

LOCAL AGENCY FORMATION COMMISSION COUNTY FOR SAN BERNARDINO

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DATE : SEPTEMBER 19, 2011 
FROM: KATHLEEN ROLLINGS-McDONALD, Executive Officer
TO: LOCAL AGENCY FORMATION COMMISSION

SUBJECT: AGENDA ITEM #12 -- REVIEW AND POSSIBLE ACTION ON ISLAND ANNEXATION POLICIES AND IMPLEMENTATION DIRECTIVES

BACKGROUND:

Following the reconsideration hearing on LAFCO 3067 et al, the six San Bernardino Islands, in February 2010 and again at the August 2010 Workshop, the Commission directed staff to bring back a discussion of its Island Annexation Policy and its directions and practices for implementation. The Policy is currently identified as follows:

ISLAND ANNEXATION PURSUANT TO GOVERNMENT CODE SECTION 56375.3 (*Policy #29 was repealed and replaced by action of the Commission March 31, 2005, amended October 18, 2006*)

1. For the purpose of applying the provisions of Government Code Section 56375.3, the territory of an annexation proposal shall be deemed "substantially surrounded" if 52% of its boundary, as set forth in a boundary description accepted by the Executive Officer, is surrounded by (a) the affected City or (b) the affected City and adjacent Cities, or (c) the affected City and a service impediment boundary as defined by the Commission to include, but not be limited to, a freeway, a flood control channel or forest service land.
2. The Commission determines that no territory within an established County Redevelopment Area shall be included within an island annexation proposal, unless written consent has been received from the County Board of Supervisors and County Redevelopment Agency.

3. The Commission directs that a City proposing to initiate an island annexation proposal shall have conducted a public relations effort within the area prior to the placement of the item on a Commission agenda for consideration. Such efforts shall include, but not be limited to, providing information on the grandfathering of existing legal County uses into the City, costs to the resident/taxpayer associated with annexation, and land use determinations. Documentation of these efforts shall be a part of the application submitted for consideration by the Commission.

In addition it has been the practice of the Commission to require Cities/Towns when annexing development related proposals – such as the Arrowhead Springs area to the City of San Bernardino, the Agricultural Preserve area within the Ontario sphere to the City of Ontario, the Agricultural Preserve Area within the Chino sphere to the City of Chino – to require the municipality to annex its islands which meet the criteria of Government Code Section 56375.3. That statutory language is included as Attachment #1 to this report. For those proposals initiated by City Resolution between January 1, 2000 and January 1, 2014 this section removes the protest ability of landowners and registered voters within the area. However, it is important to note, from January 1, 2014 on this section provides for a unique protest proceeding where the standard protest process for notice and publication are provided but a simple majority will determine the fate of the annexation/reorganization. The protest will be considered under the statute which reads as follows:

Government Code Section 57080.

...

- (b) The commission, not more than 30 days after conclusion of the hearing, shall make a finding regarding the value of written protests filed and not withdrawn and shall do either of the following:
 - (1) Terminate proceedings if written protests have been filed and not withdrawn by 50 percent or more of the registered voters within the affected territory.
 - (2) Order the territory annexed without an election.

So the policy related to the processing of Island Annexations will not expire in January 2014 as many entities have envisioned, but will move to a new process and procedure.

This policy discussion was originally scheduled for hearing on January 19, 2011. At the January 2011 hearing, staff requested continuance of the policy consideration to the July 2011 hearing. The continuance was to allow for further review with affected cities and the County and to give them additional time to respond to staff's inquiries regarding the Island Policies posed in a December 10, 2010 letter, copy included as Attachment #2. The questions were posed to the County Administrative Office and to the Cities and Towns which had territory which met the criteria established by State law and Commission policy for Islands. The Cities and Towns were: Cities of Adelanto, Barstow, Chino, Colton,

Hesperia, Loma Linda, Montclair, Redlands, Rialto, San Bernardino, Victorville and the Town of Apple Valley. The questions presented are summarized as follows:

1. Question of whether an additional policy declaration on the issue of “entire island” should be included in the Island Annexation Policy; and,
2. Question of whether or not to include the Commission’s existing practice of requiring Cities/Towns to address their islands of unincorporated territory meeting the criteria under Government Code Section 56375.3 whenever proposing annexation of large-scale development projects.

