

**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**

Attachment 4

Scott E. Porter
SPorter@CLLAW.US
(213) 542-5708

Colantuono & Levin, PC
300 S. Grand Avenue, Suite 2700
Los Angeles, CA 90071
Main: (213) 542-5700
FAX: (213) 542-5710
WWW.CLLAW.US

February 24, 2011

Marc Nolan, Deputy Attorney General
Office of the Attorney General
Executive Programs/Legal Opinions Unit
300 S. Spring Street
Los Angeles, California 90013

Re: Opinion Request 10-902 Regarding Duty To Annex Entire Island

Dear Mr. Nolan:

On behalf of the California Association of Local Agency Formation Commissions ("CALAFCO"), we write to express our thoughts on the two questions as to which Senator Negrete-McLeod's March 19, 2010 request asks the Attorney General's opinion:

- "A. Does [Government Code] Section 56375.3, pertaining to the annexation of substantially surrounded islands of incorporated 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 annexations and thereby avoid landowner/voter protest proceedings pursuant to [Government Code] Section 56375.3(a)?"

We answer the first question in the affirmative, and the second in the negative, but note that the Legislature left to each Local Agency Formation Commission ("LAFCO") to make a quasi-legislative determination, based upon its particular knowledge of the facts at issue, what constitutes "the entire island" in a given situation.

Analysis

1. The Entire Island Must Be Annexed.

Government Code 56375.3 allows a LAFCO to sometimes shorten the process of approving an annexation, by obviating the need to conduct protest proceedings. To avail itself of the more streamlined process, the requirements of subsection (b)(1) must be met. By the terms

of subsection (b)(1), the LAFCO must find that the “island” that will be annexed “constitutes the entire island.” Absent clear legislation to this effect, given LAFCO’s broad authority to interpret state law, LAFCOs would not be required to have annexed the entire island.¹ But because of the plain wording of the statute, the answer to Senator’s first question is that entire “island” must be annexed.

2. Because The Statute Does Not Define Island, LAFCO Must Make That Determination

The Legislature has not defined, and has repeatedly declined to define, the term “island.” The Cortese Knox Hertzberg Government Reorganization Act of 2000 (“CKH”) defines 77 terms – “island” is not among them.² This omission speaks to the Legislature’s intent to leave the term undefined, granting LAFCO’s discretion to construe the term according to particular facts before them. Government Code § 56375(l) grants LAFCOs power to:

To review the boundaries of the territory involved in any proposal with respect to the definiteness and certainty of those boundaries, the nonconformance of proposed boundaries with lines of assessment or ownership, and other similar matters affecting the proposed boundaries.

Subdivision (b)(3)(A) of § 56375.3 provides that an island can be “surrounded, or substantially surrounded, by the city to which annexation is proposed or by the city and a county boundary or the Pacific Ocean.” Stated differently, the word “island” is not a precise term. Depending on the facts at hand, there may be times when the word “peninsula” might be more accurately describe the area of land that is to be annexed because parts of an island need only be “substantially” surrounded by adjacent cities, the county line, or the ocean. The boundary of an island might even be formed in part by something other than a political boundary, such as prime agricultural land which is not subject to island annexation under subdivision (b)(5).³ But the Legislature left to LAFCO to determine what constitutes an “island” and whether the island is “substantially surrounded.”

Legislative history substantiates LAFCO’s authority to allow streamlined annexation, even where the island connects to other large swaths of unincorporated land. In 2004, when SB 1266 was considered, it proposed language different than what was ultimately adopted. The proposed language stated:

(b) Subdivision (a) applies to territory that meets all of the following requirements: (1) It does not exceed 100 acres in area, that area constitutes the

¹ See *Beck v. County of San Mateo* (1984) 154 Cal.App.3d 374 [LAFCO should not be required to order the annexation of the entire island].

² See Gov’t Code §§ 56010-56081.

³ See *Scuri v. Board of Supervisors* (1982) 134 Cal.App.3d 400 [interpreting predecessor statute].

entire island, **and that island does not constitute a part of an unincorporated area** that is more than 100 acres in area. (Emphasis added)

It included the requirement that the island not be connected to other unincorporated territory (*i.e.* that it truly be an island, and not merely part of a peninsula or some other configuration). But the Legislature **deleted** the proposed language emphasized above, confirming that an “island” **can** be part of a larger incorporated area. Instead, the statute now provides:

(b) Subdivision (a) applies to territory that meets all of the following requirements: (1) It does not exceed 150 acres in area, and that area constitutes the entire island.

