



September 13, 2021

Honorable Kevin Mullin
Room 3160, State Capitol

**SAN MATEO COUNTY FLOOD AND SEA LEVEL RISE RESILIENCY
DISTRICT: SPECIAL DISTRICT - #2116512**

Dear Mr. Mullin:

You have asked whether the San Mateo County Flood and Sea Level Rise Resiliency District (hereafter San Mateo district or district) is a special district that is operated separately and independently from the County of San Mateo. You have also asked whether the district may participate in a local hazard mitigation plan that is a multijurisdictional plan for purposes of being eligible to apply for federal hazard mitigation grants.

1. Question No. 1: Is the San Mateo district a special district operated separately and independently from the County of San Mateo?

1.1 Background

The board of supervisors of a county is authorized to provide by ordinance for the organization and government of districts to protect and preserve the banks of rivers and streams and contiguous lands from injury by overflowing or washing, provide for the improvement of rivers and streams, prevent the obstruction of rivers and streams, and provide for the assessment, levy, and collection of a tax within the district for those purposes.¹ Flood control districts may also be created by statute by the Legislature.² Such districts are generally considered to be special districts.³

¹ Gov. Code, § 25684; Wat. Code, § 8110.

² See, for example, the San Benito County Water Conservation and Flood Control District (Stats. 1953, ch. 1598, § 2; now known as the San Benito County Water District (Stats. 1988, ch. 655, § 2)), the Monterey County Water Resources Agency (Stats. 1990, ch. 1159, § 4), and the Santa Cruz County Flood Control and Water Conservation District (Stats. 1955, ch. 1489, § 2).

³ While there is no single definition of a special district, it is usually defined statutorily as “any agency of the state established for the local performance of governmental or proprietary functions
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Special districts are agencies of the state created to perform certain work that the policy of the state requires or permits to be done.⁴ The Legislature, in the absence of constitutional restrictions, has plenary power over the organization, boundaries, powers, and liabilities of special districts created pursuant to statute and may enlarge, restrict, modify, or abrogate the powers granted to those districts.⁵

Once established, a special district derives its powers from the statute under which it is created and from any other statutes enacted by the Legislature that grant additional powers or limit those powers already granted.⁶ A special district has those powers expressly enumerated by law and those implied powers that are necessary to the exercise of the powers granted.⁷ The authority of the Legislature to create flood control districts by special act has consistently been upheld by the courts.⁸

Thus, a flood control district created by the Legislature is an independent political subdivision that derives its powers from the Legislature, except as expressly provided by statute. The Legislature may set the boundaries of a special district and establish a mechanism for its governance.

In establishing such a special district, the Legislature is not bound by the provisions that apply to local entities when providing for the organization, operation, or government of districts or special districts, such as the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Gov. Code, § 56000 et seq.) or the District Organization Law (Gov. Code, § 58000 et seq.).⁹ One Legislature cannot bind the hands of a future Legislature by enacting a statute that a future Legislature may not change.¹⁰

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within limited boundaries.” (Gov. Code, § 82048.5; see also Gov. Code, §§ 17520, 50075.5, subd. (b), 53398.51, subd. (a), 53412, subd. (b), 53835 & 56036, subd. (a).)

⁴ See *In re Bonds of Orosi Public Utility Dist.* (1925) 196 Cal. 43, 53.

⁵ *Trumbo v. Crestline-Lake Arrowhead Water Agency* (1967) 250 Cal.App.2d 320, 323.

⁶ *Crawford v. Imperial Irr. Dist.* (1927) 200 Cal. 318, 326; see *Oakdale Irrigation District v. Calaveras County* (1955) 133 Cal.App.2d 127, 134.

⁷ *Crawford v. Imperial Irr. Dist.*, *supra*, 200 Cal. at p. 334.

⁸ See *American River Flood Control Dist. v. Sweet* (1932) 214 Cal. 778, 782; *Robbins v. Sonoma County Flood Control and Water Conservation Dist.* (1956) 138 Cal.App.2d 291, 301-302.

⁹ For instance, an argument that a special district established by the Legislature is not a true special district because it may not meet the definition of an “independent special district” under Government Code section 56044 of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Gov. Code, § 56000 et seq.) fails to consider the fact that the Legislature is not subject to the procedures under that act when establishing a special district.

¹⁰ *California Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 604, 618, fn. 4.

1.2 Analysis

The Legislature enacted a statute to create the San Mateo district.¹¹ The objects and purposes of the statute are “to address and protect against the impacts of sea level rise, including . . . tidal flooding, coastal erosion, and combined impacts from tidal and riverine flooding, and to provide for the control and comprehensive management of the floodwaters and stormwaters of the district.”¹²

In determining whether the district is operated separately and independently from the County of San Mateo, a court would look first to the language of the statutory provisions establishing the district. If statutory language is unambiguous, courts presume the Legislature meant what it said, and the plain meaning of a statute controls.¹³ In that regard a court would consider, among other things, the statutory provisions relating to the governance of the district and the powers granted to it.