As of May 2011, responses to the questions posed were received from the County and the Cities of Colton, Chino, Hesperia, Barstow, Montclair, San Bernardino and Victorville; copies are included as Attachment #3 to this report. Discussions have taken place with the staffs of the Cities of Redlands, Rialto and Loma Linda related to the questions posed but no official response has been provided. The balance of the Cities and Town have not provided a response to the questions presented.

In general the responses received, except for the City of San Bernardino, have identified support for or no opposition to the current definition of substantially surrounded adopted by the Commission and for the question of entire island, that the matter should be addressed on a case-by-case basis. Secondly, there is no consensus on the issue of making the current practice of connecting island annexations to the larger development related annexation application a policy of the Commission. The Cities of Chino and Victorville have indicated opposition to the imposition of such policy on the basis of the adoption of local policies that the City will only annex lands and voters who support the proposal and whose lands would produce a benefit to the City through annexation. This relates to lands which hold significant potential for sales tax dollars and/or increases in property valuations.

The City of San Bernardino has expressed its position that it must be “exempted” from the policy as the stipulated agreement settling the San Bernardino Islands case indicated that that Commission would not impose a condition on the annexation of its island areas. However, staff does not believe that an “exemption” is necessary given the terms of the stipulated agreement on the Commission and on the City of San Bernardino indicating it will not initiate an annexation of an island area until such time as the law regarding protest is changed.

ISSUES AFFECTING CONSIDERATION:

Since the Commission directed staff to evaluate the existing Island Annexation policy three significant issues either continue to be processed or have occurred: (1) a request for Attorney General Opinion on the question of entire island; (2) the State’s passage of SB 89 removing the discretionary Motor Vehicle In-Lieu fees for inhabited annexations; and (3) pending litigation in the case of the Sunset Beach Island Annexation to the City of

Huntington Beach regarding the ability of the City to extend existing special taxes, i.e., utility tax, to an island annexation area. The following summarizes these issues:

1. In March 2010 Senator Gloria Negrete-McLeod requested that the Attorney General weigh in on the island annexation matter by asking two specific questions:
 - a. “Does Section 56375.3, pertaining to the annexation of substantially surrounded islands of unincorporated territory require annexation of the “entire unincorporated island” as set forth in subdivision (b)(1) and (2) of Section 56375.3?”
 - b. “May a Local Agency Formation Commission split up county unincorporated islands which exceed 150 acres into smaller segments of 150 acres or less for annexation and thereby avoid landowner/voter protest proceedings pursuant to Section 56375.3(a)?”

The Attorney General’s initial response was that it would not take up the matter due to pending litigation. That litigation, Hulse v. LAFCO, was resolved by stipulated agreement and the matter, in September 2010, was again requested to be addressed by the Attorney General. To date, no information has been received regarding the status of the opinion request. However, San Bernardino LAFCO Legal Counsel and Special Counsel for the CALAFCO have submitted opinions to the Attorney General (copies included as Attachment #4 to this report). In summary they have indicated that the entire island must be annexed but the definition of what constitutes the entire island should be based upon a determination of the affected LAFCO on the question of substantially surrounded. Until such time as the Attorney General’s Office releases an opinion, we believe that the language of the existing policy is adequate for addressing these issues. Therefore, staff is recommending that the Commission direct its staff upon release of the Attorney General Opinion related to Island Annexations that an item be placed on the next available Commission agenda for which notice can be provided to review that opinion and its impact on the Island Policy.

2. On July 1, 2011 SB 89 became effective removing the discretionary Motor Vehicle In-Lieu Fee (MVLFF) funding for inhabited annexations and incorporations which occurred after 2004. This reduction was the State Budget mechanism to guarantee the continuation of the COPS Grants due to a dwindling revenue stream for the State. This legislation was drafted in the dark of night without a serious vetting to address potential implementation issues, passed by the Legislature on Tuesday June 28, and signed by the Governor on June 30, effective July 1. Attachment #5 to this report is the information prepared by Mr. Michael Coleman, Financial Policy Analyst for the California League of Cities, outlining the effects of this legislation. The effects in our County are most dramatic for the City of Fontana which processed LAFCO 3048 addressing the full range of its islands, removing a total of \$1,397,806 MVLFF funding with a return of \$298,859 COPS grant, a loss of more than

\$1,000,000. During the original discussion of this issue it was reported that in Riverside County it is anticipated that there will be four disincorporations – Wildomar, Menifee, Eastvale and Jurupa Valley -- in the near future since as much as 50% of these new cities funding has been removed. It was identified in several local newspapers that this was an unintended consequence of the legislation but staff finds this explanation hard to believe.

