

LAFCO

Santa Barbara Local Agency Formation Commission
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September 5, 2024 (Agenda)

Local Agency Formation Commission
105 East Anapamu Street
Santa Barbara CA 93101

Consider Support or Opposition for Senate Bill 1209 Indemnification Bill

Dear Members of the Commission

RECOMMENDATION

It is recommended that the Commission not support the Amended Senate Bill 1209 Indemnification Bill.

DISCUSSION

Senate Bill 1209 (Cortese) would authorize a LAFCO to require, as a condition for, among other things, processing a change of organization or reorganization, that the applicant agrees to defend, indemnify, and hold harmless the LAFCO, its agents, officers, and employees from and against any claim, action, or proceeding, as specified, to attack, set aside, void, or annul an approval by the LAFCO. The bill would require the LAFCO to promptly notify the applicant of any claim, action, or proceeding to attack, set aside, void, or annul an approval by the LAFCO and require the LAFCO to fully cooperate in the defense. The bill would specify that an applicant who is a party to the agreement is not responsible to defend, indemnify, or hold harmless the LAFCO if the LAFCO fails to notify the applicant or cooperate fully in the defense, and is not required to pay or perform any settlement relating to the agreement, unless the applicant approves the settlement. The Bill was set for hearing on March 20 in Senate Local Governance Committee.

CALAFCO is requesting that LAFCO's support SB 1209. CALAFCO sponsored bill in response to a 2022 appellate decision out of San Luis Obispo that held that LAFCOs could not use indemnification provisions in applications because indemnifications are a form of agreement that LAFCOs are currently not authorized to enter into.

A copy of the amended bill and Assembly Floor Analysis is attached.

Attachments

Attachment A - SB 1209 Indemnification Bill, as Amended

Attachment B – SB 1209 Assembly - Floor Analysis

Attachment C – SB 1209 Request for Support Letter

Please contact the LAFCO office if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "M Prater", with a horizontal line extending to the right.

Mike Prater
Executive Officer

AMENDED IN ASSEMBLY JUNE 11, 2024

SENATE BILL

No. 1209

Introduced by Senator Cortese

February 15, 2024

An act to add Section 56383.5 to the Government Code, relating to local government.

LEGISLATIVE COUNSEL'S DIGEST

SB 1209, as amended, Cortese. Local agency formation commission: indemnification.

Existing law, the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, provides the exclusive authority and procedure for the initiation, conduct, and completion of changes of organization and reorganization for cities and districts, except as specified. The act continues in existence in each county a local agency formation commission (LAFCO) that consists of members appointed, as specified, and oversees those changes of organization and reorganization. The act authorizes a LAFCO to, among other things, review and approve with or without amendment, wholly, partially, or conditionally, or disapprove proposals for changes of organization or reorganization, as specified.

This bill would authorize a LAFCO to require, as a condition for, among other things, processing a change of organization or reorganization, that the applicant agrees to defend, indemnify, and hold harmless the LAFCO, its agents, officers, and employees from and against any claim, action, or proceeding, as specified, ~~arising from or relating to the action or determination by the LAFCO.~~ *to attack, set aside, void, or annul an approval by the LAFCO. The bill would require the LAFCO to promptly notify the applicant of any claim, action, or*

proceeding to attack, set aside, void, or annul an approval by the LAFCO and require the LAFCO to fully cooperate in the defense. The bill would specify that an applicant who is a party to the agreement is not responsible to defend, indemnify, or hold harmless the LAFCO if the LAFCO fails to notify the applicant or cooperate fully in the defense, and is not required to pay or perform any settlement relating to the agreement, unless the applicant approves the settlement. The bill would specify that nothing in its provisions are to be construed to prohibit the LAFCO from participating in the defense of any claim, action, or proceeding to attack, set aside, void, or annul an approval by the commission if specified conditions are met, including that the LAFCO bears its own attorney’s fees and costs of the claim, action, or proceeding.

Vote: majority. Appropriation: no. Fiscal committee: no.
 State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 56383.5 is added to the Government
 2 Code, to read:
 3 56383.5. (a) The commission may require, as a condition for
 4 processing a change of organization or reorganization, a sphere
 5 amendment or a sphere update, or any other action or determination
 6 requested from the commission, that the applicant agrees to defend,
 7 indemnify, and hold harmless the commission, its agents, officers,
 8 and employees from any claim, action, or proceeding against the
 9 commission, its agents, officers, or employees—~~arising from or~~
 10 ~~relating to the action or determination by the commission.~~ *to attack,*
 11 *set aside, void, or annul an approval by the commission.*
 12 (b) (1) *An agreement to defend, indemnify, and hold harmless*
 13 *entered into pursuant to subdivision (a) shall require the*
 14 *commission to promptly notify the applicant of any claim, action,*
 15 *or proceeding to attack, set aside, void, or annul an approval by*
 16 *the commission and shall require the commission to cooperate*
 17 *fully in the defense.*
 18 (2) *An applicant who is a party to an agreement to defend,*
 19 *indemnify, and hold harmless entered into pursuant to subdivision*
 20 *(a) shall not be responsible to defend, indemnify, or hold harmless*
 21 *if the commission fails to notify the applicant or cooperate fully*
 22 *in the defense pursuant to paragraph (1).*

1 (c) An applicant who is a party to an agreement to defend,
2 indemnify, and hold harmless entered into pursuant to subdivision
3 (a) shall not be required to pay or perform any settlement relating
4 to the agreement, unless the applicant approves the settlement.