With respect to its governance, commencing January 1, 2020, the district is governed by a board of directors (hereafter board) that includes five city council members from various cities within the County of San Mateo and two members of the board of supervisors.¹⁴ We think that the fact that the district is governed by a board comprised primarily of members of city councils weighs in favor of a conclusion that the board is separate from and independent of the county government. In addition, the board is authorized to appoint an executive officer, a clerk, and other officers and employees of the board or district, prescribe their duties, and fix and pay their compensation.¹⁵ Thus, the district is not required to use employees or other resources associated with the county, which also weighs in favor of its independence.

¹¹ § 1 of the San Mateo County Flood Control District Act (Stats. 1959, ch. 2108), as amended by Stats. 2019, ch. 292. All further section references are to the San Mateo County Flood Control District Act unless otherwise indicated.

¹² § 2.

¹³ *In re W.B.* (2012) 55 Cal.4th 30, 52.

¹⁴ § 4.5. Since section 4 is inoperative, our analysis is limited to the facts currently presented under section 4.5, which establishes a board consisting of members of city councils and the county board of supervisors. There is no constitutional provision that prohibits the Legislature from creating a special district that includes members of city councils and the county board of supervisors. Despite the common law doctrine of incompatible offices, codified at Government Code section 1099, the state may authorize the simultaneous holding of offices if it is compelled by law or expressly authorized. (*People ex rel. Lacey v. Robles* (2020) 44 Cal.App.5th 804, 822-823.) Here, the Legislature has expressly and knowingly authorized city council members and members of the board of supervisors to hold San Mateo district offices. In our view, the presence of members of the board of supervisors on the board of the district does not render the district dependent on the county.

¹⁵ § 4.5, subd. (c)(2).

With respect to its powers, the district is declared by the Legislature to be a “body corporate and politic” with numerous powers: to have perpetual succession; to sue and be sued; to acquire property; to incur indebtedness and issue bonds; to store water within or outside of the district for the common benefit of the district; to conserve and reclaim water; to appropriate and acquire water and water rights; to control the floodwaters and stormwaters of the district and those that have their source outside of the district; to address and protect against sea level rise; to exercise the right of eminent domain; to impose taxes, assessments, and property-related fees and charges; and to make contracts and employ labor and personnel for these purposes.¹⁶

Legal title to any property acquired by the district vests in the district and is held by the district in trust and for purposes of the statute enacted by the Legislature.¹⁷ The board is authorized to levy taxes or assessments or charges in compliance with the California Constitution; proceeds are to be paid into the county treasury to the credit of the district.¹⁸ Only the board has the power to control and order the expenditure of those proceeds.¹⁹ All bonds issued by, and all property of, the district is free and exempt from all taxation pursuant to article XIII of the California Constitution.²⁰

For purposes of upfront funding, the board is authorized to request from the County of San Mateo a temporary transfer of moneys to the district from other funds of the county for the payment of district expenses until “such time as assessment or tax receipts are available.” This money must be repaid.²¹

With respect to its legality, the district is authorized to institute a proceeding in the superior court with a request that it be adjudged a legal flood control and water conservation district formed under the provisions of the legislative enactment and be deemed a conclusive judgment against all persons and the State of California.²² This provision indicates that the Legislature intended the special district to be recognized as a local entity separate from the county. Thus, the plain language of these statutory provisions indicates that the district is endowed with powers that enable it to operate independent of the county financially, legally, and administratively. Additionally, there is no provision in the statutory enactment that provides that the district is an agency of, or a department within, the County of San Mateo and not independent of that entity, nor would its funds be distributed to the benefit of the General Fund of that entity.

¹⁶ § 3, pars. (1)-(4), (6)-(8), (10), (12).

¹⁷ § 7.

¹⁸ § 8, subd. (b).

¹⁹ § 8, subd. (b).

²⁰ § 24.

²¹ § 13.

²² § 32.

The statutory language appears unambiguous. Therefore, we think a court would presume the Legislature meant what it said and find that the district is a special district that is operated separately and independently from the County of San Mateo.

1.3 Conclusion regarding Question No. 1

It is our opinion that the San Mateo County Flood and Sea Level Rise Resiliency District is a special district that is operated separately and independently from the County of San Mateo.

2. Question No. 2: May the San Mateo district participate in a hazard mitigation plan that is a multijurisdictional plan for purposes of being eligible to apply for federal hazard mitigation grants?

