

LAW OFFICE OF  
ERIC DAMIAN KELLY  
A PROFESSIONAL CORPORATION

May 25, 1982

Mr. Curt Wiedeman  
County Administrator  
Board of County Commissioners  
Mesa County  
Grand Junction, CO 81502

CONFIDENTIAL

Re: Joint Sewerage Service Agreement

Dear Curt and members of the Board:

Curt asked that I look at this agreement as it affects land use matters. There are specific issues relating to the work which we are now doing with you which are affected by this agreement: a demand by the City that a group of persons seeking sewer service from the joint system first sign annexation agreements with the City; second, the discussion of the land use implications of the rigidity of the "201" boundary.

From reading the agreement, it would appear that a lot of people helped to write it. It is not organized very logically, it does not flow very logically and there appear to be both internal contradictions and omissions. Thus, it is a very difficult agreement to handle.

For example, on fees and charges, the "manager" which is the City "utility department" makes recommendations as to the fees and charges for the system each year. The agreement then requires that:

The Board and Council shall approve such charges and fees.

The agreement says nothing about what is done if you do not like the fees which are recommended by the utility department. You apparently have no power to disapprove or to reject the recommendation or to propose an alternative fee schedule.

In an enormous lack of clarity in the same paragraph, a sentence authorizes other special districts and organizations to charge other fees, apparently for types that are part of a localized sewer system. It goes on to say:

This provision is not intended to authorize any other entities with authority to provide sewer service to areas being served or to be served by the City or County.

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That sentence has enormous land use implications, but I am not sure what they are because I have absolutely no idea what it means. It may be intended to prohibit those special districts which are tied into the present system from functioning, although I doubt it. It may be intended to discourage the formation of new special districts. I do not know what "areas being served or to be served by the City or County" are. "To be served" would mean one area if we look at a one year projection and another area if we look at a 20 year projection period.

Under paragraph 3, the "manager" has, apparently, complete authority related to "expansion of the joint system." However, in the next sentence it says that:

The City and the County reserve the specific powers to be exercised by the City and/or the County.

Under paragraph V, which mysteriously falls somehow under paragraph 4, there is a requirement that all new construction outside the City be approved at least by the City and, possibly, "at the request of the County" by the County.

The "manager" apparently has veto power over any new connections to the system City under paragraph 5 of the agreement. That paragraph seems to relate to the making of physical connections and the qualifications of the contractor making such connections. However, it is not clear and might ultimately be used by the City as a land use control in the form of tap limitations.

Paragraph 6 appears to be totally reasonable.

Paragraph 7 contains a real zinger. It reads, in full:

The parties agree to prevent sewage from any area other than that described in this agreement or this agreement as amended, from being discharged into the Joint Sanitary Sewerage System.

The following general chapter of the agreement defines the areas covered by the agreement. They are (in sum):

Area I, which is the City;  
Area II, which is a 2-mile donut around the City;  
Area III, which is the territory within Central Grand Valley Sanitation District, Fruit Vale Sewerage District, Orchard Mesa Sewerage District and Ridges Metropolitan District (the agreement says absolutely nothing about whether it includes land that might be added to those districts in the future by expansion);

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Area IV, which is "all of the territory within Mesa County and within the Grand Junction 201 service area, exclusive of areas I, II and III."

That, is what locks in the 201 planning area, not any EPA regulation or grant condition. That gives the City effective veto power, if they try to use it, over land use decisions outside the 201 service area, because the 201 service area can only be changed by amending this agreement, which can only be amended by the consent of both parties.

Paragraph 2 of this section of the agreement is very interesting. It deals generally with "the authority to provide sewerage service in these areas." The areas outside the City are controlled under two different authorities. Area II, which is the two-mile donut, is controlled both by the City "Operational Procedure" and by "requirements of the concerning annexation policies of the City." [sic] Area IV is controlled by the "Operational Procedure" established by the County, although I do not believe that the County has one. Both areas are also controlled by the resolution authorizing the bond issuance.

