

CITY AND COUNTY OF SAN FRANCISCO

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TO: Harlan Kelly, Jr.  
General Manager, Public Utilities Commission

FROM: John Roddy  
Deputy City Attorney

DATE: March 20, 2014

RE: Legal History and Status of the Southeast Community Facility and Commission

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The Southeast Community Facility, which is located at 1800 Oakdale Avenue and 1150 Phelps Avenue in the Bayview Hunters Point neighborhood and adjacent to the Southeast Wastewater Treatment Plant, consists of approximately 39,000 rentable square feet of classroom and office space and approximately 125,000 square feet of greenhouse space. These facilities were constructed for the purpose of mitigating the adverse environmental and social impacts of constructing the Southeast Water Pollution Control Plant expansion projects during the 1970's and 1980's.

The Southeast Community Facility is an asset owned by the City, and operated and maintained by the Public Utilities Commission for the benefit of the Bayview Hunters Point community. The Southeast Community Facility Commission provides guidance and advice to the Public Utilities Commission regarding operations of the Facility, and serves as an important public forum for community issues and concerns.

### Origins of the Southeast Community Facility

#### Mitigation Development

Following the passage of the Clean Water Act in 1972, federal, state and local concerns about upgrading the City's antiquated sewage system increased. The City's Department of Public Works, which was responsible for managing the City's sewer system, began developing a construction project to expand the Southeast Water Pollution Control Plant to provide secondary wastewater treatment. During preparation of an environmental impact report for the proposed expansion, neighbors and residents extensively opposed locating an expanded plant adjacent to the original plant site. In order to mitigate and minimize adverse social and environmental effects of the plant expansion, the City proposed the construction of concrete covers over the secondary clarifiers and the location of recreational fields and facilities on top of the covers.

On July 21, 1975, the San Francisco Board of Supervisors adopted Resolution No. 551-75, certifying that it had reviewed and considered the information contained in the environmental impact report for the Southeast Plant expansion. The resolution established the City's determination that the expanded and upgraded treatment plant be located adjacent to the original plant and further provided that the plant should be developed in a manner to provide approximately eight acres of recreation and park-type facilities, and that the neighboring community should be given the opportunity to offer input into the design of these facilities.

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**State and Federal Approval of Project and Funding**

The City requested sewer construction grant funding for the recreational facilities from the State Water Resources Control Board (State Board), which was responsible for managing EPA's grant construction program. The State Board staff, however, determined that the proposed recreational facilities were not eligible for grant funding. In response, the City appealed the staff determination to the full State Board.

In Order No. WQG 76-6, the State Board reversed the staff ruling, and determined that the mitigation recreational facilities were eligible for grant funding. In making this decision, the State Board partially relied on EPA's support for these projects. By a letter dated April 6, 1976, the EPA's deputy director for its construction grants program, advised the State Board that:

"We are writing to comment on the eligibility for Federal funding under PL 92-500 of the playfield proposed as part of the Southeast Treatment Plant expansion for San Francisco. This letter is intended to provide input to the SWRCB hearing on this subject scheduled for April 8 and 16. EPA is now considering a staff proposal that EPA sign a Negative Declaration on the proposed Southeast Plant expansion. This Negative Declaration would be a statement under the National Environmental Policy Act of 1969 that the unmitigated impacts of the proposed project are either not significant or have been adequately evaluated in our 1974 Environmental Impact Statement on the San Francisco Wastewater Master Plan.

In light of the great public controversy surrounding the proposed Southeast Plant expansion, we believe that extensive efforts must be made to mitigate the impacts of this project. The rationale for a Negative Declaration would rest in part on the understanding that recreational facilities will be provided to mitigate impacts by ~~placing a playfield on top of the secondary clarifiers. Consequently, we concur~~ with the stated intent of the State Board to require the construction of such facilities."

Based partially on EPA's concerns, the State Board determined that the recreational facilities were eligible for grant funding, based on the following findings:

1. There was an extraordinary scarcity of land in the area involved sufficient to support the plant expansion necessary for construction and vital for the protection of water quality in the San Francisco area.
2. The expanded plant would be located in an established residential area and the circumstances were such that some latitude in the allowance of otherwise eligible project costs would be appropriate.
3. The EIR process had identified substantial social impacts associated with the project that should be mitigated to the extent reasonably possible.
4. The construction of certain recreational facilities proposed by the petitioner was an appropriate means of mitigation, with the reasonableness thereof demonstrated by the fact that the Division of Water Quality had determined that recreational facilities are an "essential" element of the project and that any grant would be conditioned upon construction of such facilities.

