EXHIBIT C

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FROM: Donald W. Detisch
DATE: December 8, 1998
RE: Letter to Ms. Paula Higashi dated December 8, 1998, w/enc.
NUMBER OF PAGES (INCLUDING COVER PAGE): 21

IF YOU HAVE ANY QUESTIONS OR DID NOT RECEIVE ALL PAGES OF THIS FAX, PLEASE CALL ROSE AT 236-9343. THANK YOU.

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December 8, 1998

VIA FACSIMILE AND U.S. MAIL (916) 445-0278

Ms. Paula Higashi
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1300 I Street, Suite 950
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RE: Proposed Statement of Decision
Non Profit, Special Use Property Requirements
City of San Diego, Test Claim #97-TC-01 (97-238-01)
Code of Civil Procedure Sections 1235.155, 1263.320 and 1263.321
Evidence Code Sections 823 and 824
Government Code Section 7267.9
Chapter 7, Statutes of 1992
Our File No. 2058-01

Dear Ms. Higashi:

I preliminarily wanted to thank you and your staff for the professional courtesy extended to me and my client. While these matters are sometimes contentious, professionalism requires an orderly and cooperative procedure and is much appreciated.

On behalf of St. Marks we have these comments relative to the Proposed Statement of Decision. It is our understanding that our comments will be included in the binders for the upcoming agenda. For ease of reference, I am enclosing the Proposed Statement with paragraph numbered so as to correlate my remarks:

1. **Page 5, Paragraphs 1 and 2: Background**

It was our understanding that the discussion contained in Paragraphs 1 and 2 were considered irrelevant by the Commission (Chairman of the Commission so remarked). I therefore question the need for the inclusion of this language particularly Paragraph 2 in the Statement of Decision.

2. **Pages 5 through 10: Eminent Domain Power is Discretionary**

The discussion of the alleged discretionary nature of all eminent domain actions in California is, of course, the most important issue addressed. It is now declaratively stated by this Commission that any eminent domain matter coming before the Commission will meet a

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similar fate as this test claim. The Commission views the use of eminent domain in California as discretionary. It does not matter when a public entity uses its eminent domain power or if in using its power, certain mandatory requirements "kick in". In short, downstream activities including statutory requirements for seeking alternative property, etc. are not state mandated.

The cases cited for the above proposition Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830, 750 P.2d 318 by Commission staff do not support the staff's position. Justice Mosk's opinion does not appear to touch this downstream activity, nor does County of Los Angeles v. Commission (1995) 32 Cal.App.4th 805, 818. These cases simply are not persuasive.

Apparently according to the Commission's unequivocal stance, the legislature can mandate or require whatever it desires with respect to a local entity's eminent domain activity. If it entails added costs and/or new programs, it does not matter because it is an eminent domain proceeding, which, of course, is allegedly discretionary.

To contend that the use of eminent domain in today's world is discretionary is somewhat naive. To not use the power of eminent domain results in a stultification of government and allows private property owners to hold the government hostage. This is said despite the alleged holding in City of Merced v. State (1984) 153 Cal.App.3d 777. Without this case the issues here would be fresher and subject to a more realistic look.

The language of Section 9 of the Senate Bill 821 is mischievous:

> "Notwithstanding Section 17610 of the Government Code if the Commission on State Mandates determines that this act contains costs mandated by the state reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (Section 17500 et. seq.) Gov. Code. . . . "

Why is this provision included within the Senate Bill if it is already determined that this is an eminent domain matter, is therefore discretionary and not state mandated? The Commission already knows it cannot decide that these costs are state mandated. Why is this "hopeful" statement included in the Act? The legislative counsel found these costs to be state mandated. While this opinion is not determinative, shouldn't it carry some persuasive effect? We believe it should.

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3. **Page 11, Paragraph 4: Evidence of Additional Costs Alone Without A Corresponding Increase in the Level of Service**

We believe there was no evidence in the record to rebut the evidence interposed by the claimant on this issue -- see e.g. the declaration of Mike Steffen. Mr. Steffen discussed the increased level of service in reviewing and seeking alternative sites as well as the increased level of appraisal service required and additional costs.

