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 ISLAND ANNEXATION PURSUANT TO GOVERNMENT CODE SECTION 56375.3 *(Policy #29 was repealed and replaced by action of the Commission March 31, 2005, amended October 18, 2006)*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

KRM

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

Responses Received from the County of San Bernardino, Cities of Colton, Chino, Hesperia, Victorville, San Bernardino and Montclair

Attachment 3

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MAY 04 2011
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San Bernardino County

1853

INTEROFFICE MEMO

County of San Bernardino

DATE May 4, 2011

PHONE 909-387-5418

FROM GREGORY C. DEVEREAUX
Chief Executive Officer

TO KATHLEEN ROLLINGS-MCDONALD
Executive Officer - LAFCO

SUBJECT SAN BERNARDINO COUNTY ISLAND ANNEXATION POLICIES

Summary of San Bernardino Island Annexation Policies:

Through the San Bernardino County General Plan, San Bernardino County has adopted policies recognizing that cities are the logical service providers for municipal-level services and that unincorporated islands can be more effectively and efficiently served by surrounding cities.

Although LAFCO has requested the County of San Bernardino to provide a definition of "entire island", the County believes it prudent to await the California Attorney General's response to Senator Gloria Negrete-McLeod's letter requesting a definition of "entire island."

San Bernardino County looks forward to continuing to work with LAFCO as a partner in serving the residents of the County.

Provided below are San Bernardino County's General Plan policies relating to island annexations.

County General Plan Section II: Land Use

Subsection S.

5. LAND USE PLANNING IN THE SPHERE OF INFLUENCE (SOI) AREAS

The incorporated cities are often critical of the land use decisions made by the County in the sphere of influence areas. The cities' major concerns are that:

- Some of the land uses proposed by the County for the SOI areas are not compatible with, and are not logical extensions of, the adjacent land uses within the cities' boundaries.
- County development standards are relatively lax, depreciating the quality of the permitted development and adversely affecting the neighborhoods, including adjacent areas within the cities.
- The review procedures employed by the County do not include urban design and architectural design considerations used by many cities.

- Section 65300 of the California Government Code places a dual mandate on both cities and counties relating to land use planning within spheres of influence. The land use policies adopted for the SOI areas are designed to encourage annexations or incorporations. In the Inland Valley Development Agency (IVDA) area, the County has a policy of neutrality as to annexation or incorporation, and these actions are neither encouraged nor discouraged.

County General Plan Section II: Land Use

Policies

- **LU 9.2:** Discourage leap-frog development and urban sprawl by restricting the extension or creation of new urban services or special districts to areas that cannot be sustained in a fiscally responsible manner.

  Programs

  1. Consider the adoption of regulations and plans, whenever possible, such as the adoption of overlays, specific plans, zoning studies, infrastructure support plans, and other appropriate mechanisms that encourage annexation and the use of city standards within sphere of influence areas.

- **LU 9.6:** Encourage communities with development densities and intensities comparable to adjacent incorporated cities to annex to incorporated cities.

County General Plan Section IX: Economic Development

Policies

- **ED 12.2:** Promote efficiency in government by encouraging annexations that eliminate isolated County "islands" of development.

- **ED 17.2:** Facilitate annexations that result in continuity of development and the extension of existing infrastructure.

- **ED 17.3:** Develop infrastructure financing policies that are similar for development, whether under County jurisdiction or eventual City annexation.

- **ED 23.2:** Design the impact fee programs to be consistent with existing jurisdictional fee systems so that infrastructure can be expanded on a seamless basis with ongoing development within city boundaries or during annexations or incorporations.

GD:JR

RECEIVED
JAN 04 2011
LAFCO
San Bernardino County

OFFICE OF THE CITY ATTORNEY
CITY OF SAN BERNARDINO

JAMES F. PENMAN
CITY ATTORNEY

January 4, 2011

Kathleen Rollings-McDonald
Executive Officer
Local Agency Formation Commission (LAFCO)
215 North "D" Street, Suite 204
San Bernardino, CA 92415-0490

Re: January 19, 2011 LAFCO Public Hearing
Agenda Item No. 11, Islands Annexation Policies and Commission Directives on Implementation of Island Policies

Dear Ms. Rollings-McDonald:

Your letter dated December 10, 2010, requested the City of San Bernardino's input on LAFCO's Island Annexation Policies, which will be discussed at the above-referenced Public Hearing.

