to the effect of and compliance with such state law directive, for in statutory interpretations the phrase "shall" is mandatory (Govt. Code §14; Evid.Code §11).

In dealing with the above statutory language, we must look to the code for the legal definition of the words "residence" or "domicile," which have the same meaning:

"The domicile of a person is that place in which his habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he is absent, the person has the intention of returning. At a given time, a person may only have one domicile." (Evid.Code §200).

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The requirement of residence for one who is a member of a governing body is not unique in the law, and actually has a common sense basis in our representational form of government. At the local level, a person is not eligible to be a city councilman unless he is a qualified elector of the city (Govt. Code §36502), and one may not be an elector of a city unless he is a legal resident thereof (Elec.Code §193). Government Code §1770 also provides that a city office automatically becomes vacant when an incumbent officeholder ceases to be an inhabitant of the city for which he was chosen or appointed to represent. Likewise, Health and Safety Code §4179.2 provides that a district board member shall only hold office until "termination of residence within the area he represents."

A distinction must be made in such cases between an "officer" and an "employee" of a city or district, for Govt. Code §50083 provides that "No local agency or district shall require that its employees be residents of such local agency or district." And in 1974 §10.5 of Article XI of the California Constitution was added to prohibit a city, county or public district from requiring its employees to be residents of such city, county or district. However, it has been held in court cases and in an opinion of the Attorney General's office that these restrictions do not apply to elected officers (59 Op.Atty.Gen. 136). The rationale for elected officers surely seems to apply to the appointed officers of a district who comprise the governing body of the district, for like elected officials they "are not generally considered to be employees and in fact do not meet the traditional tests in determining if an employment relationship exists. That is, [they] do not have an employer who has control over daily activities, authority to hire, fire and modify terms of employment." (Id. at p. 140).

Based upon the foregoing, I can only conclude that the phrase "shall reside in the area he represents" is clear and unambiguous on its face, means exactly what it says, and cannot be interpreted otherwise. I believe that the import of this language can only be avoided by requesting the state legislature to amend §4179 of the Health and Safety Code.

2. Alternate Board Members. Health and Safety Code §§4179 et seq. provide for the appointment of board "members," but do not mention anything about alternate board members. Such an absence is not unique in the law, for the various Government Code sections relating to the election of city councilmen or county

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is the propriety of board members who are full-time employees of the entity who appointed them retaining the monthly per diem payment. My conclusion on this point is simply: they may if they want to, and if it does not violate some rule of the appointing entity, but they need not if they do not want to. Rather than go into any convoluted rationale of this astounding, yes-and-no answer, let me simply say it is based upon a review of a comprehensive opinion from the Attorney General's office and the several cases cited therein (50 Op. Atty.Gen. 87). The general rules stated there and herein applicable are: 1) There is no indication in law that the compensation of public employees is intended to be exclusive, in the absence of a different local rule; 2) It was obviously intended by the legislature to provide compensation for board members, and in the absence of any prohibition in this specific case, none will be presumed (see "legislative intent rule" mentioned under item 2 hereinabove); 3) The legislature may provide for additional compensation or expenses to officers for special duties or for holding additional offices; 4) Services as directors of a special district are not performed for the city or county, but for the district, a separate legal entity; 5) Thus, the duties performed were not part of their usual office; and 6) They would be paid not as city or county officers, but only as a district officer, and only for meetings actually attended.

If any of you have any questions regarding any of the above, please do not hesitate to contact me at your convenience.

Robert R. Wellington
District Counsel

RRW/mk

supervisors and the appointment of city and county planning commissioners do not mention or provide for alternates either. I can find nothing in my research to find that anyone has even considered the possibility of alternates in these situations.

By contrast, in connection with other enabling legislation for public entities the state legislature has specifically provided for the designation of alternates to act on a governing board in the place of the principally appointed members (e.g., Health & Safety Code §4730.1). It is a basic rule of statutory construction and interpretation that where language or a provision which could have easily been included in the law is in fact omitted from that law, there is a presumption that the legislature in its wisdom actually intended such omission. Obviously this "apparent intent of the legislature" rule is often a fiction, but I feel the rule should be applied in this case in the absence of other direction from the legislature. Again, this is a matter which, like the above-mentioned topic, could be resolved by amendment of the pertinent code sections.