Neither the Commission staff nor the Department of Finance, the only objecting party to the claim, provided counter evidence. Thus, there is no substantial evidence to support the Commission's findings.

4. **Pages 11 and 15, Paragraphs 5 and 5A: Payment of Just Compensation in Eminent Domain Is Mandated by the U.S. Constitution**

This is an issue upon which it is believed that the Commission is most vulnerable. The U.S. Constitution does not require the use of the "substitute facilities" doctrine. In United States v. 564.54 Acres of Land (1979) 441 U.S. 506, 99 S.Ct. 1854, 508, 513-517, 60 L.Ed.2d 435, the Supreme Court rejected a church's argument that the cost of providing substantially equivalent facilities at a new site should be used as the test of compensation. The "substitute facilities" test was held to be applicable only to government condemnees. Thus, it is clear the U. S. Constitution does not mandate the methodology set forth in Section 824(a) of the California Evidence Code. See also California Real Estate Law & Practice (1995) Dankert, Volume 14 at §508.10[3] at 508-14 to 508-14.1

Clearly this finding is not supported in the law or by the record.

5. **Page 15, Paragraph 6: Commission's Sole and Exclusive Authority to Determinate Mandate's Existence**

St. Mark's again points to the language of Section 9 of Senate Bill 821 and simply asks: If eminent domain issues are always discretionary and thus not state mandated, why are provisions like Section 9 included in legislation? We believe the "upstream", "downstream" mandatory activities argument is a "red herring" whereby the payment of state mandated costs can be avoided. If there is to be no reimbursement for eminent domain activities the legislature should clearly and unequivocally state at the time a statute is enacted.

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6. **Conflict of Interest:**

This issue was raised at the public hearing, but is not discussed in the proposed statement. We noted at the hearing that the primary party appearing in opposition to the test claim was the State Department of Finance. We noted also that the chair of the Commission is a State Department of Finance employee.

The chairman voted on this particular test claim, which we believe may constitute a conflict of interest.

We understand the Commission includes a public entity member. Theoretically, a San Diego City Councilman could be appointed to such a position. Would anyone seriously contend that such a Commission member could vote on San Diego's test claim? Why, therefore, is the chairman, a State Department of Finance employee, allowed to vote on a matter in which the State Department of Finance itself has taken an active, direct participatory role? We fail to see the difference and believe the process may be flawed.

We thank you for the opportunity to comment and remain available for further discussion. We appreciate your anticipated and past consideration.

Sincerely,

DETISCH & CHRISTENSEN

Donald W. Detisch

DWD:rqt
cc: Reverend M.A. "Mac" Collins
Mr. Richard Thomson

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MAILING LIST

CSM/SB# and Claim Title:	97-TC-01 (97-23-01) **CLAIM OF CITY OF SAN DIEGO**
Government Code Sec.	SB 821 wherein Code of Civil Proc. sections 1235.155 & 1263.321
Chapters	Evidence Code section 824 was added and section 823 was amended.
Originated:	09-Sep-97
Issue:	Nonprofit, Special Use Property Requirements

I am employed by Detisch & Christensen which is in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 444 West "C" Street, Suite 200, San Diego, CA 92101.

On December 8, 1998, I served the foregoing document(s) described as:

LETTER TO MS. PAULA HIGASHI DATED DECEMBER 8, 1998 FROM DONALD W. DETISCH

on the interested party(ies) in this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

XX MAIL	I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection in the United States Postal Service the same day as it is placed or collection.
XX FACSIMILE	I served the foregoing document(s) via facsimile on the following party in this action addressed below:
__PERSONAL SERVICE	I caused such envelope to be delivered by hand to the addressee(s) below.

(SEE ATTACHMENT "A" BELOW)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 8, 1998

Rose Q. Tang

Rose Q. Tang

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