There are certainly other issues raised by the agreement. There are certainly some major land use problems resulting and I am sure there will be operational problems resulting from it. Although it is extremely disadvantageous to the County in certain ways, I am not sure that it is equally advantageous to the City. There is such a lack of clarity in the agreement and so many omissions from it that I, frankly, think it is a problem to both parties.

It would be my strong recommendation that the County immediately begin the process of renegotiating this agreement with the City. The entire agreement should be rewritten. That negotiation should be conducted with the use of separate attorneys for the City and County. I think you should use a different attorney in this particular matter, leaving the option to the City to use their own, regular attorney. Although you could technically raise a conflict of interest objection to Mr. Ashby representing the City in this matter, since he has previously represented you, I do not think there would be any harm in that because I do not think he has come into possession of any confidential information which would be harmful to you in any way. However, in an agreement involving such high stakes, the two parties simply must have independent counsel.

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If you want me to represent you on that, I will be happy to do so. I do think it goes far outside the scope of the contract which we now have with you and I would thus have to bill it separately. I do not think it would involve a lot of work or a lot of expense. Earl and I have bent over backwards to pick up as many peripheral items as we could under the general scope of our contract, because I frankly do not like the flavor of public contractors who bid low on a contract and then come in with a lot of "extras." However, I do not think that any of us thought when we got into this that we would be looking at renegotiating a sewer service agreement with the City of Grand Junction as part of rewriting the land use regulations for Mesa County.

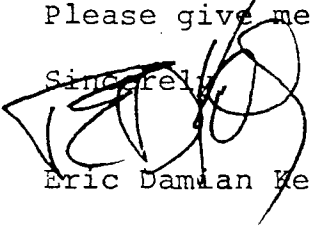
You could also hire an attorney in Grand Junction to represent you in this matter. If you should choose to do that, I certainly think that all aspects of it that relate to land use, which are most of them, ought to be coordinated with our work. Really, the rate setting function is about the only part of the operational part of the agreement that is not directly related to land use. I assume that the construction section will rapidly become mute.

I would ask that you keep this memorandum confidential. I promised Curt that I would get it to all of you. However, I am never very comfortable criticizing work in which another attorney was involved. As I indicated at the beginning of this letter, I really think the biggest problem is that the agreement was probably written by a committee, rather than by an attorney and it does contain a hodge-podge of all sorts of things.

Whatever route you may choose to get there, you desperately need to get this agreement straightened out. It not only affects, but seriously constrains your decision making ability in all kinds of land use and planning matters.

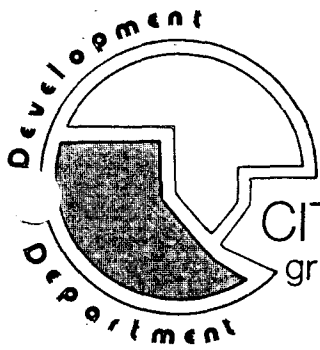
Please give me a call if you have any questions.

Sincerely,



Eric Damian Kelly

pk/sn



## CITY - COUNTY PLANNING

grand junction-mesa county 559 white ave. rm. 60 grand jct.,colo. 81501

(303) 244-1628

MEMO

TO: Curt Wiedeman

FROM: Bob Goldin, Senior City Planner

DATE: May 24, 1982

RE: Joint Sewerage Agreement

Having reviewed the "Joint Sewerage Service Agreement", Bob Goldin has the following to offer in regard to the agreement:

Areas outside the City limits, but within Area II as page 1, 2nd paragraph, page 6, II.1.B. and page 7, 2.B., gives the Manager (City Utilities Department), as per page 3, I.1. and page 4, I.3., complete authority to manage, operate and administer the joint system. Expansion of the system refers to new construction as per page 4, I.3. and 4. Construction outside Area II is up to the County or Special Districts to deal with. Taps would not be considered expansions unless the overall capacity was affected. All connection of lines per page 5, 4.A.B. and 5. shall be approved by the City. Then construction would be reviewed and approved as per page 4, I.4.A. and B. and 5.

Bottom line -- when the County and City entered into this agreement, a Power of Attorney for annexation would be required by the petitioner prior to tapping on to the system if they lie within Area II. The City, it seems, does have the authority to say "no" if these conditions are not met. There is nothing, it seems, to prevent the City from saying "no" unless one of the requirements of this agreement is not met.