5 (d) Nothing in this section shall be construed to prohibit the
6 commission from participating in the defense of any claim, action,
7 or proceeding to attack, set aside, void or annul an approval by
8 the commission if both of the following conditions are met:

9 (1) The commission bears its own attorney's fees and costs of
10 the claim, action, or proceeding.

11 (2) The commission defends the claim, action, or proceeding in
12 good faith.

O

SENATE THIRD READING
SB 1209 (Cortese)
As Amended June 11, 2024
Majority vote

SUMMARY

Authorizes a Local Agency Formation Commission (LAFCO) to require an applicant to indemnify the LAFCO, its agents, officers, and employees from and against any claim, action, or proceeding that may stem from a LAFCO decision to approve an application.

Major Provisions

- 1) Provides that a LAFCO may require, as a condition for processing a change of organization or reorganization, a sphere amendment or sphere update, or any other action or determination requested from the LAFCO, that the applicant agrees to defend, indemnify, and hold harmless the LAFCO, its agents, officers, and employees from any claim, action, or proceeding against the LAFCO, its agents, officers, or employees to attack, set aside, void, or annul an approval by the LAFCO.
- 2) Specifies that an agreement to defend, indemnify, and hold harmless entered into pursuant to 1) above, shall require the LAFCO to promptly notify the applicant of any claim, action, or proceeding to attack, set aside, void, or annul an approval by the LAFCO and shall require the LAFCO to cooperate fully in the defense.
- 3) Provides that an applicant who is party to an agreement to defend, indemnify, and hold harmless entered into pursuant to 1) above, shall not be responsible to defend, indemnify, or hold harmless if the LAFCO fails to notify the applicant or cooperate fully in the defense pursuant to 2) above.
- 4) Specifies that an applicant who is a party to an agreement to defend, indemnify, and hold harmless entered into pursuant to 1) above, shall not be required to pay or perform any settlement relating to the agreement, unless the applicant approves the settlement.
- 5) Provides that nothing in this bill shall be construed to prohibit a LAFCO from participating in the defense of any claim, action, or proceeding to attack, set aside, void or annul an approval by the LAFCO if both of the following conditions are met:
 - a) The LAFCO bears its own attorney's fees and costs of the claim, action, or proceeding.
 - b) The LAFCO defends the claim, action, or proceeding in good faith.

COMMENTS

Local Government Boundaries. The Legislature has the authority to create, dissolve, or otherwise modify the boundaries and services of local governments. Beginning in 1963, the Legislature delegated the ongoing responsibility to control the boundaries of cities, county service areas, and most special districts to LAFCOs in each county. The responsibilities and authority of LAFCOs have been modified in subsequent legislation, including a major revision of the LAFCO statutes in the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 [AB 2838 (Hertzberg), Chapter 761, Statutes of 2000]. The courts often refer to LAFCOs as the Legislature's watchdog over boundary changes.

Local governments can only exercise their powers and provide services where LAFCO allows them to. LAFCOs' boundary decisions must be consistent with spheres of influence (SOIs) that LAFCOs adopt to show the future boundaries and service areas of the cities and special districts. Before LAFCOs can adopt their SOIs,

they must prepare Municipal Service Reviews (MSRs) which analyze population growth, public facilities, and service demands. LAFCOs may also conduct special studies of local governments.

Most boundary changes begin when a city or special district applies to a LAFCO, or when registered voters or landowners file petitions with a LAFCO. In limited circumstances, LAFCOs can initiate some special district boundary changes: consolidations, dissolutions, mergers, subsidiary districts, or reorganizations.

Indemnification. When a private entity or a governmental agency brings a proposal before a LAFCO for review and approval, many LAFCOs have often required the applicant to sign an indemnity agreement. Such an agreement essentially requires the applicant to indemnify the LAFCO against any lawsuits that may stem from its decision and cover the LAFCO's legal expenses should any be incurred in the process of defending its decision. However, recent court cases have ruled that LAFCO's do not have the authority to require such indemnity agreements.