Any LAFCO Policy regarding Island Annexations must exempt the City of San Bernardino in accordance with the August 13, 2010 Stipulated Judgment and Court Order in Susan Hulse v. LAFCO, et al, San Bernardino Superior Court Case No. CIVDS 1002077 (copy attached), which states, at Page 8, Section 5, the following:

> Unless and until the California Legislature substantially revises Section 56375.3 and/or the LAFCO Act to allow annexations of territories that comprise less than an entire unincorporated island, LAFCO agrees it shall not condition any annexations requested by the City on the City's additional annexation of areas that comprise less than the entire unincorporated island of which they are a part. In addition, LAFCO further agrees that it will not withhold approval of annexations requested by the City because island annexations of less than an entire unincorporated island cannot be so conditioned.

As you know, in Hulse v. LAFCO, et al, the plaintiff was successful in reversing six Island Annexations which LAFCO forced the City of San Bernardino to accept during processing of the

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City's application for the Arrowhead Springs area annexation; and the plaintiff obtained $100,000 from LAFCO and the City as reimbursement for the plaintiff's attorneys fees and costs of litigation.

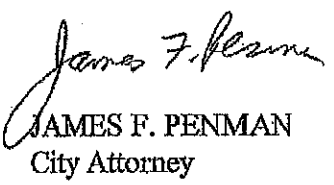
During the pendency of the Hulse v. LAFCO. et al lawsuit, as well as in July 2006, when the Mayor and Council considered Resolution No. 2006-247, the San Bernardino City Attorney's Office opined that LAFCO's Island Annexation policies violate Government Code Section 56375.3(b)(1) and (2). Section 56375.3(b)(1) requires that the territory (area) to be annexed "constitutes the entire island," and Section 56375.3(b)(2) requires that "The territory constitutes an entire unincorporated island located within the limits of a city . . . ." Government Code Section 56375.3 does not permit LAFCO to 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. This opinion is supported by a 1980 California Attorney General Opinion, 63 Ops.Cal.Atty.Gen 343, and Schaeffer v. County of Santa Clara (1984) 155 Cal.App.3d 901, and Fig Garden Park No. 2 v. Local Agency Formation Commission of Fresno County (1984) 162 Cal.App.3d 336. Although this Attorney General's Opinion and these two appellate court decisions involve the predecessor statute to Government Code Section 56375.3, the operative language in the statute remains substantially the same.

Clark Alsop, of Best, Best & Krieger, LAFCO's General Counsel, has previously informed our office that one-half of the LAFCO attorneys in California agree with our legal opinion regarding Government Code Section 56375.3.

At the request of California State Senator Gloria Negrete McLeod (letters attached), the California Attorney General's Office is currently working on Opinion Request No. 10-902, which concerns these same issues regarding Government Code Section 56375.3.

We respectfully request that LAFCO suspend the implementation and the amendment of any LAFCO Policy regarding Island Annexations under Government Code Section 56375.3 until after the California Attorney General's Opinion is issued.

Very truly yours,



JAMES F. PENMAN
City Attorney

cc: Mayor and Councilmembers, City Clerk, City Manager

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BUDGET SUBCOMMITTEE #4

September 3, 2010

The Honorable Jerry Brown
Attorney General, State of California
Office of the Attorney General
Opinion Unit
ATTN: Ms. Susan Lee, Supervising Deputy Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Re: Resubmittal of Opinion 10-505, pertaining to Local Agency Formation Commission annexation powers, which was cancelled due to pending litigation.

Dear Attorney General Brown:

In March, I submitted an opinion request concerning Local Agency Formation Commission annexation powers (see attached letter dated March 19, 2010). In May, I was informed that this request was assigned to Deputy Attorney General Marc J. Nolan, and was given Opinion Number 10-505.

In early August, I received a letter from your office that this opinion was cancelled because of an action filed by Sue Hulse in Superior Court raising similar issues. The letter went on to state that if the issues were not resolved by the litigation, you would entertain another request on this issue.

I have since been informed that a stipulated settlement was reached between the parties of the legal action in question. I have attached a copy of this settlement. Although a settlement was reached, the underlying legal questions were not resolved. I am therefore re-submitting my original request, and asking that an opinion be issued on the questions raised in my March 19th letter.

Should you have any questions about this request, please feel free to contact Vincent D. Marchand in my office at (916) 651-4032. Thank you for your attention to this matter.