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5. EPA had taken the position that the recreational facilities were, under the particular circumstances of this case, eligible for federal grant funding and had recommended that "extensive efforts must be made to mitigate the impacts of this project."

6. The project proposed, even with additional costs allowed for construction of recreational facilities would remain the most cost-effective project within the range of permissible alternatives.

**Modifications to Approved Mitigation**

In the fall of 1976 and subsequent to the adoption of Order No. WQG 76-6, the City staff determined that the projected cost of supporting structures for the recreational facilities had more than doubled and that proper maintenance and surveillance of the recreational area would be impossible because of the elevation of the facilities. Furthermore, the Bayview Hunters Point community did not support the proposed recreational facilities. After considerable communication between the City, community members and State Board staff, the City was allowed to further study impacts of the Southeast Plant expansion project, and to select more appropriate mitigation measures, subject to State Board approval.

In May 1979, the City prepared a final facilities plan that identified mitigation measures consisting of a commercial greenhouse and a skills-training center located on a parcel immediately south of the treatment plant. In late 1980, the City sought State Board approval of modifications to Order No. WQG 76-6 that proposed replacement of the recreational facilities with the greenhouse/skills training center proposal. By adopting Order No. WQG 81-1 on January 22, 1981, the State Board approved the use of state and federal grant funds for construction of this mitigation project, and determined that:

"The Bayview-Hunter's Point Community is already suffering the cumulative effects of a series of governmental decisions to locate unwelcome public facilities, such as freeways and the existing Southeast Plant, in its neighborhood. These unwanted facilities tend to generate a lack of pride in the community and to decrease the desirability of residence in the area. The commercial greenhouse and skills-training center should reduce these impacts. The support of the Bayview-Hunter's Point citizens demonstrates their belief that these facilities are necessary and that they will satisfactorily mitigate the adverse social and economic impacts of the project.

\* \* \*

While studies show that the new facilities will be self-supporting, we and the residents of the Bayview-Hunter's Point Community need some guarantee that the City will assure continued operation and maintenance of the greenhouse and skills-training center. A provision for the costs of operating and maintaining the facilities which exceed the amount actually generated by the facilities themselves should, therefore, be included in the City's revenue program. Revenue should be generated by the City to fund these costs, in the same manner that revenues are generated for the other administrative and operational costs of the City's wastewater treatment system."

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Shortly after the State Board issued Order No. WQG 81-1, EPA changed its policies on sewer construction grant awards, and rescinded several prior eligibility determinations, including the greenhouse/skills training center funding. In late 1981, the City succeeded in having Congress amend the Clean Water Act to require the EPA administrator to issue a grant for the greenhouse/skills training center.<sup>1</sup> Approximately \$13.5 million of the approximately \$20 million needed to construct the facilities was provided through state and federal sewer construction grants.

Once funding was secured, the Department of Public Works initiated the process for design and construction of the facilities. Construction was completed in 1986, and operations began in 1987. Because the City's Department of Public Works had jurisdiction over the City's sewer system and the Southeast Community Facility served as mitigation of sewage treatment plant expansion, that department assumed responsibility for maintenance of the mitigation facilities. Efforts to obtain tenants commenced under the management of the City's Department of Real Estate.

**Establishment of the Southeast Community Facility Commission**

During development and construction of the facilities, City staff and community members discussed numerous options for assuring community involvement in the management of the Southeast Community Facility. In 1987, City staff proposed and the Board of Supervisors adopted legislation to create the Southeast Community Facility Commission. Since its inception, the Commission has operated as a forum for consideration of community interests and concerns.

**Commission Purposes**

~~Chapter 54 of the San Francisco Administrative Code established the Commission for the purpose of fostering:~~

- Full employment of residents of chronically economically depressed areas of the City;
- Development of marketable job skills for untrained and undertrained City residents;
- Creation and expansion of day and evening education programs;
- Creation and expansion of day care services at a low and reasonable cost to parents;
- Expansion of opportunities for special community services for senior citizens; and
- The overall improvement of the general economic prosperity, health, safety and welfare of residents of chronically economically depressed areas of the City.

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<sup>1</sup> 33 U.S.C. 1281(m) (1): Notwithstanding any other provisions of this title, the Administrator is authorized to make a grant from any funds otherwise allotted to the State of California under section 205 of this Act to the project (and in the amount) specified in Order WQG 81-1 of the California State Water Resources Control Board.

