



MEETING DATE: 8/16/04
AGENDA ITEM: 3b

COUNCIL AGENDA REPORT

DATE: August 12, 2004
TO: MAYOR AND TOWN COUNCIL
FROM: ORRY P. KORB, TOWN ATTORNEY *OK*
SUBJECT: AUTHORIZE REQUEST FOR AMICUS PARTICIPATION IN SUPPORT OF PETITION FOR REVIEW IN *ZACK, ET AL. v. MARIN EMERGENCY RADIO AUTHORITY*, CASE NO. S125094, AT NO COST TO THE TOWN

RECOMMENDATION:

Approve preparation of letter of support for review by the California Supreme Court of the decision in *Zack et al. v. Marin Emergency Radio Authority*, case number S125094, at no cost to the Town.

BACKGROUND:

A number of Marin County agencies came together in 1998 to create the Marin Emergency Radio Authority ("MERA"), a joint powers agency ("JPA") formed for the purpose of upgrading Marin County's emergency communication system. MERA then applied to the Town of Tiburon for permit allowing the construction of a radio facility, including a 72 foot tall tower, microwave dishes and related accessory structures. The application was denied based on Tiburon's land use regulations that prohibit such facilities in residential neighborhoods unless there are no feasible alternatives.

Rather than pursue alternatives, MERA instead claimed immunity from local land use authority based on the theory that a JPA is entitled to land use immunity that is otherwise applicable to any of its member agencies, in this case the County of Marin. This theory was rejected by the trial court but accepted by the California Court of Appeal. Tiburon has petitioned the California Supreme Court to exercise its discretion to review the Court of Appeal decision.

DISCUSSION:

The issue presented by Tiburon's petition is whether section 6509 of the Government Code was intended to extend local land use immunity to JPAs, where other land use immunity statutes have

PREPARED BY: ORRY P. KORB, TOWN ATTORNEY

OPK/wp [N:\ATY\Tiburon.TCR.wpd]

Reviewed by: *[Signature]* Town Manager *PSJ* Assistant Town Manager _____ Clerk
Finance _____ Community Development

Rev: 8/12/04 12:06 pm
Reformatted: 7/19/99

PAGE 2

MAYOR AND TOWN COUNCIL

SUBJECT: AUTHORIZE REQUEST FOR AMICUS PARTICIPATION IN SUPPORT OF
PETITION FOR REVIEW IN *ZACK, ET AL. v. MARIN EMERGENCY RADIO
AUTHORITY*, CASE NO. S125094, AT NO COST TO THE TOWN

August 11, 2004

not done so. Tiburon's petition thus emphasizes the statewide proliferation of joint powers agencies, currently estimated at 1,894, according to the records of the Secretary of State, and argues that the potential for conflicts with local land use regulations is substantial and growing.

A problem posed by Tiburon's position is that many cities participate in and benefit from the statutory powers conferred on JPAs. This conflict has kept the Legal Advocacy Committee of the League of California Cities from supporting Tiburon's petition. Nevertheless, in light of the emphasis placed on land use regulation, the Town of Los Gatos has generally asserted both in litigation and in the legislative process that local land use control must be protected. Tiburon's position in this litigation is consistent with protecting local land use control.

Attachments: 1. E-mail message from Mary Ellen Wetlesen dated August 1, 2004.
2. Proposed form of letter to the Supreme Court supporting Petition for Review.

Distribution: Ann Danforth, Tiburon Town Attorney, 1505 Tiburon Boulevard, Tiburon, CA
94920

From: Mary Ellen Wetlesen <wetlesen@pacbell.net>
To: <sglickman@losgatosca.gov>, <mwasserman@losgatosca.gov>, <sdecker@losgatosca.gov>, <dmcnutt@losgatosca.gov>, <jpirzynski@losgatosca.gov>, <manager@losgatosca.gov>, <attorney@town.los-gatos.ca.us>
Date: Sun, Aug 1, 2004 9:43 PM
Subject: Important Los Gatos Land Use Issue - Tiburon Needs Your Help

Dear Mayor Glickman, Vice-Mayor Wasserman, Council Members: Decker, McNutt, Pirzynski, Town Manager Figone, and Town Attorney Kork:

The Town of Tiburon needs the help of Los Gatos in the form of an amicus letter to help get the attention of the Supreme Court to rule on a very important land use issue, that I believe could affect Los Gatos and all California cities and towns. We need the Court to clarify whether a Joint Power Authority (JPA) is immune from local land use regulations. Tiburon takes its land use authority very seriously, and I know that Los Gatos does, too. Other towns/cities have sent letters (e.g., Atherton, Woodside and Los Altos Hills), but we believe that Los Gatos' voice would be very helpful.

Time is of the essence because the Supreme Court is due to make its decision at any time. Due to the time constraint, Atherton convened a special council meeting last week to proceed with the amicus letter because they felt that the ambiguous ruling on the power of a JPA could conceivably allow a "real estate consortium" to skirt land use regulations with adverse affects within its jurisdiction. I am sure that Los Gatos feels the same way. Woodside and Los Altos Hills provided letters with quick turnaround without convening a council meeting.

I include a copy of the MEMO that Tiburon Town Attorney Ann Danforth emailed to all city/town attorneys and a copy of the pro forma amicus letter, so that it would be minimal effort for Town Attorney Orry Kork to craft a letter to address Los Gatos' concerns. Even if you were to merely print the form letter on your letterhead and send it to the Court, it would help.