In addition, two pieces of legislation were drafted late in the Legislative Session, ABX1-36 and ABX1-41, both attempting to restore funding for the MVLF for the incorporations and inhabited annexations after 2004 and to address the Orange County loss of approximately \$49,000,000. Both items did not move out of Committee and at this time are considered to be either dead (ABX1-36) or a possible two-year bill (ABX1-41). At this time staff understands that any legislative change would be anticipated to address only the shortfall facing Orange County over the financing of its bankruptcy debt.

In looking at the impact of this legislation on the Commission's island annexation program, the question of sustainability for these island annexations, in many cases, hinged upon the receipt of what was \$57 per capita in supplemental MVLF. Without that funding, the provision of increased municipal level services, such law enforcement and traffic control, will not be sustainable. It is staff's position that the exclusion of this revenue stream will mean that the policy of requiring a City to address its island areas as a part of a larger development related proposal will need to be addressed on a case-by-case basis, not a blanket policy declaration. This is in contrast to the current approach of LAFCO staff reviewing this option with city personnel. It is staff's position that these matters will need to be a Commission consideration and discussion in a public hearing setting with Commission action to require the imposition of a condition for annexation of the island areas. In addition any such annexation imposition will need to receive a collaborative County and City response so that future items, such as transportation funding issues, do not derail the process.

Therefore, based upon the actions of the State Legislature in adopting its budget package for Fiscal Year 2011-12, staff is recommending that the Commission suspend the blanket application of its directive to require a city to address its unincorporated islands as a part of a development application. Rather staff is recommending that the Commission establish a policy that any development-related annexation or reorganization, one that includes 500 or more dwelling units and/or more than 500,000 square feet of commercial/industrial development, be brought to the Commission for a discussion of that City's unincorporated island areas which meet the criteria outlined in Government Code Section 56375.3. As a part of the recommendation, the Commission should direct staff to include such language in the new Policy and Procedure Manual.

3. The final issue on island annexations is related to current litigation in process in Orange County related to the imposition by the City of Huntington Beach of its special taxes through the island annexation processed for the Sunset Beach area. No judgment has been issued on this litigation, but staff understands that the preliminary determination of the Judge in the case is that the City can extend its existing taxes to the territory in the same manner and amount currently paid by existing Huntington Beach residents.

This determination is significant to San Bernardino LAFCO as this is contrary to the position taken by staff and conditions included in prior island annexation approvals. Specifically, based upon existing Attorney General Opinions, San Bernardino LAFCO has determined that existing taxes and assessments could not be extended in an Island annexation since no ability to protest the annexation was afforded residents and landowners within the area. If the Judge in the Orange County case issues a published opinion to the contrary it will significantly change the fiscal impact of island annexations for the future. It is anticipated that a determination is at least one year away as any appeal would have to be resolved before the precedent would apply.

ENVIRONMENTAL CONSIDERATION:

At the July 2011 hearing, staff identified that the review of the Island Policy with the Commission's Environmental Consultant, Tom Dodson, and Legal Counsel resulted in the recommendation that an environmental assessment of the project be undertaken. This prompted the need to continue the consideration to the September hearing.

Mr. Dodson has reviewed the actions proposed to affirm the existing Island Annexation policy and provide an additional element to review the question of a City's unincorporated islands upon the receipt of a development related application under specific parameters and has indicated that it is his recommendation that the matter is statutorily exempt from the California Environmental Quality Act (CEQA). This recommendation is based on the finding that the Commission's approval of the updated policy has no potential to cause an adverse effect on the environment; and therefore, the project is exempt from the requirements of CEQA as outlined in the State CEQA Guidelines, Section 15061(b)(3) and the Commission's Environmental Guidelines. It is recommended that the Commission adopt the Statutory Exemption for this project and direct the Executive Officer to file a Notice of Exemption with the appropriate agency within five days.

CONCLUSION:

After reviewing the events of the last year or so regarding island annexations and the changes in revenues which flow to Cities based upon State changes, it is staff's position that the three elements of the Commission's policy on Island Annexations, as last updated in October 2006, should be maintained in their current form.