Respectfully,

Gloria Negrete McLeod

GLORIA NEGRETE McLEOD
32nd Senate District

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Nelson 10-0505

California State Senate

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BUDGET SUBCOMMITTEE #4

March 19, 2010

The Honorable Jerry Brown
Attorney General, State of California
Office of the Attorney General
Opinion Unit
ATTN: Ms. Susan Lee, Supervising Deputy Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Re: **Local Agency Formation Commission annexation powers pertaining to substantially surrounded islands of unincorporated territory.**

Dear Attorney General Brown:

Pursuant to Government Code section 12519, I respectfully request an opinion from this Office concerning the following question:

QUESTION PRESENTED

Does Opinion No. 80-223, 63 Ops. Cal. Atty. Gen 343, issued on April 25, 1980, still apply to the application of the successor statute to Government Code Section 35150, now codified as Government Code 56375.3?

Specifically,

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)?

DISCUSSION

In my district, the San Bernardino County Local Agency Formation Commission (LAFCO) recently approved the City of San Bernardino's annexation of several unincorporated "island"

parcels. The LAFCO required the City of San Bernardino to annex these island parcels as a condition for approving the city's request to annex a much larger and more desirable parcel of land.

In order to accomplish the annexation of the island parcels, the LAFCO divided larger island parcels in excess of 150 acres into several smaller ones, each smaller than 150 acres. By creating several islands of less than 150 acres out of larger island parcels, the LAFCO was able to utilize the authority granted in Government Code Section 56375.3, which allows the LAFCO to waive certain protest proceedings.

These actions raise the question of whether dividing larger islands into smaller ones subverts the spirit of Government Code 56375.3, which among other conditions requires that the area "constitutes the entire island."

I have included as an attachment the San Bernardino County LAFCO's staff report on the island annexations in question, as well as Opinion No. 80-223, 63 Ops. Cal. Atty. Gen 343, issued on April 23, 1980. Should you have any questions about this request, please feel free to contact Vincent D. Marchand in my office at (916) 651-4032. Thank you for your attention to this matter.

Respectfully,

Gloria Negrete McLeod

GLORIA NEGRETE McLEOD
32nd Senate District

COPY

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
SEAN P. O'CONNOR, Cal. Bar No. 155940
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Costa Mesa, California 92626-1993
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Attorneys for Plaintiff, Susan Hulse

FILED-Central District
SUPERIOR COURT
SAN BERNARDINO COUNTY

AUG 13 2010

By Stephanie Chandler
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

SUSAN HULSE, an Individual Plaintiff, v. ALL PERSONS INTERESTED IN THE MATTER OF LOCAL AGENCY FORMATION COMMISSION FOR SAN BERNARDINO COUNTY ("LAFCO") 3067 A-F (RESOLUTION NOS. 3071 (LAFCO 3067A); 3072 (LAFCO 3067B); 3073 (LAFCO 3067C); 3074 (LAFCO 3067D); 3075 (LAFCO 3067E); and 3076 (LAFCO 3067F) APPROVED ON NOVEMBER 18, 2009, WITH RECONSIDERATION DENIED ON FEBRUARY 17, 2010; SAN BERNARDINO COUNTY LOCAL AGENCY FORMATION COMMISSION; CITY OF SAN BERNARDINO; and DOES 1-100, inclusive, Defendants.	Case No.: CIVDS 1002077 (CEQA) Assigned for all purposes to: Hon. Judge Donald R. Alvarez Dept. S36 **STIPULATION FOR ENTRY OF JUDGMENT; [PROPOSED] ORDER AND JUDGMENT THEREON** Complaint Filed: February 25, 2010

It is hereby stipulated, by and between Plaintiff SUSAN HULSE ("Plaintiff") and Defendants LOCAL AGENCY FORMATION COMMISSION FOR SAN BERNARDINO COUNTY ("LAFCO") and CITY OF SAN BERNARDINO ("City"), as follows:

RECITALS

WHEREAS, on or about November 18, 2009, LAFCO considered and approved San Bernardino Annexation No. 361/LAFCO 3067A-F (LAFCO Resolution Nos. 3071-3076) (hereinafter, the "Island Annexations");

WHEREAS, on or about November 19, 2009, LAFCO filed Notices of Exemption regarding the Island Annexations with the Clerk of the Board of Supervisors of San Bernardino County;

WHEREAS, on or about December 17, 2009, Plaintiff Susan Hulse ("Plaintiff") filed one or more requests for reconsideration with LAFCO, pursuant to Government Code Section 56895, seeking reconsideration of the Island Annexations;

WHEREAS, on or about February 17, 2010, LAFCO denied Plaintiff's requests for reconsideration regarding the Island Annexations;

