

## **EMIGRATION IMPROVEMENT DISTRICT**

BOARD OF TRUSTEES

REGULAR MEETING

THURSDAY, MARCH 6, 2003

CAMP KOSTOPULOS, 2500 EAST EMIGRATION CANYON ROAD

SALT LAKE CITY, UTAH

Board Members in Attendance: Bill Bowen, Lynn Hales, Mike Hughes

Ex Officio: Fred Smolka–EID General Manager, Don Barnett–Barnett Intermountain Water Consulting, Gerald H. Kinghorn–Legal Counsel, Ron Rash–Carollo Engineers

Chair Mike Hughes called the meeting to order at 5:05 p.m.

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### **7. Wastewater issues**

Chair Hughes reported that the Acorn Hills system was permitted on December 23, the F Cause hearing was completed on March 4, most of the system has been bedded, and they have been asked to wait until the F Cause is finished before continuing. It was requested that certain criteria be followed and that reporting be provided to Salt Lake County. He explained that the Emigration Oaks system is owned by The Boyer Company, Dave Bennion, City Development, and Beck and requires approval of Emigration Oaks Property Owners to cross their road. He stated that he is doing the construction work on the project, and once the project is complete, it will be turned over to the EID to own and operate the system. He confirmed that he is the contractor on the job and that he is not a licensed contractor but that he hires and manages the contractors. He applied for the permit, and the EID is the body politic which went to the State to obtain the permit. He explained that the State requires a body politic to petition for a combined waste water system. He recalled that when the well protection zones were established a couple of years ago, five lots in Emigration Oaks became unbuildable. The Board agreed that something needed to be done to help those lot owners solve the problem that was created by the District. He briefly described the process they had gone through to come up with a solution. He explained that another group then approached the EID with a similar situation, in which the County permitted them to build their homes, then told them they would have to put their waste in vaults and have it pumped out. It was the Board's opinion that vaults fail, so they also agreed to try to move the waste for Acorn Hills off site and combine it into an off-site drainfield. He clarified that the District simply agreed to be the body politic if the properties with the problem could find a solution and pay for it. The property owners did the work to find a solution and hired the contractors to get it done. They also hired Michael Hughes and Ecosense Technologies to articulate the process. He described the increased size and redundancy required for a combined system.

David Crompton asked if the EID knew Chair Hughes would be the contractor. Mr. Hughes replied that he did not believe there was any question about that. Mr. Bowen stated that he had not realized that Mr. Hughes was the contractor until the February 6 EID meeting when he asked the question that he has requested be reflected in those minutes. Mr. Hales stated that he was perfectly aware month after month as this item was on the agenda and Chair Hughes reported each month that Chair Hughes was hired by both groups to provide engineering support relative to these small community systems.

Ms. Weyher stated that she had done some research and learned that Ecosense Technologies is listed in the telephone book as an LLC; that it does not have a business license in the county; that Way Big LLC, which is an owner of Ecosense, is an expired LLC; and that Michael Hughes is not a licensed contractor. She questioned why he represented that he was the contractor on this job. Chair Hughes explained that Ecosense Technologies is wholly owned by a company called Liaison. Way Big took over ownership of Ecosense, and it was then acquired by Liaison. Liaison also does not have a contracting license. He explained that his role is to oversee the contractors who do the work. He hires the engineering firms and construction contractors, all of which are licensed. He explained that lease waivers are signed with all contractors, and each carries the liability for the work they perform. Ms. Weyher stated that it was obvious that Chair Hughes was not a contractor and did not know how licensed contractors work. Mr. Hales commented that a number of property owners in the canyon have hired people who are not licensed contractors to oversee and coordinate construction of their homes. Ms. Weyher retorted that they are not using public funds. Chair Hughes and Mr. Hales clarified that the property owners involved in these wastewater projects are not using public funds. Mr. Hales explained that the homeowners have simply contracted with Chair Hughes to perform a service for them. Ms. Weyher stated that she spoke with the County and learned that a stop work order was put on the Acorn Hills project, and they indicated that they had more concerns about this project than she did. Chair Hughes explained that he attended the F Cause hearing, and not a single issue was raised other than that the County did not want him to proceed until a vegetation plan had been provided. Ms. Weyher stated that she would file a complaint with the Department of Professional Licensing that Chair Hughes is representing himself as a contractor.