By deleting “and that island does not constitute part of an unincorporated area,” the Legislature confirmed that there may be times when a LAFCO might authorize an annexation of territory that is part of a larger unincorporated area (*i.e.*, that there may be times when the “island” is part of a peninsula or connected to other islands by cherry stems or other configurations). Had the Legislature intended to foreclose the possibility that islands might be connected to larger portions of the unincorporated county territory, it would have adopted the language originally proposed. Its decision to delete that phrase is determinative here.

As the statute now stands, to utilize the streamlined annexation process authorized by subdivision (b) of § 56375.5, LAFCO must provide for the annexation of “the entire island,” but is free to determine what constitutes that island under the “substantially surrounded” rule. When a LAFCO considers a change in organization such as an annexation, it must consider the factors listed in Government Code § 56668, including subdivision (c), which requires, in part, that LAFCO consider “the effect of the proposed action and of alternative actions, on adjacent areas, on mutual social and economic interests.”⁴ By adding the “whole island” requirement, the Legislature removed LAFCO’s ability to split an island without first completing the protest proceeding process. The “whole island” requirement does not prohibit LAFCOs from splitting such islands pursuant to the notice and hearing process applicable to non-island annexations.

⁴ There are other situations where LAFCOs must determine what constitutes an area of interest. *See* Gov’t Code § 56425(e)(4) [When a LAFCO determines an appropriate sphere of influence, it must consider “the existence of any social or economic communities of interest in the area if the commission determines that they are relevant to the agency.”]

3. LAFCO's discretion is legislative and reviewed by the courts only for action that is arbitrary capricious or entirely lacking in evidentiary support

Because the Legislature has declined to define the term "island," each LAFCO has quasi-legislative discretion to make that determination in each case. Courts routinely "defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision."⁵ Such deference is even stronger for LAFCOs. "[LAFCO's] actions are presumed to comply with [CKH] because LAFCO was formed to implement [CKH]."⁶

California courts have uniformly held LAFCO's annexation decisions to quasi-legislative and subject to deferential judicial review.⁷ "LAFCO is merely a creature of the Legislature, exercising a legislative function."⁸ That LAFCOs may hold a hearing and make findings does not change the basic principle that its decisions are quasi-legislative. The decision to redraw boundaries of political subdivisions is categorically legislative no matter the procedure followed.⁹ Because determination of what constitutes an island is legislative, a court will uphold the action unless the action is arbitrary, capricious, or lacking in evidentiary support.¹⁰

4. Government Code 56375.4 Already Limits the Power to Piecemeal Annexations

Senator Negrete-McLeod's second question suggests concern that LAFCOs might attempt to circumvent the 150-acre limitation by piecemealing the annexation of islands accomplish the annexation of areas larger than 150 acres. But such concerns are misplaced, because Government Code § 56375.4(a) already prohibits use of the island annexation process for an area that "became surrounded or substantially surrounded by the city to which annexation is proposed" after January 1, 2000. Furthermore, § 56375.3 already requires the "entire island" to be annexed and § 56375.4(b) prohibits, until January 1, 2014 any proposal "involving the same or substantially the same territory as a proposal initiated pursuant to paragraph (1) of subdivision (a) of Section 56375.3 after January 1, 2000, [from being] initiated for two years after the date of adoption by the commission of a resolution terminating proceedings."

⁵ *Divers' Envtl. Conservation Org. v. State Water Res. Control Bd.* (2005) 145 Cal.App.4th 246, 252.

⁶ *City of Agoura Hills v. LAFCO of Los Angeles County* (1988) 198 Cal.App.3d 480, 490.

⁷ *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 495 ("A LAFCO annexation determination is quasi-legislative").

⁸ *Bookout v. LAFCO of Tulare County* (1975) 49 Cal.App.3d 383, 388.

⁹ *City of Santa Cruz v. LAFCO of Santa Cruz* (1978) 76 Cal.App.3d 381, 388 ["Nor does the presence of certain elements usually characteristic of the judicial process mean that [its] action was quasi-judicial."]

¹⁰ *Calif. Hotel & Motel Assn. v. Industrial Helpers Assn.*, 25 Cal.3d 200, 212 (1975).

