

# COUNTY COUNSEL

October 3, 2007

To: LAFCO Commissioners

From: William M. Dillon  
Senior Deputy County Counsel

cc: Bob Braitman, LAFCO Executive Officer

Subject: Potential Creation and Future City Annexation of  
“Islands” in the Unincorporated Area of Goleta Valley.

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## Issue:

You have asked what protections the Local Agency Formation Commission (“LAFCO”) may adopt to preserve mobile home rent controls afforded under the County’s ordinance while approving a city petition to annex the Goleta Valley?

## Conclusion:

The conclusions of this memorandum are:

1. LAFCO may waive the restriction of the Cortese-Knox-Hertzberg Local Government Reorganization Act (the “Act”) against the creation of unincorporated “islands” where LAFCO finds such restriction would be detrimental to the orderly development of the community in that it would displace senior and affordable housing. Once an island is created, however, it is still subject to annexation petitions by the city surrounding the island.
2. As with all annexations, an island annexation is subject to the property tax exchange agreement requirements of the Act that require the board of supervisors and city council to approve an exchange of property taxes before the annexation application to LAFCO is deemed complete.
3. Unlike other annexation petitions, the annexation of an unincorporated island created after January 1, 2000 is not subject to the election requirements of the Act.
4. Any island annexation proceeding initiated after January 1, 2007 is subject to a majority protest provision that requires LAFCO to terminate the proceeding if 50 percent or more of the registered voters in the affected area file objections in writing.
5. If a fully executed property tax exchange agreement is submitted to LAFCO and absent a majority protest by 50 percent of the registered voters, LAFCO does not have the authority to deny an island annexation petition.
6. It is highly problematic that LAFCO could condition approval of an annexation to require a city to adopt and enforce a rent control ordinance for the purpose of protecting senior and low income housing.

## Discussion:

**LAFCO May Allow for Creation of Islands in Certain Circumstances.** The creation of unincorporated “islands” is disfavored under the Cortese-Knox-Hertzberg Act. In particular, Government Code section 56744<sup>1</sup> generally prohibits LAFCO from approving any annexation to a city that results in the creation of an island.<sup>2</sup> There is an exception, however, as Section 56375(m) provides that a LAFCO may waive the restrictions of Section 56744 where its application “would be detrimental to the orderly development of the community and that the area that would be enclosed by the annexation or incorporation is so located that it cannot reasonably be annexed to another city or incorporated as a new city.”

Indeed, County Counsel previously advised this Commission that pursuant to Section 56375(m), the Santa Barbara LAFCO could consider approving the creation of islands where this would be beneficial to low income housing. (Chief Deputy County Counsel Alan Seltzer Memorandum to LAFCO, April 14, 2006.) In particular, County Counsel advised that “LAFCO may consider whether annexation of ‘unincorporated’ mobile home parks would have the effect of displacing senior and affordable housing without replacement so that it would be detrimental to the orderly development of the community.” (*Id.*) This is an issue that LAFCO would have to consider and decide based on substantial evidence in a duly noticed public hearing. (*San Mateo County Harbor Dist. v. Board of Supervisors* (1969) 273 Cal.App.2d 165.)

Once an island is created, there are specific procedures applicable to any city petition to annex an island, which are set forth below.

**Property Tax Exchange Agreement.** As with any other annexation, an island annexation is subject to LAFCO approval of a property tax exchange agreement in compliance with Revenue and Taxation Code section 99. For an annexation to the City, the agreement must be approved by the City Council and the Board of Supervisors and must be submitted prior to LAFCO’s acceptance of the application for the proposed annexation. (Rev. & Tax. Code § 99(b)(6).)

**No Election Required For City Annexation of Islands.** Generally, annexation procedures require an election if there is a protest by at least 25 percent but less than 50 percent of the registered voters residing in an affected territory. (See § 57075((a)(2)(A).) The election requirement, however, does not apply to island annexation proceedings initiated on or after January 1, 2000, as Gov. Code § 56375.4(a) provides as follows:

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<sup>1</sup> All references are to the Government Code unless otherwise indicated.

