

SAN MATEO



LOCAL AGENCY FORMATION COMMISSION

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January 31, 2024

Revised February 1, 2024

To: LAFCo Commissioners

From: Rob Bartoli, Executive Officer
Sofia Recalde, Management Analyst

Subject: Reconsideration of LAFCo File No. 22-09 – 1) City of East Palo Alto Proposal: To establish the East Palo Alto Sanitary District (EPASD), an independent special district, as a subsidiary district of the City of East Palo Alto (City). 2) East Palo Alto Sanitary District Alternative Application: To retain the District’s governance model; amend its Sphere of Influence (SOI) to be coterminous with its geographic service boundaries; and remove the District’s territory from the SOI of the West Bay Sanitary District.

Summary

On November 15, 2023, the San Mateo LAFCo Commission approved LAFCo File 22-09 to establish the East Palo Alto Sanitary District (EPASD), an independent special district, as a subsidiary district of the City of East Palo Alto and related actions, including adopting a resolution approving the subsidiary district proposal with terms and conditions, adopting findings and determinations pursuant to the California Environmental Quality Act (CEQA), and declining to approve the alternative application submitted by EPASD. The Commission’s approval is subject to protest proceedings pursuant to the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000. A protest hearing and protest period will be set at a later date.

Government Code Section 56895 states when LAFCo adopts a resolution making determinations, any person or affected agency may file a written request with LAFCo requesting amendments to, or reconsideration of, the resolution. Government Code Section 56895 further provides that the request shall state the specific modification to the resolution being requested and shall state what new or different facts that could not have been presented previously are claimed to warrant the reconsideration.

COMMISSIONERS: KATI MARTIN, CHAIR, SPECIAL DISTRICT ▪ RAY MUELLER, VICE CHAIR, COUNTY ▪ VIRGINIA CHANG-KIRALY, SPECIAL DISTRICT
▪ HARVEY RARBACK, CITY ▪ TYGARJAS BIGSTYCK, CITY ▪ WARREN SLOCUM, COUNTY ▪ ANN DRAPER, PUBLIC

ALTERNATES: CHRIS MICKELSEN, SPECIAL DISTRICT ▪ ANN SCHNEIDER, CITY ▪ JAMES O’NEILL, PUBLIC ▪ NOELIA CORZO, COUNTY

STAFF: ROB BARTOLI, EXECUTIVE OFFICER ▪ SOFIA RECALDE, MANAGEMENT ANALYST ▪ TIM FOX, LEGAL COUNSEL ▪
ANGELA MONTES, CLERK

On December 15, 2023 LAFCo received a letter via email dated December 15, 2023 from Ludis D. Sominskaia, Attorney with Burke, Williams & Sorensen, LLP. LAFCo received a hard copy of the letter via USPS. on December 22, 2023. Burke, Williams & Sorensen, LLP is currently serving as special legal counsel to EPASD. Ms. Sominskaia's letter (Attachment B) requests that in light of recent actions taken by the EPASD Board of Directors, the Commission should reverse the action taken on November 15, 2023 by 1) Denying the City's Proposal and 2) Approving the District's Alternative Proposal filed with San Mateo LAFCo on September 19, 2023, which proposed to (i) retain EPASD current governance structure, (ii) amend the District's Sphere of Influence to be coterminous with its service boundaries, and (iii) remove EPASD's territory from the Sphere of Influence of the West Bay Sanitary District.

Facts That the District Claim Warrant Reconsideration

The December 15, 2023 letter from Ms. Sominskaia proposes that four actions that EPASD has taken since the adoption of the LAFCo resolution on November 15, 2023 warrant the Commission's reconsideration:

1. On December 14, 2023, the District Board of Directors adopted a Capital Improvement Plan ("CIP") prepared by Sierra West, which defined the District's capital improvement objectives based on previous master plan studies and infrastructure repair requirements based on a recently completed closed-circuit television. The CIP is based on a thorough evaluation of expansion-related improvements needed to accommodate new development, and repair needs responsive to natural deterioration of the local pipeline. The CIP includes a priority list of repairs in the near and long term planning horizons, and a calculation of service rates needed to meet relevant cash flow projections.

LAFCo Response: The CIP document that was adopted by EPASD on December 14, 2023 was not included as part of the written request for reconsideration from EPASD. However, LAFCo staff reviewed the agenda packet for the December 14, 2023 EPASD Board Meeting, which included the proposed CIP (Attachment C). The CIP, prepared for EPASD by Sierra West Consultants Inc., consisted largely of data that had been collected by Sierra West Consultants for two CCTV survey reports, *CCTV Survey Results Evaluation and Pipeline Replacement Priorities Areas 1, 3, and 4* published on October 31, 2022 and *CCTV Survey Results Evaluation and Pipeline Replacement Priorities Area 2, Trunk Line, and All Areas* published on October 13, 2023. The two Sierra West Consultants reports were reviewed by the Commission at the November 15, 2023 meeting as part of the Alternative Application submitted by EPASD. The Capital Improvement Plan includes a five-year plan for proposed projects and estimated costs for improvements.