3. Council Appointment and Removal. Health and Safety Code §4179 provides that the various members of the district board of directors shall be appointed by the board of supervisors and the city council of entities within the district. Seeing no real question about the appointment powers of these bodies, I will turn to what powers of removal they have.

"Every office, the term of which is not fixed by law, is held at the pleasure of the appointing power." (Constitution Art. XX §16; Government Code §1301; emphasis added). By contrast, "Appointments to continue for a fixed term of years cannot be terminated except for cause, in which case the public officer is entitled to notice and opportunity to be heard." (40 Cal.Jur.2d, Public Officers §98, citing various cases). Health and Safety Code §4179.2 provides that the term of office of the board members of this district is fixed at four (4) years. Therefore, a member of this board may be removed by the governing body which appointed him only on a showing of some misconduct on the part of said member or a violation of some law (Good v. San Diego, 5 Cal.App. 265), although at least one case has permitted removal by the appointing board when the officer violated one of its rules (Brown v. Dwyer, 26 Cal.App. 369).

4. Board Member Compensation. Here again, the applicable law clearly and properly allows reimbursement of expenses and per diem compensation of district board members (§4179.3, amended in 1975), so I believe the only issue here, as I understand it,

December 4, 2018

Memo to: Tim Flanagan, MRWMD General Manager

From: Rob Wellington, Legal Counsel

Re: **Question as to Alternates to the Board of Directors of the Monterey Regional Waste Management District (MRWMD)**

You have indicated that you have had an inquiry about whether there could be persons appointed as alternates to the Board of Directors of the District, in addition to the regular members appointed to the Board. My opinion on this matter is set forth below.

The legislative framework under which the MRWMD is organized provides only for the appointment of "members" to the board of directors (Public Resources Code section 49120). No mention is made about the appointment of alternates. Such an absence is not unique in the laws relating to various government entities, for there are several that provide for the appointment of board members but do not mention or provide for the appointment of alternates (e.g., Mosquito Abatement Districts, the Regional Water Quality Control Board, the Air Resources Board). I cannot find in my research that there was even any consideration of the possibility of alternate board members in those situations, or in connection with the Public Resources code section mentioned above.

By contrast, in connection with the enabling legislation for other public entities the state legislature has specifically provided for the designation and appointment of "alternates" to act on a governing board in the place of the principally appointed members (e.g., County Sanitation Districts). It is a basic rule of statutory construction and interpretation that where language or a provision which could have easily been included in the law is in fact omitted from that law, there is a presumption that the legislature in its wisdom actually intended such omission. Additionally, the legislature is presumed to act intentionally and purposely when it includes language in one statute but omits it in another.

Based upon the foregoing, I can only conclude that the Public Resources Code, in providing solely for the appointment of "members" to a board of directors, is

clear and unambiguous on its face, means exactly what it says, and cannot be interpreted otherwise to provide for the appointment of "alternates" to the board. I believe the import of this language can only be avoided by requesting the state legislature to amend section 49120 of the Public Resources Code. As you know, this District has had success in the past, with good arguments and logic to support it, to amend its enabling legislation to overcome an unreasonable limit on board member compensation and the limitations on the name for the District.

The Authority. A question related to the above has to do with the board members of the District's companion joint powers agency, the Monterey Regional Waste Management Authority, created in 1993 by the member entities of the District. The board of directors of the Authority is set up as a mirror image of the District, with its members to serve concurrent terms as those served on the District board. The Authority usually only meets once per year, for a few minutes, except for those occasional instances when it has been active to institute revenue bond funding to support the District's operations. Any change of the joint powers agreement for the Authority to provide for the appointment of alternate board members could be accomplished by having the legislative bodies of all of its member entities approve an amendment to the agreement.

If you have any questions regarding any of the above, please do not hesitate to contact me at your convenience.

- R.R.W.