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May 4, 2010

The Honorable Lois Wolk
Senator, Fifth District
555 Mason Street, Suite 230
Vacaville, CA 95688
Attn: Caitlin O'Halloran

RE: Request for Attorney General's Opinion
Indexed Letter No. 09-304

Dear Senator Wolk:

By letter dated March 2, 2009, you requested an opinion of the Attorney General on the following question:

May a Local Agency Formation Commission (LAFCO) require the payment of a mitigation fee (either on a one-time basis or a recurring basis) to a public agency as a condition of approval of a land boundary change among public agencies?

Because your question calls for only a minor extension of the reasoning in some of our previously published opinions,¹ my office has decided to respond to your request with this informal letter opinion, rather than a formal published opinion. This opinion will not be disseminated in the same manner as our published opinions, and is not citable in the same manner as our published opinions. On the other hand, this letter is not provided in the context of a confidential attorney-client relationship and does not constitute legal advice; it is provided to you in consideration of our duties and authority under Government Code section 12519.

CONCLUSION

A Local Agency Formation Commission (LAFCO) may require the payment of a mitigation fee (either on a one-time basis or a recurring basis) to a public agency as a condition of approval of a land boundary change among public agencies.

¹ See 91 Ops.Cal.Atty.Gen. 33 (2008); 89 Ops.Cal.Atty.Gen. 173 (2006).

ANALYSIS

Your request letter hypothesizes a situation in which a LAFCO considers an application for the detachment of land from a fire district and the annexation of that land to a city. Upon annexation, the city would assume responsibility for providing fire protection services to the annexed territory, and the taxes formerly received by the fire district to fund those services would be shifted to the city. If the LAFCO projects that the change would have an adverse fiscal affect on the fire district, may the LAFCO lawfully condition the reorganization on the payment of a special mitigation fee to the fire district?² We believe that it may.

The Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (set forth in Government Code sections 56000 through 57550) is designed “to encourage orderly growth and development . . . essential to the social, fiscal, and economic well-being of the state.”³ The primary function of a LAFCO is to “review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization” of local agencies.⁴

Government Code section 56668 sets forth a non-exclusive list of factors a LAFCO must consider in review of a proposal. These include the cost and adequacy of governmental services in the relevant areas (§ 56668(b)); the effects of proposed actions on adjacent areas (§ 56668 (c)); and the sufficiency of revenues for providing services to new areas (§ 56686(j)). We believe that section 56668 gives a LAFCO ample authority to consider the potential adverse economic impact of a proposed annexation on the remaining territory of a special district, such as a fire district.

After a LAFCO has reviewed a proposed reorganization and has conducted a hearing, it must adopt a resolution approving or disapproving the proposal, with or without conditions.⁵ A reorganization may provide for, or be made subject to, any of a wide array of terms and conditions set forth in Government Code section 56886, so long as the conditions do not directly regulate land use, property development, or subdivision requirements. Furthermore, subdivision (v) of section 56886 provides that a LAFCO may condition its approval on “[a]ny other matters

² Revenue and Taxation Code section 99 governs the exchange of tax revenues in cases of jurisdictional change. Under section 99(b)(5), when a change will affect the service area or responsibilities of a special district, the board of supervisors of the county in which the district is located negotiates any exchange of property tax revenues on behalf of the district. The type of mitigation fee we consider here would be independent of such a property tax exchange agreement.

³ Govt. Code § 56001.

⁴ *Id.* at § 56375(a)(1).

⁵ *Id.* at § 56880.

necessary or incidental to any of the terms and conditions specified in this section," which effectively allows a LAFCO to condition its approval on "a virtually limitless array of factors."⁶

Our examination of the language of section 56886 persuades us that a mitigation fee of the type under consideration here could fall within any of several of the conditions enumerated in section 56886. For example, subdivision (a) provides for "payment of a fixed or determinable amount of money, either as a lump sum or in installments, for the acquisition, transfer, use or right of use of all or any part of the existing property, real or personal, of any city, county, or district." Subdivision (i) provides for "disposition, transfer, or division of any moneys or funds, including cash on hand and moneys due but uncollected, and any other obligations." Subdivisions (c), (f), and (h) indicate that a LAFCO may alter or shift financial responsibilities among agencies that are either party to or affected by a reorganization, and that this apportionment may be done not only on a strict quid pro quo basis but also by taking the equities of a particular situation into account. Furthermore, as noted above, subdivision (v) opens the door to the formulation of any "necessary or incidental" conditions, which could certainly include the imposition of a mitigation fee under appropriate circumstances.