<sup>2</sup> Section 56744 provides: “Unless otherwise determined by the commission pursuant to subdivision (m) of Section 56375, territory shall not be incorporated into, or annexed to, a city pursuant to this division if, as a result of that incorporation or annexation, unincorporated territory is completely surrounded by that city or by territory of that city on one or more sides and the Pacific Ocean on the remaining sides.”

**Gov. Code § 56375.4(a)**

The authority to initiate, conduct, and complete any proceeding pursuant to subdivision (a) of Section 56375.3 [normal protest hearings] does not apply to any territory that, after January 1, 2000, became surrounded or substantially surrounded by the city to which annexation is proposed.

Therefore, no election would be required or even possible for the proposed annexation of an island.

**Majority (50%) Protest Terminates The Proceeding.** The normal annexation procedure requires an election is required if 25 percent or more of the registered voters protest the annexation, which then triggers an election. For the annexation of an unincorporated island, however, LAFCO is required to terminate proceedings if written protests are filed and not withdrawn by 50 percent or more of the registered voters in the affected territory. (Section 57080(b)(1)).<sup>3</sup> Therefore, while an election is not required or even possible for a city’s proposal to annex an island, LAFCO must terminate such proceedings if 50 percent or more of the registered voters in the affected area file objections in writing.

**Limited LAFCO Discretion Over City Applications to Annex Islands.**

Notwithstanding Section 56375(m) (discussed above) which authorizes the creation of islands under certain circumstances, the creation and even the continued existence of islands is disfavored under the Act. When the Legislature rewrote the city annexation laws in 1977, one of its goals was to make it easier for cities to annex islands of unincorporated territory. (Manester, Selmi, “Annexations and Boundary Issues,” § 73.14[3].) This was evidenced by the Legislature’s declaration that the Municipal Organization Act of 1977, the predecessor to the Cortese-Knox-Hertzberg Act, was “to be liberally construed to effectuate its purposes” and a fundamental purpose of the Act is to “encourage orderly growth and development . . .” (See *Fig Garden Park No. 2 v. Local Agency Formation Com. of Fresno* (1984) 162 Cal.App.3d 336, citing former Sections 35066 and 35000.) Based on these Legislative declarations, one court concluded that “there is a strong governmental interest in avoiding pockets of unincorporated territory.” (*Fig Garden Park, supra*, at p. 342, citing *Weber v. City Council* (1973) 9 Cal.3d 950, 965.) These Legislative findings have been recodified as part of the Cortese-Knox-Hertzberg Act<sup>4</sup> and, therefore, the general policy of disfavoring the creation or continuation of islands is still the law under the modern Act.

Under the Cortese-Knox-Hertzberg Act, LAFCO cannot disapprove a city’s request to annex an unincorporated area of 75 acres or less which is surrounded or substantially surrounding by that city. In particular, Government Code section 56375(a) provides LAFCO

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<sup>3</sup> Section 57080(b) provides: 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.

<sup>4</sup> Former Section 35006 was recodified as Section 56107. Former Section 35000 was recodified as Section 56001.

“shall not have to power” to disapprove a city’s petition for annexation of an unincorporated area that is surrounded or substantially surrounded by that city. It provides:

**Gov. Code § 56375. Powers and Duties.**

The commission shall have all of the following powers and duties subject to any limitations upon its jurisdiction set forth in this part:

(a) To review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization, consistent with written policies, procedures, and guidelines adopted by the commission. [ . . . ] However, a commission shall not have the power to disapprove an annexation to a city, initiated by resolution, of contiguous territory that the commission finds is any of the following:

(1) Surrounded or substantially surrounded by the city to which the annexation is proposed or by that city and a county boundary or the Pacific Ocean if the territory to be annexed is substantially developed or developing, is not prime agricultural land as defined in Section 56064, is designated for urban growth by the general plan of the annexing city, and is not within the sphere of influence of another city.

Therefore, where the applicant has submitted a proper property tax exchange agreement and if there is no majority protest pursuant to Section 57080(b)(1), LAFCO has no authority to disapprove the annexation to the city.