The CIP references a financial plan, the *2022 Sewer Rate Analysis, Working Draft Tables*, produced by Bartle Wells Associates (no date) for the implementation of the proposed projects. This report was also reviewed by the Commission at the November 15, 2023 meeting as part of the Alternative Application submitted by EPASD. The Bartle Wells report proposes annual sewer rate increases for customers from 2023 to 2027, with an average increase of 6% a year. The proposed rates have not yet been adopted by EPASD. It also appears that the Bartle Wells report is incomplete, as it only references projects from the October 31, 2022 Sierra West Consultants report and not the October 13, 2023 Sierra West Consultants report.

The 2022 Sierra West Consultants report identified over \$20 million of high priority and near-term rehabilitation and replacement projects, with a total of \$53 million for future rehabilitation and replacement. As noted in the report, of the 117,589 linear feet surveyed, 76,000 linear feet, or 65% of the lines inspected, are classified by the consultant as pipeline with substantial structural defects. Structural defects are described in the Sierra West memo as instances of broken or sagging pipes or areas where pipes are severely clogged.

No additional information about the status of this action has been provided to LAFCo.

2. On December 14, 2023, the District Board of Directors authorized the District General Manager to undertake a process to lower capacity fees from \$14,464 per equivalent dwelling unit to an amount between \$9,000 and \$10,000 per equivalent dwelling unit as determined by consultant based on adopted Capital Improvement Plan and authorized District General Manager to propose a process for refunding developers that previously paid higher fees.

LAFCo Response: In review of the EPASD agenda packet for the December 14, 2023 meeting, the staff report for this item only consisted of an agenda topic heading regarding direction to lower capacity fees and a recommendation to the EPASD Board to approve the item (Attachment C). Neither the staff report nor the meeting minutes (Attachment D) included any information about why the change in capacity fee was being requested, how EPASD determined that \$9,000 and \$10,000 per equivalent dwelling unit would be the appropriate fee, or how the reduction in capacity changes would impact the District's budget. In the Alternative Application submitted by EPASD, the District had stated that the \$14,464 capacity charge is, in their view, the most equitable charge for new development projects and is a fair and reasonable fee.

No additional information about the status of this action has been provided to LAFCo.

3. On December 14, 2023, District Board of Directors authorized District General Manager to undertake Article 13 Section 6 (Proposition 218) process to increase sewer rates commencing July 1, 2024 from \$600 per single family residence to the rate recommended by the District's consultant.

LAFCo Response: In review of the EPASD agenda packet for the December 14, 2023 meeting, the staff report for this item only consisted of an agenda topic heading regarding direction to initiate a process to increase sewer rates and a recommendation to the EPASD Board to approve the item (Attachment C). Neither the staff report nor the meeting minutes (Attachment D) included information about why the change in sewer fee was being requested or the timeline for future action.

The *2022 Sewer Rate Analysis, Working Draft Tables*, produced by Bartle Wells Associates (no date), included an analysis of the proposed sewer rates and was presented to the Commission as part of EPASD's Alternative Application at the November 15, 2023 LAFCo meeting.

No additional information about the status of this action has been provided to LAFCo.

4. On December 14, 2023, District Board of Directors authorized the District's special counsel to draft an Ordinance setting forth a process for negotiating and approving will serve letters and development agreements including consequences if the requirements of the ordinance are not met.

LAFCo Response: In review of the EPASD agenda packet for the December 14, 2023 meeting, the staff report for this item consisted only of an agenda topic heading regarding direction to initiate drafting an ordinance and a recommendation to the EPASD Board to approve the item (Attachment C). The EPASD December 14 meeting minutes noted that this item addresses an issue identified at the LAFCo hearing surrounding the uncertainty regarding the process by which the District negotiates will-service agreements and development agreements (Attachment D).

No additional information about the status of this action has been provided to LAFCo.

Options for Commission Action

After consideration of this report and any testimony or additional materials that are submitted during the public hearing, the Commission can take one of the following actions¹:

- Disapprove the request for reconsideration. If the Commission disapproves the request, it shall not adopt a new resolution making determinations. No further reconsideration of the November 15, 2023 decision would be authorized under Government Code Section 56895.
- Approve the request for reconsideration. The Commission may approve the request for reconsideration if the Commission believes that the request for reconsideration meets the statutory requirements and presents new or different facts that could not have been presented previously to the Commission.
- Upon approving the request for reconsideration, the Commission would then consider the merits of the reconsideration request. If the LAFCo Commission decides to approve the request for reconsideration and not order the establishment of EPASD as a subsidiary district of the City of East Palo Alto, the Commission would adopt a resolution making determinations that supersede the November 15, 2023 resolution.