I also include a copy of Tiburon's Petition to the Supreme Court. If you skim this document you will understand the importance that this case has to the future land use control of all California towns/cities and to the future of all JPAs. At the end of the day, a town's/city's land use control is extremely important...don't you agree?

I always thought that government agencies should be sterling examples of open process and public participation...but the JPA in question has done everything behind closed doors, with NO public participation and has been a real bully. What happened to Tiburon could happen to Los Gatos not only in the form of a transmission facilities but in the form of a dog kennel, a half-way house, low-income housing...any form of JPA.

Tiburon's JPA, called Marin Emergency Radio Authority (MERA), believes that it can legally construct an industrial grade communications facility right in the middle of a residential neighborhood without any permits from the Town of Tiburon. The facility includes a 72 foot transmission tower, large microwave dishes, 500 gallon propane tank, generator, out buildings, etc. It would be located only 60 feet from

children's bedrooms, 20 feet from a child's play area and immediately adjacent to the public hiking trail. (MERA readily admits that radio frequency radiation would be transmitted through the children's bedrooms 24 hours a day/7 days a week)

It began with MERA's "stealth EIR" (Environmental Impact Report), whereby no one in the 500' noticing circle was notified. The JPA felt that referring to a parcel number in the bowels of a county newspaper constituted "proper notice". There were absolutely no comments from Tiburon because we were purposely kept in the dark.

It continued when the JPA came to the Town of Tiburon for a conditional use permit (CUP) in June 2000 ONLY after the time period in which to legally contest the EIR had expired.

It culminated when Tiburon refused to grant a permit because it was an inappropriate site, and the JPA proceeded to take the land via eminent domain in less than 24 hours (again with no public notice) and brought earth moving equipment to the site to begin excavation. Tiburon police red-tagged the contractor claiming that it didn't matter who owned the land, what mattered is that they did not have a permit to build. The JPA then sued the Town of Tiburon, claiming that they did not need a permit to build within its jurisdiction!!!

Tiburon prevailed in the hearing, but the JPA won in appeal. With two courts having conflicting views, it is important that the Supreme Court rule on this very important issue.

I hope that Tiburon can count on Los Gatos' support and assistance in this commitment to local land use control for all our futures.

I plan to follow up this email with a phone call in the next day or so. If you have any questions, and would like to contact me before then, please do not hesitate to email me or call me (415) 435-1254. Or please call Tiburon Town Attorney Ann Danforth at (415) 435-7373.

Sincerely yours,
Mary Ellen Wetlesen

June , 2004

Honorable Ronald M. George, Chief Justice
Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

Re: *Zack et al. v. Marin Emergency Radio Authority*
Case No. S125094

Dear Honorable Justices:

The [City][Town] of -----, California urges the Court to grant review in the referenced case. There are many thousands of joint powers agencies around the State, all established for important purposes. Yet a serious question has now emerged about the proper balance between those important joint purposes and the traditional power of cities and towns to control land use within their borders. The recent decision by the First District Court of Appeal in this case has exposed a worrisome uncertainty in published case law about the proper balance between those interests. We urge this Court to grant review and settle this important point of law.

The great majority of cities and towns in California either belong to an existing joint powers arrangement ("JPA") or will be considering one or more new ones in the near future. That is because the JPA format can be highly valuable in addressing regional needs efficiently and cost effectively. But the First District's recent decision exposes a serious problem with the JPA format — potentially serious enough to make cities and towns hesitate before joining new JPAs and insist on changes in existing ones. Unless and until this Court resolves this problem authoritatively, it will have the unfortunate effect of making the JPA format less desirable and attainable than it ought to be.

The situation in Tiburon is hardly unique. Many JPAs desire to construct new facilities or modify existing ones to pursue their various purposes. Until now, it was widely assumed that any and all such projects are subject to the land use regulations of the locality where the project is situated. Indeed, this Court suggested in *Rider v. City of San Diego* (1998) 18 Cal.4th 1035 that JPAs' ability to streamline their operations by designating a lead agency was limited to procedural requirements, not substantive

requirements like compliance with local land use regulations. Nevertheless, the First District has held that virtually any JPA in California has the power to ignore and override local land use regulations. All it need do, according to the First District's reasoning, is designate a lead agency that has land use immunity for its own projects, and that immunity automatically passes to the JPA.

Not every city and town may agree on the proper or most desirable resolution of this issue. But no city or town can make intelligent decisions about existing or new JPAs while the law remains uncertain on such a fundamental issue as the applicability of local land use regulations to JPAs.

We therefore urge the Court to grant review and resolve this question.

Respectfully submitted,

Proof of service attached

CERTIFICATE OF SERVICE BY MAIL

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above entitled cause. I caused to be served --

LETTER TO SUPREME COURT JUSTICES PURSUANT TO RULE OF COURT 28(g)

by enclosing true copies of said document in envelopes with proper postage prepaid and addressed to --

Ann R. Danforth, Esq.
Town Attorney of Tiburon
1505 Tiburon Boulevard
Tiburon, CA 94920

Attorney for Respondent
Town of Tiburon

Elliot L. Bien, Esq.
Bien & Summers LLP
23 Palomino Road
Novato, CA 94947

Attorneys for Respondents
Howard Zack, et al.

James M. Wagstaffe, Esq.
Kerr & Wagstaffe LLP
100 Spear Street, Suite 1800
San Francisco, CA 94105-1528

Attorneys for Appellant,
Marin Emergency Radio Authority

and placing same for delivery by the United States Postal Service in my usual manner on the date stated below.

The foregoing is true and correct. Executed under penalty of perjury at ---, California, on June ---, 2004