**LAFCO Does Not Have Authority To Regulate Land Use.**

An additional issue is whether LAFCO has the authority to condition an annexation on the city adopting a mobile rent control ordinance that tracks the requirements of the County’s ordinance. Such a proposal is problematic for several reasons.

First, a threshold issue is whether any LAFCO condition that requires a city adopt a rent control ordinance is a condition that would “directly regulate” the use of land. If the answer to this question is yes, then LAFCO may not impose such a condition as Section 56375(a) provides that LAFCO has no such authority. Section 56375(a) provides:

“A commission shall not impose any conditions that would directly regulate land use density or intensity, property development, or subdivision requirements. When the development purposes are not made known to the annexing city, the annexation shall be reviewed on the basis of the adopted plans and policies of the annexing city or county. A commission shall require, as a condition to annexation, that a city prezone the territory to be annexed or present evidence satisfactory to the commission that the existing development entitlements on the territory are vested or are already at buildout, and are consistent with the city's general plan. However, the commission shall not specify how, or in what manner, the territory shall be zoned. The decision of the commission with regard to a proposal to annex territory to a city shall be based upon the general plan and zoning of the city.” (Emphasis added.)

The Act does not define what is a condition “directly regulating land use density or intensity, property development, or subdivision requirements.” In the absence of any definition, it could be argued that a mobile home rent control ordinance is simply an “economic regulation” that does not seek to regulate the use of land but, rather, only attempts to regulate a particularized form of commerce or business.

County Counsel’s previous conclusion that LAFCO may allow for the creation of unincorporated islands, however, was premised on the assumption that LAFCO could find that islands in the Goleta Valley were necessary for the protection of senior and low income housing.<sup>5</sup> (Seltzer Memorandum, April 14, 2006.) Generally, regulations that govern housing availability are considered to be land use regulations. Indeed, a housing element is one of the seven mandated elements of a general plan. (Section 65583.) State planning law is replete with mandates regulating the need for housing, including low income housing. (Section 65583 *et seq.*) Rent control requirements for housing are often referred to as “inclusionary housing programs” and can be adopted as zoning ordinances under the general police powers of a city or county. (See Daniel J. Curtin and Cecily T. Talbert, *Curtin’s California Land Use Planning Law*, Solano Press, 27<sup>th</sup> ed. 2007, p. 505.)

Additionally, Section 56375(a) prohibits LAFCO from imposing condition on “property development,” which is an extremely broad term. It also prohibits conditions on “subdivision requirements.” Rent control ordinances that prohibit conversion of mobile home rental units to private ownership are sometimes accused of being regulations on conversions that must be consistent with the Subdivision Map Act, in particular Government Code Section 66427.4.

Second, even if a LAFCO require that the City impose rent control, the imposition of such a condition would still be difficult. If the condition were imposed on approval of the petition for annexation, the follow up action by the City would require the adoption of an ordinance that would be subject to the full public process mandated by state law, which could take at least several months or more to complete and would typically occur after the LAFCO process had been completed. Once LAFCO has approved an annexation, LAFCO has no enforcement tools to require compliance with its conditions.

Third, to avoid post annexation approval enforcement issues, LAFCO could request that the city adopt a mobile home rent control ordinance prior to submission of the petition for annexation. LAFCO has the authority to require a city to prezone an area proposed for annexation, however, LAFCO may not specify how, or in what manner, the territory shall be prezoned. (Section 56375(a).) Such pre zoning could inclusionary housing programs adopted as part of a zoning code. (See *Curtin’s California Land Use Planning Law, supra*, at p. 505.) Cities are bound to pre zoning restrictions for two years after annexation; however, the two year period may be shortened if the city council finds that substantial change has occurred in circumstances that necessitate a departure from the pre zoning. (Section 56375(e).)

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<sup>5</sup> County’s mobile rent control ordinance was based on providing affordable single-family homes. See County Code § 21-127.

As stated above, however, LAFCO does not have the authority to deny a city's petition for annexation of an island where an executed proper property tax exchange agreement has been submitted and there is no majority protects of the registered voters in the effected area. Hence, if islands are created, LAFCO looses much of its discretion to disapprove petitions for annexation.

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