Marc Nolan, Deputy Attorney General
February 24, 2011
Page 5

5. Conclusion.

We conclude that the answer to Senator Negrete-McLeod's first question is "Yes, the entire island must be annexed, but LAFCO has discretion to determine what constitutes the island." The answer to the second question is that LAFCOs may not split unincorporated islands, because state law already requires the LAFCO to annex the "entire island," and any annexations must also comply with the requirements of Government Code 56375.4.

Should you have any questions or comments, feel free to contact either of the undersigned. Scott Porter can be reached at (213) 542-5708 or sporter@cclaw.us; Michael Colantuono can be reached at (530) 432-7359 or mcolantuono@cclaw.us.

Very truly yours,



Michael G. Colantuono
Scott E. Porter

SEP:slf

c: William Chiat, Executive Director, CALAFCO
Clark Alsop, General Counsel, CALAFCO



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Clark H. Alsop
(909) 483-6641
clark.alsop@bbklaw.com

Jonathan M. Lamb
(909) 483-6652
jonathan.lamb@bbklaw.com

3500 Porsche Way, Suite 200
Ontario, CA 91764
Phone: (909) 989-8584
Fax: (909) 944-1441
bbklaw.com

February 25, 2011

VIA REGULAR U.S. MAIL
VIA E-MAIL TO MARC.NOLAN@DOJ.CA.GOV

Deputy Attorney General Marc Nolan
California Department of Justice
Office of the Attorney General
Executive Programs/Legal Opinions
300 S. Spring Street
Los Angeles, CA 90013

Re: Opinion Request No. 10-902

Dear Mr. Nolan:

Best Best & Krieger represents the San Bernardino County Local Agency Formation Commission. At your invitation, we are writing to express our opinion on Senator Negrete-McLeod's request for Attorney General's Opinion No. 10-902 relating to island annexations. Senator Negrete-McLeod formulated the request based on the two following questions relating to Local Agency Formation Commissions ("LAFCOs") and annexations of unincorporated territory pursuant to provisions of the California Government Code:

"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?"

We answer this question in the affirmative, except that the particular territory may be a smaller portion of a larger contiguous island as long as the territory annexed is "substantially surrounded" in its own right as determined by a LAFCO.

"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)?"

We answer this question in the negative, but note that portions of a large unincorporated island territory which are already "surrounded" or "substantially surrounded" and are 150 acres or less may still be annexed pursuant to Section 56375.3.

Marc Nolan, Deputy Attorney General
California Department of Justice
February 25, 2011
Page 2

On behalf of the San Bernardino County LAFCO, please accept our full analysis and responses as set forth below.

A. – ENTIRE UNINCORPORATED ISLAND

Senator Negrete-McLeod asks the following: “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?”

California Government Code Section 56375.3 permits the annexation of certain territory such that Government Code Section 57000 *et seq.* protest proceedings are unavailable.¹ For exemption from such proceedings, these annexed territories – or “islands” – must meet the requirements of Section 56375.3(b). As it pertains to this particular inquiry, the Code requires the territory meet two basic requirements in subdivision (b). First, the territory subject to the island annexation proceedings may “not exceed 150 acres in area, and that area constitutes the entire island.” (Gov. Code § 56375.3(b)(1).) Second, the territory must be “surrounded, or “substantially surrounded.” (Gov. Code § 56375.3(b)(3).) Accordingly if a territory is 150 acres or less in area, constitutes “the entire island” to be annexed, and is surrounded or substantially surrounded, then an island annexation is not subject to protest proceedings. Senator Negrete-McLeod appears to be requesting guidance on whether all of the contiguous or connected portions of any “surrounded” or “substantially surrounded” territory must be part of the same single annexation in order to be considered an “entire island” under the Code.

The Code neither defines the term “island” nor “entire island.” However, the Code provides some guidance by implication. Section 56375.3(b)(3) specifies that a territory must be “surrounded in either of the following ways” listed in Section 56375.3(b)(3)(A)-(B) to be considered an “island.” Accordingly, the Code defines by implication the term “island” as 1) territory that is “surrounded, or substantially surrounded, by the city to which annexation is proposed or by the city and a county boundary or the Pacific Ocean” or 2) territory that is “surrounded by the city to which annexation is proposed and adjacent cities.” (Cal. Gov. Code § 56375(b)(3).) Therefore, if a territory is 150 acres or less in area and is either “surrounded” or “substantially surrounded” by a city, a city and another city, a city and a county, or a city and the Pacific Ocean then such territory will be considered an “island.”