BG/mm

*Sewer  
agreement  
file*

MEMORANDUM TO: Board of County Commissioners  
FROM: Eric Damian Kelly  
RE: Arrangements for Sewer System Management

PROBLEM ANALYSIS: From several meetings with you, with the County Administrator, with interested developers, with the planning staff and with the diverse group at the last joint City-County meeting on the subject, it is clear that the County faces several issues related to the sewer system: 1) who ought to manage the sewer system; 2) who ought to operate the sewer system; 3) who sets major policies, such as line extension and connection policies; 4) how the special districts connected to the sewer system can be included in decisions affecting them; 5) who will maintain and operate lines which are not within the City limits of the City of Grand Junction and not within the corporate limits of any special district; 6) who will be responsible for long-range planning for optimal plant utilization and future expansion.

There appears to be general agreement on one issue, which is that the City of Grand Junction ought to operate the system. It has the equipment, professional staff and expertise to operate such a system. Any other entity would have to make large capital expenditures in order to acquire

However, even certain issues related to the maintenance of the system remain subject to question, such as maintenance of lines outside the City and outside the special districts. Although the City says in theory that it will do it, at least one major developer is totally convinced that the City will not do so when the issue really arises. *If pd to do so should be in contract*

Further, there is no decision-making mechanism for such policy decisions as establishment of "service area" boundaries and line extension policies.

As a practical matter, the service area and line extension issue are symptomatic of the larger issue, which is that there is no structure of any kind for on-going management of the system. The City clearly has the right to manage the system within the City limits, but there is no clear authority for anyone to make major management decisions for areas outside the City limits. Within the special districts, the district boards can make certain decisions, but those boards are reluctant to make decisions on such issues as service-area expansion in the absence of a system-wide policy. One special district board is sufficiently concerned about the current management status of the County-wide system that it is reportedly purchasing its own computer system to do billing.

Another major management issue that is not being addressed is

planning for plant expansion and for service of additional areas. In addition, everyone involved with the system has apparently always contemplated that there would be tap fees collected and set aside for future system expansion. At the present time there is no mechanism for handling those fees other than to have them paid to the City as operator.

ALTERNATIVES: People close to the system have discussed a number of alternatives. Those include:

--"Super District," which would encompass the entire Valley-wide service area and pick up the loose ends. For example, in areas not included in the City or in a special district, it would be the full service sewer agency. For the City and special districts, it would simply be a master-system and plant operator, although it might also contract to run those districts.

--"Maintenance District" in unincorporated areas. Such a district would simply be responsible for line maintenance in those areas not within a special district and not within the City.

--County Home Rule. With a Home Rule Charter, the County would have a good deal more flexibility to establish an operating and management system for the Valley-wide Sewer System.

--County Sewer Department. Although a Home Rule Charter would give the County more flexibility in some ways, the County actually has the current authority to operate a sewer system or any part thereof on its own. Thus, if it is so inclined, the County could simply take on a greater operational role in dealing with the sewer system by setting up a department and hiring the appropriate people.

--Sewer Authority. Under the Authority concept, the sewer system could be run like the Airport, with a new, inter-governmental entity set up to manage and operate the sewer system.

Each of the approaches outlined above has problems. The major ones are:

"Super District." This approach would require special legislation from the Colorado General Assembly. While in concept the General Assembly might be willing to consider such legislation, working out the details of the legislation (particularly the powers of the super district as they relate to the powers of the existing special districts and the City) would be likely to turn into a major political melee which would kill the proposal.

Maintenance District. Although there may be a way to

accomplish the maintenance district under existing law, it would solve only the line maintenance problems. The County would still need some sort of management entity for the system.

County Home Rule. The County Home Rule approach to the sewer problem is really the sledgehammer approach to eliminating a pesky fly. A sledgehammer is a useful tool, as is County Home Rule, but it is not a necessary or even the best tool for solving the problem and it is so big and so complex that adopting it simply to solve this one problem would be a big mistake.