In the 2021 appellate court case *San Luis Obispo Local Agency Formation Commission v. City of Pismo Beach*, a dispute arose over attorney fees and costs. The Central Coast Development Company (Central Coast) owned a 154-acre parcel of property within the sphere of influence of the City of Pismo Beach (Pismo Beach). Central Coast wanted to construct 252 single family residences and 60 senior housing units on the parcel. Pismo Beach approved Central Coast's application for a development permit for the property. Pismo Beach and Central Coast applied to the LAFCO for Pismo Beach to annex the property. The LAFCO application contained the following indemnity agreement:

"As part of this application, Applicant agrees to defend, indemnify, hold harmless and release the San Luis Obispo Local Agency Formation Commission (LAFCO), its officers, employees, attorneys, or agents from any claim, action or proceeding brought against any of them, the purpose of which is to attack, set aside, void, or annul, in whole or in part, LAFCO's action on the proposal or on the environmental documents submitted to or prepared by LAFCO in connection with the proposal. This indemnification obligation shall include, but not be limited to, damages, costs, expenses, attorneys' fees, and expert witness fees that may be asserted by any person or entity, including the Applicant, arising out of or in connection with the application. In the event of such indemnification, LAFCO expressly reserves the right to provide its own defense at the reasonable expense of the Applicant."

The LAFCO ended up denying the annexation application, and Pismo Beach and Central Coast sued the LAFCO. The LAFCO prevailed and presented Pismo Beach and Central Coast with a bill for more than \$400,000 in attorney fees and costs. Pismo Beach and Central Coast ultimately refused to pay. According to the Court, the Special District Risk Management Authority (SDRMA), a public entity insurance pool, paid the LAFCO's fees and costs, and the LAFCO and SDRMA subsequently sued Pismo Beach and Central Coast to recover the expenses based on the indemnity provision of the annexation application. The Trial Court ruled in favor of Pismo Beach and Central Coast because the LAFCO had no authority to require such fees. The Appellate Court affirmed the Trial Court's decision.

Government Code Section 56383 allows a LAFCO to establish a schedule of fees and service charges for the following:

- a) Filing and processing applications filed with the LAFCO.
- b) Proceedings undertaken by the LAFCO and any reorganization committee.
- c) Amending or updating a sphere of influence.
- d) Reconsidering a resolution making determinations.

However, the Appellate Court stated that, "Moreover, section 56383 contemplates that fees charged thereunder will be limited to those necessary to the administrative process, not to post-decision court proceedings...Nothing in section 56383, no matter how broadly construed authorizes the indemnity agreement."

In *San Luis Obispo Local Agency Formation Commission v. Central Coast Development Company*, a subsequent 2022 appellate court case also regarding the awarding of attorney fees, the Court stated, "We affirmed in *San Luis Obispo Local Agency Formation Com. v. City of Pismo Beach* (2021) 61 Cal.App.5th 595 [275Cal.Rptr.3d 837] (*LAFCO I*). We determined that the indemnity agreement was not supported by consideration and that LAFCO has no statutory authority to impose an indemnity agreement as a condition of LAFCO's statutory duty to consider Central Coast's application." The Court also stated, "Government Code section 56383 does not include a provision for attorney fees incurred in the collection of such processing fees and charges. In *LAFCO I*, we expressly rejected the argument that the authority to provide for attorney fees could be implied from statutes.

Other Indemnity Authority. LAFCOs are seeking the ability to enter into indemnity agreements with applicants, which is not unique as other governmental entities have this authority. For example, Government Code section 66474.9(b) of the Subdivision Map Act allows local agencies to require a subdivider to indemnify the local agency for lawsuits challenging the local agency's approval of a subdivision. Such an agreement requires the subdivider to defend, indemnify, and hold harmless the local agency from any claim, action, or proceeding against the local agency to attack, set aside, void, or annul, an approval of the local agency concerning a subdivision. Like this bill, the Subdivision Map Act requires the local agency to promptly notify the subdivider of any claim and that the local agency cooperate fully in the defense. If the local agency fails to promptly notify the subdivider of any claim, or if the local agency fails to cooperate fully in the defense, the subdivider is not responsible to defend, indemnify, or hold harmless the local agency.

According to the Author

According to the author, "SB 1209 would authorize LAFCOs to be indemnified by an applicant when a commission approves their application. For most applications to public agencies, such as those for land-use, private parties indemnify the involved city or county. Similarly, LAFCOs have normally required an indemnification provision in applications and conditions of approval. However, in 2022, the Second District Court of Appeals determined that LAFCO, despite prevailing in the underlying court case, could not require or rely upon indemnification because it is not expressly authorized in the Cortese-Knox-Hertzberg Local Government Act of 2000. Without the ability to indemnify, the LAFCO will necessarily have to consider whether to make concessions to the applicant, or to not defend its actions."