Section 56001 of the Act expresses the Legislature's intent that community service priorities should "be established by weighing the total community service needs against the total financial resources available for securing community services" and "are required to reflect local circumstances, conditions, and limited financial resources." The equitable distribution of financial and other resources is a pervasive concern of the Act, as evinced by section 56001's declaration that boundary modification should serve the aim of providing "necessary governmental services and housing for persons and families of all incomes in the most efficient manner feasible," and by the requirement that a LAFCO consider "environmental justice"⁷ when evaluating a proposal. The Legislature has further declared that the Act "shall be liberally construed to effectuate its purposes."⁸

Moreover, although it is true that a LAFCO "has only those express (or necessarily implied) powers which are specifically granted to it by statute,"⁹ it has broad discretion in how it exercises those powers.¹⁰ For example, pursuant to its power to approve a proposal "with . . . amendment," a LAFCO may establish new boundaries for an annexation by altering the boundaries proposed to it in the application.¹¹ A LAFCO may also amend a proposal by

⁶ *Bd. of Supervisors v. Loc. Agency Formation Commn.*, 3 Cal. 4th 903, 912 (1992).

⁷ See Govt. Code § 56668(o).

⁸ *Id.* at § 56107(a).

⁹ *City of Ceres v. City of Modesto*, 274 Cal. App. 2d 545, 550 (1969).

¹⁰ *Bozung v. LAFCO*, 13 Cal. 3d 263, 288 (1975) (stating that LAFCO has "large discretionary powers").

¹¹ *Tillie Lewis Foods, Inc. v. City of Pittsburg*, 52 Cal. App. 3d 983, 1003 (1975) (construing repealed § 54790, the predecessor to § 56375, and noting that such occurrences were common); see also 91 Ops. Cal. Atty. Gen. 33, 36 (2008) (concluding that a LAFCO may enlarge the boundaries of a proposed incorporation beyond those set forth in the petition for incorporation).

changing the organizational structures proposed—for example, by transforming independent special districts into subsidiary districts of a new city.¹² We note, too, that the Supreme Court has upheld LAFCO measures that were imposed exclusively for mitigation purposes, as where a LAFCO required that a new city's receipt of property taxes be phased in more slowly than originally proposed, in order to reduce the loss of tax revenues to the county.¹³

For all of these reasons, we believe that it is within a LAFCO's discretion under section 56886 to require a mitigation fee as a condition of its approval of the annexation.¹⁴

Sincerely,



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¹² *Fallbrook Sanitary Dist. v. San Diego Loc. Agency Formation Commn.*, 208 Cal. App. 3d 753, 765 (1989) (pertaining to an incorporation).

¹³ *Bd. of Supervisors*, 3 Cal. 3d at 908.

¹⁴ We note that the Cortese-Knox-Hertzberg Act *requires* that a proposal which includes an incorporation be revenue neutral unless the county and all of the subject agencies agree to the proposed transfer, or the proposal contains mitigation measures adequate to protect the subject county from negative fiscal effects of the incorporation. Govt. Code § 56815. Mitigation measures may include “tax sharing agreements, lump-sum payments, payments over a fixed period of time, or any other terms and conditions pursuant to Section 56886.” § 56815(c)(2). Under the maxim “*expressio unius est exclusion alterius*,” the restriction of section 56815 to incorporations might suggest that the Legislature has rejected the policies of revenue neutrality and mitigation for other land boundary changes, such as annexations. We have therefore reviewed in detail the legislative history of section 56815. A full discussion of the relevant legislative history is beyond the scope of this informal letter opinion, but we are satisfied that, while the Legislature has elected not to require revenue neutrality or mitigation in connection with other boundary changes, the Legislature has also not confined the principles of revenue neutrality and mitigation to incorporations, nor has it diminished the existing authority of a LAFCO to condition the LAFCO's approval on the adoption of measures designed to mitigate the revenue effects of boundary changes.