Margot McCallum verified with Chair Hughes that he would stand to gain personally from his work on this project and asked if he believed that was a fair business practice since he is Chair of the EID Board. Chair Hughes replied that he had no problem with it. Ms. McCallum asked if this project was put out to bid so other contractors could bid on it. Chair Hughes explained that the work is not being done by the District, and that question is not relevant. He explained that the EID's only involvement is that they will take ownership of a completed system and manage it into perpetuity. Ms. McCallum stated that she had an issue with Chair Hughes gaining financially from a project in which the EID is involved.

Mr. Crompton maintained that the project could not have proceeded without the EID obtaining the permit. Therefore, Chair Hughes would not have been able to make any money unless the Board had voted in favor of the project proceeding. Chair Hughes explained that he would have made money on the work he did for the property owners whether or not the EID agreed to take over and maintain the systems, and he did not believe a conflict existed. He stated that he has discussed every aspect of this project every month for a year and a half, and the minutes will reflect that. He explained that the EID caused something to happen to the property owners, that no one did anything about solving

it, and that the Board felt obligated to do something to help solve the problem. Mr. Bowen agreed that was the case with Emigration Oaks, but he did not believe the same argument could be made for Acorn Hills. Chair Hughes explained how the Acorn Hills situation was similar because the County wanted to force owners of homes that had already been built to put their waste into vaults. He recalled that Mr. Bowen, in meeting after meeting, had commented that vaults fail and are not a good idea, and that has been the Board's position throughout this process. Mr. Bowen agreed that he had said that vaults fail and stated that these two systems are not the only systems of this type being considered. He was aware of one other area in Emigration Oaks where a source protection problem exists. He admitted that he may not have paid sufficient attention to the location of Acorn Hills and that Acorn Hills did not have the source protection issue associated with it. He believed the taped records could demonstrate that he was either not listening or that the distinction was not well articulated.

Chair Hughes believed it was odd that this appeared to be such a surprise to everyone when there have probably been 30 meetings where this was discussed. The Board has talked about it to the point that the other Board Members got irritated when he discussed issues related to the wastewater systems at the meetings. He did not believe there was any contractor who would have gone through the process. He commented that it has been a nightmare to get it to this point, including a multitude of design changes with Salt Lake County, the State of Utah, the Division of Drinking Water, and the property owners. He stated that he had not tried to hide anything about what was happening. He noted that the people who will receive the benefit are thrilled to have a solution, are paying for it completely, and not one dime of public funds will go into these systems. The systems they will get are three times the system they would have if they did not have to meet the criteria required for this type of system. He was proud of what he had been able to accomplish, and he did not have any apologies for the work he had done. He stated that, if people want to complain and slow their neighbors' progress, they should do what they think they need to do. The reality is that the property owners had a problem, no one stepped up to help them, he did what he could, the District did what it had to do with its eyes completely open, and the records and the minutes will reflect that.

Kathy Christensen, a homeowner in Emigration Oaks, commented that she appreciated what the District has done, and she believed the people in attendance who had come to take pot shots at the Board were being unfair. She believed they were entitled to their point of view, but they are criticizing rather than trying to do anything constructive to solve problems. She appreciated the members of the Board who have tried to solve problems for property owners who cannot get their homes built through no fault of their own.

Ron Draughon asked Chair Hughes if he had recused himself from any vote from which he could derive financial gain, such as the vote to obtain the permits which allowed him to do the work which resulted in his financial gain. Chair Hughes replied that he did not. Mr. Kinghorn clarified that the EID Board authorized Chair Hughes to work with the homeowners to find a solution because the homeowners were in a quandary about how to deal with the source protection zone, and no one knew what would ultimately happen. Chair Hughes came back each month and reported on the alternatives they had tried. There is now a system that has been approved by the State, and Mr. Kinghorn had a draft policy to distribute to the Board this evening. No vote has been taken on the policy or the contract, and Chair Hughes will have to file a disclosure and should recuse himself from voting on the final contract because he does stand to make a financial gain. However, the contract is not

yet before the Board for a vote. Mr. Kinghorn stated that he did not believe anyone could have anticipated that this process would have ended as it has. He stated that Chair Hughes did what the Board authorized him to do, which was to find a solution to the problem. He agreed that this matter could have been discussed in greater detail so the Board might have been better informed about the process, but the report always came at the end of the agenda, and the other Board Members asked for a brief report so they could end the meeting and go home. He believed those reports were given short shrift and that the Board Members could have asked more questions. He was not aware that Chair Hughes had ever made an attempt to hide anything. Now the Board is in a position where they need to develop a policy and consider where they are. They should hold a public meeting to discuss the issues related to this matter and find a process to get to the end result without unfairly damaging anyone, especially those who relied on Chair Hughes who acted in a dual capacity when he got the State to approve the system. Mr. Kinghorn explained that the District will manage the system when it is done, and the property owners will be charged a service charge to cover the cost of managing it.