WHEREAS, on or about February 22, 2010, LAFCO executed and recorded Certificates of Completion for the Island Annexations;

WHEREAS, upon the recordation of the Certificates of Completion, the Island Annexations were deemed to be completed and in existence;

WHEREAS, on February 25, 2010, Plaintiff filed and served her Complaint to Invalidate Unlawful Island Annexations Approved Pursuant to Government Code Section 56375.3; for Violations of the California Environmental Quality Act ("CEQA"); and for Declaratory and Injunctive Relief, which complaint was brought pursuant to Code of Civil Procedure Sections 800 *et seq.* as a "reverse validation" action (hereinafter, the "Action");

WHEREAS, to date, no interested parties have answered or otherwise intervened in the Action;

WHEREAS, on or about April 6, 2010, Plaintiff filed and served her First Amended Complaint to Invalidate Unlawful Island Annexations Approved Pursuant to Government Code Section 56375.3, for Violations of CEQA, and for Declaratory and Injunctive Relief (hereinafter, "Complaint");

WHEREAS, Plaintiff's Complaint alleges that the Island Annexations were unlawfully approved, pursuant to Government Code Section 56375.3 and CEQA; and Defendant LAFCO disputes these allegations; and

WHEREAS, the parties enter into this Stipulated Judgment for the purpose of avoiding any additional costs of litigation, and without any admission of wrongdoing or violation of law;

AGREEMENT

Based on the Recitals set forth above, which are incorporated herein, and in consideration therefore, the parties agree that a Stipulated Judgment in the form and manner set forth below (see Exhibit "A" to the attached Order and Judgment) shall be submitted to and may be made and entered by the Court with respect to the rights and obligations of the parties to this Stipulated Judgment.

DATED: August 5, 2010

LOCAL AGENCY FORMATION COMMISSION FOR SAN BERNARDINO COUNTY

By _____
Kathleen Rollings-McDonald
Executive Officer

APPROVED AS TO FORM:

RUTAN & TUCKER, LLP

By: _____
Mark Austin, Esq.
Special Counsel to the LAFCO, Defendant

WHEREAS, Plaintiff's Complaint alleges that the Island Annexations were unlawfully approved, pursuant to Government Code Section 56375.3 and CEQA; and Defendant LAFCO disputes these allegations; and

WHEREAS, the parties enter into this Stipulated Judgment for the purpose of avoiding any additional costs of litigation, and without any admission of wrongdoing or violation of law;

AGREEMENT

Based on the Recitals set forth above, which are incorporated herein, and in consideration therefore, the parties agree that a Stipulated Judgment in the form and manner set forth below (see Exhibit "A" to the attached Order and Judgment) shall be submitted to and may be made and entered by the Court with respect to the rights and obligations of the parties to this Stipulated Judgment.

DATED: August 5, 2010

LOCAL AGENCY FORMATION COMMISSION FOR SAN BERNARDINO COUNTY

By _____
Kathleen Rollings-McDonald
Executive Officer

APPROVED AS TO FORM:

RUTAN & TUCKER, LLP

By: _____
Mark Austin, Esq.
Special Counsel to the LAFCO, Defendant

DATED: August 12, 2010

CITY OF SAN BERNARDINO

By _____
Patrick J. Morris, Mayor

APPROVED AS TO FORM:

JAMES F. PENMAN, CITY ATTORNEY

By: _____
Henry Empeño, Jr., Senior Deputy
City Attorney for the City of
San Bernardino, Defendant

DATED: August 12, 2010

SUSAN HULSE

By _____
SUSAN HULSE, Plaintiff

APPROVED AS TO FORM:

SHEPPARD MULLIN RICHTER & HAMPTON, LLP

By: _____
Marguerite P. Battersby, Esq.
Daniel P. Bane, Esq.
Attorneys for Susan Hulse, Plaintiff

[PROPOSED] ORDER AND JUDGMENT

Based on the foregoing Recitals, and the attached Stipulated Judgment (Exhibit "A"), and with good cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment in this matter shall be entered in accordance with the Stipulated Judgment, attached hereto as Exhibit "A" and incorporated herein in full.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction over this matter until such time as the Island Annexations (LAFCO 3067A-F) have been detached from the City of San Bernardino, and payment in full has been made to Plaintiff, as set forth in the Stipulated Judgment.

IT IS SO ORDERED, ADJUDGED, AND DECREED.