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**Commission Duties**

Section 54.3 of Chapter 54 of the Administrative Code authorizes the Southeast Community Facility Commission to:

- (a) Provide guidance necessary for the establishment, retention and enhancement of business activities of the greenhouse, educational and job skills centers, child care and senior activities centers, and any other appropriate activities at the Southeast Community Facility;
- (b) Provide guidance to ensure that operation of the facility enhances opportunities first for the benefit of the residents of the Bayview-Hunters Point community and thereafter for the benefit of all other residents of the City and County of San Francisco to engage in employment training and educational activities;
- (c) Review and provide guidance on budget matters necessarily affecting the development and improvement of operations of the greenhouse, educational and job skills centers, child care and senior activities centers, and any other appropriate activities at the Southeast Community Facility;
- (d) Review and provide guidance regarding proposed lessees and agreements with qualified private, community, public assistance and horticultural organizations;
- (e) Provide policy guidance necessary to ensure compliance with all relevant municipal, State and federal laws and regulations, including, but not limited to, construction grant agreements, regulations and orders;
- (f) Review and provide guidance on a regular basis on budgetary matters related to the operation and maintenance expenses at the Southeast Community Facility.

Section 54.4 authorizes the Commission to use rent revenues in excess of operational costs ("surplus funds"), subject to the budgetary and fiscal requirements of the Charter, for specified purposes.<sup>2</sup>

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<sup>2</sup> SEC. 54.4. SURPLUS FUNDS.

- (a) In accordance with State and federal grant agreements, regulations and orders, all proceeds from the leasing of the Southeast Community Facility shall be used to defray City and County costs of operating and administering the facilities.
- (b) Proceeds from the leasing of the facilities that exceed the costs of operating and administering the facilities, as calculated at the end of the fiscal year, shall be known as "surplus funds."
- (c) Subject to the budgetary and fiscal requirements of the Charter, the Commission may allocate surplus funds accrued during the prior fiscal year for certain uses related to the operations and activities of the Southeast Community Facility.
- (d) Surplus funds may be allocated for the following purposes:

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**Commission Structure**

The Commission consists of seven members appointed by and serving at the pleasure of the Mayor; the Commission members must reside or work in the Bayview-Hunters Point community, if possible. The Commission is authorized to appoint an Executive Director, who serves at the pleasure of the Commission and is not subject to the civil service provisions of the Charter. Based on the provisions of Chapter 54, the Southeast Community Facility Commission provides guidance regarding the management and operations of the facilities; its role is essentially advisory.

**City Department Jurisdiction Over the Southeast Community Facility**

The legal ownership of the Southeast Community Facility, as with any City assets, lies with the City, and the legal responsibility for maintaining and operating the facilities lies with the City department assigned jurisdiction over such functions by the City Charter. Until 1996, jurisdiction over the City's sewer system, and thus the Southeast Community Facility, was exercised by the City's Department of Public Works. Upon transfer of jurisdiction over the sewer system from that department to the City's Public Utilities Commission, maintaining and operating the Facility became the legal responsibility of the City's Public Utilities Commission.

**Transition from the Department of Public Works to the Public Utilities Commission**

In 1932, voters approved a massive charter revision intended to ensure the accountability of elected officials. The existing Board of Public Works, with appointed members, was replaced with a Department of Public Works subject to the management and control of the Chief Administrative Officer, who at the time was appointed for life. The Department of Public Works was responsible for managing streets, traffic and sewers, among other things. The Public Utilities Commission was also created in 1932, and given substantial authority to manage City utility systems, including the water and power systems, MUNI and the Airport. This general

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(1) Scholarships first for residents of the Bayview-Hunters Point community and thereafter for all other residents of the City and County of San Francisco to attend classes and other educational activities at the Southeast Community Facility or other accredited institutions of education;

(2) Scholarships first for children residing in the Bayview-Hunters Point community and thereafter for all other resident children of the City and County of San Francisco to attend child care centers at the Southeast Community Facility or other State-licensed child care providers;

(3) Supplementary funding for job training programs and activities at the Southeast Community Facility;

(4) Supplementary funding for community agencies which address the needs as identified in Section 54.1.

Findings.

(e) There is hereby established a reserve fund to consist of 10 percent of each year's budget surplus for the facility, as available, to be used for the purpose of facility maintenance only. This reserve fund will be maintained for a five-year period, and the use of this reserve fund will be reviewed at the termination of the five-year period.

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configuration continued until the voters again reorganized City government through charter amendments adopted in November 1995.

Included among the many significant 1995 amendments to the charter was a provision authorizing the Mayor to transfer functions between city departments that were not otherwise assigned to departments by the charter (Charter sec. 4.132). On July 1, 1996, Mayor Brown, by letter to the Board of Supervisors, determined that all the functions, duties and assets of the City's sewer enterprise should be transferred to the Public Utilities Commission. Over the next year, Department of Public Works, Public Utilities Commission and Controller's Office staff developed memoranda of understanding that facilitated the transfer of sewer enterprise assets, functions and the personnel who performed such activities. As a consequence of the Mayor's exercise of his power to transfer functions, all sewer enterprise related assets, including the Southeast Community Facility, are now under the jurisdiction of the Public Utilities Commission.