If the Commission decides to approve the request for reconsideration and rescind its November 15, 2023 decision, the Commission will need to adopt a new resolution rescinding LAFCo Resolutions No. 1312 that approved the dissolution of the District and made certain findings and determinations, and adopt a resolution that would amend the District's Sphere of Influence to be coterminous with its service boundaries, and remove EPASD's territory from the Sphere of Influence of the West Bay Sanitary District.

- Continue this item to March 20, 2024, if the Commission needs more information.

Discussion and Staff's Recommendation

Based on the information submitted in the District's letter requesting reconsideration, LAFCo staff does not believe that the District had provided new or different facts that could not have been presented previously and that warrant reconsideration pursuant to Government Code

¹ Government Code Section 56895(g)

Section 56895. The CIP document is largely comprised of data and documents that were presented to the LAFCo Commission at the November 15, 2023 meeting as part of EPASD's Alternative Application. LAFCo staff therefore recommends that the Commission disapprove the request for reconsideration.

The actions taken by EPASD's Board on December 14, 2023 seem to be in response to the November 15, 2023 LAFCo staff report, the City's Proposal, and to comments made by Commissioners regarding the Proposal and Alternative Application at the November 15 meeting. The letter from Ms. Sominskaia states that "the recent changes crystallize the District's position as the agent that can best provide sewer service to local ratepayers." As noted previously in this report, while these actions are in response to comments made by LAFCo Commissioners, there were other factors that led to the Commission's approval of the City's Proposal, including consistency with past LAFCo actions, a plan for service from the City, future growth, and State policy preference for provision of municipal services within city boundaries. Furthermore, three of the four actions taken by the EPASD Board on December 14, 2023 only authorized staff to begin work on increasing sewer rates, lowering connection fees and drafting an ordinance setting forth a process for negotiating and approving will serve letters and development agreements. The fourth action to adopt a CIP largely consisted of data that had previously been presented to LAFCo for consideration. Finally, staff does not believe that an agency's own actions subsequent to a LAFCo decision can constitute "new or different facts that could not have been presented previously" within the meaning of California Government Code Section 56895(a). Since the timing of the four District actions was entirely under the control of the District, there is no basis to conclude that the agency could not have presented these facts previously by taking its action prior to the Commission's consideration of the District's own Alternative Proposal in November 2023.

Other Comments in Reconsideration Request

Ms. Sominskaia's letter also included a comment about the transmittal of the adopted resolution for LAFCo File 22-09. While the signed copy of the resolution was sent to affected agencies on November 22, the resolution was adopted by the Commission on November 15, 2023. The transmittal of the resolution on a date after adoption does not change the adopted date of the resolution. In correspondence with LAFCo staff, EPASD has contended November 22 is that date of the adoption of the resolution, which would have made December 22, 2023 as the last date for LAFCo to receive the request for reconsideration. While the letter from Ms. Sominskaia is dated December 15, it was not emailed to LAFCo until December 17 and the hard copy of the letter was not received until December 22. Regardless of this issue, LAFCo staff has brought forward the request for reconsideration to the Commission.

Ms. Sominskaia's letter also includes a statement about the District's Alternative Application that was submitted to LAFCo and considered by the LAFCo Commission. LAFCo staff reviewed the SOI application against similar criteria required for the subsidiary district proposal and also presented the application to the LAFCo Commission for consideration at the same hearing as the subsidiary district proposal in alignment with Government Code Section. This included a review of documented submitted by EPASD including CCTV reports, draft financial documents, capacity and sewer rates, and District master plans.

As stated in the November 15, 2023 staff report, a special district that is the subject of a subsidiary district proposal has a right under the law to make an alternative proposal. In the context of the law governing LAFCo, a “proposal” is defined as a desired change of organization or reorganization initiated by a petition or by resolution of application of a legislative body or school district for which a certificate of filing has been issued². A “change of organization” is a defined term under the law and includes a list of LAFCo actions relating to governance changes³. A mere request for a SOI amendment is considered an “application” and does not amount to a change of organization or reorganization.

LAFCo Determinations for City Proposal

The City’s Proposal that was approved by the LAFCo Commission on November 15, 2023 included application materials, a plan for service, a capital improvement plan, and a proposed budget for EPASD operations and maintenance and capital improvement. The City’s application to LAFCo contained a technical memorandum prepared by Freyer & Laureta (F&L), a consulting firm, that outlines its plan for capital improvements to address capacity and development issues and proposes a budget for both capital improvements and ongoing operations and maintenance if EPASD were to become a subsidiary district of the City. The LAFCo Commission determined that the City’s proposed budget and improvement plan would best serve the needs of the community while protecting the health and safety of residents and ratepayers.