County Sewer Department. Establishment of a County Sewer Department would be a way of solving operational problems, such as line maintenance, but it would not solve the management problems because it is clear that the City and the special districts will fight any attempt by the County to manage the system unilaterally, especially at a staff level.

Sewer Authority. Colorado law provides for the establishment of a Sewer Authority, but it must include two counties. Thus, it cannot be used effectively to solve the problems related to the Valley-wide Sewer System. See C.R.S. 1973 §32-7-104.

However, there is a fairly simple alternative which would incorporate many of the strengths of the alternatives suggested by others.

RECOMMENDATION: Sewer Board.

Under C.R.S. 1973, §30-20-402, The County expressly authorized to contract with other counties or municipalities:

For or concerning the planning, construction, lease, or other acquisition and the financing of water facilities or sewer facilities, or both, and the maintenance and operation thereof.

That you are already doing. However, the section further provides that:

Any such counties or municipalities contracting with each other may also provide in any contract or agreement for a board, commission or such other body as their boards or governing bodies may deem proper for the supervision and general management of the \*\*\*sewer facilities \*\*\*and for the operation thereof, and may prescribe its powers and duties and fix the compensation of the members thereof.

The primary difference between this approach and some of the other approaches is that you do not create a new governmental



entity. The Sewer Board would have no direct taxing power and would have only those powers which you and the City would give it by contract; in contrast, a special district, once established, has all the powers granted it by law and has an independent legal existence. However, I think that distinction is of legal consequence in this situation, because there is really a very specific and relatively limited set of functions to be delegated to the proposed entity.

The important thing is that the Sewer Board could be structured to manage the sewer system. It could set service area policies (independently or subject to some broad parameters established by the contract creating it), it could set user fees, it could set line extension policies, it could do long-range sewer planning, it could hold (and manage) tap fees and other funds escrowed for expansion and it could take care of all of the sewer lines that no one else wants.

The Board can clearly be composed of whatever kind of membership you might designate. I would recommend that you find a way to have the special districts as well as the City and County represented on it. In addition, in order to prevent major political problems for the first Sewer Board, I would recommend that the basic operating agreement with the City be worked out before the Board is established (probably in the same contract), so that the Board takes that and some basic policy guidelines on service area as the parameters within which it is to manage the system.

I have been told that the City is open to such a proposal. Given the history of these negotiations, it might be a good idea if someone besides a County representative had the idea first. If you can feed the idea out and get it started from some other direction, I certainly will not tell a soul where it came from.

STRATEGY FROM HERE: I recommend that we proceed as follows:

A) Plant the seeds of this idea where they may grow in City turf;

B) Meet with City and special district representatives to go over issues, directed toward us drafting a proposed agreement;

C) Prepare draft agreement doing three basic things: 1) establishing Sewer Board; 2) establishing service area or criteria for determining service area; 3) agreeing to have City operate the system;

D) Meet with City only, prepared to negotiate agreement to closure;

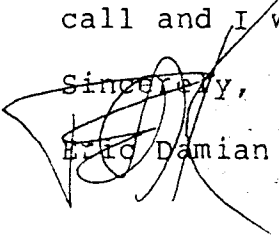
E) Finish and sign agreement.

It is my sense that the time is right to make this work;

further, with the system coming on line and constant issues arising related to the service area, I think the issue is fairly urgent. I would thus recommend that we try to meet with the City and special districts within 30 days, with the intent of finishing the entire process this year if possible but no later than January.

Please give me a call if you have any questions. If you want to meet to review these recommendations, please have Curt give me a call and I will plan to get over there next week.

Sincerely,

  
Eric Damian Kelly

April 30, 1982

Mr. Eric Kelly  
200 East Abriendo Avenue  
Pueblo, Colorado 81004

Dear Eric:

Here's a copy of the EPA Grant Conditions per our discussion on Thursday, I tried to get some of the back up per #5 on Page 4 -- let me know if you need.

Also, Maxine gave me the letter from Tri-R Realty -- thought we ought to look at the concept. I don't think it makes sense, do you?

See you later.

Curt Wiedeman  
County Administrator

CW/ju  
enc: two