However, staff is proposing that an additional element be added to have the Commission review the question of a City's unincorporated Island areas which meet the criteria of Government Code Section 56375.3 upon the receipt of a development related application which includes 500 or more dwelling units and/or 500,000 square feet of commercial/industrial development. This will then become a determination of the Commission based upon an understanding of the existing revenue forecasts and service transfer issues between the County and City and will be addressed on a case-by-case basis. In approving this addition, staff does not believe it is necessary to specifically exempt the City of San Bernardino from these considerations as requested by the City based upon the terms of the signed stipulated agreement. However, if the Commission disagrees with this position, exemption language can be easily added to the addition proposed.

RECOMMENDATION:

Staff recommends that the Commission take the following actions:

1. Certify that the maintenance of the existing language for the Island Annexation Policy and the proposed inclusion of a new procedure to address development-related annexations is statutorily exempt from the provisions of the California Environmental Quality Act and instruct the Executive Officer to file a Notice of Exemption within five (5) days of this action;
2. Affirm the existing policy language for Island Annexations and add a new element of review that requires Commission consideration of a City's unincorporated island areas whenever a development-related annexation application is received which includes 500 or more dwelling units and/or 500,000 square feet of commercial/industrial development, to read as follows:

**ISLAND ANNEXATION PURSUANT TO GOVERNMENT CODE SECTION
56375.3**

1. *For the purpose of applying the provisions of Government Code Section 56375.3, the territory of an annexation proposal shall be deemed "substantially surrounded" if 52% of its boundary, as set forth in a boundary description accepted by the Executive Officer, is surrounded by (a) the affected City or (b) the affected City and adjacent Cities, or (c) the affected City and a service impediment boundary as defined by the Commission to include, but not be limited to, a freeway, a flood control channel or forest service land.*
2. *The Commission determines that no territory within an established County Redevelopment Area shall be included within an island annexation proposal, unless written consent has been received from the County Board of Supervisors and County Redevelopment Agency.*

3. *The Commission directs that a City proposing to initiate an island annexation proposal shall have conducted a public relations effort within the area prior to the placement of the item on a Commission agenda for consideration. Such efforts shall include, but not be limited to, providing information on the grandfathering of existing legal County uses into the City, costs to the resident/taxpayer associated with annexation, and land use determinations. Documentation of these efforts shall be a part of the application submitted for consideration by the Commission.*
4. *The Commission directs that upon receipt of a development-related annexation or reorganization application, which anticipates development of 500 or more dwelling units and/or 500,000 square feet of commercial/ industrial development, LAFCO staff shall, within 90-days, place an item on the Commission's discussion calendar to review that City's unincorporated island areas which meet the criteria identified in Government Code Section 56375.3. The questions to be reviewed shall include, but not be limited to, the feasibility of annexing the island areas as a condition of application approval, the anticipated revenues available to fund service extension should the areas be annexed, and any special circumstance in reference to original change of organization application or the island areas.*

This amendment shall be included in the resolution of approval for the revised and reorganized Policy and Procedure Manual scheduled for consideration on the Commission's October 19, 2011 Hearing Consent Calendar.

3. Direct staff that upon notification of the issuance of an Attorney General Opinion related to the questions on island annexations posed by Senator Negrete-McLeod that an item be placed on the next available Commission agenda for which notice can be provided to review that opinion and the impact on the Commission's Island Policy.

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Attachment:

1. [Government Code Section 56375.3 – Island Annexation Statute](#)
2. [December 10, 2010 Letter to City/Town Manager Regarding Questions on the Commission's Existing Island Annexation Policies](#)
3. [Responses Received from the County of San Bernardino, Cities of Colton, Chino, Hesperia, Victorville, San Bernardino and Montclair](#)
4. [Letters to State Attorney General from Scott Porter of Colantuono & Levin PC on behalf of CALAFCO and Clark Alsop of Best, Best & Krieger on behalf of San Bernardino LAFCO](#)
5. [Outline of Impacts of SB 89 Prepared by Mr. Michael Coleman, Fiscal Policy Advisor for the California League of Cities, Excerpt from Chart Showing San Bernardino and Riverside Counties, Copy of SB 89](#)
6. [Letter from Tom Dodson and Associates for Environmental Assessment](#)