The question then becomes whether the reference to “entire island” refers to the entirety of the contiguous territory meeting the definition of “island,” or whether it refers to the portion of territory to be annexed which itself meets the definition of “island.” Put another way, the question is whether or not a smaller portion of an otherwise larger unincorporated territory can itself be considered the “entire island” for purposes of Section 56375.3.² We answer in the affirmative.

¹ All subsequent references to the “Code” or “Section” are to the California Government Code.

² Courts interpreting the island annexation provisions of the Code did so with regard to former Section 35150(f). Except as otherwise noted, that statute now exists in substantially the same form in current Section 56375.3.

Marc Nolan, Deputy Attorney General
California Department of Justice
February 25, 2011
Page 3

The court in *Fig Garden Park No. 2 Association v. Local Agency Formation Commission of Fresno* noted the following:

The entire island concept was introduced into statute to prevent piecemeal annexation of large surrounded or substantially surrounded areas, thus prohibiting the circumvention of the [150]-acre limitation and/or the annexation of smaller areas within larger substantially surrounded areas. In other words, in initially determining the existence and parameters of an island, *the determining factor is whether it is surrounded or substantially surrounded*. If it is, that fixes the dimension and existence of the island. The second requirement is that the annexation include the entire island which is surrounded or substantially surrounded territory.” (*Fig Garden Park No. 2 Association v. Local Agency Formation Commission of Fresno* (1984) 162 Cal.App.3d 336, 343 (emphasis added).)

Thus, the relevant inquiry is whether the area to be annexed is surrounded or substantially surrounded *in its own right*. As an example of this principle, the *Fig Garden* court used a figure to illustrate that the Code intended to prohibit dividing up a larger island into smaller pieces for purposes of avoiding protest proceedings, but that a legitimate island may still be a smaller part of a larger unincorporated territory. (*Fig Garden*, 162 Cal.App.3d at 343.) The court held that if a territory does not exceed 100 acres (150 acres under current statute) and is substantially surrounded, the territory qualifies for annexation. (*Fig Garden*, 162 Cal.App.3d at 346.) It therefore follows that an “entire island” may be a part of a larger contiguous and surrounded territory so long as the part to be annexed is itself substantially surrounded.

In *Scuri v. Board of Supervisors of Ventura County* (1984), the court confronted the argument of whether the definition of “entire island” in an island annexation “must be a piece of property, fewer than 100 acres in area, surrounded entirely by the city...” (*Scuri v. Board of Supervisors of Ventura County* (1984) 134 Cal.App.3d 400, 408.) The property in question was substantially surrounded by a city but also partially bordered by prime agricultural land. The court held that a city may annex the prime agricultural land by use of specific statutory provisions applicable to agricultural land, and that the island annexation provisions would allow for further annexation if the remaining territory is less than 100 acres (now 150 acres) in size. Accordingly, the court essentially dismissed the argument that the “entire island” must constitute the whole contiguous area of any surrounded or substantially surrounded territory.

The Legislature has also evidenced an intent to clarify the statute relating to whether a smaller portion of a larger island may be annexed under island annexation procedures. The aforementioned 1984 cases interpreted the former Government Code Section 35150(f), which subsequently became Government Code Section 56375.3. In 2004, however, the legislature increased the applicable acreage of territory eligible for island annexation proceedings from 100 acres to 150 acres when modifying Section 56375.3, and *deleted* the requirement that the island may “not constitute a part of an unincorporated areas that is more than 100 acres in area.” Thus, the Legislature evidenced an intent to allow smaller portions of a larger territory to be annexed by Section 56375.3 proceedings.

Moreover, Section 56375(l) empowers a LAFCO to determine the boundaries of any proposals before it. Specifically, the statute empowers a LAFCO to, in pertinent part, “review the boundaries of the territory involved in any proposal with respect to the definiteness and certainty of those boundaries, the