DATED: AUG 13 2010, ~~2010~~

Donald R. Alvarez, Judge

EXHIBIT "A"

STIPULATED JUDGMENT

1. Promptly upon entry of this Stipulated Judgment by the Court, the San Bernardino Local Agency Formation Commission ("LAFCO") shall take the following actions to effect the rescission of LAFCO Resolution Nos. 3071 (LAFCO 3067A), 3072 (LAFCO 3067B), 3073 (LAFCO 3067C), 3074 (LAFCO 3067D), 3075 (LAFCO 3067E), and 3076 (LAFCO 3067F) (collectively, the "Resolutions") approving the annexation of six (6) unincorporated San Bernardino County islands pursuant to Government Code § 56375.3 ("Section 56375.3") (collectively, the "Island Annexations"):

A. The Certificates of Completion for the Island Annexations, issued by the LAFCO Executive Officer on February 22, 2010, and recorded that same day as document numbers 2010-0067724, 2010-0067725, 2010-0067726, 2010-0067727, 2010-0067728, and 2010-0067729, shall be effectively rescinded by the LAFCO Executive Officer's recordation, at LAFCO's expense, of six (6) new certificates of completion confirming the restoration of the *status quo ante* the Island Annexations. LAFCO shall exercise its best efforts to record the new certificates of completion not later than four (4) calendar days following Court approval of this Stipulated Judgment.

B. The new certificates of completion shall reflect the following actions regarding the Island Annexations:

Area	Agency And Action Taken
LAFCO 3067A	City of San Bernardino –*Detached From* San Bernardino County Fire Protection District (SBCFPD) – *Annexed to* SBCFPD Valley Service Zone – *Annexed to* SBCFPD Service Zone PM-2 – *Annexed to* County Service Area 70 – *Annexed to* County Service Area SL-1 – *Annexed to*

LAFCO 3067B	City of San Bernardino –*Detached From* San Bernardino County Fire Protection District (SBCFPD) – *Annexed to* SBCFPD Valley Service Zone – *Annexed to* SBCFPD Service Zone PM-2 – *Annexed to* County Service Area 70 – *Annexed to* County Service Area SL-1 – *Annexed to*
LAFCO 3067C	City of San Bernardino –*Detached From* San Bernardino County Fire Protection District (SBCFPD) – *Annexed to* SBCFPD Valley Service Zone – *Annexed to* SBCFPD Service Zone PM-2 – *Annexed to* County Service Area 70 – *Annexed to* County Service Area SL-1 – *Annexed to*
LAFCO 3067D	City of San Bernardino –*Detached From* San Bernardino County Fire Protection District (SBCFPD) – *Annexed to* SBCFPD Valley Service Zone – *Annexed to* SBCFPD Service Zone PM-2 – *Annexed to* County Service Area 70 – *Annexed to* County Service Area SL-1 – *Annexed to*
LAFCO 3067E	City of San Bernardino –*Detached From* San Bernardino County Fire Protection District (SBCFPD) – *Annexed to* SBCFPD Valley Service Zone – *Annexed to* SBCFPD Service Zone PM-2 – *Annexed to* County Service Area 70 – *Annexed to* County Service Area SL-1 – *Annexed to*
LAFCO 3067F	City of San Bernardino –*Detached From* San Bernardino County Fire Protection District (SBCFPD) – *Annexed to* SBCFPD Valley Service Zone – *Annexed to*

	SBCFPD Service Zone PM-2 – *Annexed to* County Service Area 70 – *Annexed to* County Service Area SL-1 – *Annexed to*

2. Upon the entry of this Stipulated Judgment by the Court and LAFCO's completion of the actions set forth hereinabove, LAFCO shall promptly notify all affected public agencies, and all property owners/residents in the affected areas through correspondence sent by regular mail using a mailing list provided by the City, that the Island Annexations have been rescinded. Additionally, LAFCO shall immediately notify the appropriate taxing authorities that any property tax and subvention revenue designations affecting the San Bernardino County Fire Protection District ("SBCFPD"), SBCFPD Valley Service Zone, SBCFPD Service Zone PM-2, County Service Area 70, and/or County Service Area SL-1, and any other affected agencies, made as a result of the Island Annexations, must be returned to the *status quo ante* the Island Annexations.

3. The City of San Bernardino ("City") shall repeal City Resolution Nos. 2006-247 and 2006-348 at its next regularly scheduled meeting of the City Council following entry of this Stipulated Judgment by the Court. All parties agree that the Arrowhead Springs Annexation was not (and shall not be) conditioned on the annexation of the six (6) areas identified as LAFCO 3067A-F, or the five (5) additional areas referenced in City Resolution No. 2006-348.