Ms. Weyher stated that she did not wish to personally attack Chair Hughes, but she believed it was important that this issue be resolved. She had no intention of obstructing the project, but she believed it was important that the EID work as professionally as possible.

Chair Hughes noted that the property owners spent more than \$20,000 for percolation tests and that there is no way to explore a solution without an idea of where the solution can be put. The parties involved had to move forward at some point, and the parties were all committed to doing that. A solution had to be engineered before it could be taken to the State to apply for a permit, and engineering is very costly. He explained that he oversaw the work but did not do any of it, and he became manager of the project by default. The solution took on a life of its own, and he did not go out and solicit the work. He stated that he probably stood to lose money on the Acorn Hills project. That did not matter to him because the property owners had been through so much, and he felt bad about that. He was happy to help and was proud of the work he had done.

Mr. Bowen stated that he believed Mr. Kinghorn had accurately described the process that occurred at the Board meetings and that it had been given short shrift. He believed that contrasted with the work and approaches the Board has taken on other projects where they have been more careful. He noted that they spent thousands of hours on the Emigration Oaks expansion area, which he believed was approached with meticulous detail and full and complete understanding. He believed they had made mistakes and not proceeded carefully in this instance. He referred to the February 6 meeting minutes. He noted that they state that Mr. Kinghorn indicated that he would have to come up with a risk assessment and that he believed the risk would be very low. However, in a personal conversation Mr. Bowen had with Mr. Kinghorn, Mr. Kinghorn had indicated that the risk assessment was difficult for him to undertake because this had never been done before. Mr. Kinghorn commented that this is a pioneering effort to try to solve these problems. Mr. Bowen stated that he believed the process had failed materially and accepted his share of the responsibility for that. He recalled that Chair Hughes reported on this process numerous times, and as Mr. Bowen thought back over the conversations, he would characterize them as reporting on the technologies and bureaucratic processes with the State, not with the action and operational issues that were undertaken. He stated that, when Chair Hughes reported that the Acorn Hills project was 75% completed at the February meeting, he was shocked and wondered

how things had reached that point so quickly. Mr. Bowen believed the Board had abandoned its methodical public processes in this case.

Mr. Hales stated that he had a different view of the process and that he concluded differently than Mr. Bowen. He believed this item had been on at least 80% of the agendas for the last 18 months. He wanted it to be clear that the problem in Emigration Oaks was caused by the EID Board and their desire to provide a source protection zone and that the Board imposed restrictions on a number of previously platted and sold lots in Emigration Oaks. That resulted in discussions by the Board of what their liability to the lot owners might be. In his mind it was always clear where this process was headed, which was that the EID would ultimately take ownership of the wastewater systems upon appropriate contractual agreements with the lot owners. Those contracts would deal with liability, repair, associated fees, etc. Acorn Hills had a similar situation, not with an immediate source protection problem, but with the District planning to supply water on that street. He believed Chair Hughes had given reports of all the aspects of the project. He explained that the District is still pursuing a process of contractually binding the lot owners to terms that the EID and community can tolerate where risks are understood to the extent they can be understood and where the fees will come from the home owners, not tax payers. He believed that, if the people Chair Hughes contracted with to provide services have a problem, that is between them, and he was not aware of any problems. He did not see that this process created a responsibility on the Board that they were not willing or wanting to take on, and he would be willing to speak under oath to his opinions. He noted that he attended every Board meeting, and he did not understand where the comments expressed this evening were coming from. He noted that the people who contracted with Chair Hughes are not at this meeting complaining about the situation. He was not certain about the purpose of the attacks from the public or whether people were attacking Chair Hughes, the Board, or the process.

Ms. Weyher stated that the State of Utah penalizes people and makes it impossible for them to work in the future if they represent themselves as contractors and are not. Mr. Hales explained that the EID has not contracted with Chair Hughes, and he has not made that representation to the Board. Ms. Weyher stated that she was talking about being a contractor, hiring subcontractors, overseeing a project, and having the proper licensing to insure that person is personally responsible if something goes wrong. Mr. Hales replied that the important thing for the Board to consider if they enter into contracts to take responsibility for the two systems is that they have the responsibility to assess the systems as they are in the ground, not necessarily how they got in the ground. The Board will review the contracts with the owners to be certain that the systems meet the purpose for which they were designed and that the liabilities for those systems are with the appropriate parties.