Marc Nolan, Deputy Attorney General
California Department of Justice
February 25, 2011
Page 4

nonconformance of proposed boundaries with lines of assessment or ownership, and other similar matters affecting the proposed boundaries.” (Cal. Gov. Code § 56375(l).) A LAFCO’s discretion is quasi-legislative and is reviewed by courts only for determination of whether there was “fraud or a prejudicial abuse of discretion.” (Cal. Gov. Code § 56107(c).) This “prejudicial abuse of discretion is established if the court finds that the determination or decision is not supported by substantial evidence in light of the whole record.” (Cal. Gov. Code § 56107(c); see *Simi Valley Recreation & Park Dist. v. Local Agency Formation Commission of Ventura County* (1975) 51 Cal.App.3d 648, 685-87.) . Similarly, the court in *Beck v. County of San Mateo* (1984) held that “LAFCO should, and does, have the discretion to determine that portions of an island already properly subject to island annexation be annexed....” (*Beck v. County of San Mateo* (1984) 154 Cal.App.3d 374, 384 (emphasis added).) Accordingly, if the definitions of “island” or “entire island” are not stated in the relevant statute, the responsibility to define appropriate boundaries of such islands lie with LAFCOs. LAFCOs therefore have substantial discretion to determine whether a particular territory qualifies as an “entire island.”

Based on the aforementioned cases and statutes, Section 56375.3 does require annexation of the “entire unincorporated island,” but the particular territory may be a smaller portion of a larger contiguous island as long as the territory annexed is “surrounded” or “substantially surrounded” in its own right as determined by a LAFCO.

B. – SPLIT OF UNINCORPORATED ISLANDS

Senator Negrete-McLeod also asks the following: “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)?”

Section 56375.4(a) prohibits the annexation of territory that “became surrounded or substantially surrounded by the city to which annexation is proposed” after January 1, 2000. In other words, a city cannot annex a part of a territory and thereby create a portion of territory which would be subject to the annexation provisions of Section 56375.3. Moreover, in 1980 the California Attorney General’s Office determined that the provisions of Section 35150(f) (now Section 56375.3(b)) did not allow a LAFCO “to split an ‘entire island’ of more than [150] acres into two areas so as to preclude an election....” (63 Cal.Ops.Atty.Gen 343.) Accordingly, the Code already prohibits these “piecemeal” annexations.

As noted previously, the *Fig Garden* court used a figure to illustrate that Section 56375.3 prohibits dividing up an island into smaller pieces for purposes of avoiding protest proceedings unless those portions of territory would otherwise qualify as an island by being “surrounded” or “substantially surrounded” – even if that specific island is considered part of a larger unincorporated area. (*Fig Garden*, 162 Cal.App.3d at 343.) The court held simply that if a territory does not exceed 100 acres and is substantially surrounded by a city, the territory qualifies for an island annexation. (*Fig Garden*, 162 Cal.App.3d at 346.)

In *Beck v. County of San Mateo* (1984), the court addressed whether a territory would be properly subject to island annexation proceedings if annexations of adjacent properties created a new parcel of less than 100 acres (now 150 acres). (*Beck v. County of San Mateo* (1984) 154 Cal.App.3d 374, 382.) The challengers argued that the territory could not be annexed under island annexation proceedings because

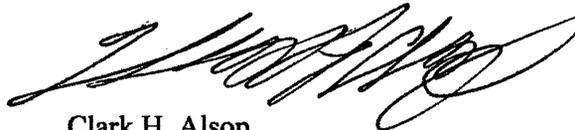
Marc Nolan, Deputy Attorney General
California Department of Justice
February 25, 2011
Page 5

the territory was previously exempted based the fact that adjacent unincorporated prime farmland increased the territory's acreage beyond the maximum statutory limits. The court noted that "it would be incongruous and contrary to the liberal interpretation policy" specified in the statute to hold that while the whole of the territory was subject to annexation, the subdivided parts would be exempt. (*Beck*, 154 Cal.App.3d at 383.) Specifically, the court held that "if the entire island was subject to annexation...its subdivided parts are subject to annexation *so long as that subdivision is surrounded or substantially surrounded either by the annexing city alone or by the annexing city and an adjacent city.*" (*Beck*, 154 Cal.App.3d at 384 (emphasis added).)

Therefore, dividing up a larger unincorporated island into smaller pieces for purposes of avoiding protest proceedings is not permissible, but portions of territory which are already "surrounded" or "substantially surrounded" and are 150 acres or less may still be annexed pursuant to Section 56375.3.

Thank you for the opportunity to address to you our opinions on these issues. If you should have any questions or comments, please feel free to contact me.

Sincerely,



Clark H. Alsop
of BEST BEST & KRIEGER LLP



Jonathan M. Lamb
of BEST BEST & KRIEGER LLP

CHA: jml

Cc: Kathleen Rolling-McDonald, SBLAFCO Executive Officer