Arguments in Support

According to the California Association of LAFCOs, the sponsors of this bill, "This bill will add new language to the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (The Act) authorizing LAFCOs to enter into indemnification agreements with applicants. Counties and cities are already empowered to enter into, and require, indemnification and routinely do so with respect to discretionary land-use approvals. SB 1209 will provide LAFCOs with a similar authority in this situation.

"This bill is in response to a 2022 decision of the Second District Court of Appeals, which found that existing State law does not provide LAFCOs with the explicit authority needed to require indemnification. Absent an indemnification authority - and because LAFCO funding is statutorily required in a specified ratio from the county, cities, and special districts within a county - any costs to defend litigation end up being absorbed by a LAFCO's funding agencies. Consequently, SB 1209 will allow LAFCOs to use indemnification agreements, similar to those already in use by counties and cities in land use applications which, in turn, will prevent some costs to defend litigation from being shifted to a county, its cities, and its special districts."

Arguments in Opposition

According to the California Association of Resource Conservation Districts, "RCDs are special districts created by Division 9 of the Public Resources Code in which the Legislature declared RCDs legal subdivisions of the state. The services provided by RCDs are largely funded by state and/or federal grants, which also serve as the main fund source for RCDs' basic administration costs. Most RCDs receive little to no local tax dollars to support RCD functions and the indemnification and defense requirements that may be imposed by SB 1209 are simply financially infeasible for most RCDs. Accordingly, many RCDs would be incapable of seeking sphere of influence changes or latent power activations that may be necessary to implement critical climate resilience and adaptation projects.

"CARCD is aligned with the LAFCO mission to discourage urban sprawl, preserve open space and prime agricultural lands and we appreciate that LAFCOs are being requested to approve requests that are antithetical to this mission. We agree with the intent of SB 1209 to shield LAFCO decision-making from lawsuits, or the threat of lawsuits, that would force LAFCOs into approving projects that allow for new developments on lands that should be protected or restored. However, we strongly disagree with the premise of SB 1209 being applied to RCDs. We believe the intentions of SB 1209 have some merit but apply too broadly and will cause serious harm to RCDs across the state."

FISCAL COMMENTS

None.

VOTES

SENATE FLOOR: 39-0-1

YES: Alvarado-Gil, Archuleta, Ashby, Atkins, Becker, Blakespear, Bradford, Caballero, Cortese, Dahle, Dodd, Durazo, Eggman, Glazer, Gonzalez, Grove, Hurtado, Jones, Laird, Limón, McGuire, Menjivar, Min, Newman, Nguyen, Niello, Ochoa Bogh, Padilla, Portantino, Roth, Rubio, Seyarto, Skinner, Smallwood-Cuevas, Stern, Umberg, Wahab, Wiener, Wilk

ABS, ABST OR NV: Allen

ASM LOCAL GOVERNMENT: 9-0-0

YES: Juan Carrillo, Waldron, Sanchez, Haney, Kalra, Pacheco, Ramos, Ward, Wilson

UPDATED

VERSION: June 11, 2024

CONSULTANT: Jimmy MacDonald / L. GOV. / (916) 319-3958

FN: 0003559

LAFCO

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September 5, 2024

Honorable Juan Carrillo, Chair
Assembly Local Government Committee
1020 N St., Rm. 157
Sacramento, CA 95814

RE: ***SUPPORT, AS AMENDED - SB 120 (Cortese): Local agency formation commission: indemnification***

Dear Chair Carrillo and Committee Members:

The Santa Barbara Local Agency Formation Commission (LAFCO) is pleased to support Senate Bill 1209, sponsored by the California Association of Local Agency Formation Commissions (CALAFCO). SB 1209 would add a new section into Government Code authorizing LAFCOs to enter into an indemnification agreement with an applicant, which would hold harmless the LAFCO or its agents from any action attacking a LAFCO approval. Counties and cities are already empowered to enter into, and require indemnification, and routinely do so with respect to discretionary land-use approvals. SB 1209 would provide LAFCOs with a similar authority in this situation.

This bill is in response to a 2022 decision of the Second District Court of Appeals, which found that existing State law does not provide explicit authority to LAFCOs to require indemnification in any situation. Absent indemnification authority - and because LAFCO funding is statutorily required in a specified ratio from the county, cities, and special districts within a county - the costs to defend litigation must be absorbed by all of LAFCO's funding agencies.

Consequently, **SB 1209** will provide LAFCOs with the ability to use a tool already in use by counties and cities, and prevent some costs to defend litigation from being shifted to a county, its cities, and its special districts.

Thus, for the above reasons, Santa Barbara LAFCO is in strong ***support of SB 1209*** and respectfully requests your AYE vote.

Yours Sincerely,

Mike Prater
Executive Officer

cc: Members and All Consultants, Assembly Local Government Committee
The Honorable Dave Cortese, California State Senate
René LaRoche, Executive Director, CALAFCO