4. The City shall not initiate any further island annexations pursuant to Section 56375.3 in which the area sought to be annexed comprises less than an entire unincorporated island, unless and until the California Legislature substantially revises Section 56375.3 and/or the Cortese-Knox-Hertzberg Act (Government Code Sections 56000 *et seq.*) (hereinafter, the "LAFCO Act") specifically to allow such annexations.

5. Unless and until the California Legislature substantially revises Section 56375.3 and/or the LAFCO Act to allow annexations of territories that comprise less than an entire unincorporated island, LAFCO agrees it shall not condition any annexations requested by the City on the City's additional annexation of areas that comprise less than the entire unincorporated island of which they are a part. In addition, LAFCO further agrees that it will not withhold

approval of annexations requested by the City because island annexations of less than an entire unincorporated island cannot be so conditioned.

6. Any "interested persons," as that term is used in Code of Civil Procedure §§ 860 *et seq.*, failing to timely respond to the Complaint, are in default, and this Stipulated Judgment may be entered against them pursuant to Code of Civil Procedure Section 585, subdivision (c).

7. LAFCO and the City shall, within ten (10) calendar days following receipt of notice that the Court has approved and signed this Stipulated Judgment, reimburse Plaintiff's attorneys' fees and costs of litigation in this matter as follows:

A. The City shall be liable to Plaintiff for, and shall reimburse Plaintiff for, $66,667.00, and no more; and

B. LAFCO shall be liable to Plaintiff for, and shall reimburse Plaintiff for, $33,333.00, and no more.

C. The foregoing amounts represent two separate liabilities for which the City and LAFCO are <u>not</u> jointly or severally liable. Under no circumstances shall LAFCO be required to pay the amount owed by the City, or the City be required to pay the amount owed by LAFCO.

8. Plaintiff's recovery of attorneys' fees and litigation costs in connection with this Action are limited to the amounts set forth in Paragraph 7 above. Plaintiff shall not be entitled to recover any further attorneys' fees and/or costs from either the City or LAFCO that relate in any manner to the Action, the Resolutions, or the Island Annexations (including but not limited to fees and costs incurred before the Action was initiated), except for the amounts set forth in Paragraph 7 above. Any party who is required to bring a post-judgment enforcement action on, or defend any challenge to, this Stipulated Judgment may recover their fees and costs if they are the prevailing party, as determined by the Court.

9. The City and LAFCO shall each pay their own respective attorneys' fees and costs of litigation in this matter, including any fees and costs incurred in complying with this Stipulated Judgment. Neither the City nor LAFCO shall seek reimbursement nor recovery from the other for their attorneys' fees and/or costs of litigation in this matter.

10. The Court shall retain jurisdiction over this matter until such time as the Island Annexations (LAFCO 3067A-F) have been detached from the City of San Bernardino and payment in full has been made to Plaintiff, as set forth in this Stipulated Judgment.

PROOF OF SERVICE

STATE OF CALIFORNIA COUNTY OF SAN BERNARDINO

I am employed in the County of San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is 300 No. "D" Street, Rm 668, San Bernardino, California.

On **August** 13, **2010**, I served the foregoing document described as: **STIPULATION FOR ENTRY OF JUDGMENT; [PROPOSED] ORDER AND JUDGMENT THEREON** on the persons set forth below as follows:

Marguerite P. Battersby, Esq.,
Sheppard, Mullin, Richter & Hampton
650 Town Center Drive, 4th Floor,
Costa Mesa, CA 92626
714.513.5100 office; 714.513.5130 *fax*
(Attorneys for Plaintiff, HULSE)

Mark J. Austin, Esq.
RUTAN & TUCKER
611 Anton Blvd., 14th Floor
Costa Mesa, CA 92626-1931
(714) 641-5100; (714) 546-9035
(Attorneys for Defendant, SAN BERNARDINO COUNTY LOCAL AGENCY FORMATION COMMISSION)

✓ *(BY UNITED STATES MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the above listed addresses. By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

✓ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

___ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **August** 13, **2010**, at San Bernardino, California.

Angela Rodriguez
Legal Secretary
City Attorney's Office
300 N. D Street
San Bernardino, CA 92418

(signature)

*Per Judicial Council of California POS-040 [Rev. January 1, 2010]

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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

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

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

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 Scurl 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 fact 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).

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@cllaw.us; Michael Colantuono can be reached at (530) 432-7359 or mcolantuono@cllaw.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

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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.

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.

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[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.

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 that 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

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

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,

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