

**LOCAL AGENCY FORMATION COMMISSION
COUNTY OF SAN BERNARDINO**

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DATE: SEPTEMBER 9, 2005
FROM: KATHLEEN ROLLINGS-McDONALD, Executive Officer
TO: LOCAL AGENCY FORMATION COMMISSION

SUBJECT: Agenda Item #6: Consideration of Special Counsel Fee Policy and Designation of Special Counsel for LAFCO 2981 – Sphere of Influence Reductions for Cities of Fontana and Rialto and Waiver of Associated Costs

RECOMMENDATION:

Staff recommends that the Commission take the following actions:

1. Modify existing Fee Schedule to:
 - a. Rescind the existing Special Counsel Fee;
 - b. Provide for a separate Legal Counsel Deposit; establish that deposit at \$500; indicate that applicants will be responsible for all costs associated with Legal Counsel review of the proposal;
 - c. Modify existing application categories under LAFCO Filing Fees for Jurisdictional Change Items (1) through (6) through a \$500 reduction to reflect the establishment of the separate Legal Counsel Deposit; and,
 - d. Continue adoption of LAFCO Resolution No. 2896, reflecting these changes, to the October 19, 2005 hearing;
2. Retain Jeffrey Goldfarb of Rutan and Tucker as Special Counsel for LAFCO 2981; and,
3. Take one of the following actions:

- a. Staff supports the acceptance of the offer for payment of costs up to \$10,000 from County Supervisor Gonzales. Approval of this action would establish the contractual relationship with the County's Economic Development Department; or,
- b. If the Commission chooses to accept responsibility for payment of all Legal Counsel costs, waive the imposition of the Legal Counsel fees for LAFCO 2981, finding that the payment of the fees would be detrimental to the public interest.

BACKGROUND:

At the August 17th hearing, the Commission again discussed the need for Special Counsel for consideration of LAFCO 2981 and at the conclusion of that hearing requested that staff review the entire policy for Special Counsel and return at the September hearing with a discussion of both issues.

Staff has reviewed the question of the equity of the Special Counsel policy, which was presented by Commission members, in relation to the assignment of fees when Special Counsel is required. Staff concurs with the expressions of concern that the payment of direct costs is only applied when Special Counsel is required, not for items involving LAFCO Legal Counsel review and consideration. Up through Fiscal Year 1994-95, the Commission had a separate deposit for Legal Counsel charges. In Fiscal Year 1995-96, however, this deposit was eliminated as it was desired to "simplify" the complexity of the Commission's Fee Schedule, reducing the categories assigned for fees and/or deposits. In 2001, the Special Counsel deposit was instituted due to the Commission's policy shifts related to waiver of conflict for LAFCO Legal Counsel and requiring that the applicants pay the escalating costs for the use of outside Counsel.

In addressing the entire question of Legal Counsel charges, in the staff view, the options available to the Commission are:

1. Eliminate all fees or charges related to LAFCO Legal Counsel or Special Counsel except for the Legal Defense Policy for litigation;
2. Establish a fee deposit for all Legal Counsel charges; or,
3. Make no change – retaining the current Fee policy as outlined in the Fee Schedule.

Staff does not support Option #1 as it would place the burden for funding these activities on all the levels of government currently required to support the

Commission – the County, the 24 Cities and the 53 Independent Districts – rather than the applicant. During Fiscal Year 2004-05, the Commission imposed the requirement for payment of Special Counsel fees on several occasions, and the costs associated were \$23,000 during that period. However, in each of these cases, the applicant has been a city, special district, or developer – not a grassroots community group – which typically view the item as a cost of doing business.

Staff does not support Option #3 as it gives no credit for the Legal Counsel costs within the existing fee structure when Special Counsel is required.

Staff supports Option #2 as it is the most equitable to those who file applications with the Commission and those who are statutorily required to fund the Commission’s activities. Therefore, the staff’s recommendation is for the Commission to take the following actions:

1. Rescind the Legal Fee Responsibility Item A – Special Counsel Required;
2. Adopt a new Legal Fee Responsibility, Item A – LAFCO Legal Counsel Deposit identified as follows:

A. LAFCO Legal Counsel Deposit \$500

(Applicants shall be required to reimburse the Commission for Legal Counsel charges and costs in excess of the fee deposit outlined above. Reimbursement to LAFCO shall be required prior to issuance of the Certificate of Completion. If charges billed to LAFCO are less than the amount of deposit, the balance of the deposit will be refunded to the applicant or applied to other fee categories where excess charges have been incurred.)

3. On the Fee Schedule reduce Application Submission – Item A (1) through (6) by \$500 to reflect the conversion to a LAFCO Legal Counsel Deposit; and
4. Direct staff to advertise the adoption of the resolution making these changes for the October 19, 2005 hearing with the effective date immediately thereafter.

This policy and fee schedule change does not alter the Commission’s ability to waive the imposition of these fees according to its Fee Policy and State law.

Whether or not the Commission takes the action identified above, the question remains regarding the waiver of Legal Counsel charges for the BIC application to reduce the spheres of influence for the Cities of Fontana and Rialto. As outlined in the August staff report (copy attached) staff does not support the

waiver of the Legal Counsel fees as it sets a precedent for other groups seeking to incorporate, form a new special district, propose large reorganizations, etc.

The minutes of the August hearing show that it was the consensus of the Commission that BIC would not be responsible for payment of the Legal Counsel charges for the sphere of influence reductions proposal. However, no decision was rendered regarding whether or not the Commission would accept the offer by Supervisor Gonzales to fund these costs up to \$10,000.

If the Commission approves the changes outlined above instituting a Legal Counsel deposit, staff would recommend that it accept the offer of Supervisor Gonzales to pay the costs, not to exceed \$10,000, for Special Counsel. Accepting this offer would establish a contractual relationship with the County's Economic Development Department to fund these costs.

However, if the Commission determines that the fees should be waived in their entirety, Government Code Section 56383(d) and (f) would apply (copy attached). These Code Sections indicate that the Commission may waive the fees for the costs associated with processing of an application if it finds that failure to do so would be "detrimental to the public interest". Therefore, the appropriate action would be for the Commission to waive the imposition of the Special Counsel Fee, or newly modified Legal Counsel Deposit, for LAFCO 2981 finding that the waiver is in the public interest as it will allow for the continued processing of the application to a public hearing before the Commission for consideration of the merits of the proposal.

KRM/

Attachments:

1. [Staff Report for August 17, 2005 Hearing with copy of existing Fee Schedule](#)
2. Government Code Section 56383