MEMORANDUM OF LAW

DATE: March 6, 1987

TO: Councilwoman Abbe Wolfsheimer
FROM: City Attorney
SUBJECT: San Pasqual Valley - Channel Maintenance - Section 404 Permit

At the Transportation and Land Use Committee meeting on February 9, 1987, you asked this office for its legal comments as to the necessity of joining affected City lessees in the San Pasqual Valley as co-applicants for an Army Corps of Engineers Section 404 permit.

You also asked whether a 404 permit, once issued, is assignable or transferable without the prior written consent of the Army Corps of Engineers.

By memorandum dated February 12, 1987, addressed to Dave Nielsen, this office reviewed the general background which may lead to an ultimate application for a 404 permit for some portion of the activities involved in creating an adequate drainage channel through the San Pasqual Valley. A copy of that memorandum is attached for reference.

The February 12 memorandum discussed the fact that the City is still doing work preliminary to a determination of whether or not a 404 permit will actually be required but that, if and when "we are ready to finalize and submit any proposed application . . . for a 404 permit, we should consult with, and perhaps obtain the approval of, the various ╒affectedσ . . . lessees."

As you know, Section 404 permits are required under certain circumstances involving "the discharge of dredged or fill material into waters of the United States." The permits are issued pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344). Parts 323 through 328 of Volume 33 of the Code of Federal Regulations provide the general rules with regard to the issuance and enforcement of Section 404 permits. Volume 51, No. 219 of the Federal Register dated November 13, 1986, provides, to our knowledge, the latest version of said rules and regulations.

Section 325 of Volume 33 of the Code of Federal Regulations involves applications for Section 404 permits. Section 325.1(d)(7) is entitled "Signature on Application" and provides as follows:

> . . . ╒Tσhe signature of the applicant or the the agent will be understood to be an

affirma-tion that he possesses the requisite property

> interest to undertake the activity proposed in the application . . ..

The question of whether a lessee should or must be a co-applicant, therefore, must be answered in part based upon the issue of who is actually going to "undertake the proposed activity." Since, at this point in time, we are not aware of exactly what, if any, portion of the channel construction will be an "activity" requiring a Section 404 permit, it is also not known at this point whether the City or a lessee will be performing the "activity." If, as we get closer to a determination of the applicability of the Section 404 permit requirements to the channel work, it becomes clear that work requiring a Section 404 permit should be accomplished by a lessee, then it would clearly be both necessary and appropriate to include the lessee as a co-applicant. In the event we determine that the City should accomplish any activity requiring a 404 permit then, of course, the lessee may not be a required applicant or co-applicant.

It should be noted that the TMY lease, for example, does not authorize any channel maintenance outside of a 300-foot-wide configuration (Section V.A.5. - TMY lease - see attached). Also it should be noted that Section IV.C.26. of the TMY lease allows the City to enter on to the lease premises for the purpose of "developing municipal services" and reserves a right in the City to "establish and use such rights of way over, under, along and across the lease premises for utilities, thoroughfares, or access as it may deem advisable for the public good." Paragraph 26 also provides for a lease rent reduction in the event such activity by the City results in physical damage to the lease premises. See attached.

Also, Paragraph V.A.8. of the TMY lease provides as follows:

> Deletion of Portion of the Leased Premises. In the event any portion of the leased premises is not used by LESSEE for its highest and best permitted use, then CITY may, at CITY'S option, delete that portion
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> of the leased premises not used by LESSEE from Section IA, DEMISED PREMISES hereof. Provided, however, Section III, CONSIDERATION hereof, shall be adjusted downward by the City Manager on equitable basis.

Therefore, with regard to your question as to the necessity

of lessees being co-applicants for a Section 404 permit, it is our conclusion that once the ultimate channel configuration has been determined, the City must then consider whether or not the City itself should proceed with the work utilizing the above lease provisions or whether the work should be done by lessees. At that point, a determination can also be made as to whether any portion of the work to be accomplished will require a Section 404 permit.

If the City is to accomplish the work itself and a 404 permit is determined to be required for some portion of the work, it would not be necessary for the lessees to be co-applicants. On the other hand, if the lessees are determined to be the appropriate parties to cause the work to be done, the City, as the owner, should still be the applicant with the lessee as a co-applicant.

The determination as to whether the lessee or the City should accomplish the work has a significant economic aspect since, should a 600-foot-wide channel be determined to be the ultimate channel width, more than two million cubic yards of sand will be required to be removed from the area of the TMY leasehold alone, which removal could produce more than $2 million in income to the owner of the sand.

Your second question asks whether or not the 404 permit, once issued, is assignable or transferable without the prior written consent of the Army Corps of Engineers. The suggested permit form is contained in Appendix A following Section 325.10 of the regulations. The July 1986 version of the rules and permit form contain the following language:

> I.(t) That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the trans-ferree's written agreement to comply with all terms and conditions of this permit or by the transferree subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit.

For whatever reasons, the November 1986 version of the rules and regulations contains a substantially different permit form and does not include the above language. The November 1986 form does contain, in Appendix A, the following language:

> 4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward

> a copy of the permit to this office to validate the transfer of this authorization.

Therefore, in answer to your question, a 404 permit is assignable and transferable without the prior written consent of the Army Corps of Engineers so long as the transferee agrees to accept the obligations as contained in the permit. It should also be noted that the rules and regulations provide under Section 325.1(f):

> No fee will be assessed when a permit is transferred from one property owner to another.

JOHN W. WITT, City Attorney
By
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Attachments 3
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