2.1 Background

We have been informed that the district would like to participate and be included in a multijurisdictional plan for purposes of being eligible to apply for federal hazard mitigation grants. Federal law, administered by the Federal Emergency Management Agency (FEMA), makes hazard mitigation grants available to state and local governments to reduce risks from natural hazards such as flooding.²³ In order to receive federal hazard mitigation grants, a local government must have a mitigation plan approved by FEMA.²⁴ FEMA may accept multijurisdictional plans “as long as each jurisdiction has participated in the process and has officially adopted the plan.”²⁵ Multijurisdictional plans must contain “identifiable action items specific to the jurisdiction requesting FEMA approval or credit of the plan.”²⁶

For these purposes, federal law defines a “local government” as follows:

“Local government is any county, municipality, city, town, township, public authority, school district, *special district*, intrastate district, council of governments (regardless of whether the council of governments is incorporated as a nonprofit corporation under State law), regional or interstate government entity, or agency or instrumentality of a local government; any Indian tribe or authorized tribal organization, or Alaska Native village or organization; and any rural community, unincorporated town or village, or other public entity.”²⁷

²³ 44 CFR § 201.6(a)(1).

²⁴ 44 CFR § 201.6(a)(1).

²⁵ 44 CFR § 201.6(a)(4).

²⁶ 44 CFR § 201.6(c)(3)(iv).

²⁷ 44 CFR § 201.2, emphasis added. The law also allows for grants to subgrantees, which are accountable to the grantee for the use of the funds provided, and subgrantees can be a state agency, local government, private nonprofit organization, or Indian tribal government. (*Ibid.*) For purposes of other provisions that generally apply to federal awards, federal law defines a local government to mean any

2.2 Analysis

To answer the question posed, we must determine whether the district constitutes a “local government” for purposes of federal law and, if so, whether provisions of state law prohibit its participation in a multijurisdictional plan.

As discussed above, under federal law, a special district is considered a unit of local government that is eligible to apply for federal funds. Because we have concluded in Question No. 1 that the San Mateo district is a special district that is operated separately and independently from the County of San Mateo, we conclude it constitutes a “local government” under applicable federal law relating to hazard mitigation grants. We are aware of no provision of federal law that would preclude the district’s participation in a multijurisdictional plan.

With respect to state law, according to the California Governor’s Office of Emergency Services (OES) internet website,²⁸ OES has two units focused on mitigation planning: state mitigation planning and local mitigation planning. Areas of responsibility include implementing and administering, in cooperation with local governments and communities, training and technical assistance on local hazard mitigation plan (hereafter LHMP) development.

OES reviews all LHMPs in accordance with state and federal law and coordinates with local jurisdictions throughout the planning stages. Once OES finds a plan approvable, it is forwarded to FEMA.

Under state law, each local planning agency is required to prepare and submit to each county and city, for adoption, “a comprehensive, long-term general plan for the physical development of the county or city.”²⁹ Each city or county must update that general plan periodically, including its safety element.³⁰ The safety element of that plan is required to include information about flood control and hazards, including identifying information from special districts.³¹ *Those entities are required to establish “cooperative working relationships among public agencies with responsibility for flood protection.”*³²

On or before January 1, 2022, the safety element must also be “reviewed and updated as necessary to address climate adaptation and resiliency strategies applicable to the city or county”; those entities are also required to cooperate with special districts that have expertise in this area.³³

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unit of government within a state, including a special district or any agency or instrumentality of a local government. (2 CFR § 200.1.)

²⁸ OES, Hazard Mitigation Planning, available at <<https://www.caloes.ca.gov/cal-oes-divisions/hazard-mitigation/hazard-mitigation-planning>> (as of Aug. 18, 2021).

²⁹ Gov. Code, § 65300.

³⁰ See Gov. Code, §§ 65302 & 65302.15, subd. (a).

³¹ Gov. Code, § 65302, subd. (g)(2)(A)(xi).

³² Gov. Code, § 65302, subd. (g)(2)(B)(v), emphasis added.

³³ Gov. Code, § 65302, subd. (g)(4).

As part of that safety element, a city or county is authorized to adopt an LHMP that complies with federal law.³⁴

As mentioned above, the district has expertise in flood control and climate change and is the flood control district that is designated by the state to address and protect against the impacts of sea level rise in a specified region of northern California. Accordingly, cities and counties in its jurisdiction are required to establish a cooperative working relationship with it in the development of the safety element of a general plan. Because the safety element may include an LHMP, we think the district's participation in such a mitigation plan would not conflict with state law.

Thus, reading all these provisions together, there does not appear to be any state or federal law that would preclude the district from participating in a multijurisdictional plan in order to apply for hazard mitigation funds in the future, provided the county and the district comply with all applicable state and federal requirements.

2.3 Conclusion regarding Question No. 2

It is our opinion that the San Mateo district may participate in a local hazard mitigation plan that is a multijurisdictional plan for purposes of being eligible to apply for federal hazard mitigation grants, provided the county and the district comply with all applicable state and federal requirements.

Very truly yours,

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LMP:blt

³⁴ Gov. Code, § 65302.6, subd. (a).