Mr. Kinghorn explained that one aspect of the contract requires Ecosense to warrant to the District that the systems work in compliance with the construction permits, so there will be a contractual relationship between Ecosense and the District. One problem with disclosures at this point is that the District is still working through the terms of the contractual relationship. This is a work in progress, and there is no final contract. He recommended that a meeting be held to discuss the policies and contractual issues, after which the Board can make some decisions about this process before the contract is finalized.

Mr. Hales noted that the Board always asks for Mr. Kinghorn's recommendations as they have this evening, and the record will show that they have asked for his opinion regarding

legalities throughout this process. He could not remember a time when the Board had acted outside of Mr. Kinghorn's recommendations, and that is what they are doing with this process.

Ms. Weyher asked Chair Hughes again if his business was legitimate and whether he had a business license. Chair Hughes replied that he does have a business license under the name of Liaison.

Ms. McCallum stated that this was not a personal attack on Chair Hughes but was a matter of the process by which the EID Board conducts its business. She believed the EID had a contract with Chair Hughes because the permit had to be acquired by the EID. She believed a relationship existed that is perceived by the public to be something that it is not, and she believed Board Members needed to be very careful about appearances.

Chair Hughes stated that sometimes people lose sight of the idea that this is about public service. It was the public that had the problem, and it was the public that the EID tried to serve. He explained that the EID Board was formed to provide water and sewer to Emigration Canyon, and sometimes people lose sight of the fact they are supposed to be providing service to the public. He noted that these property owners could not build on their lots or move into their homes for months on end because the EID was trying to keep their well clean for the rest of the people on the water system.

Mr. Crompton stated that he believed Chair Hughes should have recused himself from any further action on the Board as soon as he realized he stood to make a financial gain from this process. Mr. Draughon stated that he was concerned about the legality of any vote that was taken on this issue in the past where Mr. Hughes did not recuse himself. Mr. Bowen stated that he did not recall after reviewing the minutes that the Board had taken a vote to obtain the permit. Mr. Hales stated that he has asked the County Attorney on a number of occasions what constitutes a conflict of interest, and each attorney he has spoken with has his own opinion. He stated that he had never heard a unanimous agreement of what constitutes a conflict of interest, and many people may disagree with Mr. Crompton's opinion. Mr. Crompton stated that he believed when it comes to material gain the ordinance is clear. Mr. Hales replied that he had read the ordinance and did not see that Chair Hughes was in conflict based on his contracting with the property owners nor that his role as EID Chair had brought him any gain. He noted that many people in the canyon contract with other people in the canyon to provide a service for them. Mr. Crompton argued that the Acorn Hills sewer project would not be approved if the EID Board does not agree to contract for its maintenance, and Chair Hughes' material gain from that project depends on his vote. Mr. Hales stated that he believed the people had paid Chair Hughes as the project went along, and his compensation did not depend on the Board taking over the system. Chair Hughes confirmed that was correct.

Mr. Smolka noted that another special improvement district could potentially have been formed to take over the sewer systems. Mr. Bowen recalled that Mr. Kinghorn had made a statement that this system relied on approval by the EID because it is the only special improvement district in the jurisdiction. He had been impressed by the idea that it was the EID or nothing. Mr. Kinghorn recalled that he stated his opinion as being that the State would not approve a community wastewater system unless it was operated by a public entity, and he did not think they would approve it for a homeowners association. The problem with predicting what the State might do with this situation is that the State has never worked with one of these systems before. These two systems are the first ever

approved in the State of Utah. He had been uncertain how this would develop, because the regulations depended on the type of technology employed.

MOTION: Bill Bowen moved to ALLOCATE time to adequately discuss the wastewater systems topic at the next regularly scheduled Board meeting and that the District make a substantial effort to inform the public of the issues to be discussed. He believed a newsletter should be distributed and that it should be posted on the web site. Lynn Hughes seconded the motion.

VOTE: Unanimous in favor of the motion.

Mr. Hales stated that he was not certain that the Board was at a point where the policy could be finalized before April 10 and posted for public review. Mr. Bowen stated that the policy itself could either be a detailed item on the agenda that evening or not, depending on whether or not it is ready.