As stated in the November 15, 2023 LAFCo staff report and the adopted resolution, the City’s proposal to establish EPASD as a subsidiary district aligns with the State’s policy preference of a single multi-purpose government agency for urbanized areas (i.e., the City of East Palo Alto) to provide municipal services (Government Code Section 56001). While the subsidiary district would maintain EPASD as a separate entity from the City, the subsidiary district model adheres to the intent of the State Legislature. Furthermore, the establishment of EPASD as a subsidiary district of the City of East Palo Alto aligns with the preferred governance options outlined in the adopted 2009 and 2022 MSRs.

The LAFCo Commission approved the proposal that EPASD become a subsidiary district of the City of East Palo, with its City Council acting as the EPASD Board, for several reasons:

- Planning for wastewater utilities could align with the City’s envisioned land use planning and established master plans.
- The City could address and balance infrastructure requirements, funding options, and developer requirements, to facilitate needed new housing, jobs and municipal revenues to improve public services.
- The management of wastewater service delivery to the residents of the District would likely be enhanced with the substantive management and organizational structure of the City in which the contracted sewer service provider would be managed by the City Manager and City Public Works Director who would report to the City Council which, as the ex officio Board of Directors for EPASD, are beholden to EPASD rate payers.

² Government Code section 56069

³ Government Code Section 56021

- Enhanced efficiencies by removing a layer of government and enhanced ease of use of constituents, with single provider of services.

Finally, as described in the 2022 Municipal Service Review for the City of East Palo Alto, EPASD, and the West Bay Sanitary District and stated in the City's Proposal, the City has more resources that it can leverage to bring state and federal funding to sewer service-related projects and can do so more efficiently without coordinating among multiple agencies and boards.

Notice

Public notice of the hearing was mailed and emailed to affected agencies and interested parties at least 21 days prior to the February 7, 2024 LAFCo hearing. As allowed for in Government Code, a public notice was published at least 21 days prior to the hearing as a 1/8th page display advertisement in the San Mateo County Times, The Almanac, and The Daily Post because the total number of notices required to be mailed exceeded 1,000. There are roughly 4,000 parcels and approximately 9,600 registered voters in the affected territory. This noticing is in the same manner as the original proposal⁴.

Protest Proceedings

If LAFCo disapproves the request for reconsideration, protest proceedings will follow LAFCo staff will give notice of the protest hearing to all landowners and registered voters in the affected territory (i.e. the service area of the East Palo Alto Sanitary District) via 1/8th page display ads in at minimum the San Mateo County Times published in both English and Spanish. Direct mailing of notices is not required because the mailing lists exceed 1,000.

- Landowner Protest: If protests are filed by fewer than 25% of the number of landowners owning less than 25% of the assessed value of land, the Commission shall order the formation of the subsidiary district. If 25% to 50% of the landowners file protests, the Commission shall order the organization be subject to an election. Over 50% landowner protest terminates the proposal.
- Registered Voter Protest: If protests are filed by fewer than 25% of the number of registered voters in the affected territory, the Commission shall order the formation of the subsidiary district. If 25% to 50% of the registered voters file protests, the Commission shall order the organization be subject to an election. Over 50% registered-voter protest terminates the proposal.

LAFCo staff had set a protest hearing for February 16, 2024 prior to the submittal of the request for reconsideration from EPASD. Upon receiving the reconsideration request, LAFCo staff sent notice cancelling this hearing. It is anticipated that a new notice setting the protest period and protest hearing date will be published the week of February 12, 2024.

Recommended Commission Action

1. Open the public hearing and accept public comment.
2. By resolution, disapprove the request for reconsideration for LAFCo File No. 22-09 -

⁴ Government Code Section 56895(f)

Proposal to establish the East Palo Alto Sanitary District (EPASD) as a subsidiary district of the City of East Palo Alto

Attachments

- A. Government Code Section 56895 – Reconsideration
- B. Letter Requesting Reconsideration dated December 15, 2023 from Iudis D. Sominskaia, Attorney with Burke, Williams & Sorensen, LLP. Burke, Williams & Sorensen, LLP representing EPASD
- C. East Palo Alto Agenda Packet for December 14, 2023 Board Meeting
- D. Adopted Resolution No. 1312 for the formation of EPASD as a subsidiary district of the City of East Palo Alto, dated November 15, 2023
- E. Resolution Disapproving the Request for Reconsideration
- F. Resolution Approving the Request for Reconsideration and Rescinding the Approvals of the establishment of the East Palo Alto Sanitary District