**Budget and Lease Approval Authority**

The Facility's budget consists of the annual expenditures necessary to operate and maintain the Facility. Funds for such expenditures are derived from two sources: revenues from greenhouse, day care and skills training tenants, and revenues from sewer service charges necessary to cover expenditures not covered by rental revenues.

Prior to the Mayor's transfer determination, the Facility's budget was prepared by Facility staff and Department of Public Works staff, with review and comment by Facility Commissioners. The Public Works Department budget, including the Facility draft budget, was submitted to the Chief Administrative Officer, who then submitted the draft budget to the Mayor's Office in the normal course of business. The Board of Supervisors then reviewed and approved the annual budget.

Subsequent to the transfer, Public Utilities Commission staff work with Facility staff and the Facility Commission to develop the annual budget, rather than Department of Public Works staff. The budget is then approved by the Public Utilities Commission and the complete Public Utilities Commission budget is then submitted to the Mayor for Board approval.

Several times in the recent past, the Southeast Community Facility Commission has discussed seeking modification of its duties to include substantive control of budgets and expenditures related to Facility operations, using funds and revenues under the control of the Public Utilities Commission. As we has advised numerous times, the voter approved Charter provides to the Public Utilities Commission the exclusive authority to control all funds, facilities and operations related to the water, sewer and power utility services, subject to the Charter's budget procedures. While the Board of Supervisors has authority under the Charter to approve or disapprove the Public Utilities Commission's budget, it cannot require the Public Utilities Commission to undertake specific expenditures related to Public Utilities Commission facilities, nor can it prohibit such specific expenditures or give that authority to another entity. Determining the appropriate uses of sewer service charge revenues with regard to the Facility's budget (which include both sewer service charges and lease receipts) and executing leases are matters under the jurisdiction of the Public Utilities Commission.

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**Lease Revenues and Operational Expenditures**

In 1987, the Department of Real Estate initiated the process of obtaining tenants for the Facility. Based on the purposes of the Facility and the availability of suitable tenants, the department set proposed rents suitable to attract and retain nonprofit and educational service providers. During the 27 years that the Facility has been operational, lease revenues have never equaled or exceeded operations costs. From fiscal year 1998 through fiscal year 2013, expenditures exceeded rental revenues by approximately \$7.1 million; this amount was covered by sewer service revenues, in accordance with the State Board order and applicable law.

The Public Utilities Commission has maintained records of Facility operations since the sewer enterprise was transferred from the Department of Public Works to the Public Utilities Commission jurisdiction in 1996. Apparently, almost no relevant records for years prior to 1998 have been retained. Department of Public Works staff did not retain archived records after jurisdiction of the sewer system was transferred to the Public Utilities Commission. Facility staff also has no financial records dating back to 1987. The Department of Real Estate has found handwritten accounts of Facility rental receipts, by calendar year:

1987: \$193,355	1993: \$298,331
1988: \$234,335	1994: \$305,149
1989: \$248,020	1995: \$314,120
1990: \$250,009	1996: \$316,494
1991: \$253,614	1997: \$300,981
1992: \$272,030	1998: \$324,957

No records of operational expenditures prior to 1998 have been found. The Public Utilities Commission has retained lease revenues and expenditures information subsequent to 1998. The table below contains revenues and expenses data from fiscal years 1998 to 2013.



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Fiscal Year	Total Rent	Operating Expenses	Deficit
1998	\$ 324,957	501,266	\$ (176,309)
1999	\$ 333,551	625,003	\$ (291,452)
2000	\$ 343,449	599,970	\$ (256,521)
2001	\$ 375,945	712,171	\$ (336,226)
2002	\$ 389,222	716,711	\$ (327,489)
2003	\$ 394,965	809,351	\$ (414,386)
2004	\$ 406,242	899,710	\$ (493,468)
2005	\$ 417,520	920,831	\$ (503,311)
2006	\$ 428,266	1,089,442	\$ (661,176)
2007	\$ 439,651	1,063,526	\$ (623,875)
2008	\$ 453,719	962,470	\$ (508,750)
2009	\$ 461,859	698,794	\$ (236,935)
2010	\$ 474,030	810,284	\$ (336,254)
2011	\$ 487,450	1,132,101	\$ (644,651)
2012	\$ 499,883	1,094,392	\$ (594,509)
2013	\$ 505,586	1,277,999	\$ (772,413)
			\$ (7,177,723)

